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ALLAHABAD SERIES

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89. Hon'ble Mr. Justice Arun Kumar Singh Deshwal

(2024) 5 ILRA 11
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application No. 69 of 2024

M/S Rajshi Processors, Raebareli ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Sri Anurag Mishra

Counsel for the Opposite Parties:

Civil Law-Code of Civil Procedure-1908-Order 47 Rule 1(1) - Order sought to be reviewed takes into consideration all the submissions made by the learned counsel for the petitioner- Learned counsel for the petitioner could not point out any specific material which was placed before the Court while arguing the writ petition and which has not been taken into consideration by this Court while passing the order.

While assailing the orders passed by the Constitutional Court, the learned Advocates are expected to act with some sense of responsibility and to ensure the dignity of the Court even while contending that the order passed by the Court suffers from a patent error-The allegation that **"this Court has blindly believed the stand of the revenue that the seller/supplier firm were non-existent and bogus firms"** besides being incorrect, is disrespectful towards the Court- The court deprecates the disrespectful manner of drafting of this review application.

Review petition is dismissed. (E-15)

List of Cases referred:

1. Madhusudhan Reddy Vs VS Narayan Reddy & ors.: 2022 SCC OnLine SC 1034

2. Hari Vishnu Kamath Vs Syed Ahmad Ishaque 1954 SCC OnLine SC 8

3. S. Bagirathi Ammal Vs Palani Roman Catholic Mission (2009) 10 SCC 464

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

1. Heard Shri Pranjal Shukla, learned counsel for the review petitioner.

2. By means of the instant review petition, the petitioner is seeking review of a judgment and order dated 14.05.2024 passed by this Court in Writ Tax No.128 of 2024.

3. The petitioner is engaged in manufacture and sale of Aluminum Casting & Machinery Parts. The petitioner had filed GSTR 3B for the months of May, 2019, August, 2019 and December, 2019. The Deputy Commissioner, Special Investigation Branch, Commercial Tax, Lucknow had conducted a survey of the place of business on 25.02.2020. The petitioner claimed to have received inward supplies worth Rs.16,39,200/-from M/s Ridhi Sidhi Enterprises, worth Rs. 17,25,160/- from M/s Siddhartha Trading Company and worth Rs. 29,78,025/- from M/s Satvik Enterprises and claimed Rs.2,95,056/-, Rs.2,63,160/- and Rs. 4,54,275/- respectively towards I.T.C. Claim for inward supplies received from the aforesaid firms. Special Investigation Branch, Agra conducted a survey of the aforesaid three firms whereupon it came to light that all the aforesaid three firms were non-existent and bogus firms and the petitioner had fraudulently claimed I.T.C. benefit of Rs.10,12,491/- without any actual supply of goods, on the basis of the fake invoice issued by the aforesaid three non-existence bogus firms. The Special

Investigation Branch found that the petitioner had knowingly claimed excessive amount towards I.T.C. in his GSTR-2A also and had adjusted the same in the tax payable by him. Thus, the petitioner claimed a total of Rs. 15,93,491/- I.T.C. in violation of the provisions of law.

4. The adjudicating authority issued a notice under Section 74 in reply to which the petitioner submitted his explanation alongwith the evidence, stating that it had received inward supplies from M/s Ridhi Sidhi Enterprises, M/s Siddhartha Trading Company and M/s Satvik Enterprises and in support of its claim of actual receipt of inward supplies, the petitioner had submitted invoices, copies of GR (goods receipts), e-way bill, ledger and bank statements of the firms, evidence of transaction of amounts through RTGS and evidence of physical receipts of goods. The inward supplies received by the petitioner were entered in the stock register.

5. The adjudicating authority did not accept the explanation of the petitioner because the Special Investigation Branch, Agra had found the aforesaid three firms, namely, M/s Ridhi Sidhi Enterprises, M/s Siddhartha Trading Company and M/s Satvik Enterprises to be nonexistent and bogus and that the tax invoices had been issued without any actual supply of goods upon which the petitioner had fraudulently taken benefit of I.T.C. The adjudicating authority declined the benefit of I.T.C. to the petitioner and imposed penalty on the petitioner and fixed the liability of interest also.

6. The appellate authority found that in his explanation submitted before the adjudicating authority, the petitioner had produced GR No. 213/dated 13.05.2019, 694/dated 21.08.2019, 695/dated 21.08.2019 and 1363/dated 15.12.2019 issued by M/s Goyal Goods Carry Corporation, Daresi No. 2, Agra as evidence for transport of goods from Agra to Raebareli. The adjudicating authority found that GR No. 213/dated 13.05.2019 and 1363/dated 15.12.2019 had been issued on a similar format, whereas GR No. 694/dated 21.08.2019 and 696/dated 21.08.2019 had been issued on a different format, whereas all of those have been issued by the same transport company and, which had no other branch. The GSTIN-09AJBPG5336KIZ5 and phone number 6395078684 were mentioned on the transport bilty. GST is payable on transport services. When an enquiry was conducted on the basis of GSTIN number mentioned on the transport bilty, the GSTIN was found to be not valid as per the information available on the common portal. The phone number mentioned on the transport bilty, was found to be in use of some lady at Kasganj. From the aforesaid facts, it appears that the bilties had been attached with the explanation of the petitioner to somehow show the real inward supply by making adjustments. The adjudicating authority found that the alleged supplier firms were non-existent and the bilties had been produced merely to establish transactions with non-existing firms. No goods were transported from Agra to Raebareli and the transactions were paper transactions only.

7. While advancing submissions in support of the Writ Petition filed by the petitioner challenging the order passed by the assessing authority and the appellate authority, the learned counsel for the petitioner had submitted that the petitioner had actually received inward supplies, which was established from the records produced before the adjudicating authority.

The supplier firms were having valid GSTIN 4 registration when the petitioner had received the supplies. Merely because GSTIN registration of the firm was cancelled subsequently at their own requests, the petitioner cannot be penalized for the same. As per Section 16 of the GST Act, 2017, the petitioner was merely required to be in possession of a tax invoice or debit note issued by the supplier, receipt of goods and actual payment of tax to the Government. As per learned counsel for the petitioner the requirements of Section 16 of the GST Act, 2017 and Rule 36 of GST Rules 2017 had been fulfilled by the petitioner by furnishing the aforesaid requisite documents.

8. While deciding the Writ Petition, this Court had held that Section 16 (2) (b) of the GST Act provides that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods unless he has received the goods. "Received the goods" means the person claiming input tax credit must have actually received the goods. Where a person merely produces documents mentioned in Rule 36 regarding receipt of goods without actual receipt of any goods and it is established that the transaction of goods was merely paper transactions, the person will not be entitled to get the benefit of input tax credit in view of the provision contained in Section 16(2)(b) of the GST Act, 2017. The petitioner had fulfilled the documentary requirements and the input tax credit was granted to him. Subsequently, in an enquiry conducted by the Special Investigation Branch, it came to light that the firms from which the petitioner claimed to have received inward supplies, were non-existent and bogus. Neither the firms were found on the addresses, claimed by them, nor could any godown or other premises of those firms be found and it appeared that the firms were existing on paper only. The non-existent firms could not have made any actual supplies. Merely because the firm was registered on the date of transaction, it cannot be said that the department was bound to give I.T.C. benefit to the petitioner, even though it has been revealed later on the firm was non-existent and it could not have made any actual supplies.

9. This Court further held that the findings of Special Investigation Branch revealed that the petitioner had committed a fraud against the department and the public exchequer by claiming inward supplies from non-existent firms to take advantage of I.T.C. It is settled law that fraud vitiates even the most solemn proceedings and the mere fact that the I.T.C. benefit had earlier been granted to the petitioner merely because the firms were registered, would not create any estoppel against the authorities taking appropriate action for claiming refund of the benefit wrongly availed by the petitioner on the ground of receiving inward supplies from non-existent firms. This Court found that the appellate authority had passed the impugned order after taking into consideration the facts and circumstances of the case and the material available on record.

10. The petitioner is seeking review of the order passed by this Court on the ground that this Court's order suffers from errors apparent on the face of the record as discrepancies in the judgment are prevalent and the judgment dated 14.05.2024 does not deal with the material presented by the petitioner on record. It has further been stated in the grounds of the review petition that *"this Court has blindly believed the stand of the revenue that the seller/supplier firm were non-existent and bogus firms,*

which is a grave mistake and an omission committed by the respondent at the time of hearing and while passing the order as no survey has been conducted by the department on the place of business of the supplier firms, whether it was before cancellation or after cancellation."

11. It has also been contended in the review petition that Order 47 Rule 1 C.P.C. provides for filing of an application for review of a judgment on the basis of discovery of important matter or evidence, which after exercise of due diligence, was not within the knowledge of the petitioner. The petitioner has filed e-stamp affidavit of the transporter to prove bona fide transaction and the movement of goods.

12. It would be appropriate to have a look at the provision contained in Order XLVII, Rule 1 (1) C.P.C. before proceeding any further: -

Application for review of judgment.—*(1) Any person considering himself aggrieved—*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c)by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order.

* * *

13. The learned counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court in case of **S. Madhusudhan Reddy Vs. V. Narayan Reddy and Others: 2022 SCC OnLine SC 1034**, which was an appeal filed against an order passed by the High Court allowing a review application While allowing the appeal and setting aside the order passed by the High Court in review, the Hon'ble Supreme Court held that the review petition was nothing short of an abuse of process of the Court and the same ought to have been rejected by the High Court as not maintainable, without having gone into the merits of the matter.

14. The following passage from the judgment in case of **S. Madhusudhan Reddy** (Supra) discusses the law regarding the scope of review:-

"18. A glance at the aforesaid provisions makes it clear that a review application would be maintainable on (i) discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be produced by him when the decree was passed or the order made; (ii) on account of some mistake or error apparent on the face of the record; or (iii) for any other sufficient reason.

19. In Col. Avatar Singh Sekhon v. Union of India 1980 Supp SCC 562, this Court observed that a review of an earlier order cannot be done unless the court is satisfied that the material error which is manifest on the face of the order, would result in miscarriage of justice or undermine

its soundness. The observations made are as under:

"12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In Sow Chandra Kante v. Sheikh Habib (1975) 1 SCC 674, this Court observed:

'A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. … The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.'"

(emphasis in original)

20. In Parsion Devi v. Sumitri Devi (1997) 8 SCC 715, stating that an error that is not self-evident and the one that has to be detected by the process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise the powers of review, this Court held as under:

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174 this Court opined:

'11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.'

Again, in Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (1970) 4 SCC 389, this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of this jurisdiction under Order 47 rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'".

[emphasis in original]

15. The review petition refers to a decision of the Hon'ble Supreme Court in the case of **Sarla Mudgal, President, Kalyani and others versus Union of India and others,** but neither its citation or case number and date of decision have been

given in the petition, nor has its copy been provided to the Court and, therefore, this Court cannot go through the aforesaid judgment. However, the following passage of the aforesaid judgment has been quoted in the petition: -

"Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence."

16. The review petition refers to a decision of the Hon'ble Supreme Court in the case of **Hari Vishnu Kamath v. Syed Ahmad Ishaque 1954 SCC OnLine SC 8**, wherein

"...is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? The learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

17. The aforesaid observations were made by the Hon'ble Supreme Court while discussing the scope of a Writ of Certiorari, as paragraph 28 of the judgment, from where the aforesaid passage has been extracted, begins with the words – *"8. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it"* Although the judgment in **Hari Vishnu Kamath** (Supra) is not relevant for deciding a review petition, it supports the approach adopted this Court while deciding the writ Petition which was filed seeking issuance of a Writ of Certiorari.

18. In **S. Bagirathi Ammal v. Palani Roman Catholic Mission** (2009) 10 SCC 464, the Hon'ble Supreme Court held that: -

"12. An error contemplated under the Rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. In other words, it must be an error of inadvertence. It should be something more than a mere error and it must be one which must be manifest on the face of the record. When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials placed before the court. ***If the error is so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the applicant, in such circumstances, the review will lie. Under the guise of review, the parties are not entitled to rehearing of the same issue but the issue can be decided just by a perusal of the records and if it is manifest can be set right by reviewing the order…."***

19. When we examine the aforesaid grounds taken in the memo of the review petition in light of the law laid down by the Hon'ble Supreme Court in **S. Madhusudhan Reddy** (Supra) relied on by the learned counsel for the petitioner himself, it appears that the order dated 14.05.2024 sought to be reviewed takes into consideration all the submissions made by the learned counsel for the petitioner. Even while advancing submissions in support of review application, learned counsel for the petitioner could not point out any specific material which was placed before the Court while arguing the writ petition and which

has not been taken into consideration by this Court while passing the order dated 14.05.2024. Therefore, the ground that this Court did not deal with the material presented by the petitioner on record, is without any substance.

20. So far as the allegation levelled in the review petition that this Court has blindly believed the stand of the revenue that the supplier/firm was non-existent and bogus, the Court had considered the material that was available before it while passing the order sought to be reviewed. The Officers of Special Investigating Branch had conducted a survey of premises of the suppliers from whom the petitioner claims to have received inward supplies and they found that the three firms from which the petitioner claims to have received supplies, namely M/s Ridhi Sidhi Enterprises, M/s Siddharth Trading Company and M/s Satvik Enterprises, were non-existent and bogus and the invoices had been issued without any actual supply of goods, upon which the petitioner had fraudulently taken benefit of Input Tax Credit. The Appellate Authority found that the petitioner had produced 04 goods receipts issued by Goyal Goods Carry Corporation, which were on different formats and the GSTIN mentioned on the receipts was found to be not valid, as per the information available on the common portal. The mobile number printed on the goods receipts was found to be in use of some lady living at Kasganj and it was not of any transport Company. No material was placed by the petitioner to rebut the aforesaid factual findings based on the survey of the premises of the supplier firms made by officials of Special Investigating Branch. While examining the validity of the aforesaid findings, this Court found that the findings were based on sufficient material and did not require any interference in exercise of writ jurisdiction of this Court. In these circumstances, the allegation leveled in the review petition that this Court has blindly believed the stand of the revenue, is also without any substance.

21. Although a litigant is well within its right to challenge the validity of any order in accordance with the law and in case the order suffers from an error which is apparent on the face of the record, the litigant would be well within its right to say so, but while assailing the orders passed by the Constitutional Court, the learned Advocates are expected to act with some sense of responsibility and to ensure the dignity of the Court even while contending that the order passed by the Court suffers from a patent error. The allegation that *"this Court has blindly believed the stand of the revenue that the seller/supplier firm were non-existent and bogus firms"* besides being incorrect, is disrespectful towards the Court. This Court deprecates the disrespectful manner of drafting of this review application.

22. The petitioner has annexed a copy of an affidavit of one Vishal Goyal stating that he had taken goods from M/s Ridhi Sidhi, Siddharth Trading and Satwik Trading Company and had delivered the same to the petitioner during 2019-2020 and that his Transport Company is active. The mobile number and the GST number mentioned on the receipts were wrong and the transporter does not have GST registration. The copy of the affidavit does not bear any stamp of Notary. The material which the petitioner now produced before this Court, could have very well be brought by him before the Appellate Authority by exercise of due diligence, but he did not do so. Moreover, it supports the findings of the appellate authority that the GST number and

the mobile number mentioned on the transporter's receipt were fake. Therefore, the copy of the affidavit of Vishal Goyal filed by the petitioner along with the review application does not provide any good ground for review of the earlier order.

23. In view of the foregoing discussion, the review petition is **dismissed.**

(2024) 5 ILRA 18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD J.

Criminal Appeal No. 128 of 1983
Connected with
Government Appeal No. 877 of 1983

Hari Shankar Rai ...Appellant
Versus
State ...Respondents

Counsel for the Appellant:
Sri A.D. Gilani, Sri A.D. Giri, Sri R.K. Shahi, Sri S.K. Rai

Counsel for the Respondents:
A.G.A., Sri Harish Chandra Tiwari

Criminal Law-Indian Penal Code-1860-Sections-302 & 304 (I) -There is an unsuccessful attempt by the defense specially the accused to prove that the murder of the deceased occurred in self-defence- Mother of accused was not brought into the witness box to testify about that incident- Ignoring the direct evidence like testimonies of eye-witness in which P.W.-1 is elder brother of the deceased whereas P.W.-2 and P.W.-3 are independent witnesses as also the medical evidence and the relevant documents, only on assumption and presumption, the trial court convicted the accused under Section 304-I of I.P.C- Ocular evidence always prevails over the medical evidence- Minor discrepancy on the part of the Investigating Officer does not effect on the otherwise clinching evidence produced by the prosecution-Result Impugned order set aside-accused-appellant is convicted for the offence under Section 302 I.P.C. and sentenced to undergo life imprisonment.

Government Appeal allowed and Criminal Appeal dismissed. (E-15)

List of Cases cited:

1. Jai Deo Vs St. of Pun. 1963 Cr.L.J. 493

2. Tara Chand Vs St. of Har. reported in 1972 SC Cr.R. 9

3. Darbara Singh Vs St. of Pun. reported in (2012) 10 SCC 476

4. Mritunjoy Biswas Vs Pranab @ Kuti Biswas & anr. (2013) 12 SCC 796

(Delivered by Hon'ble Rajiv Gupta, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Heard Mr. R.K. Shahi, learned counsel for the accused, Mr. Harish Chandra Tiwari, learned counsel for the first informant and Mr. Jitendra Kumar Jaiswal, learned A.G.A. for the State in both the appeals, as well as perused the record.

2. Since these criminal appeal as well as government appeal are directed against the judgment and order dated 19th January, 1983 passed in Sessions Trial No. 245 of 1981 (State Vs. Mahendra Rai & Hari Shanker Rai) arising out of Case Crime No. 215 of 1979 (251/3), under Section 302 of I.P.C., Police Station, Tariya Sujan, District-Deoria, whereby the accused Hari Shanker Rai has been convicted and sentenced to undergo four years rigorous imprisonment for the offence punishable under first part of

Section 304 of I.P.C., whereas the accused Mahendra Rai has been acquitted for the offence punishable under Section 302 of I.P.C., the same have been heard and clubbed together and are being decided by this common judgment.

3. During the pendency of the instant Government Appeal before this Court, the accused-respondent no.1 Mahendra Rai has already passed away and the Government Appeal qua accused-respondent no.1 Mahendra Rai has been abated vide order dated 31st August, 2022.

4. The prosecution case as cropped up from the records of both the above appeals is that on a written report given by the informant/P.W.-1 Shivji dated 13th December, 1979 (Exhibit-ka/1), first information report (Exhibit-Ka/8) came to be registered on 13th December, 1979 at 1305 hours at Police Station-Tariya Sujan, District-Deoria against the accused Hari Shanker Rai @ Chhotey and Mahendra Rai under Section 302 of I.P.C. In the written report, it has been alleged by the informant/P.W.-1 that his brother Krishna Kumar was studying in Lok Manya Inter College. The accused Hari Shankar Rai @ Chhotey also studied in the same school. There was a fight between his brother Krishna Kumar and accused Harishanker Rai @ Chhote a few days back over some issue. Because of said fight, on 13th December, 1979 at 08:00 a.m. in the morning, when his brother Krishna Kumar was going to have tea from the western side of the road, while passing in front of the house of Harishankar alias Chhote, he saw that accused Harishanker Rai @ Chhotey and his father Mahendra Rai assaulted his brother Krishna Kumar by knives on his chest and stomach with intention to kill him due to which his brother Krishna Kumar sustained injuries and fell down. Due to noise, Navrang Prasad, Ramji, Subhan, Radha Kishna, Prasad, Kanu and Ram Kankan Ram, the informant and many other persons reached there, by then the accused Harishankar and Mahendra Rai ran away. The informant took his brother Krishna Kumar, who was in a serious condition, to the Government Hospital at Tamkuhi Road for his treatment. The incident has been witnessed by above witnesses and many other people. While the treatment of his brother Krishna Kumar was going, on at the Government Hospital, Tamkuhi Road, his brother succumbed to the said injuries caused by the accused, namely, Harishanker Rai @ Chhotey and Mahendra Rai. After leaving the dead body of his brother at Government Hospital, he came to the Police Station for lodging the first information report.

5. After lodging of the first information report, P.W.-4 Sub-Inspector Ausaf Ahmad Khan, after taking over the charge of Investigating Officer, went to the Government Hospital, where the dead body of the deceased was lying and at about 02:45 p.m. he prepared the inquest report (Exhibit-ka/2) of the body of the deceased. Thereafter P.W.-4 prepared the diagram and chalan (Exhibit-ka/3 and 4). After keeping the dead body of the deceased in a sealed cover, the same was sent to the Mortuary for post-mortem.

6. An autopsy of the deceased has been conducted by Dr. C.B. Singh (P.W.-5) on 14th December, 1979 at 11:15 a.m. and in the autopsy report (Exhibit-ka/7), the cause of death of the deceased has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

"1. Stab wound with incised margins 1 cm. x 1 cm. x chest cavity deep on the front and middle of chest, 8 cm. below the sternal notch.

2. Stab wound with incised margins 1 cm. x abdominal cavity deep on the right side of abdomen, 6 cm above the umbilicus at 11'0 clock position.

3. Multiple abrasion on an area of 2 cm. at the base of right thumb."

7. On the very day of incident i.e. 13th December, 1979, P.W.-4 i.e. the Investigating Officer inspected the place of occurrence and prepared site plan (Exhibit-ka/5) and found the earth scratched. He recorded the statement of Subhan and Radha Kishun. He also arrested the accused Mahendra Rai in Tamkuhi market. On 17th December, 1979, a site plan (Exhibit-ka/11) of the house of the accused was also prepared. Thereafter the investigation was taken over by Sri Lalji Singh, who after conclusions of the statutory investigation under Chapter XII Cr.P.C. has submitted the charge-sheet (Exhibit-Ka/6) against both the accused persons, namely, Mahendra Rai and Hari Shanker Rai on 30th January, 1980.

8. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 12th April, 1981, the concerned Court framed following charges against the accused-persons:

"CHARGES

I, S.L. Tripathi, Sessions Judge, Deoria, hereby charge you-

1. Harishanker Rai alias Chhote, &

2. Mahendra Rai

as follows :-

That you, on 13.12.1979, at about 8.30 a.m. , in village Seorahi, P.S. Tarayasujan of this district, did commit murder by intentionally or knowingly causing the death of Krishna Kumar (with knife) and thereby committed an offence punishable u/S 302 of Indian Penal Code and within the cognizance of this Court of Sess.

And I hereby direct that you be tried by this Court on the aforesaid charge."

9. The charges were read out and explained in Hindi to the accused, who pleaded not guilty and claim to be tried.

10. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Shivji (complainant) (elder brother of the deceased)/eye witness as per the prosecution	P.W. -1
2	Subhan (resident of village Sevarahi, Police Station-Sevarahi)/another eye witness as per the prosecution	P.W. -2
3	Radha Kishun (resident of Tamkuhi Road, Police Station-Sevarahi), other eye-witness of the incident as per the prosecution	P.W. -3
4	Sub-Inspector Ausaf Ahmad Khan, the first Investigating Officer	P.W. -4
5	Dr. Chandra Bhushan Singh, the then Medical Officer, Sadar Hospital, Deoria, who conducted the autopsy of the deceased	P.W. -5

11. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 13th December, 1979	Ex.Ka.-1

2	First Information Report dated 13th December, 1979	Ex.Ka.-8
3	Injury report of the deceased Krishna Kumar	Ex. Ka.-10
4	Entry of registration of case in General Diary	Ex. Ka/9
5	Inquest report dated 13th December, 1979	Ex.Ka.-2
6	Diagram of the dead body of the deceased	Ex.Ka.-3
7	Chalan of the dead body of the deceased	Ex.Ka.-4
8	Post-mortem report of the deceased dated 14th December, 1979	Ex.Ka.-7
9	Charge-sheet original dated 30th January, 1980	Ex.Ka.-11
10	Site plan with index dated 13th December, 1979	Ex.Ka.-5

12. The defence in support of their case has also produced following documentary evidence:

1	Injury report of accused Hari Shanker Rai	Ex.Kha.-1
2	Awadhesh Kumari wife of accused Mahendra Rai	Ex.Kha.-2

13. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused Hari Shanker Rai and Mahendra Rai, while giving their statements in the Court, denied the prosecution evidence and stated that they have been falsely implicated on account of harbouring grudges. The accused have also stated that they lived at a distance of about one furlong from the house of the deceased. Accused Hari Shanker Rai also conceded that he was the rival contestant in the election of the Students Union against the accused Krishna Kumar and the deceased had beaten him in that connection. However, accused Mahendra Rai had not accepted the said grudge. Both the accused have also denied that they had committed the murder of the deceased Krishna Kumar or that any witnesses had seen them in commissioning of the alleged crime. They have also stated that they did not know about the medical examination of Krishna Kumar, his death on account of those injuries and the postmortem examination. They also did not know about the lodging of the report, preparation of the site plan and the scratched blood-stained earth. They have further stated that they have been falsely implicated due to enmity. The accused Hari Shanker Rai has further stated that before the occurrence, some heated conversations were exchanged between him and the deceased Krishna Kumar and the deceased Krishna Kumar had threatened him. He has again stated that on 13th December, 1979 at about 07:30 a.m. when he was sitting in his verandah, the deceased along with three other persons had come and beaten him mercilessly by stick and when his mother Avadhesh Kumari tried to save him, she had also been beaten by them. Then, his mother Avadhesh Kumari wielded a sickle in self-defence due to which the deceased Krishna Kumar sustained injuries. After that, accused Hari Shanker Rai went to his relative's place. He also got himself medically examined and a police report has also been lodged by him on which the Police made local inspection.

14. Apart from the documentary evidence, both the accused Hari Shanker Rai as well as Mahendra Rai have also produced two witnesses in their defence, who are as follow:

1	Dr. Pavan Kumar Srivastava, who had medically examined the accused Hari Shanker Rai and prepared the medical examination report (Exhibit-Kha/1)	D.W.-1

2	Dr. Satya Prakash Tripathi, who had medically examined the wife of accused Mahendra Rai, namely, Smt. Avadhesh Kumari and prepared medical examination report (Exhibit-Kha/2)	D.W.-2

15. On the basis of above evidence oral as well as documentary adduced during the course of trial, the trial court, while passing the impugned judgment, while relying upon the defence argument that the role of accused Mahendra Rai in the holistic view as per the testimonies of P.W.1 Shivji, P.W.-2 Subhan and P.W.-3 Radha Kishun, is doubtful, has recorded its finding that undoubtedly the prosecution evidence makes the participation of the accused Mahendra Rai in the entire occurrence extremely doubtful and the benefit of doubt must be extended to him. Consequently, the trial court has opined that the accused Mahendra Rai had nothing to do with the murder of the deceased Krishna Kumar and therefore, he must be acquitted of the charge of murder levelled against him. So far as the role of accused Hari Shanker Rai is concerned, the trial court has recorded that there is absolutely no occasion to doubt that he has not committed the murder of the deceased. The trial court has also not accepted the argument of the defence counsel that since no blood was found on the spot, therefore, the place of occurrence is doubtful. In that regard, the trial court has recorded its finding that the scratched earth had been found by the Investigating Officer (P.W.-3), then no blood was found anywhere else nor even the accused had shown the blood at any other place to the Investigating Officer. Hence, the above argument too has no force and particularly where the witnesses had consistently testified to prove the place of occurrence. The trial court has also recorded that the edge of the motive was also not very relevant where it was established by cogent evidence that an occurrence had really taken place.

16. The trial court has also not accepted the theory of self-defence put forth by the defence counsel on behalf of the accused Hari Shanker Rai that the deceased was the aggressor, who came inside the house of the accused along with three other persons and started beating him by stick and when his mother, namely, Awadhesh Kumari tried to save him, they also had beaten her because of the same, accused Hari Shanker Rai and his mother Awadhesh Kumari sustained injuries and in the self-defence, the accused caused injuries to the deceased Krishna Kumar. The trial court has recorded that neither the accused has produced Awadhesh Kumari before the trial court as defence witness nor any blood was found inside the house. The stick which is alleged to have been used by the deceased was also not available nor has the same been produced by the defence before the trial court. Hence the theory of self-defence could not be said to be correct.

17. So far as the medical examination report of the mother of the accused Hari Shanker Rai, namely, Awadhesh Kumari (wife of accused Mahendra Rai) (Exhibits-kha/1 and 2) produced by the defence in order to prove the theory of self-defence, is concerned, the trial court has opined that the injuries sustained by Awadhesh Kumari were not connected with the occurrence in which the deceased Krishna Kumar had lost his life.

18. Relying upon the injury report of accused Hari Shanker Rai and the testimony of D.W.-1, who medically examined him, the trial court has recorded that it is possible that the accused Hari Shanker Rai might have received his injuries in the same

occurrence. The eye-witnesses of the occurrence had seen the occurrence from the stage where the two knife blows had been given and not the earlier part of it which occasioned the use of knife. As such, the possibility could not be ruled out that the deceased Krishna Kumar attacked the accused Hari Shanker and caused injuries to him and thereafter, accused Hari Shanker whipped out a knife and committed murder. The theory of self-defence has been put forward before the trial court in that respect. Although the said theory was not placed in the same manner but as the facts are sufficiently eloquent, that benefit could not be withheld.

19. The trial court has further recorded that in the circumstances, when the deceased attacked accused Hari Shanker Rai, he had right to protect himself in the form of self-defence, but his attacking the deceased Krishna Kumar twice with a knife shows that he exceeded the right of self-defense. Relying upon the judgment of the Hon'ble Supreme Court in the case of Jai Deo Vs. State of Punjab reported in 1963 Cr.L.J. 493 wherein it was held that the accused must stop as soon as the apprehension to him disappeared, the trial court has opined that in the present case the accused Hari Shanker had done the same, once he stabbed the deceased and then followed him to a distance of two steps and gave another knife blow on the stomach of the deceased, which clearly shows that the accused had exceeded the right of self-defence. The trial court, in view of the judgment of the Hon'ble Supreme Court in the case of Tara Chand Vs. State of Haryana reported in 1972 SC Cr.R. 9, has held that the accused Hari Shanker was guilty of the offence punishable under the first part of Section 304 I.P.C. The trial court has, therefore, convicted him for that offence and sentenced him to undergo four years rigorous imprisonment, whereas the trial court has acquitted the accused Mahendra Rai for the alleged charge granting him benefit of doubt.

20. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant Hari Shanker Rai has preferred the present Criminal Appeal, whereas the State of U.P. has preferred the present Government Appeal against the impugned judgment of acquittal of accused Mahendra Rai by the trial court.

21. Assailing the impugned judgment and order of conviction, the learned counsel for the accused-appellant in present criminal appeal and learned counsel for the accused-respondent in the government appeal, has advanced following submissions:

(i) P.W.-2 Subhan and P.W. -3 Radha Kishun are not eye-witness but chance witnesses because, as per the prosecution case, they reached at the place of occurrence when the incident has already taken place. Even otherwise, P.W.-1 Shivji being the elder brother of the deceased is an interested witness.

(ii). There are major contradictions in the statements of the alleged prosecution witnesses i.e. P.W.-1, P.W.-2 and P.W.-3, therefore, the same are not reliable and trustworthy.

(iii) Crime weapon i.e. knife, which is alleged to have been used by the accused for stabbing the deceased Krishna Kumar, has not been recovered nor the same has been sent for its chemical examination to the Forensic Science Laboratory.

(iv) Blood stained earth has also not been collected by the Investigating Officer nor the same has been sent for chemical examination.

(v). No recovery memo has been prepared by the Investigating Officer either of the knife (Ala Katla) or the blood stained earth.

(vi). There was no motive for the accused to commit the alleged crime.

(vii). As per the prosecution specially the eye-witnesses i.e. P.W.-1, P.W.-2 and P.W.-3, the accused Hari Shanker caused injuries to the deceased Krishna Kumar by knife which does have one side edge, whereas in his testimoney, P.W.-5 Dr. C.B. Singh has opined that edges of both sides of injury nos. 1 and 2 were clean cut, meaning thereby that the injury nos. 1 and 2 can be caused by a weapon having edges on both sides. As such, the medical evidence does not support the prosecution version.

22. On the basis of the above submissions, learned counsel for the accused-appellant in Criminal Appeal has submitted that since the prosecution has completely failed to established its case beyond reasonable doubt against the accused-appellant and the evidence on record has not been examined in correct perspective by the trial Court, the impugned judgment and order passed by the trial court convicting and sentencing the accused-appellant under the first part of Section 304 I.P.C. to undergo four years rigorous imprisonment cannot be legally sustained and is liable to be quashed.

23. On the other-hand, learned counsel for the first informant and the learned A.G.A. for the State in criminal appeal as well as in government appeal submit as under:

i. The submission of the learned counsel for the accused-appellant and the accused-respondent that the motive is not clear, is incorrect. From the version of the first information report as well as from the version of the first informant/P.W.-1, wherein it has been stated that due to students union election, there was altercation between the accused Hari Shanker Rai and the deceased Krishna Kumar and the deceased had beaten accused Hari Shanker Rai one or two months back and because of the same, the accused Hari Shanker Rai harboured grudge, it is established that the accused has motive or intention to commit the alleged crime. Even otherwise, in the statement recorded under Section 313 Cr.P.C., the accused Hari Shanker Rai has admitted that due to election of students union, the deceased had beaten him.

ii. Medical examination reports of the accused Hari Shanker Rai and his mother Awadhesh Kumari i.e. Exhibits-kha/1 and 2 are fabricated, as no such injuries were caused by the deceased nor the incident as alleged by accused Hari Shanker Rai has ever taken place. In order to establish a cross case and also for establishing theory of self-defence, such false incident has been built up by the defence.

iii. In the site plan (Exhibit-ka/5) dated 13th December, 1979 prepared by the Investigating Officer, Point "D" has been marked for indicating the presence of P.W.-2 Subhan at the time of occurrence, meaning thereby that P.W.-2 has seen the incident with his own eyes. As such the submission of the learned counsel for the accused-appellant and learned counsel for the accused-respondent that he is a chance witness is also incorrect. He is an eye witness to the incident.

iv. For establishing the theory of self-defence, the defence has shifted the place of occurrence by submitting that the verandah of the house of the accused was the exact place of occurrence, where the deceased came along with three persons and

had beaten the accused Hari Shanker by stick and when his mother tried to save him, they had also beaten her. In response thereto his mother wielded the deceased with sickle due to which he sustained injuries. When as matter of fact, the incident took place in front the shop of Jugul from where the house of the accused Mahendra Rai is 15 to 16 steps away and the said place of occurrence has sufficiently been proved by the prosecution.

v. Though the first informant/P.W.-1 Shivji is the brother of the deceased but he is one of the eye-witness, who saw the entire incident with his open eyes. He is throughout consistent from the initial stage of lodging of the first information report and till the conclusion of his testimony before the trial court. Therefore, his testimony cannot be discarded on the ground of his being brother of the deceased.

vi. In the statement recorded under Section 313 Cr.P.C., the accused Hari Shanker Rai built up a cross case by stating that on the date of the incident i.e. 13.12.1979 at about 7:30 a.m. when he was sitting in his varandah deceased Krishna Kumar and three others came there and had beaten him, when his mother came to rescue him, she too was beaten. His mother in her defence saved her with sickle in which Krishna Kumar got injured. However, such cross case has not been fully established by the defence either by oral or by documentary evidence. From the statement of D.W.-1 Dr. Pawan Kumar Srivastava, which has heavily been relied upon by the defence as he has examined the accused-appellant Harishanker and found five injuries on his person, it crops up that injuries found by D.W.-1 on the body of the accused Hari Shanker Rai have been reported to be caused at around 9 to 12 O'clock at day time on 13.12.1979 but as per prosecution story the incident has taken place on 13.12.1979 at about 8:30 a.m. meaning thereby the incident dated 13.12.1979 at 8:30 a.m. occurred prior to the receiving of injuries on the person of accused-appellant Harishanker. It has not been established by the appellant/ defence that the injuries on the person of Harishanker has been inflicted by Krishna Kumar in the same incident as alleged by prosecution. It is also pertinent to mention here that with regard to the incident in which such injuries have been sustained by accused Hari Shanker, no complaint or first information was lodged by the accused at the police station concerned.

vii. The medical examinations of accused Hari Shanker Rai and his mother Awadhesh Kumari have not been been conducted through Majroobi Chiththi of police station concerned. Even otherwise, the medical examination reports of accused Hari Shanker Rai and his mother Awadhesh Kumari have been prepared in private capacity after two days of the actual incident occurred. Not only this Harishanker has given an application at police station concerned on 17.12.1979 as an afterthought wherein he has stated that his mother had caused injuries to Krishna Kumar with knife in her defence, whereas accused Harishanker has already stated in his statement under section 313 Cr.P.C. that his mother caused injuries to Krishna Kumar with sickle.

viii. It is also noteworthy that this application has not been proved by him in his defence nor the same is exhibited as defence document and it seems that this application has been prepared and given to the concerned Superintendent of Police as an afterthought with ulterior motive.

ix. There are no inconsistencies or contradictions in the testimonies of all the prosecution eye witnesses i.e. P.W.-1, P.W.-2 and P.W.-3 and the inconsistencies or

contradictions pointed out by the learned counsel for the accused-appellant and accused-respondent are too minor.

24. On the basis of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye witnesses, namely, P.W.-1, P.W.-2 and P.W.-3, namely, Shivji, Subhan and Radha Kishun who are consistent throughout in their examination-in-chief and the cross-examinations inspire confidence in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of the deceased Krishna Kumar and the same has also been supported by the medical evidence in all material particulars, therefore, trial court has committed gross error in convicting the accused-appellant Hari Shanker Rai under first part of Section 304 I.P.C. Despite the defence having been failed to establish its case of self-defence and the trial court has recorded its finding that the accused Hari Shanker had exceeded his right of self-defence, the trial court while ignoring the entire evidence produced by the prosecution, has passed the impugned judgment. The accused Hari Shanker Rai is liable to be convicted for the offence punishable under Section 302 I.P.C. instead of Section 304 Part-I I.P.C. As such the appeal filed by the accused-appellants, who committed heinous crime of murdering the deceased Krishna Kumar is liable to be dismissed.

25. In reply to the submissions made by the learned counsel for the accused-respondent in Government Appeal, learned A.G.A. and the learned counsel for the first informant submit that the prosecution has fully established its case beyond reasonable doubt against the accused-respondents by oral as well as documentary evidence but the trial court has not examined the same and passed the impugned judgment of acquittal of accused Mahendra Rai only on the argument raised by the defence counsel before the trial court, which is per-se illegal and is liable to be quashed. The learned A.G.A. and learned counsel for the first informant further submit that in support of the above argument, learned counsel for the accused-respondent has failed to produce any documentary as well as oral evidence before this Court as well as trial court. There exist direct evidence against the accused Hari Shanker Rai by way of testimonies of P.W.-1, P.W.-2 and P.W.-3. As such, the Government Appeal filed by the State is liable to be allowed by reversing the impugned judgment of the trial court and convicting and sentencing him for the offence under Section 302 I.P.C. The learned A.G.A. also submits that since the Government Appeal qua the accused-respondent Mahendra Rai has already been dismissed as abated, nothing is required to be said in his case.

26. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

27. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.

28. Before entering into the merits of the case set up by the learned counsel for the accused-appellant in criminal appeal, learned counsel for the accused-respondent in government appeal and the learned A.G.A. as also the learned counsel for the

first informant in both the appeals qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses as well as the defence witnesses.

29. P.W.-1 Shivji in examination-in-chief stated that the accused Harishankar is the son of accused Mahendra Rai. Both of them are residents of Tamkuhi Road. House of both the accused is 100 steps away from his house to the west. He further stated that he is elder brother of the deceased Krishna Kumar He was murdered 2 years and 8 months ago at 08:30 a.m. (morning) in front of Jugul's shop. House of accused Mahendra Rai is 15-16 steps away from Jugul's shop.

30. This witness further stated that when the deceased Krishna Kumar was proceeding towards the station to have tea while he himself was coming from the sugar mill after collecting tax, the accused Harishankar and Mahendra Rai stopped Krishna Kumar and the accused Harishankar stabbed Krishna Kumar. Mahendra had exhorted the accused Hari Shanker Rai to kill Krishna Kumar. The knife blow was sustained by his brother in his chest, then Mahendra caught hold the hand of Krishna Kumar from behind and then accused Harishankar gave the second blow of the knife in the stomach of Krishna Kumar. Krishna Kumar screamed and fell there. This witness, Naurang, Subhan, Radha Kishun, Ramji and Rama Kant while making alarm reached there and then both the accused ran away to their house. P.W.-1 picked up Krishna Kumar and took him to Tamkuhi Road Hospital. When he went to take medicine on the advise of Doctor, his father Jamuna Rai reached there. Two hours later, Krishna Kumar died in the said hospital.

31. This witness again stated that the accused Hari Shanker Rai and his brother Krishna Kumar studied in Lokmanya Inter College, Tamkuhi Road. The accused Hari Shanker Rai was contesting election for the post of General Secretary of Student Union in which his brother was campaigning for his opponent. A month or two, prior to the incident, there was a fight between the accused Hari Shanker Rai and the deceased Krishna Kumar on the same issue and the deceased Krishna Kumar hit the accused Harishankar. Krishna Kumar was not contesting the election for the post of General Secretary of Student Union. In the first information report, he did not mention that the deceased Krishna Kumar hit the accused Hari Shanker Rai. Later that quarrel was resolved amongst them.

32. In the cross examination-this witness denied that the deceased Krishna Kumar was not going to take tea. He stated that he did not lodge the first information report under influence of anyone. The deceased Krishna Kumar became unconscious after getting injured. The deceased Krishna Kumar used to go to take tea every day, therefore, he mentioned in the first information report that he was going to take tea. In normal course, he used to go daily to collect tax.

33. This witness further stated that at the time of incident, no one came from the nearby shops because the shops were closed. He saw the incident from a distance of 30-35 steps away while the accused Hari Shanker was stabbing the deceased with knife. The accused Mahendra Rai did not stab the deceased. In the first information report he has not disclosed that the accused Hari Shanker Rai was holding a knife at the time of incident, as he was nervous. Then,

this witness stated that the first knife blow was given on the chest of the deceased and the second knife blow was given in his stomach. Blood oozed from both the places. This incident took place at 2-3 steps beside the road. This witness stated that he took the deceased Krishna Kumar to the hospital by rickshaw. The doctor met him in the hospital and admitted his brother there and examined the injuries. His father reached the hospital within 10-15 minutes. He denied the fact that his father had taken the deceased Krishna Kumar to the hospital.

34. This witness again stated that he did not see mother of the accused Hari Shanker on the spot. He also did not see any injuries on the person of accused Hari Shanker Rai. He denied that the fact that the deceased Krishna Kumar went at the house of Harishankar and assaulted him and his mother. He further denied the suggestion that the mother of accused Hari Shanker Rai used sickle in defence. He further denied the suggestion that the Investigating Officer came to the spot and on his advice, they changed the place of the incident. He further denied that there were no witnesses at the spot and the accused Mahendra Rai was not at home on the day of the incident.

35. P.W.-2 Subhan, alleged star eye witness stated in his examination-in-chief that about 2 years and 8 months back, the deceased Krishna Kumar was murdered at 08:30 a.m. in the morning. He was getting a shave at the barber shop and was sitting inside the shop. When the deceased Krishna Kumar was going from the south, accused Harishankar abused him and then Harishankar stabbed the deceased Krishna Kumar. One knife blow was given on his chest and the other one was given on the stomach of the deceased due to which the deceased Krishna Kumar fell down. The accused Mahendra was standing behind him. On the alarm being raised, the accused ran away. The incident was witnessed by P.W.-3 Radha Kishun, Naurang, Ramji and P.W.-1 Shivji. The deceased Krishna Kumar was taken to the hospital, where he died.

36. In the cross-examination, this witness stated that when Krishna Kumar fell and screamed, he came out of the shop. The deceased Krishna Kumar had fallen towards his south on the unpaved track. He had fallen 2 to 4 steps away from him. He further stated that at the time of incident he did not see the wife of accused Mahendra Rai i.e. mother of accused Harishanker Rai. He denied not to have seen the incident and since he is a servant of Jamnadas, he is giving false deposition. He did not see any injury on the person of accused Harishanker.

37. P.W.-3 Radha Kishun, other prosecution star eye witness stated in his examination-in-chief that the murder of Krishna, son of Jamuna took place two and half years back at 7:00 a.m. or 7:30 a.m. in the morning. The murder took place near the barber's shop on the other side of the road in front of Mahendra's house. He was going from the bank to the station. He saw the incident from a distance of 20-25 paces. The accused Harishankar assaulted the deceased Krishna Kumar by a knife. He sustained injuries in his chest and stomach. This witness again stated that the incident was witnessed by several people but the accused ran away.

38. In the cross-examination, this witness stated that there is a transformer at the intersection and there is a bank 5-6 shops away from it on the east side. On the date of incident he was present on the west road in front of transformer. When he saw, the deceased Krishna Kumar had fallen. A

crowd of 50-60 people assembled there. He also ran and reached there. The deceased Krishna Kumar had fallen 10 steps west of the house of accused Mahendra Rai. At the relevant time, only the barber shop was open, whereas the rest of the shops were closed. This witness further stated that the deceased Krishna Kumar was not stabbed after he fell down. He disclosed to the Investigating Officer that knife blows were given on the stomach and chest of the deceased. He then stated that Jamuna is his neighbour. He did not notice, if blood spilled out on the spot. The deceased Krishna Kumar had fallen in supine position.

39. Lastly, this witness stated that large number of persons assembled at the doorstep of Mahendra as well as on the terrace. He did not notice any injury either on the person of wife of Mahendra (mother of accused Harishanker) or on the person of accused Harishanker. He denied to give false statement being the neighbour of Jamuna and he did not see the accused Mahendra Rai on the date of incident.

40. P.W.-4 Sub-Inspector Ausaf Ahmad Khan in his examation-in-chief stated that he went to the hospital the same day and recorded the statement of first informant Shivji. He found the dead body of the deceased Krishna Kumar in the hospital. He prepared the inquest report, photo of the dead body etc. He further stated that at the spot, he found ground scratched but he did not found any blood. The accused was searched but was not found. On the same day, the accused Mahendra was arrested from Tamkuhi Road. This witness further stated that he recorded the statement of witness Radha Kishun.

41. In the cross-examination, this witness stated that he did not found the wife of accused Mahendra to be injured. He denied that wife of accused Mahendra had injuries and he was concealing the same. He further denied that the incident took place inside the house of accused Mahendra Rai and the ground was not scratched.

42. P.W.- 5 Dr. C.B. Singh who was conducted the post mortem examination of the body of the deceased Krishna Kumar, stated in his examination- in-chief that the cause of death of the deceased was excessive bleeding and shock due to ante-mortem injuries noted in the post-mortem report. In his testimony, this witness opined that injury nos. 1 and 2 can be caused by a sharp knife, injury no. 3 could have been caused by rubbing of the knife. Death of the deceased was likely to occur at 10:00 a.m. on 13th December, 1979. After getting injured, death may instantaneously be caused or the victim may remain alive for some time.

43. This witness further opined that injury number 3 could also have been caused by a rough stick. The edges of injury nos. 1 and 2 on both sides were clean cut. Such injuries could also have been caused by a knife that have an edge on both sides and could also be caused by a knife that had an edge on only "one side". He further states that the head of the wound was noted by him, as such he cannot state if the knife was single edged or double edged. If the knife has only one edge, the head of the wound will not make a clean cut.

44. D.W.-1 Dr. Pavan Kumar Srivastava, who conducted the medical examination of accused Hari Shanker Rai, stated that he found five injuries on his body. He further stated that injury Nos. 1, 2, 3 were caused by some blunt weapon and were about two days old. Injury number nos. 1 and 2 were normal and injury no.3 was kept

under observation till the X-ray report was received. He further stated that all injuries sustained by accused Harishanker Rai may have occurred on 13th December, 1979 at 09:00 to 10:00 a.m.

45. In the cross examination, this witness stated that neither the accused Harishanker nor any other person did produce any X-ray report before him. There is a government hospital in Sevarhi also.

46. D.W.-2 Dr. Satya Prakash Tripathi, who conducted the medical examination of mother of accused Hari Shanker Rai (wife of accused Mahendra Rai), namely, Awadhesh Kumari, stated that he found as many as 9 injuries on her body. He further stated that all injuries are simple except injury no.9, which could be commented after receiving the X-ray report. Injury nos. 4, 6 and 7 were caused by friction with some hard object and the remaining injuries were caused by some hard object. All the injuries found on the body of Awadhesh Kumari were about two days old and the same could have been caused even on 13th December, 1979 at 09:00 a.m. to 10:00 a.m.

47. Before proceeding to discuss the issues raised in these appeals we may note some background facts.

48. There are two incidents, which are alleged to have occurred at different times and places, first is as per the version given by the prosecution and second is as per the defence version particularly that of the accused Hari Shanker Rai.

49. The incident, as per the version of the prosecution, is alleged to have occurred on 13th December 1979 at 08:30 a.m. (morning) in front of the shop of Jugul from which the house of accused Mahendra Rai is 15 to 16 steps away. This incident has been supported by all the prosecution eye witnesses i.e. P.W.-1, P.W.-2, P.W.-3 as well as by the formal witnesses i.e. P.W.-4 and P.W.-5 in their testimonies. As per the prosecution/first informant, the incident is as follows:

"कृष्ण कुमार मेरा छोटा भाई था। उसका कत्ल 2 साल 8 महीना हुआ सुबह 8-1/2 बजे जुगुल की दुकान के सामने हुआ। जुगुल की दुकान से 15-16 कदम दूर महेन्दर राय का मकान है। कृष्ण कुमार चाय पीने स्टेशन तरफ जा रहा था। मैं तकाजा। वसूल करके सूगर मिल की तरफ से आ रहा था। मुजरिमान हरीशंकर और महेन्दर राय ने कृष्ण कुमार को रोक लिया। हरीशंकर ने कृष्ण कुमार को चाकू मारा। महेन्दर ने कहा था कि इसे जान से मार दो। चाकू मेरे भाई के सीने में लगा तब महेन्दर ने पीछे से कृष्ण कुमार का हाथ पकड़ लिया फिर हरीशंकर ने चाकू का दूसरा वार पेट पर किया। कृष्ण कुमार चिल्ला कर वही गिर गया। मैं, नौरंग, सुभान, राधा कीशुन, रामजी व रामकक्कन चिल्लाते हुए वहा पहुंचेतंब दोनों मुजरिमान अपने घर भाग गये। मैं कृष्ण कुमार को उठाकर तमकूही रोड अस्पताल में ले गया। डाक्टर ने मुझे दवा लेने के लिये भेजा तब तक मेरे पिता जमुना राय वहाँ पहुँच गये।"

50. The incident, as per the version of accused Hari Shanker (defence), is alleged to have occurred on 13th December, 1979 at 07:30 a.m. (morning) in Varandah of the house of accused Hari Shanker Rai. Except the accused Hari Shanker in his statement recorded under Section 313 Cr.P.C., nobody has supported the said incident.

51. As per the accused Hari Shanker Rai, the incident is extracted hereunder:

"कतल से एक दिन पहले मेरी गाली गलौज कृष्ण कुमार से हुई। फिर कृष्ण कुमार धमकी देकर चला गया । 13-12-79 को सुबह 7-1/2 बजे मैं अपने बरामदे में बैठा था तब लाठी डण्डा लेकर कृष्ण कुमार और तीन अन्य आदमी आए। उन्होंने मुझे मारा। मेरी मां बचाने आई तो उसे भी मारा। मेरी मां ने बचाव में हासिया चलाया जिससे कृष्ण कुमार को चोट आई । हम डर से रिश्तेदारी में चले गये। मैंने डाक्टरी मुआयना भी कराया और रिपोर्ट भी लिखवाई। मैंने मॉ का भी मुआयना कराया।"

52. It is surprising to note that the accused Mahendra Rai (father of the

accused Hari Shanker Rai) in his statement recorded under Section 313 Cr.P.C. did not say anything about the incident disclosed by the accused Hari Shanker Rai. It is also pertinent to mention here that Awadhesh Kumari mother of the accused Hari Shanker Rai (wife of accused Mahendra Rai), who, as per the version of the accused Hari Shanker Rai, has not been produced by the defence during the course of trial to testify the said incident in which she wielded the deceased Krishna Kumar with sickle in her self-defence when the deceased Krishna Kumar along with three others on account of dispute over student Union election, came in Varandah of the house of accused Hari Shanker Rai and had beaten him and when she tried to rescue him, she was also beaten by them.

53. It is also important to note that while recording the statement of accused Hari Shanker Rai under Section 313 Cr.P.C., when a question has been put to the accused Hari Shanker Rai that he and the deceased Krishna Kumar studied in Lokmanya Inter College and in connection with the election of student union, there was scuffle between them and the deceased Krishna Kumar had beaten him?, the accused Hari Shanker Rai answered that all facts are true. When as a matter of fact, when the same question was put to the accused Mahendra Rai while recording his statement under Section 313 Cr.P.C., he answered that the same is incorrect.

54. We may also record that qua the incident in which injuries have been sustained by accused Hari Shanker and his mother Aadhesh Kumari, no complaint or first information was lodged by the accused before the police station concerned.

55. The medical examinations of accused Hari Shanker Rai and his mother Awadhesh Kumari have not been conducted through Majroobi Chiththi of police station concerned inasmuch as their medical examinations have been conducted by the Doctors i.e. D.W.-1 and D.W.-2 in their private capacity after two days of the actual incident occurred. Even otherwise, the accused Harishanker has submitted an application to police station concerned on 17.12.1979 as an afterthought wherein he has stated that his mother has caused injuries to Krishna Kumar with knife in her defence. Even otherwise, the prosecution witnesses i.e. P.W.-1, P.W.-2, P.W.-3 and P.W.-4 have specifically stated in their testimonies that at the time of incident they have not seen any injury on the person of accused Hari Shanker Rai nor on the person of Awadhesh Kumari.

56. On the deeper scrutiny of the facts as discussed herein above, it is apparently clear that the incident as alleged by the accused Hari Shanker Rai is a separate incident in which he and his mother have sustained injuries of which the medical examinations have been conducted by D.W.-1 and D.W.-2, who prepared their medical examination reports (Exhibits-kha/1 and 2) respectively. It appears that there is an unsuccessful attempt by the defense specially the accused Hari Shanker Rai to prove that the murder of the deceased Krishna Kumar occurred in self-defence of his mother Awadhesh Kumari and also an attempt to protect his father i.e. another accused Mahendra Rai from this murder case.

57. From bare evaluation and deliberation of the evidence led during the course of trial, we find that on one hand, the trial court itself has also recorded in paragraph 10 of its judgment that the deceased Krishna Kumar had died on

account of injuries which have been caused by knife at around 08:00 a.m. on 13th December, 1979, whereas the trial court in paragraph-11, on the testimonies of D.W.1 and D.W.-2 who medically examined the accused Hari Shanker Rai and his mother Awadhesh Kumari respectively after two days of the incident i.e. on 15th December, 1979, has recorded that the accused Hari Shanker Rai and his mother Awadhesh Kumari could have sustained injuries at about 09:00 a.m. or 10:00 a.m. on 13th December, 1979, on the other-hand the trial court has opined that the deceased Krishna Kumar, the accused Hari Shanker Rai and his mother Awadhesh Kumari (wife of another accused Mahendra Rai) had sustained their injuries near or about the same time.

58. In paragraph-25 of the impugned judgment, the trial court has recorded different opinion while recording that the accused has come forward with a self defence theory, wherein it was alleged that the occurrence had taken place inside the house of the accused in which the deceased along with three other persons first assaulted the accused Hari Shanker Rai and thereafter his mother Awadhesh Kumari consequent to which they sustained injuries. In this respect it has been observed by the trial court judge that neither the sickle which has allegedly been used in causing injuries to the deceased, has been produced nor it was got chemically examined. Blood was also not found inside the house of accused Hari Shanker Rai. Even Awadhesh Kumari was not brought into the witness box to testify about that incident. Danda was allegedly used by deceased but that too was not recovered nor has been produced by the accused. The trial court has recorded that in view of the above, the defence story could not be accepted as correct.

59. Further, on one hand, the trial court in paragraph-26 has opined while recording that the testimony of Dr. Satya Prakash Tripathi (D.W.-2) could not be given much wieghtage, as he had not given out any data by which he had pointed out the time of the injuries sustained by Awadhesh Kumari i.e. mother of the accused Hari Shanker Rai. The trial court has further recorded that as per opinion of D.W.-2 himself, the injuries sustained by Awadhesh Kumari were about two days old, therefore, it is clear that they could have been caused even at 04:00 p.m. on 13th December, 1979, as such Awadhesh Kumar could have sustained the injuries much after the occurrence. Her injuries could not, therefore, be linked with the occurrence in which Krishna Kumar had lost his life.

60. On the other-hand, in paragraph-27 qua the injuries sustained by accused Hari Shanker Rai, the trial court has recorded that on the basis of opinion of D.W.-1 who medically examined the accused Hari Shanker Rai, that the injuries sustained by him could have been caused in the morning of 13th December, 1979, it is possible that the accused Hari Shanker might have sustained his injuries in the same occurrence. The trial court assumed that eye-witnesses of the occurrence had witnessed the incident from the stage where two knife blows had been given and not prior to it which occasioned the use of knife. Hence the possibility could not be ruled out that the deceased Krishna Kumar attacked the accused Hari Shanker and caused injuries to him and thereafter the accused Hari Shanker whipped out a knife and committed the murder of the deceased. On the basis of such possibility, the trial court has accepted the theory of self-defence taken by the defence. However, relying upon

the judgment of the Hon'ble Supreme Court in the case of Jai Deo (Supra), the trial court has also opined that since the accused Hari Shanker Rai stabbed the deceased once and then followed him to a distance of two steps and gave another knife blow on his stomach, the accused Hari Shanker Rai exceeded the right of self-defence. On the basis of such possibility and assumption, the trial court has convicted the accused Hari Shanker under the First Part of Section 304 I.P.C. and sentenced him to undergo four years rigorous imprisonment.

61. On one hand, the trial court has discarded the incident set up by the defence, which is alleged to have occurred in Varandah of accused Hari Shanker Rai and also refused to accept the submission of the defence that injuries sustained by the accused Hari Shanker Rai and Awadhesh Kumari was caused in the aforesaid incident, whereas on the other-hand, the trial court has admitted the incident set up by the prosecution, which is alleged to have occurred in front of the shop of Jugul and the said incident has been witnessed by eye witnesses i.e. P.W.-1, P.W.-2 and P.W.-3, which has also been supported by PW.-4 Investigating Officer. However, while ignoring the direct evidence like testimonies of eye-witness in which P.W.-1 is elder brother of the deceased whereas P.W.-2 and P.W.-3 are independent witnesses as also the medical evidence and the relevant documents, only on assumption and presumption, the trial court convicted the accused Hari Shanker Rai under Section 304-I of I.P.C. under the impugned judgment which in our opinion is not only illegal, perverse, whimsical and infirm.

62. The submission of the learned counsel for the accused-appellant that the prosecution version that the accused Hari Shanker Rai stabbed the deceased Krishna Kumar by knife which has one side edge, whereas the P.W.-5 Dr. C.B. Singh, who conducted the post-mortem examination of the body of the deceased stated that injury nos. 1 and 2 found on the person of the deceased can be caused by a weapon having edges on both sides, makes the prosecution case doubtful is liable to be rejected on the ground that it is settled law that the ocular evidence always prevails over the medical evidence. The Hon'ble Supreme Court in the case of **Darbara Singh Vs. State of Punjab** reported in (2012) 10 SCC 476 has held that in case there is contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value. For ready reference, paragraph no.10 of the said judgment reads as follows:

"10. So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved. (Vide: State of U.P. Vs. Hari, (2009) 13 SCC 542; and Bhajan Singh @ Harbhajan Singh & Ors. Vs. State of Haryana, (2011) 7 SCC 421)."

63. To the submission made by the learned counsel for the accused-appellant that non recovery of crime weapon i.e. knife having been made from any of the accused creates a dent in the prosecution case, we may record that such minor discrepancy on the part of the Investigating Officer does not effect on the otherwise clinching evidence produced by the prosecution which have been discussed in detail herein above. The Hon'ble Supreme Court in the case of **Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas & Another** reported in (2013) 12 SCC 796 has held that when there is ample unimpeachable ocular evidence and same has been corroborated by medical evidence, non-recovery of weapon does not affect the persecution case. The relevant paragraphs i.e. paragraph nos. 33 and 34 are being quoted herein below:

"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.

34. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198 : (AIR 2002 SC 3119 : 2002 AIR SCW 3596)], this Court has ruled that

"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder".''

In **Lakhan Sao v. State of Bihar and Another** reported in *[(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)]*, it has been opined by the Hon'ble Supreme Court that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

In **State of Rajasthan v. Arjun Singh and Others** reported in [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)], the Hon'ble Supreme Court has expressed that:

"18..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place".

64. In view of the aforesaid facts and the findings recorded by us herein above, we are of the firm opinion that the finding of the Court below with regard to accused-appellant Hari Shanker Rai is illegal and incorrect, as the guilt of the accused-appellant Hari Shanker Rai has been proved beyond reasonable doubt by the prosecution.

65. Consequently, in view of the deliberations held above, the judgment and order dated 19th January, 1983 passed in Sessions Trial No. 245 of 1981 (State Vs. Mahendra Rai & Another) arising out of Case Crime No. 215 of 1979, Police Station Tariya Sujan, District-Deoria convicting him under Section 304 Part-I of I.P.C. is set aside and instead, the accused-appellant

Hari Shanker Rai is convicted for the offence under Section 302 I.P.C. and sentenced him to undergo life imprisonment with a fine of Rs. 50,000/-. In default of payment of fine within three months, he shall further undergo six months additional imprisonment.

66. Since the accused-appellant Hari Shanker Rai is reported to be on bail, the Chief Judicial Magistrate, Deoria shall ensure that the accused-appellant Hari Shanker Rai is arrested and sent to jail for serving his sentences awarded herein above.

67. Thus, in sum and substance, the criminal appeal filed by the accused-appellant Hari Shanker Rai is dismissed.

68. The Government Appeal filed on behalf of the State is, hereby, allowed by setting aside the acquittal of accused Hari Shanker Rai under Section 302 I.P.C. and confirming his conviction under Section 302 I.P.C. and awarding the sentence of life imprisonment with fine of Rs. 50,000/-, in default of payment of fine, he has to further undergo six months additional imprisonment. Since the instant Government Appeal qua accused-respondent Mahendra Rai has already been abated by this Court vide order dated 31st August, 2022, no further orders are required to be passed against him.

69. There shall be no order as to costs.

70. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Deoria, henceforth, for necessary compliance.

(2024) 5 ILRA 35
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 257 of 1981
With
Government Appeal No. 757 of 1981

Ayodhya & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri C.S. Saran, Sri Adya Prasad Tiwari, Sri Amar Saran, Sri Arunesh Kumar Singh, Sri Rajeev Chaddha, Sri S.S. Tripathi

Counsel for the Opposite Party:
D.G.A.

Criminal Law-Indian Penal Code-1860-Sections 147, 149 & 30 - Criminal Appeal & Government Appeal against order passed by the trail court whereby accused were convicted U/s 147, 149 & 302 IPC and under the same impugned judgment other accused persons were given benefit of doubt- The star prosecution specifically St.d in their testimonies that all the seven accused with intention to kill the deceased had first beaten him at his doorstep and thereafter they had dragged him to the doorstep of accused, where they had mercilessly beaten him by lathi and spears due to which he sustained serious injuries and ultimately died on the spot- No contradiction or inconsistencies in the testimonies of the witnesses- Post mortem report and testimony of P.W.-4 who conducted the autopsy also supports the prosecution case- Accused also had motive to commit the murder.

While acquitting both the accused-respondents, namely, Pyare and Chhotku, the trial court has not examined the evidence led by the prosecution in correct perspective- Pyare and Chhotku also actively participated in alleged crime along with other five accused, who have been convicted by the trial court on the same set of evidence- The acquittal of the accused-respondents, namely, Pyare Singh and Chhotku, is consequently, reversed.

Criminal Appeal Dismissed and Government Appeal filed on behalf of the St. is allowed. (E-15)

List of Cases cited:

1. Mritunjoy Biswas Vs Pranab Alias Kuti Biswas & anr. (2013) 12 SCC 796.

2. Lakhan Sao Vs St. of Bihar & anr. [(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)

3. St. of Raj. Vs Arjun Singh & ors. [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. Both the Criminal as well as Government Appeals are directed against the impugned judgment dated 21st January, 1981 passed by the II Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 205 of 1980 (State Vs. Ayodhya & 6 Others), arising out of Case Crime No. 36 of 1978, under Sections 147/148/149/302 I.P.C., Police Station-Ghughuli, District-Gorakhpur, whereby accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, have been convicted for offence under Section 147 I.P.C. and Section 302 read with Section 149 I.P.C. and have been sentenced to two years rigorous imprisonment for commission of offence under Section 147 and life imprisonment for commissioning of offence under Section 302 read with Section 149 I.P.C., with an observation that both the sentences were to run concurrently, whereas the accused-Pyare and Chhotkoo have been acquitted for all charges alleged against them.

2. Since the basic facts, issues and the judgment of the trial court are similar and common, both criminal appeals have been clubbed and heard together and the same are being decided by this common judgment.

3. We have heard Mr. J.P. Tripathi, learned A.G.A. for the State, Shri P.K. Singh and Mr. Gyan Prakash Singh, learned counsel for accused-respondents in Government Appeal and Mr. Rajeev Chaddha and Arunesh Kumar Singh, learned counsel for accused-appellants in criminal appeal as well as perused the entire material available on record.

4. The present case proceeds on a written report of the informant/P.W.-1 Naik (Exhibit-ka-1) dated 23rd September, 1978, wherein it has been stated that he was resident of village Nebuiya Tola Dusadhi Bari. Sister of accused Ayodhya, namely, Sitabi having a bad character was resident of same village. There was rumour/discussion about illicit relationship of Sitabi with informant's son i.e. deceased Ganga and other villagers, namely, Pyare Singh and Chhotku Baba etc. Sister of accused Ayodhya, namely, Sitabi fled away somewhere three-four days ago. The accused Ayodhya and others suspected that the deceased enticed away Sitabi. Due to the said grudge, on the night of 22nd September, 1978 at around 9 p.m, the accused Ayodhya and his associates, namely, Pyare Singh, Chhotku, Ramjeet, Lakhan, Sanhu and Chhangur having consensus opinion and having been armed with lathi (sticks) and spears came at the doorstep of the informant and started asking him as to where his son Ganga was, on which the informant replied that his son went to the place of his relative at Pipara. Just in the meantime when the conversation between the informant/P.W.-1 and accused Ayodhya was being exchanged, his son Ganga came with his relative, namely, Mahajan resident of Sakin Pipra, Police Station Shyam Deukha and suddenly

the accused persons pounced on his son and started beating him and dragging him towards accused Ayodhya's house. On this, the informant, his wife Jaleba and his relative Mahajan also followed and reached at the doorstep of the accused Ayodhya for saving Ganga. At the doorstep of accused Ayodhya, all the accused persons started beating Ganga mercilessly by sticks (lathi) and spears, due to which deceased Ganga sustained injuries and fell down. On the alarm being raised by the informant, so many persons of the village including Kanhai and Sita Ram also arrived flashing their torches. The accused Ayodhya and the accused Pyare had pressed the throat of Ganga and the other accused persons wielded sticks (lathis) and spears at him. The son of the informant Ganga died instantly there. With the help of witnesses, the accused Ayodhya was caught on the spot, whereas the other accused persons succeeded in running away. The dead body of his son Ganga was lying at the doorstep of accused Ayodhya throughout the night.

5. The next morning, first informant Naik went to the police station Ghughuli, which was at a distance of about 7 miles from his village and lodged first information report on 23rd September, 1978 at 7.30 A.M. on the basis of his written report (Exhibit-Ka/1) dated 23.9.1978. After that, Head Constable Brijraj Yadav prepared the chik report. The head constable also re-arrested the accused Ayodhya, who was brought by the informant and the village Chaukidar at the police station. The blood stained Kurta worn by the accused Ayodhya was taken into custody and recovery memo (Exhibit-ka/14) in that regard has been prepared by the Head Constable. The case was entered in General Diary No. 11 at 7.30 A.M. (Exhibit-Ka/13). The Investigating Officer/P.W.-3, namely, Devendra Kumar Singh started the investigation on 23rd September, 1978 and interrogated the accused Ayodhya at the police station. Thereafter the Investigating Officer/P.W.-3 proceeded for the place of occurrence and took into possession the dead body of the deceased Ganga from the house of the accused Ayodhya. The inquest (Exhibit-Ka/2) was prepared on the same date i.e. 23rd September, 1978 at 10.00 A.M and ended at 12:05 P.M. on the same date. The Investigating Officer/P.W.-3 also prepared the Khaka Lash(Exhibit-Ka/3) and Challan Lash (Exhibit-Ka/4). The dead body of the deceased was handed over in a sealed cover to constable Sharda Lal Srivastava for being taken to mortuary. A letter (Exhibit-Ka/5) requesting the Medical Officer to conduct the post-mortem examination of the dead body of the deceased was also prepared and sent. The Investigating Officer also collected the blood-stained earth and plain earth from the place where the dead body was lying and recovery memo in that regard was also prepared (Exhibit-Ka/ 6). Two recovery memos Exhibits Ka/7 and 8 were also prepared for the torches, which were produced by the witnesses Kanhai and Sita Ram. On the same date the Investigating Officer prepared the site-plan (Exhibit Ka/9) showing the house of accused Ayodhya and the place where the dead body was found lying. The Investigating Officer/P.W.3 also recorded the statements of the informant/P.W.-1 Naik, his wife Jaleba, his relative Mahajan and other witnesses at the spot. All other accused persons ultimately surrendered in the court.

6. The post-mortem has been conducted by Dr. A.P. Singh (P.W.-4) on 24th September, 1978 at 12:30 p.m. and in

the post-mortem report (Exhibit-ka/11), the cause of death of the deceased has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

"1. Lacerated wound 1" x 1/4" x bone deep on left side head, 3 1/2" above the left ear.

2. Contusion 1 1/2" x 1" on left upper lid.

3. Abressed contusion 1" x 1/2" on right eyebrow.

4. Abressed contusion 1" x 1" on right side of face just below eye.

5. Contusion swelling 4" x 1" on part of neck middle.

6. Incised wound 1" x 1/2" x 2" on back of left upper arm, 3" above elbow joint, direction from back to front.

7. Incised wound 1" x 1/2" x 1 1/2" on back of left forearm, 2" below the elbow joint, direction from back to front.

8. Multiple contusion area of 8" x 4" on back of right upper arm.

9. Multiple contusion area of 4" x 3" on back of right forearm just above wrist joint.

10. Contusion 3 1/2" x 1 1/2" on right iliac fossa.

11. Contusion 2" x 2 1/2" on outer aspect of left thigh middle.

12. Incised wound 1" x 1/2" x 1 1/2" on front of left leg, 3" below knee joint.

13. Incised wound 1" x 1/2" x 1 1/2" on front of left leg, 2" below injury no. 12

14. Incised wound 1" x 1/2" x 1/2" on front of left leg, 3" below injury no.13

15. Incised wound 1/2" x 1/3" x 1/2" on front of left leg, 1" below injury no. 14.

16. Incised wound 1" x 1/2" x 1 1/2" on front of right leg, 2" below ankle joint.

17. Multiple contusion on area of 6" x 4" on front of right leg, 2" below knee joint.

18. Contusion 4" x 1" on front of left thigh, 3 1/2" above knee joint.

19. Contusion 5 1/2" x 1" on outer aspect of right thigh, 2" above knee joint.

20. Multiple contusion on area of 12" x 12" on back both side just below neck root."

7. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-3 has submitted the charge-sheet (Exhibit-Ka/10) against all the accused persons, namely, Ayodhya, Chhotkoo, Pyare, Ramji, Sanhu, Lakhan and Chhangur on 17th October, 1978.

8. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 10th September, 1980, the concerned Court framed following charges against the accused-persons:

"CHARGES

I, G. Chandra, II Addl. District and Sessions Judge, Gorakhpur, hereby charge you Ayodhya, Pyare Singh, Chhotkoo, Ram Ji, Lakhan, Sanhoo and Chhangur as follows:-

Firstly, that you, on 22.9.1978, at about 9.00 P.M., at village Nebuiya, Tola Dusadhi Bari, P.S. Ghughuli District Gorakhpur were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, viz., in committing the murder of Ganga, committed the offence of rioting and there by committed an offence punishable u/s. 147,1.P. C., and within my cognizance.

Secondly, that you, on the aforesaid date, time and place, were a

member of an unlawful assembly, in prosecution of the common object of which, did commit murder by intentionally or knowingly causing the death of Ganga, and thereby committed an offence punishable under section 302 read with section 149, 1.P.C., and within my cognizance.

And I hereby direct that you be tried by me on the said charges."

9. The charges were read out and explained to the accused persons in Hindi, who pleaded not guilty denying the accusation and demanded trial.

10. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Naik (complainant) (father of the deceased)/eye witness as per the prosecution	P.W.-1
2	Mahajan (relative of the informant/P.W.-1)/another eye witness as per the prosecution	P.W.-2
3	Devendra Kumar Singh/Investigating Officer, the then Station House Officer, Police Station-Ghughuli, District-Gorakhpur	P.W.-3
4	Dr. A.P. Singh, the then Medical Officer, Primary Health Centre, Maharajganj, who conducted the autopsy of the deceased	P.W.-4
5	Sharda Lal, Constable, Police Station-Ghughuli District-Gorakhpur	P.W.-5
6	Brijraj Yadav, the then Head Constable, Police Station-Ghughuli, District-Gorakhpur	P.W.-6

11. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 23rd September, 1978	Ex.Ka.-1
2	First Information Report dated 23rd September, 1978	Ex.Ka.-12
3	Recovery memo of blood stained and plain earth dated 23rd September, 1978	Ex. Ka.-6
4	Two recovery memos torches which were produced by the witnesses Kanhai and Sita Ram dated 23rd September, 1978	Ex. Ka/7 & 8
5	Recovery memo of Kurta, which was taken into possession from accused Ayodhya dated 23rd September, 1978	Ex.Ka.-14
6	Copy of the G.D. entry about the first information report	Ex.Ka.-13
7	Panchayatnama (Inquest Report)	Ex.Ka.-2
8	Khakha Lash and Photo Lash	Ex.Ka.-3 & 4
9	Letter written to the Chief Medical Officer for getting the post-mortem of the deceased conducted	Ex.Ka.-5
10	Post-mortem report dated 24th September, 1978	Ex.Ka.-11
14	Charge-sheet original dated 17th October, 1978	Ex.Ka.-10

15	Site plan with index dated 23rd September, 1978	Ex.Ka.-9

12. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused Chhotkoo, Pyare, Ramji, Sanhu, Lakhan and Chhangur, while giving their statements in the Court, denied the prosecution evidence and stated that they have been falsely implicated on account of harbouring grudges. The accused persons had also taken a plea that they had been implicated falsely due to the election rivalry of Pradhan. The accused Ayodhya, while giving his statement in the Court of Session u/s.313, Cr.P.C., also denied the entire prosecution evidence. He further stated that the informant Naik and the Pradhan Vidya Singh were very close to each other and that he did not cast his vote in favour of Vidya Singh in the election rivalry of Pradhan. He further stated that he had accompanied the informant Naik to Maun Nala' where the dead body of Ganga was lying. Naik took the dead body and carried it to his (Naik's) house. Naik took him (accused Ayodhya) to the police station. It was at the instance of Naik that the police had taken him into custody at the police station. The accused persons did not adduce any defence evidence.

13. On the basis of above evidence oral as well as documentary adduced during the course of trial, the trial court, relying upon the testimonies of P.W.-1/Informant and P.W.-3 Mahajan that the accused Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, all belong to the same family, had wielded sticks (lathi) and spears (Ballam) on the deceased Ganga and that the deceased died instantaneously on the spot as a result of injuries caused by them, has come to the conclusion that the case against those accused persons is fully established for the offence under Section 147 and Section 302 read with Section 149 I.P.C. As such, they have been sentenced to undergo two years rigorous imprisonment for the offence under Section 147 I.P.C. and life imprisonment for the offence under Section 302 read with Section 149 I.P.C. However, the trial court under the same impugned judgment, with regard to the involvement of the accused Pyare and Chhotkoo in the alleged crime, has recorded its finding that there is no strength in the testimonies of the witnesses to show that those accused Pyare and Chhotkoo would also have involved in committing the alleged crime, more so when they neither had any friendship with the informant/P.W.-1 nor they had any foeship against the deceased Ganga. The trial court had further recorded that though in the first information report lodged on the basis of written report given by the informant/P.W.-1, specific role has been attributed to the accused Pyare of throttling the neck of the deceased Ganga along with accused Ayodhya but in their testimonies, P.W.-1 and P.W.-3 did not at all state that the accused Pyare had played any part in the alleged crime. The trial court has also observed that on the basis of such finding, the prosecution has failed to prove the guilt of the accused Pyare and Chhotkoo successfully in commissioning of the alleged crime. As such the trial court has given benefit of doubt to the accused Pyare and Chhotkoo and resultantly, the trial court has acquitted both the accused.

14. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellants has preferred the present Criminal Appeal, whereas the State of U.P.

has preferred the present Government Appeal against the impugned judgment of acquittal of accused Pyare and Chhotkoo by the trial court.

15. Assailing the impugned judgment and order of conviction, the learned counsel for the accused-appellants in present criminal appeal has advanced following submissions:

(i) The alleged occurrence happened on 22nd September, 1978 at 09:00 p.m. (night), whereas the first information report was lodged on 23rd September, 1978 at 7 to 8 a.m. (morning), meaning thereby that there is delay of 10 to 11 hours in lodging of first information report for which no plausible explanation has been given making the prosecution case doubtful.

(ii) On the date and time of alleged incident, there was no source of light so as to identify the accused, who have committed the alleged crime.

(iii) P.W.-2 Mahajan, who is stated to be relative of the informant is a chance witness and not an eye witness. His testimony that on the date of incident, he came along with the deceased to drop him at his house is also doubtful. Since deceased was a major person and not a minor, therefore, it is impossible to believe as to why P.W.-2 accompanied the deceased when he was returning to his home.

(iv) As per the prosecution version, the accused persons have assaulted the deceased with lathi (sticks) and spears (Ballam) but during the course of investigation, no recovery of any weapon was made from any of the accused persons.

(v) As per the version of the first information report as well as the testimony of P.W.-1, at the door of accused Ayodhya, when the accused persons were assaulting the deceased, on shouting of the informant/P.W.-1 so many persons of the village including Kanhai and Sita Ram also arrived flashing their torches and recovery memos of the torches of Kanhai and Sita Ram have also been prepared and exhibited. However, both Kanhai and Sita Ram have not been examined as prosecution witnesses during the course of trial.

(vi) Neither the place i.e. front of house of P.W.-1, initially where the accused persons have assaulted the deceased with lathi and spears, when he returned from his relative place along with P.W.-2 has been marked by the Investigating Officer in the site plan nor any blood stain earth or plain earth has been collected by the Investigation Officer while preparing the recovery memo.

(vii) As per the post mortem report of the deceased, no stab wound has been found on the body of the deceased whereas according to the prosecution witnesses, the accused have assaulted the deceased by lathi and spears.

(viii) The watchman/village chowkidar, who is alleged to have guarded the body of the deceased throughout the night till morning, has not been examined during the course of trial.

16. On the cumulative strength of the aforesaid submissions, learned counsel for the accused appellants submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

17. Following submissions have been made by the accused-respondents in the present Government Appeal in order to support the judgement of the trial court:

In the murder case of one Ram Parikhan Singh, Vidya Singh was an accused. Though it is not clear from the record as to whether he was convicted or

acquitted in the said case but it crops up from the record that he was in jail for some period in the said murder case. Vidya Singh who was friend of P.W.-1 was also village pradhan and accused Pyare had not cast his vote in favour of Vidya Singh. Sundar Singh i.e. father of the accused Pyare Singh was also a witness in the murder of Ram Parikhan Singh and that is why there was direct inimical relations between the family of Pyare Singh and Vidya Singh along with P.W.-1. The accused Pyare Singh and Chhotkoo were neither the family members of other accused Ayodhya and others nor they had any concern with their family. Because of inimical relations with Vidya Singh, they have been falsely implicated in the present case.

18. On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that since this is not a case of direct evidence and there are major contradictions and inconsistencies in the prosecution evidence oral as well as documentary, produced during the course of trial, impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the Government Appeal filed by the State is liable to be dismissed.

19. On the other-hand, learned A.G.A. for the State in reply to the submissions made by the learned counsel for the accused-appellants have made his point wise submissions.

(i) To the first submission made by the learned counsel for the accused-appellant regarding delay in lodging of the first information report, it is submitted that the delay has satisfactorily been explained by the prosecution. In the cross-examination, P.W.-1 has stated that the villagers advised him that the accused persons who ran away, had come and were hiding here and there and if the informant and other villagers would go to the Police Station for lodging of the first information report, in their absence, the remaining accused persons could take away the accused Ayodhya along with them, who was caught from the spot and other accused would succeed to run away. P.W.-1 has also stated that since it was already late in the night and the dead body also had to be guarded, as such, they did not go to file the report at night and waited for the morning.

(ii) Qua the second submission made by the learned counsel for the accused-appellants, learned A.G.A. submits that since all the accused were of the same village of informant/P.W.-1 and were well known, they could be identified at night easily. Apart from the above, it is submitted that in the torch lights of several people along with Kanhaiya and Sita Ram, who came to the spot on shouting of informant, the accused persons have been identified by the prosecution witnesses. The recovery memos of the torches of Kanhaiya and Sita Ram have also been exhibited.

(iii). So far as the third submission made by the learned counsel for the accused-appellants that P.W.-2 Mahajan is a chance witness is concerned, it is submitted that P.W.-2 is not a chance but an eye witness of the alleged crime. In his cross-examination, he has specifically stated that on the date of incident the deceased went to his relative place and reached the place of P.W.-2 and requested him to drop him to his house and on his request, he came to his house along with him. He is thoroughly consistent in his examination-in-chief as also in his cross-examination. His testimony has also been supported by P.W.-1 in his testimony. There

is no inconsistency in testimonies of both eye witnesses i.e. P.W.-1 and P.W.-2.

(iv) Qua the fourth submission made by the learned counsel for the accused-appellants that as per the prosecution case, all the accused persons have caused injuries to the deceased by sticks (lathi) and spears but no recovery has been made from any of the accused persons, which cast a dent in the prosecution version, learned A.G.A. submits that since the prosecution version that the accused persons assaulted the deceased by lathi (sticks) and spears has been supported by the testimonies of eye witnesses i.e. P.W.-1 and P.W.-2 and the post-mortem report of the deceased, non recovery of any weapon from any of the accused persons would not affect the credibility of the prosecution witnesses. It was failure on the part of the Investigating Officer that he has not made any recovery of any weapon from any of the accused for which no benefit can be extended to the accused-appellants.

(v) So far as the fifth and eighth submissions made by the learned counsel for the accused-appellants that non examination of eye witnesses, namely, Kanhaiya and Sita Ram in whose torch lights, the accused have been identified and also the village chowkidar, who guarded the dead body of the deceased throughout the night, as per the version of the first information report is concerned, it is submitted by the learned A.G.A. that same does not prevail over the clinching evidence produced by the prosecution by way of testimonies of eye-witnesses, namely, P.W.-1 and P.W.-2, which has been fully supported by the medical evidence.

(vi) It is submitted by the learned A.G.A. that the sixth submission made by the learned counsel for the accused-appellants that since the Investigating Officer has not made any recovery memo of the blood stain earth and plain earth from the place i.e. front of the house of the informant/P.W.1, where initially, the accused persons assaulted the deceased by lathi and spears as soon as he reached thereafter from his relative place along with P.W.-2 nor the Investigating Officer marked the said place in the site plan, which makes the prosecution case doubtful, has also no relevance, as at that time, where the deceased was not seriously injured and no blood was coming out from his body. Even otherwise, the Investigating Officer has collected the blood stain earth and plain earth from the place i.e. front of the house of accused Ayodhya, where the deceased was seriously injured and ultimately has been done to death and he has also prepared their recovery memos, which have been exhibited and has also marked the said place in the site plan.

(vii) To the seventh submission made by the learned counsel for the accused-appellants that since no stab wound has been found on the body of the deceased as per the post-mortem report, the entire prosecution case is doubtful, learned A.G.A. submits that according to the prosecution case the accused persons assaulted the deceased by lathi (sticks) and spears, which is duly supported by the post mortem report on the ground that if a person assaulted with a stick and a spear, he will not get the same injury as if he is assaulted with a knife like stab wound.

20. On the basis of the aforesaid submissions learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye witnesses, namely, P.W.-1 and P.W.-2 who are consistent throughout in their examination-in-chief and the cross-examinations are credible in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of

the deceased Ganga and the same has also been supported by the medical evidence and the police evidence, therefore, trial court has not committed any error in recording conviction of the accused-appellants under Section 147 and 302 read with Section 149 I.P.C. As such the appeal filed by the accused-appellants, who committed heinous crime by murdering the deceased Ganga is liable to be dismissed.

21. In reply to the submissions made by the learned counsel for the accused-respondents in Government Appeal, learned A.G.A. submits that the prosecution has fully established its case beyond reasonable doubt against the accused-respondents by oral as well as documentary evidence but the trial court has not examined the same and passed the impugned judgment of acquittal of accused Pyare and Chhotkoo only on the argument raised by the defence counsel before the trial court, which is per-se illegal and is liable to be quashed. The learned A.G.A. further submits that in support of the above argument, learned counsel for the accused-respondent has failed to produce any documentary as well as oral evidence before this Court as well as trial court. There exist direct evidence against the accused Pyare and Chhotku by way of testimonies of P.W.-1 and P.W.-2. As such the Government Appeal filed by the State is liable to be allowed reversing the impugned judgment of the trial court and convicting and sentencing them for the offence under Section 147 I.P.C. and Section 302 read with Section 149 I.P.C. as to when other five accused have been convicted on the same evidence, how could these two accused go scot free.

22. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

23. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.

24. Before entering into the merits of the case set up by the learned counsel for the accused-appellant and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

25. P.W.-1/informant Naik , who is the father of the deceased Ganga, has stated in his examination-in-chief that the accused Ayodhya, Chhangur, Lakhan, Sanhu and Ramjit belong to the same family, whereas the accused Pyare and Chhotkoo are their associates. The name of sister of accused Ayodhya is Sitaabi. Sitaabi's behavior was not good, she had an illicit relationship with the deceased Ganga. Two years ago, murder of the deceased took place. Sitaabi ran away from the village four days prior to the incident and the deceased also ran away from his home. The accused Ayodhya and others tried to search Sitaabi but she was not traced. Ayodhya and others suspected that the deceased had taken away Sitaabi along with him and showed their serious displeasure towards the deceased. Further P.W.-1 has reiterated the same version as unfolded in the first information report.

26. In the cross-examination it has been submitted by P.W.-1 that the father of the accused Pyare is Sundar Singh and nephew of Sundar Singh is Satveer Singh. Bidya Singh is the relative (Pattidar) of the

aforesaid persons. Sunder Singh was not the relative (Pattidar) of Ram Parikhan Singh, who was murdered in which Vidya Singh and others were implicated. He did not know whether Vidya Singh was convicted in that case or not but he was imprisoned. He also did not know whether Sunder Singh was pursuing the said case against Vidya Singh. Vidya Singh was the Pradhan of the village. There was no enmity between Vidya Singh and Sundar Singh, and they used to talk. Consolidation cases were pending between Satveer Singh and Vidya Singh.

27. It has been further stated by this witness that Sitaabi had four brothers. Initially Sitaabi was married in Pakdi and then she started living with Vanshraj resident of her village. The name of her first husband was not known to him. Vanshraj has three boys and one girl. The name of Sitaabi's eldest son is Sudarshan. Sitaabi's two sons and one daughter were married. At the time of the incident, Sitaabi's son had already given birth to a daughter. Sudarshan's daughter was 3 years old at the time of the incident. Sitabi's husband Vanshraj was working in Dhanbad coal mine at the time of the incident. Sitaabi lived with her husband in Dhanbad. He did not know as to whether Sitaabi has filed any affidavit in this case or not. Other brothers of Sitaabi are Beni, Mangroo and Brijlal and they had also come at the time of the incident but they were not involved in the alleged crime. He did not disclosed the names of the aforesaid brothers of Sitaabi to the Investigating Officer because they were not involved. He only disclosed the names of those persons who had actually killed the deceased, to the Investigating Officer.

28. Again this witness has stated that his son Ganga (deceased) was married but his wife had died a year before the incident. The characters of both Ganga and Sitaabi were bad. He did not know which woman was related to Ganga. When Ganga left his house since 3 to 4 days, he did not make any effort to search him as he had gone to his relative place at Pipra. At the time of the incident, he was sitting on the outer porch of his house. The accused came to his door but did not come to his porch. Even his son Ganga and his relative Mahajan (P.W.-2) could not come to his porch. When his son came to the door, the accused started beating him with a stick only for a minute but none of the accused hit the deceased at his door with a spear. There was no blood on his door. His son Ganga was hanged by the accused from his hands and legs and taken along with them. Two accused caught the hands of the deceased and two caught his legs. When the informant/P.W.-1, his wife and P.W.-2 Mahajan reached the door of accused Ayodhya, his son Ganga was on the ground and the accused were beating him. He first saw from a distance of two steps that the accused were beating his son at the door of accused Ayodhya. He started screaming as soon as he saw it. At that time there was no one else there except the accused. On his alarm, people reached there. Kanhai and Sita came first on his alarm. Seeing Kanhai and Sita, the accused started running away. However, accused Ayodhya was apprehended by the informant/PW.-1 and P.W.-2 Mahajan, Sita Ram and Kanhai.

29. It has also been stated that after apprehending accused Ayodhya, he brought him to his house and made him sit there. No information was sent to the Village Pradhan. The watchman/village chowkidar had arrived shortly after the murder took place. Sita, P.W.-2 Mahajan and the people of the village had come near the dead body. Till the Police came, the same people were guarding the dead body. His wife and he stayed at

their home. People advised him that the remaining six accused had returned and they were hiding here and there. If they went to the Police Station along with accused Ayodhya, they would rescue him on the way and also the dead body had to be guarded and that is why he didn't go to lodge the report at night. There were still 2 hours of night left and then he went to the police station along with the watchman and the accused Ayodhya.

30. In his cross-examination, this witness has denied that accused Pyare Singh has been falsely implicated under the influence of Vidya Singh from him. He also denied that Vidya Singh was his friend or associate. He further stated that dead body of his son remained lying at the door of accused Ayodhya till 11 o'clock on that date. From the door of accused Ayodhya, the body of the deceased was taken on a cot to Badagaon and then taken on a Dunlap. He has denied that body of the deceased was taken away from the spot much later.

31. In his examination-in-chief, P.W.-2 Mahajan, who is another eye and star witness has stated that the deceased Ganga and the informant/P.W.-1 are his relatives. Two years ago, Ganga was murdered. He had gone to his house in the morning on the day when Ganga was murdered. He left his house at 8:00 p.m. in the evening to drop Ganga at his house and reached his house at around 9:00 p.m. in the night. When P.W.-1 along with Ganga reached his doorstep, he saw that accused Sanhu, Ayodhya, Lakhan, Chaangur, Ramjeet, Chhootkoo and Pyare having sticks (lathi) and spears were inquiring about the whereabout of Ganga, in the meantime, he alongwith Ganga reached there. Immediately thereafter, all the accused pounced on Ganga and wielded two-three lathi blows, consequent to which he fell down. Thereafter, all the accused together dragged Ganga to the door of accused Ayodhya and when they were hitting Ganga by sticks (lathi) and spears, P.W.-2, P.W.-1 Naik and his wife reached the door of accused Ayodhya. On hearing the noise, Sita and Kanhai came there having torches in their hands and thereafter several people reached there. Seeing them coming, all the accused except accused Ayodhya, ran away but the accused Ayodhya was apprehended by them and he was brought at the doorstep of P.W.-1 Naik. When Ganga went to his house, he was wearing lungi and shirt.

32. In the cross-examination, P.W.-2 stated that on the day of incident, he just went to drop Ganga at his house but otherwise, had no specific reason to visit there. They did not carry any weapon from the village. Only on the request of Ganga, he went to drop him at his house for which he did not assign any reason. No one accompanied Ganga at his place.

33. This witness has further stated that he and Ganga were ten steps away when they overheard the accused at the door of Ganga. As soon as they saw Ganga, the assailants attacked him and they did not try to save Ganga because accused were seven in number.

34. Again this witness has stated that he knew Vidya Singh, the then Pradhan of Nebuiya village. When the Investigating Officer came to the spot, Vidya Singh also came. Before Vidya Singh, Ram Parik Singh was the Pradhan, who had been murdered before the instant incident. He did not know that father of accused Ram Pyare, namely, Sundar Singh used to represent the prosecution case before the court concerned. He also did not know whether there is

enmity between the families of Vidya Singh and accused Ram Pyare or not. He has denied that under influence of prosecution, he has implicated the accused Ram Pyare. On the day, when he went with Ganga to his house, there was no special reason for accompanying him at night. Ganga told him that he was not coming from his home, he was coming from some other place. He did not inquire from where he was coming.

35. It has been further stated that when he reached at the house of Ayodhya, he saw Ganga lying in prone position. Ganga must have been assaulted for about 3 to 4 minutes at the doorstep of accused Ayodhya. He saw Ganga's injury. Ganga sustained four injuries of spears, one on the thigh, second on the armpit, third on the spleen and fourth on the back side of head near the ear. He cannot point out as to who caused the injuries by spear to the deceased as there was seven persons, who had beaten the deceased altogether. All the accused dragged Ganga to the doorstep of Ayodhya, threw him forcefully on the ground and assaulted him. When the accused were taking Ganga at the doorstep of accused Ayodhya, then he along with first informant Naik and his wife had accompanied them there.

36. Inspector Devendra Singh, the then Station House Officer of Police Station Ghughuli is the Investigating Officer, who has been examined as P.W.-3. In his examination-in-chief, he stated that he started the process of investigation of the instant case from 23rd September, 1978. The accused Ayodhya was apprehended and brought to the police station and was detained in the lock-up of the police station. He recorded the statement of the accused Ayodhya at the police station and then left for the incident site along with relevant papers.

37. This witness has further stated that when he reached the spot of the incident, he found the dead body of Ganga lying in front of the house of accused Ayodhya. He had shown the place where he found the dead body with the symbol “A” on the site plan.

38. From the place where the dead body was lying, he collected the blood stained earth and plain earth and sealed it in different boxes. He also inspected the torches of the witnesses. He has also recorded the statements of the informant/P.W.-1, his wife Jilewa, Mahajan P.W.-2 etc. He inspected the incident site at the instance of the witnesses. He searched the accused and tried to arrest them but the accused had absconded, hence no arrest could be made. The accused in the instant case had surrendered in the court and were sent to jail on 30th October, 1978, where he recorded their statements. After completing the investigation, charge sheet (Ex. A/10) came to be submitted in the court in his writing and signature on 17th October, 1978.

39. Dr. A.P. Singh, who conducted an autopsy on the person of the deceased Ganga has been examined as P.W.-4. During the course of post-mortem, he has noted as many as 20 injuries on the body of the deceased. In his examination-in-chief this witness has stated that as per his opinion, the cause of death of the deceased was due to shock and haemorrhage caused by the injuries. He has also opined in his testimony that incised wounds could be caused by spears and contusion and abraded contusion wounds can be caused by lathi. Ganga could have died on 22nd September, 1978 at 9 o'clock during night hours. The injuries in ordinary course were sufficient to cause death.

40. Sharda Lal Constable has been examined as P.W.-5. He stated that he has taken the body of the deceased to the Mortuary for post-mortem. He identified the dead body of the deceased in the presence of doctor.

41. Sub-Inspector Brij Raj Yadav has been examined as P.W.-6. He stated in his examination-in-chief that he had prepared the chik report and made entry of the same in General Diary. He has also proved the same before the trial court. He further stated that the accused Ayodhya was brought at the Police Station by the informant/P.W.-1 and Chowkidar (watchman), who handed him over and he was detained in the police lock-up. One of the shirts (kurtas) which was worn by the accused Ayodhya on which some blood stains were found, was taken in possession by the police and sealed.

42. Before proceeding to discuss the issues raised in these appeals we may note some background facts.

43. The incident i.e. murder of the deceased Ganga, occurred on 22nd September, 1978 at around 09:00 p.m. during night hours and his dead body was lying at the doorstep of accused Ayodhya all through the night. On the next day i.e. 23rd September, 1978, inquest and post-mortem examination of the dead body of the deceased Ganga were conducted.

44. As per the prosecution, P.W.-1/informant, namely, Naik, who was father of the deceased Ganga and P.W.-2 Mahajan, who is relative of P.W.-1/informant are the star eye witnesses.

45. Both the star prosecution witnesses i.e. P.W.-1 and P.W.-2 have specifically stated in their testimonies i.e. in their examination-in-chiefs as well as in their cross-examinations that all the seven accused with intention to kill the deceased Ganga, had first beaten him at his doorstep and thereafter they had dragged him to the doorstep of accused Ayodhya, where they had mercilessly beaten him by lathi and spears due to which he sustained serious injuries and ultimately died on the spot. There is no contradiction or inconsistencies in the testimonies of both the star prosecution witnesses. In the first information report as well as in his testimony, P.W.-1 is consistent in stating that all seven accused persons have murdered his son Ganga.

46. The relevant portion of the testimony of informant/P.W.-1 Naik qua the commissioning of the alleged offence is extracted herein below:

(In examination-in-chief)

"आज से लगभग 2 वर्ष हुआ रात के नव बजे का समय था। मैं अपने दरवाजे पर था। मुलजिमान अयोध्या प्यारे, छोटकू, लखन, छागुर, सन्तू और रामजीत हाजिर अदालत जो लाठी भाला लिए थे. आये और मेरे लड़का गंगा के बारे गाली देकर पूछा कि कहा है तो मैने बताया कि पिपरा रिस्तेदारी में गया है। बातचीत हो ही रही थी कि इसी में महाजन व गंगा आ गये। यह देखकर मुझे गाली देने लगे व मेरे लड़के को लाठी भाला से मारने लगे। जब मेरा लड़का मार खाकर गिर गया तब उसे अयोध्या आदि मुलजिमान उठा ले गये और अपने दरवाजे पर अयोध्या के दरवाजे पर लाठी भाला से मारने लगे। मैं व मेरी स्त्री भी रोती पिटते उसके पीछे गये। वहाँ पर हम लोगो ने शोर किया और हमारे शोर पर कन्हई व सीता टार्च लेकर आ गये। मेरा लड़का वहीं अयोध्या के दरवाजे पर मार से उसी वक्त मर गया। मेरे गाँव के दस बीस आदमी वहाँ आ गये। मारने वाले मारना छोड़कर भागे। अयोध्या को लोगो ने पकड़ लिया शेष मुलजिमान भाग गये। अयोध्या को अपने दरवाजे पर लाया। चौकीदार को बुलाया। रात को, लाश रखाने व मुलजिम को पकड़ने के वजह से थाने पर नहीं जा पाये। इस कत्ल की दरखास्त 2 बजे रात को मैने लिखाया। इक्ज० क-1 को पढ़कर सुनाया गया गवाह ने कहा कि वही रिपोर्ट है इसे मैंने गाँव के एक आदमी से लिखाया था यह याद नहीं आ रहा है कि किससे लिखाया था।"

(In cross-examination)

"घटना के समय मैं अपने घर के बाहरी ओसारे में बैठा हुआ था। मुलजिमान मेरे दरवाजे पर आये लेकिन मेरे ओसारे में नहीं आये। मेरा लड़का व महाजन भी मेरे ओसारे में नही आ पाये थे। जब मेरा लड़का दरवाजे पर आ गया तो मुलजिमान ने लाठी से मारना शुरू किया। मेरे दरवाजे पर मुलजिमान ने एक मिनट तक लाठी से मारा। मेरे दरवाजे पर किसी ने भाला से नही मारा। मेरे दरवाजे पर खून नही गिरा था। मेरे लड़के को हाथ पैर पकड़ टांग कर मुलजिमान ले गये। 2 आदमियों ने हाथ पकड़ा था। और 2 आदमी पैर पकड़े थे। मैं अपने लड़के के साथ पीछे-2 नहीं गया मैं अपनी औरत को जानकर साथ में लेकर गया। महाजन भी मेरे व मेरे औरत के साथ-2 अयोध्या के दरवाजे पर गये। अयोध्या के दरवाजे पर जब हम तीनों आदमी पहुँचे तब मेरा लड़का गिरा पड़ा था व मुलजिमान उसको मार रहे थे। मैं पहले पहल 2 लट्ठे की दूरी से देखा कि मुलजिमान अयोध्या के दरवाजे पर मेरे लड़के को मार रहे है। मैं देखते ही चिल्लाने लगा था। उस वक्त मुलजिमान के अलावा वहाँ और कोई नहीं था। मेरे शोर पर लोग पहुँचे। मेरे शोर पर पहले कन्हई व सीता आये। कन्हई व सीता को देखकर मुलजिमान भागना शुरू किये। अयोध्या को मै व महाजन ने पकड़ा था। सीता व कन्हई ने भी पकड़ा था। जहाँ मेरा लड़का मारा गया था वहाँ से 2 कटटा पच्छिम पर अयोध्या मुलजिम पकड़ा गया। 20 कट्ठे (लट्ठे) का एक बित्ता होता है। यह मुझे नहीं मालूम कि कितने हाथ या कितने कदम का एक कट्ठा होता है। मैं नही बता सकता कि मुलजिमान हमारे घर से अयोध्या के घर ले जाने के रास्ते में मारा या नहीं मारा। मैने रिपोर्ट में यह लिखाया था कि हमारे घर से मुलजिमान टांग ले गये। रिपोर्ट में यह लिखाया था कि घर से मारते पीटते हमारे लड़के को अयोध्या के घर तक ले गये।"

47. The relevant portion of the testimony of P.W.-2 Mahajan qua the commissioning of the alleged offence is extracted herein below:

(In examination-in-chief)

"आज से लगभग 2 वर्ष हुये जब गंगा का कत्ल हुआ। गंगा का जिस दिन कत्ल हुआ उस दिन सुबह वह मेरे घर गये थे। मैं अपने घर से शाम के 8 बजे गंगा को उनके घर पहुँचाने के लिये चला था और उनके घर पर करीब नव बजे रात में पहुँच गया था। हम लोग जब गंगा के दरवाजे पर पहुँचे तो देखा कि सन्तू, अयोध्या, लखन, छागुर, रामजीत, छोटकू और प्यारे लाठी व भाला लेकर नायक से पूछ रहे थे कि गंगा कहा गया। तब तक हम लोग पहुँच गये। तब वह लोग गंगा के उपर टूट पडे व 2-4 लाठी मारे, मार खाकर गंगा गिर गये। गंगा को सभी मुलजिमान मिलकर अयोध्या के दरवाजे, पर उठा ले गये। और फिर सभी मुलजिमान हाजिर अदालत लाठी भाला से मुलजिमान को मारा। अयोध्या के दरवाजे पर पीछे 2 मै, नायक व नायक की स्त्री गई शोर पर सीता व कन्हई हाथों में टार्च लिये हुये आ गये और उसके बाद कई आदमी आ गये। और आदमियों को आते देखकर मुलजिमान भागे जिसमें से मुलजिम अयोध्या पकड़ लिये गये शेष भाग गये। अयोध्या को नायक के दरवाजे पर लाकर विठाया गया। गंगा जब मेरे घर गये थे तब लुंगी व कमीज पहने थे।"

(In cross-examination)

"हम लोग दस कदम पर थे जब हम लोगों ने गंगा के दरवाजे पर मुलजिमान की बातें सुनी हो। जैसे हम लोग पहुँचे वैसे ही गंगा नजर आ गये और उनपर मुलजिमान टूट पड़े। हमने गंगा को बचाने की कोशिश नहीं किया क्योंकि मुलजिमान सात आदमी थे किसी मुलजिम ने मुझपर कोई वार नही किया।

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जब अयोध्या के घर पर पहुँचा तो गंगा गिरे हुये थे। वह मुँह के बल गिरे थे। अयोध्या के दरवाजे पर करीब 3-4 मिनट तक गंगा मारे गये होगे। मैने गंगा का चोट देखा। गंगा को भाले की चोट चार जगह लगी थी। जाँघ में, एक कन्धे के नीचे बगल में, एक किल्ली और एक सिर पर पीछे कान के पीछे । यह मैं नहीं बता सकता कि भाले की चोट किसने 2 पहुँचाई क्योंकि सात आदमी मार रहे थे। मुलजिमान ने गंगा को अयोध्या के दरवाज पर ले जाकर पटक दिया व मारा था। जब लोग गंगा को अयोध्या के दरवाजे ले जा रहे थे तब मैं नायक व उसकी औरत साथ अयोध्या के दरवाजे पर गये।"

48. The post mortem report of the deceased as well as the testimony of P.W.-4 Dr. A.P. Singh, who conducted the autopsy of the deceased also supports the prosecution case. In his testimony, P.W.-4 has stated that the incised wound and contused wounds could be caused by spears and lathi (sticks), which have been used in the commissioning of alleged offence as per the testimonies of P.W.-1 and P.W.-2.

49. The accused also had motive to commit the murder of the deceased as they had suspected that the deceased Ganga had enticed away the sister of the accused Ayodhya, namely, Sitaabi because of their illicit relationship.

50. Now we may come on the merits of the submissions made by the learned counsel for the accused-appellants in

Criminal Appeal, learned counsel for the accused-respondents in Government Appeal as well as the submissions made by the learned A.G.A. in both the above appeals.

51. On the basis of deeper scrutiny of the evidence oral as well as documentary led during the course of trial and as has been discussed herein above in detail, we find substance in submissions made by the learned A.G.A. for the State in both the appeals.

52. As regards, submission made by the counsel for the accused-appellants that there is delay in lodging of the first information report, we find that P.W.1/informant has satisfactorily explained the same in his examination-in-chief as well as in his cross-examination respectively. For ready reference, the same are extracted here-under:

"अयोध्या को लोगो ने पकड़ लिया शेष मुलजिमान भाग गये। अयोध्या को अपने दरवाजे पर लाया। चौकीदार को बुलाया। रात को, लाश रखाने व मुलजिम को पकड़ने की वजह से थाने पर नही जा पाये। इस कत्ल की दरखास्त 2 बजे रात को मैने लिखाया"

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"लोगों ने कहा कि मुलजिमान लौट आये है व इधर उधर छिपे हैं। अयोध्या को थाने ले जाएंगे तो वो लोग उसे रास्ते में छुड़ा लेंगे और लाश को भी रखना है। इसीलिए रात में रिपोर्ट लिखाने नहीं गया। 2 घड़ी रात बाकी थी तब मुलजिम अयोध्या को लेकर चौकीदार के साथ मैं थाने गया।"

53. So far as the submissions made by the learned counsel for the accused-appellant that since neither the Investigating Officer has collected any earth (blood stained earth or plain earth) from the door of the informant/P.W.-1 nor he has marked the said place in the site plan, which makes the prosecution case doubtful, is concerned, we may record that P.W.-1 and P.W.-2 have specifically stated in their testimonies that at the doorstep of informant/P.W.-1, the accused had wielded four lathi blows at Ganga and thereafter they dragged him at the doorstep of accused-Ayodhya where they wielded several lathi blows and repeatedly assaulted him with spears resulting in his instantaneous death. Therefore the main place of occurrence in the facts of the present case is the door of accused Ayodhya, which has been marked as "A" in the site plan.

54. To the submissions made by the learned counsel for the accused-appellants that P.W.-2 Mahajan, who is stated to be relative of the informant/P.W.-1 is a chance witness an not an eye witness, we may record that he is an eye witness. He is throughout consistent in his examination-in-chief as well as in his cross-examination. He has specifically supported the prosecution case. In his testimony, he has narrated the entire incident as unfolded by P.W.-1 in the first information report as well as in his testimony. He also has sufficiently explained his presence at the place of incident, where he had accompanied the deceased Ganga.

55. To the submission made by the learned counsel for the accused-appellant that non recovery of any weapon having been made from any of the accused creates a doubt in the prosecution case, we may record that such minor discrepancy on the part of the Investigating Officer does not effect on the otherwise clinching evidence produced by the prosecution which have been discussed in detail herein above.

The Hon'ble Supreme Court in the case of **Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas & Another** reported in (2013) 12 SCC 796 has held that when there is ample unimpeachable ocular evidence and

same has been corroborated by medical evidence, non-recovery of weapon does not affect the persecution case. The relevant paragraphs i.e. paragraph nos. 33 and 34 are being quoted herein below:

"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.

34. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198 : (AIR 2002 SC 3119 : 2002 AIR SCW 3596)], this Court has ruled that

"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder".."

In **Lakhan Sao v. State of Bihar and Another** reported in *[(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)]*, it has been opined by the Hon'ble Supreme Court that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

In **State of Rajasthan v. Arjun Singh and Others** reported in [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)], the Hon'ble Supreme Court has expressed that:

"18..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place".

56. The submission made by the learned counsel for the accused-appellant that since no stab wound has been found on the body of the deceased therefore, the prosecution case is doubtful, has no force. Stab wound can be caused by knife or a sharp edged weapon and as per the post-mortem report of the deceased, incised and contusion wounds have been found on the person of the deceased, which can be caused by spears and lathi (sticks) respectively and the same has also been opined by P.W.4 Dr. S.P. Singh in his testimony, inasmuch as spears and lathi have been used in the alleged crime as per the version of P.W.-1 and P.W.-2.

57. The next submission made by the learned counsel for the accused-appellants that non-examination of witnesses of first information report, namely, Kanhai and Sita Ram in whose torch lights, the accused have been identified and Chowkidar, who guarded the dead body of the deceased throughout the night at the door of accused Ayodhya, during the course of trial, cast a dent in the prosecution case, has also no force, as they are not eye witnesses and their testimonies are not relevant than the testimonies of eye witnesses like P.W.-1 and P.W.-2, whereas recovery memos of torches were proved by the Investigating Officer (P.W.-3).

58. We have also considered the submissions made by the accused-

respondents in the Government Appeal and the counter submissions made by the learned A.G.A.

59. The submissions made by the learned counsel for the accused-respondents qua false implications of accused-respondents, namely, Pyare Singh and Chhotku along with other accused in the present case because there is inimical relations between Pyare Singh and Vidya Singh, the then Village Pradhan and also the informant/P.W.-1 Naik is an associate of Vidya Singh, in whose influence, P.W.-1 has implicated them in the present case, are liable to be rejected as the defence on their behalf have completely failed to establish such plea of false implication. They have neither produced any document in that regard nor they have produced any oral evidence like defence witness to testify the said plea during the course of trial.

60. While acquitting both the accused-respondents, namely, Pyare Singh and Chhotku, the trial court has completely failed to examine the said issue. The trial court has not carefully scrutinize the testimonies of eye witnesses i.e. P.W.-1 and P.W.-2 and misread the same while recording a finding that from perusal of the testimonies of P.W.-1 and P.W.-2, the accusation of both the accused-respondents do not crop up. In his testimony, P.W.-1 has specifically stated that he is not friend or associate of Vidya Singh, the then Village Pradhan from whom, there were inimical relations of accused-respondent Pyare Singh. P.W.-1 and P.W.-2 have clearly stated in their statements before the trial court that the accused-respondents Pyare and Chhotku also actively participated in alleged crime along with other five accused, who have been convicted by the trial court on the same set of evidence. As such the false implications of accused-respondents, namely, Pyare Singh and Chhotku has no legs to stand.

61. In view of the aforesaid facts and the findings recorded by us herein above, we are of the firm opinion that the finding of the Court below with regard to accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, is correct and the guilt of the accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji has been proved beyond reasonable doubt by the prosecution, which is sustainable.

62. Consequently, in view of the deliberations held above the criminal appeal at the behest of appellant no.5 Chhangur stands dismissed. The appellant no.5, who is reported to be in jail, need not surrender before the Court concerned.

63. Since the appellant nos. 1 to 4, namely, Ayodhya, Ram Ji, Lakhan and Sanhu had died, the present criminal appeal at their behest have already been abated by this Court. As such, no further order is required to be passed by us qua appellant nos. 1 to 4.

64. However, after considering the facts and circumstances of the case and examining the findings recorded by the trial court in acquittal of accused-respondents Pyare Singh and Chhotku, we are of the view that the trial court has not examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents cannot be sustained. The prosecution has fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The

acquittal of the accused-respondents, namely, Pyare Singh and Chhotku, is consequently, reversed.

65. Both the accused-respondents, namely, Pyare Singh and Chhoktu are accordingly convicted for the offence under Sections 147 and 302/149 I.P.C. and sentenced to two years rigorous imprisonment for the offence under Section 147 I.P.C. and life imprisonment for the offence under Section 302/149 I.P.C., like accused-appellants, who have been convicted and sentenced by the trial court under the impugned judgment.

66. The Government Appeal filed on behalf of the State is, hereby, allowed.

67. There shall be no order as to costs.

68 The Chief Judicial Magistrate, Gorakhpur shall ensure that both the accused-respondents are arrested and sent to jail for serving their sentences awarded herein above.

69. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Gorakhpur, henceforth, for necessary compliance.

(2024) 5 ILRA 53
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 261 of 1982

Ved Prakash & Ors. ...Appellants
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri Virendra Singh, Ms. Aarushi Khare (A.C.)

Counsel for the Opposite Party:
A.G.A.

Criminal Law-Indian Penal Code-1860-Sections-34, 302 - Juvenile Justice Care & Protection of Children Act, 2000-Section 15-Criminal appeal against judgment of conviction U/s 302/34 IPC- No error in the eye-witness account which had been rendered by the P.W. - 2. It mattered little that P.W. - 3 who had claimed that the accused had made an extra-judicial confession had turned hostile or whether the brother of the deceased who was allegedly there on the spot has not appeared as a witness- Minor discrepancies in the St.ment of an eye-witness would not make much difference- As far as the sentence is concerned, the appellant no. 2 was a juvenile at the time of incident, he would be governed by the provisions of Section 15 of the Act of 2000- Appellant No.2 was released on bail way back in the year 1982 and ever since then he has never misused the liberty of bail therefore Rs 20,000/- fine imposed upon him which shall be equally distributed between the surviving heirs and legal representatives of the deceased.

Appeal dismissed. (E-15)

List of Cases cited:

2020 (10) SCC 555 : Satya Deo @ Bhoorey Vs St. of U. P.

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Vinod Diwakar, J.)

1. Upon an incident having taken place on 18.4.1981 whereby Shyam Singh had died, a first information report was got lodged by his wife – Kailashpati. The first information report had stated that the brother of Shyam Singh, namely, Balveer Singh accompanied by his four sons, namely, Vijayvir Singh alias Vijay, Ved

Prakash, Chandra Prakash alias Pappu and Rajesh alias Raju and the brother-in-law of Balveer, namely, Surendra (sala) had reached the house of the deceased. The motive assigned in the first information report was that the deceased Shyam Singh had executed a Will in favour of his three daughters and, therefore, the accused Balveer Singh and his four sons wanted to do away with him. In the first information report, it was very categorically stated that the four sons of Balveer Singh and his brother-in-law were armed with lathis and swords. Specifically, it has been stated that Chandra Prakash, Rajesh alias Raju, Ved Prakash had swords whereas Balveer Singh and Surendra had lathis in their hands. At the time of the incident, another brother of the deceased, namely, Kripal Singh had reached the spot. Apart from the brother, Dharmveer Singh son of Chiranjeet Chauhan and Bhagwana Singh son of Kathera Singh had also reached at the place of incident. The first information report states that not only there were three eye-witnesses present but many others of the area had also reached the spot. The first informant in the first information report had stated that the first information report was written on the dictation of the first informant by her daughter – Vimla.

2. After the lodging of the first information report, the Police got into action and various relevant materials found on the spot were recovered and kept in Police custody. The accused Chandra Prakash, it was alleged, had also made a confessional statement before the Police on 18.4.1981 itself and had also under Section 27 of the Evidence Act got recovered the sword as was used in the incident. The sword was recovered in the presence of two eye-witnesses, namely, Ram Singh and Ashok Kumar Tyagi.

3. Upon completion of the investigation, the Police submitted its charge sheet and the court of sessions, thereafter, on 3.8.1981 framed charges against the accused Shyam Singh, Chandra Prakash alias Pappu, Ved Prakash, Balveer Singh, Rajesh alias Raja and Surendra Singh.

4. When the trial commenced, from the side of the prosecution 7 prosecution witnesses were produced and examined.

5. Upon the conclusion of the Trial, the IIIrd Additional Sessions Judge, Bijnor, convicted the accused, namely, Chandra Prakash alias Pappu, Ved Prakash and Rajesh alias Raju for the offences under Sections 302/34 IPC and they were thereafter sentenced for rigorous imprisonment for life. By the same order, Surendra Singh, Vijayvir Singh and Balveer Singh were acquitted. Thereafter, the instant Criminal Appeal was filed challenging the judgement and order dated 27.1.1982 passed by the IIIrd Additional Sessions Judge, Bijnor.

6. The P.W. - 1 who was the doctor who had conducted the postmortem proved the port-mortem report and categorically mentioned as to how the injuries which had resulted in the death of the deceased had been inflicted on the body of the deceased.

7. The P.W. - 2 is the wife of the deceased and she is an eye-witness of the incident and she gives the entire eye-witness account saying that the deceased – Shyam Singh and she herself were sleeping in the veranda of their house and a functional lantern was there in the veranda. She had also stated that in the eastern side of the veranda, her brother-in-law (dewar), namely, Kripal Singh was also sleeping. She

has stated that Balveer Singh, the accused, was her brother-in-law (dewar) and Vijay, Ved Prakash, Chandra Prakash and Rajesh were his sons and Surendra was the brother-in-law (sala) of Balveer Singh. She recognized all the six accused who were present in the court. She thereafter, in her testimony, gives the reason for the murder of her husband. She had stated that because of the fact that her husband executed a Will in favour of her daughters, the accused could not tolerate the transfer of the property in the name of the daughters and, therefore, the murder had taken place. She states that when the six accused entered the place of incident and when upon hearing certain noises, she got up, she saw Balveer Singh standing along with Surendra and Vijai who were having lathis in their hands. Chandra Prakash alias Pappu had a sword in his hand. Ved Prakash and Raju had tabals (a kind of a sharp edged weapon). Chandra Prakash alias Pappu had attacked/assailed the husband of the first informant who was sleeping. She states that on the injury being inflicted, the husband of the first informant got up and stood on the cot himself. When this happened, the other accused started hitting the deceased (the husband of the first informant) by lathis and tabal. She had stated that when a lot of hue and cry was created by the first informant then the other witnesses, namely, Kripal (dewar), Dharmveer and Bhagwan came on the spot. She had stated in the statement in chief itself that Kripal had joined hands with the accused. She, thereafter, had stated that after injuries were inflicted and her husband was killed, the accused ran away from the southern side. She further states that Abdul Karim and Rajesh were her servants. A day before the incident, they had told her that Balveer and his four sons were saying that they would get rid of Shyam Singh. She had stated that the report was got lodged by her and it was scribed by her daughter on her dictation. She had stated that whatever she had dictated was scribed by her daughter. In the cross-examination which took place, the P.W. - 2 stood firm with her averments in the chief.

8. Upon a specific question being put as to whether, she was accompanied by one Basant Singh when she went to lodge the first information report, she denied this fact but had stated that, in fact, she knew one Basanta Ahir. In the cross-examination, she had also stated that she woke out of her sleep when her husband was, in fact, giving calls for being saved. She denied the fact that she did not know the actual age of Rajesh alias Pappu. She denied the fact that he was 13-14 years of age.

9. The P.W. -3, Rajesh who the first informant stated had informed a day prior to the incident that the accused Balveer Singh was planning to do away with her husband was declared hostile by the prosecution.

10. The P.W. - 4, Bhagwan, another eye-witness, who according to the first informant had come to the place of incident upon the hue and cry being made, had also stated that he saw the entire incident with his own eyes. He had very categorically stated that when he had reached the place of incident beside him, there were Dharmveer and Kripal also at the place of incident and no other person was there. He further added to the statements he had made that after half and an hour other persons started coming to the spot.

11. The P.W. - 5 Ram Singh happens to be a witness who had witnessed the recovery of the swords.

12. The P.W. - 6, Ijhar Hussain, is the constable who had taken the dead-body for the port-mortem.

13. The P.W. - 7, Dharmveer Singh, the Investigating Officer, had also proved the first information report and, thereafter, had stated that the entire investigation had been done under his supervision. The statement of the accused were thereafter recorded under Section 313 Cr.P.C. In the statement they had denied having committed the crime and had also denied their presence at the place of occurrence.

14. Learned Amicus Curiae for the appellants Ms. Aarushi Khare made the following submissions:-

I. The appellants – Ved Prakash and Chandra Prakash had died and, therefore, the Appeal had already abated against them. So far as Rajesh @ Raju is concerned, she states that at the time of the incident, he was a juvenile. In fact, she states that when the Appeal was filed, he had given out his age as 12 years. When the appeal was pending, an application was moved on 6.9.2023 for declaring the appellant- Rajesh @ Raju a juvenile. Thereafter, the Principal Magistrate of the Juvenile Justice Board informed this Court by a communication dated 10.11.2023 that on 6.11.2023 the appellant – Rajesh @ Raju had been declared juvenile and that at the time of incident his age was 12 years 1 month and 18 days. She, therefore, submits that the trial as was undergone was of a juvenile who was in conflict with law and therefore it was not a proper trial. She, however, submits relying upon a judgement of Supreme Court reported in **2020 (10) SCC 555 : Satya Deo alias Bhoorey vs. State of Uttar Pradesh** that in the event a trial had taken place of a juvenile who was in conflict with law alongwith other adult persons and at the stage of Appeal it was discovered that the appellant – Rajesh @ Raju was a juvenile at the time of the incident then the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the "Act of 2000") were to apply. For that purpose, she relies upon the paragraph no. 16 of the judgement reported in 2020 (10) SCC 555 which is being reproduced here as under:-

"16. Further, the provisions of the 2000 Act are to apply as if the juvenile had been ordered by the Board to be sent to the special home or institution and ordered to be kept under protective care under sub section (2) of Section 16 of the Act. The proviso states that the State Government or the Board, for any adequate and special reasons to be recorded in writing, review the case of the juvenile in conflict with law who is undergoing sentence of imprisonment and who had ceased to be a juvenile on or before the commencement of the 2000 Act and pass appropriate orders. However, it is the Explanation which is of extreme significance as it states that in all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment on the date of commencement of the 2000 Act, the juvenile's case including the issue of juvenility, shall be deemed to be decided in terms of clause (1) of Section 2 and other provisions and Rules made under the 2000 Act irrespective of the fact that the juvenile had ceased to be a juvenile. Such juvenile shall be sent to a special home or fit institution for the remainder period of his sentence but such sentence shall not exceed the maximum period provided in Section 15 of the 2000 Act. The statute overrules and modifies the sentence awarded, even in decided cases."

and, therefore, she submits that even if the appellant is to be convicted, if the

appeal is decided against him then he would be punished as per the Act of 2000.

II. Learned counsel for the appellant has submitted that a perusal of the statement of P.W. -2 does not inspire confidence. She submits that in the first information report, the P.W. -2 had stated that she had come out of her sleep because of certain noises. Subsequently, in her statement before the Court, she says that when the husband of the deceased had raised a hue and cry, then she woke up.

III. Learned counsel for the appellant further submitted that the motive which the appellant had given, that the husband of the first informant had executed a Will in favour of his daughters and, therefore, the brother of the deceased had killed him does not have legs to stand. She states that when the brother was done away with, the Will would come into operation. This would in no manner help the accused persons. In fact, they stood to lose if the husband died. The motive as had been alleged was a weak motive.

IV. Learned counsel for the appellant states that Kripal, the brother of the deceased, who had witnessesed the incident did not appear in the witness box. Similarly, she states that the eye-witness – Dharamvir Singh also did not appear in the witness box. So far as the eye-witness account of Bhagwana Singh is concerned, she submits that it had various contradictions. She states that P.W. -2 had stated that in addition to Kripal, Dharmveer Singh and Bhagwana Singh, there were many other persons of the locality assembled but she states that at the time of incident only Kripal, Dharamveer Singh and Bhagwana Singh were there on the spot.

V. Learned counsel further submits that the extra-judicial confession with regard to the servant is also not reliable as out of the two servants only one servant, namely, Rajesh appeared in the witness box and he also turned hostile.

VI. Learned counsel for the appellant states that if the statement of Bhagwana Singh is looked into, it becomes clear that in two other cases, namely, in one case of **State vs. Baljeet** and in another case of **State v. Battu,** he was a police witness and, therefore, there was every possibility in this case also that he was appearing as a police witness.

VII. Learned counsel for the appellant submits that as per Section 24 of the Children Act, 1960 and Section 18 of the Act of 2000 no joint trial of a juvenile and a person who was not a juvenile could have been undergone.

VIII. Learned counsel for the appellant further submits that the appellant who was admittedly a juvenile at the time of incident could not have any mens rea and, therefore, could not be punished under Section 302 IPC. He was only acting on the directions of his father who had actual control and command over the will and thinking of the juvenile (minor). A father is a natural guardian and, therefore, it could not be said that the appellant was having the mens rea to commit the murder. She further submits that the father of the appellant had in fact been acquitted.

IX. Learned counsel for the appellant in the end submits that in the event the appeal is dismissed and the judgement of conviction is upheld then as per the judgement of **(1981) 4 SCC 149 : Jayendra and another v. State of Uttar Pradesh and (2000) 6 SCC 89 : Umesh Singh and another vs. State of Bihar,** the sentence may be modified and the appellant may not be sentenced for life. She also states that as per Section 15 of the Act of 2000, there were 7 methods in which a juvenile could be dealt with and the appellant who was only about 12 years of age at the time of the incident

could be given the minimum sentence possible.

15. Learned Additional Government Advocate Sri Amit Sinha in opposition has supported the judgement of the trial court and had submitted that the P.W. - 2 was a reliable eye-witness and the account which she had given could not in any manner be rejected or doubted.

16. Learned AGA further submits that even a single eye-witness account which was reliable, could result in a conviction.

17. Learned AGA further submits that when the incident was admitted and when the eye-witness account which was a reliable one was there on record then definitely the conviction was the only conclusion to which the Court could come to.

18. Learned AGA further submits that the appellant be given maximum punishment as could be given after the Juvenile Justice Board had held that the appellant was a minor.

19. Learned AGA submits that the provisions of Section 24 of the 1960 Act and Section 18 of the Act of 2000 had no relevance in the instance case as the trial had taken place treating the appellant an adult. He, therefore, submits that those provisions could not be pressed at this point of time.

20. Having heard learned Amicus Curiae Ms. Aarushi Khare, this Court is of the view that the incident which had resulted in the criminal case being registered and which was tried by the IIIrd Additional Sessions Judge, Bijnor was a case where there was a definite eye-witness account of P.W. - 2 who was the wife of the deceased. No perusal of the record or the assessment of the evidence leads us to conclude that there was any error in the eye-witness account which had been rendered by the P.W. - 2. It mattered little that P.W. - 3 Rajesh who had claimed that the accused had made an extra-judicial confession had turned hostile or whether the brother of the deceased Kripal who was allegedly there on the spot has not appeared as a witness even though there were minor discrepancies in the statement of P.W. - 2 who was an eye-witness would not make much difference. The fact of the matter remained with the incident was witness of P.W. - 2 and, there is no reason to disbelieve her.

21. Under such circumstances, the Appeal is dismissed vis-a-vis the appellant no. 2, Rajesh, so far as the conviction portion is concerned. However, so far as the sentence is concerned, we are of the view that when the appellant no. 2 Rajesh Kumar @ Raju was a juvenile at the time of incident, he would be governed by the provisions of Section 15 of the Act of 2000 as per the judgement of Supreme Court reported in **2020 (10) SCC 555 : Satya Deo @ Bhoorey vs. State of Uttar Pradesh.**

22. Since the incident is of the year 1981, we are of the view that the appellant Rajesh @ Raju must be now a fairly elderly person. He was never a criminal before the incident had occurred and also at the time when he had committed the crime he was under the influence of his father and it could not be said that he was intentionally committing the crime.

23. We are also of the view that the appellant Rajesh was released on bail way back in the year 1982 and ever since then he

has never misused the liberty of bail or has ever jumped the bail.

24. Under such circumstances, we are of the view that the minimum possible sentence be imposed upon him. We, therefore, consider it appropriate to fine him for Rs. 20,000/- which shall be equally distributed between the surviving heirs and legal representatives of Shyam Singh.

25. Since the appellants no. 1 and 3 had died during the pendency of the appeal vis-a-vis them stood abated.

26. For the hard work which has been put in by the learned Amicus Curiae Ms. Aarushi Khare, we quantify her fee as Rs. 30,000/- which shall be payable to her by the Legal Services Authority forthwith. The payment be got done under the supervision of the Registrar General of this court.

(2024) 5 ILRA 59
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.05.2024

BEFORE

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

Criminal Appeal No. 298 of 1990

Banwari & Ors. ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
R. Murtaza, Aishwarya Mishra, Alok Singh, Altaf Mansoor, Ashok Kumar Singh, K Jaiswal, Rishad Murtaza, Syed Ali Jafar Rizvi

Counsel for the Respondents:

Criminal Law-Indian Penal Code-1860-Sections-147, 149 & 302 - Criminal appeal against judgment and order of conviction of life imprisonment- Trial Court has discounted the various arguments relating to delayed F.I.R., discrepancies in the St.ments of the alleged two eye witnesses, discrepancy in the recording of the inquest report and the F.I.R., the discrepancy in Medical and ocular evidence, the unnatural behaviour of the witnesses, who are close relatives of the deceased.

No blood was found in the grove of where the dead body was lying, or at the place on the road where the deceased was hit by gunshot fired by accused- Reasonable suspicion about exact place of occurrence of the incident-Presence of P.W.-1 and P.W.-2, at the place of occurrence to be doubtful and their testimonies to be unreliable-False implication of cannot be ruled out because of a subsequently developed story of existence of prior enmity between the parties- It is quite unnatural that a person whose paternal cousin was attacked in front of his own eyes would be so meticulous and farsighted as to take a file cover along with him to keep the plain piece of paper so that it is not creased at all while submitting his report at the Police Station-Result-Impugned judgment set aside.

Appeal allowed. (E-15)

List of Cases referred-;

1. Tulia Kali Vs St. of T N, (1972) 3 SCC 393

2. Dahari & ors.Vs St. of U P (2012) 10 SCC 256

3. Periyasamy Vs St., rep. by the Inspector of Police, 2024 SCC OnLine SC 314

4. Darshan Singh Vs St. of Pun. (2024) 3 SCC 164

5. Md Jabbar Ali & ors. Vs St. of Assam 2022 SCC OnLine SC 1440

6. Mahendra Singh & ors. Vs St. of M. P. (2022) 7 SCC 157

7. Khema alias Khem Chandra & ors. Vs St. of U.P., (2023) 10 SCC 451

8. Ramashish Rai Vs Jagdish Singh, 2005 (10) SCC 498

9. Vadivelu Thevar Vs St. of Madras, 1957 SCR 981

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

1. This Criminal Appeal arises out of judgement and order dated 11.05.1990 passed by the IIIrd Additional Sessions Judge, Sitapur in Sessions Trial No.663 of 1987 whereby the Appellant no.3 Mahesh has been convicted under Sections 302 and 147 read with Section 149 of the I.P.C. and sentenced to undergo life imprisonment, the appellant no.4-Jagdish along with appellant no.1- Banwari, appellant no.2-Moti Lal and appellant no.5- Babu Ram have been convicted under Section 148 read with Section 149 and Section 302 I.P.C. with life imprisonment.

2. Only two of the original five appellants i.e. appellant nos.2 and 4, namely, Moti Lal and Jagdish are alive as the appellant nos.1, 3 & 5, namely, Banwari, Mahesh, and Babu Ram died during the pendency of the Appeal and the Appeal in respect of them has already been abated.

3. The case of the prosecution as mentioned in the prosecution story written report Exhibit Ka-1 and the F.I.R. Exhibit Ka-2 of the paper-book is that on 27.04.1987, the informant Damodar Prasad, along with his uncle Vishwanath and cousin brother, Shiv Kumar were returning home after making a query from the Sawmill regarding cutting of logs of wood. As soon as all three reached Barhtara Taal around 6:30 P.M., the accused Jagdish son of Babu Ram along with Banwari, son of Paragdeen, Moti Lal son of Gokarna and Babu Ram son of Banwari and Mahesh son of Gokaran armed with deadly weapons appeared from the sugarcane field of Raghubar and on the exhortation of Jagdish, all of them attacked Shiv Kumar. Jagdish fired from his gun, Babu Ram attacked him on his neck with a knife and then all of them dragged Shiv Kumar to the sugarcane field of Raghubar. The informant Damodar Prasad along with his uncle Visvanath tried to shout for help but no one came and Banwari, Moti Lal and Mahesh tried to attack the informant and his uncle and also threatened them for life in case they reported the matter to the Police. As a result of such threat, the informant Damodar Prasad, along with his uncle ran to their home in the village Benipur and did not report the matter to the Police Station at night out of fear. They returned in the morning to search for Shiv Kumar and they found his body in a grove south of Barhtara Taal. The informant wrote out a written report (Exhibit Ka-1) and had gone to the Police Station to report the matter after leaving members of his family Suraj Prasad and Bhagwan Das and others near the dead body.

4. On the basis of said written report by Damodar Prasad, son of Suraj Prasad, dated 28.04.1987, F.I.R., Exhibit Ka-2 was registered as Case Crime No. 80 of 1987, on the same day at 06:25 A.M. against the accused for the offence under Sections 147/148/149 and 302 I.P.C. The Station House Officer Phool Singh Bhadoria rushed to the place of occurrence alongwith other policemen. On reaching the spot, he prepared the inquest report of the dead body and sealed it and sent it for post-mortem examination after completing other formalities and inspected the place of occurrence and prepared a site plan with index (Exhibit C-6). He then took the

statements of witnesses and prepared an inquest report (Exhibit Ka-8). On receipt of post-mortem report and completion of investigation, charge sheet was prepared against the accused persons and filed in Court.

5. Separate charges were framed by the IInd Additional Sessions Judge against all the accused on 21.01.1988. The prosecution examined six witnesses, Damodar Prasad as P.W.-1, Vishwanath as P.W.-2, Head Constable Satendra Nath Trivedi as P.W.-3, Constable Umakant Yadav as P.W.-4, Phool Singh Bhadoria as P.W.-5 and Dr. Gopal Swaroop, who conducted the post-mortem, as P.W.-6.

6. The statements of the accused under Section 313 of the Cr.P.C. were thereafter recorded. They denied the allegations and stated that they had been falsely implicated due to family dispute and long running enmity. The accused gave documentary and oral evidence. In the documents filed by them was a certified copy of the statement of Banwari dated 02.11.1977, which was given in the court of Vith Additional District and Sessions Judge, Sitapur in Sessions Trial No. 359 of 1976 titled as *State Vs Ramavtar and others*, under Sections 147, 148, 307/149, 324, 323 of the I.P.C. This case was decided on 11.03.1978. The statement of Banwari was given in the said Sessions Trial against Vishwanath, Ramavtar, Lalta Prasad, Madhuram and Brij Lal, who were the accused and were being prosecuted for causing injuries to one Ganeshi. Copy of the judgement in Sessions Trial No. 188 of 1986 : *State versus Jagdish son of Baburam*; decided on 14.08.1984 by the Sessions Judge Sitapur was also filed, in which, Jagdish was tried for offence punishable under Section 302 of the I.P.C. for the murder of his uncle Jagadamba on 28.12.1984. Jagadamba was the real brother of Babu Ram. The accused Jagdish had been acquitted.

7. The accused also examined Lalta Prasad as D.W.-1, who was the owner of the sawmill and he stated that Vishwanath had not come to his sawmill alongwith his son Shiv Kumar at any time in the recent past for cutting of wood logs.

8. The Trial Court considering the evidence on record had convicted the accused appellants and sentenced them as aforesaid.

9. It has been argued by the learned counsel for the surviving appellants that the appellants have been deliberately and falsely implicated because they belong to a collateral line of the same family. Banwari and Gokaran are real brothers. Babu Ram is the son of Banwari and Jagdish is the son of Babu Ram, the grandfather, son and grandson have all been implicated. Similarly, Motilal and Mahesh are the sons of Gokaran. Thus, both sons of Gokaran, son of Banwari have also been implicated. One Jagdamba was the real brother of Babu Ram and uncle of Jagdish. Jagdish was earlier implicated in murdering his uncle Jagdamba Prasad in 1984, but was acquitted.

10. It has been argued that the motive for attacking Shiv Kumar as shown by the prosecution, was that around two months ago from the date of the murder, Jagdish had threatened Shiv Kumar of dire consequences over taking water from the public tap, where Jagdish had gone to take a bath and had an altercation with Shiv Kumar. It has been argued that the accused/ appellant Jagdish had his own well in front

of his house, and there was no question of Jagdish going to the public tap to take a bath.

11. Learned counsel for the surviving appellants has submitted that the finding of guilt recorded by the learned trial court against the surviving appellants is against the weight of evidence and, therefore, the same is unsustainable. He has taken us through the entire testimonies of prosecution witnesses recorded before the learned trial court and on the basis thereof, he has submitted that a delayed first information report was lodged in this case after consultation in order to falsely implicate the surviving appellants. The delay in lodging the first information report has not been sufficiently explained by the prosecution.

12. He has also submitted that the learned trial court has failed to appreciate the fact that the contradictions/inconsistencies appearing in the testimonies of prosecution witnesses of fact are of such nature, which materially affect the core of the prosecution story and they being material in nature could not have been ignored by the learned trial court.

13. His further submission is that by not mentioning in the written report when the deceased and prosecution witnesses went to the sawmill for getting the wood sawed, the prosecution has tried to conceal the real genesis and true prosecution story for false implication of the surviving appellants.

14. His further submission is that though the first information report is not an encyclopedia, the failure of the first informant to mention the fact of prior enmity in the written report materially affects the credibility of the content of the written report, Ext. Ka-1.

15. He has also submitted that only two witnesses of fact, namely, PW-1, Damodar Prasad, and PW-2, Vishwanath, have been examined by the prosecution in support of its case. They are admittedly related to the deceased, being cousin brother and father, respectively. As they have introduced a new story of pre-existing enmity between the parties, the aforesaid witnesses of fact also become interested witnesses. Therefore, their testimonies, before they could be relied upon by the learned trial court, ought to have been corroborated by the testimony of an independent witness. In the absence of corroboration of the testimonies of such witnesses of fact, the finding of guilt recorded by the learned trial court against the surviving appellants is patently illegal and unsustainable.

16. He has concluded his submission by stating that the prosecution witnesses, namely, PW-1, Damodar Prasad and PW-2, Vishwanath, allegedly witnessed this incident. Their conduct of not making any efforts to save the deceased, who was closely related to them, is quite unnatural. Furthermore, they did not attempt to return to the place of incident to save and ascertain the whereabouts of the deceased in the evening. They did not attempt to contact the village chaukidar nor did they contact other residents of their village. They went to the place of occurrence on the next morning only, i.e., on 28.04.1987. Such unnatural conduct gives rise to the only conclusion that neither the witnesses of fact, namely, PW-1, Damodar Prasad and PW-2, Vishwanath had seen the incident nor did they know about such incident till the

morning of 28.04.1987 when the dead body of the deceased was recovered.

17. In support of his aforesaid submissions, learned counsel for the surviving appellants has placed reliance on the judgments of Hon'ble Supreme Court rendered in the cases of **Vadivelu Thevar vs. State of Madras** reported in **AIR 1957 Supreme Court 614, Khem Chandra @ Khema and others vs. State of U.P. reported in (2023) 10 SCC 451, Mohammed Jabbar Ali and others vs. State of Assam** reported in **2022 SCC Online Supreme Court 1440 and Maruti Rama Naik vs. State of Maharashtra reported in 2003 (10) SCC 670.**

18. Sri Umesh Chandra Verma, learned A.G.A. has argued that P.W.-1 is a wholly reliable witness. He was young and educated and he remembered everything clearly. He has made a very fair admission at the time of cross-examination regarding long running enmity between the members of the same family. He also admitted that the appellants and the deceased had a common ancestor. He has also argued that the postmortem report corroborated the injuries that have been mentioned in the F.I.R. and the deceased was beaten up brutally and body dragged away. It has also been noted that insofar as the occurrence of the incident is concerned, P.W.-1 and P.W.-2 have both given a concerted clear and reliable version. There may be certain discrepancies in the statement of P.W.-2 as he is old and he was the father of the victim and, thus, emotionally disturbed. However, there were no such discrepancies, which were so material as to affect the veracity of the entire statement made by P.W.-2. It has also been stated that P.W.-1 and P.W.-2 had enough time to fill up the lacunae in the story set up by them in case they had cooked up the story, as the F.I.R., according to the appellants, was lodged with a delay of 12 hours. They had enough time to have thought it over and over again and then got the F.I.R. lodged. It has also been argued that under Section 134 of the Evidence Act, the quality of evidence given by a witness has to be looked into and no particular number of witnesses are required to prove a fact. It has also been argued that medical evidence has corroborated the injuries found on the body of the deceased with statement made by the eye-witnesses and it cannot be said that P.W.-1 and P.W.-2 had fabricated a false case only because of old enmity running between the parties. With regard to the motive, which is allegedly lacking in the murder of the deceased, it has been argued that the prosecution is not required to prove an impossibility and it cannot possibly enter the minds of the accused to know the exact reason for the attack on the deceased. It was not necessary for them to have dragged the deceased from one sugarcane field to another grove, which was 250 paces away and only because the body was found at such a distance from the original place of attack, it cannot be said that the deceased was not attacked near the sugarcane field of Raghubar. It is possible that they had dragged the body during the course of brutally beating up Shiv Kumar.

19. Sri Rishad Murtaza, in rejoinder, has submitted that the prosecution must prove its case beyond reasonable doubt and in this case, the appellants have been convicted without looking into the reasonable story put up by the defence counsel. The reasonable doubt created in the minds of the Court cannot be said to be without reason. Suspicion howsoever grave cannot take the place of proof. It has been reiterated that it was a blind murder and the entire story that has been cooked up by the

prosecution is only because of old running enmity between the accused and the deceased's family as it has been admitted by both prosecution witnesses that they trace their pedigree to a common ancestor. Three generations of all male relatives in the collateral line have been implicated falsely. Jagdish had a well of his own, where he could have taken a bath and it is not explained by the prosecution witnesses as to why he would go to a public tap some 50 meters away from his house to take a bath, where he would have had an altercation with the deceased, which was also around two months ago and then waited for such a long time to murder him in revenge.

20. We have also gone through the judgement of the Trial Court, wherein it has discounted the various arguments relating to delayed F.I.R., discrepancies in the statements of the alleged two eye witnesses, discrepancy in the recording of the inquest report and the F.I.R., the discrepancy in Medical and ocular evidence, the unnatural behaviour of the witnesses, who are close relatives of the deceased, and has observed that it was natural for the witnesses/relatives of the deceased, not to have pursued the assailants in the evening of 27.04.1987, when the deceased was attacked in front of their eyes as the assailants were armed and they had threatened them.

21. The Trial Court has observed that the Police Station was 6 km away and night having fallen, it was not possible for the prosecution witnesses to have shown courage to search out the dead body of Shiv Kumar on the same night. They had no arms with them. It was natural for them to remain silent in the night. The Trial Court has, therefore, rejected the argument regarding F.I.R. being delayed and the explanation for the same not being given in a satisfactory manner.

22. The Trial Court has rejected the argument regarding F.I.R. appearing to have been lodged after deliberation and consultation as in the inquest report in the opinion of the Investigating Officer, it is mentioned that a murder was committed by some miscreants. The Trial Court has observed that the Investigating Officer had admitted his mistake that the word *"Badmashon"* should not have been written.

23. The Trial Court has further observed that non-mention of motive in the written report, Exhibit Ka-1 shows that the prosecution witnesses had no idea in their mind that the accused persons and specially Jagdish would commit murder of Shiv Kumar simply because of an incident of a quarrel over taking of water from a public hand-pump.

24. The Trial Court disbelieved the argument regarding false implication of Banwari only because Banwari had given evidence against Vishwanath P.W.-2 in another case. The Court observed that Banwari had given evidence against Vishwanath in favour of Ganesh Paasi about ten years ago and there was a cross case also. It was difficult to believe that Vishwanath had been waiting to implicate the accused Jagdish and Banwari for ten years. If he had a grudge against Banwari, he would not have implicated falsely the other accused persons.

25. The Trial Court has also discounted the contradictions in the evidence of Damodar Prasad and his uncle Viswanath and found that there was no material contradictions in the evidence of these two witnesses led by the prosecution. Both the witnesses had supported the story of the prosecution with regard to material facts on record.

26. The Trial Court has explained the non-mentioning of the details of taking

the wood to the sawmill at Hargaon and then going again to collect the same by saying that Damodar Prasad had stated in his evidence that he had not given the details in the morning to avoid a lengthy written report.

27. The Trial Court has also discounted the discrepancies in ocular and medical evidence as it has assumed that once Shiv Kumar was fired upon and attacked with a knife and dragged into the field of Raghubar, Damodar Prasad and Vishwanath had run away and, therefore, did not see the other injuries inflicted upon Shiv Kumar.

28. The Trial Court has disbelieved the statement of Lalta Prasad D.W.-1 that Vishwanath and Damodar had not come to the sawmill to get their Wood logs cut either on 27.04.1987 or at any time before that day on the ground that Lalta Prasad had admitted that his son and his uncle also sat at the sawmill in his absence.

The Trial Court observed that Lalta Prasad appeared to be an interested person and gave evidence to defend the accused because of his affinity with them. He also knew Vishwanath very well, that is why he had stated that Vishwanath had told him on the very next day about the murder of his son, Shiv Kumar. The Trial Court, therefore, did not place any reliance on evidence of the Defence Witness Lalta Prasad.

29. We have gone through the evidence of the P.W.-1 and 2, the alleged eye witness and that of the S.H.O. Phool Singh Bhadauria, the Investigating Officer, and Dr. Gopal Swaroop who had conducted the post-mortem.

30. Dr. Gopal Swaroop, who had conducted the post-mortem on 29.04.1987 while being posted at District Hospital Sitapur, had stated that the deceased was around 25 years of age and his death had taken place around two days ago. At the time of post-mortem, green discolouration was present on the dead body. The left side parietal, occipital and temporal bones of the skull were fractured into pieces, and the glands were lacerated. Left pelvic girdle was also fractured. Both the intestines were lacerated. The following antemortem injuries were found on the body :-

1. Lacerated wound 3.5 cm x 1.5 cm bone deep over the chin.

2. Multiple abraded contusions in an area of 17 cm x 17 cm side to side and up and down from chin to forehead, all over the face.

3. Lacerated wound 4. 5 cm x 1.5 cm bone deep over the back of the skull 9 cm above the transverse process of the seventh cervical vertebra

4. Lacerated wound 2 cm x 0.5 cm muscle deep over the back of the skull 1 cm away and laterally to injury number three.

5. Incised wound 4 cm x 1 cm bone deep over the back, on the back 3 cm above the transverse process of the seventh cervical vertebrae.

6. Multiple firearm wounds of entry in an area of 5 cm x 5 cm cavity deep margins inverted. Blackening present around the margins. Each measuring 0.5 cm x 0.5 cm, just above the upper border of the left pelvic bone.

7. Multiple abrasions in an area of 27 cm x 24 cm (up down and sign to side) over the front of the chest and upper part of the abdomen, 8 cm below the suprasternal notch above and 7 cm above the umbilical lower margins.

In the opinion of the Doctor, the ante-mortem injuries were caused on 27.04.1987 at about 06:30 P.M. Injury no. 6 was caused by some firearm. Injury no.5 was caused by some sharp cutting weapon like knife. Injury no.1, 3 and 4 by some blunt object like *lathi*. Injury nos.2 and 7 were caused by friction. The deceased had taken his food about four hours prior to his death. His death was caused due to ante-mortem injuries.

31. We have gone through the evidence of P.W.-1 and find that his written report at the P.S. Hargaon and his statement recorded under Section 161 Cr.P.C. did not contain any details. During evidence of P.W.-1, he had stated that Jagdish was a criminal and he was the son of Baburam who in turn was the son of Banwari. Jagdish had killed his paternal uncle Jagdamba Prasad in 1984 but he was acquitted during trial. Before the murder, around one month ago Shiv Kumar had an argument with Jagdish on a public tap at around 11:00 AM and he had witnessed the said incident. Shiv Kumar was filling his bucket of water from the public tap when Jagdish came and told him that he wanted to take a bath and that Shiv Kumar should fill his bucket after Jagdish had taken his bath. An argument took place and Jagdish had threatened to seek revenge from Shiv Kumar. P.W.-1 stated that he alongwith his paternal uncle Vishwanath and his paternal cousin Shiv Kumar had gone to Hargaon to the sawmill of Lalta Prasad to get the logs of wood cut at around 09:00 A.M. and they returned home because some other person's wood was being cut at the time. They returned to the sawmill at around 03:00 P.M., but at that time, there was no electricity and the wood logs could not be cut. They waited for around one hour and then they started from the sawmill for their home at around 06:00 P.M. and at around 06:30 P.M., when they reached near Barhatara talab, the accused came out of the sugarcane field of Raghubar and attacked Shiv Kumar on the exhortation of Jagdish.

32. P.W.-1 also admitted that he had written a report and signed the same before submitting it at Police Station Hargaon at around 06:00 A.M. The Sub-Inspector had taken the statement of Damodar at the Police Station. In his evidence before the trial court, Damodar gave in detail his pedigree and his relation to the accused appellants and admitted that they had a common ancestor, but all of them had been living in separate houses for a long time.

P.W.1 also stated that Shiv Kumar used to work at a Halwai shop, but he had left the same two months before he was murdered. He used to go early in the morning to Hargaon on a cycle to Bedhab Halwai shop and returned in the evening. Damodar Prasad admitted that the public tap was around 20 to 25 metres South of his house. His house was around 150 to 200 paces away from Jagdish's house. Jagdish had his own well around 10 to 15 paces in front of his house. The well had a concrete slab to facilitate washing and taking a bath adjacent to it.

33. P.W.1 also admitted that he had not stated in the F.I.R. about the incident of quarrel between Jagdish and Shiv Kumar at the public tap that occurred around one month ago before the murder because he was too emotionally disturbed at the time of writing the report, which he submitted at the Police Station at around 06:00 A.M., on 28.04.1987.

34. P.W.1 was put a specific query as to since when he was emotionally

disturbed and he gave a reply that from the very time of the incident around sunset the previous evening. By the time they had reached home night had fallen and they had told their family members and other villagers about the incident. The village Chowkidar lived in another village Vijaypur which was 2 to 3 furlongs from their village and there was a big pond in between. If one wanted to avoid the pond, the distance between Vijaipur and their village would be around five furlongs and the road to Vijaipur was running in front of the house of Banwari and Banwari had threatened them with dire consequences. (One furlong is about 200 meters and even if longer route would have been taken by the P.W.1, he would not have had to cover more than 1 kilometer to inform the village Chowkidar).

35. This Court has noticed that P.W.1 had said that the villagers as well as their family members did not report the matter to the Police Station at night because of fear of the accused attacking them also. On the one hand, P.W.1 said that he had written in the report that he had not reported the incident at night out of fear and that he did not inform the Chowkidar on the next morning because he was flustered and disturbed about the incident that had occurred the previous night. They started looking for Shiv Kumar much before sunrise the next day along with 10 to 15 people from the village. On the other hand, P.W.1 also said he had no knowledge that the village chowkidar had to be informed, therefore, he, did not think of informing the village Chowkidar. When they had gone to search for Shiv Kumar, they were carrying *Lathi*s and Kanta with them. When they found the body of Shiv Kumar, sunrise had not taken place, but because of dawn, they could see clearly though they did not take any source of light with them. Vishwanath, Suraj Prasad and Bhagwan Das had stayed with the body of Shiv Kumar, whereas he along with his other uncle Hari Shankar had gone to the Police Station Hargaon for lodging the report. He had walked on foot to the Police Station, which took him about half an hour. He also stated that the police station was around 3 K.M. and that he could normally walk 5 to 6 K.M. in an hour.

36. P.W.1 stated that he had taken paper and pen from Bhagwan Das, who resided in the village Benipur, and he had taken a file cover from his own house along with him to the Police Station. He had no idea whether Shiv Kumar was dead or alive when he started from home, therefore, he did not write the report at home but wrote it on his way to the Police Station. The handwritten report was shown to P.W.-1 who admitted that it was in his handwriting. Two Sub-Inspectors and a Constable had accompanied him on cycles to the place of occurrence. He had not written in the report that they could not find the dead body in Raghubar's field, but had found it to the south of the road with the help of blood trail on the way and signs of dragging although he had stated such facts while giving his oral statement to the Sub-Inspector at the Police Station and he did not know as to why the same had not been written in his statement recorded under Section 161 Cr.P.C. at the Police Station in the report. He had only stated that while searching they had found the body of Shiv Kumar to the south of Bartara talaab in his written report to keep it brief.

37. P.W.1 stated that the Sub-inspector had stayed on the spot for around two hours after reaching around 08:00 A.M. The sealed body was taken to the District hospital at around 10:00 A.M. after inquest report was prepared in his presence. The

statement of Vishwanath, his paternal uncle, was also taken by the Sub-Inspector in his presence.

38. It was stated by P.W.-1 that at the time when Jagdish exhorted the other accused to kill the enemy, Shiv Kumar turned and ran towards the south of the road, but Jagdish fired upon him from around two and a half arms length. Shiv Kumar was hit in his back, but P.W.-1 did not see exactly where he was hit as at the moment he was hit he fell down. Baburam then attacked Shiv Kumar with his knife on the neck. It was not clear from the distance as to whether he was stabbed more than once with the knife.

After being shot and being attacked by the knife Shiv Kumar was dragged by the assailants into the sugarcane field and they could not see what happened thereafter, he may have been attacked by knife more than once or even by *lathi* but they could not see.

39. P.W.-1 also stated that he lived in a separate house from Vishwanath and his son, Shiv Kumar. He had accompanied Vishwanath and his son in taking 2 to 3 wooden logs to Hargaon sawmill in a bullock cart, which they had borrowed from the nephew of Vishwanath and Hari Shankar. It took them around one and half hours to reach the sawmill from the village. The wood logs were big and needed more than two persons to be transported. The wood logs were not weighed at the sawmill. There were two or three or four wood logs, but not six, that were taken by them. Each of such wood logs would be around one quintal in weight.

40. P.W.1 stated that he had not written about transporting the wooden logs to the sawmill by bullock cart in the morning as he thought that all applications / written reports need to be brief. P.W.-1 stated that neither he nor Vishwanath nor Shiv Kumar had gone out to work as labourers on that day, because they knew that they had to get the wooden logs cut at the sawmill and to take them back home. They eventually had gone to the sawmill some one month later where the wooden logs were already cut and they took them back to their village without giving the sixty rupees cutting charges to the sawmill owner because he had not returned the leftover wood which could have been used for other purposes.

41. The P.W.-1 further stated in his evidence that he did not mention this fact in the written report because he did not think it was necessary to mention each and every fact that was witnessed by him in his report. He had seen the accused appearing on the road from Raghubar's sugarcane field and they were around 25 paces away from them. P.W.-1 also stated that he had shown the spot where Shiv Kumar was attacked by the accused to the Sub-inspector and also the place where he had fallen down and also the place where Shiv Kumar's body was found later on during the spot inspection by the Police.

42. The P.W.-2, Vishwanath stated that Shiv Kumar was his son and Damodar Prasad was his nephew. He also stated that he had gone along with Shiv Kumar and Damodar to Hargoan to get some six, seven or eight wooden logs cut at the sawmill of Lalta Prasad in the morning. Total weight of the logs would be around twenty quintals. There was no electricity, and therefore, the logs could not be cut. They were returning home at around 6 P.M. and as they reached Barhtara Taal the accused appeared from the sugarcane field of Raghubar and attacked

Shiv Kumar. He alongwith Damodar had shouted for help, but because the place was lonely, nobody came to help. Banwari, Moti and Mahesh threatened them with their weapons. As a result, they had run away to the village where they had sought help from other villagers, but nobody was ready because night had fallen. He had not approached the Police Station at night out of fear of the accused.

43. P.W.2 stated that they had gone to search for Shiv Kumar's body at dawn and when he was not found in the sugarcane field of Raghubar, they traced the blood drops towards the south of the road and found Shiv Kumar's body in the grove of Hardayal. Suraj Prasad, Bhagwan Das, and he himself waited near the body, while, Damodar and Hari Shankar went to the Police Station to get the report lodged.

44. P.W.-2 also stated about the argument that had taken place near the public tap between Jagdish and Shiv Kumar in which he has intervened and taken Shiv Kumar back home. At that time Jagdish had threatened Shiv Kumar of taking revenge. He also stated that the wooden logs were eventually taken back about ten days after the incident and that he had not given the charges for cutting of wood at the sawmill because the sawmill owner had sold some of his wood for which a quarrel had taken place.

45. P.W.2 stated that he had not mentioned to the Sub-inspector in his statement under Section 161 of the Cr.P.C. about wooden logs not being cut at the sawmill and about them returning home on foot at around 06:00 P.M. P.W.-2 stated during his cross-examination that he did not remember as to what he had told the Sub-Inspector at the time because he was too flustered and disturbed sitting next to the dead body of his son. He did not remember whether he had told the Sub-Inspector about taking the wood in the morning to Hargaon and then going again at around 03:00 P.M. in the afternoon to collect the cut wood. He also stated that he had gone to Hargaon in the morning and stayed there for about one hour. When they had gone again in the afternoon, they had stayed there for around two hours. P.W.-2 also stated that they had not taken the bullock cart for carrying the wood home as they had told the sawmill's owner not to cut the wood in their absence. If the wood had been cut, they would have hired a cart at Hargaon. The wood was not cut because there was no electricity. He had not tried to take the wood to any other sawmill in Hargoan, because he was familiar with the sawmill's owner, Lalta Prasad. Shiv Kumar used to work at sweet shop of Bedhab Halwai in Hargaon, but he had left the job around two months prior to the dated of incident. While he was working in the Halwai Shop, Shiv Kumar used to commute daily from home to Hargaon, either on his cycle or on foot.

46. P.W.-2 denied the suggestion that Shiv Kumar was working in the Halwai shop at Hargaon on the day he was murdered, and when he did not return home, they started searching for him in the morning and after finding the dead body they had cooked up the story of taking wooden logs to Hargaon day before. P.W.-2 denied any suggestion of enmity with the family of the accused or of any proceeding initiated under section 107/116, Cr.P.C. some ten to twelve years ago, but admitted that a case under Section 307 I.P.C. had been instituted, some nine years ago where Banwari had given evidence in favour of Ganesh Pasi and against Vishwanath and his brother Ramavtar. He denied having

previous enmity with the accused but stated that after his son Shiv Kumar was killed by them enmity has resulted.

47. Vishwanath also expressed ignorance about the names of owners of fields lying on either side of the chak road except for Raghubar's sugarcane field. Later on when the dead body of Shiv Kumar was discovered, he also came to know that the grove belonged to Hardayal. The Sub-Inspector had taken his statement in the morning at around 08:00 A.M. when he was sitting near the dead body of his son. He did not remember as to whether he was made to put his thumb impression on the inquest report, as he was not in his right mind, when the statement was taken, he did not know what was written in the report. He did not know also as to why the police had written "Badmaashon" instead of "Mulziman" in the inquest report. P.W.-2 stated that at the time of the attack Shiv Kumar was some twenty paces ahead of him. He was followed by Damodar and Vishwanath was trailing behind them. His son was fired upon from a distance of around two arms length while he was walking towards the village on the east. After receiving gunshot injury, he fell upon his face to the south of the chak road. Both P.W.-1 and P.W.-2 had rushed to save him, but they could not save him because the accused were carrying arms and had threatened them. They remained on the spot where Shiv Kumar was attacked for around 15 minutes and they saw Shiv Kumar being dragged into the sugarcane field of Raghubar. They ran away to their village Benipur in order to save their lives. P.W.-2 also stated that they witnessed the beating up of Shiv Kumar with *Lathi*s as they had stood there for around 15 minutes. After Shiv Kumar was dragged into the sugarcane field, they could not see him because it was dark. P.W.-2 also stated that Shiv Kumar had received only one gun shot injury and was stabbed only once at that time.

48. In his statement of P.W.-5, the Investigating Officer, Phool Singh Bhadauria has clearly stated that after recording statement under Section 161 of the Cr.P.C. of Vishwanath, and some 5 to 6 other villagers, efforts were made to arrest the accused. Banwari Lal was arrested from his house in the early morning hours on 03.05.1987 alongwith his licensed rifle. Moti Lal was arrested on 05.05.1987. The statement of sawmill's owner, Lalta Prasad Sharma was recorded on 07.05.1987. The accused Jagdish, Mahesh and Babu Ram had surrendered on their own in the Trial Court. P.W.-5 stated that he did not mention in the site plan prepared by him about the place, from where, the accused had fired upon the victim as he was not told about it by the witnesses. He admitted that at the end of the inquest report, the word "Badmaashon" had been written in his own handwriting. He had mentioned the name of Vishwanath as eye witness both in the inquest report and in the charge sheet. He denied having arrested Banwari alongwith his rifle from his home on 29.04.1987 itself and having kept him illegally in the lock up before showing his arrest on 03.05.1987. He could not give any reason as to why he did not mention the name of Lalta Prasad the sawmill owner in the charge sheet as a witness, although he had taken his statement on 07.05.1987.

P.W.-5 has stated very clearly that neither Damodar nor Vishwanath had told him anything about leaving wood logs at the sawmill of Lalta Prasad in the morning of 27.04.1987, and of having gone to Hargaon to collect their wood in the afternoon on the same day. Vishwanath had also not told him that Shiv Kumar had fallen to the ground on receiving the gunshot injury, and that the

accused had dragged Shiv Kumar into the field of Raghubar.

49. P.W.5- Phool Singh Bhadoria, the Investigating Officer, while preparing the inquest report, had given a description of the place, where the body was found, and also the condition of the body when it was found by the Investigating Officer. The body was found with its face down in the grove of Hardayal, some 250 paces away from the Chak road. A description of the bloodstained clothes on the body had been given. During description of the condition of the body, it had been mentioned by the Investigating Officer that blackening alongwith pellets injury was noticed on the back. Injury was also noticed on the back of the neck. Injuries were noticed on the face, and on the head. On the rest of the body, there were abrasions caused due to dragging. The cause of death as mentioned in the inquest report was injuries caused by miscreants *"badmashon".*

50. We have noticed that P.W.-1 has stated at one place that when Jagdish had exhorted the others to kill Shiv Kumar he had turned to his right and started running away but was hit on his back by the shot fired by Jagdish and he fell face down on the side of the road and was attacked by knife, thereafter, by the other accused. At another time during giving his statement he had stated that as Shiv Kumar was walking ahead of them they crossed Barhtara Taalab the accused appeared and Jagdish fired upon Shiv Kumar while exhorting others to kill him. There is a discrepancy in the two versions by the same witness.

51. We have also noticed that while P.W.-1 has stated that the quarrel over the public tap occurred some one month ago near the time of Holi. P.W.-2 has stated that the quarrel took place around two months ago and that he had intervened between Shiv Kumar and Jagdish and taken his son home.

52. There is a lot of improvisation in the initial statement made under Section 161 Cr.P.C. before the Police and the evidence given by P.W.-1 and P.W.-2 during the course of Trial. This Court feels that there is a concerted effort on the part of both witnesses, P.W.-1 and P.W.-2 to impress upon the Trial Court that they were extremely disturbed by what they had witnessed on 27.04.1987 while returning from Hargaon. However, it is not clear as to why having been so disturbed they did not try and reach the Police Station at Hargaon in the night of 27.04.1987 itself while there is an admission on their part that there was another route, though a little longer, from their village to Hargaon which was known to them as they had taken the wooden logs on a bullock cart by the longer route to Hargaon in the morning. There was at lease one bicycle at home which Shiv Kumar used while commuting to Halwai shop at Hargaon when he was working.

53. It also raises a doubt in the mind of the Court that admittedly there were a large number of male members in the extended family of Vishwanath and they all lived in the same village though in separate houses, as to why Vishwanath and Damodar the eye witnesses, did not try and contact any of their family members and start a search for Shiv Kumar on that night itself as the village was only one and a half kilometres away from the place of the occurrence and it was only late evening and not the dead of the night when they reached their village.

54. There is no recovery of countrymade guns from either Jagdish or

Baburam. Although Banwari was arrested from his house along with his licensed rifle, it was not the weapon used for killing Shiv Kumar. There is a specific description made by P.W.-1 and P.W.-2 regarding Jagdish extorting the other accused to kill the enemy and then firing a shot on Shiv Kumar from his gun, which led to his death. A few of the large pellets were recovered from the body of the deceased during post-mortem as has come out in the statement of Dr. Gopal Swaroop.

55. Another doubtful factor is the delayed lodging of F.I.R. The learned counsel for the appellant has highlighted this fact. Here it is worthwhile to refer ***to Tulia Kali versus State of Tamil Nadu, (1972) 3 SCC 393*** in which the delayed filing of F.I.R. and its consequences have been discussed in paragraph 12 of the report. The Supreme Court has observed thus:-

"First Information Report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence produced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment, which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in lodging of the first information report should be satisfactory explained."

56. It was also stated by P.W.-2 that when they went looking for Shiv Kumar's dead body at dawn they did not find the dead body in the sugar cane field of Raghubar. This statement made by P.W.-2 shows that he was certain that Shiv Kumar was dead by the time when they went looking for him in the morning. He has repeatedly referred to "dead body", instead of referring to his son as Shiv Kumar during the time he and other villagers went looking for him next morning. The Investigating Officer while preparing the site plan of the place of occurrence has stated that no blood was found in the grove of Hardayal where Shiv Kumar's dead body was lying, or at the place on the road where Shiv Kumar was hit by gunshot fired by Raghubar.

57. Vishwanath in his a statement under Section 161 Cr.P.C. told the Investigating Officer that Jagdish and Moti were carrying country made pistols (Tamancha). Banwari was carrying rifle (Bandook) Babu Ram was armed with a knife, and Mahesh was armed with a *lathi*. Jagdish extorted others that their enemy Shiv Kumar had come and opened fire on Shiv Kumar. Babu Ram attacked him with a knife on his neck from behind. He also stated that when they returned home they did not go to the Police Station at night because they were afraid. He did not say that he asked his neighbours/other family members for help. Vishwanath also stated that they started looking for the dead body of Shiv Kumar in the morning in the sugarcane field of Raghubar. He has repeatedly used the word "laash" instead of Shiv Kumar in his statement under Section 161 Cr.P.C. He

along with Sarju Prasad and Bhagwandas stayed behind near the dead body and sent Damodar and Harishanker to the Police Station for reporting the incident. All the other villagers who were present during the preparation of report supported the version of Vishwanath given to the Investigating Officer but the Investigating Officer did not produce any of such independent witnesses to corroborate the prosecution witnesses story in Trial Court. Banwari was arrested from his house in Benipur at 5:30 A.M. on 03.05.1987 along with his licensed SBBL rifle.

58. According to the settled legal position as held by the Hon'ble Supreme Court in **Dahari and others vs. State of Uttar Pradesh reported in (2012) 10 SCC 256**, the testimonies of related witnesses or interested witnesses cannot be discarded solely on the ground of their relation to the deceased However, their testimonies need to be carefully examined before they are relied upon to convict the accused/ appellant.

59. If we scan the testimonies of witnesses of fact i.e. P.W.-1, Damodar Prasad and P.W.-2, Vishwanath having regard to the aforesaid legal position, we find that P.W.-1 and P.W.-2 are relatives of the deceased being cousin and father of the deceased respectively. Having developed a subsequent story of prior enmity between the appellants and the deceased, they can also be termed as interested witnesses.

60. Hon'ble the Supreme Court **in Periyasamy vs. State, rep. by the Inspector of Police, reported in 2024 SCC OnLine SC 314**, has held that the testimonies of interested witness cannot be relied upon in want of corroboration of their testimonies by any other independent witness.

61. According to the written report, Ext. Ka-1, this incident occurred on 27.04.1987 at about 06:30 PM, when the appellants including two surviving appellants, namely, Moti Lal and Jagdish sprang from an agricultural field while the first informant, Damodar Prasad, his uncle, Vishwanath and the deceased, Shiv Kumar were returning to their village. The appellant, Jagdish exhorted and shot the deceased from a firearm, which he was carrying. The appellant, Baburam inflicted injuries to the deceased by a knife. The appellants thereafter dragged the deceased into an adjoining sugarcane field of Raghuvar and also threatened P.W.-1, Damodar Prasad and P.W.-2, Vishwanath of dire consequences, if they intervened or they go to police station to get the case lodged, which led P.W.-1 and P.W.-2 to return to their homes. It is only in the next morning i.e. on 28.04.1987, when they again went to trace the whereabouts of the deceased, where they found Shiv Kumar dead lying at place 'D' as shown in the site plan, Ex. ka-6. It is to be remembered that the incident occurred in the month of April and the alleged time of occurrence is stated to be 06:30 PM. If we take the prosecution story to be true for the sake of argument, we find it quite unnatural that P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, being cousin and father of the deceased respectively, who had seen the deceased being shot by the appellant, Jagdish and stabbed by the appellant, Baburam, on returning to their home immediately after the incident on 27.04.1987, but neither informing other residents of the village about the incident nor making any efforts return to the spot to save the deceased or to know his whereabouts. We fail to understand as to what prevented the first informant to go to police station, which is situated at a distance of about six kms. from

the place of occurrence to report the matter, because admittedly when the witnesses, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath returned to their home, they were not prevented or obstructed by the appellants. According to the prosecution story, the accused, Jagdish, Banwari and Motilal were armed with firearms, accused, Baburam was armed with knife and accused, Mahesh was armed with *lathi*. The first informant, P.W.-1/ Damodar Prasad did not try to contact village *chaukidar* in order to inform him about this incident. Therefore, the conduct of of P.W.-1, Damodar Prasad, and P.W.-2, Vishwanath, who chose not to return to the crime scene along with the other residents of the village on 27.04.1987 in the evening to save the deceased, Shiv Kumar or to trace his whereabouts, lends support to the submission advanced by the learned counsel for the appellant that, in fact, P.W.-1, Damodar, and P.W.-2, Vishwanath had not witnessed the incident.

62. The submission advanced by learned A.G.A. that the first informant and other residents did not return to the place of occurrence in the late evening of 27.04.1987 nor did they go to the police station because of threat extended by the appellants, does not appear to to us to be sound for the reason that P.W.-1, Damodar Prasad has stated in his testimony that in the morning of 28.04.1987, when the first informant and other residents went to trace whereabouts of the deceased, they were armed with *kantas* and *lathi*s. When the prosecution witnesses had in their possession *kantas* and *lathi*s, the normal course of conduct would have been to go to crime scene on 27.04.1987 itself to save Mayaram or to trace whereabouts of the deceased, which the prosecution witnesses did not do and the explanation offered by the prosecution as discussed above, appears to us to be far from being convincing.

63. We find the presence of P.W.-1, Damodar Prasad and P.W.-2, Vishwanath at the place of occurrence doubtful for one more reason. In the postmortem report, Ex. Ka-14, there are seven ante-mortem injuries reported on the body of the deceased as stated above. Injury No.6 is a firearm injury where as injury No.5 is an incised wound, which could be inflicted by a knife. However, we have noticed also that the postmortem report, Ex. Ka-14 reveals fractured pelvic girdle and temporal base of skull was also found to be fractured into pieces, which suggest that the manner of assault was quite different from what has been stated by P.W.-1, Damodar Prasad and P.W.-2, Vishwanath.

64. We have also noticed that that in the site plan, Ex. Ka-6, the place, where the deceased was allegedly shot, has been shown as “A”. According to prosecution witnesses, after the deceased was shot and injured by knife, the deceased was dragged into nearby sugarcane field of Raghuvar. Thereafter, according to prosecution witnesses, they returned to their home. However, site plan, Ex. Ka-6 also reveals that the dead body of the deceased was found at place “D”, which is about 246 paces away from place “A” and still more distant from the sugarcane field of Raghuvar. If according to prosecution witnesses, the deceased was shot at place “A” and was thereafter dragged into nearby sugarcane field of Raghuvar, then, in that case, we do not see any reason as to why the dead body of the deceased would be dragged to place “D” from where it was finally recovered. It is quite unnatural to do so because half of the distance between the sugarcane field of Raghuvar wherein Shiv Kumar was pulled into after being shot at and point “D”, where the dead body of the deceased was recovered, is a *chakroad*, where movement

of villagers is very common. There was always a possibility of the appellants having been noticed by local residents passing by on a summer evening. There is no prosecution witness, who had seen the appellants shifting the dead body of the deceased from the sugarcane field of Raghuvar to place point "D" or killing the deceased at point "D". This give rise to a reasonable suspicion about exact place of occurrence of this incident.

65. Hon'ble the Supreme Court in **Darshan Singh vs. State of Punjab**, reported in **(2024) 3 SCC 164**, in paragraph No.31 has observed as under :-

"31. If the PWs had failed to mention in their statements under Section 161CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance. [See : (i) Rohtash v. State of Haryana [Rohtash v. State of Haryana, (2012) 6 SCC 589 : (2012) 3 SCC (Cri) 287] , (ii) Sunil Kumar Sambhudayal Gupta v. State of Maharashtra [Sunil Kumar Sambhudayal Gupta v. State of Maharashtra, (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375 : (2011) 72 ACC 699] , (iii) Rudrappa Ramappa Jainpur v. State of Karnataka [Rudrappa Ramappa Jainpur v. State of Karnataka, (2004) 7 SCC 422 : 2004 SCC (Cri) 1954] and (iv) Vimal Suresh Kamble v. Chaluverapinake Apal S.P. [Vimal Suresh Kamble v. Chaluverapinake Apal S.P., (2003) 3 SCC 175 : 2003 SCC (Cri) 596]"

(emphasis supplied by us)

66. P.W.-5, Phool Singh Bhadauriya, the Investigating Officer, in his testimony, has stated that the first informant, P.W.-1/ Damodar Prasad had not stated in his statement under Section 161 Cr.P.C. that there were marks of dragging from place "A" to the sugarcane field of Raghuvar. P.W.-1 had also not stated that on the date of incident, he had gone to sawmill for getting the wood logs sawed at about 03:00 PM in the afternoon. P.W.-2, Vishwanath had also not stated in his statement under Section 161 Cr.P.C. that the accused persons had dragged the deceased into the sugarcane field of Raghuvar. We also find that it is the P.W.-1, Damodar Prasad, who has deposed that the dead body of the deceased was found in the grove of Hardayal. However, he, for reasons best known to him, did not mention this fact in the written report, Ex. Ka-1 and he has tried to offer an explanation thereof by saying that he did not mention this fact in the written report, Ex. Ka-1 as it would have made the written report lengthy. We find this explanation to be untenable for the reason that inclusion of such an important fact would have hardly rendered the first information report to be lengthy; rather inclusion of such fact in the written report, Ex. Ka-1 would have made it more trustworthy.

67. We also find it very strange that P.W.-1, Damodar Prasad, who lodged the F.I.R., had stated in the written report, Ext. Ka-1 that the deceased was shot by the accused, Jagdish whereas the accused, Baburam had inflicted injury on the back of head of the deceased by a knife. However, this witness, in his cross-examination as P.W.-1, has stated that when he saw the dead body of the deceased in the morning of 28.04.1987, he had not seen any injury on the body of the deceased. It also shows that P.W.-1, Damodar Prasad neither had seen

the incident nor had he gone to the grove of Hardayal, where the dead body of the deceased was found, because the postmortem report, Ex. Ka-14 reveals as many as seven visible injuries on the body of the deceased, which are of such nature, which cannot escape any ordinary man's attention. Therefore, P.W.-1, Damodar Prasad appears to us to be unreliable.

68. Thus, for all the aforesaid reasons, we find the presence of P.W.-1, Damodar Prasad and P.W.-2, Vishwanath on 27.04.1987 at around 06:30 PM at the place of occurrence to be doubtful and their testimonies to be unreliable.

69. The possibility of false implication of appellants in this case cannot be ruled out because of a subsequently developed story of existence of prior enmity between the parties. Prior enmity is always held to be a double edged weapon, which can also be a tool of false implication. In this regard, the judgment of Hon'ble the Supreme Court in *Nagaraj Reddy vs. State of Tamil Nadu* may be usefully referred to.

70. In **Md Jabbar Ali and others Vs. State of Assam, reported in 2022 SCC OnLine SC 1440**, decided on 17.10.2022, the Supreme Court was considering an appeal against judgement of the Guwahati High Court, affirming conviction of all the nine appellants. The case of the prosecution was that on 19.11.1999 at about 7 A.M. when P.W.-6 had gone to his land an altercation took place between him and accused No.11. At that time other accused armed with deadly weapons surrounded the victim and one of them stabbed him in the abdomen. As a result of which the deceased Akbar Ali fell unconscious and succumbed to his injury shortly. P.W.-1 and P.W.-4 were also injured, though not fatally. Thereafter, the other accused present at the place of the occurrence who were armed with deadly weapons surrounded the deceased and so no other person could come and prevent the commission of all offences.

The Trial Court on consideration of evidence on record came to the following conclusions: –

The evidence of P.W.-1 and P.W.-2, both injured witnesses lent support to each other and were corroborated with medical evidence and the presence of these witnesses at the place of the occurrence could not be doubted, on basis of minor variations in the evidence of P.W.-6 who was the informant in the case. There was no ground to disbelieve the version of P.W.-6 which corroborated the evidence of P.W.-1 and P.W.-2.

Discrepancies were due to normal errors of memory and due to lapse of time. The defence had failed to establish that persons accused were not present at the place of the occurrence at the time of the incident and that they did not kill the deceased. The F.I.R. was lodged promptly, all the accused were named in the F.I.R. The parties were known to each other, and the fact that all the accused had come to the place of occurrence, armed with deadly weapons clearly indicates that the accused had intention to kill the deceased.

71. The High Court considered the submissions made on behalf of the appellant as well as the State and affirmed the judgement mainly because the deceased as well as other prosecution witnesses had received injuries caused by sharp weapons and it observed that there is settled law that evidence tendered by different prosecution witnesses have to be considered as a whole and such evidence could be put in different compartments and considered separately.

72. The counsel for the respondent-State had supported the judgement of the High Court and of the Trial Court and argued that the case was of clinching evidence and the involvement of the accused had been proven beyond reasonable doubt by the prosecution on the strength of deposition of injured witnesses, P.W.-1, P.W.-2, P.W.-4 and P.W.-5 which was corroborated by medical evidence duly proved on record. The minor discrepancies in the evidence of some of the prosecution witnesses could not demolish the consistent evidence of P.W.-1 and P.W.-2 and P.W.-5. The State-respondent placed reliance upon *Sohrab Vs. State of Madhya Pradesh, 1972 (3) SCC 751; Bharwada Bhoginbhai Hirji Bhai Vs. State of Gujarat, 1983 (3) SCC 217; State of U.P. Vs. M.K. Anthony, 1985 (1) SCC 505; Prithu @ Prithi Chand Vs. State of Himachal Pradesh, 2009 (11) SCC 588; and State of Madhya Pradesh Vs. Chhaakki Lal, 2019 (12) SCC 326.*

73. The Supreme Court on re-appreciation of evidence of the prosecution witnesses noted that P.W.-1 who was also an injured witness stated that on the day of the occurrence Shahid Ali had extorted the other accused to attack Akbar Ali and Jabar Ali had stabbed Akbar Ali with a spear. P.W.-3 was not an eye witness but on information he had deposed that he went to the place of the occurrence and found Akbar Ali lying dead and P.W.-4 had informed him that Moin Ali had killed Akbar Ali. P.W.-4 stated in his evidence that he saw injuries on the abdomen of Akbar Ali who was assaulted by Hassan Ali but he had not seen Hassan Ali assaulting Akbar Ali. The Court on analysis of evidence came to the conclusion that there were variations in the evidence of P.W.-6, who was the first informant with the evidence of P.W.-1 P.W.-2 and P.W.-4, as to who gave the fatal blows that caused the death of Akbar Ali. When it was not clear as to who stabbed the deceased Akbar Ali, the Trial Court as well as the High Court should not have relied on the evidence of such witnesses which was highly inconsistent with each other in holding the accused guilty. The Court also noted that all the witnesses that had been examined were related to each other and to the deceased and there were inherent contradictions in their evidence.

74. The Supreme Court noted that great weight had been attached to the testimonies of related witnesses. In the said case and the credibility of such witnesses who were related witnesses ought to have been examined with greater care to rule out any tainted evidence given in the Court of law. It is true that just because witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, but it is also true that their testimonies have to be scrutinized with greater care and circumspection. The Supreme Court placed reliance upon Gangadhar Behera and Others Vs. State of Orissa, 2002 (8) SCC 381*; Raju @ Balachandran Vs. State of Tamil Nadu, 2000 (12) SCC 701, Dileep Singh Vs. State, AIR 1953 Supreme Court 364, Sarvan Singh Vs. State, 1976 (4) SCC 369, Ganpati and Another Vs. State of Tamil Nadu, 2018 (5) SCC 549*, where the Supreme Court had observed that evidence of related or interested witnesses should be meticulously and carefully examined and the rule of prudence requires that evidence of such witnesses should be scrutinized with greater care. When only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious in evaluating their evidence during trial. The evidence of related witnesses can be rejected if there are material contradictions and inconsistencies

found in their evidence. The Court also noted that the witnesses had given contradictory versions as to who gave the fatal blow to the deceased. The Court relied upon State of *Rajasthan Vs. Kalki and Another, 1981 (2) SCC 752*, where the Supreme Court had distinguished between normal discrepancies and material discrepancies and that the Courts have to label as to in which category a discrepancy can be categorised. Material discrepancy will corrode the credibility of the prosecution case while insignificant discrepancies do not do so. The Supreme Court thereafter noted that there being material discrepancies in the testimonies of witnesses, the prosecution had failed to prove the guilt of the accused beyond doubt. Additionally, the prosecution had examined only related witnesses and not a single independent witness. The injuries caused to P.W.-1 P.W.-2 and P.W.-4 and P.W.-5 were simple in nature caused by blunt objects and the Trial Court as well as the High Court had grossly erred in convicting and sentencing the accused, only on the basis of evidence of such injured witnesses.

75. In ***Mahendra Singh and Others Vs. State of Madhya Pradesh, reported in (2022) 7 SCC 157***, decided on 03.06.2022, the Supreme Court was considering an appeal against an order of the High Court, confirming conviction under Section 148 and 302, read with Section 149 I.P.C. The Trial Court as well as the High Court had relied upon the testimony of Amol Singh P.W.-6, who was the real brother of the deceased Bhagat Singh. The Supreme Court relied upon judgement rendered in *Vadivelu Thevar Vs. State of Madras (supra)* and observed that the testimony of a related/ interested witness was to be read with greater care and caution, and after examining it in detail found him to be a wholly unreliable witness. The Court instead relied upon evidence of D.W.-3 and D.W.-4 whose statements could not be shaken during cross examination. The Court observed that it is a settled law that same treatment is required to be given to defence witnesses as is to be given to prosecution witnesses, and from the evidence of these witnesses, it was amply clear Amol Singh P.W.-6 could not have witnessed the incident of murder of the deceased. No conviction could be based on his testimony. The corroboration from medical evidence also was not available as medical evidence could only establish that the death was homicidal. Such medical evidence could not establish that P.W.-6 had witnessed the incident. Only because prosecution has proved that motive is established, conviction cannot be sustained. The Court set aside the conviction and allowed the appeals.

76. In Khema ***alias Khem Chandra and others Vs. State of U.P., reported in* (2023) 10 SCC 451**, the Supreme Court was considering the judgement of this Court, dismissing the appeal filed by the appellants confirming the Trial Court order convicting the appellants for offences punishable under Section 302, read with Section 149, Section 307, read with Section 149 and Section 148 of the I.P.C. and sentencing them to imprisonment for life with a fine of ₹5000 each. The prosecution story was that the deceased Prakash was going to extend invitation for his two daughters' weddings in the village and he was attacked by the accused with Farsa and club/*Lathi* and Danda and country made pistols in the morning at about 8 A.M. of 27.04.2002. Two brothers of the deceased Omveer P.W.-1 and Inder P.W.-2 along with their sister, Omvati and Kripa wife of the deceased Prakash also received injuries.

77. The Supreme Court after going through the judgement of the Trial Court and the High Court found that conviction of the accused was based on the testimonies of P.W.-1 and P.W.-2, and corroboration of such testimonies was done from the recoveries made on the basis of memorandum of accused under Section 27 of the Evidence Act. The Court thereafter analysed the testimony of P.W.-1 and P.W.-2 who were both brothers of the deceased, and as such would fall in the category of interested witnesses. However, the Court also observed that their testimony cannot be discarded only on the ground that witnesses are interested witnesses. Although their testimony is required to be scrutinized with greater care and circumspection. The Court found several discrepancies in the version of the incident given by P.W.-1 and by P.W.-2. The Court doubted their version and the possibility of some fabrication in the injury certificate could not be ruled out.

78. The Supreme Court noticed that there were material improvements in the evidence of P.W.-2. It had also come out that there was previous enmity between the accused and the deceased. The Supreme Court referred to ***Ramashish Rai Vs. Jagdish Singh, 2005 (10) SCC 498***; where it was observed *that previous enmity is a double edged sword. On the one hand, it provides motive to the crime and on the other there is a possibility of false implication.*

The Supreme Court also placed reliance upon ***Vadivelu Thevar Vs. State of Madras, 1957 SCR 981***; and observed:

"– – –. Hence in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of evidence necessary for proving a fact. Generally, speaking, oral testimony in the this context, may be classified into three categories, namely:

Wholly reliable.

Wholly unreliable

Neither wholly reliable nor wholly unreliable

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way – it may convict, or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence, or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial – –".

79. The Supreme Court found the testimony of P.W.-2 as falling under the third category and need was felt for its corroboration. For such corroboration the Trial Court had relied upon recoveries of weapons made at the instance of the accused. The Court found that such recoveries/seizure memo was not prepared in accordance with the Rules. The Court, therefore, allowed the appeal and set aside the conviction of the appellants.

80. We have gone through the original Trial Court records and Exhibit Ka-1 which is a copy of the written report submitted at P. S. Hargaon by P.W.-1. It has been pointed out by Sri Rishad Murtaza that the paper on which the written report was submitted does not have any creases on it to show that it was folded and kept in the pocket of P.W.-1 while taking it from his home in the village Benipur to the Police Station. We are of the considered opinion that although P.W.-1 had stated during his

cross examination that he had taken a paper and blue refill pen from his neighbour Bhagwandas and a file cover from his own home it is quite unnatural that a person whose paternal cousin was attacked in front of his own eyes by his other cousins, would be so meticulous and farsighted as to take a file cover along with him to keep the plain piece of paper so that it is not creased at all while submitting his report at the Police Station.

81. We have also noticed that P.W.-1 while writing the report did not mention that all the accused were close relatives of P.W.-1 and belonged to the extended family of the deceased sharing a common ancestor. P.W.-1 has mentioned in his written report that the accused belonged to the same village Benipur without mentioning their relation with the deceased or with himself. In the natural course of things if a person knows the accused well, he would not only mention their names but also the relation with the deceased.

82. After having given our thoughtful consideration to the rival submissions in the light of testimonies of alleged witnesses of fact, namely, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, we do agree that in this incident, the deceased, Shiv Kumar had died, however, for all the aforesaid reasons, we do not find testimonies of witnesses of fact, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, who are related and interested witnesses, to be fully reliable so as to base conviction of surviving appellants on their testimonies only. Therefore, we hold that the prosecution has failed to prove its case beyond reasonable doubt and the trial court committed an error in holding the surviving appellants guilty of offences under Sections 148 and 302 read with Section 149 I.P.C.

83. In conclusion, we are of the considered opinion that the present criminal appeal deserves to be allowed and the same is, accordingly, ***allowed***. Consequently, the impugned judgment and order dated 11.05.1990 is set aside. The surviving accused-appellants, Moti Lal and Jagdish are acquitted of charges under Sections 148 and 302 read with Section 149 I.P.C.

84. The surviving appellants No.2 and 4, Moti Lal and Jagdish are on bail. Their bail bonds are hereby cancelled and sureties are discharged.

85. The surviving appellants No.2 and 4, Moti Lal and Jagdish are directed to file the personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A Cr.P.C. within six weeks from today.

86. Let a copy of this judgment be also sent to the trial court concerned along with trial court record for its information and necessary compliance forthwith.

(2024) 5 ILRA 80
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 802 of 1982

Jagdish & Ors. ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
Sri Siddharth Shukla, Sri Arvind Kumar Maurya, Sri Om Prakash Verma, Sri Vivek

Prasad Mathur, Sri Ganesh Shankar Srivastava

Counsel for the Respondents:
A.G.A.

Criminal Law-Indian Penal Code-1860-Sections-302, 307, 323 r/w 34 - Criminal appeal against judgment and order of conviction- PW-1 St.d that she got up because she had to facilitate her two months' old child to defecate. However, when the excreta was not present on the spot and when the Investigating Officer did not mention about the presence of any excreta in the site plan, she came up with a story that the excreta had flown away because of the heavy rain- Testimony of PW-2 and PW-3 suggests that the presence of accused-appellants are doubtful at the place of incident. The PW-2 and PW-3 St.d that they had been prevented by fourth accused to reach at the place of incident does not inspire confidence- First informant St.d that she and her husband (deceased) were staying in her Myika, that St.ment also is not very believable- No person can be convicted on the basis of doubt- Impugned judgment & order set aside.

Appeal allowed. (E-15)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Upon an incident, having taken place in the intervening night of 19th and 20th July 1980, a First Information Report was lodged on 20.7.1980. Ram Jiyawan Tripathi scribed the tehrir on the dictation of the first informant, Radhika Devi. In the F.I.R. it was stated that on the previous night, while the first informant and her husband Buchnoo Tiwari were sleeping in the Veranda of their house in village Dulahi, Police Station Khesraha, District Basti, after having their dinner etc., at around 12 mid-night because of the call of nature, the younger daughter, who was sleeping with the first informant, woke up. The complainant was trying to ease the child, and at that moment, four persons reached the place of the incident with country-made pistols and *lathies*. When the first informant asked them not to come near her and her husband then, the assailant, Jagdish, son of Ram Dulare, who was having country-made pistol in this hand, fired on the husband of the first informant. Thereafter, the first informant, caught hold of Jagdish. Thereupon, Jagdish exhorted his friends to kill the husband of the first informant. Upon this exhortation, Vishdhar alias Shridhar, son of Shiv Moorat, fired a second shot at the husband of the first informant and Ram Achal, son of Mitthoo, who also accompanied them, pushed the first informant aside. As a result, the first informant fell. Also, Jagdish slapped her. When all this was happening, the first informant raised a hue and cry and, therefore, Ram Jiyawan Tiwari, son of Munnu Tripathi, Bhagwan Dutt son of Mannar and a lot of persons of the village with lanterns and torch came to the house of the first informant. The crowd that had collected at the house of the first informant tried to chase the accused persons but they ran away. However, because of the firearm injuries, the husband of the first informant died. She mentioned Jagdish and Ram Achal's motives in the first information report. Because of certain litigation with regard to her land, the husband, i.e., the deceased, who was doing pairvy in the cases, was killed. She stated in the first information report that the dead-body of her husband was lying in the house itself and while she had gone to lodge the first information report, the injured daughter Poonam was with her *devar*.

2. The lodging of the first information report had set into motion the investigating agencies and they recovered the torches of the witnesses Bhagwan Dutt Tiwari and Narad Tiwari and took them into

custody. Also, the mud where the blood was found, was taken into custody. The lantern and cot were also taken into custody. When the search was made in the house of the accused, no firearm etc. was recovered. The injury report and post mortem report were also prepared. Upon the charge-sheet having been submitted, the Court of Additional Sessions Judge, Basti, on 03.12.1980 framed charges against Jagdish, Ram Achal and Vishdhar @ Sridhar under Sections 323, 302, 307 read with Section 34 of I.P.C. The trial commenced when the accused persons denied the charges and prayed for trial.

3. From the side of the prosecution as many as ten witnesses were produced and examined.

4. PW-1-Radhika Devi, the first informant, proved the first information report and gave her side of the story. She has stated in her testimony that Buchnoo Tiwari (deceased) was her husband. Vansh Gopal was her father, and she was the only daughter of her father. When she was one and half years of age then her mother died. She further stated that her father, Vansh Gopal, had never remarried, and when she grew up, her father married her. At the time of marriage, he had given her ten bighas of agricultural land and when Vansh Gopal died, all the agricultural land and the properties were inherited by her. She stated that Vishdhar was Jagdish's brother-in-law (sala), and Ram Achal was Jagdish's agriculture labourer *(someone who helped in agriculture work)*. She stated that someone had impersonated herself and sold her properties to Jagdish and his brother Keshav. Upon coming to know about this execution of the sale-deed, Buchnoo Tiwari and Jagdish became inimical. At the time of the incident, civil cases were going on with regard to the land in question. She stated that she had four children; two sons and two daughters. At the time of the incident, the youngest daughter was one and half months to two month old, the daughter Poonam, who was older than the youngest daughter, was 3 to 4 years old and the sons were older than two daughters and were aged about 10 to 7 years. She had stated that her house in the village was a hut with two rooms and one Veranda. The house faced towards the East. Also on the East was the *sahan* of the house. The animals were tied on the Southern and Eastern side of the house. On the date of the incident, she states in her testimony, Buchnoo Tiwari and she herself were lying down on two separate cots. The youngest daughter was sleeping with her and one who was elder to her was sleeping with her husband Buchnoo Tiwari and the two sons were sleeping inside the house. She came for sleeping in the Veranda because they had to look after the animals. She had stated that, like always, the lantern lit in the Veranda and the cots were in the North-South direction. After they had their food and slept, the youngest daughter had a call of nature, and she had risen to ease her. Then, the accused persons, Jagdish, Vishdhar and Ram Achal, reached the house. Along with them was one more person she did not recognize. Jagdish and Vishdhar had country-made pistols, and Ram Achal had a lathi. The fourth persons she could not recognize was having a lathi with him. As soon as Jagdish entered into the Veranda of the house, he fired on the husband of the first informant. The first informant immediately left the child whom she was carrying and caught hold of Jagdish. She recognized Jagdish who was present in the Court.

5. Upon Jagdish having been incapacitated as the first informant held him, he exhorted Vishdhar to kill her husband, and thereupon Vishdhar fired upon the

husband of the first informant. When Vishdhar fired, a few of the pellets also injured the daughter of the first informant, who was sleeping with the husband. Because of the firing, the husband of the first informant died. After that, Ram Achal pushed aside the first informant, who fell down on her back and Jagdish also slapped her. As a result, she had certain scratches on her back and was injured. After the incident, the four accused ran away, realizing that the villagers might reach the place of incident. However, Bhagwan Dutt, who had reached the house by the time the incident was over, had tried to catch hold of the accused persons. When the second shot had been fired, Bhagwan Dutt, Ram Jiyawan and Narad had reached the spot with lathis, etc., and they had seen the whole incident. Ram Jiyawan, in fact, tied a piece of cloth on the injury that had been caused to the husband of the first informant. On the next day, i.e. on the day after the incident had occurred, the first information report was lodged by the first informant. She had dictated the first information report to Ram Jiyawan Tripathi, a villager teacher. After he had written it down, he had also read it out to the first informant, and after she was satisfied with the contents, she had put her thumb impression on the FIR. PW-1 proved the first information report and said that it was the document, which was Exhibit-Ka-1. After Ram Jiyawan had written the report, he was taken by Balram to the Police Station. Along with the first information report, he had also taken the first informant and her daughter -Poonam, who was injured, to the Police Station. When the Inspector had come to the house of the first informant, he had found the dead body of her husband, the lantern and the cot, and he had prepared a recovery memo with regard to the lantern and the cot. On the next day, the injury report was prepared.

6. In her cross-examination, the first informant stood firm to what she had stated in her examination-in-chief. In the examination-in-chief, she had stated that Chhagur, Mannar and Munnu are of her village and were all related. Narad and Balram are the sons of Chhagur. She had stated that Bhagwan Dutt (PW-2), who was also a prosecution witness and an eye-witness, is the son of Mannar. She had stated that Bhagwan Dutt and Ram Jiyawan are related to each other. She had also stated that they are not her relatives and that she was the only child of her parents. She has categorically stated that they are the relatives of her husband. Upon being asked whether her husband Buchnoo Tiwari, Vanshraj, Munnu Tiwari, Mannar Tiwari, Kalika Tiwari were accused in some case of theft, etc., she said that she did not know about that fact. She, in fact, denied of having known any criminal case which was going on against her husband and his father, Vansh Raj. She also denied any criminal case vis-a-vis Ram Achal involving her husband. Upon a question being asked that her actual father was Ram Dev, she denied the fact and insisted that Vansh Gopal was her father. She stated on oath that her husband - Buchnoo Tiwari was staying in her father's house. The actual house of Buchnoo Tiwari was in Village-Gothwa, which had, because of it being dilapidated, fallen, and, therefore, he was also staying in her house. In her testimony, she said that the incident had happened in the month of Ashadh (which is equivalent to July-August). She had stated that on the date of incident, it was drizzling and that the clouds were there in the sky. The night was dark, and it was raining, and because of the fact that her elder daughter was suffering from chicken pox, the first informant had kept the lantern on, and also, for the four previous nights, the lantern was lit. She has stated that when Bhagwan Dutt

reached the house of the first informant, the accused person had run away and that it was raining heavily. Upon a question probably being asked, as to where the excreta of the young child was, she said that because of there being heavy rains, the excreta had got washed away. When the accused persons had run away, she had held her husband and wept. She was not aware as to whether the blood had got stuck to her clothes as well. She has stated that the Veranda had no plinth and that Jagdish had fired while he was getting down. Nobody had hit the first appellant and the deceased with lathis. In the Veranda no pellet, etc., was found, and the pellets that had entered the chest of her husband were lying there. Upon being asked as to whether the her husband's father, Vansh Raj, was under the observation of the Police, she replied that she did not know about that. She only stated that her case about her property was decreed in the Munsif's Court, and the appeal was pending. Before the date when the appeal was to be argued, the incident had occurred, and the husband of the first informant was killed. She has stated that the appeal was still pending. She denied the fact that the husband of the first informant had many enemies and that any of those enemies might have come and killed her husband.

7. The PW-2 Bhagwan Dutt appeared in the witness box and gave his statement and had categorically stated that in the night of 19th and 20th July, 1980 he was sleeping in his house and had woken up to answered the call of nature. At mid-night, he went out with his torch to check out if his cattle were properly tethered and upon finding that one particular animal was not found at its place, he called out his brother Kalika Tiwari and informed him about the missing animal and also went out to search for the animal. When he reached the house of Deena Nath Pandey, then, he heard the sound of the gunshot being fired from the side of the house of Buchnoo Tiwari and also heard the shouting of the wife of Buchnoo Tiwari i.e. Radhika (first informant). The witness, after that, stated that he ran towards the house of Buchnoo Tiwari and he also found that a lantern was lit in the Vernadah of that house. In the light of the torch and the lantern, he saw Radhika was holding Jagdish and was shouting at the top of her voice that Jagdish was holding a country made pistol. He had also heard that Jagdish had exhorted Vishdhar to kill Buchnoo and thereupon, Vishdhar had fired upon the Buchnoo Tiwari. He had also seen the incident where Ram Achal had pushed Radhika, and thereafter, Jagdish had slapped Radhika. He also stated that he did not recognize the fourth person. He has stated that he, his brother and one Narad had tried to catch hold the accused persons, but they could not do so. Upon coming back to the house of Buchnoo Tiwari, he found that Buchnoo Tiwari was dead and that he was covered with blood. He also found that the daughter of Radhika, who was sleeping with Buchnoo Tiwari, had also got injured. Radhika, while weeping, narrated the whole incident, and when the Police came to their house, they had told the incident to the Police. He had also stated that he had given his torch to the Police, which was taken in custody, and a recovery memo was prepared. He has also mentioned about the case which was going on between Radhika and the accused persons. In his cross-examination, he had stood firm and had answered the questions as were put to him. He had stated that his house was a little away from the house of the complainant but because of his cattle had got freed from where he had tethered them, he had chased the cattle and, therefore, had reached near the place of the incident. He also stated that

when he was chasing his cattle, it was not raining, and it was a dark night. The time gap between the two fires was one to one and one half minutes. He had stated that when the fourth man, whom he did not recognize, scolded him as to why he had stopped around 16-17 steps away from the place of incident. He had again categorically stated that on the date of incident, it was intermittently raining, but it was not raining heavily.

8. PW-3 Ram Jiyawan Tripathi was also an eye-witness and had virtually repeated what the PW-2 had stated. He, however, had stated that his house was around 30 steps away from the house of PW-2 and that the house of Bhagwan Dutt from the house of the place of incident was at 200-250 steps away.

9. PW-4 is the Police Constable-Mannu Yadav and he was the person who had taken the daughter of complainant for medical examination.

10. PW-5-Raj Narayan Gupta, the X-ray Technician had proved the x-ray report etc.

11. PW-6-Dr. B.P. Shukla had conducted the post-mortem of the deceased and had proved the postmortem.

12. PW-7-Dr. S.C. Tripathi, the Radiologist, who had done x-ray of the elder daughter of the deceased.

13. PW-8-Dr. U.K. Prasad had examined the injuries of Poonam and Radhika.

14. PW-9-Ashok Kumar Rai was the Investigating Officer. He had stated in his cross-examination that he was not aware whether it had rained in the night of the incident, but he stated that after he had reached, it did rain. He had also proved the recovery memo, etc.

15. PW-10-Shri Bakey Yadav Constable stated that he was posted as a constable at Police Station Khesaraha in July, 1980 and had taken the dead-body for postmortem.

16. After that, the accused's statements under Section 313 of Cr.P.C. were recorded.

17. Upon the completion of trial, the Additional Sessions Judge-I, Basti convicted the appellants Jagdish, Vishdhar @ Sreedhar, and Ram Achal and found them guilty under Sections 302 read with Section 34, 307 read with Section 34 and 323 read with section 34 on 23.3.1982 aggrieved by same the instant criminal appeal was filed.

18. During the pendency of the criminal appeal, the appellant, Jagdish died and thus, appeal abated qua him. Shri Ganesh Shankar Srivastava, learned Advocate argued for Ram Achal, and the appellant, Vishdhar @ Sreedhar, is represented by Shri Vivek Prasad Mathur, Advocate and they, argued thus :

(i) There is no independent eye-witness to prove the allegations. PW-1 is the wife, and PW-2 and PW-3 are relatives of the deceased, therefore their testimony can't be relied upon.

(ii) It has further been stated that there are contradictions in the statements of PW-1 and PW-2. PW-1 had given a reason for getting up at mid-night and it was that she had got up to facilitate the easing of her younger child, who was to defecate. He further submits that the actual excreta was never found on the spot nor was it

mentioned in the site plan, which was prepared immediately after the incident, by the Investigating Officer. To explain that the excreta had got washed away, the PW-1 had stated that it was raining heavily. While opposite to this statement, learned counsel for the appellants stated that PW-2, PW-3 and the Investigating Officer all had stated that it was not raining heavily and that it was only raining intermittently and that too after large intervals and, therefore, the excreta could not have got washed away.

(iii) Learned counsel submits that the first informant had given a reason for getting up in the night but the fact remained that she was not there and had given a wrong reason. When the excreta was not found, she stated it had been washed away. But this fact was not corroborated by the other witness, who had stated that it was only intermittently raining.

(iv) Learned counsel for the appellants has further argued that the PW-2 stated that he was carrying a torch when he approached the deceased's house. He submits that when the lantern was lit, then the torch ought not to have been lit. By lighting the torch, the witness would have exposed themselves to the accused persons.

(v) Learned counsel for the appellants further stated that the first informant's motive was also not very convincing. Motive can always be a double edged weapon. The first informant was aware that a civil case was pending between herself and the accused person and, therefore, she could have easily implicated the accused persons. Learned counsel for the appellants further stated that as per the statement of PW-2, he was directed/ordered by the fourth person, who was present and whose name none of them could tell, to stay away and, therefore, he had stopped around 16-17 steps away from the place of incident and, therefore, all the narrations which he was giving in his testimony was a cooked-up narration as it was all taken from the first information report and statements of PW-1. Nothing was original of his and, therefore, it can easily be said that PW-2, in fact, never reached the spot and had only to help the PW-1, become a witness in the case and stated all wrong facts.

(vi) Learned counsel for the appellants subsequently stated that the pellets which were found could not be connected with any firearm. He, in fact, submits that no firearm was ever recovered. Learned counsel for the appellants states that the appellant no.3 Jagdish was, in fact, not at the spot and lived far away from the place of incident.

(vii) Learned counsel for the appellants states that the first informant was close to the dead-body of the deceased and had held him tightly, but no bloodstain came on the clothes of the first informant, meaning thereby that all the story which she had narrated was a concocted one. Learned counsel for the appellants thereafter stated that as per the ages given under Section 313 of Cr.P.C., the appellants no.2 and 3 namely Vishdhar and Ram Achal, are alive and had crossed 60 years of age, and they were now very elderly persons and that even if they were convicted, their sentences be reduced. Learned counsel for the appellants further submits that the incident was of the year 1980, and the appellants who were alive had already undergone the trauma of being an accused for a fairly long period, i.e. almost 44 years.

(viii) Learned counsel for the appellants further states that Balram Tiwari, who could have been a relevant witness and who had taken the *tehrir* to the Police Station along with the child, was not brought in the witness box as a witness. He submits that even Narad Tiwari, who was present at the spot and was an eye-witness, was not

produced as a witness and, therefore, submits there were major lacuna in the case of the prosecution.

(ix) Learned counsel for the appellant has stated that there was every possibility that Radhika Devi had done away with the deceased and was implicating the accused. He submits that a fake Radhika Devi had replaced the real Radhika Devi, and she had stated in her examination-in-chief that she, along with the deceased, was staying in her Maika. learned counsel states that this fact was wrong as, in fact, all the witnesses, namely PW-2 and PW-3, were related to the deceased. The impersonated Radhika now wanted to make use of the decrees which were in favour of the real Radhika, by killing the deceased.

19. Smt. Archana Singh, learned A.G.A., however, has opposed the appeal and has submitted that PW-1, who was the wife of the deceased, was an eye-witness whose testimony could not be disbelieved. She had lost her husband and well recognized the accused persons. The fact could not be disbelieved where she stated in the first information report and her statement before the Court that she recognized the accused persons. Learned A.G.A. further submitted that even if there were small discrepancies in the evidence of the other prosecution witnesses, then that could not jeopardize the prosecution's case. Learned A.G.A. states that under no circumstances, the place of incident, the medical evidence, the source of light, the time of the incident, etc., be questioned.

20. Learned counsel for the appellants had tried to convince the Court that the PW-1, i.e. the first informant, was not an eye witness but had concocted the entire story. Picking up threads from the statement of the PW-1, they have argued that PW-1 had stated that the deceased was staying with her parents in village, but she has produced the PW-2 & PW-3, who were related to the deceased (husband). We find that none of the witnesses, who had appeared in the witness box, were relating to PW-1, the first informant.

21. Further, we find that PW-1 had given a fake story that gave a reason for her to wake-up in the mid-night. She stated that she got up because she had to facilitate her two months' old child to defecate. However, when the excreta was not present on the spot and when the Investigating Officer did not mention about the presence of any excreta in the site plan, she came up with a story that the excreta had flown away because of the heavy rain. About the heavy rain that PW-1 mentioned, we find that there are actual contradictions in the statements of the PW-2 and PW-3. They do not, in fact, mention a heavy rain, the Investigating Officer, had only mentioned intermittent rainfall.

22. The testimony of PW-2 and PW-3 suggests that the presence of accused-appellants are doubtful at the place of incident. The PW-2 and PW-3 stated that they had been prevented by fourth accused to reach at the place of incident does not inspire confidence and thus, are disbelieved.

23. We also find that the PW-2 and PW-3 were the relatives of the deceased and, therefore, when the first informant Radhika stated that she and her husband (deceased) were staying in her Myika, that statement also is not very believable. Therefore, doubt has definitely been created in our minds, and no person can be convicted on the basis of doubt.

24. Under such circumstances, for all the reasons stated above, the appeal,

therefore, stands allowed. The judgment and order 23.3.1982 is set aside. The appellants before us, are acquitted of the charges levelled against them in the instant case. The appellant No.1 has already been died. The appellant nos. 2 and 3, Ram Achal and Vishdhar @ Sridhar were granted bail on 29.03.1982, therefore, their bail bonds as well as the sureties are discharged.

(2024) 5 ILRA 88
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 2474 of 2018
WITH
Criminal Appeal No. 2258 of 2018
WITH
Criminal Appeal No. 2326 of 2018
WITH
Criminal Appeal No.1982 of 2018
WITH
Criminal Appeal No. 1993 of 2018

Ratan Pahalwan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Prashant Kumar Singh, Ambrish Kumar Kashyap, Arun Kumar Shukla, Ashok Kumar Tripathi, Saurabh Sachan

Counsel for the Respondent:
G.A., Dharmendra Pratap Singh, J.P. Singh

Criminal Law-Indian Penal Code-1860-Sections-148, 149 &302 -The Arms Act-1959- Sections 4/25-Criminal appeal against judgment and order of conviction for life imprisonment-the testimony of the witness of the PW-1 who is the mother is not at all believable. She has changed stands very frequently. She has introduced so many things like the peepal tree and Shiv Sewak at her convenience and the peepal tree is not to be found even in the site-plan. In fact the Investigating Officer who was PW-10 St.s that the PW-1 had never told him about the peepal tree. It appears strange that the site-plan was prepared at the telling of the PW-1; that would mean that in fact the site-plan was also prepared not at the spot but somewhere else-Despite the fact that she mentioned that she did not know the addresses of the assailants before the Court, in the FIR she had mentioned the addresses and the parentage of all the accused persons-The mother of the deceased had St.d that the deceased had died on the spot and was lying dead but despite that the police had taken the dead to the Hallet Hospital. which raises a big question mark to the fact as to whether the deceased was found at the spot where, it is alleged, he was killed. The panchayatnama ought to have taken place at the place where the deceased lay dead-The ballistic report from the forensic lab was also never received and taken into account by the prosecution-Result Impugned order quashed.

Appeal allowed. (E-15)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Vinod Diwakar, J.)

1. These appeals have been filed against the judgment and order dated 22.3.2018 passed by the Additional District & Sessions Judge, Court No.12, Kanpur Nagar convicting the appellants-Ratan Pahalwan, Mahesh @ Maheshiya, Mewalal, Ram Kumar Mallah, Suresh @ Mandir and Vikas Maurya for life imprisonment under section 302 read with section 149 IPC. A fine of Rs.50,000/- had also been imposed on each of the convict and in the event of non-depositing of fine, they had to undergo additional imprisonment of 180 days. Also, the accused Ratan Pahalwan, Ram Kumar Mallah and Vikas Maurya, under section 4/25 of the Arms Act, were sentenced for one year rigorous imprisonment and a fine

of Rs.1000/- each was imposed and in the event of non-depositing of the fine, they had to undergo 30 days' additional imprisonment. The Accused Mahesh @ Maheshiya; Suresh @ Mandir and Mewalal were also sentenced for three years' rigorous imprisonment under section 25/27 of the Arms Act with a fine of Rs.3000/- each and in the event of non-depositing of fine, they had also to undergo 90 days' additional imprisonment. It was provided that all the sentences were to run concurrently.

2. Brief facts of the case are that on 30.7.2009 a First Information Report was lodged by one Gyanwati wife of Om Prakash. The FIR was got written on the dictation of Gyanwati by one Manoj Kumar son of Jamuna Prasad. In the FIR, it was mentioned that on 30.7.2009, the son of Gyanwati namely Sarvesh Pandit when was sitting with Munna Pandit and Dayaram in front of the Santoshi Maa Temple where a light bulb was on, at around 10.30 pm, Ratan Pahalwan son of Jagmohan, resident of 4/272 Purana Kanpur along with Mahesh @ Maheshi son of Ganga Prasad, r/o 5/237 Purana Kanpur; Ram Kumar Mallah and Suresh Mandir sons of Ganga Prasad, r/o 5/237 Purana Kanpur and Vikas son of Roshan Pahalwan who were armed with country made firearms and Chapad, approached Sarvesh Pandit and said that they would take the revenge of the death of Basant Pahalwan. Thereafter they surrounded Sarvesh and attacked him. Consequently, the son of the first informant died. In the FIR, the motive has been given that around 12-13 years prior to the lodging of the FIR, in the area of Police Station Nawabganj, Basant Pahalwan had been killed and in that the son of Gyanwati had been jailed and on account of this revenge, Ratan Pahalwan and others were inimical to her son and they always wanted to do away with him. Thereafter she categorically stated that the dead-body of her son Sarvesh Pandit was lying under a tree and she requested that investigation be undergone and justice be done.

3. Thereupon investigation ensued. Six accused were arrested and on 14.8.2009 at the pointing of Mahesh, a country made pistol of 315 bore was recovered. In that regard, a recovery memo was prepared and an FIR was lodged under section 4/25-A of the Arms Act. Similarly, the accused Ram Kumar Mallah on 14.8.2009 had got recovered a *Chapad* and against him also an FIR under the Arms Act was got lodged. On 30.8.2009, Vikas Maurya got recovered a *Kulhadi* (axe) and similarly against him also, an FIR under the Arms Act was got lodged. On 24.8.2009, Suresh @ Mandir had got recovered another .315 bore country made pistol and against him also, an FIR under the Arms Act was got lodged. On 7.9.2009, Mewa Lal son of Ganga Prasad had got another country made .315 bore pistol recovered and against him also, an FIR was got lodged. The firearms, as were recovered, were kept in the custody of the police and the recovery memos were accordingly prepared. From the spot, where the alleged murder had taken place, three empty cartridges and two bullets of .315 bore were recovered and they were kept in a tin box of which a recovery memo was prepared and was exhibited as Exhibit Ka-27. The plain soil and the soil on which there was blood was also recovered and a recovery memo was prepared and was exhibited as Exhibit Ka-28. After the FIR was lodged, the police had reached on the spot and had taken the body of Sarvesh Pandit to the Hallet Hospital where the Panchayatnama was got prepared. This

happened on 31.7.2009. Thereafter the Constable Pradeep Kumar Rai took the dead-body for the post mortem.

4. Charges were framed by the police and they were forwarded to the Court of Additional Sessions Judge, Court No.13. The Court upon taking cognizance of the matter, charged the accused under the relevant sections. All the accused pleaded not guilty and denied charges and thereafter the trial commenced.

5. From the side of the prosecution as many as 14 prosecution witnesses gave their statement-in-chief and they were also cross-examined.

6. PW-1 Gyanwati wife of Om Prakash had stated in her examination-in-chief that her son on 30.7.2009 was sitting under a Goolar tree on a *chabutara* and by his side Munna Pandit and Dayaram were also sitting. The goolar tree was in front of Santoshi Mata Temple and at that time i.e. around 10.30 pm she (Gyanwati) was standing on a *chabutara* which surrounded a Peepal tree near her house. Around 7-8 paces behind her, her nephew Shiv Sewak Sharma was standing. From the side of *gaushala*, Ratan Pahalwan, Ram Kumar, Mahesh @ Maheshiya, Mewa Lal, Suresh @ Mandir and Vikas arrived. Ratan Pahalwan exhorted all the accompanying assailants and said that they had to take revenge of his brother Basant and had ordered them to kill Sarvesh. Ram Kumar and Ratan who were carrying chapad; Mahesh, Mewalal and Suresh who were having the tamancha along with Vikas who was having a kulhadi, surrounded the son of the first informant and they started assaulting the son of the first informant who fell down faced downwards. He was shouting for help. The nephew of the first informant and the first informant reached the spot but the assailants threatened the first informant that if she raised her voice, she would also be killed. PW-1 also stated that there were a lot of people living in the area but because of the fear of the assailants, none of them came. She has also stated that Guddu @ Anwar and Rajesh had seen the incident and they were standing 7-8 paces away near a bargad tree. After having killed the deceased, the assailants went away. The first informant went to the police station and told them about the incident. The police asked her to give a written complaint then she got hold of Manoj and on her dictation the report was written down. On that document she had also signed. She thereafter also proved the tehrir. Thereafter the police came on the spot and recovered four empty cartridges and two bullets and they took her son in a Jeep to the Hallet Hospital where he was declared dead. Post mortem was thereafter done. Here she again stated that the motive for killing her son was that her son while was working as a Home-Guard had got recovered four and half kilograms of gunpowder and a tamancha from the house of one of the assailants Ratan and she reiterates about the fact that 12-13 years back when Basant Pahalwan was killed, the assailants thought that her son had killed him. Earlier also, Sarvesh was attacked upon. In her cross-examination, the PW-1, upon being asked as to whether she was aware that her son was a history-sheeter, she denied that her son was ever externed. She categorically stated that Guddu @ Anwar was sitting on the neighbouring *chabutara*. Upon being asked about Daya Ram and Munna Pandit, whose names she had mentioned in the FIR, she stated that at the time when the incident had occurred, they were not there at the spot. She stated that they were sitting beside her son before the incident had occurred. She then stated that even though she knew the house

of Ratan Pahalwan but she did not know its number. She stated that she had in fact mentioned in the FIR which she had got lodged that she was standing by the Peepal tree in her house. She also stated that she was standing 10 paces away from the place where the incident had occurred and this fact she had also stated in the FIR. She had also mentioned in the FIR that Shiv Sewak was standing 7-8 paces away behind her. She has stated that she definitely mentioned in the FIR that Vikas had a small axe. She has stated that the copy of the FIR was given to her at 4.00 pm on the next day i.e. on 31.7.2009. She had stated that her son worked in J.K. Jute Factory. She reiterates that her son was beaten for around 6-7 minutes. Upon being asked as to why her husband had not appeared at the spot, she had stated that he was asleep. She had also stated that while she was sitting at the threshold of her house, she had not made any efforts to wake-up her husband. She has also stated that the wife and the children of the deceased were also present on the spot.

7. Shiv Sevak, the nephew, appeared in the witness box as PW-2. He repeats the case as was stated by PW-1.

8. PW-3 Rajesh Kumar who was, as per the first informant, present on the spot, had stated in his examination-in-chief that he was not present there. He was thereafter declared hostile. In the cross-examination, he has stated that he was not threatened by the assailants.

9. PW-4 Dr. R.L Mahip was the doctor who had proven the post mortem report.

10. PW-5 Constable Ashok Kumar Mishra had proven the chik FIR.

11. PW-6 Guddu @ Anwar who, per the first informant, was present at the spot, had stated that he was not there on the spot and thereafter he was also declared hostile. In the cross-examination, he stood firm on what he had stated in the examination in chief.

12. PW-7 Constable Girja Kumar was a formal witness.

13. PW-8 Tannu who was a witness of the recovery of the empty cartridges and the bullets, had stated that he was not present at the time when the recovery memo was prepared and that they were not recovered in from of him and that he had signed on a blank paper.

14. PW-9 was the scribe of the FIR Manoj Kumar and he had virtually stated what the PW-1 had stated to him.

15. PW-10 was the Investigating Officer Satyendra Singh Rathor. He had stated that on the date of incident, he had gone on the spot along with the first informant and on the next date he was present at the time of panchayatnama and he was also instrumental in getting all the recovery memos prepared. PW-10 had stated in his cross-examination that the bullet and the pallets were sent to Agra for forensic lab test. He had stated that when he had gone on the spot, the deceased was lying in an injured state. He had stated that the first informant had not told him about the fact that she was standing by a peepal tree. He had also stated that the first informant had not told him that behind her, was her nephew Shiv Sevak Sharma standing. He states that he had not stated as to how high was the *chabutara* and he had also not stated that there was blood near the *chabutara* and on the walls. He had stated that there were also

no bullet marks on the walls and on the trees and he further states that when he had reached the spot, the body of the deceased was not lying on the *chabutara* but was on the ground. The deceased, he stated, was a history-sheeter and there were many other serious cases pending against him.

16. PW-11 was Sub-Inspector Shiv Karan Sonkar and he was the Investigating Officer in the case under the Arms Act.

17. PW-12 Pratap Singh was also an Investigating Officer under the Arms Act.

18. PW-13 Sub-Inspector Pradeep Kumar Rai had stated that he had reached the LLR (Hallet) Hospital at around 23.40 hours and had got conducted the panchayatnama. He had taken out the dead body from the mortuary. He has also stated that he had got sent the dead body for the post mortem.

19. PW-14 Sub-Inspector Ram Niwas was the witness of the recovery of the axe (kulhadi).

20. Thereafter the accused persons got their statements recorded under section 313 Cr.P.C. They had all stated that they were innocent.

21. One Arjun, who was the defence witness, had come forward and had stated that Vikas Maurya was his neighbour and on 28.8.2009 at 10.00 pm, he was sitting in front of his house after having taken his diner and thereafter the police came to the house of Vikas Maurya and had taken him away.

22. Learned counsel for the appellants has argued that in fact the murder had not taken place at the spot as had been alleged by the PW-1. Learned counsel for the appellants has stated that the mother of the deceased i.e. the first informant had stated in the FIR itself that the deceased was dead and was lying on the spot yet it has been stated that the dead-body of the deceased was taken from the spot and was taken to the LLR (Hallet) Hospital. Learned counsel for the appellants, therefore, states that in fact the murder had taken place somewhere else and the dead body was taken to the LLR Hospital and there the panchayatnama was conducted. He submits that had the death taken place on the spot where the first informant was saying then the panchayatnama too would have been conducted on the spot itself. For giving the reason as to why the dead body was taken to the Hallet Hospital, the police officer Pradeep Kumar Rai had stated that when he had gone on the spot, he had found that the dead-body was breathing and therefore he taken him away. Learned counsel for the appellants states that when the assault was to the extent, as had been mentioned in the FIR itself and when it was stated by the first informant, that her son was dead then there was no reason for taking the dead-body to the hospital for panchayatnama. Learned counsel for the appellants stated that the police personnel are from an experienced service and they could easily decipher as to whether a person is dead or alive. Learned counsel for the appellants thereafter states that in fact after the first informant had come to know about the death of her son somewhere else, she had gone to report about the death and the police who were aware of the fact that the accused persons were also history-sheeters, took out their names from their own records and had, in the FIR, given their names, parentage and the addresses. Learned counsel for the appellants states that if the statement of PW-1 is seen, she has very categorically stated

that even though she knew about the houses of Ratan Pahalwan but she did not know the number of the house (i.e. the address). Learned counsel for the appellants states that if the FIR is seen then the addresses of all the accused had been given. This, he submits, definitely was the doing of the police. Learned counsel for the appellants thereafter has stated that in the FIR, the PW-1 had tried to create eye-witnesses on the spot apart from her itself. She had also named Munna Pandit and Dayaram in the FIR but subsequently she had done away with them and in her statement-in-chief she had brought in Guddu @ Anwar and Rajesh as eye-witnesses. Learned counsel for the appellants further states that in the FIR she had also not stated about the fact that there was any peepal tree by the side of which she was standing and that behind her, Shiv Sewak Sharma was standing around 7-8 paces away. Learned counsel for the appellants, therefore, states that the PW-1 had come up with all cooked-up story. He submits that Munna Pandit and Dayaram did not even come into witness box. The witnesses which she had tried to bring in as eye-witnesses namely Guddu @ Anwar and Rajesh came to the witness box but they had turned hostile. Further, learned counsel for the appellants states that the post mortem report shows that there were three bullets which had entered the body of the deceased. It is alright, he submits, that this matched with the three empty cartridges but he submits that only one bullet was recovered from the body of the deceased and one which had probably escaped from the exit wound was also found. Where did the third bullet go was a mystery. Learned counsel for the appellants further states that all the firearms which were recovered were country made pistols of .315 bore but pellets were also recovered from the body of the deceased. How those pallets entered the body of the deceased was again a mystery. Learned counsel for the appellants states that when no forensic lab test was done on the firearm and on the pellets, it mattered little as to what was the recovery done. Learned counsel also states that even the motive was a strange motive which the PW-1 had given. He states that the accused persons were taking a revenge of an event which had taken 13 years prior to the incident which she was reporting. Still further, learned counsel for the appellants states that the father of the deceased who was sleeping was the first person the first informant would have woken-up but she had allowed him to sleep. Also, the wife and children of the deceased who were standing at the spot as per the PW-1 had not come forward to give their side of the story. Learned counsel for the appellants, therefore, states that all the statements which the PW-1 had given get falsified. If the statement of the Investigating Officer PW-10 is seen, it would reveal that he had categorically denied that PW-1 had told him about the peepal tree by which she was standing. What is more, even the peepal tree was not shown in the site-map which the Investigating Officer had prepared; meaning thereby, learned counsel for the appellants states, that even the site-plan was not prepared after going to the site but in fact it was prepared sitting in the police station. Learned counsel for the appellants, to bolster his submissions, relied upon the decisions of the Supreme Court in **Ravasaheb @ Ravasahebgouda etc. vs. State of Karnataka : 2023 LiveLaw (SC) 225; Ajai @ Ajju etc. etc. vs. The State of Uttar Pradesh : 2023 LiveLaw (SC) 110; Chhote Lal vs. Rohtash & Ors. (Criminal Appeal No.2490 of 2014 decided on 14.12.2023); Amar Singh vs. The State (NCT of Delhi) (Criminal Appeal No.335 of 2015 decided on 12.10.2020)** and also

upon the decisions of this Court in **Criminal Appeal No.4857 of 2011 (Parshu Ram vs. State of U.P.) decided on 14.2.2019; Criminal Appeal No.6583 of 2004 (Karan Singh & Anr. vs. State of U.P.) decided on 13.1.2017; Criminal Appeal No.1875 of 2007 : Shesh Narain vs. State of U.P. (decided on 27.5.2016); Criminal Appeal No.2421 of 1985 : Bashir & Anr. vs. State of U.P. (decided on 17.5.2019) and Criminal Appeal No.4122 of 2015 : Gulshan @ Mekedam Singh Jatav vs. State of U.P. (decided on 6.8.2020).**

23. Learned AGA Sri Amit Sinha and the learned counsel appearing for the first informant Sri Saurabh Sachan, however, have stated that even if the first informant who was the eye-witness and in this case now virtually the lone eye-witness, her evidence ought to be believed as she was a mother who was giving evidence with regard to the death of her son and she would not lie to implicate others falsely.

24. Learned counsel for the first informant also argued that even if the peepal tree was not given in the site-plan and it was not mentioned in the FIR, it mattered little. The site as it contained things and which came to the fore after the statements were recorded, alone were to be looked into. He has tried to, after reading the statement of PW-1, establish that the PW-1 was a truthful eye-witness and if she had by any chance missed out certain facts in the FIR about which she was changing her statement in the Court, then it mattered little. In this regard, learned counsel for the first informant relied upon the decision of the Supreme Court in **Bipin Kumar Mondal vs. State of West Bengal : AIR 2010 SC 3638; Sunil Kumar vs. State Govt. of Delhi : AIR 2004 SC 552; Vijendra Singh vs. State of U.P. (2017) 11 SCC 129; Dhanaj Singh @ Shera & Ors. vs. State of Punjab : (2004) 3 SCC 654; Ravasaheb @ Ravasahebgouda etc. vs. State of Karnataka : (2023) 5 SCC 391; State of U.P. vs. Krishna Master : AIR 2010 SC 3071; State of MP vs. Dharkole @ Govind Singh & Ors. : AIR 2005 SC 44 and State of Rajasthan vs. Ani @ Hanif & Ors. : AIR 1997 SC 1023.**

25. Having heard Sri Ambrish Kumar Kashyap and Sri Ashok Kumar Tripathi for the appellant in Criminal Appeal No.2474 of 2018; Sri Ashutosh Pandey for the appellants in Criminal Appeal nos.2258 of 2018 and 2326 of 2018; Sri Surendra Singh, Advocate for the appellants in Criminal Appeal Nos.1982 of 2018 and 1993 of 2018; learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra, learned Brief Holder and Sri Saurabh Sachan, Advocate for the first informant, this Court is of the view that the appeals deserve to be allowed. The first informant had come up in the FIR with a case that when the assailants had come, Munna Pandit and Dayaram were sitting beside the deceased. However, though in the FIR she had stated so, in her statement before the Court she stated that they were sitting beside the deceased before the incident had occurred and in fact at the time when the incident had occurred, Guddu @ Anwar and Rajesh were there on the spot. We find that the peepal tree by which she says she was standing by at the time of incident was also never mentioned and in fact the Investigating Officer also had not shown it in the site-plan. We also find that throughout PW-1 had never introduced Shiv Sewak Sharma but for the first time in the Court she had stated that he was standing a few paces behind her at the time of the incident and Shiv Sewak thereafter also comes before the Court and testifies in her favour but his statement was absolutely a weak statement which could not be relied upon. We also find that

she had justified the absence of her husband and has stated that it was not required to wake him up. She has stated that the wife and children of the deceased were present on the spot but they never cared to come in the witness box. The eye-witnesses which had come up to the witness box had turned hostile and the eye-witnesses with regard to which she had made a mention in the FIR never turned up to give their testimony. It was just possible that due to the fear of the assailants who were history-sheeters, the eye-witnesses were not coming forward but in the instant case we find that the testimony of the witness of the PW-1-Gyanwati who is the mother is not at all believable. She has changed stands very frequently. She has introduced so many things like the peepal tree and Shiv Sewak at her convenience and the peepal tree is not to be found even in the site-plan. In fact the Investigating Officer who was PW-10 states that the PW-1 had never told him about the peepal tree. It appears strange that the site-plan was prepared at the telling of the PW-1; that would mean that in fact the site-plan was also prepared not at the spot but somewhere else.

26. What is more we find that the mother of the deceased, PW-1 had got the FIR lodged and despite the fact that she had mentioned that she did not know the addresses of the assailants before the Court, in the FIR she had mentioned the addresses and the parentage of all the accused persons. This shows that the police very interestingly, which had the record of all the history-sheeters, had mentioned about the addresses and the parentage of the accused persons in the FIR. Also, we find that in the FIR the mother of the deceased had stated that the deceased had died on the spot and was lying dead but despite that the police had taken the dead to the Hallet Hospital. This raises a big question mark to the fact as to whether the deceased was found at the spot where, it is alleged, he was killed. The panchayatnama ought to have taken place at the place where the deceased lay dead.

27. Under such circumstances, we are of the view that the eye-witness PW-1, the mother, is an absolutely doubtful witness. The conviction cannot be done on the basis of her testimony. Also, we find that the PW-10 has stated in so many words that all the facts which the PW-1 was stating in the Court were never told to him. The ballistic report from the forensic lab was also never received and taken into account by the prosecution. This not only speaks volumes about the prosecution's functioning but also makes it unbelievable.

28. For all the reasons, the Criminal Appeals are allowed. The order dated 22.3.2018 passed by the Additional District & Sessions Judge, Court No.12, Kanpur Nagar is quashed. The appellants namely Ratan Pahalwan, Mewa Lal, Mahesh @ Maheshi, Suresh @ Mandir, Ram Kumar Mallah and Vikas Maurya, who are in jail, be released forthwith unless they are required in any other case.

(2024) 5 ILRA 95
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 2558 of 2014
WITH
Criminal Appeal No. 2582 of 2014
WITH
Criminal Appeal No. 2639 of 2014
WITH
Criminal Appeal No.2640 of 2014

Sushil Kumar Dwivedi @ Sonu Dwivedi ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Balendra Kumar Singh, Arpit Srivastava, Parijat Kumar Tiwari, Rakesh Chandra Upadhyay, Ram Surat Patel, S.P. Tewari, Udai Karan Saxena, Veerendra Singh, Vijay Singh Senga

Counsel for the Respondent:
Govt. Advocate, Anil Srivastava, B.N.Singh, Ram Bahadur, Ravi Yadav

Criminal Law-Indian Penal Code,1860-Sections 147, 148, 149 302 & 506- -Criminal Appeal against the judgment and order whereby accused persons were sentenced for life imprisonment- The fact that the PW-2 reached at the spot on the relevant date is very doubtful-That PW-2 was only making out a case so as to show that he was available at the flat when the incident happened and thus he was a chance witness who had been created to become an eye-witness-The husband of the deceased was not produced as a witness who could have definitely told in the first person as to whether there were any commercial transaction between him and Sonu Saxena which had been made to appear to be a cause for the murders.

The ballistic expert St.d that the empty cartridges matched, but the bullets which had entered the body did not, then it creates a definite doubt that there was some tampering done with the firearms- The firearms, as per the St.ment given by PW-13 Ram Sajivan, were taken out from the Malkhana on 21.05.2009 and again they were kept inside the Malkhana after one day and were handed over to PW-13 on 24.05.2009 the time which the prosecution got, definitely must have enabled the prosecution to tamper with the firearms- A doubt is created when the chick is seen-Chick is transcribed only on one page and if one looks at the hand-writing then it appears that efforts had been made to make the chick FIR fit into one single page-Result- order passed by the T.C is quashed .

Appeal allowed. (E-15)

List of Cases cited:

1. (2023) 2 SCC 352 : Manoj & ors.. Vs St. of U.P.

2. (2003) 2 SCC 353 : Manoj & Ors. Vs St. of Madhya Pradesh,

3. (2016) 16 SCC 418 : Harbeer Singh Vs Sheeshpal & ors.

4. Jarnail Singh & ors. Vs St. of Pun. (2009) 9 SCC 719

5. 1976 Criminal L.J. 1568 : Bahal Singh Vs St. of Har.

6. AIR 2023 SC 3245 : Pradeep Vs St. of Har.

7. St. of M.P. Vs Ramesh & anr. 2011 Cri.L.J. 2297

8. K. Venkateshwarlu Vs St. of Andhra Pradesh : 2012 Cri.L.J. 4388

9. Radhey Shyam & ors. Vs St. of Raj. : (2023) 6 SCC 151

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Criminal Appeal No.2558 of 2014 has been filed along with Criminal Appeal Nos.2559 of 2014, 2582 of 2014, 2639 of 2014 and 2640 of 2014 challenging the judgment and order dated 26.6.2014 passed by the Court of Additional District & Sessions Judge, Court No.5, Kanpur Nagar.

2. On 5.3.2014 at about 9.00 pm, it has been alleged in the FIR which itself was lodged on 5.3.2014 at 23.00 pm (11.00 pm) at police station Govind Nagar, District Kanpur Nagar, that in Flat No.HIG 304 Ratan Lal Nagar Rudra Vatika, Kanpur Nagar the first informant along with his real brother's wife Neeta Singh, his maternal brother (mamera bhai) Tilak Singh along with Nishi, Nidhi, Abhay, Tushar, the children of his real brother was present. At around 9.00 pm the call bell rang and in

response thereto Neeta, the wife of his brother, opened the door. Upon opening the door, Sonu Saxena, who lived in a neighbouring flat, enquired as to where Puti (husband of Neeta) was and to this question Neeta had replied that he had gone to Lucknow. Along with Sonu Saxena, Sonu Dwivedi had also come and very abusingly he said that she would not tell where Puti was unless they made her naked and was taken around. When the first informant and his cousin Tilak heard about this statement being made by Sonu Dwivedi, then the first informant along with his nephews and nieces came to the door to inquire as to who was being disrespectful to his brother's wife. Upon reaching there, the first informant has stated, in the FIR, that he along with others saw that Sonu Saxena @ Anesh Saxena, Guddu Dwivedi @ Santosh Kumar Dwivedi had revolvers in their hands while Sonu Dwivedi, Anil Shukla and Tanu Shukla had country made pistols in their hands. Upon reaching the door, when Tilak the Mama's son of the first informant told Sonu that he may not be disrespectful to Neeta Singh then Guddu Dwivedi said that Tilak be also picked up from the house and taken away. While this was happening Tanu Shukla @ Shravan Kumar Shukla and Anil Shukla put their country made pistols on the temples of the foreheads of Neeta Singh and Tilak Singh and took them downstairs and throughout they kept asking as to where Puti was and said that if they did not reveal where Puti was, they would kill them with their guns. While this was happening, the first informant and the young nephews and nieces shouted for help. However, Sonu Saxena and Guddu Dwivedi who were having revolvers in their hands shot at Neeta Singh and Tilak Singh indiscriminately and thereafter they all got into their Santro Car which was parked outside and went away. It has been stated in the FIR that the whole incident had occurred in a crowded area and that after the incident had occurred the whole area was gripped with fear and everybody of the area closed their doors and windows. He has categorically stated in the FIR that the incident occurred due to the fact that there was some transaction of money and old enmity. It has further been stated that after the incident had occurred, the local police had taken the injured to the Hallet Hospital where Neeta Singh was declared dead and Tilak Singh was directed for being further treated to a better hospital. Through the FIR, the first informant had prayed that the FIR be lodged and action be taken. Specifically the first informant had stated that other than Sonu Saxena, all the other three accused persons were residents of Nauraiya Kheda, Police Station Govindpur.

3. Upon the FIR being lodged, the police got into action and the investigation thereafter commenced. On 10.3.2009, the Sub-Inspector B.P. Mishra along with Constable Ashutosh Mishra and Vinod Kumar who were in their Jeep along with the driver J.P. Yadav while they were searching for the accused of the incident which had occurred on 5.3.2009 and of which FIR was lodged on the same date and was registered as Case Crime No.127 of 2009 under sections 147, 148, 149, 307, 308, 504 and 506 IPC and section 7 of Criminal Law Amendment Act, they reached the Dada Nagar factory area crossing and when they reached the Factory No.H-10, they spotted someone who panicked on seeing the police jeep. Before being spotted, he was hiding behind the Factory No.H-11. Upon being suspicious the Sub-Inspector B.P. Mishra along with the Constables and the Driver who were accompanying him at 6.30 in the morning caught hold of that person. When the name of that person was asked, he informed that he was Sonu Saxena @ Anesh

Saxena, resident of 405, Flat Rudra Vatika Apartment, area 304 Ratan Lal Nagar. Upon further searching him, it was found that he had a licensed revolver No.NPG-21798 and that it was a .32 bore revolver. Along with the revolver, four live cartridges of .32 bore were also recovered from him. After the recovery of the firearm along with bullets, a case was registered as Case Crime No.134 of 2009 under sections 25/27-A of the Arms Act read with section 7 of the Criminal Law Amendment Act. The apprehended person Sonu Saxena @ Anesh Saxena upon being questioned, informed that on 5.3.2009 he had, with his licensed revolver, fired at Neeta Singh and Tilak Singh. Thereafter Sonu Singh was arrested.

4. In a similar fashion on 13.3.2009 at around 2.00 am in the morning Santosh Kumar Dwivedi, Anil Shukla, Shravan Kumar Shukla @ Tanu Shukla and Sushil Kumar Dwivedi @ Sonu Dwivedi were apprehended. On 12.3.2009 the Sub-Inspector B.P. Mishra had got an information from a Mukhbir Khas that four named accused in the murder case of Puti Singh's wife and Tilak Singh were hiding in the factory area and upon getting this information, the Sub-Inspector B.P. Mishra had reached the area and had apprehended the four persons and from Santosh Kumar Dwivedi a .32 bore licensed revolver numbered as FG-33215 along with four live cartridges of .32 bore were recovered. The second person namely Anil Shukla was also arrested and from his possession a country made revolver was recovered. The third person Shravan Kumar Shukla @ Tanu Shukla was also arrested with a country made pistol of .315 bore. The fourth person arrested was Sushil Kumar Dwivedi @ Sonu Dwivedi and from his possession also a .315 bore country made pistol was recovered. Against them along with the earlier case crime being Case Crime No.127 of 2009, other cases were added. Case Crime No. No.137 of 2009 under section 25/27 of the Arms Act was imposed against Santosh Kumar Dwivedi; Case Crime No.138 of 2009 under section 25/27 of the Arms Act was imposed against Anil Shukla; Case Crime No.139 of 2009 under section 25/27 of the Arms Act was imposed against Shravan Kumar Shukla @ Tanu Shukla and Case Crime No.140 of 2009 under section 25/27A of the Arms Act was imposed against Sushil Kumar Dwivedi @ Sonu Dwivedi in police station Govind Nagar, District Kanpur Nagar.

5. Here it may be noted that since the initial FIR as was lodged by the first informant Virendra Singh, was lost, the photocopy was kept on the record of the case.

6. The recovery memos with regard to the revolvers and the bullets were also prepared and were exhibited as Exhibit Nos.Ka-14, Ka-15, Ka-16, Ka-17, K-18 and Ka-19 during the sessions trial.

7. Even before the FIR was lodged on 5.3.2009, it is the case of the prosecution that the Sub-Inspector Akhilesh Kumar Shukla (PW-11) who was posted at Chowki Ratan Lal Nagar, Police Station Govind Nagar, had received information of the incident on his mobile phone and upon getting the information, he had rushed along with two accompanying constables and a driver of the jeep to Rudra Vatika Apartment where the Sub-Inspector Akhilesh Kumar Shukla found that the people who had assembles at the spot were running away and that on the spot Shiv Tilak Singh was lying in an injured state and was gasping for breath and Neeta Singh was lying injured in a very quiet state. He picked up both the

injured persons in his jeep and took them to the LLR Hospital and upon reaching the hospital, Neeta Singh was declared dead while Shiv Tilak Singh was given medication. He has in his statement, before the Court, stated that because Shiv Tilak Singh required better treatment, he was taken to the Regency Hospital where he died. The PW-11 has stated that thereafter SHO Dinesh Tripathi (PW-8) had taken over the investigation and he had directed him to get the panchayatnama of the two dead-bodies done. On the next day i.e. on 6.3.2009, the panchayatnama of the two bodies was done in the presence of five witnesses in the presence of Akhilesh Kumar Shukla, the Sub-Inspector who had taken the body from the place of incident to the hospital. Thereafter post mortem had followed and from the body of Neeta Singh, three bullets were recovered and from the body of Shiv Tilak Singh, one bullet was recovered. The recovery memo of the five empty cartridges, found at the place of incident, was prepared. So also the recovery memo of the bullets recovered from the body of the deceased was also prepared. The revolvers, the country made pistols, the live bullets recovered along with them, the empty cartridges and the bullets recovered from the bodies were all kept with the police after preparing proper recovery memo and they were also kept in the Malkhana of the police.

8. After around two days i.e. on 7.3.2009, the Sub-Inspector of Police Station Govind Nagar, Kanpur Nagar sent Kumari Nidhi, the daughter of Narendra Singh Chandel @ Puti and the deceased Neeta Singh for the examination of her injury. The doctor's opinion about the injury was that one injury could be caused by a firearm and the other injury by a hard object. It was stated in the injury report that both the injuries were simple and were two days old. The investigation culminated in the submission of a charge sheet before the Court and the Court on 8.1.2010, by five different charge sheets, charge-sheeted the five accused under section 25/27 of the Arms Act. The five accused upon reading and understanding the charges, refused of having committed the crime and prayed for trial. Similarly, on 15.9.2010, the five accused were also charged by the Court of Additional Sessions Judge, Court No.3 under section 302 read with section 149 and under section 307 read with section 149 IPC. Here also, the accused denied the charges and prayed for trial.

9. Before the trial Court as many as 14 prosecution witnesses were examined and from the side of the defence, 3 defence witnesses were examined.

10. PW-1 Head Constable Suraj Singh has proven the FIR, the photocopy of which was available on record. He has stated that the Special Report (SR) of the case was sent on 6.3.2009 at 7.50 am through Constable Raj Bahadur. He has also proven the chik FIR. He has denied the suggestion that the FIR was actually written on 6.3.2009 and not on 5.3.2009.

11. PW-2 is Virendra Singh who is the first informant in the case. He has categorically stated that he personally knew Anesh Saxena @ Sonu Saxena, Sushil Dwivedi @ Sonu Dwivedi; Santosh Dwivedi @ Guddu Dwivedi; Anil Shukla, Shravan Kumar Shukla @ Tanu Shukla and he had also recognized them in the Court. He had very categorically stated that apart from Anesh Saxena, the other four accused were living in the village where the first informant was living. With regard to Narendra Kumar @ Puti, he has stated that he was his younger

brother and was staying in Flat No.402 HIG 304 in Rudra Vatika Apartment with his family and the accused Anesh Saxena was also living in the same apartment in Flat No.405 along with his family. He has stated that before the incident, his brother Puti had lent Rs.2,10,000/- to Anesh Saxena. On the date of incident i.e. on 5.3.2009 at around 9.00 pm he was in the same house where Narendra Kumar @ Puti along with his wife Neeta Singh and their children Abhay, Tushar, Nidhi and Nishi was living. On the date of incident his cousin (mamera bhai) Shiv Tilak was also present. When the call bell rang, Neeta Singh had opened the door. Anesh Saxena had inquired as to where Puti was and to that Neeta Singh had replied that he had gone to Lucknow. The other four accused, who were present in the Court, were also there with Anesh. Sonu Dwivedi had said that she would not tell about the whereabouts of Puti and, therefore, she be taken out naked. Upon hearing this, the first informant and his nephews and cousin reached the door. He saw that Sonu Saxena and Guddu Dwivedi had revolvers in their hands and the others had country made pistols. Shiv Tilak reprimanded the five accused as to why they were misbehaving with his cousin's wife (bhabhi). Upon this Guddu Dwivedi asked the others to catch hold of Shiv Tilak also. PW-2 has then stated that Tanu Shukla and Anil Shukla caught hold of Neeta Singh and Shiv Tilak and had took them downstairs throughout flaunting their country made pistols. The first informant, his brother and nephews cried for help. The accused had taken Neeta Singh and Shiv Tilak to the portico of the building. The accused were throughout, while they were taking the two i.e. Neeta Singh and Shiv Tilak, kept saying that they may tell as to where Puti was otherwise they would kill them. When Neeta Singh had nothing else to tell other than that Puti had gone to Lucknow, the accused did not believe this and with their firearms shot at Neeta Singh and Shiv Tilak and thereafter went away on their Santro Car. He has stated that a lot many people had seen the incident specially Amar Singh and Preetam Singh. After the actual firing had happened, the police arrived at the spot and they took Neeta Singh and Shiv Tilak to Hallet Hospital where Neeta Singh was declared dead but Shiv Tilak was given the treatment. There itself the PW-2 had written the report and had also got it photocopied. Thereafter the FIR was lodged.

12. In the cross-examination, the first informant had stated that he was 42 years of age and had a Medical Store in Nauraiya Kheda. The Medical Store was functional since 1993 and that it was situated in a small place. It opened at 9.00 am and closed at 10.00 pm and that it was half a kilometer away from his house. He has categorically stated in his cross-examination that he had six more brothers namely Jaswant Singh, Pratap Singh, Rajendra Singh, Babu Singh, Shyam Singh and Narendra Singh. Shyam Singh was an Advocate; Jawant Singh was working in ICI Duncon Factory; Pratap Singh was working in Animal Husbandry; Rajendra Singh had a factory and Babu Singh also had a factory. Narendra Singh also had a factory and was manufacturing plastic. PW-2 has stated that his mobile number was 9451140475 and that all the mobile numbers were fed in his mobile directory. He has stated that the mobile number of Puti at the time of incident was different but at the time of his giving the testimony it was 9670991199. With regard to the fact that he knew Amar Singh and Preetam Singh, he had consistently stated that he had known them for a fairly long time and their houses were also near his house. Upon being asked that why he had

gone to the house of Puti Singh on the date of incident, he had stated that his *Jija*'s daughter was getting married and since Puti was out of station, he had come to the house of Puti to take Neeta and her children to the marriage. He had reached the house at around quarter to nine. Since, in the FIR, he had not stated about the fact that he along with Neeta and children had to go to the marriage, he had stated that he was stating the same for the first time in the Court. he had gone to the house of Neeta on his bike and thereafter had to take them all to the marriage in the Santro Car of Narendra. He had stated that he had owned a revolver and it was a lincenced one.

13. He has also stated in his cross-examination that at the time when the incident had occurred, his nephew Tushar was with him behind a particular pillar. He has also stated that in the night of the incident at 01:30 am i.e. on 06.03.2009, he had seen Puti Singh in the hospital. On the date of the incident Putti Singh was not in Kanpur and so was Shyam Singh, another brother, not in Kanpur. The other brothers were in Kanpur. Since on the date of incident the PW-2 had left his mobile at his own house, he was not in possession of any mobile phone. When the PW-2 had gone to get the place of incident inspected, the children had gone to the house of Babu Singh, a brother of the first informant. Upon a question being asked as to whether he had seen any bullet hitting Nidhi, he replied that he had never seen any bullet hitting her. In the cross-examination, he had very categorically stated that he had not stated the fact during investigation that there was a marriage in the family for which he had reached the house of Narendra Singh. He had stated that this fact was also not told by him in the statement recorded under Section 161 Cr.P.C. No invitation card etc. of the marriage was placed on record. The evidence of PW-2 had commenced on 16.12.2010 and on 25.10.2011 for the first time without producing any invitation card etc. he only mentioned that on the date of incident he alongwith Putti's wife was to go to the marriage of the daughter of one Munni Singh who was the daughter of his Fufa. However, he states that the other brothers of his had not attended the marriage.

14. PW-3 is the daughter of Narendra Singh Chandel and Neeta (deceased). When she gave her statement, she was 13 years of age and the Court had tested whether she could give the statement and whether she knew the importance of taking oath. The Court after being convinced that PW-3 had the capacity of understanding what she said and she was conscious of the importance of taking oath, she was permitted to give her statement-in-chief. She had reiterated what had been stated by the first informant. She had stated in her cross-examination that she was not aware if any bullet had hit her. She only came to know about the fact that a bullet had hit her when the medical was done. She had never stated that she had also been injured in the event. She has stated in her cross-examination that her elder sister was Rishi and had been studying in Doon International School and that all the four brothers and sisters were studying in that school for the past 4-5 years. However, in her cross-examination she has again stated that till the standard 5th, she had studied at Nauraiya Kheda and at the moment she had given the statement, she was studying in class six. However, she has stated that before she was studying in class VI, she was studying in Kedar Singh Inter College. A lot of other things had been stated in her cross-examination but only the the relevant portion of her statement has been reproduced in this paragraph.

15. PW-4 was the doctor who had examined the injuries of Nidhi, daughter of Narendra Singh and he had given his statement with regard to the two injuries which were found on the body of Nidhi. He had stated that the injuries were not serious ones and that they were not in any manner infected despite the fact that no medicine was applied on them.

16. PW-5 was the doctor who had conducted the postmortem on Shiv Tilak and he has proven the postmortem report.

17. PW-6 Sri Dileep Singh Sachan who was the Pharmacist of the postmortem house and has proven the postmortem report of the deceased Neeta W/o Narendra Singh.

18. PW-7 who was the Head Constable Promod Kumar Yadav and he has proven the First Information Reports under the Arms Act.

19. PW-8 Inspector Dinesh Tripathi who had, upon information being received, reached the spot where the shooting had occurred and he had taken the two victims Neeta Singh and Shiv Tilak to the hospital. He has stated that on the spot he had not met Narendra Singh and his brother Babu Singh but had met the PW-2 Virendra Singh.

20. PW-9 was the Sub-Inspector V.P. Mishra who was the first Investigating Officer. He has narrated throughout as to how the incident had occurred and how he had taken the statements of various persons.

21. PW-10 Ashutosh Mishra, Constable had proven the arrest memo of the accused persons and had also proven the recovery memo of the firearms which had been recovered.

22. PW-11 the Sub-Inspector Akhilesh Kumar Shukla was the person who had reached on the spot on the date of the incident upon getting an information on his mobile. He has also stated the story of the prosecution as was narrated by the other prosecution witnesses. He had stated that he did not go back to the place of incident as he was suspended from service on that very date.

23. PW-12 the Sub-Inspector Santosh Kumar Awasthi was the formal witness who had proven the recovery memos of the various fire arms.

24. PW-13 is the prosecution witness Ram Sajivan who had carried the firearms, the empty cartridges and the bullets which were recovered from the spot to the forensic laboratory at Agra from Kanpur. He has stated that he had reached Agra on 24.05.2009. He had stated that the Exhibits Ka-33 and Ka-34 were given to him on that very date. He has further stated that for the first time the fire arm, empty cartridges and the bullets were taken out from the Malkhana on 21.05.2009 and on that date they were again deposited in the Malkhana and thereafter, on 24.05.2009 the fire arm, empty cartridges and the bullets in a sealed cover were given to him. On 21.05.2009 the date which is there on Exhibit Ka-33 was the date when the articles were taken out from the Malkhana and 24.05.2009 (Exhibit 34) was the date when he had left station. In between 21.05.2009 and 24.05.2009, taking out of the fire arms and the bullets etc. and of them being again kept in the Malkhana, there was no record. There was no entry in any register.

25. PW-14 was the Sub-Inspector Raghuvar Dayal who had proven the

recoveries of the various fire arms and was a formal witness.

26. Thereafter the statements of the five accused were recorded under Section 313 Cr.P.C. and they had denied the commission of the crime.

27. DW-1 was Dr. Shailendra Gupta who had been produced to show that Sonu Saxena on the date of occurrence was not in Kanpur but was in Muzaffar Nagar.

28. DW-2 is one Pramod Kumar Srivastava who had told that Anesh @ Sonu Saxena was the husband of her niece Shalini and that he was the uncle (Mama) of Shalini. He had also stated that on 25/26.02.2009 Sonu Saxena had gone to Muzaffar Nagar to get a chek up done of Shalini but in fact he had fallen ill over there and was admitted in a hospital at Muzaffar Nagar. DW-2 had also stated that Anil Shukla also was, on 05.03.2009, with him.

29. After the completion of trial, the accused persons Anesh Saxena @ Sonu Saxena and Santosh Kumar Dwivedi @ Guddu Dwivedi were convicted under Section 302 of IPC and were sentenced for life imprisonment with a fine of Rs. 10,000/- . Whereas, Shushil Kumar Dwivedi @ Sonu Dwivedi, Shravan Kumar Shukla @ Tanu Shukla and Anil Kumar Shukla were convicted under Section 302 read with section 149 of IPC and they were sentenced for life imprisonment with a fine of Rs. 10,000/- each. All the accused were also, under Section 147 of IPC, sentenced for one year of imprisonment and under section 148 of IPC three years sentence was awarded. Again under Section 506 of IPC they were sentenced for one year. In the event, the accused convicted persons did not deposit the fine, then they had to further undergo six months' additional imprisonment. The punishments were to run concurrently. The accused persons were acquitted under Section 307 read with sections 149 and 506 of IPC and under Section 7 of the Criminal Law Amendment Act. They were also acquitted under Section 25/27 of the Arms Act.

30. Learned counsel for the appellants Sri V.P. Srivastava, Senior Advocate assisted by Sri P.K. Singh and Sri Vijay Singh Sengar, Advocates argued as under :-

(i) The FIR was an ante-dated FIR. He has submitted that even though in the FIR which is a photocopy of the original, it was written that the incident had happened on 5.3.2009 at around 9.00 pm, the Chik which was prepared shows that the FIR was actually lodged at 23.00 hours i.e. at 11.00 pm. Learned counsel for the appellants further states that if the Panchayatnama is seen of both the deceased i.e. Neeta Singh and Shiv Tilak then it becomes clear that the time of the information received by Akhilesh Kumar Srivastava (PW-11) was 9.00 pm. Learned counsel for the appellants took the Court through the original record and drew the attention of the Court to the date on the Chik FIR which had an overwriting over the digit 5. There was overwriting on page one and he submits that there was overwriting also in page 2 at the end of the FIR. He submits that in fact at the time of the lodging of the FIR, the names of the accused persons were not known and a plain paper on which the GD was to be written was left unused in the record of the Police which was filled-up later on. He submits that this was the reason why the chick was written on both sides of only one page and in fact the continuation of it was written in the left hand margin of the second

page. After the informant side had made up its mind as to who had to be made the accused, the FIR was got registered. Learned counsel for the appellants states that the original Tahreer was made to disappear and a photocopy of it was placed on the record. He submits that in the cross-examination, the chick writer PW-1 Constable Sooraj Singh has very conveniently only stated that he had forgotten to sign over the overwritings. Learned counsel for the appellants further states that when the FIR was lodged at 23.00 hours, how in the Panchayatnama it had been said that the PW-11 i.e. Akhilesh Kumar Shukla had got the information at 09:00 pm.

(ii) Learned counsel for the appellants next submitted that the presence of PW-2 Virendra Singh at the place of incident was absolutely doubtful. He submits that in the FIR the PW-2 who has lodged the FIR has stated that he was there at the spot and he had also overheard what conversation the assailants had with the deceased-Neeta Singh but nowhere in the FIR had he stated that why he was present in the flat in question. Learned counsel for the appellants, therefore, suggests that in fact the PW-2 was not there on the spot and that only to have an eye-witness, as an afterthought, when the FIR was being got lodged by him, he was made to give an eye-witness account. To bolster this argument of his, learned counsel for the appellants states that in the FIR and in the statement under Section 161 CrPC, the PW-2, the first informant, had never stated that he had reached the flat of his brother Putti to take Putti's wife i.e. Neeta (deceased) and the children to some marriage which they had to attend. Learned counsel for the appellants states that for the first time on 07.02.2011 while being cross-examined by the counsel of accused Santosh and Sushil Dwivedi, he had stated that on the date of the incident he had gone to Putti Singh's house as there was a marriage of the daughter of his *Jija* and since Putti Singh was out of station i.e. in Lucknow, he had gone to fetch Putti Singh's wife Neeta Singh and the children. He had stated that he had reached there at around 08:45 pm and he categorically states that for the first time he was stating this fact in the Court. The relevant portion of the statement is being reproduced here as under :-

"घटना वाले दिन पूती सिंह के यहाँ जाने का कारण था। मेरे जीजा जी की बेटी की शादी थी और पूती सिंह बाहर (लखनऊ) थे इसलिए विवाह समारोह में सम्मिलित होने के लिए बहू और बच्चो को लाने के लिए गया था। मैं पूती सिंह के घर लगभग पौने नौ के आस पास पहुँचा था। उनको पहले पता था कि साथ जाना है। मेरे पहुँचने के लगभग आधे पौपन घण्टे बाद समारोह में जाना था। यह शादी में जाने वाली बात आज न्यायालय में सर्वप्रथम बता रहा हूँ। मैं अपनी बाइक से गया था उनके पास सेन्ट्रो कार नीचे खड़ी थी उससे जाना था। मैनें अपनी बाइक नीचे पोर्टिको में खड़ी की थी।"

He had also stated that he had gone on his motorcycle and not on his car as Putti Singh's car was there which could be taken to go to the marriage. Learned counsel for the appellant has further stated that during trial on 25.10.2011, after a long lapse of time, PW-2 the first informant had stated that he alongwith the family of Putti Singh was to go to the marriage of the daughter of his Behnoi Sri Sultan Singh Chauhan who was his Fufa's daughter's husband. He had stated that all the family members were to go but he has also very categorically stated that in the marriage neither Putti Singh nor Shyam Singh Chandel had gone. The extremely important information with regard to the name of the father of the girl who was to get married was made known to the Court on 25.10.2011 whereas the evidence of PW-2 had begun on 16.12.2010. Learned counsel, therefore, states that the story was a cooked up story. Learned counsel for the appellants further states that if it was so important for everybody to

attend the marriage then Putti Singh and Shyam Singh also ought to have been there in Kanpur to attend the marriage. Since the learned counsel for the appellants relied upon the statement which was given on 25.10.2011, the same is being reproduced here as under :-

"मेरे बहिनोई श्री सल्तान सिंह चौहान मेरे गाँव में रहते है। यह मेरे सगे बहिनोई नहीं बल्कि फुफेरे बहिनोई है। सगे फूफा? का नाम श्री लल्लन सिंह है। लल्लन सिंह की विटिया और सुल्तान सिंह की पत्नी का नाम श्रीमती मुन्नी है। इन्ही श्रीमती मुन्नी सिंह की सगी बटिया की शादी में घटनावाले दिन मेरे परिवार के सभी लोग सपरिवार आमंत्रित थे। और इस भान्जी की शादी में न पूती सिंह आये और न श्याम सिंह चन्देल आये थे।"

Upon being asked as to whether any invitation card of the marriage was there, PW-2 had stated that the marriage card was not there on record at all. The statement with regard to the marriage card was given by the PW-2 on 22.10.2011. Learned counsel for the appellants further to prove this fact, has relied upon the statement which the PW-2 had given on 22.10.2011. The relevant portion with regard to the invitation card is being reproduced here as under :-

"यह कहना सही है कि 'मेरे घर में आज शादी है" वाली बात न एफ०आई०आर० में है और न बयान 161 सी०आर०पी०सी० में लिखवायी थी। यह कहना गलत है कि अदालत में पहली बार सिखाने पर झूठा ब्यान दिया कि घर में शादी थी। शादी के निमत्रण पत्र या अन्य कोई दस्तावेज प्रमाण पत्रावली पर उपलब्ध नहीं है। यह कहना गलत है कि मैं बिल्कुल झूठ बोल रहा हूँ कि उस दिन मेरे घर में शादी थी। यह कहना भी गलत है कि शादी के सिलसिले में वहाँ गये ही नहीं क्योकि वहाँ कोई शादी थी ही नहीं।"

Learned counsel for the appellants, to show that the PW-2 was a chance witness, has further stated that the family of the first informant had its ancestral home in village Nauraiya Kheda and he states that in his statement he had also stated that Sonu Dwivedi, Anil Shukla and Tanu Shukla also belonged to the same village and, therefore, he stated that they were very well known to the PW-2 and it was just possible that he had some enmity with them and, therefore, the names were introduced in the FIR. Learned counsel submitted that only to give credence to the story about the fact that there was some money transaction, the accused Sonu Saxena was introduced in the FIR as he lived across the house of his younger brother Putti Singh. Learned counsel for the appellants further states that the PW-2 had stated that he had a mobile but he had left it at his ancestral house. He had stated that he had a car also but that car was also not brought and he had come on a motorcycle as he was aware that Putti Singh had a car and in that car he was to take the family of Putti Singh. Upon a question being put that Putti Singh had talked to Anil Shukla (an accused) on 05.03.2009 at around 09:35 pm and also at around 09:56 pm, the PW-2 had denied that he had known about the phone call from Putti Singh to Anil Shukla. Upon being confronted with regard to the call details of the phone number of Putti Singh being 9918560533 by which he had dialled the phone number of Anil Shukla being 9335632772, he clearly states that he was not aware of the fact that Putti Singh had called Anil Shukla. Learned counsel for the appellants relying upon a judgment of the Supreme Court reported in **(2023) 2 SCC 352 : Manoj and Ors. vs. State of U.P.** has stated that a chance witness is one who appears on the scene suddenly when something is happening and then disappears after noticing the occurrence about which he was required to come later on and give his evidence.

Learned counsel for the appellants states that as per the law laid down by the Supreme Court a testimony of a chance witness should be utilised by the prosecution very cautiously. He submits that the evidence of the chance witness requires a very cautious and strict scrutiny and if there was any slackness in the explanation about

the presence of the chance witness at the place of incident then his deposition ought to be rejected. Since learned counsel for the appellants relied heavily on paragraphs 102, 103 and 104 of the judgment reported in **(2003) 2 SCC 353 : Manoj & Ors. vs. State of Madhya Pradesh,** the same are being reproduced here as under :-

"102. A chance witness is one, who appears on the scene suddenly. This species of witness was described in *Puran v. State of Punjab (AIR 1953 SC 459)*, in the following terms:

"Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence."

103. This court has sounded a note of caution about dealing with the testimony of chance witnesses. In *Darya Singh v. State of Punjab (AIR 1965 SC 328),* it was observed that:

"…where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.…..If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised."

104. In *Jarnail Singh v. State of Punjab [(2009) 9 SCC 719]* again, this Court held that:

"22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of *occurrence (Satbir v. Surat Singh (1997) 4 SCC 192 30, Harjinder Singh v. State of Punjab (2004) 11 SCC 253, Acharaparambath Pradeepan and Anr. v. State of Kerala (2006) 13 SCC 643 and Sarvesh Narain Shukla v. Daroga Singh (2007) 13 SCC 360).* Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal v. State of Rajasthan (2004) 10 SCC 632)."

Since the learned counsel for the appellants also relied upon paragraphs 22 to 24 of the judgment reported in **(2016) 16 SCC 418 : Harbeer Singh vs. Sheeshpal & Ors**., the same are being reproduced here as under :-

"22. The High Court has further noted that there were chance witnesses whose statements should not have been relied upon. Learned counsel for the respondents has specifically submitted that PW5 and PW6 are chance witnesses whose presence at the place of occurrence was not natural.

23. The defining attributes of a "chance witness" were explained by Mahajan, J., in *Puran v. State of Punjab, AIR 1953 SC 459*. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

24. In *Mousam Singha Roy v. State of W.B.*, (2003) 12 SCC 377, this Court discarded the evidence of chance witnesses while observing that certain glaring

contradictions/omissions in the evidence of PW 2 and PW 3 and the absence of their names in the FIR has been very lightly discarded by the courts below. Similarly, *Shankarlal v. State of Rajastahan, (2004) 10 SCC 632 and Jarnail Singh v. State of Punjab,* (2009) 9 SCC 719, are authorities for the proposition that deposition of a chance witness, whose presence at the place of incident remains doubtful, ought to be discarded. Therefore, for the reasons recorded by the High Court we hold that PW5 and PW6 were chance witnesses and their statements have been rightly discarded."

Similarly, paragraphs 20 to 23 of the judgment of the Supreme Court in **Jarnail Singh & ors. vs. State of Punjab reported in (2009) 9 SCC 719** are also being reproduced here as under :-

"20. After considering the oral as well as documentary evidence on record, the High Court came to the conclusion that the statement of Gurcharan Singh (PW-18) in respect of the fact of hatching of a conspiracy by Balbir Singh and Gurdip Singh, at the Bus-stand Bassi Pathana on 21-6-2000 at 7.30/8.00 p.m. was not worthy of credence. Gurcharan Singh (PW-18), a chance witness could not explain under what circumstances he was present at the bus-stand at the said time.

21. In *Sachchey Lal Tiwari v. State of U.P. (2004) 11 SCC 410*, this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:

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"If the offence is committed in a street only a passer-by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there."

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence *(Satbir v. Surat Singh (1997) 4 SCC 192; Harjinder Singh v. State of Punjab (2004) 11 SCC 253; Acharaparambath Pradeepan & Anr. v. State of Kerala (2006) 13 SCC 643; and Sarvesh Narain Shukla v. Daroga Singh and Ors. (2007) 13 SCC 360).* Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded *(vide Shankarlal v. State of Rajasthan (2004) 10 SCC 632).*

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. *(vide Thangaiya v. State of Tamil Nadu (2005) 9 SCC 650).* Gurcharan Singh (PW-18) met the informant Darshan Singh (PW-4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW-18) and Darshan Singh (PW-4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present

case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned."

Paragraph 10 of the judgment reported in **1976 Criminal L.J. 1568 : Bahal Singh vs. State of Haryana** is also being reproduced here as under :-

"10. As to the presence of P. Ws. 4 and 5 at the time and place of occurrence the trial Court entertained grave doubts. If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny. In the instant case, P.Ws. 4 & 5 were agnatic relations of the deceased-one of them a close one. The reason given by them for being at the place of occurrence did not appear to be true to the trial Court. There was not any compelling or sufficient reason for the High Court to differ from the evaluation of the evidence of the two chance witnesses. It may well be as remarked by the High Court that the respondent was also their collateral but they appeared to be partisan witnesses on the side of the prosecution and hence their testimony was viewed with suspicion by the trial Judge."

Learned counsel for the appellants, therefore, in effect argued that the PW-2 was a complete outsider and was not in fact an eye-witness and only to provide an eye-witness account, he had been introduced in the case. However, he submits that this introduction of the PW-2 could not be successfully done. Learned counsel for the appellants, therefore, submits that the testimony of PW-2 be out-rightly rejected.

(iii) Learned counsel for the appellants thereafter has submitted that at the time when the incident had occurred, the Police had reached the spot and had recovered from the spot five empty cartridges and these five empty cartridges were kept in a sealed cover. Recovery memo was prepared on 06.03.2009 in the presence of two witnesses Sanjay Singh and Rajendra Singh. At the time of the postmortem, from the dead bodies of Neeta Singh and Shiv Tilak again four bullets were found. In the body of Shiv Tilak Singh there was a fire wound entry and the bullet which had embedded itself in his body was extricated. Similarly, there were three firearm injuries on the dead-body of Neeta Singh and they were all entry wounds and therefore three bullets were found in the postmortem. These used bullets were also kept by the Police in a sealed cover in Malkhana on 21.05.2009. As per Exhibit Ka-33 the firearm, the empty cartridges and the bullets which were retrieved from the dead-bodies were sent to the forensic laboratory at Agra. The forensic laboratory upon opening the sealed covers numbered the empty cartridges as EC-1 to EC-5. The revolver of point 32 bore which was recovered from Santosh Kumar Dwivedi was numbered as 1/09. The live cartridges of this revolver were given the numbers as LC-1 to LC-4. The revolver which was allegedly that of Anesh Saxena was numbered as 2/09 and the live cartridges which were found were of that revolver were numbered as LC-5 to LC-8. The other firearms and the other bullets, which were found from other co-accused, were also numbered. The four bullets, out of which the three were found from the body of the deceased Neeta Singh were numbered as EB-1, EB-2 and EB-3 and the fourth bullet which was found from the body of Shiv Tilak was numbered as EB-4. The report which the forensic laboratory gave was to the effect that

the empty cartridge one, empty cartridge two and the empty cartridge four were fired from the revolver 2/09, while the empty cartridge three and empty cartridge four were fired from the revolver 1/09. However, it gave a definite report that the bullets EB-1, EB-2 and EB-3 did not match the revolvers which were in question. However, EB-4 matched a particular revolver. Learned counsel for the appellants, therefore, states that the entire prosecution case becomes falsified. The Constable, Ram Sajivan PW-13 had taken into custody the firearm and the bullets on 21.05.2009. However, the Exhibit Ka-43 i.e. the document by which the report was given, shows that the bullets and the firearms had reached the forensic laboratory on 25.05.2009. Learned counsel for the appellants states that Kanpur Nagar from Agra is hardly two hours away but it took the firearms and the bullets to reach Agra from Kanpur almost four days. This delay, learned counsel for the appellants states, is unexplainable. The Constable Ram Sajivan PW-13 upon being questioned as to how such a delay occurred in sending the bullets and the firearms, he stated that when the document Exhibit Ka-33 was prepared, the articles which he had to take, were given to him on that very date i.e. on 21.5.2009. But, he states that, thereafter he had kept the articles, which were given to him, again in the Malkhana and thereafter he was again given the articles i.e. on 24.5.2009. He states that his ravangi was entered in the General Diary on 21.05.2009 and on 24.05.2009. He states that after the articles were taken out on 21.5.2009 they were again kept in the Malkhana and thereafter again taken out. However, these activities were not registered in any register. Since learned counsel for the appellants heavily relied upon a certain portion of the statement of PW-13, the same is being reproduced here as under :-

"जिस दिन प्रदर्श क-33 व क-34 तैयार किये गये थे उसी दिन मुझे दे दिये गये थे। ये दोनो प्रपत्र एक ही दिन मुझे मिले थे। जिस दिन ये दस्तावेज तैयार करके मुझे दिये गये थे उसी दिन मुझे वस्तुएं भी प्रदान कर दी गई थी।

प्रश्नः- जिस समय आपको वस्तुए मिली और विधि विज्ञान प्रयोगशाला में दाखिल करने तक आपके कब्जे में रही ?

उत्तरः- डाकेट व वस्तुए मिली थी उनको थाने के मालखाना मे दाखिल किया व विधि विज्ञान प्रयोगशाला में दाखिल करने के लिए रवाना होने पर पुनः मिली उसके बाद विधि विज्ञान प्रयोगशाला में दाखिल करने तक मेरे कब्जे में रही।

पहली बार दिनांक 21.05.09 को प्राप्त हुई और 21.05.09 को ही थाने में जमा कर दी। दुबारा 24.05.09 को वस्तुएं प्राप्त हुई थी। ऐसा नहीं है कि बीच में और कभी मिली हो। दिनांक 24.05.09 को माल निकालने के लिये थाने मे कोई प्रार्थना पत्र नहीं दिया क्योकि जरूरत नहीं थी।

प्रश्नः- दिनांक 24.05.09 को माल निकालने के थाना इन्चार्ज या समाप्त ? अधिकारी की अनुमति प्राप्त की गई?

उत्तरः- मैने मालखाना इन्चार्ज हेड मुहर्रिर ने ही निकालकर दिया था।

दिनांक 21.05.09 व 24.05.09 की जी०डी० मे मेरी रवानगी दर्ज है यह रवानगी माल निकालने के सम्बन्ध में दर्ज है। यदि दिनांक 22.05.09 व 23.05.09 में सामान निकालना दर्ज हो तो वह गलत होगा।"

Learned counsel for the appellants relying upon the statement of the PW-13 states that in fact the firearm and the empty cartridges after they were taken out after 21.05.2009, were again fired and the empty cartridges which the Police now obtained were kept as original empty cartridges. However, since there was no chance of changing the bullets which were retrieved from the dead bodies, they remained the same. He, therefore, states that as per the forensic laboratory's report, the empty cartridges matched but the three out of the four bullets which were retrieved from the dead-bodies had not matched the firearms. He, therefore, submits that the prosecution had tried to come up with an absolutely false case and those very firearm which were sent to the forensic laboratory were not used by the alleged assailants.

(iv) Learned counsel for the appellants states that PW-3 who was the daughter of the deceased-Neeta and was named Nidhi was also such a witness who could not be relied upon. He submits that the PW-3 was of a tender age at the time when the incident had occurred. She was, at the time of incident, just ten years of age and on the date of the recording of her examination-in-chief she was thirteen years of age. Learned counsel for the appellants states that the deceased had four children namely Nidhi, Nishi, Abhay and Tushar. Nishi was elder to Nidhi, yet no evidence of Nishi was got recorded. Nidhi who got tutored, gave her evidence. Learned counsel for the appellants states that the incident in question occurred on 05.03.2009. There is absolutely no reference of any injury to the PW-3 Nidhi on that date. Even in his statement under Section 161 Cr.P.C., the PW-2 first informant, did not mention about any injury to Nidhi. Suddenly on 07.03.2009, Shyam Singh, an uncle of the child witness Nidhi, who was a lawyer got a recommendation from the Police for medical examination of the child witness Nidhi. Even the recommendation did not mention about any particular injury. The injury report which was given by Dr. Shailendra Tiwari does not say that the injury was serious. In his examination-in-chief and in his cross-examination, the doctor clearly states that he had never stated that the injury was because of any firearm and it could also have been by the heat emitted from a candle. He had stated that there was no infection in the injury and there was absolutely no doubt about the fact that it was a harmless injury. Learned counsel for the appellants thereafter took the Court to the statement of the PW-3 the child witness and he submits that there were major contradictions in the statement of the child witness. Learned counsel for the appellants stated that on 27.06.2011, in her cross-examination before the Court, she states that her elder brother was studying in Doon International School and thereafter she again says that all the four children were studying in Doon International School. She states that her residential address in the school was given as Nauraiya Kheda. However, subsequently in her cross-examination on 29.06.2011, she states that till the 5th standard, she had studied in Nauraiya Kheda and that the name of the school was Kedar Singh Inter College. These two statements which the PW-3 gave on 27.06.2011 and 29.06.2011 are being reproduced here as under :-

"27.6.2011

मेरी बडी बहिन ऋषि दून इन्टरनेशनल स्कूल में पढ़ती है। हम चारो भाई बहिन दून इण्टरनेशनल स्कूल में पढ़ते है। हम दोनो बहिने पिछले 4-5 साल से व कक्षा-2 से इस स्कूल में पढ़ रहे है। स्कूल में हम लोगों का पता नौरैया खेड़ा का शायद लिखा है।

29.6.2011

मैनें कक्षा 5 नौरया खेडा से पढ़ी हूँ इस समय कक्षा 6 में पढ़ रही हूँ। इन स्कूल से पहले केदार सिंह इण्टर कालेज में पढ़ते है। मेरे भाई लोग केदार सिंह इण्टर कालेज में नही पढ़ते थे वह छोटे थे।"

Learned counsel for the appellants, therefore, states that when there was no injury on the body of the child witness Nidhi and the same was created by the family members and thereafter an injury report was obtained, it all clearly went to show that the child witness was being used for the purposes of giving credence to the prosecution case. Learned counsel for the appellants further states that under no circumstance could it be established that the injury was an injury caused during the incident. He, in fact, goes to the extent of pointing out from the judgement of the Sessions Court where he had disbelieved the injury. Learned counsel for the appellants also states that the contradiction in the statement of the child witness also goes to show that she was a tutored witness. What is more, learned counsel for the appellants

submits that none of the other witnesses were brought-forth in the evidence box as they could not be tutored and only one child witness could be tutored. To bolster this argument, learned counsel for the respondents, relied upon a judgment of the Supreme Court in **AIR 2023 SC 3245 : Pradeep vs. State of Haryana** and specifically relied upon paragraphs 8 and 9 which are being reproduced here as under :-

"8. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

9. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

He further relied upon a judgment of the Supreme Court in **State of M.P. vs. Ramesh & Anr. reported in 2011 Cri.L.J. 2297** and since he relied upon paragraph 13, the same is being reproduced here as under :-

"13. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an interference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

Similarly, in paragraph 9 of the judgment of the Supreme Court in **K. Venkateshwarlu vs. State of Andhra Pradesh : 2012 Cri.L.J. 4388**, the law is clear that a child witness, unless his witness is corroborated, should not be relied upon. Ultimately, learned counsel for the appellants relied upon the judgment of the Supreme Court in **Radhey Shyam & Ors. vs. State of Rajasthan : (2023) 6 SCC 151** and here he relied upon paragraph 6 which is being reproduced here as under :-

"6. The age of PW3 was 12 years at the time of the recording of her evidence. Evidence of PW 3 cannot be rejected only on the ground that her age was 12 years. However, being a child witness, her evidence needs a very careful evaluation with greater circumspection considering the fact that a child witness can always be easily tutored. Therefore, we have made a careful scrutiny of her version"

Learned counsel for the appellants, therefore, states that the evidence of a child witness needs a careful evaluation with a great circumspection as a child witness is always amenable to tutoring. In the instant case, learned counsel for the appellants states that if proper scrutiny of the evidence of the child witness is done then definitely the evidence of the child witness had to be rejected.

(v) The other eye-witnesses Amar Singh and Preetam Singh, it was argued, were also created as eye-witnesses but they never cared to come in the witness box.

(vi) In the end learned counsel for the appellants states that the husband of the deceased-Neeta Singh though had appeared on the spot, as per the statement of PW-2, at 01:30 am after the incident had taken place at 09:00 pm on 05.03.2009, was never produced as an eye witness. Learned counsel for the appellants states that in fact the PW-2 had gone to the extent of saying that the husband of the deceased-Neeta had also appeared on the scene of the incident at the time of the postmortem on the next date i.e. on 06.03.2009 at around 10:00 to 11:00 am. He states that a husband whose wife had died and who as per Police had even talked to the accused person namely Anil Shukla on the date of the incident and who chose never to appear in the witness box, makes the prosecution story highly improbable and in fact puts the story of the prosecution in the realm of suspicion.

31. Ms. Archana Singh, learned Additional Government Advocate for the State, however, has argued that the arguments of the learned counsel for the appellants with regard to the FIR being ante-dated does not stand on any firm ground. She submits that when the FIR was lodged on 05.03.2009 at around 23:00 hours i.e. at 11:00 pm then it definitely narrated the incident which had occurred at 09:00 pm and if the PW-11 Akhilesh Kumar Shukla had stated that he had taken Neeta Singh and Shiv Tilak Singh upon an information which he had received at 09:00 pm then there was absolutely nothing wrong in it. He could have received, as had been brought on evidence, the information at about 09:00 pm from other sources on his mobile number and this if has not been questioned, then the question with regard to the FIR being antedated, could not be agitated in the criminal appeal. Learned Additional Government Advocate further submits that the chik which was written on receiving of the Tahreer was so written on one page because it got contained in that one page itself. Learned Additional Government Advocate thereafter answering to the submission of learned counsel for the appellants that the PW-2 was a chance witness and, therefore, he was never there, was also not having any ground to stand. She submits that it was very natural for PW-2 to have reached the house of the deceased-Neeta Singh as he was to take Neeta Singh and her children to a marriage ceremony. Still further, learned Additional Government Advocate has submitted that the testimony of PW-3 the minor daughter of Smt. Neeta i.e. Ms. Nidhi also could not be ignored. A child witness normally speaks the truth and even if there were minor contradictions in her statements, they could not be ignored. Still further, learned AGA submitted that it mattered little if the articles which were to be taken to the forensic laboratory were taken out on 21.05.2009 and that they reached the forensic laboratory at Agra on 25.05.2009. She submits that after the articles were taken out, they must have been taken by the PW-13 Ram Sajivan at his own convenience.

32. Sri Anil Srivastava, learned Senior Counsel appearing for the first informant adopted the arguments of the

learned AGA and vehemently argued that the appeal, on the basis of the direct eye-witnesses account, be dismissed.

33. Having heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri P.K. Singh and Sri Vijay Singh Sengar, learned counsel for the appellants; Sri Anil Srivastava, learned Senior Advocate assisted by Sri Ram Bahadur, learned counsel for the informant and Ms. Archana Singh, learned Additional Government Advocate for the State, we are of the view that the criminal appeals deserve to be allowed. The fact that the PW-2 reached at the spot on the relevant date is very doubtful in view of the extremely shaky evidence of his. He had reached the flat where Neeta Singh was staying on a motorcycle whereas he was in possession of a car. When he was conscious that he had to take the whole family the natural thing would have been that he ought to have gone on a car. However, not taking of the car to the house of Neeta Singh, could have been ignored, had, upon a specific question being asked as to where was the invitation card, he had given an absolutely unacceptable reply with regard to the invitation card. Still further, had the story about going to the marriage, not been told, we would have considered the presence of PW-2 at the house of Neeta Singh, a close relative, a very natural thing to happen. However, what makes the prosecution case doubtful is that when the PW-2 was to take the family of the deceased to a marriage, then he ought to have mentioned about it in the FIR itself. Further in the very beginning of his testimony, he should have told about the place where he along with the deceased and her family was to go to the marriage. Still further he states that no invitation card was there on record. At one place he had stated that he was going to attend the marriage of the daughter of his *Jija* and at another place he had stated that the marriage was not of a very close niece but of the daughter of a *Jija* who was married to the daughter of a Fufa of PW-2. We also find that the PW-2 has not been able to definitely produce any invitation card for the marriage to which he intended to take Neeta Singh and her children. Still further, we find that the husband of Neeta Singh was not in Kanpur Nagar but was in Lucknow. He had no intention of attending the marriage. Similarly, we find that the other brothers who were six in number of PW-2 had also no plans of attending the marriage. In fact there is no case put-forth by the prosecution that the other brothers were to attend the marriage. What is more we find from the record that the husband of Neeta Singh had called up Anil Shukla on his phone on the date of the incident at around 09:35 pm and it has been stated that Anil Shukla was attending some other marriage. All this clearly goes to show that PW-2 was only making out a case so as to show that he was available at the flat when the incident happened and thus he was a chance witness who had been created to become an eye-witness.

34. The appellants' side, by their arguments, had clearly been able to dislodged the PW-2 as an eye-witness. Here it might suffice to say that the appeals could have been allowed by this Court on this ground itself. However, we are dealing with the other issues also as they were argued at length by the counsel for the appellants.

35. The PW-3, it has been submitted by the learned counsel for the appellants, was a child witness and, therefore, her evidence should be evaluated with caution. We find from a perusal of the FIR that it does not mention about any injury

to the child witness Nidhi. We also find that for two good days the child witness and all her relatives had remained quiet about the alleged injury on her body. Suddenly on 07.03.2009 upon the entry of an uncle Shyam Singh who himself was a lawyer of some standing, the child witness was sent for medical examination. The medical examination was preceded by a chitthi majroobi which did not contain any elaborate description of any injury which had to be examined. She was sent for a general medical examination. The doctor who examined the injuries has appeared in the witness box and had stated that the injuries were definitely not of a gun shot. In fact the Court below had disbelieved the case which had been brought-forth by the child witness with regard to the injuries on her person. Still further, we find that the child witness had faltered in giving description of the school which she and her siblings were studying in for the past five years.

36. We also find that none of the brothers of PW-2 Virendra Singh appeared in the witness box. It is alright if all the brothers had not appeared but definitely the Court gets a feeling that all evidence brought-forth by the prosecution should be analysed with some trepidation and caution when a very important witness i.e. the husband of the deceased Neeta Singh was not produced as a witness of the prosecution. He was the person who could have definitely told in the first person as to whether there were any commercial transaction between him and Sonu Saxena which had been made to appear to be a cause for the murders which had taken place. We find from the evidence that on the date of occurrence i.e. 05.03.2009, the PW-2 Virendra Singh (first informant) had testified before the Court that the husband of the deceased i.e. Putti Singh had come to the hospital at around 01:30 am in the morning of 06.03.2009. He states that he was also present at the time of postmortem but what prevented him from actually participating in prosecution, makes the whole story of the prosecution very mysterious and weak.

37. With regard to the report of the ballistic expert also, this Court is of the view that when the ballistic expert stated that the empty cartridges matched, but the bullets which had entered the body did not, then it creates a definite doubt that there was some tampering done with the firearms. The firearms, as per the statement given by PW-13 Ram Sajivan, were taken out from the Malkhana on 21.05.2009 and again they were kept inside the Malkhana after one day and were handed over to PW-13 on 24.05.2009. This time, the Court feels, which the prosecution got, definitely must have enabled the prosecution to tamper with the firearms and therefore, the case of the prosecution becomes doubtful.

38. So far as the antedating of the FIR is concerned, definitely a doubt is created when the chick is seen. The chick is transcribed only on one page and if one looks at the hand-writing then it appears that efforts had been made to make the chick FIR fit into one single page. The effort was to the extent that even in the margin of the page, the chick was written. However, since there is no definite proof of any antedating, we cannot wholly rely upon this argument of the appellants.

39. From the record, we find that the appellant-Anesh Saxena @ Sonu Saxena, who had filed Criminal Appeal No.2559 of 2014, had died on 19.4.2016 and, consequently the appeal vide order dated 27.2.2017, stood abated.

40. Thus, for all the reasons which form part of this judgment, the Criminal Appeal Nos.2558 of 2014; 2582 of 2014; 2639 of 2014 and 2640 of 2014 are allowed. The judgment and order dated 26.6.2014 passed by the Additional Sessions Judge, Court No.5, Kanpur Nagar is quashed. The appellants namely Sushil Kumar Dwivedi @ Sonu Dwivedi, Anil Kumar Shukla; Santosh Kumar Dwivedi @ Guddu Dwivedi and Shrawan Kumar Shukla @ Tanu Shukla, who are in jail, be released forthwith unless they are required in any other case.

(2024) 5 ILRA 115
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Appeal No. 2609 of 2022

Pradeep Kumar Verma ...Appellant
Versus
Union of India ...Respondent

Counsel for the Appellant:
Rajeev Kumar Srivastava

Counsel for the Respondent:
Shiv P. Shukla

Criminal Law-Indian Penal Code-1860-Sections 120-B, 409 & 477-A - Prevention of Corruption Act, 1988-- Section 13 (2) r/w Section 13 (1) (c) (d) -The Code of Criminal Procedure,1973-Section 197-The Constitution of India, 1950- Article 20 (3) - Criminal Appeal against order of conviction passed by the trail court-The learned trail court without referring to the prosecution evidence has proceeded to refer to the defense evidence first-An authority competent to remove an official from service is competent to give sanction for prosecution of the employee but the Prosecution did not adduce any documentary evidence before the trial Court to prove as to who was the authority competent to remove a Postal Assistant and an Assistant Post Master from service.

The trial Court has not even gone through the St.ments given by the prosecution witnesses in their cross-examination- No proof of any falsification of account- No proof that any of the appellants had obtained any valuable thing or pecuniary advantage or that they intentional enriched themselves illicitly during the period of their office- No accused person can be convicted on the basis of a mere presumption- No accused person is bound to disclose facts which will ensure his conviction- The difficulty in adducing direct evidence does not mean that the prosecution is not required to adduce any evidence of conspiracy and the Court will simply presume that the accused persons had entered into a conspiracy. In absence of direct evidence, conspiracy has to be proved by circumstantial evidence-The enquiry team had not made any enquiry regarding who was guilty for the embezzlement-Prosecution could not give any evidence of a conspiracy between the accused persons and the only evidence was one accused acted negligently in supervising the work of the other accused-Result- judgment of conviction and sentence set aside

Appeal allowed. (E-15)

List of Cases cited:

1. Manzoor Ali Khan Vs U.O.I. & ors.: (2015) 2 SCC 33

2. Heera Lal Bhagwati Vs CBI: AIR 2003 SC 2545

3. Esher Singh Vs St. of A.P. (2004) 11 SCC 585

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

1. Heard Sri Manish Bajpai, the learned counsel for the appellant in Criminal Appeal No.2261 of 2022, Sri Rajeev Kumar Srivastava, the learned counsel for the appellant in Criminal Appeal No.2609 of 2022 and Sri Shiv P. Shukla, the learned counsel for the respondent-Union of India.

2. Both the aforesaid appeals have been filed against the same judgment and order dated 25.08.2022, passed by the learned Special Judge, P.C. Act, C.B.I. Court No.4, Lucknow in Criminal Case No.18 of 2007, which was instituted on the basis of F.I.R. bearing R.C. No.6 (A) of 2007 and, therefore, the same are being decided by a common judgment.

3. The facts relating to Criminal Appeal No.2609 of 2022 & Criminal Appeal No.2261 of 2022 are that the Superintendent, Post Office, Fatehgarh Division, Farrukhabad had given a complaint dated 28.02.2007 to the Superintendent of Police, C.B.I./A.C.B. Lucknow stating that Pradeep Kumar Verma (the appellant in Criminal Appeal No.2609 of 2022 was posted as Postal Assistant, Amar Nath Agnihotri (the appellant in Criminal Appeal No.2261 of 2022) was posted as Assistant Postmaster and Alladin was posted as Postmaster in the Head Post Office, Fatehgarh, District Farrukhabad during the period August 2005 to January 2006. Pradeep Kumar Verma was assigned the duties of savings certificate discharge counter. He used to receive cash from the head post office and to make payments in respect of National Savings Certificate (NSC), Kisan Vikas Patra (KVP) and Indira Vikas Patra (IVP) and after fulfilling all the formalities Amar Nath Agnihotri, Assistant Postmaster used to examine the documents and Alladin, Post Master used to verify the transactions regarding NSC, KVP and IVP. In the months of August 2005 to January 2006, Pradeep Kumar Verma embezzled Rs.31,92,772/-. Amar Nath Agnihotri and Alladin did not check the receipt book, discharge journals and monthly returns etc. properly, made false entries in records, committed forgery in the documents and embezzled Rs.31,92,772/-. The offence was committed in connivance with Amar Nath Agnihotri and Alladin. The Superintendent of the Post Office had made a request for initiating legal proceedings against Pradeep Kumar Verma, Amar Nath Agnihotri and Alladin.

4. On the basis of the aforesaid complaint, an F.I.R. bearing RC No.06 (A) of 2007, under Sections 120-B, 409, 477-A I.P.C. and Section 13 (2) read with Section 13 (1) (c) (d) of Prevention of Corruption Act, 1988 was lodged in Police Station C.B.I./A.C.B. Lucknow, U.P. After investigation a charge-sheet dated 19.06.2007 for the offences under Sections 120-B, 409, 477-A I.P.C. and Section 13 (2) read with Section 13 (1) (c) (d) of Prevention of Corruption Act, 1988 was filed against Pradeep Kumar Verma and Amar Nath Agnihotri only and the learned trial court took cognizance of the offence on 08.06.2007 and they were tried in Criminal Case No.18 of 2007.

5. Both the accused persons were convicted and sentenced as follows: -

(i) three years simple imprisonment and Rs.20,000/- fine for the offence under Section 120-B I.P.C. read with Section 409, 477-A I.P.C. and simple imprisonment for an additional period of four months in case of failure to pay fine;

(ii) ten years simple imprisonment and Rs.25,000/- fine for the offence under Section 409 I.P.C. and simple imprisonment for an additional period of one year in case of failure to pay fine;

(iii) five years simple imprisonment and Rs.20,000/- fine for the offence under Section 477-A I.P.C. and simple imprisonment for an additional period of one year in case of failure to pay fine;

(iv) five years simple imprisonment and Rs.20,000/- fine for the offence under Section 120-B I.P.C. read with Section 13 (2) read with 13 (1) (c) (d) of Prevention of Corruption Act, 1988 and simple imprisonment for an additional period of five months in case of failure to pay fine;

(v) five years simple imprisonment and Rs.20,000/- fine for the offence under Sections 13 (2) read with 13 (1) (c) of Prevention of Corruption Act, 1988 and simple imprisonment for an additional period of five months in case of failure to pay fine; and

(vi) five years simple imprisonment and Rs.20,000/- fine for the offence under Sections 13 (2) read with 13 (1) (c) of Prevention of Corruption Act, 1988 and simple imprisonment for an additional period of five months in case of failure to pay fine.

6. A charge-sheet was submitted against both the appellants on 07.12.2011, under Sections 120-B read with 409 and 477-A I.P.C. 409 I.P.C., 477-A I.P.C. 120-B I.P.C. read with Section 13 (2) read with 13 (1) (c) (d) of Prevention of Corruption Act, 1988, Section 13 (2) read with 13 (1) (c) of Prevention of Corruption Act and Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act.

7. The prosecution examined eleven witnesses besides submitting documentary evidences.

8. The appellant Pradeep Kumar Verma denied the allegations in his statement under Section 313 Cr.P.C. and stated that the prosecution sanction had been granted against the Rules. He had done all works relating to KVP, NSC and IVP and prepared discharge journals and hand-to-hand receipt books in his own hand writing as per the Rules, on the basis whereof the day-to-day account was countersigned by the Treasurer, the Postmaster and APM-II. Had he committed any irregularities the Assistant Postmaster and the Postmaster would have made a complaint to the higher authorities. The Investigating Officer conducted the investigation properly and submitted a charge-sheet wrongly. The matter was initiated by an unsigned letter dated 09.10.2006 purportedly sent by some office bearer of the employees union. Pradeep Kumar Verma had been elected as a delegate in the elections of U.P. Postal Cooperative Society held in September 2006, due to which his rivals and some other persons had become jealous of him. A dispute had occurred with PW-3 Arun Yadav regarding checking of attendance register of Head Post Office relating to August, 2006. He had been falsely implicated due to these reasons.

9. The other appellant Amar Nath Agnihotri stated in his statement recorded under Section 313 Cr.P.C. that the prosecution sanction had been granted in a mechanical way without independent application of mind. The responsibility of supervision of daily work rests on the Postmaster. He stated that he had joined the Postal Department in July, 2004 after coming back from Army Postal Service. During this entire tenure he did not verify any document. No punishment was imposed upon him in the departmental proceedings, whereas some other employees had been punished.

10. A bare perusal of the impugned judgment and order passed by the learned trial court indicates a glaring flaw in its approach inasmuch as without referring to the prosecution evidence, the learned trial

court has proceeded to refer to the defense evidence first.

11. DW-1 Pradeep Kumar Verma stated that he got appointed in Postal Department on 01.11.1983 as a Branch Assistant. He remained posted in various sub post offices. He had passed the savings bank eligibility test in the year 1996. He was transferred to the post of Postal Assistant in Head Office, Fatehgarh on 16.06.2005. He was assigned the duties of savings bank section. He had been elected the Divisional Secretary of the departmental employees union in the year 1992. In the year 1997, he was elected as the Divisional Secretary of All India Postal Employees Union Class-III. In the year 2005 he had been elected as a delegate of U.P. Postal Cooperative Societies, Hazratganj, Lucknow. Dr. Arun Yadav, who was working as Complaint Inspector in the office of Postal Superintendent, Fatehgarh, had openly supported the appellant's rival candidate and he had pressurized the polling officials to get votes in favour of another candidate. A complaint in this regard was made to the Superintendent of Post Office, Farrukhabad, whereupon Dr. Arun Yadav had been removed from the polling centre. While Dr. Arun Yadav was holding the post of Complaint Inspector, he came at about 2.30 p.m. on some day in August, 2005 and checked the attendance register and he misbehaved with the employees who had not signed the attendance register, including a lady employee Smt. Sunita Yadav. The employees told Pradeep Kumar Verma about the ill treatment of Dr. Yadav and he had talked to Dr. Arun Yadav stating that a crowd gathers even before opening of the counters and in a haste of starting the work the employees could not have made their signatures. The complaint of this incident was also made to the Superintendent Post Office Farrukhabad, whereupon Dr. Arun Yadav had abused and threatened Pradeep Kumar Verma that he would not be able to continue his service.

12. Pradeep Kumar Verma further stated that Lajja Ram Dixit, who was working as an Assistant Post Master-II, has leveled a false allegation that the appellant had taken away the pending return vouchers. In the year 1999 several complaints regarding corruption were made against the Post Office Superintendent R. P. Tripathi. The Chief Post Master General, Lucknow had sent a letter dated 25.11.1999 to Pradeep Kumar Verma asking him to examine the correctness of the complaint. While the appellant was lodged in District Jail, Lucknow since April, 2007, on 25.09.2008 he was removed from service in furtherance of an ex-parte enquiry, on some other charges, which are not related to the allegations of embezzlement involved in the present case.

13. Pradeep Kumar Verma also stated that no complaint of the alleged embezzlement had been made by any investor. An unsigned complaint was made at 10.00 a.m. on 09.10.2006 when the Superintendent of the Post office was on L.T.C. leave and without verifying its correctness, an enquiry team was constituted consisting of R.C. Verma and Sarvesh Kumar Mishra, Inspectors Post Office, Farrukhabad, Imran Khan, the Complaint Inspector, Farrukhabad and Dr. Arun Yadav, Inspector, Post Office, Chhibramau and it reached Head Post Office Farrukhabad within an hour at about 11.30 a.m.. The members of the enquiry team remained present in the Head Office till 4.00 p.m. on 09.10.2006. The returns of KVP, NSC, IVP for all pending months had already been prepared, been signed by the

Assistant Postmaster-II, Amar Nath Agnihotri and had been handed over to Postmaster, Fatehgarh even before 09.10.2006 for physical verification of return vouchers. The return of the Head Post Office and 63 other Sub Post Offices had already been submitted for certification of the cash-books by Assistant Postmasters Accounts/Postmasters.

14. Pradeep Kumar Verma further stated that while the enquiry team was present in the Head Office on 09.10.2006, three bags containing KVP of the months March, 2006, July, 2006 and September 2006 had been booked in parcel at 01.53 hrs. which bags had been handed over by Banking Clerk Rajesh Shakya to Smt. Sunita Yadav on the dispatch counter. In her examination, the Dispatch Clerk Sunita Yadav admitted having received three parcels and having sent the same to RMS, Kanpur. On 10.10.2006 the Postmaster Fatehgarh, Alladin had given information of booking of return parcel to the Assistant Superintendent and the officer in-charge of the enquiry team, where upon all the three booked parcels were intercepted midway and received by the Assistant Superintendent Headquarter at his office on 11.10.2006, whereas as per the departmental Rules, any registered post/parcel can be returned only on the request of the sender. The parcels in question had been sent by the Postmaster, Head Post Office, Fatehgarh and he had not made any request for getting return of the already sent parcels. All the three parcels were opened without any order of Superintendent, Post Office, Farrukhabad and a list/inventory was prepared. The discharge journal, hand-to-hand receipt book and payment register etc. used to be given to the Treasurer and the Treasurer used to prepare HO summary, payment journal, vouchers and payment register on daily basis. When the account tallied, the Assistant Postmaster-Accounts used to make entries in the cash-book. After the account was tallied, the original vouchers and journal returns used to be kept in the custody of the Assistant Postmaster-II. The number of KVP, NSC and IVP, in respect of which payment was made on daily basis, was shown in the monthly statistics register which was signed by the Postmaster on daily basis.

15. After referring to the evidence of accused-appellant Pradeep Kumar Verma the learned trial court has referred to the submissions advanced on behalf of the accused Pradeep Kumar Verma in order to establish that he is innocent. This approach of the learned trial court is also patently erroneous and against the well established principles of trial of criminal cases in which the prosecution is required to make out a case and it is only thereafter that an accused person is called upon to defend himself. Therefore, the trial courts first deal with the prosecution evidence and submissions made by the prosecutor and the defence is considered only later on but a contrary approach has been adopted by the learned trial court in the present case.

16. It was argued on behalf of the prosecution that while working on the post of Postal Assistant in the Head Office, Fatehgarh, District Farrukhabad on 17.08.2005, 20.08.2005, 22.08.2005, 25.08.2005, 02.09.2005, 03.09.2005, 13.09.2005, 15.09.2005, 05.10.2005, 22.10.2005, 24.10.2005, 26.10.2005, 29.10.2005, 17.11.2005, 18.11.2005, 19.11.2005, 30.11.2005, 05.12.2005, 06.12.2005, 07.12.2005, 12.12.2005, 16.12.2005, 29.12.2005, 17.01.2006 and 23.01.2006, the appellant Pradeep Kumar Verma, acting under a criminal conspiracy

with the other appellant Amar Nath Agnihotri, showed payment of excess amount in the government documents e.g. hand-to-hand receipt books, discharge journals and monthly returns etc. and he dishonestly made payments of KVP of lesser value. By committing forgery and making false entries in the documents, he misappropriated Rs.31,92,772/- and thereby caused wrongful gain to himself and to the co-accused Amar Nath Agnihotri and he caused wrongful loss of the aforesaid amount to the postal department.

17. The trial Court referred to the examination-in-chief of PW-1 Awdhesh Kumar Srivastava, who was posted as Superintendent, Post Office Fatehgarh in the year 2007 and he had granted sanction for prosecution of the appellants. He stated that he was the competent authority to remove both the appellants from their posts.

18. The learned trial court held that the prosecution sanction was granted by PW-1 after applying his independent mind and it was legal and valid. It is relevant to note that only an authority competent to remove an official from service is competent to give sanction for prosecution of the employee but the Prosecution did not adduce any documentary evidence before the trial Court to prove as to who was the authority competent to remove a Postal Assistant and an Assistant Post Master from service.

19. PW-2 Uday Prakash Gangal stated in his examine-in-chief that he was posted as Assistant Superintendent, Post Office, Fatehgarth from the afternoon of 23.02.2007 to 07.10.2009 and he had worked as officer-in-charge of the enquiry team with effect from 06.03.2007. The other members of the enquiry team were Sri Ram Sagar Sharma, Deputy Divisional Inspector, Kannauj, Dr. Arun Yadav, Deputy Divisional Inspector, Chhibramau and Sri Sarvesh Kumar Mishra, Deputy Divisional Inspector Farrukhabad. Prior to PW-1 Sri R. C. Verma and Sri R.S. Pal had headed the enquiry team respectively. The PW-2 proved the F.I.R. that had been lodged by the PW-1 Awdhesh Kumar Srivastava. This witness deposed about the procedure for payment of KVP as per which at the start of the day, the Postal Assistant KVP payment counter receives cash after making entry in the cash-book maintained by the Treasurer, after verification by the Postmaster or the Assistant Postmaster. In absence of the Treasurer, he obtains payment from other Postal Assistants working on other counters with the prior approval of Postmaster or the Assistant Postmaster and these transactions are recorded by the concerned Counter Assistant in hand-to-hand receipt books. The KVPs received for payment are checked by the Postal Assistants working on KVP payment counter and thereafter he presents the KVPs along with guard-file of purchase of KVP certificate to the Assistant Postmaster. After checking the details, the Assistant Postmaster grants approval for payment and makes a remark *"paid on ……date"* on the certificate. The Postal Assistant also makes an entry on the certificates received after approval of Assistant Postmasters and in case the amount to be paid is less than Rs.20,000/-, he makes cash payment after taking an acknowledgment of receipt, but if the amount is Rs.20,000/- or more, the payment is made through an account payee cheque. At the close of each working day the Postal Assistant working on the KVPs payment counters prepares the discharge journals of paid KVPs containing serial number of the certificate, it's value and registration number. The discharge journals are prepared

denomination wise and are checked and sanctioned by Assistant Postmasters on daily basis. The Postal Assistant working on the payment counter maintains the register of discharged KVPs, wherein the consolidated amount paid denomination wise is also recorded. The Assistant Postmasters tallies the discharge details recorded in the discharge journals with the discharged KVPs and attaches the discharged KVPs to the discharge journal. The discharge journals are signed by the Postal Assistant and Assistant Postmaster and the seal of the post office is put on it. The Postal Assistant prepares an abstract in the hand-to-hand receipt book wherein he enters the total amount received from the treasury, the total amount received from the other Postal Assistants and the total amount paid and he returns the balance amount to the treasurer. The Treasurer receives the balance amount and enters it in the hand-to-hand receipt book. The Treasurer prepares Head Office summary according to the aforesaid abstract of discharged certificates and treasurer's cash-book.

20. PW-2 categorically stated that the Postmaster is responsible for the entries made in the Head Office summary. The discharged certificates and the discharge journals are kept in the personal custody of Assistant Postmasters, till the same are submitted to the Director of Postal Accounts. At the end of the month, a consolidated summary of the discharged certificates is prepared under the supervision of the Assistant Postmaster and the original discharged certificates are sent to the Director, Postal Accounts, Lucknow. The postmaster is responsible for sending the monthly details to Director Postal Accounts. The Treasurer maintains the Head Office summary wherein the receipts and payments made under all the heads are recorded. The Postmaster checks the Head Office summary from the registers of all the related sections. The Postmaster checks the discharged savings certificates and satisfies himself that the amount of paid up savings certificates mentioned in the Head Office summary is as per the discharge journals of discharged certificates and that they are available in record.

21. The PW-3 Arun Yadav stated in his examination-in-chief that he was a member of the enquiry team constituted for enquiring embezzlement made in the Head Post Office Fatehgarh during the period August, 2005 to January, 2006. The enquiry was conducted after the relevant original KVPs discharge journals were received back from the Director, Postal Accounts, Lucknow and it was found that embezzlement of Rs.1,00,000/- was made on 20.08.2005, Rs.1,00,000/- on 22.08.2005, Rs.19,19,942/- on 25.08.2005, Rs.40,516 on 02.09.2005, Rs.20,000/- on 03.09.2005, Rs.2,00,000/- on 13.09.2005, Rs.1,00,000/- on 15.09.2005, Rs.2,000/- on 05.10.2005, Rs.1,40,000/- on 22.10.2005, Rs.80,116/- on 24.10.2005, Rs.6,000/- on 29.10.2005, Rs.80,000/- on 26.10.2005, Rs.3,40,000/- on 18.11.2005, Rs.2,00,000/- on 18.11.2005, Rs.2,40,000/- on 19.11.2005, Rs.1,000/- on 30.11.2005, Rs.2,00,000/- on 05.12.20005, Rs.6,00,000/- on 06.12.2005, Rs.2,00,000/- on 07.12.2005, Rs.1,20,000/- on 12.12.2005, Rs.20,000/- on 16.12.2005, Rs.4,10,320/- on 29.12.2005, Rs.100/- on 17.01.2006 and Rs.2,000/- were embezzled on 23.01.2006. The accused had made an excess deposited of Rs.222/- on 17.08.2005. The total amount embezzled on the aforesaid dates came to Rs.31,92,772/- which had been made by the appellants. The complaint of embezzlement was made to C.B.I. by Awadhesh Kumar Srivastava, the

then Superintendent Post Office Fatehgarh (PW-1). The complaint Exhibit-A3/1 and A3/2 were proved by PW-2. He proved D-3 seizure memo dated 09.04.2007 relating to hand-to-hand receipt book, NSC, KVP issued during the period 01.08.2005 to 31.08.2005 and 01.10.2005 to 31.12.2005 and Head Office summary for the period 01.08.2005 to 11.08.2005 and 03.10.2005 to 30.12.2005 which bear signatures of U.P. Gangal (PW-2).

22. The witness PW-3 Arun Yadav stated that the members of the Enquiry Team had made an assessment of the embezzled amount on the basis of documents D-4, hand-to-hand receipt book of NSC, KVP, IVP, discharge accounts relating to the period August, 2005 to 31.12.2005.

23. The PW-4 Awadhesh Singh Yadav stated that he had worked on the NSC issue counter in the Head Post office during June, 2001 till September 2006. He stated that as he had worked with the appellants, he recognizes their hand writings and signatures. He proved documents D-4 hand-to-hand receipt book of NSC, KVP, IVP, discharge accounts which was marked as Ex-A7. Hand-to-hand receipt books for the dates 05.10.2005, 22.10.2005, 24.10.2005, 29.10.2005, 17.11.2005, 18.11.2005, 19.11.2005, 30.11.2005, 05.12.2005, 06.12.2005, 07.12.2005, 12.12.2005, 16.12.2005, 29.12.2005, 17.01.2006 and 23.01.2006 were attached to it. These hand-to-hand receipt books had been prepared and signed by Pradeep Kumar Verma. He stated that Suresh Chandra Gupta, Assistant Postmaster had worked and signed on 05.10.2005, 20.11.2005 and 30.11.2005. D-7 Treasure's cash-book had signatures of PW-4 as the treasurer on 05.10.2005. He further stated that the document D-5 was the hand-to-hand receipt books of the NSC/KVP issue counter for the period 01.08.2005 to 31.10.2005, which had been prepared by PW-3 in his own handwriting, except for 04.10.2005 and 07.10.2005.

24. PW-5 Collector Singh was posted as treasurer in the post office. He also stated that the hand-to-hand receipt book contains signatures of Suresh Chandra Gupta, Assistant Postmaster on some of the dates and on rest of the dates Amar Nath Agnihotri had signed as the Assistant Postmaster. While performing the duties of treasurer in that post office, PW-5 used to provide cash to RD counters and NSC discharge counter as per the instructions of the Postmaster or the Assistant Postmaster, make an entry in the cash-book and get the same signed by the concerned Postal Assistant. At the end of the working hours, the amount remaining with all the counters was received by PW-5 through hand-to-hand receipt book and entries were made in the Treasurer's cash-book and HO summary on the basis of hand-to-hand receipt book. While closing the treasury, signature of postmaster are obtained on the HO summary. This witness stated after seeing document D-9 that the certificates and discharge journals dated 17.08.2005 were available therein, which included one certificate of Rs.500/-, eleven certificates of Rs.1,000/-, seven certificates of Rs.5,000/- and 58 certificates of Rs.10,000/-, without any discharge journal. All the certificates and discharge journal bear signature of Amar Nath Agnihotri and the discharge journals had been prepared in the handwriting of accused Pradeep Kumar Verma. This witness proved KVP certificate and discharge journal filed as D-10 and stated that 4 certificates of denomination Rs.1,000/-, 7 of denomination Rs.5,000/- and 12 of denomination Rs.10,000/- and three discharge journals relating to the

aforesaid certificates prepared in the hand writing of Pradeep Kumar Verma were there before the witness and the rear side of KVP certificates and discharge journals bear signatures of Amar Nath Agnihotri, which was proved by him as Exhibit-A9. Similarly this witness proved D-11 containing 46 KVP certificates and discharge journals dated 22.08.2005, D-12 containing 64 certificates and discharge journals dated 25.08.2005, D-16 containing 33 certificates and discharge journal dated 02.09.2005.

25. The trial court observed that in the light of the aforesaid statements of witness when the court examined D-16, it was found that there were 10 certificates of denomination of Rs.1,000/-, 2 of Rs.500/-, 3 of Rs.5,000/-, 4 of Rs.100/- and 28 of Rs.10,000/- These certificates bear signatures of Suresh Chandra Gupta. Some of the certificates bear signatures of some other officer, which are not recognized by the witness.

26. PW-5 Collector Singh stated that the document D-13 consisted of 16 certificates of denomination of Rs.1,000/-, 2 of Rs.5,000/-, 9 of Rs.10,000/-, 18 of Rs.1,000/-, 01 of Rs.1,000/- and 01 of Rs.500/- along with voucher dated 03.09.2005. These certificates bear signature of some Assistant Postmaster other than Amar Nath Agnihotri. D-13 was marked as Ex-A-13. Similarly, this witness proved numerous other certificates and discharge journals for various dates.

27. PW-6 Ram Sagar Sharma stated that he had worked as Deputy Divisional Inspector Kannauj since 01.10.2004 to 30.09.2007 and he was one of the members of the enquiry team. The enquiry team had verified NSC, KVP payment vouchers for the period September, 2005 to January, 2006 which were provided to the enquiry team from the Head Post Office summary, the Treasurer cash-book and hand-to-hand receipt book etc. During continuance of the proceedings PW-6 had been included as a member of the enquiry team in place of Imran Khan. He stated that Pradeep Kumar Verma made payment of Rs.12,59,690/-, Rs.4,16,815/- Rs.5,84,070/-, Rs.13,04,284/- towards KVPs discharged on 17.08.2005, 20.08.2005, 22.08.2005 and 25.08.2005 respectively, whereas as per the available voucher the amount of payment on the aforesaid dates were Rs.12,59,912/-, Rs.3,16,815/-, Rs.4,48,070/- and Rs.11,04,342/- respectively and the difference amount had been embezzled by the accused persons. Similar statements were given regarding some other dates also and the witness stated that the accused persons embezzled a total of Rs.31,92,772/- to various dates. The basis of this inference of embezzlement was that the vouchers of the aforesaid amount were not found during enquiry. He further stated that the embezzlement was done by Pradeep Kumar Verma. Amar Nath Agnihotri was responsible for supervising the work of Pradeep Kumar Verma and he did not supervise it as per the departmental rules, due to which embezzlement was made and, therefore, Amar Nath Agnihotri is also responsible for the embezzlement.

28. PW-7 Sarvesh Kumar Mishra stated that he was also one of the members of the enquiry team. The enquiry team had conducted the enquiry on the basis of the documents and vouchers obtained from the Head Post Office, Fatehgarh in which it was found that the amount of vouchers received during the enquiry was less than the amount shown in the accounts as having been paid.

29. PW-7 categorically stated that the amount of payment vouchers which

were not available, was treated by the enquiry team as the amount embezzled. He further stated that as per the departmental rules, all the paid up vouchers ought to have been in custody of the Assistant Postmaster Amar Nath Agnihotri but the accused persons did not follow the departmental rules and these vouchers continued to remain with Pradeep Kumar Verma and were taken by Pradeep Kumar Verma to his home.

30. It is recorded in the judgment that PW-7 had been cross-examined on behalf of the accused persons and even in his cross-examination he merely reiterated the statements given in his examination-in-chief and no such discrepancy came to light in his cross-examination as may create a doubt against the credibility of this witness.

31. PW-8 Upendra Kumar stated that he used to work as a Postal Assistant on S/B Counter in August, 2005, during which period Amar Nath Agnihotri was working as Assistant Post Master-II (S/B). The Counter Clerks used to take cash from the Treasury in the morning and to render accounts and enter the balance amount in hand-to-hand receipt book and deposit the balance cash amount in the Treasury, after counter signature of APM-II. The APM-II used to prepare separate log books for the transactions made on the counters during the entire day and tally the same with hand-to-hand receipt books. Nominal roll was prepared by the Reader of the Postmaster and was signed by the Postmaster. Nominal roll contains particulars regarding which of the employee will perform which duty during the day. He further stated that the treasurer prepares a head-wise/item-wise HO summary on the basis of hand-to-hand receipt book for various counters. Pradeep Kumar Verma was looking after the work of NSC discharge, whereas this witness was working on S/B counter during the relevant time and he also gave a date wise description of the amounts obtained by Pradeep Kumar Verma like other previous witnesses.

32. PW-9 Santosh Kumar Pandey was working as a Junior Accounts Officer in the Office of the Director, Postal Accounts and he proved the document D-2, through which the summary description of discharged KVP Journals of the desired dates had been provided. The summary ran into 4 pages annexed with D-2 and he had gone to the C.B.I. Office and had handed over the same. In his cross-examination, PW-9 stated that the vouchers which could be found out, had been made available over to C.B.I. When asked about the monthly returns, PW-9 stated that whatever had been received through parcel, was made available to the C.B.I.

33. PW-10 Ram Shiromani Pal stated that he had worked as an Officer In-charge of the enquiry team. Pradeep Kumar Verma had prepared the hand-to-hand receipt book for the period 17.08.2005 to 23.01.2006 in his own handwriting and it bears the signature of Pradeep Kumar Verma and Amar Nath Agnihotri, APM. On three of the dates i.e. 05.10.2005, 24.10.2005 and 30.11.2005 it had been signed by Suresh Chandra, APM and on other dates Amar Nath Agnihotri had signed it. HO summary of the dates on which the alleged fraud was committed, had been prepared by Treasurer, Collector Singh (PW-5), which bears signature of the Postmaster R.P. Gupta and Alladin.

34. PW-11 Ram Naresh Dwivedi was entrusted investigation of the matter by means of an order dated 01.03.2007, passed by the Superintendent of Police, CBI/ACB,

Lucknow. He had recorded statements of witnesses and obtained original KVPs journal summary and other documents and had submitted a charge-sheet against the appellants on 19.06.2007.

35. The learned trial court mentioned the submissions advanced on behalf of the accused Pradeep Kumar Verma that he was progressing in the departmental position in a very impressive manner and, therefore, the officers of the post office hatched a conspiracy and got him entangled in it and charges had been prepared against him only on the basis of findings of the enquiry report.

36. The learned trial court concluded that the accused persons took advantage of the shortcomings in the rules of the post office and made embezzlement and were successful in concealing the same for a long period of time. Had Amar Nath Agnihotri performed his duties in a proper manner, embezzlement would have come to light immediately and action would have been taken. Amar Nath Agnihotri knowingly committed negligence in performance of his duties. He did not supervise the work of Pradeep Kumar Verma. He continued to verify the entries made by Pradeep Kumar Verma, thereby assisting in commission of his criminal acts. This establishes the criminal intent of Amar Nath Agnihotri. The learned trial court referred to the principle of law that a person seeking equity must approach with clean hands. The court held that the members of the enquiry team have given evidence which establishes complicity of the accused persons in the commission of offence in connivance with each other and the submissions advanced on behalf of the accused person that they have been entangled by hatching a conspiracy because of animosity, is fictitious and fabricated, as the accused persons could not give any evidence in support of this contention.

37. The learned trial court further held that Amar Nath Agnihotri used to supervise the work of Pradeep Kumar Verma and verify the entries made by Pradeep Kumar Verma in hand-to-hand receipt books. He committed negligence in performance of his duty and verified the entries without tallying the same with other related documents and thus he assisted in criminal activities of Pradeep Kumar Verma. If such act is committed repetitively, the same cannot be done without predetermination and criminal conspiracy.

38. The learned trial court found that the prosecution witnesses have clearly proved that Pradeep Kumar Verma has shown false and forged payment in hand-to-hand receipt books. Amar Nath Agnihotri, APM SB-II verified the fake entries of payments in hand-to-hand books under a criminal conspiracy with Pradeep Kumar Verma, whereas he was responsible to verify the entries in hand-to-hand receipt books by original discharged vouchers, which he failed to do. Thus both the accused persons cheated the postal department and caused financial loss to it.

39. The learned trial court found that the prosecution has been successful in proving that while working on the post of Postal Assistant in Head Post Office, Fatehgarh, District Farrukhabad on 17.08.2005, 20.08.2005, 22.08.2005, 25.08.2005, 02.09.2005, 03.09.005, 13.09.2005, 15.09.2005, 05.10.2005, 22.10.2005, 24.10.2005, 26.10.2005, 29.10.2005, 17.11.2005, 18.11.2005, 19.11.2005, 30.11.2005, 05.12.2005, 06.12.2005, 07.12.2005, 12.12.2005,

16.12.2005, 29.12.2005, 17.01.2006 and 23.01.2006 acting under a criminal conspiracy with the co-accused Amar Nath Agnihotri, Assistant Postmaster. He showed excess payment in hand-to-hand receipt books, discharge journals and monthly returns etc. whereas he deceitfully made payments of lessor amounts towards Kisan Vikas Patra and by making forgery of documents and false entries he embezzled Rs.31,92,772/-. The payment vouchers of the aforesaid excess amounts could not be found during enquiry, whereas Pradeep Kumar Verma had obtained the amounts from the treasury and it is established from the cash summary and hand-to-hand receipt books of the Head Post Office. The learned trial court found that PW-6 has proved the attendance register (D-34) of Head Post Office for the period August, 2005 to January, 2006 for the dates 22.08.2005, 25.08.2005, 02.09.2005, 03.09.2005, 13.09.2005, 15.09.2005, 05.10.2005, 22.10.2005, 24.10.2005, 26.10.2005, 29.10.2005, 17.11.2005, 18.11.2005, 19.11.2005, 30.11.2005, 05.12.2005, 06.12.2005, 07.12.2005, 12.12.2005, 16.12.2005, 29.12.2005, 17.01.2006 and 23.01.2006 to show that the accused persons were present on duty on the aforesaid dates.

40. After recording the aforesaid finding, the learned trial court proceeded to record that the accused persons have not proved the documents submitted in their defence by producing any independent witness. The defense documents produced by Amar Nath Agnihotri were photocopies, which had not been proved by any independent defense witness. Pradeep Kumar Verma had produced photocopies of termination order dated 25.09.2008, F.I.R. No.535/99 dated 02.11.1999, under Sections 409, 420 I.P.C. and the final report submitted by the Investigating Officer. Pradeep Kumar Verma had also produced photocopy of a complaint sent by him to the then Minister of Communication, Government of India regarding the misdeeds committed by Sri Ram Prasad Tripathi, the then Superintendent, Post office, Farrukhabad and Sri K.P. Pandey, the then Postmaster, Fatehgarh and another complaint submitted to the Director General, Post against Ram Prasad Tripathi the then Superintendent, Post Office Fatehgarh but these had also not been proved by any independent witness. The complaint did not bear any date and, therefore, the same was suspicious. The learned trial court held that the aforesaid complaint did not diminish the effect of charges leveled against the accused persons and the merits of the case.

41. After recording finding of guilt of the accused persons, the learned trial court proceeded to examine the submissions advanced by the accused Amar Nath Agnihotri that the prosecution sanction had been granted in a mechanical manner; that the postmaster was responsible for supervision and verification of day to day work of post office and that no punishment was inflicted upon him in the departmental enquiry (in respect of the same allegation), whereas some other employees had been punished. It was also submitted on behalf of Amar Nath Agnihotri that he was absent on some of the dates.

42. This approach of the learned trial court in holding the accused persons guilty even before proceeding to examine their defence, indicates that the trial court was predetermined to convict the accused persons even before examining their defence.

43. The learned trial court rejected all the submissions made in defence and

held that non-infliction of any penalty in departmental enquiry would not absolve him to his responsibilities. The absence of Amar Nath Agnihori on some of the dates would not absolve him of his negligence towards performance of his duties on other dates on which he was present, particularly when the offence was committed as a series of acts.

44. While assailing the validity of the aforesaid order the learned counsel for the appellant Pradeep Kumar Verma has submitted that as per the statement of the prosecution witnesses, Pradeep Kumar Verma has been held to be guilty of committing embezzlement for the sole reason that some discharge vouchers were not produced before the enquiry team. No evidence had been led to establish that any embezzlement had actually been committed. Pradeep Kumar Verma cannot be held guilty of any embezzlement merely on the basis that some discharge journals were not made available to the enquiry team, in absence of any proof of actual embezzlement.

45. The learned counsel for the appellant Amar Nath Agnihotri has submitted that the Investigating Officer did not carry out any investigation and he has submitted the charge-sheet merely on the basis of the departmental enquiry conducted by the enquiry team. When Amar Nath Agnihotri has been exonerated in departmental enquiry, submission of charge-sheet and conviction in furtherance of the same on the basis of a departmental enquiry alone, is unsustainable in law.

46. While deciding the question of sentence the learned trial court took into consideration the submissions made on behalf of Pradeep Kumar Verma that he has been terminated from service in another matter and Rs.14,00,000/- have been recovered from him.

47. On behalf of the appellant Amar Nath Agnihotri, it was submitted that he was aged 71 years (at the time of conviction order) and had spent 2 years 7 months in jail and 20% of his pension had been deducted for a period of three years. Nothing has been recovered from him from his home.

48. It is relevant to note that the F.I.R. was lodged by Awadhesh Kumar Srivastava PW-1 who did not prove the same before the trial court. The F.I.R. has been proved by PW-2, who had not lodged the F.I.R. himself. Although, the enquiry team had found that Suresh Chandra Gupta had performed the duties of Assistant Postmaster on three dates, on which dates also some vouchers were not found and it was found that payments had been made without any vouchers, Suresh Chandra Gupta was not made an accused in the case. Although, it is correct that an accused can be convicted if the charges against him are proved and mere non-involvement of any other person involved in the commission of offence as an accused in the case in itself will not be fatal to the prosecution case, this fact is relevant for consideration of the plea of the accused persons that they were entangled under a conspiracy by some other officers of the department in a vindictive manner. The conduct of the officers in not including Suresh Chandra Gupta, who had worked as Assistant Postmaster on three dates, on which dates also some discrepancies were found in the account, supports this contention of the accused person.

49. The witnesses PW-2 clearly stated that the responsibility of maintenance of the records of the post office lied on the

Postmaster and yet the Postmaster has not been made an accused in the case.

50. The witnesses PW-10 Ram Shiromani Pal had stated that the Treasurer Alladin was responsible for maintenance of the records of the Treasury and although discrepancies were found therein also Alladin has also not been made an accused.

51. These facts support the contention of the accused persons that they have been entangled in the case in a vindictive manner. It appears that the accused persons have been made escape-goats.

52. The trial Court has referred to the statements made by the prosecution witnesses in their examination-in-chief and the statements made by the prosecution witnesses in their cross-examination has not been referred to by the trial Court. Only this much has been stated in the trial Court's judgment that PW-7 had been cross-examined on behalf of the accused persons and even in his cross-examination he merely reiterated the statements given in his examination-in-chief and no such discrepancy came to light in his cross-examination as may create a doubt against the credibility of this witness.

53. When this Court proceeded to peruse the statements of the prosecution witnesses given in their cross-examination, several facts came to light, which indicates that the trial Court has not even gone through the statements given by the prosecution witnesses given in their cross-examination.

54. PW-5 Collector Singh, who was posted as Treasurer in the head post office, stated in his cross-examination that he had also put his signature on the hand-to-hand receipt book on 02.10.2005. This witness stated that after completion of the work related to payment, the discharge journals are sent from the Head Post Office, Fatehgarh to Lucknow. This witness stated that the appellant Amar Nath Agnihotri has not signed the certificate D-11. The discharge journal document D-16 was shown to PW-5 and he stated that it had signature of Assistant Postmaster (SB-II). Sri Suresh Chandra Gupta. Exhibit A-12 also bears signature of APM (SB-II) Suresh Chandra Gupta. He stated that the attendance register of the Head Post Office Fatehgarh (document D-34) mentions that Amar Nath Agnihotri was posted as APM-IV (Mails). This document belies the prosecution allegation that Amar Nath Agnihotri was posted as APM (SB-II).

55. After seeing the nominal roll D-35, PW-5 stated that during the relevant period Amar Nath Agnihotri was posted as APM-IV, whereas Suresh Chandra Gupta was posted as APM (SB-II). After seeing the attendance register on 30.05.2005 this witness stated that on the said date Suresh Chandra Gupta was working as APM (SB) II. He further stated that besides the hand-to-hand receipt books, there is no other means of finding out any embezzlement. The hand-to-hand receipt books are a bunch of loose papers prepared by the concerned counter clerk and it does not bear any seal. After some time when the hand-to-hand receipt book gets completed, it is kept in the custody of counter clerk or the Head Postmaster. The postmaster is in-charge of the Post Office and he assigns duties to other officers/employees. PW-5 categorically stated that at the time of the incident, Suresh Chandra Gupta was posted as APM (SB) II till his retirement on 31.01.2006 and when someone used to go on leave or training

Karan Singh or any other person used to work as APM (SB) II.

56. PW-6 Ram Sagar Sharma, who had worked as a member of the enquiry team, stated in his cross-examination that from the attendance register, nominal roll, payment vouchers and hand-to-hand receipt books, it is established that on 02.09.2005 and 03.09.2005 Sri Suresh Chandra Gupta had worked as APM (SB) II in place of Amar Nath Agnihotri. On 30.11.2005 Sri Suresh Chandra Gupta had worked as APM. After seeing the hand-to-hand receipt book (D-4) PW-6 stated that on 05.09.2005, 05.10.2005, 29.10.2005 and 30.11.2005 Suresh Chandra Gupta had worked as APM (SB) II in place of Amar Nath Agnihotri. He stated that the original vouchers or the original discharge journals were not presented before him during enquiry and the same were not demanded by him from the officer in-charge. He did not ever visit the head post office Fatehgarh for conducting enquiry. He did the verification while sitting in the office of ASP Sub Division, Fatehgarh and all the other members of the enquiry team remained present there only. He further stated that the enquiry was continuing since about 2-3 months before he became a member of the enquiry team but he did not examine proceedings of enquiry that had been conducted prior to his becoming a member of the enquiry team. He did not make any inspection in the Head Post Office, Fatehgarh during the entire enquiry proceedings. He knows that there is one post of post-master and one post of Deputy Post-master in the Head Post Office, Fatehgarh but he did not remember as to how many posts of Assistant Postmaster were there in the Head Post Office. He expressed ignorance as to whether the appellant Amar Nath Agnihotri was working as an Assistant Postmaster-IV (Mail) at the time of the incident.

57. PW-6 also stated that the hand-to-hand receipt book relating to KVP discharged for the dates 30.08.2005 and 31.08.2005 bears the signatures of Amar Nath Agnihotri but the hand-to-hand receipt book of dates 01.09.2005, 02.09.2005, 03.09.2005, 05.09.2005, 06.09.2005, 07.09.2005, 08.09.2005, 10.09.2005, 10.09.2005, 12.09.2005, 13.09.2005 and 30.09.2005 do not bear signatures of Amar Nath Agnihotri and he could not tell as to which of the Assistant Postmaster had signed the hand-to-hand receipt book on the aforesaid dates. He further stated that the hand-to-hand receipt book for the dates 01.10.2005 to 19.10.2005, 21.10.2005, 27.10.2005 to 31.10.2005, 05.11.2005, 08.112005 to 16.11.2005, 19.11.2005 to 30.11.2005, 01.12.2005, 03.12.2005, 30.12.2005 to 31.12.2005 also do not bear signature of Amar Nath Agnihotri and he could not tell as to which Assistant Postmaster had signed the receipt book for the aforesaid periods.

58. PW-6 further stated that the photocopies of hand-to-hand receipt book of only two dates i.e. 17.01.2006 and 23.01.2006 were there in hand-to-hand receipt book of January, 2006 and receipt book of 23.01.2006 did not bear signature of Amar Nath Agnihotri and he could not tell as to which Postmaster had signed the receipt book on that dates. He and the enquiry team had not made any enquiry regarding who was working as Assistant Postmaster SB-II on the aforesaid dates and whose signatures are there in the hand-to-hand receipt book on those dates.

59. After examining Exhibit A6/1 (Paper D-35) PW-6 stated that from August 2005 to January 2006 Amar Nath Agnihotri

was working as APM-IV, whereas Suresh Chandra Gupta was working as APM-II.

60. PW-7 Sarvesh Kumar Mishra, Sub-Divisional Inspector, Postal, Farrukhabad stated that he was also a member of the enquiry team. The enquiry team conducted the enquiry on the basis of the documents and vouchers obtained by the Head Post Office. He stated that some payment vouchers had been provided to the enquiry team whereas merely photocopies of some payment vouchers were provided. He had verified the original or photocopies of the payment vouchers from HO summary/treasure's cash-book, hand-to-hand receipt book and purchase forms. The treasure's cash-book is prepared by the Treasurer of the Head Post Office, wherein the Treasurer enters the number of transactions of cash/cheque with other Postal Assistants and Sections. Acknowledgment of cash handed over to any other employee is also noted by the Treasurer in the cash-book. The amount drawn from the Treasury was entered in the hand to hand receipt book of the payment account. Upon tallying the same with the Treasurer's cash-book no discrepancy came to light on any of the dates.

61. PW-8 Upendra Kumar stated in his cross-examination that in case any error occurs in the cash transactions on any date, the same is detected in the evening of the same day. After seeing the KVP discharge journal D-17 this witness stated that this discharge journal regarding payments of NSC/KVP had been prepared by the Postal Assistant. HO summary is prepared on the basis of original discharge vouchers and hand to hand receipt book. After the treasurer tallies the account and the Postmaster is satisfied with same, they put their signatures on it. After then the original discharge vouchers and payment journals are kept in the custody of APM-II.

62. PW-10 Ram Shiromani Pal, the then Assistant Superintendant, Head Post Office, Fatehgarh stated that the enquiry team had examined the KVP payment journals, head office summary and hand to hand receipt book of Pradeep Kumar Verma for the period August 2005 to 23.01.2006 and he stated about the details of embezzlement committed date-wise. On 17.08.2005, the alleged embezzlement committed was of minus Rs.222/-. The embezzlement is committed when an amount is illegally taken away from the treasury. When the amount is found to be in excess it can by not be termed as embezzlement and it may at the most amount to negligence in discharge of duty. PW-10 also stated that on 05.10.2005, 24.10.2005 and 30.11.2005 Suresh Chandra, APM had signed on the hand to hand receipt book and on the other dates Amar Nath Agnihotri had signed the same. He categorically stated that the HO summary of the dates on which embezzlement was allegedly committed had been prepared by Collector Singh, which bears signatures of Postmaster Sri R.P. Gupta and Sri Alladin. He further stated that it is not that some vouchers of the relevant dates were not found. Entire vouchers had been found but some discrepancies were found with the amount entered in the HO summary and no report thereof was sent to the higher officers either by the Postmaster or by the Treasurer. He stated that he had submitted his report only about the amount of embezzlement and he had not given any details regarding who was guilty for the embezzlement. This member of the enquiry team stated that during the entire period of enquiry he did not carry out any inspection of the Head Post Office, Fatehgarh. During the entire service

tenure he had never worked with Amar Nath Agnihotri. He stated that overall in-charge of the post office is Postmaster. At the time of the incident, Alladin was the Postmaster. He had not held any particular person guilty in his enquiry report. He had merely made calculations on the basis of vouchers, head office summary and hand to hand receipt book and the difference amount was presumed to have been embezzled. As he had never worked with Amar Nath Agnihotri he did not recognize his signatures. During enquiry proceedings he had become acquainted with his signatures but at the time of making statement he has stated that as eleven years elapsed he could not recognize the signatures of Amar Nath Agnihotri on hand to hand receipt books. He admitted that he had not examined the nominal roll or the attendance register during enquiry. He further stated that he had conducted the enquiry as head of the enquiry team. He had found that Suresh Chandra, Assistant Postmaster had signed on the hand to hand receipt book on three dates and on rest of the dates Amar Nath Agnihotri had signed the same.

63. PW-11 Ram Naresh Trivedi, Inspector, S.I.T., U.P. Lucknow stated in his examination-in-chief that he had been entrusted with the investigation of this case on 01.03.2007. He had prepared plan of investigation and on 03.04.2007 he had recorded statement of Sri Santosh Kumar Pandey, Junior Accounts Officer, Office of the Director, Postal Accounts, Lucknow and had obtained original KVPs, journal in summary and other documents from him. He had also recorded the statements of Sri Sohan Lal Gupta, ASP, Fatehgarh, Sub Division Farrukhabad, Arun Yadav, Sub Divisional Inspector, Chhibramau, Sri Ram Sagar Sharma, Sub Divisional Inspector, Kannauj and Sri U.P. Gangal, ACP Fatehgarh Sub Division on 04.05.2007. Sri U.P. Gangal had stated about the procedure for KVP discharge and had supported the allegation of commission of offence on the basis of enquiry. He further stated that he had recorded statements of several other persons. After completing the investigation he has submitted a charge-sheet against Pradeep Kumar Verma and Amar Nath Agnihotri on 19.06.2007. He proved the document D-2 which was a letter dated 03.04.2007 (Exhibit A-25) which had been sent to him by the then Senior Accounts Officer, Postal Accounts, U.P. along with the original discharge return summary of the concerned month and he had provided hand written KVP discharge details running into three pages.

64. In his cross-examination the Investigating Officer Sri R.N. Trivedi stated that he did not remember as to how many FIRs were lodged and how many investigations had been carried out or how many cases were pending since prior to lodging of the F.I.R. in this case. Although, he had prepared a plan for carrying out the investigation neither he had given the same to any other investigating officer nor was the same available on record. It was available in the case diary but the case diary had not been produced before the court. The general diary was also not available on the record and without seeing it he could not state as to how the case was registered. He stated that he had not perused the postal department's enquiry report during investigation. He did not make any enquiry regarding how many and what posts were sanctioned in the Head Post Office, Fatehgarh and as to which of the posts were lying vacant and who was working on which of the post. He has not even made any enquiry regarding accounts during investigation. He did not investigate any particulars of the account in which the

embezzled amount had been transferred. He had recorded the statement of most of the witnesses in the CBI Office situated at Lucknow. He stated that a case regarding disproportionate assets was going on against Pradeep Kumar Verma but no such case was instituted against Amar Nath Agnihotri. He did not remember as to whether he had carried out any investigation on the point of the posts on which Amar Nath Agnihotri worked during August, 2005 to January, 2006. He did not remember as to who was the Postmaster at the time of incident.

65. The discharge journal D-16 was shown to PW-11 and after seeing it he stated that it did not bear the signature of Amar Nath Agnihotri and he could not tell as to who had signed it. He had not perused the Post Office Savings Bank Manual, Volume-II, Postal Manual Volume-VI and Postal Financial Hand Book, Volume-II. He did not remember as to whether he had gone to the house of Amar Nath Agnihotri during investigation or not. After seeing the attendance register the Investigating Officer stated that Alladin was working on the post of Postmaster, R.B. Yadav was Deputy Postmaster, Collector Singh and Lajja Ram Dixit were working as Assistant Postmasters, SB-I, Suresh Chandra Gupta was working as APM SB-II, Amar Nath Agnihotri was working on the post of APM-IV (Mails).

66. It is relevant to note that PW- 2 Uday Prakash Gangal had stated that Prior to him, Sri R. C. Verma had headed the enquiry team but Sri R. C. Verma was not produced as a witness.

67. PW-3 had proved the seizure memo D-3, but the seized documents were not proved by him.

68. PW-9, Junior Accounts Officer in the Office of the Director, Postal Accounts, stated that he had gone to the C.B.I. Office and had handed over the document D-2, through which the summary description of discharged KVP Journals of the desired dates had been provided. The summary ran into 4 pages only. In his cross-examination, PW-9 stated that the vouchers which could be found out, had been made available over to C.B.I. When asked about the monthly returns, PW-9 stated that whatever had been received through parcel, was made available to the C.B.I. Thus the witness who provided the documents from the office of the Director, Postal Accounts, did not state that the entire relevant documents had been provided to the investigating Officer.

69. PW-5 Collector Singh, who was working as Treasurer in the post office, stated that besides the hand-to-hand receipt books, there is no other means of finding out any embezzlement. The hand-to-hand receipt books are a bunch of loose papers prepared by the concerned counter clerk and it does not bear any seal. After some time when the hand-to-hand receipt book gets completed, it is kept in the custody of counter clerk or the Head Postmaster. The postmaster is in-charge of the Post Office and he assigns duties to other officers/employees. PW-7, who was a member of the enquiry team, also stated that that overall in-charge of the post office is Postmaster. At the time of the incident, Alladin was the Postmaster. Yet, the Post Master was not made an accused in the case.

70. PW-5 categorically stated that at the time of the incident, Suresh Chandra Gupta was posted as APM (SB) II till his retirement on 31.01.2006 and when someone used to go on leave or training Karan Singh or any other person used to work as APM (SB) II, yet Suresh Chandra Gupta was also not made an accused.

71. PW-6, who was a member of the enquiry team, stated that the original vouchers or the original discharge journals were not presented before him during enquiry and he had not even demanded the same from the officer in-charge. He did not ever visit the head post office Fatehgarh for conducting enquiry. He did the verification while sitting in the office of ASP Sub Division, Fatehgarh and all the other members of the enquiry team remained present there only. He further stated that the enquiry was continuing since about 2-3 months before he became a member of the enquiry team but he did not examine proceedings of enquiry that had been conducted prior to his becoming member of the enquiry team. He did not make any inspection in the Head Post Office, Fatehgarh during the entire enquiry proceedings. PW-6 Ram Sagar Sharma stated that an inference of embezzlement was made because some vouchers were not found during enquiry. However, PW-10 Ram Shiromani Pal, Head of the enquiry team stated that it is not that some vouchers were not found and the entire vouchers had been found, but some discrepancies were found with the amount entered in the head office summary.

72. PW-6 further stated that the embezzlement was done by Pradeep Kumar Verma. Amar Nath Agnihotri was responsible for supervising the work of Pradeep Kumar Verma and he did not supervise as per the departmental rules, due to which embezzlement was made and, therefore, Amar Nath Agnihotri is also responsible for the embezzlement. This statement merely makes out a case of negligence in performance of official duties against Amar Nath Agnihotri and it does not make out commission of any offence by him.

73. PW-6 further stated that he and the enquiry team had not made any enquiry regarding who was working as Assistant Postmaster SB-II on the aforesaid dates and whose signatures are there in the hand-to-hand receipt book on those dates. After examining Exhibit A6/1 (Paper D-35) PW-6 stated that from August 2005 to January 2006 Amar Nath Agnihotri was working as APM-IV, whereas Suresh Chandra Gupta was working as APM-II.

74. PW-7, who was also a member of the enquiry team, stated that the enquiry team had conducted the enquiry on the basis of the documents and vouchers as obtained by the Head Post Office. He stated that some payment vouchers had been provided to the enquiry team whereas merely photocopies of some payment vouchers were provided. He had verified the original or photocopies of the payment vouchers from HO summary/treasure's cash-book, hand-to-hand receipt book and purchase forms. Upon tallying the same with the Treasurer's cash-book no discrepancy came to light on any of the dates.

75. PW-10 Ram Shiromani Pal, who had headed the enquiry team, stated that on 05.10.2005, 24.10.2005 and 30.11.2005 Suresh Chandra, APM had signed on hand to hand receipt book and on the other dates Amar Nath Agnihotri had signed the same. He categorically stated that the HO summary of the dates on which embezzlement was allegedly committed had been prepared by Collector Singh, which bears signatures of Postmaster Sri R.P. Gupta and Sri Alladin. However, none of the aforesaid three persons have been made an accused in the case.

76. PW-7 further stated that the entire vouchers had been found but some

discrepancies were found with the amount entered in the HO summary and no report thereof was sent to the higher officers either by the Postmaster or by the Treasurer.

77. PW-7 categorically stated that he had submitted his report only about the amount of embezzlement and he had not given any details regarding who was guilty for the embezzlement. He had not held any particular person guilty in his enquiry report. He had merely made calculations on the basis of vouchers, head office summary and hand to hand receipt book and the difference amount was presumed to have been embezzled. There is no other evidence which may prove beyond doubt that the appellants had committed the embezzlement.

78. PW-11 – Investigating Officer stated that he had not made any enquiry regarding how many and what posts were sanctioned in the Head Post Office, Fatehgarh and as to which of the posts were lying vacant and who was working on which of the post. He has not even made any enquiry regarding accounts during investigation. He did not investigate any particulars of the account in which the embezzled amount had been transferred. He had recorded the statement of most of the witnesses in the CBI Office situated at Lucknow. He stated that a case regarding disproportionate assets was going on against Pradeep Kumar Verma but no such case was instituted against Amar Nath Agnihotri. He did not remember as to whether he had carried out any investigation on the point of the posts on which Amar Nath Agnihotri worked during August, 2005 to January, 2006. He did not remember as to who was the Postmaster at the time of incident.

79. From the aforesaid statements of the Prosecution witnesses, it is established that the prosecution could not adduce any evidence to prove that the appellants had committed any offence.

80. The delegation of duties in post offices is provided in Rule 2 of Post Office Savings Bank Manual Volume-II, which has been issued under the authority of Director General of Posts, India and Secretary to the Government of India, Department of Posts, Ministry of Communication inter alia and it provides as under: -

"2.(i) All the duties of the Postmaster in connection with the Savings Certificates may, under the orders of the Head of the Circle, be performed by the Deputy Postmaster, Assistant Postmaster or Supervisor, such delegation being specifically mentioned in the memorandum of distribution of work, except the following which shall be the personal responsibility of the Head Postmaster:-

(a) Deciding claims in respect of Savings Certificates of deceased holders which lie within his power of decision and the safe custody of records relating to such claims.

(b) Signing and submission of savings certificates returns to the Postal Accounts Office in offices where there is no separate Selection Grade Official In charge of the Savings Certificate branch.

(c) Sanctioning the transfer of savings certificates from one person to another. (d) Endorsing the remarks "Checked" and "duplicate on record" on the original invoice to be sent to Postal Accounts Office.

(ii) ***The Postmaster will, however, remain personally responsible for the general functioning of the Savings Certificates branch and in particular, the***

regular submission of the Savings Certificates returns on the due dates."

81. The procedure for encashment of savings certificates is provided in Rule 13 of Post Office Savings Bank Manual, which inter alia provides that the certificates will be placed before the Postmaster, who will satisfy himself about the authenticity of the certificate and the tile of the holder. He will also ensure that the examination of the certificate has been carried out in the manner prescribed and that the amount payable as noted on the certificate is correct. He will then pass order pay under his signature at a suitable place above the place for the holder's signature to authorize payment. The payments will then be made by the counter assistant.

Rule 33 (4) of the Post Office Savings Bank Manual Volume-II provides as follows: -

"33 (4) In Head Offices, ***the discharged certificates along with the respective identity slips, if any, and vouchers on account of payment of annual/six monthly interest should remain in the custody of the Postmaster*** *until the time of their dispatch to the Postal Accounts Office when they should be dispatched in his presence."*

82. Rule 52 of the Post Office Savings Bank Manual Volume-II provides that the certificate documents and vouchers for dispatch to the Postal Accounts Office should be entered in the voucher list Form NC-31(A). These lists should be signed by the Head Postmaster and dispatched with the documents and vouchers attached under the same cover as the Post Office Certificate journal. Copies of the voucher lists prepared by means of carbonic paper should be kept on record.

83. The Postal Financial Hand Book Volume-II contains financial rules and instructions. Rule 47 provides for maintaining head office summary and it provides that the head office summary must be kept by the treasurer himself. The several items of the head office summary will be written up from various subsidiary journals, registers and accounts, which include savings bank and post office certificate. The balance shown in the head office summary has to be verified by the head post master in the presence of the treasurer and the assistant treasuer and the head office summary must be signed by both the head post master and the treasurer before the close of office each day.

84. A perusal of the aforesaid rules makes it clear that the Postmaster is personally responsible for the general functioning of the Savings Certificates branch and in particular, the regular submission of the Savings Certificates returns on the due dates. The payment of savings certificates has to be made only when authorized by the post master. The post master is responsible to keep the discharged certificates and vouchers in his custody. PW-2 had categorically stated that the Postmaster is responsible for the entries made in the Head Office summary. Yet the responsibility for the lapses committed by the post master has been imposed upon the postal assistant and assistant post master in violation of the rules.

85. The appellants have been convicted and sentenced for the offence under Section 477-A I.P.C., i.e. falsification of accounts, which provides as follows: -

"Section 477A. Falsification of accounts.—

Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, electronic record, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.— It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed."

86. There is no proof of any falsification of account committed by the appellant Amar Nath Agnihotri and he has been held to be guilty of falsification of accounts merely for the reason that some discharge vouchers were not provided to the enquiry team and the amount of those discharge vouchers was presumed to have been embezzled.

87. Section 13 (1) (c) of Prevention of Corruption Act makes a person guilty of criminal misconduct, if he dishonestly or fraudulently misappropriates or otherwise converts **for his own use** any property entrusted to him or any property under his control as a public servant or allows any other person so to do. Neither any property has been recovered from any of the appellants which had been dishonestly or fraudulently misappropriated by them, nor is there any proof of any such property having come to the hands of the appellants. Therefore, there is nothing to support conviction of the appellants for the offence under Section 13 (1) (c) of Prevention of Corruption Act.

88. There is no proof that any of the appellants had obtained any valuable thing or pecuniary advantage or that they intentional enriched themselves illicitly during the period of their office. None of the accused persons have been found to be in possession of or at any time during the period of their office, been in possession of pecuniary resources or property disproportionate to their known sources of income. Therefore, the charges under Section 13 (1) (c) and 13 (1) (d) of Prevention of Corruption Act also were not proved and the learned trial court convicted the accused persons for the aforesaid offences without there being absolutely any evidence to prove the aforesaid charges.

89. The learned trial court referred to the judgment of Hon'ble Supreme Court in the case of ***Manzoor Ali Khan Vs. Union of India and others: (2015) 2 SCC 33***, wherein the Hon'ble Supreme Court has held that *"Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of the Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines*

justice, liberty, equality, fraternity which are the core values in our Preambular vision. Therefore, the duty of the court is that any anti- corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it."

90. While relying upon a precedent, the observation of the Courts have to be read in light of the factual background of the case and the issue that was being decided. **Manzoor Ali Khan** (Supra) was a Writ Petition filed in public interest, seeking a direction to declare Section 19 of the Prevention of Corruption Act, 1988 unconstitutional and to direct prosecution of all cases registered and investigated under the provisions of the PC Act against the politicians, MLAs, MPs and government officials, without sanction as required under Section 19 of the PC Act. The Hon'ble Supreme Court held that it is not possible to hold that the requirement of sanction is unconstitutional, but the competent authority has to take a decision on the issue of sanction expeditiously. A fine balance has to be maintained between need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other hand.

91. The decision in **Manzoor Ali Khan** (Supra) does not lay down that a person accused of corruption has to be punished even in absence of any evidence.

92. No accused person can be convicted on the basis of a mere presumption. The criminal justice system requires proof beyond reasonable doubt and persons cannot be convicted even on the basis of preponderance of probabilities, which is the basis of decision in the civil proceedings. The prosecution does not allege that any of the accused persons was responsible for custody of the discharge vouchers. The responsibility of providing the discharged vouchers to the enquiry team did not rest on the accused persons. The person who was responsible for custody of the discharged vouchers, has not been made an accused. Therefore, the finding of guilt of the accused persons, which has been recorded solely on the basis of discharged vouchers having not been provided to the enquiry team, is unsustainable in law.

93. While proceeding to hold the appellants guilty of commission of penal offences, the learned trial court referred to the principle of law that a person seeking equity must approach with clean hands. It indicates that the trial was acting under a patent misconception of law that an accused facing a trial has himself approached the Court and he has to himself disclose the complete facts that may lead to his conviction. The trial Court's observation indicates its approach is that a failure to make a complete disclosure of incriminating facts, rather a failure to make a confession of guilt, will justify conviction of the accused persons. The accused persons had not approached the Court and there was no obligation on them to have approached the Court with clean hands, rather it was the prosecution which had approached the Court to get the accused persons punished and it was the duty of the prosecution to prove the guilt of the accused persons beyond any reasonable doubt. The approach of the trial

Court was against the basic principle of criminal justice system that every person is presumed to be innocent, unless it is proved beyond any reasonable doubt that he is guilty and no accused person is bound to disclose facts which will ensure his conviction.

94. Article 20 (3) placed in Part III of the Constitution of India, which contains Fundamental Rights, provides that *"No person accused of any offence shall be compelled to be a witness against himself."* Non-disclosure of incriminating facts is a Fundamental Right of the accused. Equity can only supplement the law, it cannot supplant the law and in any case, the principles of equity will not override the Fundamental Rights guaranteed under the Constitution of India. Therefore, the observation of the trial Court indicates a lack of understanding of the difference of approach to be adopted while deciding a criminal trial as against a civil disputes reliance.

95. The learned trial court referred to Section 15 of the Evidence Act, which provides as under: -

"15. Facts bearing on question whether act was accidental or intentional.

Where there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations ..."

96. Section 15 of the Evidence Act merely provides that where there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant. This Section merely provides for relevance of a fact, but it does not provide that a series of acts would give rise to a presumption of guilt of the accused.

97. The learned trial court proceeded to decide as to whether there was any criminal conspiracy between the appellants Pradeep Kumar Verma and Amar Nath Agnihotri. The learned trial court has referred to a decision of the Hon'ble Supreme Court in the case of **Heera Lal Bhagwati Vs. CBI:** AIR 2003 SC 2545, wherein it was held that it is difficult to adduce direct evidence of criminal conspiracy. However, the difficulty in adducing direct evidence does not mean that the prosecution is not required to adduce any evidence of conspiracy and the Court will simply presume that the accused persons had entered into a conspiracy. In absence of direct evidence, conspiracy has to be proved by circumstantial evidence.

98. In **Esher Singh v. State of A.P.** (2004) 11 SCC 585, the Hon'ble Supreme Court held that: -

"38. ... the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. ***A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal***

conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied on for the purposes of drawing an inference should be prior in point of time than the actual commission of the offence in furtherance of the alleged conspiracy."

(emphasis in original)

99. In the present case PW-6 stated that the embezzlement was done by Pradeep Kumar Verma. Amar Nath Agnihotri was responsible for supervising the work of Pradeep Kumar Verma and he did not supervise as per the departmental rules, due to which embezzlement was made and, therefore, Amar Nath Agnihotri is also responsible for the embezzlement. This statement merely makes out that the accused Amar Nath Agnihotri was negligent in performance of his duties, but it does not establish a criminal conspiracy between the two accused persons. So far as negligence is concerned, the statements of witnesses as well as the provisions contained in the relevant rules referred to above clearly demonstrate that it was the post master who was responsible for the overall working of the Post Office and maintenance of records and the treasurer was also responsible for the accounts. It appears that they have also been negligent in performance of their duties. PW-10, who had headed the enquiry team, stated that the enquiry team had not made any enquiry regarding who was guilty for the embezzlement. In view of these facts, there was absolutely no evidence in the present case to establish existence of a criminal conspiracy between the accused persons.

100. The trial court held that the members of the enquiry team have given evidence which establishes complicity of the accused persons in the commission of offence in connivance with each other and the submissions advanced on behalf of the accused person that they have been entangled by hatching a conspiracy because of animosity, is fictitious and fabricated, as the accused persons could not give any evidence in support of this contention. The trial Court ignored the facts that the prosecution could not give any evidence of a conspiracy between the accused persons and the only evidence was that Amar Nath Agnihotri acted negligently in supervising the work of the other accused Pradeep Kumar Verma.

101. In this regard, it is relevant to note that PW-2 clearly stated that the responsibility of maintenance of the records of the post office lied on the Postmaster. The witnesses PW-10 Ram Shiromani Pal had stated that the Treasurer Alladin was responsible for maintenance of the records of the Treasury and discrepancies were found therein also. In case a mere negligence in performance of duties can be sufficient to raise a presumption of a criminal conspiracy, the treasurer and the post master should also be treated to be a part of the conspiracy, but they have not been made accused in the case.

102. The accused persons cannot be held to be guilty merely because they could not prove his innocence. The evidence was to this effect also that the treasurer and the post master were also responsible for the works done, but they have not been made the accused.

103. The learned trial court has sentenced the accused persons separately for the offence of criminal conspiracy, criminal misappropriation and falsification of account, criminal conspiracy and falsification of account, criminal conspiracy

and criminal misconduct under Sections 13 (2) read with Section 13 (1) (c) and (d) and they have been sentenced separately for the offence under Section 13 (2) read with Section 13 (1)(c) and 13 (2) read with 13 (1) (d) and separate amounts of fine have been imposed on them for all the aforesaid offences. This approach of the learned trial court in multiplying the alleged guilt of the accused persons manifold, appears to be vindictive and unjust and it cannot be appreciated.

104. In view of the aforesaid discussions, it is established that the members of the enquiry team have themselves stated that they did not visit the Head Post office, Farrukhabad, where the offence had allegedly been committed. Even the Investigating Officer did not state that he had visited the Head Post Office. The members of the enquiry team stated that they assumed the amount for which the discharge journals had not been made available to have been embezzled. No enquiry was conducted and no material was produced to establish that any embezzlement had in fact been committed. The members of the enquiry team categorically stated that no enquiry had been conducted regarding who as guilty for the alleged embezzlement. The witnesses have stated that the Postmaster was the over all in-charge for the day to day work conducted in the post office but he has not been prosecuted. The Treasurer was responsible for preparation of accounts. Although his name was included as an accused in the F.I.R. no charge-sheet was submitted against him. The Investigating Officer conducted the investigation by sitting in his office at Lucknow and he has not taken any steps in the investigation to ascertain as to whether any embezzlement had in fact been committed and if yes who was responsible for the same. He had conducted the investigation merely on the basis of the statements given by the witnesses by coming to his office and the documents produced by the witnesses to him while sitting in his office. It shows that no proper investigation has been carried out and in fact there is no material to establish that the appellants had committed any embezzlement. The prosecution has miserably failed to prove, what to say about proving beyond reasonable doubt that, the accused persons Pradeep Kumar Verma and Amar Nath Agnihotri have committed any embezzlement. As such, the judgment of conviction and sentence passed by the learned trial court in Case No.18 of 2007: State through C.B.I. Vs. Pradeep Kumar Verma an another appears to be unsustainable in law.

105. Accordingly the Criminal Appeal No. - 2609 of 2022 and Criminal Appeal No. - 2261 of 2022 are ***allowed.*** The impugned judgment and order dated 25.08.2022, passed by the learned Special Judge, P.C. Act, C.B.I. Court No.4, Lucknow in Criminal Case No.18 of 2007, arising out of R.C. No.6 (A) of 2007, under Sections 120-B, 409, 477-A I.P.C. and Section 13 (2) read with 13 (1) (c) (d) of Prevention of Corruption Act, 1988, Police Station C.B.I./A.C.B. Lucknow is hereby set aside and the appellants are acquitted of all the charges for which they have been tried. The appellant Amar Nath Agnihotri has been released on bail but the other appellant Pradeep Kumar Verma is in jail. The personal bond and sureties filed by the appellant Amar Nath Agnihotri shall remain effective for a period of 30 days from today and within this period he shall file a fresh personal bond and two sureties under Section 437-A Cr.P.C. to the satisfaction of the trial Court for his appearance before the Hon'ble Supreme Court in case any appeal

or petition is filed against this order and the Hon'ble Supreme Court issues notice to him. The appellant Pradeep Kumar Verma is in jail and he shall be released from custody forthwith unless he is wanted in any other case, subject to the condition that he shall file a fresh personal bond and two sureties within a period of three weeks from the date of his release from custody, to the satisfaction of the trial Court under Section 437-A Cr.P.C.

106. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2024) 5 ILRA 141
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 3532 of 2019

Ajit Kushwaha ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Narendra Kumar, Atharva Dixit, Dharmendra Singh, Kamlesh Kumar Tripathi ,Nitinjay Pandey, Raghuvansh Misra

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Section s498-A, 304-B-Dowry Prohibition Act-1961-Sections 3 & 4-The Indian Evidence Act, 1872- 113B-)- Criminal appeal has been preferred against the Judgment and Order of conviction whereby appellant sentenced to undergo imprisonment for life-Deceased was found lying on the bed, killed in a brutal manner at her matrimonial home in suspicious circumstances-Essential ingredients which need to be proved in order to attract the offence of dowry death are proved-Incident of dowry death proved relying on the presumption as to dowry death against the appellant-Appellant in his St.ment u/s 313 Cr.P.C. St.d that he was not present in the house at the relevant point of time and a benefit of plea of alibi should be given to him but the appellant could not produce any evidence or photograph of birthday celebration nor the bus tickets round the trip-No credible evidence is lead by the defence to prove that accused had gone to attend the birthday party of his sister's son-no reason disclosed as to why the deceased had not joined the appellant-Sentence of the appellant modified from life imprisonment to 14 years imprisonment.

Appeal allowed. (E-15)

List of Cases cited:

1. Bachani Devi & anr. Vs St. of Ha. (2011) 4 SCC 427

2. Binay Kumar Vs St. of Bihar (1997) 1 SCC 283 : JT (1996) 10 SC 79

3. Hem Chand Vs St. of Har. (1994) 6 SCC 727

4. G.VS Siddaramesh VS St. of Karn. (2010) 3 SCC 152

5. Kashmira Devi Vs The St. of Uttarakhand, AIR 2020 SC 652

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the State and perused the record.

2. The present criminal appeal has been preferred against the Judgement and Order of conviction dated 13.03.2019 passed by Additional Sessions Judge, Court No.15, Kanpur Nagar in Sessions Trial No.361 of 2016 (State vs. Ajit Kushwaha) arising out of Case Crime No.0023 of 2016, Police Station Govind Nagar District Kanpur whereby the appellant has been convicted under Section 304B IPC and sentenced to undergo imprisonment for life and under Section 498-A IPC two years simple imprisonment and a fine of Rs.5000/- and in case of default in payment of fine a further simple imprisonment of one month. The appellant has further been convicted under Section 3/4 of Dowry Prohibition Act for two years simple imprisonment and fine of Rs.2000/- and in case of default a further simple imprisonment of 15 days. All the sentences shall run concurrently. However, the accused-appellant has been acquitted of the charge under Section 302 IPC.

3. Shorn of unnecessary details, the brief facts are as follows:

On 18.01.2016 at 08:50 pm, the first informant Kamal Sen Mehta lodged a First Information Report bearing Case Crime No. 23 of 2016, under Sections 498A, 304B IPC and Section 3/4 of Dowry Prohibition Act at Police Station Govind Nagar, District Kanpur Nagar against the appellant Ajit Kushwaha and 11 others alleging that the marriage of his youngest daughter Pooja Kushwaha was solemnized with Ajit Kushwaha on 31.05.2015. At the time of marriage, sufficient dowry was given but later on there was further demand of dowry of cash Rs.5 lacs to run the business and a car, which she often disclosed to her family. She was kept under starvation and was harassed. On 18.01.2016, the first informant called his daughter on telephone but there was no response. He immediately went to her in-laws' place and found the door to be locked. The concerned police Station was informed, the Police reached and opened the door and found his daughter killed in a brutal manner. People in the vicinity disclosed that they saw the in-laws fleeing from the spot. Hence, the First Information Report was lodged.

4. During the course of investigation, the inquest proceedings were conducted in the presence of Naib Tehsildar on 18.01.2016 at 10.00 P.M. and the body was sent for autopsy. The post-mortem of the deceased Pooja was conducted on 19.1.2016 at 1.55 P.M.

5. The investigation was conducted and a Charge Sheet No. 85/2016 dated 17.04.2016 was submitted against accused Ajit Kushwaha, Ram Lakhan Kushwaha, Premwati Kushwaha and Sameer under Sections 498-A, 304-B and 302 IPC and Section 3/4 Dowry Prohibition Act. Rest other co-accused were exonerated.

6. On 04.05.2016, the matter was committed by the learned Chief Metropolitan Magistrate, Kanpur Nagar to the Court of Sessions for trial. On 18.05.2016, learned Trial Court framed the charges against the accused Ajit Kushwaha, Ram Lakhan Kushwaha, Premwati Kushwaha and Sameer under Sections 498-A, 304-B IPC and Section ¾ of the Dowry Prohibition Act and alternatively under Section 302 IPC.

7. The accused denied the charges and claimed to be tried.

8. To establish the prosecution case, total seven prosecution witnesses were examined.

9. **P.W.1 Kamal Sen Mehta**, the father of the deceased in his examination-in-chief deposed that Pooja Kushwaha was his third daughter. Her traditional marriage ceremony took place at Kashmir, Govind Nagar at Kanpur Nagar on 31.05.2015 with Ajit Kushwaha after giving sufficient dowry. Just after the marriage, there was a demand of dowry of cash Rs. 5 lacs and a car. They even tortured and gave beatings to his daughter and kept her under starvation. Whenever she visited her parental house, she used to disclose to her family members about the harassment caused by her in-laws. Before the traditional marriage ceremony, his daughter and Ajit Kushwaha performed the love marriage on 15.1.2015 at Arya Samaj Temple. Subsequently, on being pressurized by the close relatives, the traditional marriage ceremony was organised on 31.05.2015. On 18.01.2016, when he called his daughter Pooja Kushwaha on her telephone, she did not attend the call. Then he went to her in-laws place where he found the door to be looked. He informed the police, the police reached the spot and got the door opened and saw Pooja lying on bed and brutally killed. Severe blows were found on the head and face of the deceased. There was swelling on the neck and blood was oozing out from the face and nose. It seemed that she was assaulted with heavy object and neck was pressed in order to kill her. The local residents informed that they saw the accused running from the place of occurrence. The said witness proved the written Tehrir and inquest report. During the cross-examination he deposed that he used to run a tailoring shop. His other daughter Monica was a widow. He had three daughters, the eldest one was Monica, then Sucheta Mehta and the youngest was Pooja. The in-laws of Sucheta lived nearby his house. Pooja used to take tuition of 25-30 children and earned Rs.35,000/-40,000/-. At the time of incident, Ajit used to work at Reliance Company. He further added that he was not happy with Arya Samaj marriage of his daughter. After the marriage, her in-laws demanded of cash Rs. 5 lacks to run the business or a car.

10. **P.W.2 Monica,** the elder sister of the deceased in her examination-in-chief supported the version of the first informant. Just before a week of the incident, her parents and in-laws of the deceased went to the Police Station Govind Nagar to settle the matrimonial dispute. Thereafter on 18.01.2016, her father received a call that due to non-fulfilment of dowry demand, Pooja had been killed by her in-laws. When she reached at her in-laws place, she saw Pooja lying dead on her bed and the blood was oozing out from her nose and mouth. There were injuries on her neck, cheek, lips and other parts of the body. No family members of her in-laws were present at the spot. In her cross-examination, she asserted the prosecution version.

11. **P.W.3 Sarvjeet Mehta**, the elder brother of the deceased in his examination-in-chief asserted the version of his father and sister.

12. **P.W.4 Rakesh Kumar**, Nayab Tehsildar who posted at Kanpur Nagar proved the inquest proceedings of the deceased Pooja. According to the opinion of the Panchas, the deceased appeared to have died due to throttling. The blood was oozing out from the nose and mouth, there were injuries on the left side of the neck and contusion on the face.

13. P.W.5 Dr. Sangam Singh Sachan, who was posted as Medical Officer, at Community Health Centre, Kanpur deposed that on the alleged date, he was on

duty at the post mortem house and had conducted the autopsy According to the post-mortem report, following ante-mortem injuries were found on the body of the deceased:

1. Contusion 12 x 4 cm left side head above left ear.

2. Contusion 3 x 2 cm., back of head over occipital region.

3. Laceration and contusions on inner side of upper and lower lips inner side

4. Contusion 3 x 2 cm. left side of cheek.

5. Contusion 4 x 2 cm. right side face, 4 cm below angle of mouth right side.

6. Abraded contusion 13 x 4 cm. front of neck.

On dissection echymosis present in subcutaneous area. Blood and blood clot in neck tissues. Hyoid bone was fractured. The cause of death was Asphyxia due ante-mortem throttling.

14. He deposed that the injury nos. 1 to 5 would have been caused with kicks and fists and injury no. 6 must have been caused due to throttling.

15. **P.W.6 Constable Milan Kumar** in the examination-in-chief stated that he was posted as CCTNS on 18.01.2016 at Police Station Govind Nagar. He proved the Chik FIR (Exhibit Ka-9) which was entered on the same day and Rapat No. 43 at 20:50 hours and also proved the GD Entry.

16. **P.W.7 Vishal Pandey,** the Circle Officer/Investigating Officer stated in his examination-in-chief that after lodging of the FIR, he took over the investigation, made a spot inspection, prepared the site plan, recorded the statements of the witnesses under Section 161 Cr.P.C., collected the inquest and the post mortem report, recorded the statement of the accused and arrested them on 22.01.2016. On 26.03.2016, he recorded the statement of Monica, the sister of the deceased and Sarvjeet Mehta, the brother of the deceased and Udai Kumar, the witness of the inquest. On 31.03.2016, he recorded the statement of the other witnesses and on the basis of incriminating material, he submitted the charge sheet against the accused Ajit Kushwaha, Ram Lakhan Kushwaha, Premwati Kushwaha and Sameer Kushwaha. He proved the site plan as Exhibit Ka-1 and the charge sheet as Exhibit Ka-12, which was in his hand writing and signed by him.

17. After the prosecution evidence, the statement of the accused were recorded under Section 313 Cr.P.C. and three defence witnesses were also examined, namely, Manju Maurya, Parasu Ram and Vikram Singh as DW-1, 2 and 3 respectively.

18. The accused in their statement recorded under Section 313 Cr.P.C. stated that the charge sheet was submitted on incorrect facts. He stated that he solemnized love marriage with the deceased and there was no demand of dowry of cash Rs. 5 lacs or a car nor she was harassed. It was an intercaste love marriage against their parent's will at Arya Samaj. His parents used to live in the village while he and his wife Pooja lived at Labour Colony, Dada Nagar, Kanpur. Her friends visited to meet her even after the marriage. On 17.01.2016, he had to go to Lucknow to attend the birthday celebration of his sister's son but Pooja did not agree to accompany him, so he went alone and returned back on the next day and found her dead.

19. **D.W.1 Manju Maurya** was the real sister of the accused Ajit Kushwaha

who on oath stated that the birthday of her son was celebrated on 17.1.2016 at Lucknow and Ajit also joined the celebration and returned on the next date. On 19.01.2016, she came to know that when Ajit came to Lucknow to attend the function on the same night, some unknown persons killed Pooja by throttling her neck.

20. **D.W.2 Parasu Ram** who was the Gram Pradhan of Village Damraas stated that the co-accused Ram Lakhan used to live in his village and looked after his agriculture land. His younger son aided him in his work. His wife too remained at the village while Ajit Kushwaha his elder son used to live at Dada Nagar Colony at Kanpur.

21. **D.W.3 Vikram Singh** in his defence stated that he was an auto driver and on 17.01.2016 at around 1:00 pm he went to drop Ajit Kushwaha at the Bus Station, while on the way Ajit disclosed that he was going to Lucknow at his sister's house.

22. Having heard the learned counsel for the appellant, learned A.G.A. for the State and after perusal of the record, we find that the prosecution witnesses have asserted in their testimonies that the marriage of Pooja was solemnised with Ajit Kushwaha on 31.05.2015. The alleged incident took place on 18.01.2016, which occurred within seven years of the marriage. There was demand of dowry of cash Rs.5 lacs to run the business and a car.

23. As far as unnatural death of the deceased Pooja Kushwaha at her matrimonial home is concerned, it has been stated by the prosecution witnesses that when they reached her in-laws house, they found the door to be locked. On information, the local police reached the spot and opened the door and found the dead body of Pooja Kushwaha lying killed in a brutal manner. In such circumstances, the deceased died an unnatural death in suspicious circumstances at her matrimonial home. The appellant in his statement under Section 313 Cr.P.C. stated on oath that on 17.01.2016, he went to Lucknow to attend the birthday party of his sister's son and returned back on 18.01.2016 and then came to know about the death of his wife Pooja. P.W.-2 Monica, the sister of the deceased in her examination-in-chief deposed that a week before the incident, her parents and the in-laws of Pooja went to the police station for the settlement of the matrimonial dispute which indicates that there were estranged relationship between them. According to the post mortem report, six ante-mortem injuries were found on the body of the deceased. The cause of death was Asphyxia due to ante mortem throttling. The hyoid bone was also found fractured.

24. While discussing about the demand of dowry for business purpose etc., the Hon'ble Supreme Court in **Bachani Devi and another vs. State of Haryana (2011) 4 SCC 427** has held that :

"If a demand for property or valuable security directly or indirectly has nexus with marriage such demand would constitute demand for dowry. Cause or reason for such demand is immaterial."

25. Dowry Demand as referred in Section 304-B IPC which reads as under:

" 304-B. Dowry death-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection

with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation- For the purposes of this sub-section, 'dowry' shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

26. The essential ingredients which need to be proved in order to attract the offence of dowry death is as follows:

(i) Death is caused in unnatural circumstances.

(ii) Death must have occurred within seven years of the marriage of the deceased.

(iii) It needs to be shown that soon before her death, the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry.

27. Coming to the first ingredient, the post mortem report suggests that the deceased died due to Asphyxia as a result of ante-mortem throttling. There were six ante-mortem injures around the head and face. The door was found locked and it could be opened after the intervention of the Police and the dead body of deceased was found lying on the bed, killed in a brutal manner. Therefore, it is proved beyond doubt that the deceased died an unnatural death at her matrimonial house.

28. The second ingredient is also proved as the marriage between the deceased and the appellant took place on 31.05.2015 and death of the deceased took place on 18.01.2016 which is within seven years of time frame.

29. The third ingredient was also proved. From the perusal of record, it transpires that P.W.1, P.W.2 and P.W.3 in their testimony asserted that accused appellant demanded cash Rs.5 lacs to run the business and a car. Soon after the marriage, she was subjected to harassment and was kept under starvation. Whenever, she visited her parental house she used to disclose the atrocities caused to her at the matrimonial house. A week before the incident, the parties went to the police station for settlement of the matrimonial dispute. Thus, the deceased was subjected to harassment, soon before her death in connection with the dowry.

30. Section 113-B of the Evidence Act raises a presumption against the accused which reads as under:

"113-B. Presumption as to dowry death*- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in conn3ection with, any demand for dowry, the court shall presume that such person had caused the dowry death.*

Explanation- For the purposes of this section, 'dowry death' shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860)."

31. A reading of Section 113-B of the Evidence Act shows that there must be material to show that soon before the death of woman, such woman was subjected to cruelty or harassment for or in connection

with demand of dowry, then only a presumption can be drawn that a person has committed the dowry death of a woman. It is then up to the appellant to discharge this presumption.

32. From the evidence as discussed about the incident of dowry death has been proved safely relying on the presumption as to dowry death against the appellant.

33. An overall appreciation of the evidence adduced, it is apparent that the appellant in his statement under Section 313 Cr.P.C. stated that he was not present in the house at the relevant point of time and a benefit of plea of alibi should be given to him. He claimed that he went to his sister's house at Lucknow to celebrate the birthday of his sister's son on 17.01.2016 and returned back on 18.01.2016 and found his wife killed in a brutal manner. But the appellant could not produce any evidence or photograph of birthday celebration nor the bus tickets round the trip.

34. It is well settled law, when a plea of alibi is taken by an accused, the burden of proof is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. In this context, it may be usefully reproduce a few paragraph from the case of **Binay Kumar v. State of Bihar (1997) 1 SCC 283 : JT (1996) 10 SC 79 :**

"22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant.

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it

would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

35. Applying the above principles in the facts of this case, we find that no credible evidence is lead by the defence to prove that accused had gone to attend the birthday party of his sister's son. No school records are produced to show that the date of birth of his sister's son was the day prior to the incident. No independent witness was produced to prove the appellant's presence at Lucknow. There is no reason disclosed as to why the deceased had not joined the appellant. Taken cumulatively, we do not consider the plea of alibi to be established by the defence.

36. From the discussion above, it is evident that all the three ingredients of dowry death have been proved. The marriage of the deceased took place on 31.05.2015 and the death of the deceased took place on 18.01.2016, which is within seven years of time frame. From the perusal of the testimony of the prosecution witnesses P.W.1, P.W.2 and P.W.3 who have asserted that there was demand of dowry of cash Rs. 5 lacs to run business and a car which the deceased disclosed to her family members whenever she visited her parental house. Matrimonial discord between the deceased and her husband was existing regarding which both the families approached the police station for the settlement of dispute. The deceased died an unnatural death in suspicious circumstances at her matrimonial home. Six ante-mortem injuries were found on her face and neck. The cause of death was Asphyxia due to ante-mortem throttling. After the incident, the house was found locked and after the intervention of the police, the house was opened where Pooja was found lying killed in a brutal manner. Therefore, all the ingredients of Section 304-B IPC have been satisfied pointing towards the guilt of the appellant.

37. Finally, coming to the question of sentence, we find that the trial court had awarded the life imprisonment to the accused appellant Ajit Kushwaha under Section 304-B IPC. Punishment under Section 304-B IPC varies from seven years to life imprisonment. When the court proceeds to award maximum permissible sentence for an offence, it is the cardinal principle of law that reasons have to be given for awarding such maximum punishment. We do not find any such reason given by the trial court. We otherwise find that there are no circumstances which may justify awarding of extreme punishment to the accused appellant Ajit Kushwaha in the facts of the present case. Considering the evidence in his entirety, we are of the considered view that punishment of life under Section 304-B IPC to the accused appellant Ajit Kushwaha is not warranted.

38. In **Hem Chand Vs. State of Haryana (1994) 6 SCC 727**, the Supreme Court has observed that though punishment under Section 304-B varies from 7 years to life but award of extreme punishment should not be as a matter of course and must be awarded in rare cases. In paras 7 and 8, the Hon'ble the Supreme Court observed as under:

"7. Now coming to the question of sentence, it can be seen that Section 304-B I.P.C. lays down that:

"Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years

but which may extend to imprisonment for life."

The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case, A reading of Section 304-B I.P.C., would show that when a question arises whether a person has committed the offence of dowry death of a woman that all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death shall presume to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B I.P.C. also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection With the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 I.P.C. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr. Usha Rani, P.W. 6 and Dr. Indu Latit, P.W. 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decomposed. On the other hand, Dr. Dalbir Singh, P.W. 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B I.P.C. would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable under Sections 304-B and 201 I.P.C. have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence under Section 304-B I.P.C. was made out. Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime he himself indulged therein and precipitated in it and that bride killing cases are on the increase and therefore a serious view has to be taken. As mentioned above Section 304-B I.P.C. only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore

awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

8. Hence, we are of the view that a sentence of 10 years' R.I. would meet the ends of justice. We, accordingly while confirming the conviction of the appellant under Section 304-B I.P.C. reduce the sentence of imprisonment for life to 10 years' R.I. The other conviction and sentence passed against the appellant are, however, confirmed. In the result, the appeal is dismissed subject to the above modification of sentence."

39. Recently in **G.V. Siddaramesh V. State of Karnataka (2010) 3 SCC 152,** Hon'ble Apex Court while allowing the appeal filed by the accused only on the question of sentence altered the sentence from life term to 10 years on more or less similar facts. Hon'ble H.L. Dattu, J. (as His Lordship then was) speaking for the Bench held as under: (SCC p. 160, para 31)

"31. In conclusion, we are satisfied that in the facts and circumstances of the case, the appellant was rightly convicted under Section 304-B IPC. However, his sentence of life imprisonment imposed by the courts below appears to us to be excessive. The appellant is a young man and has already undergone 6 years of imprisonment after being convicted by the Additional Sessions Judge and the High Court. We are of the view, in the facts and circumstances of the case, that a sentence of 10 years' rigorous imprisonment would meet the ends of justice. We, accordingly while confirming the conviction of the appellant under Section 304-B IPC, reduce the sentence of imprisonment for life to 10 years' rigorous imprisonment. The other conviction and sentence passed against the appellant are confirmed."

40. In **Kashmira Devi Vs. The State of Uttarakhand, AIR 2020 SC 652**, the principle laid down in Hem Chand (supra) has been reiterated and the court observed in para 24:-

"24. Having arrived at the above conclusion the quantum of sentence requires consideration. The High Court has awarded life imprisonment to the appellant on being convicted under Section 304-B IPC. The minimum sentence provided is seven years but it may extend to imprisonment for life. In fact, this Court in the case of Hem Chand Vs. State of Haryana (1994) 6 SCC 727 has held that while imposing the sentence, awarding extreme punishment of imprisonment for life under Section 304-B IPC should be in rare cases and not in every case. Though the mitigating factor noticed in the said case was different, in the instant case keeping in view the age of the appellant and also the contribution that would be required by her to the family, while husband is also aged and further taking into consideration all other circumstances, the sentence as awarded by the High Court to the appellant herein is liable to be modified."

41. Applying the principle of law as laid down in the aforementioned cases and having regard to the totality of facts and circumstances of this case, we are of the considered opinion that the deceased has been done to death on account of several injuries caused to her. The homicidal death has occurred just within an year of marriage. Once the plea of alibi is discarded and the presumption of Section 113-B is not discharged, the appellant will have to be awarded commensurate punishment in the case. We therefore hold that the appellant is liable to punishment of 14 years imprisonment, which shall meet the ends of justice. Accordingly, we modify the

sentence of the appellant from life imprisonment to that of 14 years imprisonment. In our view, this case does not fall in the category of a ***'rare case'*** so as to award to the appellant life imprisonment especially when the Trial Court has not recorded any specific finding for acquittal under Section 302 IPC.

42. In the light of the foregoing discussion, the impugned judgment and order of conviction dated 13.03.2019 passed by Additional Sessions Judge, Court No.15, Kanpur Nagar in Sessions Trial No. 361 of 2016 (State vs. Ajit Kushwaha), stands modified.

43. The accused appellant Ajit Kushwaha is in custody since 22.01.2016 and has remained in jail ever since then. The actual period of incarceration undergone by him is about more than eight years. We are of the considered view that the sentence awarded to accused appellant Ajit Kushwaha under Section 304-B IPC be modified to the sentence of 14 years imprisonment. The fine and the default sentence shall remain maintained. The appellant Ajit Kushwaha shall serve out the remaining sentence if not already served provided he is not wanted in any other case.

44. In view of the above, the present criminal appeal consequently succeeds and is **allowed** in part to that extent.

45. The Trial Court records be returned back and consigned to record.

(2024) 5 ILRA 151
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 3850 of 2019
Connected with
Criminal Appeal No. 3872 of 2019

Matgulla @ Ajay ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Kumar Ashutosh Srivastava

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Sections 302 r/w 34, 504-The Arms Act-1959- Sections 4/25- Indian Evidence Act, 1872-Section 27- Criminal appeals against judgment and order of conviction whereby the accused appellants convicted and sentenced to life imprisonment- The incident occurred at about 6.30 in the evening on 13.2.2016, it is alleged that when the deceased objected to hurling of abuses by the accused persons both the accused stabbed the deceased-No specific role assigned to any of the two accused-The injury report as well as postmortem it is apparent that there was a solitary stab wound caused to the deceased-PW-1 has admitted that he has not seen the incident- Presence of P.W-2 appears to be doubtful, particularly as he neither tried to save the injured nor took him to the hospital and was also not the person, who lodged the report- The absence of panchnama also shows that there were no independent witnesses who had witness the disclosure allegedly made by the accused-The manner in which the knife (murder weapon) is said to have been recovered on the pointing out of the accused raises more questions than it answers- Orders of conviction and sentence set aside.

Appeal allowed. (E-15)

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

1. These appeals are directed against judgment and order of conviction and sentence dated 26.4.2019 and 29.4.2019, passed by Sessions Judge, Amroha, in Sessions Trial No. 172 of 2016 (State Vs. Matgulla @ Ajay and another), arising out of Case Crime No.60 of 2016; and Sessions Trial No.171 of 2016 (State Vs. Matgulla @ Ajay) arising out of Case Crime No.62 of 2016, Police Station Hasanpur, District Amroha, whereby the accused appellants Matgulla @ Ajay and Sanjay have been convicted and sentenced to life imprisonment alongwith fine of Rs.30,000/- each under Section 302/34 IPC and on failure to deposit fine to undergo additional imprisonment for one year; two years rigorous imprisonment under Section 504 IPC, and also accused appellant Matgulla @ Ajay has been convicted and sentenced to one year rigorous imprisonment alongwith fine of Rs.5,000/- under Section 4/25 of the Arms Act and on failure to deposit fine to undergo additional imprisonment for three months. All sentences are to run concurrently.

2. Written report of informant Lala (PW-1) forms the basis of prosecution case as per which his brother had lit fire near the graveyard and was sitting by it, to warm himself in cold weather, when the two accused arrived and started hurling abuses to the informant's brother. The incident is of 13.2.2016 at 6.30 PM. Ranjeet (PW-2), the informant's brother (deceased) and Dharmpal (not produced) objected to the abuses whereafter the accused persons inflicted knife blows on the deceased. On the basis of such written report the first information report came to be lodged on the date of incident under Sections 307, 504 IPC at 9.30 hours as Case Crime No.60 of 2016. The Investigating Officer collected bloodstained and plain earth from the place of occurrence. Recovery memo in that regard has been exhibited as Ex.Ka-10. The injured brother was rushed to the local primary health centre wherein the doctor incharge examined him and vide his report (Ex.Ka-2) indicated following injuries on him:-

"(i) I/w 3 x 1 cm on left side of chest 10 cm above umbilicus."

3. The injured brother died couple of hours later. Inquest was conducted around 9.00 pm on the date of incident (Ex.Ka-4). Postmortem was conducted on the next date i.e. 14.2.2016 at 1.00 pm. As per the postmortem report (Ex.Ka-3), following ante-mortem injuries were found on the deceased:-

"Stabbed wound size 3.5 cm x 1 cm x cavity deep, margins are inverted, present on left side of abdomen, 12 cm below left nipple and 12 cm above umbilicus and 3 cm lateral to midline."

4. The cause of death has been specified as shock due to ante-mortem injury. Clothes worn by the deceased were also taken in custody and all such recovered materials were sent to Forensic Research Laboratory, Agra.

5. Accused Matgulla was thereafter arrested on 15.2.2016 and on his pointing out the weapon of assault i.e. knife was recovered from the bushes nearby the place of occurrence. The recovery of knife has been exhibited as Ex.Ka-11. Another first information report under Section 4/25 of the Arms Act was then registered on 15.2.2016, at 20.10 hours, being Case Crime No.62 of 2016. The recovered knife was also sent to FSL, Agra for its scientific examination.

6. The report of FSL has been exhibited as Paper No.23-A. As per this report blood was found on all items including the knife. However, blood on the knife was found disintegrated, and therefore, it could not be matched. Investigation ultimately concluded with submission of chargesheet (Ex.Ka-14) against the accused appellants under Section 302, 307, 504 IPC. A separate chargesheet (Ex.Ka-20) was also submitted against the accused Matgulla under Section 4/25 of the Arms Act. Cognizance was taken on the chargesheets, whereafter the case was committed to the court of sessions where it got registered as Sessions Trial Nos.171 and 172 of 2016. The accused appellants denied the charges framed against them and demanded trial.

7. In addition to the documentary evidence adduced during the trial, the prosecution has relied upon the oral testimony of two witnesses of fact, namely Lala (PW-1) and (Ranjeet) PW-2. PW-1 is the informant. In his examination-in-chief he has stated that the incident occurred at 6.30 pm. The deceased had lit fire and was sitting near it to warm himself when the two accused came and started abusing his brother. Deceased, Ranjeet and Dharmpal objected to it, whereafter accused Sanjay caught hold the deceased and accused Matgulla stabbed him with a knife. PW-1 admits that he has not seen the incident himself. Rather, he was going to ease himself near the graveyard and when he arrived at the spot the accused had left. He only claims to have seen the two accused fleeing from the spot. Matgulla was carrying knife in his hand while running away. He claims that he, together with his injured brother came to police station and got the written report scribed. PW-1 has stated that his house is about 100 paces from the place of incident. He was in the habit of going to the same graveyard to ease himself. He has also stated that after causing the stab injury the accused left towards the north. He later specified during cross-examination that he saw the accused from a distance of about 20 paces, and there was no other villager at the place of occurrence. He has admitted that there existed no dispute between the deceased and the accused. He further claimed that when he came to the place of occurrence he was informed by the injured brother that accused Sanjay had caught hold of him while accused Matgulla stabbed him. He stated that this fact was informed to the Investigating Officer and the fact that this was not mentioned in his statement under Section 161 Cr.P.C. cannot be explained. He also stated that alongwith the deceased brother, Ranjeet and Dharmpal were also sitting by the side of fire but they made no attempt to save his brother.

8. However, in his further cross-examination, PW-1 has claimed that he saw the incident himself. Other villagers came later. He also claimed that accused persons threatened him with knife; he was pushed by them before fleeing.

9. The other prosecution witness of fact namely, Ranjeet (PW-2) has also supported the prosecution case. PW-2, however, offers somewhat distinct narration of the incident. As per him the accused persons hurled abuses on the deceased because deceased had earlier objected to the plucking of sugarcane from the field and had also beaten the accused. PW-2 has further stated that after the incident occurred, he raised an alarm alongwith Dharmpal and rushed towards the village. At some distance he saw PW-1 and informed the incident to him. In his cross-examination PW-2 has stated that the deceased was like an uncle to

him and lived at a distance of 50 metres from his house.

10. PW-2, however, claimed that apart from himself and Dharmpal, two other persons namely, Rahul and Sovinder were also warming themselves by the fire lit by deceased. Rahul and Sovinder have not been produced. This part of the testimony of PW-2 does not find support either from PW-1 or from any other evidence on record. This witness, however, states that PW-1 was not even present at the place of occurrence. He has denied that the Investigating Officer was informed by him that he came to the village and informed the incident to PW-1. PW-2 has also stated that police arrived nearly after half an hour later and took the injured alongwith PW-1. According to PW-2 the informant's brother had fainted on being stabbed and he was not in a position to speak.

11. PW-3 is the doctor, who had examined the injured. He has stated that there was a solitary cut injury of the size 3x1 cm on left side of chest 10 cm above the umbilicus. This injury could have come with a sharp object.

12. PW-4 is doctor Farid Husain, who has conducted the postmortem of the deceased. He has stated that the solitary injury was caused by a sharp object and the corners were inverted.

13. PW-5 is the Investigating Officer, who has proved the police papers. He also arrested the accused and proved the recovery of knife. In his cross-examination the witness has admitted that the informant did not inform him that accused Sanjay had caught hold of the deceased. This witness has clearly stated that he found no traces of any fire lit at the place of occurrence. PW-6 is also a formal witness, who has proved the police papers.

14. The evidence led during trial has been confronted to the accused, who have denied the evidence adduced against them during trial. Matgulla has denied that any knife was recovered on his pointing out. Similar stand of denial was taken by both the accused's. It is on the basis of the above evidence that the Court of Sessions has convicted the accused appellants and sentenced them as per above.

15. Sri Rahul Saxena, appearing for the appellants submits that the appellants have been falsely implicated; there was no motive on their part to commit the offence; recovery of knife from accused Matgulla is not reliable since the recovery was from open bushes and is otherwise refuted by testimony of witness; there is no independent witness to the recovery of knife; there is no disclosure statement of the accused pursuant to which the recovery was made; the testimony of PW-1 and PW-2 are not reliable.

16. Sri Vikas Goswami, learned A.G.A., on the other hand, submits that the witnesses are reliable and minor contradictions in their testimony cannot be relied upon to discredit the prosecution case. The State counsel further argues that there was a definite motive to commit the offence by the accused and that the testimony of PW-1 and PW-2 have rightly been relied upon by the trial court. Submission is that Court of Sessions has evaluated the evidence on record in correct perspective and that the appeals lack merit.

17. We have heard Sri Rahul Saxena, learned counsel for the accused appellants as well as Sri Vikas Goswami,

learned A.G.A. for the State and carefully perused the evidence on record. Original records of trial court have also been examined by us.

18. Prosecution case, in this case, emanates on the written report, wherein it is specifically alleged that the incident occurred at about 6.30 in the evening on 13.2.2016. In the written report it is alleged that when the deceased objected to hurling of abuses by the accused persons both the accused stabbed the deceased. In the FIR there is no specific role assigned to any of the two accused. However, in the injury report as well as postmortem it is apparent that there was a solitary stab wound caused to the deceased. The prosecution case essentially relies upon the recovery of knife allegedly made on the pointing out of the accused appellant Matgulla as well as testimony of two prosecution witnesses of fact namely, PW-1 and PW-2.

19. PW-1 in his examination-in-chief has stated that the deceased objected to the hurling of abuses by the accused on which accused Sanjay had caught hold the deceased and accused Matgulla stabbed him. This part of the testimony of PW-1 is stated in court and does not find reference in the FIR. PW-1 has admitted that he has not seen the incident, wherein his brother was stabbed. In his examination-in-chief he has only stated that he saw the two accused fleeing from the place of occurrence. In the cross-examination he is specific that he has not seen the incident himself. PW-1 has further stated that he saw the two accused fleeing from a distance of twenty paces and that no other villager had come. From the testimony of PW-1 we find that he was neither present at the place of occurrence when the deceased was stabbed nor he has seen the incident with his own eyes. This witness cannot be stated to be an eye-witness. The most that can be attributed to PW-1 is that he saw the accused running from the place of occurrence. The place of occurrence in the present case is the graveyard which is a deserted place. It has come in evidence that there were bushes around and people generally used the location to ease themselves. It is also admitted that there was no source of light. The incident has occurred in the month of February and the witnesses have themselves suggested that it was dark. Though the witnesses have claimed that it was not fully dark but from the evidence available on record we find that the source of light was lacking at the place of occurrence. We are doubtful of the prosecution case that even in the absence of source of light PW-1 could have identified accused persons from a distance of twenty paces. It appears more probable to us that PW-1 arrived later at the place of occurrence and that by then the accused had already left.

20. PW-2 is the other witness of fact, who has supported the prosecution case. As against the version of PW-1 that deceased was sitting by the fire alongwith Dharmpal and Ranjeet, PW-2 has claimed that two more persons namely, Rahul and Sovindar were also present at the place of occurrence. He has categorically stated that PW-1 was not present at the place of occurrence. PW-2 has stated that though there were four persons but none of them attempted to save the deceased. PW-2 has been confronted with his previous statement made to the Investigating Officer, wherein he had alleged that he raised alarm and informed the villagers about the incident and when he left the place the injured was still lying at the spot. PW-2 moreover has stated that police arrived soon after the incident and had taken the injured to the doctor

alongwith PW-1. The Investigating Officer, however, had denied that he had come to the place of occurrence or that he had taken the injured to the hospital. Although the Investigating Officer has stated that some local policemen may have come to take the injured but he is not definite in that regard. The version of PW-2 that there were four persons sitting alongwith the deceased is clearly at variance with the prosecution version. There is also material improvement in the statement of PW-2 from what he has initially disclosed to the Investigating Officer. On the basis of evaluation of evidence on record we find do not find PW-2 to be a reliable witness. His presence appears to be doubtful, particularly as he neither tried to save the injured nor took him to the hospital and was also not the person, who lodged the report.

21. The other aspect which requires examination in this case is the recovery of knife on the pointing out of accused Matgulla. The recovery memo of knife is Ex.Ka.11 which shows that there is no independent witness to the recovery of knife. The knife otherwise has been recovered from the bushes near the place of occurrence close to graveyard. The manner in which the knife is said to have been recovered on the pointing out of the accused appellant Matgulla raises more questions than it answers.

22. First and foremost, we find that though it is alleged that accused Matgulla was arrested on 15.2.2016 and he admitted his guilt before the police personnel and also offered to get the knife recovered but admittedly no disclosure statement has been prepared of accused Matgulla nor any panchnama has been contemporaneously recorded by the Investigating Officer. The absence of panchnama also shows that there were no independent witnesses who had witness the disclosure allegedly made by the accused. In the absence of disclosure statement of accused or its contemporaneous recording in the presence of independent witnesses the alleged recovery of knife cannot be taken in evidence in terms of Section 27 of Indian Evidence Act, 1872.

23. The site plan otherwise shows that the recovery of knife is from a place quite close to the place of occurrence. It is difficult to believe that the knife lying in the close vicinity of the injured was not noticed for two days. There is absolutely no reason as to why no independent person was associated either at the time of making of disclosure statement of the accused or when the recovery itself was allegedly made. Mere statement that no independent person was willing to testify is not backed by any details furnished by the Investigating Officer of the persons whom he tried to associate in this process. The knife although is alleged to have blood stains but as per FSL report it is not proved that the blood found on the knife is human blood. The recovery of knife therefore cannot be relied upon as a circumstance against the accused appellants.

24. In the facts of the case apart from testimony of two witnesses there is no other evidence brought on record to implicate the accused appellants. So far as PW-1 is concerned we have already observed that his testimony cannot be treated to be that of an eye-witness, inasmuch as he was not present at the place of occurrence at the time of incident and came later by when the incident had occurred. We have also observed that there was no source of light and as it was somewhat dark the possibility of accused's being recognized from a distance is remote. The place of occurrence is a graveyard

having bushes all around and it was being used by the villagers for the purposes of defecation etc. So far as PW-2 is concerned we find that his testimony cannot be relied upon as there are material contradictions in his version. There are otherwise improvements made in his testimony from what was disclosed earlier at the stage of investigation. We, therefore, do not found the testimony of PW-2 to be reliable or safe in order to convict the accused appellants. These aspects appear to have been overlooked by the trial court and the statement of witnesses have been relied upon routinely without due care and caution. The conclusions drawn by the trial court on the aspect of appellants' guilt is thus found to be contrary to the weight of evidence on record.

25. Record otherwise shows that appellant Matgulla @ Ajay is in jail for last more than eight years, whereas accused Sanjay has undergone incarceration of almost six years. Upon evaluation of prosecution evidence we find that the accused appellants are clearly entitled to benefit of doubt, inasmuch as the prosecution has not succeeded in establishing its case against the accused appellants beyond reasonable doubt. The findings of the trial court that the guilt of accused appellants are established beyond reasonable doubt are thus reversed.

26. Consequently, the appeals succeed and are allowed. The judgment and orders of conviction and sentence of the accused appellants Matgulla @ Ajay and Sanjay are set aside. The appellants shall be set to liberty unless they are required in any other case, subject to compliance of Section 437A Cr.P.C.

(2024) 5 ILRA 157

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 4378 of 2019

Shyamveer ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Suresh Dhar Dwivedi, Bishram Tiwari, Ritesh Singh, Suresh Singh

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Sections-323, 376 & 452-The Scheduled Caste and Scheduled Tribe - Prevention of Atrocities Act, 1989-Section 3(2)(v)- Criminal appeal against the judgment and order of conviction and sentence of life imprisonment- Accused entered the house of the victim and subjected her to sexual assault- Victim has been consistent in implicating the accused appellant of committing rape upon her during investigation under Section 161 Cr.P.C. also- By the time medical examination was conducted, almost 40 hours had expired. In a case of rape, any force used by the perpetrator to drag the victim or push her on the ground to commit rape necessarily need not cause such serious injury that it would leave a scar even after two days- No lady would otherwise make a false accusation against her own dignity merely for getting some money as compensation- No evidence on record to show that the offence of rape was committed by the accused on account of the caste identity of the victim-Conviction u/s 3(2)(v) SC/ST Act & u/s 323 IPC reversed-Punishment under Section 376 IPC is modified to 7 years rigorous imprisonment alongwith fine of Rs.50,000/-.

Appeal disposed of. (E-15)

List of Cases cited:

1. Patan Jamal Vali Vs The St. of Andhra Pradesh (2021) 16 SCC 225

2. Babu Vs St. of U.P. Criminal Appeal No.2878 of 2013, decided on 15.7.2022

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

1. This appeal is directed against judgment and order of conviction and sentence dated 25.5.2019, passed by the Special Judge (SC/ST Act), Shahjahanpur in Sessions Trial No. 1936 of 2003 (State Vs. Shyamveer), arising out of Case Crime No. 75 of 2000, Police Station Madanapur, District Shahjahanpur, whereby the accused appellant Shyamveer has been convicted and sentenced to life imprisonment alongwith fine of Rs.50,000/- under Section 376 IPC read with Section 3(2)(v) SC/ST Act and on failure to deposit fine to undergo additional simple imprisonment for one year; five years rigorous imprisonment alongwith fine of Rs.10,000/- under Section 452 IPC and on failure to deposit the fine to undergo additional simple imprisonment for two months; and six months rigorous imprisonment alongwith fine of Rs.500/- under Section 323 IPC and on failure to deposit fine to undergo additional simple imprisonment for fifteen days. Sentences are to run concurrently.

2. Informant in the present case is the husband of the victim, who has reported that on 21.5.2000 he had gone for work and his wife and children were at home. At about 8.00 in the evening accused Shyamveer, a resident of the same village, entered the house; assaulted his wife and ultimately dragged her inside a Kothari (small room) and subjected her to sexual assault. On raising of alam by the victim Udaiveer and informant's son came; challenged the accused; saved the victim; whereafter the accused fled. This written report is dated 23.5.2000 in respect of incident of 21.5.2000. First information report was lodged at 12.20 afternoon on 23.5.2000, as Case Crime No.75 of 2000, under Section 452, 376, 323 IPC & Section 3(1)12 SC/ST Act, at Police Station Madanapur, District Shahjahanpur. The victim was medically examined at 3.25 pm on 23.5.2000. No external or internal injuries were found. The victim herself reported that she was carrying pregnancy of 20 weeks. Supplementary medical report has also been submitted, wherein no cardiac activity was seen in the fetus. The doctor opined that the pregnancy was of 8 weeks 6 days but the fetus was not alive. Doctor in his cross-examination has stated that though pregnancy was disclosed as of 20 weeks but in fact the pregnancy was of 8 weeks 6 days. Statement of witnesses were recorded, and thereafter a chargesheet was submitted under Section 452, 323, 376 IPC & Section 3(2)(v) SC/ST Act on 26.7.2000 by the Investigating Officer. The Magistrate took cognizance of the chargesheet and committed the case to the court of sessions, where accused was charged of offences under Section 452, 323, 376 IPC and Section 3(2)(v) SC/ST Act.

3. During the course of trial, documentary evidence have been adduced by the prosecution in the form of FIR as Ex.Ka-6; written report as Ex.Ka-1; medical examination report as Ex.Ka-2; supplementary report as Ex.Ka-3; chargesheet as Ex.Ka-4; and site plan with Index as Ex.Ka-5.

4. In addition to above, the informant has been produced in evidence as PW-1 by the prosecution. He has supported the prosecution case and has also proved the

written report. Accused Shyamveer lived at a distance of about 100 Kilometre (wrongly recorded, as the accused is of same village and 100 meters appears to have mentioned as 100 kms). Ompal, Ramanpal sons of Rampal and Sadhu Singh are residents of village against whom various cases of Dacoity, loot etc. are pending. In his further cross-examination he has stated that report was got scribed by the Investigating Officer Pramod Kumar and he had merely affixed his thumb impression. He has denied the suggestion that only for receiving Rs.50,000/- compensation from the State that a false report has been lodged.

5. PW-2 is the victim and wife of the informant. She is Khatik, which is a scheduled caste. She has supported the prosecution case and has alleged that while she was dragged inside a small room and pushed on the floor to commit rape, she sustained injuries and her bangles got broken. Accused also carried a firearm by which she was threatened. She has stated that the written report was got scribed by Pramod Kumar. In her cross-examination PW-2 has stated that Shyamveer is a resident of same village and had taken a house close by. At the time of incident she was cooking food and her elder son was playing on the roof along with her other four children. The door was open. Accused came abruptly and gagged her, so that she could not raise an alarm. She did not remember as to for how long the accused continued to gag her. Victim claims to have been physically assaulted by the accused. The accused was also drunk. Accused was naked. Prior to this incident accused has never come to her house. She has denied the suggestion that on account of enmity with Ompal, Ramanpal and Sadhu Singh, they have got the accused implicated under Section 376 IPC.

6. Mukesh is the son of victim, aged about 14 years, and has been produced as PW-3. He has supported the prosecution case, as per which his mother was dragged inside the room and subjected to sexual assault. The witness himself has seen the incident alongwith Udaiveer. In the cross-examination he has stated that he was playing on the roof. Accused was naked. On raising of alarm by his mother, PW-3 came downstairs by when Udaiveer also arrived, whereafter accused fled.

7. Dr. Deepa Dixit (PW-4) was posted at Women Hospital at Shahjahanpur and had conducted the medical examination of the victim. She had certified that there were no external or internal injuries on the victim. In the pathological report, no dead or live spermatozoa was found. As per ultrasound the victim was pregnant by 8 weeks 6 days but the fetus had no cardiac activity. No definite opinion with regard to rape has been expressed. She has stated that initially on the disclosure of the victim pregnancy was assessed of 20 weeks but on examination the pregnancy was of only 8 weeks 6 days.

8. PW-5 is the Circle Officer M.M.Verma, who was the Investigating Officer of the present case. He has proved the police papers as also the chargesheet. Head Constable Ram Sewak was produced as PW-6 who has proved the GD.

9. Udaiveer, who is stated to be the only independent eye-witness, has been produced as PW-7. This witness has not supported the prosecution case and has been declared hostile.

10. It is on the basis of above evidence that statement of accused has been recorded under Section 313 Cr.P.C. The accused has stated that he has been falsely implicated on account of enmity.

11. Court of sessions on the basis of evidence led in the matter has ultimately concluded that prosecution has established its case beyond reasonable doubt relying upon the testimony of victim as well as other witness of fact namely PW-3.

12. On behalf of appellant, it is submitted that the accused appellant has been falsely implicated on account of village enmity, and that the incident is imaginary. Learned counsel for the appellant further submits that the implication of accused appellant is for the purposes of securing compensation from the State. Submission is that at the instigation of villagers Ramanpal, Ompal and Sadhu, who were implicated in various serious offences of dacoity, loot, murder etc., the appellant is falsely implicated. Learned counsel further submits that the medical evidence does not support the commissioning of rape. It is also stated that the prosecution story is otherwise wholly improbable.

13. Learned AGA, on the other hand, has supported the judgment of the court of sessions, under challenge, whereby accused appellant has been convicted and sentenced as per above.

14. We have heard Sri Ritesh Singh, learned counsel for the appellant and Sri Surendra Singh, learned AGA for the State and have perused the material placed on record including the original record of the Trial Court. Mrs. Abhilasha Singh has also appeared for High Court Legal Services Authority.

15. As per the prosecution case, the incident occurred on 21.5.2000 at about 8.00 in the evening. According to the victim she was cooking food in her house and her five children were playing on the roof of the house. The accused was living nearby and he entered the house and subjected her to sexual assault. This incident is sought to be proved with the aid of oral and documentary evidence, which has already been referred to above.

16. The evidence on record has been examined by us. Victim has explained before the court the manner in which the accused entered the house; dragged her inside the room and subjected her to sexual assault. She has been consistent in implicating the accused appellant of committing rape upon her during investigation under Section 161 Cr.P.C. also. Her testimony is supported by the version of PW-3, who is the son of the informant. According to PW-2 (victim), she raised an alarm whereafter PW-3 and Udaiveer rushed to the rescue of the victim. PW-3 has also been consistent in implicating the accused, since the stage of investigation.

17. On behalf of appellant, it is submitted that the medical evidence does not support the prosecution case, inasmuch as there are no external or internal injuries found on the victim. It is also argued that no spermatozoa etc. has been found in the pathological report. The doctor has also not given any definite opinion with regard to rape on the victim.

18. So far as the medical evidence is concerned, we find that though the incident occurred on 21.5.2000 but the FIR was lodged on the third day i.e. 23.5.2000. By the time medical examination was

conducted, almost 40 hours had expired. In a case of rape, any force used by the perpetrator to drag the victim or push her on the ground to commit rape necessarily need not cause such serious injury that it would leave a scar even after two days. The trial judge has opined that possibility of victim having taken Bath or changing her clothes etc. within those 40 hours would be natural, particularly when it was peak of summer. Traces of crime may not be available in the medical evidence due to lapse of time.

19. The victim otherwise is a mother of five children and unless any specific reason of false implication is established during the trial, this Court would be inclined to rely upon the testimony of victim, who has been consistent during the investigation and trial. No lady would otherwise make a false accusation against her own dignity merely for getting some money as compensation. The son of the victim i.e. PW-3 has also been consistent in implicating the accused appellant of committing the offence. So far as PW-7 is concerned, we find that though he had supported the prosecution case at the stage of investigation but has turned hostile during trial. Since PW-7 is a resident of same village, the possibility of him being influenced by the accused party cannot be ruled out. The mere fact that PW-7 has not supported the prosecution case would not be of much importance.

20. In the facts of the case, we find that the victim has clearly narrated the manner in which the accused entered in her house and subjected her to sexual assault while she was cooking food and her husband was away. She has been consistent in her version. Her deposition is also supported by PW-3. In the absence of any reason of false implication, we do not find any good ground to disagree with what has been held by the trial court. The finding that prosecution has succeeded in proving the offence under Section 376 IPC by the accused against the victim is thus sustained.

21. So far as the allegation under Section 452 IPC is concerned, also we find that the witnesses have been consistent in stating that the accused entered the house of the victim against her wishes and subjected her to sexual assault. Offence under Section 452 IPC is thus sustained.

22. Coming to the offence under Section 3(2)(v) SC/ST Act, we find that the only evidence on record is the disclosure by the victim that she is Khatik by caste. Khatik is a scheduled caste. Apart from establishing the identity of victim, as being scheduled caste, there is no other evidence that offence upon the victim was committed on account of her caste identity. Neither the victim nor PW-3 has at any stage of their deposition has supported the prosecution case about commissioning of offence under Section 3(2)(v) SC/ST Act.

23. In what manner an offence under Section 3(2)(v) SC/ST Act can be established has been dealt with extensively by the Supreme Court in Patan Jamal Vali Vs. The State of Andhra Pradesh, reported in (2021) 16 SCC 225. In para 62 to 64 of the report, the Supreme Court has clearly laid down that the prosecution must prove that the offence was committed on account of caste identity by the accused appellant, which are reproduced hereinafter:-

"62. The issue as to whether the offence was committed against a person on the ground that such person is a member of an SC or ST or such property belongs to such member is to be established by the

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

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

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

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

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

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

64. The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of the SC & ST Act while registering cases of gendered violence against women from the SC & ST communities. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to

meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these."

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

25. So far as the offence under Section 323 IPC is concerned, we find that evidence on record do not justify implication of the accused appellant under Section 323 IPC, inasmuch as no injury of any kind has been found on the victim. The conviction and sentence against the accused appellant under Section 323 IPC is, therefore, reversed.

26. Coming to the question of sentence, we find that the trial court has awarded life sentence to the accused appellant under Section 376 IPC. Punishment under Section 376 IPC varies from 7 years to life. When the court proceeds to award maximum permissible sentence for an offence, it is the cardinal principle of law that reasons have to be given for awarding such maximum punishment. We do not find any such reasons to have been disclosed by the trial court. We otherwise find that there are no circumstances, which may justify awarding of extreme punishment to the accused appellant in the facts of the present case. It is admitted that accused appellant is the first offender and no such incident has been reported against him earlier. The possibility of reformation of the accused cannot be ruled out. On the aspect of sentence, we may refer to a recent judgment of the Division Bench of this Court in Babu Vs. State of U.P., passed in Criminal Appeal No.2878 of 2013, decided on 15.7.2022. Relevant portion of the judgment is reproduced hereinafter:-

"14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The

human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

16. In Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166, the Supreme Court referred the judgments in Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

18. …….

19. …….

20. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system. ”

27. Considering the evidence in its entirety, we are of the view that punishment of life under Section 376 IPC to the accused appellant is not warranted, and ends of justice would be met if the minimum punishment of 7 years is awarded to the accused appellant under Section 376 IPC. To that extent we modify the judgment and order of the court below.

28. For the reasons and discussions held above, this appeal succeeds in part. While conviction of accused appellant under Section 376 and 452 IPC is sustained, his conviction under Section 3(2)(v) SC/ST Act and 323 IPC is set aside. The punishment imposed upon accused appellant under Section 452 is maintained, while under Section 376 IPC is modified to 7 years rigorous imprisonment alongwith fine of Rs.50,000/-. On failure to pay fine, the accused appellant shall undergo default sentence of 6 months. Punishments shall run concurrently.

29. Mrs. Abhilasha Singh, who has appeared for the High Court Legal Services Authority, shall be entitled to payment of her fee, as per rules.

30. Appeal, accordingly, stands disposed of.

(2024) 5 ILRA 165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 7124 of 2023

Anand Kumar Asthana ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Shishir Jain, Lakshyadeep Srivastava

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

A. Service Law – Constitution of India – Article 311(2) – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 7 – Punishment – Opportunity of hearing – Documentary evidence and list of witnesses was not served – Charges were not so grave in nature, which could lead to the major punishment – Effect – Major punishment imposed – Validity challenged – Held, the charges framed, should be precised and clear and the chargesheet alongwith copy of the documentary evidence and the list of witnesses, if any, should be served upon the charged government servant – Show cause notice cannot be a proof of any misconduct, unless a decision is taken, while affording the opportunity of hearing to such employee – Though the noting dated 29-07-2021, is not an order and even the same has never been served upon the petitioner and therefore, that cannot be treated as documentary proof against the petitioner. (Para 21, 22 and 27)

Writ petition allowed. (E-1)

List of Cases cited:

1. Anant R. Kulkarni Vs Y.P. Education Society & ors.; (2013) 6 SCC 515

2. Managing Director, ECIL, Hyderabad & ors. Vs B. Karunakar & ors.; (1993) 4 SCC 727

3. Haryana Financial Corporation & anr. Vs Kailash Chandra Ahuja; (2008) 9 SCC 31

4. Delhi Development Authority Vs Hello Home Education Society; (2024) 3 SCC 148

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

1. Heard Sri Shishir Jain, learned counsel for the petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counsel, Sri Pankaj Patel, learned Additional Chief Standing Counsel for the State and Sri Ajay Kumar Singh, for Varanasi Development Authority, Varanasi.

2. Under challenge is the impugned punishment order dated 24-08-2023 passed by the opposite party no. 1 and the charge no. 1 of the chargesheet dated 28-12-2021.

3. The factual matrix of the case is that the petitioner was appointed as Junior Engineer on daily wage basis in Lucknow Development Authority on 01-01-1988 and thereafter, his services were regularized and he was transferred to Varanasi Development Authority, Varanasi(hereinafter referred to as, 'VDA'). When the petitioner was posted as Junior Engineer Enforcement (Nagwan Ward) surprisingly, on 21-07-2021, inspection of various roads in Nagwan Ward was conducted by the Vice Chairman, VDA and allegedly, unauthorized building constructions were found in progress and thereafter, a show cause notice dated 22-07-2021, was issued to the petitioner and the petitioner submitted reply to the show cause notice, on 28-07-2021. Thereafter, a departmental enquiry was instituted, wherein the charges were framed and the chargesheet dated 28-12-2021 was served upon the petitioner. The petitioner submitted reply to the chargesheet and the enquiry proceeding was concluded and the enquiry report was sent to the disciplinary authority, whereafter, issuing the show cause notice, the disciplinary proceeding was concluded and the final punishment order was passed on 24-08-2023.

4. Contention of learned counsel for the petitioner is that the chargesheet contains three charges and so far as the charge no. 1 is concerned, it finds mention that the same is framed on the basis of the show cause notice dated 22-07-2021, though the same was replied, but, the alleged noting dated 29-07-2021, has never been communicated to the petitioner, wherein, it is mentioned that the report with respect to the work of the petitioner is 'unsatisfactory'. He further argued that the Enquiry Officer, ignoring the request of the petitioner for furnishing the copy of the order dated 29-07-2021, proceeded in the matter and even the same has repeatedly been sought not only from the Enquiry Officer but,to the Disciplinary authority as well, though the same was never served upon the petitioner.

5. Adding his arguments, he submits that the petitioner has also taken specific plea in paragraph nos. 17 & 26 of the writ petition, which has not been controverted in specific terms, in the Counter Affidavits filed by VDA as well as by the State and therefore, it is an admitted fact that the order dated 29-07-2021, has never been served upon the petitioner, thus, the whole disciplinary proceeding including the chargesheet, vitiates in the eyes of law.

6. Further contended that the nature of the order is as such, which cannot be the basis of the charge no. 1 and even the same would be of no avail, if relied upon.

7. In support of his contentions, he has placed reliance on the Judgment of the Hon'ble Apex Court, on the case reported in **(2013) 6 Supreme Court Cases 515, Anant R. Kulkarni Vs. Y.P.Education Society and Others,** and has referred paragraph no. 31 of the abovesaid Judgment, which is quoted hereinunder :-

31.The conclusion reached by the Division Bench that the Tribunal and the learned Single Judge had found that there was a defect in the manner in which the enquiry was held, and therefore there was no question of it recording a finding on merit to the effect that charges levelled against the appellant were not proved, is also not sustainable in law. It is always open for the Court in such a case, to examine the case on merits as well, and in case the court comes to the conclusion that there was in fact, no substance in the allegations, it may not permit the employer to hold a fresh enquiry. Such a course may be necessary to save the employee from harassment and humiliation."

8. Referring the aforesaid, he submits that the Hon'ble Apex Court in abovesaid case has held that it is always open for the court to examine the case on merits and in case, the court comes to the conclusion that there was in fact no substance in the allegations, it may not permit the employer to hold a fresh enquiry.

9. Further reliance is placed on the Constitutional Bench Judgment reported in **(1993)4 Supreme Court Cases, 727, Managing Director, ECIL, Hyderabad and Others** Vs. B.Karunakar and Others and has referred paragraph no. 28 of the said Judgment, which is quoted hereinunder :-

"28. The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second

Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges.

10. Referring the aforesaid, he submits that the provision of Article 311(2) of the Constitution of India, speaks about reasonable opportunity of being heard in respect of charges against a delinquent employee and therefore, it is well settled that reasonable opportunity of hearing to a delinquent employee is 'hallmark' test of any disciplinary proceeding against a delinquent employee, under the constitutional scheme'.

11. Further, he has placed reliance on the Judgment of the Hon'ble Apex Court in case of **Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, reported in (2008)9 Supreme Court Cases, 31**, and has referred paragraph no. 21 of the said Judgment, which is quoted herein under :-

"21. From the ratio laid down in B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

12. The constitutional Bench has laid down that doctrine of natural justice, requires supply of copy of enquiry report to the delinquent employee, and non supply of such report would amount to breach of principle of natural justice.

13. Concluding his arguments,he submits that the charge no. 1 mentioned in the chargesheet, is hit by the settled proposition of law as well as the procedure prescribed in the U.P.Government Servant(Discipline & Appeal) Rules, 1999 and therefore, the impugned order dated 24-08-2023 including the whole disciplinary proceeding may be quashed.

14. Refuting the aforesaid contentions, learned counsel for VDA submits that since the petitioner was having the charge of the area of Nagwan Ward, wherein the allegation for unauthoritzed construction of building was initially raised and thereafter a show cause notice was given, thus this fact was well within the knowledge of the petitioner, however now the petitioner is not posted in the domain of VDA and therefore, so far as any exigency regarding DPC is

concerned, the same is not required to be addressed by VDA.

15. Learned counsel appearing for the State has also opposed the contentions and submitted that once, it was found that the petitioner is involved, while permitting illegal construction in Nagwan Ward, he was suspended and the charges were framed against him and thereafter conducting a full fledged enquiry, the enquiry report was submitted and the disciplinary authority, after providing the due opportunity of hearing, even according the opportunity of personal hearing, concluded the disciplinary proceedings and the punishment order was passed and therefore, there is no erroneousness or ambiguity in the order impugned.

16. Adding his arguments, he submits that infact it is an admitted position that two charges were not found proved, but, in so far as the charge no. 1 is concerned, after due discussion in the enquiry, it was found proved partly, on the basis of the order dated 29-07-2021. He added that the order dated 29-07-2021 was passed on the reply submitted by the petitioner to the show cause notice dated 22-07-2021 and therefore, it cannot be said that the same was not in the knowledge of the petitioner, thus, submission is that no interference is warranted.

17. Having heard learned counsels for the parties and after perusal of material placed on record, it transpires that the petitioner has approached this court while taking a plea that the final punishment order dated 24-08-2023 is passed without serving a copy of the noting dated 29-07-2021, which is said to be transcribed on the show cause notice dated 22-07-2021.

18. The Disciplinary Authority, initially proceeded with the procedure for imposing the major penalty and issued undated chargesheet alongwith covering letter dated 28-12-2021. The contents of the chargesheet are extracted as under :-

आरोप-पत्र

श्री आनन्द कुमार अस्थाना,
अवर अभियन्ता, सम्प्रति निलम्बित,
वाराणसी विकास प्राधिकरण , वाराणसी।

वाराणसी विकास प्राधिकरण, वाराणसी के अन्तर्गत वार्ड नगवां में प्रधानमंत्री आवास योजना कुरूहुआ के आस-पास एवं कार्य स्थल तक पहुँच मार्ग, अखरी रोड, चुनार रोड, अवलेशपुर, चितईपुर एवं अन्य मुख्य मागर्गों पर 100 से अधिक संख्या में अनाधिकृत भवनों का निर्माण कार्य गतिमान पाये जाने के संबंध में।

आरोप संख्याः-1

वाराणसी विकास प्राधिकरण, वाराणसी के अंतर्गत वार्ड नगवां में प्रधानमंत्री आवास योजना कुरूहुआ के आस-पास एवं कार्यस्थल तक पहुँच मार्ग, अखरी रोड, चुनार रोड, अवलेशपुर, चितईपुर एवं अन्य मुख्य मागों पर 100 से अधिक संख्या में अनाधिकृत भवनों का निर्माण कार्य गतिमान पाया गया। आपका यह कृत्य कर्मचारी आचरण नियमवाली के विपरीत है। इस प्रकार प्रथम दृष्ट्या आप द्वारा अपने पदेन दायित्वों का निर्वहन नहीं किया गया, जो उ०प्र० सरकार कर्मचारी आचरण नियमावली 1956 का उल्लंघन है, जिसके लिए आप दोषी है। उक्त अनाधिकृत निर्माणों के सम्बन्ध में कारण बताओं नोटिस पत्रांक संख्या-119/वि०पा०/ उपा०/2021/22, दिनांक 22.07.2021 जारी किया गया एवं उक्त के कम में सभी स्थलों का शत-प्रतिशत निरीक्षण कर आख्या प्रस्तुत किये जाने के निर्देश दिये गये थे, किन्तु

एक माह बीत जाने के पश्चात् भी आख्या प्रस्तुत नहीं की गयी। अवैध निर्माण कर्ताओं द्वारा किये जा रहे अवैध निर्माण को बाधित करने में। रोकने में, सौपें गये कार्यों/दायित्वों का उचित प्रकार से निर्वहन न किये जाने के फलस्वरूप प्राधिकरण की छवि धूमिल हुई है एवं अवैध निर्माण होने के कारण प्राधिकरण को सम्भावित वित्तीय क्षति पहुँपाये जाने के प्रथम दृष्टया दोषी पाये जा रहे हैं एवं कार्यों के प्रति घोर लापरवाही व अवैध निर्माण में संलिप्तता प्रतीत होती है, जो उ०प्र० सरकारी कर्मचारी आचरण नियमावली 1956 का उल्लंघन है।

पठनीय-अभिलेखीय साक्ष्यः-

कारण बताओं नोटिस पत्रांक संख्या-119/ वि० प्रा०/ उपा०/2021-22 दिनांक 22.07.2021 की छायाप्रति ।

आरोप संख्या-2

कार्यालय पत्र संख्या-490/ वि० प्रा० उपा०/2019-20, दिनांक 31.01.2020 द्वारा दिनांक 29.01.2020 को बिना पूर्व अवकाश स्वीकृत करायें कार्यालय से अनुपस्थित रहने पर कारण बताओं नोटिस जारी किया गया, जो उ०प्र० सरकारी कर्मचारी आचरण नियमावली-1956 का उल्लंघन है, जिसके लिये आप दोषी है।

पठनीय अभिलेखीय साक्ष्यः-

कारण बताओं नोटिस पत्र संख्या -490/ वि० प्रा०/ उपा०/2019-20 दिनांक 31.01.2020 द्वारा दिनांक 29.01.2020 की छायाप्रति ।

आरोप संख्या-3

दिनांक 18.02.2020 को आहूत मानचित्र अनुभाग की समीक्षा बैठक के दौरान मानचित्र स्वीकृत हेतु लम्बित प्रकरणों की समीक्षा करने पर यह तथ्य संज्ञान में आया कि मानचित्र की पत्रावलियो पर लम्बे समयान्तराल में कोई कार्यवाही सम्पादित नहीं की गयी. जिसके संबध में आपको कारण बताओं नोटिस पत्र संख्या-515/वि० प्रा०/उपा०/ 2019-20. दिनांक 19.02.2020 जारी किया गया। उक्त के संबंध में आप द्वारा दिनांक 24.02.2020 को जवाब दिया गया, जो संतोषजनक नहीं पाया गया। तद्कम में कार्यालय पत्र संख्या-683/वि० प्रा०/अधि०/2019-20, दिनांक 07.03.2020 द्वारा कठोर चेतावनी निर्गत की गयी। इस प्रकार आप द्वारा गम्भीर लापरवाही एवं कूटरचित कृत्य एवं विभागीय कर्तव्यों के निर्वहन के पदेन दायित्वों के प्रति लापरबाही एवं उदासीनता परिलक्षित होती है. जो उ०प्र० सरकारी कर्मचारी आचरण नियमावली -1956 का उल्लंघन है, जिसके लिये आप दोषी है।

पठनीय-अभिलेखीय साक्ष्य-

1. कारण बताओं नोटिस पत्र संख्या - 515/वि० प्रा०/ उपा०/2019-20, दिनांक छायाप्रति 19.02.2020की

2. श्री अस्थाना द्वारा कारण बताओं नोटिस दिनांक 19.02.2020 के सम्बन्ध में दिनांक 24.02.2020को प्रस्तुत उत्तर की छायाप्रति

3. कठोर चेतावनी पत्र संख्या-683/वि० प्रा० / अधि०/2019-20. दिनांक 07.03.2020 की छायाप्रति ।आपसे यह अपेक्षा की जाती है कि आप आरोप पत्र प्राप्त होने की तिथि से अधिरोपित

आरोप के संबंध में अपना लिखित उत्तर 15 दिन से 01 माह के अन्दर जांच अधिकारी को अनिवार्य रूप से प्रस्तुत कर देगे तथा प्रस्तुत किये लिखित कथन में यह भी स्पष्ट रूप से अंकित करेंगे कि आप आरोप पत्र में उल्लिखित किसी साक्ष्य का परीक्षण करना चाहते हैं अथवा किसी साक्षी का प्रति परीक्षण करना चाहते हैं या अपने बचाव में अपनी तरफ से किसी साक्षी या

साक्ष्य को प्रस्तुत करना चाहते हैं, तो उनका नाम व पता तथा विवरण भी स्पष्ट रूप से लिखित कथन में ही इंगित करेंगे। यदि आप स्वयं सुनवाई के कम में जाँच अधिकारी से मौखिक सुनवाई का व अवसर भी प्राप्त करना चाहते तो उसे भी स्पष्टतः अपने लिखित उत्तर में इंगित करेंगे। जांच अधिकारी द्वारा आरोप के समर्थन में साक्ष्य प्रस्तुत किये जायेगें, जिसमे मौखिक एवं अभिलिखित साक्ष्य सम्मिलित होंगें। मौखिक या लिखित साक्ष्य होने के समय जांच अधिकारी द्वारा अपचारी अभियंता को गवाहों से प्रति परीक्षण करने का अवसर भी दिया जायेगा। जांच अधिकारी द्वारा अपचारी अभियंता को साक्ष्य के अंतर्गत दिये गये अनियमिताओं की स्वीकार्यता के सम्बन्ध में आपत्ति प्रस्तुत करने का अवसर भी दिया जायेगा। जांच में साक्ष्य लेने की कार्यवाही पूर्ण हो जाने के पश्चात जांच अधिकारी अपचारी अभियंता को अपने बचाव में मौखिक / लिखित कथन प्रस्तुत करने हेतु स्थान, समय व तिथि निर्धारित करते हुए अपचारी अभियन्ता को यथोचित सूचित करते हुए अपचारी अभियन्ता का उत्तर प्राप्त किया जायेगा, जिसमें मौखिक व अभिलेखीय साक्ष्य सम्मिलित होंगे।

उक्त के अतिरिक्त अपचारी अभियंता को यह भी निर्देशित किया जाता है कि यदि व उक्त निर्धारित अवधि में अधिरोपित आरोप के सम्बन्ध में अपना लिखित उत्तर जांच अधिकारी को प्रस्तुत नहीं करता है तो यह माना जायेगा कि उसे आरोप के सम्बन्ध में कुछ भी नहीं कहना है तथा आरोप स्वीकार्य है और तदोपरान्त दण्डन प्राधिकारी । अनुशासनिक प्राधिकारी द्वारा जांच आख्या का गुण दोष के आधार पर परीक्षण कर तथा सम्यक निर्णय लेकर आदेश प्रख्यापित कर दिया जायेगा।

श्री राज्यपाल की आज्ञा से

आरोप पत्र अनुमोदित ।

(जांच अधिकारी)

अपर आयुक्त (प्रशासन)

प्रयागराज मण्डल, प्रयागराज।

(दीपक कुमार)

प्रमुख सचिव,

आवास एवं शहरी नियोजन विभाग

उ०प्र० शासन

19. After serving the aforesaid chargesheet, the reply was submitted by the petitioner and the Enquiry Officer concluded the enquiry proceedings vide enquiry report dated 20-10-2022, which is evident that out of total three charges, charge nos. 2 & 3 were not found proved and the charge no. 1 is found proved, partly.

20. A bare reading of charge no. 1 is apparent that the documentary evidence in support of charge no. 1 is letter dated 22-07-2021, which is a show cause notice. The show cause notice dated 22-07-2021 is quoted in verbatim as under :-

वाराणसी विकास प्राधिकरण, वाराणसी

119/वि.प्रा./उपा./2021-22

दिनांक: 22/07/2021

कारण बताओ नोटिस

श्री आनंद कुमार अस्थाना, अवर अभियंता प्रवर्तन (नगवां वार्ड)।

अधोहस्ताक्षरी द्वारा 21.07.2021 को औचक स्थल निरीक्षण के दौरान आपके अधीनस्थ कार्यक्षेत्र वार्ड नगवा में प्रधानमंत्री आवास योजना कुरुहुआ के आस-पास एवं कार्यस्थल तक पहुंच मार्ग, अखरी रोड, चुनार रोड, अबलेशपुर, चित्तईपुर एवं अन्य मुख्य मार्गों पर 100 से अधिक संख्या में भवनों का निर्माण कार्य गतिमान पाया गया।

प्रथम दृष्ट्या ये समस्त निर्माण कार्य प्राधिकरण से अनुमति प्राप्त किए बिना अवैध रूप से गतिमान प्रतीत हो रहे है। आपके कार्यकाल में अधीनस्थ नागवां वार्ड / क्षेत्र में अवैध निर्माणों में अप्रत्याशित वृद्धि हुयी है तथा वार्ड । प्रवर्तन अवर अभियंता के रूप में आप द्वारा शिकायतों एवं अवैध निर्माणों पर प्रभावी कार्यवाही कर निस्तारण नहीं किया जा रहा है। आपके उपरोक्त कृत्य से स्पष्ट है कि प्रवर्तन अवर अभियंता के रूप में अपने विभागीय कर्तव्यों एवं दायित्यवों के निर्वहन एवं उच्चाधिकारियों द्वारा प्रदत्त दिशा निर्देशों के अनुपालन में लापरवाही एवं घोर उदासीनता बरती गयी है, जो अत्यंत खेद का विषय है तथा उत्तर प्रदेश सरकारी सेवक आचरण नियमावली 1956 *में निहित प्रावधानों के विपरीत है।*

इस संबंध में 03 दिवस में अधोहस्ताक्षरी के समक्ष प्रकरणवार स्थलीय निरीक्षण के साथ कृत वैधानिक्क कार्यवाही की आख्या एवं इस आशय का लिखित प्रत्यावेदन प्रस्तुत करें कि आपके विरुद्ध अपने विभागीय कर्तव्यों एवं दायित्वों के निर्वहन एवं उच्चाधिकारियों द्वारा प्रदत्त दिशा निर्देशों के अनुपालन में लापरवाही एवं घोर उदासीनता बरतने के कारण क्यों न अनुशासनात्मक कार्यवाही संस्थित कर दी जाये। संलग्नक निर्माण स्थलों के फोटोग्राफ्स ।

(ईशा दुहेन)
उपाध्यक्ष।
दिनांकः

पत्रांकः/वि.प्रा./उपा/2021-22

प्रतिलिपि - निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. सचित।
2 प्रभारी अधिकारी-अधिष्ठान।
3. जोनल अधिकारी- नगवां ।
4. गार्ड फाइल।

(ईशा दुहेन)
उपाध्यक्ष।

21. From perusal of the show cause notice dated 22-07-2021,it is evident that the charges are not so grave in nature, which could lead to the major punishment, though, it has been pleaded by the opposite parties that on the show cause notice itself, a note was transcribed that 'the work of the petitioner is unsatisfactory', to which petitioner has vehemently controverted and stated that aforesaid noting was never intimated/served upon the petitioner. For the other reasons also, the show cause notice cannot be a proof of any misconduct, unless a decision is taken, while affording the opportunity of hearing to such employee, more so, noting 'unsatisfactory' was also not intimated to the petitioner, as the opposite parties have failed to substantiate it, before this court.

22. So far as the disciplinary proceedings instituted against the petitioner under the U.P.Government Servant(Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules 1999'), are concerned, that has not been adhered to, as the Rule 7 of Rules, 1999, clearly prescribes that the charges framed, should be precised and clear and the chargesheet alongwith copy of the documentary evidence and the list of witnesses, if any, should be served upon the charged government servant. The Rule 7((iii) & (v) of the Rules, 1999, are quoted hereinunder :-

"(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government

servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

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

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

23. The provisions are very clear in it's terms that documentary evidences and list of witnesses mentioned in the chargesheet, must be given to the delinquent, but, the said noting/order dated 29-07-2021, was never served to the petitioner, though the same is very basis of charge no. 1 as on the basis of the same, the Enquiry Officer came to the conclusion that the chrage no. 1 is partly proved.

24. Undisputedly, the said order dated 29-07-2021, is a noting/internal order, as it was not communicated to the petitioner and prior to passing of this order,no opportunity of hearing was afforded to the petitioner.

25. It's so long settled that a person, who is required to answer a charge, must know not only the accusation, but, also the testimony by which the accusation is supported and further, he must be given the copy of the documentary evidence mentioned in support of the charge. Further non supply of the documents/evidences mentioned in the chargesheet absolutely vitiate the enquiry proceedings.

26. This court is also aware about the Judgment and order, rendered in the case of Delhi Development Authority Vs. Hello Home Education Society, reported in (2024) 3 Supreme Court Cases, 148, wherein, in paragraph no. 19.7, it has been held as follows:-

"19.7. The issue relating to internal notings as to whether it would confer any right or not has been adequately dealt with and settled by series of judgments of this Court. It is well settled that until and unless the decision taken on file is converted into a final order to be communicated and duly served on the party concerned, no right accrues to the said party. Mere notings and in-principle approvals do not confer a vested right. Relevant extracts from judgments of this Court in this regard are being reproduced hereunder.

(a) Bachhittar Singh [Bachhittar Singh v. State of Punjab, 1962 SCC OnLine SC 11 : AIR 1963 SC 395] : (AIR p. 398, paras 9-10)

"9. The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State

Government cannot, in our opinion, be regarded as bound by what was stated in the file. ?

10. ? Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

27. Hon'ble Supreme Court, in very clear words, has held that merely writing something on the file does not amount to an order. In fact, in the present matter, on the basis of the noting dated 29-07-2021, the Enquiry Officer had come to the conclusion that since the noting says that the work of the petitioner is unsatisfactory and therefore, he found that the charge no. 1 is partly proved, though the noting dated 29-07-2021, is not an order and even the same has never been served upon the petitioner and therefore, that cannot be treated as documentary proof against the petitioner and thus, the Enquiry Officer as well as the Disciplinary Authority are not only mistaken, but, they have ignored the settled proposition of law.

28. In view of the abovenoted submissions and discussions, the writ petition, is hereby **allowed.**

29. Consequently, the impugned punishment order dated 24-08-2023 is hereby quashed.

30. With all respect at my command to the settled law, there seems to be no substance in the charge no. 1, as the same is based only on the show cause notice and a noting on the file thereof, which cannot be treated as documentary evidence as such, the same is of no consequence, therefore, for saving the petitioner from further humiliation and harassment, the charge no. 1 of the chargesheet dated 28-12-2021, is also hereby quashed.

31. Consequences shall follow.

(2024) 5 ILRA 174
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 17751 of 2019

Jitendra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi, Deepak Dwivedi, Sheshnath Bhardwaj

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rule 8(2)(b) – Dismissal – Charge of submitting fake Caste Certificate – No enquiry was held saying that it is not reasonably practicable – Permissibility – Held, no reasons emerge as to why the competent authority has not found it reasonably practicable to hold an inquiry against the petitioner – The reasons for denial of inquiry must be supported by document and other related material – High Court quashed the

impugned order leaving it open for the respondents to proceed against the petitioner in accordance with law. (Para 9, 10, 15 and 17)

Writ petition allowed. (E-1)

List of Cases cited:

1. Tarsem Singh Vs St. of Punj. & ors.; 2008 (2) SCC (L&S) 140

2. Jaswant Singh Vs St. of Punj. & ors.; 1991 (1) SCC 362

3. Chief Security Officer Vs Singasan Rabi Das, 1991 (1) SCC 729

4. Prithi Pal Singh Vs St. of Punj.; 2008 (2) SCC (L & S) 135

5. Moti Lal Vs St. of U.P. & ors.; 2008 (26) LCD 93

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents no. 1 to 3.

2. Under challenge is the dismissal order dated 24.05.2019, a copy of which is annexure 1 to the writ petition.

3. The short argument as raised by learned counsel for the petitioner is that a perusal of the impugned dismissal order would indicate that it is alleged that the petitioner secured appointment in the department on the post of Constable by submitting a fake caste certificate consequently by following the provisions of Rule 8(2)(b) of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the Rules, 1991) as it is not reasonably practicable to hold an inquiry, hence, without holding an inquiry, the petitioner has been dismissed.

4. The argument of learned counsel or the petitioner is that though Rule 8(2)(b) of the Rules 1991 clearly empowers the authority empowered to dismiss or remove a person for some reasons to be recorded by the authority in writing that it is not reasonably practicable to hold an inquiry, yet the reasons should emerge from the order impugned.

5. The contention of learned counsel for the petitioner is that a perusal of the order impugned would indicate that the only reason that has been recorded by the competent authority for dismissing the petitioner from service without holding of an inquiry by exercising power as conferred under Rule 8(2)(b) of the Rules 1991 is that as the petitioner has secured appointment on the basis of fake caste certificate consequently it is not reasonably practicable to hold an inquiry.

6. The aforesaid reasoning on the part of the competent authority is not understood in as much as no reasons emerge from the order impugned as to why simply because the petitioner has secured an appointment on the basis of a fake caste certificate as to why a regular departmental inquiry cannot be held. Once Rule 8(2)(b) of the Rules 1991 casts a duty upon the competent authority to record reasons as to why it is not reasonably practicable to hold an inquiry as such some practical reasons should emerge from the order impugned but the reasons as have been recorded by the competent authority while dismissing the petitioner from service by not holding any inquiry do not inspire any confidence and also cannot be said to be such a reason whereby the competent

authority was precluded from holding an inquiry.

7. Learned Standing Counsel has also not been able to indicate as to how the aforesaid reason as has been recorded by the competent authority appeals to reason and as to what precluded the competent authority from holding a regular departmental inquiry against the petitioner neither are the reasons contained in the counter affidavit.

8. Having heard learned counsels for the parties and having perused the record it emerges that the petitioner was working on the post of Constable and has been dismissed under provisions of Rule 8(2)(b) of the Rules, 1991 by recording that it is not reasonably practicable to hold an inquiry.

9. From perusal of the order impugned no reasons emerge as to why the competent authority has not found it reasonably practicable to hold an inquiry against the petitioner. A regular employee like the petitioner has been dismissed without holding regular inquiry and even the reasons as emerge from the perusal of the order impugned do not inspire confidence of there being some reason whereby it was not reasonable practicable to hold an inquiry. No reasons also emerge from a perusal of the counter affidavit as to why regular inquiry was not found practicable to be held against the petitioner.

10. This aspect of the matter has been considered by Hon'ble Supreme Court in the case of **Tarsem Singh vs State of Punjab and others, 2008 (2) SCC (L&S) 140** wherein Hon'ble Apex Court has held that inquiry may be dispensed with only on the ground that it is reasonably not practicable and that subjective satisfaction of the authority while recording finding with regard to reasonable practicability of inquiry proceedings based on objective criteria is must. The reasons for denial of inquiry must be supported by document and other related material.

11. Hon'ble Supreme Court in the case of **Jaswant Singh vs State of Punjab and others, 1991 (1) SCC 362** has held as under:

"5. The impugned order of April 7, 1981 itself contains the reasons for dispensing with the inquiry contemplated by Article 311 (2) of the Constitution. Paragraph 3 of the said order, which we have extracted earlier, gives two reasons in support of the satisfaction that it was not reasonably practicable to hold a departmental enquiry against the appellant. There are (i) the appellant has thrown threats that he with the help of other police employees will not allow holding of any departmental enquiry against him and (ii) he and his associates will not hesitate to cause physical injury to the witnesses as well as the enquiry officer. Now as stated earlier after the two revision applications were allowed on October 13, 1980, the appellant had rejoined service as Head Constable on March 5, 1981 but he was immediately placed under suspension. Thereafter, two show cause notices dated April 4, 1981 were issued against him calling upon him to reply thereto within 10 days after the receipt thereof. Before the service of these notices the incident of alleged attempt to commit suicide took place on the morning of April 6, 1981 at about 11.00 a.m. In that incident the appellant sustained an injury on his right arm with a knife. He was, therefore, hospitalised and while he was in hospital the two show cause notices were served on him at about 10.00 p.m., on April 6, 1981. Before the appellant could reply to the said show cause notices

respondent 3 passed the impugned order on the very next date i.e. April 7, 1981. Now the earlier departmental enquiries were duly conducted against the appellant and there is no allegation that the department had found any difficulty in examining witnesses I n the said inquiries. After the revision applications were allowed the show cause notices were issued and 10 days time was given to the appellant to put in his replies thereto. We, therefore, enquired from the learned counsel for the respondents to point out what impelled respondent 3 to take a decision that it was necessary to forthwith terminate the services of the appellant without holding an inquiry as required by Article 311 (2). The learned counsel for the respondents could only point out clause (iv) (a) of sub-para 29 (A) of the counter which reads as under:

"The order dated April 7, 1981 was passed as the petitioner's activities were objectionable. He was instigating his fellow police officials to cause-indiscipline, show insubordination and exhibit disloyalty, spreading discontentment and hatred, etc. and his retention in service was adjudged harmful."

This is no more than a mere reproduction of para 3 of the impugned order. Our attention was not drawn to any material existing on the date of the impugned order in support of the allegation contained in paragraph 3 thereof that the appellant had thrown threats that he and his companions will not allow holding of any departmental enquiry against him and they would not hesitate to cause physical injury to the witnesses as well as the enquiry officer if any such attempt was made. ***It was incumbent on the respondents to disclose to the court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent 3 in the impugned order. Clause (b) of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case (SCC p. 504, para 130).***

"A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail."

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. *In the counter filed by respondent 3 it is contended that the appellant, instead of replying to the show cause notices, instigated his fellow police officials to disobey the superiors. It is also said that he threw threats to beat up the witnesses and the Inquiry Officer if any departmental inquiry was held against him. No particulars are given. Besides it is difficult to understand how he could have given threats etc. when he was in hospital. It is not shown on what material respondent 3 came to the conclusion that the appellant had thrown threats as alleged in para 3 of the impugned order. On a close scrutiny of the impugned order it seems the satisfaction was based on the ground that he was instigating his colleagues and was holding meetings with other police officials with a view to spreading hatred and dissatisfaction towards his superiors. This allegation is*

based on his alleged activities at Jullundur on April 3, 1981 reported by SHO/GRP, Jullundur. That report is not forthcoming. It is no one's contention that the said SHO was threatened. Respondent 3's counter also does not reveal if he had verified the correctness of the information. To put it tersely the subjective satisfaction recorded in paragraph 3 of the impugned order is not fortified by any independent material to justify the dispensing with of the inquiry envisaged by Article 311 (2) of the Constitution. We are, therefore, of the opinion that on this short ground alone the impugned order cannot be sustained."

(emphasis by the Court)

12. Likewise Hon'ble Apex Court in the case of **Chief Security Officer vs Singasan Rabi Das, 1991 (1) SCC 729** while considering the aforesaid proposition of law and considering an identical rule with regard to employee of the Railway Protection Force has held that in the absence of sufficient material or good ground for dispensing with inquiry, the recourse of Article 311 (2) proviso (b) cannot be adopted by the authorities.

13. Likewise Hon'ble Apex Court in the case of **Prithi Pal Singh vs State of Punjab, 2008 (2) SCC (L & S) 135** has held that holding of departmental inquiry is the rule and the second proviso to Article 311(2) of the Constitution of India provides for exception and that it is trite law that existence of such exceptional situation must be shown to exist on the basis of relevant materials.

14. Likewise a division bench of this Court in the case of **Moti Lal vs State of U.P. and others, 2008 (26) LCD 93** while considering the provision of Rule 8(2)(b) of the Rules, 1991 has held as under:

"12. It has been settled by the catena of decisions of judgments of Hon'ble Supreme Court that denial of opportunity provided by the statute or non-compliance of statutory provisions falls in the category of exception. Ordinarily, the authority should adopt the recourse of departmental proceedings in accordance with Rules before awarding major penalty. The order for dismissal from service which takes away the right of livelihood of an employee should be passed only with due compliance of principles of natural justice and the service rules. ***The provisions contained in rule 8 (2) (b) of the rules, is an exception to the general rule which requires compliance of principles of natural justice. The recourse of Rule 8 (2) (b) of the Rules, should be adopted only in exceptional cases and justified grounds where the departmental inquiry against the delinquent is not possible or in case departmental inquiry his held, it shall affect the national integrity, security or alike matters."***

(emphasis by the Court)

15. Keeping in view the aforesaid discussion, the writ petition is **allowed**. The order impugned dated 24.05.2019, a copy of which is annexure 1 to the petition, is quashed.

16. Consequences to follow.

17. However, it would be open for the respondents to proceed against the petitioner in accordance with law.

(2024) 5 ILRA 179
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 189 of 2022

Subhash Chandra Srivastava (In person) ...Appellant

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Subhash Chandra Srivsastava

Counsel for the Respondents:
G.A., Jai Prakash Prasad, Rakesh Yadav, Sanjay Kumar Mishra

Criminal Law-Indian Penal Code-1860-Sections-323, 504, 352 & 427-The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989-Section 3(1)(r) 14-A (2) 15A (3), (5)- Criminal appeal with the prayer to cancel / quash the bail granted to the respondent-Section 15A (3), (5) of the S.C./S.T. (P.A.) Act mandates that prior to the hearing of the bail application under the provisions of S.C./S.T. (P.A.) Act, notice must be sent to the informant of the case-prior to the hearing of the bail application, the initial step after the filing of the application for bail to be taken by the Court was to pass an effective order to issue notice to the informant / victim or his dependent. Only after due notice, an order on such bail application in either way should had been passed, but the learned Special Judge did not bother to comply with the mandatory provisions under the S.C./S.T. (P.A.) Act-Result-Impugned order allowing bail application of the respondent set aside.

Appeal allowed. (E-15)

List of Cases referred-;

1. Jagjeet Singh & ors. Vs Ashish Mishra @ Monu, (2022) 9 SCC 321

2. Criminal Appeal No.293 of 2023 (Raees Hanif Sayyed Vs The St. of Mah. & anr. dated 10.4.2023

3. Criminal Appeal No.1278 of 2021 (Hariram Bhambhi Vs Satyanarayan & anr. decided on 29.10.2021

4. Sunita Gandharva Vs St. of M.P. & anr., 2020 SCC OnLine MP 2193

5. Criminal Petition No.200315 / 2020 C/W Criminal Petition No.200318 / 2020 (Marenna @ Mareppa Vs The St.)

6. (Sahebreddy @ Sabreddy Vs The St. of Karn.) dated 21.7.2020

7. n R/Special Civil Application No. 6369 of 2020 (Hemal Ashwin Jain (Sheth) Vs U.O.I.) dated 6.8.2020

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

1. Heard the appellant in person, learned A.G.A. for the State as well as learned counsel for the respondent no.2 and perused the material available on record.

2. This criminal appeal under Section 14-A (2) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred by the appellant - Subash Chandra Srivastava (In person) with the prayer to cancel / quash the bail granted to the respondent no.2 vide order dated 1.1.2020 passed by the Special Judge, S.C./S.T. (P.A.) Act, Padrauna, Kushinagar in Special Trial No.492 of 2019 (State Vs. Raju @ Sunil Kumar Srivastava) arising out of case crime no.436 of 2019 under sections 323, 504, 352, 427 IPC and 3 (1) (r) S.C./S.T. (P.A.) Act, Police Station Kotwali Padrauna, District Kushinagar.

3. The factual aspect of the matter, as revealed from the perusal of the F.I.R. of this case, is that 3 named accused persons along with 3 - 4 other unknown associates were present on the place of occurrence and co-accused Sunil @ Raju was making a puncture in the vehicle of the informant. When it was protested by the informant and his friend Ram Narain Mushar, they were threatened and abused by all the aforesaid accused persons and Ram Narain Mushar was also abused by his caste name on a public place in the public view. The incident occurred due to a land dispute between the parties whereupon the accused persons had already made an assault upon the house of the informant on 25.5.2019. The incident happened on 30.8.2019 at about 11:00 A.M. and the F.I.R. was lodged on the same day at 22:15 hours. Subsequently, after submission of the charge-sheet, cognizance was taken on 7.12.2019 and at this stage a bail application was moved by respondent no.2 Raju @ Sunil Kumar Srivastava and he was granted interim bail by the Special Judge, S.C./S.T. (P.A.) Act, Kushinagar till 1.1.2020 and an order was also passed to issue notice to the informant of this case. Thereafter, on 1.1.2020, the impugned bail order was passed whereby the accused / respondent no.2 was granted regular bail by the trial court.

4. Albeit several instances have been mentioned in the present appeal relating to misuse of bail on the part of respondent no.2, which was granted to him by the impugned order dated 1.1.2020 but at the time of argument the learned counsel for the appellant concised his argument on the sole issue that Section 15A (3), (5) of the S.C./S.T. (P.A.) Act mandates that prior to the hearing of the bail application under the provisions of S.C./S.T. (P.A.) Act, notice must be sent to the informant of the case. In the present matter, no notice was served upon the informant and without notice, the bail application of the accused respondent no.2 was heard and allowed and the informant was provided no opportunity of hearing on bail application before the Special Judge, S.C./S.T. (P.A.) Act, Kushinagar at Padrauna. Since the mandatory provisions of the S.C./S.T. (P.A.) Act have not been complied with by the learned Special Court, the bail granted to the accused respondent no.2 vide order dated 1.1.2020 is liable to be cancelled.

5. Per contra, learned counsel for the respondent no.2 opposed the present appeal and it has been vehemently argued that due notice was given to the informant of this case prior to the disposal of the bail application no.2119 of 2019 by the Special Court under S.C./S.T. (P.A.) Act, Kushinagar at Padrauna. It is further argued that the factum of notice to the informant finds place in paragraph 5 of the impugned order dated 1.1.2020 itself which says that a notice has been issued to the informant, but neither the informant nor any counsel on his behalf was present before the Court which led the Court to hear the prosecution and the accused on bail application and bail was granted by the learned Special Court to the present respondent no.2 after hearing. It is further submitted that present is not a case of misuse of bail granted to the accused respondent no.2 by the learned Special Court and prayer has been made to dismiss the present appeal.

6. I have considered the rival submissions made by the learned counsel for the parties and gone through the entire record including the impugned order carefully.

7. Before dealing with the rival submissions of the learned counsel for the

parties and the learned State Counsel, I deem it proper to have a glance over the relevant provisions embodied in Section 14A, Sub-sections (1) and (2) and Section 15A, Sub-sections (1), (2), (3), (4), (5) of the S.C./S.T. (P.A.) Act, which are extracted below –

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

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

"15A. Rights of victims and witnesses.--(1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victims age or gender or educational disadvantage or poverty. .

(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(4) A victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court, as the case may be, to summon parties for production of any documents or material, witnesses or examine the persons present.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing."

8. It appears from the perusal of the record that a report was called for from the concerned Special Court as to whether any notice was given to the informant of this case prior to the disposal of the bail application or not. A report dated 14th May, 2024 sent by Sri Gagan Kumar Bharti, Addl. District & Session Judge / Special Judge, S.C./S.T. (Prevention of Atrocities) Act, Sant Kabir Nagar is available on record. The learned Special Judge has submitted his report quoting the report of the Session Clerk which reads like this –

"उक्त वाद में माननीय उच्च न्यायालय में आदेश दिनांक 01.05.2024 क्रिमिनल अपील नंo - 189 / 2022 के अनुपालन में अवगत करना है कि पत्रावली के अवलोकन से स्पष्ट है कि जमानत प्रार्थना पत्र प्रस्तुत करने व जमानत आदेश के दौरान वादी सुभाष चंद्र श्रीवास्तव को न तो जमानत नोटिस प्रार्थना पत्र की सुनवाई हेतु नोटिस निर्गत करने का साक्ष्य उपलब्ध है और न ही सम्बंधित थाने से जमानत प्रार्थना पत्र के बावत कोई रिपोर्ट ही प्रस्तुत करने का अभिलेखीय साक्ष्य ही पत्रावली पर मौजूद नहीं है" (प्रति संलग्न)

9. The said report reveals this fact that no notice was sent to the informant of this case and it also reveals that no police report was available on record to show that any notice was served upon the informant. So far as the averment made in the impugned order dated 1.1.2020 is concerned, it has been mentioned in paragraph 5 of the said order

that "वादी मुकदमा को पक्ष रखने हेतु नोटिस निर्गत की गयी है, परन्तु न तो वादी मुकदमा उपस्थित आया, न ही उसकी तरफ से अधिवक्ता ही न्यायलय उपस्थित आये".

10. It is explicitly clear from the perusal of the impugned order that although a notice was sent to the informant as per the impugned order, but it is nowhere mentioned in the said order that the said notice was ever served upon the informant. It is also not mentioned in the impugned order that the notice was returned back to the Court by the police at any stage prior to the disposal of the bail application of the accused after service. Contrary to that the report sent by Sri Gagan Kumar Bharti, Additional District & Session Judge / Special Judge, SC/ST (Prevention of Atrocities) Act, Sant Kabir Nagar reveals that no such notice as required by law was ever sent to the informant. Hence, this Court is of the opinion that no notice was served upon the informant and, therefore, it is a case wherein without affording the opportunity of hearing on the bail application to the informant the said application was heard and bail was granted to the accused / respondent no.2.

11. At this stage, this Court takes notice of the fact that the appellant before this Court does not belong to S.C./S.T. community. Undoubtedly, he is the informant of this case, but the notice which is required to be given essentially is a notice sent to the victim or his dependent as mentioned in Sub-section (3) and (5) to Section 15A of the S.C./S.T. (P.A.) Act. It is noteworthy that nowhere the word 'informant' has been used in the aforesaid provision. Apart from this, the affidavit in the appeal in hand has also been filed by the informant / appellant Subash Chandra Srivastava, who is not a member of S.C./S.T. community admittedly.

12. Now two issues emerge out from the peculiar facts and circumstances of the case in hand. Firstly, whether apart from victim or dependent, the informant is the person who is also required to be served notice prior to the disposal of a bail application under the S.C./S.T. (P.A.) Act and secondly, in the present appeal, whether affidavit along with the memo of appeal could be filed by the informant himself who is not a member of S.C./S.T. community.

13. The F.I.R. discloses the fact that the appellant / informant is the eyewitness of the case and he was also abused and threatened along with his associate Ram Narain Mushar, who happened to be a member of S.C./S.T. community and the whole occurrence happened before him. The said Ram Narain Mushar belonged to the marginal section of the society and was a member of the S.C./S.T. community and he was abused and threatened by his caste name at a public place in the public view as well. The bail by the impugned order was granted to the respondent no.2 / accused by the Special Court, S.C./S.T. (P.A.) Act. Hence, an appeal under Section 14-A of the S.C./S.T. (P.A.) Act was maintainable. The conclusion which can easily be arrived at on basis of the aforesaid provisions is that if any final judgment and order or sentence is passed by a Special Court or an Exclusive Special Court, the appeal shall lie to the High Court both on facts and on law. In other words, it is promulgated in the aforesaid provisions that if the order appealed against is passed by a Special Court or an Exclusive Special Court granting or refusing bail, the appeal shall lie to the High Court against such order. Since the impugned order in this matter was passed by the Special Court, S.C./S.T. (P.A.) Act, the appeal in all circumstances was maintainable before the High Court under

Section 14-A of the said S.C./S.T. (P.A.) Act. It is notable that nowhere it is mentioned under Sub-section (1) and (2) of Section 14-A of the S.C./S.T. (P.A.) Act as to who may file the appeal. Since on the competency of the appellant to file the appeal the provisions are silent, a natural and logical inference may be inferred that this is the victim or his dependent who, in any circumstances, is competent to file an appeal against the order granting bail to the accused under the S.C./S.T. (P.A.) Act for the simple reason of his entitlement of a reasonable, accurate and timely notice to any Court proceeding including any bail proceeding. Undoubtedly, he is not the sole competent person to prefer the appeal but the informant may also file such appeal under Section 14-A of the S.C./S.T. (P.A.) Act.

14. Since the appellant in this case, being the informant, is a person competent to file the present appeal, it is connotative that he may file the memo of appeal supported with his own affidavit. At the cost of the repeatation, it should be reminded that in the matter in hand the present appellant is not the mere informant but also an aggrieved person. Hence his competency to depose by way of affidavit cannot be questioned in the appeal in hand.

15. The aforesaid proposition of law finds its root in the law promulgated by the Hon'ble Apex Court. A three Judge Bench of the Hon'ble Supreme Court in **Jagjeet Singh and others vs. Ashish Mishra Alias Monu, (2022) 9 SCC 321** got an occasion to deal with the subject as to whether notice to be sent to the informant prior to the disposal of the bail application under S.C./S.T. (P.A.) Act is required or not, which can certainly be taken note of. The said decision of the Hon'ble Supreme Court was quoted and followed by the Division Bench of High Court of Judicature at Bombay (Bench at Aurangabad) in **Criminal Appeal No.293 of 2023 (Raees Hanif Sayyed Versus The State of Maharashtra and another)** dated 10.4.2023 and their Lordships while referring to the Hon'ble Supreme Court held that –

"In fact in this case there was no question of offences under the Atrocities Act, yet, the Hon'ble Supreme Court has upheld the rights of the victim to be heard and to participate in the proceedings before the Courts. Note has been taken in respect of the provisions under the Atrocities Act which make the legal obligation to hear the victim and then it has been reiterated that the rights of the victim are totally independent, incomparable, and not accessory or auxiliary to those of the State under the Code of Criminal Procedure and therefore, the presence of 'State' in the proceedings, would not tantamount to according a hearing to a victim of the crime. Under such circumstance, when such wide rights are given to the informant / victim and those are acknowledged, it is mandatory on the part of the Special Judges to issue notice to the victims / informants, as the case may be in view of Section 15-A(3) of the Atrocities Act and then to proceed to hear them under Section 15-A(5) of the Atrocities Act."

16. This Court feels that in a matter like the present one to insist upon the phenomenon that notice to the informant was not required on the ground that nowhere the word 'informant' has been used in Sub-section (3) and (5) of Section 15-A of the S.C./S.T. (P.A.) Act particularly in the peculiar circumstances of this case where the impugned order dated 1.1.2020 nowhere shows and not even a whisper may be found in the said order on the point that any notice

was ever sent to the victim or his dependent and since in fact no notice was sent to the victim or his dependent, all the proceedings relating to the grant of bail to the accused / respondent no.2 were bad in law and vitiated as well. The Special Court even did not bother to ascertain whether any notice was actually sent to the informant / victim or his dependent of the case and if such notice was sent, whether it was served upon him or not is another loophole in the impugned order. It is found on its face that the impugned order does not speak even a single word whether the notice sent to the informant / victim or his dependent was served upon him or not while making hearing on the bail application. With a vigilant eye it may be seen in paragraph 5 of the impugned bail order that the learned Special Judge writes upon issuance of notice to the informant and also of the absence of the informant and his counsel but nowhere he mentions anything regarding the service of notice upon the informant and this omission denies the opportunity of hearing which is a valuable legal right of any victim / informant in the matter of hearing of bail application under the provisions of S.C./S.T. (P.A.) Act, which is also associated with the constitutional belief of a fair trial.

17. The Hon'ble Supreme Court in **Criminal Appeal No.1278 of 2021 (Hariram Bhambhi Versus Satyanarayan & Anr**.) decided on 29.10.2021 made significant observations particularly in the context of Section 15-A of the S.C./S.T. (P.A.) Act and it has been recognized that Sub-sections (3) and (5) of Section 15-A of the S.C./S.T. (P.A.) Act specifically make the victim or his dependent an active stakeholder in the criminal proceedings. These provisions enable a member of the marginalized caste to effectively pursue a case and counteract the effects of defective investigation. It was also highlighted that the purpose of Section 15-A of the S.C./S.T. (P.A.) Act was to protect the rights of victims and witnesses whose rights as equal beneficiaries of the criminal justice system are often overlooked due to their weak social position. The Hon'ble Supreme Court in the aforesaid judgment and order referred to a decision of the Madhya Pradesh High Court in **Sunita Gandharva Versus State of MP & Anr., 2020 SCC OnLine MP 2193** and while highlighting the purpose of the amendment inserting Section 15A observed that :

"21. With the years of experience, it was found that due to some vagueness in the definitions and some procedural inertia, the purpose of Act lacked fulfilment, therefore, to make it more victim oriented, the Amendment Act was introduced.

22. With the legislative intent reiterated in the letter, no iota of doubt exists that intention of the Amendment Act was for Speedy Trial and Protection of Victims' Rights. By way of Section 2 (ec) Victim has been defined and beside Section 14-A, Section 15-A, "Rights of victim and witnesses" was introduced to take care of them for the first time. Definition of Victim includes-relatives, legal guardian and legal heirs and this definition is much wider than the definition of Victim provided in Section 2 (wa) of Cr.P.C. which includes guardian or legal heir, not the relatives. Similarly, Section 15A of Atrocities Act provides an extensive mechanism for protection of Victims/Witnesses. Even the victim has been given a chance to appear before the Court at the time of hearing of bail application. Right of the Court to cancel or revoke the bail is one of the measures by which protection of Victims/Witnesses can be ensured…"

18. The same dictum of law echoes in various decisions given by different High Courts such as High Court of Judicature at Bombay (Bench at Aurangabad) in Criminal Appeal No.293 of 2023 (Raees Hanif Sayyed Versus The State of Maharashtra and another) dated 10.4.2023, High Court of Karnataka (Kalaburagi Bench) in **Criminal Petition No.200315 / 2020 C/W Criminal Petition No.200318 / 2020 (Marenna @ Mareppa Versus The State) and (Sahebreddy @ Sabreddy Versus The State of Karnataka) dated 21.7.2020** and High Court of Gujarat at Ahmedabad in **R/Special Civil Application No. 6369 of 2020 (Hemal Ashwin Jain (Sheth) Versus Union of Indian) dated 6.8.2020** wherein the right of the informant to be heard prior to the hearing of the bail application moved under the provisions of S.C./S.T. (P.A.) Act and a proper service of notice to him has been expounded and a cumulative reading of the aforesaid decisions draws a definite conclusion that the first informant / complainant / victim or dependent shall be made as a party in the Court proceedings and it is the duty of the Court to issue necessary notice to the first informant or complainant or victim / his dependent to hear them in any proceedings as envisaged under Sub-section (5) of the Section 15A of the S.C./S.T. (P.A.) Act.

19. It is also important to note here that the plea that since the accused has made out a case for bail in his favour, to issue notice to the informant / victim or his dependent of the case was not necessary at all, may be termed as a bogus plea which is a complete denial of the legal principle of opportunity of hearing. Suffice it to say that prior to the hearing of the bail application, the initial step after the filing of the application for bail in the matter in hand to be taken by the Court was to pass an effective order to issue notice to the informant / victim or his dependent. Only after due notice, an order on such bail application in either way should had been passed, but as a matter of regret, in the case in hand, the learned Special Judge did not bother to comply with the mandatory provisions under the S.C./S.T. (P.A.) Act as mentioned and discussed here-in-above.

20. Having regard to the facts and circumstances of the case and the case laws cited above, the Court is of the opinion that the court concerned erred in granting bail to the accused respondent no.2 without complying with the mandatory provisions of Section 15A of the S.C./S.T. (P.A.) Act. The impugned order was passed by the court concerned without issuing notice to the informant / victim or his dependent and without affording a reasonable and sufficient opportunity of hearing to him which is patently illegal and suffers from infirmity and illegality and the same is liable to be set-aside and the appeal is liable to be allowed.

21. Accordingly, the appeal is allowed and the impugned order dated 1.1.2020 allowing the bail application of the accused respondent no.2 is hereby set-aside.

(2024) 5 ILRA 185
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 1620 of 1982

Rajesh & Ors. ...Appellants

Versus

State ...Respondent

Counsel for the Appellants:
D.N.Wali, Bhavya Sahai, D.Singhal, N.N. Wali, Neeraj Tomar, Om Singh Tomar, P.S.Pundir, Patanjali Mishra (A.C), R.N.Sharma, Sunil Vashistha

Counsel for the Respondent:
N.K.Verma, Brijesh Sahai, Dga, Keshav Sahai, Rishi Chadha

Criminal Law-Indian Penal Code-1860-Sections-302r/w 34 & 34 - Indian Evidence Act, 1872-Section 27 -Criminal appeal against judgment and order of conviction of life imprisonment- Motive as was given for the commission of the murder of was not a strong one-Recovery as was made under Section 27 of the Evidence Act was not as per the law-Evidence of the witnesses who had last seen the accused was not reliable- First information report was earlier lodged under Section 364 IPC had been converted into a first information report under Section 302 /201 IPC at 7:00PM could, in fact, not have been converted at 7:00PM as the Investigating Officer himself had St.d that he had given directions to Constable at 8:05PM to get the first information report registered under Section 302 IPC.

When under torch light the dead body could have been discovered, there was no reason to adjourn/postpone the preparation of the panchayatnama to the next day- *Panchayatnama* becomes a doubtful document when it shows that the proceedings had commenced on 9.1.1980 at 9:30PM but it did not show any time when the panchayatnama was finally prepared-Result-Order of conviction set aside.

Appeal allowed. (E-15)

List of Cases cited:

1. Shahaja@ Shahajan Ismail Mohd. Shaikh Vs St. of Maharashtra 2022 SCC Online SC 883.

2. St. of Uttar Pradesh Vs Deoman Upadhyaya AIR 1960 SC 1125

3. Phulukuri Kottaya Vs Emperor, AIR 1947 PC 67

4. AIR 2022 SC 5273 : Ramanand @ Nandlal Bharti Vs St. of Uttar Pradesh

5. AIR 2022 SC 5110 : Subramanya Vs St. of Karnataka

6. Brij Bhushan Singh Vs Emperor AIR 1946 PC 38

7. AIR 1984 SC 1622 : Sharad Birdichand Sarda Vs St. of Maharashtra

8. 2010 (9) SCC 567 : C. Muniappan & ors.Vs St. of Tamil Nadu

9. Rishi Kesh Singh & Ors. Vs The St. AIR 1970 Allahabad 51 (FB)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Vinod Diwakar, J.)

1. When the deceased Ajay Kumar who was a student of B.A. in the D.A.V. College had gone missing then an application for missing/first information report was lodged on 8.1.1980 with allegations that the first informant had given Rajesh Kumar, a friend of his nephew Ajay Kumar, Rs. 700/- for getting diesel which was in short supply then, on 6.1.1980 at around 5:00PM and when till 7.1.980 till around 11:00AM, Rajesh Kumar did not come with the diesel then he sent his nephew Ajay Kumar to him who thereafter went missing. It had further been stated in the application/first information report that despite extensive search Ajay Kumar had not been found. He states that even Rajesh Kumar also was not to be found. The first informant/applicant, therefore, prayed that Ajay Kumar, his nephew, be searched out.

2. This application/F.I.R., with regard to Ajay Kumar going missing, was entered in the Police Report at GD-25. The chick as was prepared of the first information report

lodged was exhibited as Exhibit – Ka-8 and was written by the Head Moharrir Jagdish Sharan for offences under Section 364 IPC. On. 8.1.1980 investigation of the case was entrusted to the P.W.- 10 Rajendra Pal Jain, Sub-Inspector and he commenced the search for Ajay Kumar. Thereafter, the investigation was handed over to P.W. -13 K.C. Tyagi, who in the course of investigation reached Sarwat Gate and from an informer he got information that the accused Rajesh Kumar had gone a little earlier towards Minakshi Talkies and from there he could be arrested. On the basis of this information along with police personnel on 9.1.1980 in a patrol car P.W.- 13 reached the cross-road of Minakshi Talkies where he came across witnesses Kharag Singh, Rishipal, Yusuf and Rajeshwar and took them alongwith him.

3. From the record, it appears that Rajesh was seen approaching the Investigating Officer from the side of the Minakshi Talkies. The appellant-accused Rajesh Kumar was thereafter arrested at around 6:00pm. Upon an interrogation the accused Rajesh told that he could lead the police party to the clothes, with which the dead body of the deceased Ajay Kumar, was wrapped. He also stated that he would get recovered the baniyan and other clothes which could be found in the room of the house of one Sukhveer situate in Mohalla Keshavpuri wherein in room no. 14 one Ombir (another accused) lived. Upon getting this information, P.W. -13 K.C. Tyagi reached the Room No. 14 where, it had been stated by Rajesh that, the dead body was to be found. He had stated that in the Room No. 14 of the premises owned by P.W. -12, Sukhveer Singh, the dead body was to be found wrapped in a bedding below the cot.

4. When the police party along with the accused Rajesh reached the room in question, the key of the lock was not there with Rajesh and, therefore, P.W. - 13, the Investigating Officer K.C. Tyagi, pushed the door and the door opened. It has been stated in the statement of the P.W. - 13 that the time at which the door was opened was around 7.45PM. Thereupon, Rajesh entered the room and in the light of various torches the bedding was taken out in which the dead body of Ajay Kumar was allegedly wrapped. The bedding was opened in the presence of witnesses and the corpse of the deceased Ajay was recovered and it was identified by the witnesses. A slip of plastic was found on the neck of the deceased and a baniyan was also found stuffed inside his mouth. There and then, it has been alleged that the recovery memo was prepared as Exhibit – Ka-2 by P.W. - 13 in the presence of witnesses who had accompanied him to the spot. Thereafter, recovery memo of the said dead body was sent by the P.W. 13, K.C. Tyagi, along with constables – Satyapal and Baburam – for adding Section 302 and 201 IPC in the first information report which was already lodged on 8.1.1980.

5. Further case of the prosecution is that thereafter when there was shortage of light in the evening of 9.1.1980, the inquest was not done there and then in the night but was adjourned for the next day i.e. for 10.1.1980 and the same was got prepared on the next day. Thereafter, the corpse was sent in a sealed bundle for post mortem in the mortuary at Muzzaffar Nagar. When the dead body was recovered, the recovery memo was prepared and was exhibited as Exhibit Ka-3. With regard to the articles, which were found in the room, recovery memos were prepared.

6. On 10.1.1980 at about 2:00PM, the other accused/appellant Rajguru was arrested and on 14.1.1980 the accused-appellant Omvir surrendered. Upon the investigation being completed, charge sheet was submitted by the Investigating Officer, P.W. - 13, K.C. Tyagi against the accused – Rajesh and Rajguru and a charge sheet was also submitted by Hariraj Singh against the accused Ombir.

7. After considering the material on record, the accused were charged by the court of IVth Additional Sessions Judge under Sections 302 read with Section 34 IPC and under Section 201 IPC. When the appellants/accused denied the charges and prayed for trial, the case was put to trial.

8. From the side of the prosecution as many as 13 witnesses were brought to the witness box. They gave their statements-in-chief and they were also cross-examined. The accused thereafter got their statements recorded under Section 313 Cr.P.C. and when thereafter the IIIrd Additional District & Sessions Judge, Muzaffarnagar on 30.6.1982 found the accused Rajesh, Rajguru and Ombir guilty under Section 302/34 IPC and under Section 201 IPC then they were punished for life imprisonment under Section 302/34 IPC and were also sentenced to undergo 7 years of rigorous imprisonment under Section 201 IPC (both the sentences were directed to run concurrently).

9. Aggrieved by the judgement and order of the Sessions Court dated 30.6.1980, the present Criminal Appeal has been filed.

10. On 3.3.2017, the appellant Rajguru was declared juvenile. The order dated 3.3.2017 was brought on record by the counsel for the appellant no. 2 by means of affidavit of compliance dated 10.4.2017.

11. During the trial the P.W.- 1 Raghunath Singh who is the first informant, in the statement-in-chief, had stated that the deceased Ajay Kumar was his nephew and that the incident was of 6.1.1980. On that date, his brother Raghu Prakash along with Ajay (deceased) and another nephew were sitting at their house. He states that Rajesh who was known to Ajay had always been coming to their house. Ajay Kumar and his father and the first informant were all living in the same house. He has stated that at the relevant point of time there was scarcity of diesel and they were all sitting together in the house of the first informant on 5/6th January when Rajesh approached them and said that he had certain coupons of diesel and that he could fetch diesel for them. For this purpose, the first informant gave Rs. 700/- to Rajesh and requested him to get him as much diesel as he could get for him. Therefore, Rajesh had promised that he would get diesel on the next date i.e. on 7.1.1980. Rajesh took the money and when he did not come on the 7th i.e. on the next date then the first informant P.W.-1 waited till 11:00am and when he did not come he sent his nephew (deceased) Ajay to search out Rajesh. After having sent Ajay kumar, the family had waited for Ajay Kumar to come back with Rajesh but when he did not return then on the 8th of January 1980 a missing report was got lodged in the Kotwali. In his cross-examination, he has stated that he had come to know about the fact that Ajay Kumar had died on 10.1.1980 at around 12:00Noon and this information was given to him by Sunil the real brother of the deceased- Ajay Kumar. He has stated that he was not aware as to when the accused were arrested after he had submitted his report. He has also stated that the witness

Rishi Pal (P.W.-3) was related to the accused as his sister was married to Ram Kumar, the real brother of Ajay Kumar. He has denied that the witnesses P.W. 9 Salauddin Yusuf, P.W. 8 Rameshwar Dayal and Kaliram were known to him.

12. P.W. - 2, Kharak Singh, who was the witness of the recovery of the dead body, had stated that the deceased Ajay Kumar was known to him and he repeated the story as to how the witness was contacted by P.W. - 13 and how they had gone to the room where the dead body was found. He has also stated the manner in which Rajesh was arrested. He has categorically stated that after Rajesh was arrested, he had informed the Police Officials that he knew where the dead body of Ajay Kumar was and he also could get recovered the Baniyan by which the strangulation had been done. He also states how exactly Rajesh had led them to the place from where the recovery was done. He has, thereafter, stated that the recovery memo was prepared by P.W. - 13 which was marked as Exhibit ka-2. He has stated in his cross-examination that he had seen the dead body of the deceased Ajay Kumar twice after recovery and that he had fainted thereafter. He has also stated that the dead-body was recovered at around 9:00PM on 9.1.1980. He has further stated that he never informed to anyone in the family of the deceased Ajay Kumar. Upon a specific question being asked as to how the door of the room was opened, he specifically answered that the door was pushed and despite the fact that there was a lock in the door, it opened.

13. P.W. - 3, Rishi Pal is again the witness in whose presence the dead body was recovered. He has also stated that he knew Ajay Kumar from before and he also stated the same story as to how they were contacted by the Police and as to how Rajesh was arrested.

14. P.W. - 4, Anil Kumar, is the witness who professes that he had last seen the deceased along with the accused Rajesh. He has stated that on 7.1.1980 at around 11:00 to 11:30am, he along with Munish was at the Sarpat gate and from the Chandra Talkies a Rikshaw carrying Ajay (deceased) and Rajesh also with a drum containing oil was seen. When Ram Kumar, the real elder brother of the deceased saw them, he had shouted and asked Ajay Kumar as to where he was going. Ajay had answered that he was going to take the diesel along with Rajesh. The deceased and Rajesh were followed by P.W. - 4, Anil Kumar, Ram Kumar and Munish on another Rikshaw. Thereafter Rajesh had got the Rikshaw stopped at the shop of Madhu Panwale and, Rajesh and the witness P.W. - 4 reached the petrol pump and they had stopped in the neighbouring tea shop and, thereafter, the P.W. - 4 left Ajay Kumar alongwith Rajesh and went away. On that very day, somebody from the house of the Ram Kumar had come to the house of P.W. -4 and had informed that Ajay had not returned to the house and therefore on the next day i.e. on 8.1.1980 a search was made but Ajay Kumar was not to be found. They had also gone to the house of Rajesh but he was also not traceable. He has stated that after 7.1.1980 when he had seen Ajay Kumar with Rajesh he had never seen Ajay Kumar thereafter.

15. P.W. - 5, Munish is also a witness who had stated that he had last seen Ajay Kumar with Rajesh on 7.1.1980 and he repeated the story as was narrated by P.W. - 4.

16. P.W. - 6, Hariram, is the constable who had taken the dead body on 10.1.1980 for postmortem.

17. P.W. - 7 is the Doctor who had conducted the post mortem and had stated that the hyoid bone was fractured and had given his opinion that the death had taken place because of strangulation and throttling. However, he has not stated that there was any strangulation sign over the dead body.

18. P.W. - 8, Rameshwar Dayal, is again the witness who stated that he had seen the deceased Ajay Kumar along with Rajesh Kumar, Omveer and Rajguru. He had stated that on 7.1.1980 at around 7:15PM he was in his room opposite to the building where Omveer was staying. Along with him, Salauddin and Kaluram were also there with him and that in his room an electricity bulb was lit. At around 8:00pm in the night Omveer, Rajesh and Rajguru, the accused persons, who were present in the court came along with the deceased – Ajay Kumar. The latter greeted him by saying – Namaste. When Rameshwar Dayal P.W. - 8 questioned as to how Ajay Kumar was, he had replied that he was alright and had said that he had gone with Rajesh for fetching diesel. Then thereafter the four i.e. the three accused and Ajay Kumar as per the P.W. - 8 went inside the Room No. 24 and it has been stated that P.W.-8 Rameshwar Dayal continued to sit where he was sitting and at around 8:30PM, he saw that the accused persons came out of the room but Ajay Kumar did not come out. Again upon asking the accused where Ajay Kumar was they had answered that he had gone out with the coupons to get the diesel. He had, thereafter, stated that the accused had, thereafter, left the place. They had before leaving the place locked the room and had not returned the whole night.

19. P.W. - 9, Salauddin, is again the witness who was sitting with P.W. - 8, Rameshwar Dayal. He has also stated somewhat, what had been stated by the P.W. - 8, Rameshwar Dayal. He has stated that he had come to know the names of Rajesh, Rajguru and Omvir a few days ago when they had come to play cards in the room of Omvir.

20. P.W. - 10 is one Rajendra Pal Jain, the Sub-Inspector. He is one who had initiated the case under Section 364 IPC.

21. P.W. - 11 is again the constable, Sita Ram, who alongwith P.W. - 6 Kaliram had taken the dead body for postmortem.

22. P.W. - 12 is the land-lord Sukhvir Singh and who had categorically stated that he was a landlord of the property no. 409 and that there were 14 rooms in the building which he owned and that since the year 1979-80 in Room No. 14 Omvir and Rajpal were tenants. He recognized the accused Omvir who was present in the Court. In Room No. 10, he states, Devendra Kumar Tyagi and Rameshwar Dayal were staying as tenants. Then he states that Rameshwar was not, in fact, his tenant but he quite often used to come to meet his friend Devendra.

23. PW-13 is the Investigating Officer and has given his statement-in-chief indicating as to how on 09.01.1980 on the information of an informer, he had arrested the accused at around 06:00 pm in the presence of the witnesses Kharak Singh (PW-2), Rishipal (PW-3), Yusuf and Rajeshwar and has thereafter once again stated that how Rajesh upon arrest had stated that he would lead to the place where the dead-body of Ajay was to be found and also he would get discovered the baniyan and clothes in which the dead-body was wrapped. He has stated that Rajesh had told him that room no. 24 was a room which was

rented by the co-accused Omvir. He, thereafter, states that the room had a lock and Rajesh had informed that the key was with Omvir. He stated that upon pushing the door, the door had opened. He states that this was done i.e. opening of the door at 07:45 pm. Thereafter, the accused Rajesh had entered the room and in the light of various torches he had pulled out a holdall in which the dead-body was wrapped. In the presence of the witnesses present, the holdall was opened and it revealed the dead-body of Ajay, which was wrapped and also had a ligature mark around the neck. Also the mouth was stuffed with a baniyan. He prepared the recovery memo as Exhibit Ka-2 in his own handwriting and thereafter, he had sent Rajesh alongwith the Constables, Babu Ram and Satyapal alongwith the recovery memo to get the F.I.R. changed from Section 364 of the I.P.C. to 302 of I.P.C. The entry thereafter in the Police Station was made at around 08:05 PM on 9.1.1980 by Rajeshwar Dayal, Constable. He also stated that exhibit Ka-21 was the charge sheet submitted by the police vis-a-vis Rajesh and Rajguru and the exhibit ka-22 was the charge sheet against the accused Omvir. Thereafter, the Police had reached the spot for preparing the inquest report. Since there was no light in the room, the Panchayatnama was not prepared in the night and that it was prepared in the presence of witnesses at 07:30 am on 10.01.1980 i.e. on the next day. Upon a specific question being asked in his cross-examination, as to whether the lock was broken, he had replied that it was not broken and only upon pushing the door, the same had opened.

24. The statements of the accused recorded under Section 313 of Cr.P.C. were mostly to the effect that they had denied all the allegations made against them and they had denied that they had committed the crime. However, one important question vis-a-vis Rajesh i.e. question no. 29 is important which is with regard to Exhibit -24 through which the accused Rajesh on 08.01.1980 had got a report lodged stating that while he was returning from school a boy with the name of Munish had accosted him and had taken him to a nearby barber shop where Raj Kumar along with other boys, whose names he did not know, had given him a good beating. They had also threatened him with dire consequences. He has stated very categorically that he was taken away in between 11:00 AM to 12:00 Noon on the 8th of January, 1980.

25. Sri Brijesh Sahai, learned counsel has appeared alongwith Sri Rahul Sharma for the appellant no. 1 and Sri Sunil Vashishth, learned counsel appeared for the appellants no. 2 and 3 have specifically argued that the entire case was of a circumstantial evidence and that the accused who were apprehended and tried and, thereafter, convicted should be acquitted as the judgement under challenge had not app reciated the evidence correctly. He basically argued on following issues:-

(i) Sri Brijesh Sahai learned Senior Counsel submitted that the first issue on which he intended to argue was that, in fact, there was no motive with the accused. He has argued that the motive was an extremely weak one. He submits that the first informant had come up with a case that on 06.01.1980 he had given Rajesh Rs. 700/- to bring diesel coupons for him which would fetch the first informant diesel. He thereafter states that when Rajesh did not come he had sent Ajay on 07.01.1980 and thereafter Ajay had disappeared and, therefore, on 08.01.1980 at around 05:00 PM in the evening he had got a report lodged with

regard to the fact that Ajay was missing. Learned counsel for the appellants states that motive is an important aspect on the basis of which a person who had been made an accused on the basis of circumstantial evidence could be convicted. He submitted that it was important to see if the motive was a strong one or was not such a motive which could be relied upon to convict a person. He submits that when the motive itself was an absolutely weak one, the case could not have proceeded on the basis of it and he therefore submits that the prosecution under circumstantial evidence ought not to have proceeded.

(ii) Next argument which the learned counsel for the appellants thereafter has made is that the evidence of the witnesses who had last seen the accused was a weak one. They should have seen the deceased at such a time which would have made the statements of the witness reliable. That is to say that they should have seen the deceased Ajay at such a time by which it could have been said that it was in proximity to the time of the offence. PW-4 and PW-5 had seen the deceased Ajay on 07.01.1980 at around 11:00 AM in the morning and thereafter in the evening of 7.1.1980 at around 04:00 PM. Learned counsel for the appellants states that the statements of Anil Kumar and Munish were somehow self contradictory. At one place they have stated that they actually saw the deceased going with the appellant Rajesh for fetching diesel and thereafter they state something which was absolutely unconnected. They said that the four of them had entered the room no. 14 at around 07:30PM. Their statements are in direct contradiction with the statement of PW-8, Rameshwar Dayal who had stated that Rajesh, Raj Guru and Omvir had entered the room of Omvir at around 08:00 PM in the night and he also states that Ajay had greeted him and had also stated that Rajesh would give him the coupons on a future date for the diesel which was required to be given to his uncle. Learned counsel therefore states that at one place the witnesses who had last seen the deceased state that they had actually seen the deceased taking the diesel whereas the PW-8 Rameshwar Dayal states that the deceased was mentioning that he would actually get the diesel subsequently.

(iii) Learned counsel for the appellants thereafter argued stated that the appellant - Rajesh since had got the dead-body recovered after he was arrested and that recovery was done under Section 27 of the Evidence Act, the conviction or the acquittal of the appellant Rajesh would to quite an extent depend on the fact as to whether the recovery was a proper one under Section 27 of the Evidence Act. Learned counsel for the appellants states that under Section 27 of the Evidence Act, the discovery ought to be made from the spot which:-

(i) is not accessible to the public at large,

(ii) the spot should be a special spot which was specially within the exclusive knowledge of the arrested person who was getting the recovery done.

(iii) There ought to be a disclosure statement which in addition to the fact that the recovery was going to be made had also to state that the arrested person was the author of the concealment.

Learned counsel relied upon paragraphs no. 42, 43, 44 and 45 of the judgement in **Shahaja@ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra** reported in **2022 SCC Online SC 883**. Since learned counsel relied upon those

paragraphs, they are being reproduced here as under:

"42. The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

(1) Discovery of fact in consequence of an information received from accused;

(2) Discovery of such fact to be deposed to;

(3) The accused must be in police custody when he gave informations and

(4) So much of information as relates distinctly to the fact thereby discovered is admissible - Mohmed Inayatullah v. The State of Maharashtra : (1976) 1 SCC 828 : AIR 1976 SC 483 : 1975 CLJ 668

Two conditions for application –

(1) information must be such as has caused discovery of the fact; and

(2) information must relate distinctly to the fact discovered - Kirshnappa v. State of Karnataka : (1983) 2 SCC 330 : AIR 1983 SC 446 : 1983 Cri LJ 846

43. We may refer to and rely upon a Constitution Bench decision of this Court in the case of ***State of Uttar Pradesh v. Deoman Upadhyaya*** reported in AIR 1960 SC 1125, wherein, the Supreme Court in Paragraph-71 has explained the position of law as regards Section 27 of the Act as under:

"71. The law has thus made a classification of accused persons into two : (1) those two have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion, of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says:"I pushed him down such and such mineshaft", and the body of the victim is found as result, and it can be proved that his death was due to injuries received by a fall down the mineshaft."

44. The scope and ambit of Section 27 of the Act were illuminatingly stated in ***Phulukuri Kottaya v. Emperor,*** AIR 1947 PC 67, which have become locus classicus, in the following words:

"It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed 'A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

45. What emerges from the evidence of the PW-4 & PW-10 respectively is that the appellant stated before the panch

witnesses to the effect that "I will show you the weapon concealed adjacent the shoe shop at Parle". This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence."

Also learned counsel relied upon the judgements reported in **AIR 2022 SC 5273 : Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh and in AIR 2022 SC 5110 : Subramanya vs. State of Karnataka,** and submitted that the accused while in custody ought to have given his statement before two independent witnesses, and the exact statement or rather the exact words uttered by the accused should be incorporated in the panchnama prepared by the Investigating Officer. Learned counsel submitted that the first part of the deposition for the purpose of Section 27 of the Evidence Act ought to have been drawn in police custody in the presence of two independent witnesses. The judgements cited above held as follows:

"This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

(iv) Learned counsel for the appellants then submitted that the evidence of the Investigating Officer had to be of a very good quality and if there was any doubt with regard to the evidence as was produced by the Investigating Officer then the whole case would become doubtful and the conviction could not be done.

26. In this regard, learned counsel for the appellants has very categorically stated that after the arrest had taken place on 09.01.1980 at around 06:00 PM of the appellant Rajesh and thereafter when Rajesh had proceeded for getting the dead-body recovered, learned counsel for the appellant states that he never confessed with regard to the actual authorship of the concealment. Learned counsel for the appellants thereafter submitted that in the absence of the confession and in the absence of the fact that he had stated that he was the author of the concealment, the recovery as was made under Section 27 of the Evidence Act could not be considered a recovery under Section 27 of the Evidence Act and would therefore be only a confession which would come in the category of Section 25 of the Evidence Act and could not be relied upon.

27. Learned counsel for the appellants thereafter submitted that after the arrest had taken place at 06:00 PM, the document Exhibit Ka-2 was prepared at 07:00 PM and this document clearly is to the effect that the dead-body had been discovered and that the case had already been got registered under Section 364/ 302/ 201 of I.P.C. Learned counsel for the appellants thereafter drew the attention of the Court to the statement of PW-13 wherein he states that he had actually

sent the accused Rajesh with the Constable, Babu Ram and Satyapal at 08:05 PM with a direction that the F.I.R. now be also got registered under Section 302 of I.P.C. Learned counsel for the appellant therefore states that when this direction was being given at around 08:05 pm on 09.01.1980 then the Exhibit Ka-2 which was of 09.01.1980 and was prepared at 07:00 PM definitely goes to show that the recovery was a sham recovery and that the Exhibit Ka-2 and the F.I.R. thereafter which was registered as Exhibit Ka-22 were all prepared sitting in the Thana and, therefore, no reliance could be placed on the evidence as had been brought forth by the PW-13.

28. Learned counsel for the appellants further states that if the statement made by the PW-13 is perused then it becomes clear that after the arrest had taken place at 06:00 PM and the Police party had started searching for the room in which the dead-body was to be found then there was a clear averment that everything had been done in the light of various torches. However, he submits that when it came to the preparation of the actual inquest report, the Police Officer had mentioned that there was no light present and, therefore, he was adjourning/postponing the preparation of the Panchayatnama for the next day. Learned counsel for the appellants therefore submits that this definitely goes to show that in fact the recovery memo etc. was not recorded on that day and the same was actually prepared subsequently when the Police had got the whole night of 09.01.1980 and 10.01.1980 to do the mischief. Before the Panchayatnama was prepared all the documents with regard to the recovery etc. were manufactured and while doing so they had missed out the timing given in the panchayatnama and therefore the evidence of the PW-3, the Investigating Officer which ought to have been of a high quality was definitely not of such a quality which could lead the Court to convict a person.

29. Learned counsel for the appellants further drew the attention to the Panchayatnama and from it he had shown that the Panchayatnama proceedings had commenced on 09.01.1980 at 09:30 PM and when it came to an end it was not shown in the Panchayatnama. He, therefore, submits that the preparation of the Panchayatnama was also not done on the spot but was done elsewhere. Learned counsel for the appellants having shown that the evidence of the PW-13 the Investigating Officer was of a weak kind thereafter went on to argue that the deceased Ajay was a young boy studying in the B.A. Class and was of around 21 years of age and that he submits that if he was being throttled by three young men then he would have definitely resented the acts of the three young men and there would have been at least some noticeable injuries on his own body. But, in fact, no injury has been found. Learned counsel for the appellants therefore submits that in fact the murder had taken place in some other way and the dead-body was planted in the room from where discovery had been shown and that in fact the appellants had thereafter been implicated only on the basis of suspicion.

30. Learned counsel for the appellants thereafter to substantiate his arguments that the investigation had proceeded only on the basis of suspicion, has drawn the attention of the Court to the Exhibit Ka-24 which was an N.C.R. which had been got lodged by the appellant Rajesh on 08.01.1980 against one prosecution witness Munish PW-5 and against Ram Kumar the real brother of the deceased Ajay. He submits that thereafter the Police had only a feeling/suspicion that

it was just possible that Rajesh might have committed the crime. He submits that suspicion cannot take the place of proof and therefore the conviction on the basis of suspicion was absolutely erroneous. Learned counsel relied upon the case of **Brij Bhushan Singh vs. Emperor reported in AIR 1946 PC 38** to bolster this argument.

31. Learned counsel for the appellants further has stated that to say that the accused was not in his proper senses at the time when he was taken by the three accused persons as per the case of the prosecution was also wrong. He submits that PW-8 when had seen the accused persons going with Ajay, PW-8 had stopped him and had specifically asked various questions which he had definitely answered in his full consciousness.

32. Learned counsel for the appellants also to make the recovery etc. doubtful submits that the PW-2 has stated that when he had seen the dead-body, he had actually fainted and thereafter had become conscious only at 09:00 PM in the night of 09.01.1980. He therefore submits that if that was the case then the signature which was there of PW-2 on the recovery memo becomes doubtful and, therefore, he submits that the entire case of the prosecution which is based on the investigation as was done by the Investigating Officer was absolutely doubtful in nature and therefore could not be considered by the Court for convicting the three accused.

33. Learned counsel for the appellants has relied upon the judgment of Supreme Court reported in **AIR 1984 SC 1622 : Sharad Birdichand Sarda vs. State of Maharashtra** and has submitted that as per the law laid down in it if the links which lead to the conviction, are not complete and if there is any broken link then the Court could not convict an accused. In the instant case, he submits, that the entire evidence of the Investigating Officer is doubtful. The arrest had taken place at 06:00 PM. The recovery memo was prepared at 07:00PM (which contained the Sections 302 and 201 of I.P.C.) even before the F.I.R. was upgraded to Section 302 of I.P.C. in the Police Station which was done at 08:05 PM. He, therefore, submits that the entire case of the prosecution as has been broughtforth through the various witnesses becomes doubtful and the case is a fit case for the acquittal of the three accused-appellants.

34. Learned counsel submitted that as per the judgement in the case of **Sharad Birdichand Sarda vs. State of Maharashtra reported in AIR 1984 SC 1622**, the Supreme Court has held that "before conviction could be based on circumstantial evidence the following conditions must be fully established and they are:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused. .

3. The circumstances should be of conclusive nature and tendency.

4. They should exclude every possible hypothesis except one to be proved.

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These conditions have been called as the 'Five golden principles' or to say' constitute the panchsheel of the proof of a case based on circumstantial evidence.'

35. Sri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra, however, in reply, has submitted that the recovery which was done in the presence of the witnesses could not be lightly brushed aside. Learned counsel for the State further submits that even if there was certain shortcomings in the time etc. which had been given in the recovery memo and in the F.I.R. which stated that the Section 302 of I.P.C. had been added in the F.I.R., it would make a little difference and, therefore, the appeal be dismissed and the conviction of the three appellants be affirmed. He relied upon a judgement of Supreme Court reported in **2010 (9) SCC 567 : C. Muniappan and others vs. State of Tamil Nadu**. He specifically relied upon paragraph no. 85 of the judgement which is being reproduced here as under:-

"85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses."

36. Learned A.G.A. has further submitted that the motive was definitely there and he submits that in the year 1980 a sum of Rs. 700/- was a valuable amount and murders did take place for the recovery of such amount. Learned A.G.A has also submitted that the evidence of such persons who had last seen the accused along with the deceased specially PW-8 which was approximately in the time the offence took place could not be lightly brushed aside.

37. Before parting, we would like to bring on record the fact that certain original documents of the paper book were torn and, therefore, the photocopy of the paper book which the learned counsel for the appellants has submitted and which contains the photocopies of the original documents were relied upon by the Court. Learned AGA had not denied the fact that the photocopies attached in the paper book which had been handed over by the learned counsel for the appellants were not reliable.

38. Having heard Sri Brijesh Sahai, learned Senior Counsel, assisted by Sri Rahul Sharma and Sri Sunil Vashisth learned counsel for the appellants, learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra for the State, we do find that the motive as was given for the commission of the murder of Ajay Kumar was not a strong one. It was said that Rs. 700/- were given to Rajesh with a request to him to get the coupons for fetching diesels. When he did not come with the diesel on 7.1.1980, the deceased was sent and when he did not again return on the 8th of January 1980 then a missing report was got reported. For a person like the uncle of the deceased Rs. 700/- was definitely of not much importance and he would definitely not have ventured to send his nephew, the deceased, to Rajesh one of the accused for getting back with money. This, we also conclude, on account of the fact that on 8th of January 1980 Rajesh had got a report lodged with regard

to the fact that the brother of the deceased Ajay, Munish Kumar had manhandled him. We also find that the recovery as was made under Section 27 of the Evidence Act was not as per the law. Definitely when Rajesh was under the police custody, he had not approached the place which was not accessible to public at large. Room No. 24 was such a room where Rajesh, Omvir and Rajguru had easy access. In fact, we find as per the evidence on record that when Rajesh had gone to get the dead-body recovered, he had not open the lock but had entered the room by just giving a push to the door. We also find that the recovery under Section 27 of the Evidence Act was not as per the law which has been laid down by the Supreme Court in the cases of **Shahaja@ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra reported in 2022 SCC Online SC 883, Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** reported in **AIR 2022 SC 5273 and Subramanya vs. State of Karnataka reported in AIR 2022 SC 5110.**

39. We thus are definitely of the view that the recovery as was made under Section 27 of the Evidence Act was of no value whatsoever. Still further, we are of the view that the evidence of the witnesses who had last seen the accused was not reliable. The evidence had definitely to be of such a nature which was in proximity to the time of the offence. P.W. 4 and P.W. - 5 were mentioning of something which had happened on 7.1.1980 and similarly P.W. 8 had mentioned about having seen the deceased in the company of the accused on the same day but in the evening on that date. Not only does this create a doubt with regard to the truthfulness of the witnesses but it also creates a doubt as to whether anything which the prosecution had done was done with sincerity. The time at which the deceased was seen could not be said was in the proximity of the time when the murder had actually taken place. One can easily see that one set of witnesses had seen the deceased on 7.1.1980 in the morning while the other set of witnesses had seen the deceased in the company of the accused in the evening and thus the evidence of having seen the deceased last with the accused loses its importance. We are also of the view that evidence of the Investigating Officer was not above board. The document which shows that first information report was earlier lodged under Section 364 IPC had been converted into a first information report under Section 302 /201 IPC at 7:00PM could, in fact, not have been converted at 7:00PM as the Investigating Officer himself had stated that he had given directions to Constable Babu Ram and Satyapal at 8:05PM to get the first information report registered under Section 302 IPC. Also, we are of the view that when under torch light the dead body could have been discovered at 6:00PM on 9.1.1980, there was no reason to adjourn/postpone the preparation of the panchayatnama to the next day. Also we are of the view that the panchayatnama becomes a doubtful document when it shows that the proceedings had commenced on 9.1.1980 at 9:30PM but it did not show any time when the panchayatnama was finally prepared.

40. Thus, we are of the view that when the prosecution had not been able to prove its case beyond reasonable doubt the conviction of the appellants would be an unsafe proposition. We are of the view that when a doubt has been created in the minds of the Court upon consideration of the entire evidence, the appeal should be allowed and the appellants had to be acquitted. The paragarph no. 177 of the judgement of the Full Bench decision **in Rishi Kesh Singh &**

Ors. vs. The State reported in AIR 1970 Allahabad 51 (FB) is being reproduced here as under:-

"177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:—

The majority decision in 1941 All LJ 619 = AIR All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused."

41. Ultimately, we are of the view that the prosecution has definitely failed to prove the case which was taken by it beyond reasonable doubt.

42. Under such circumstances, the instant criminal appeal is **allowed**. The judgement and order dated 30.6.1982 passed by the IIIrd Additional Sessions Judge, Muzaffarnagar is quashed and set aside. The appellants are acquitted of the charges on the basis of which the trial had proceeded. Since the appellants are on bail, the bail bonds and sureties are discharged.

(2024) 5 ILRA 199
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 1667 of 2021
And
Jail Appeal No. 338 of 2018
wih other cases

Rammilan Bunkar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Shiv Babu Dubey, S.P.S. Chauhan, Sukhendra Singh

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Section-302 r/w 34, 304-B, A98-A - Indian Evidence Act, 1872-Section 106-The Dowry Prohibition Act, 1961-Sections 3/4- The trial courts invariably in all the cases have exonerated the accused persons from the charge u/s 304-B I.P.C. but with the aid of Section 106 of Evidence Act convicted the accused persons in a most casual and cursory fashion u/ s 302 I.P.C-Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.

Making a reference in one paragraph is not going to help the prosecution. To establish a case u/s 302 I.P.C., the prosecution has to establish its case by making a full-dressed trial producing various prosecution witnesses to establish the guilt of accused u/s 302 I.P.C. beyond the pale of any suspicion or doubt-Section 106 of Evidence Act cannot be used mechanically or as a tool in the hand of prosecution to convict the accused without discharging duty on its part.

Matter remitted back for retrial. (E-15)

List of Cases referred-;

1. Rajbir @ Raju & anr. Vs St. of Har. (2010) 15 SCC 116

2. Jasvinder Saini Vs St. (Government of NCT of Delhi), (2013) 7 SCC 256.

3. Vijay Pal Singh & ors. Vs St. of Uttarakhand, (2014) 15 SCC 163

4. Shamnsaheb M. Multtani Vs St. of Karn. (2001) 2 SCC 577

5. Kamil Vs St. of U.P., AIR 2019 SC 45.

6. Dr. (Smt.) Nupur Talwar Vs St. of U.P. & anr., 2017 10 ADJ 586

7. St. of Rajasthan Vs Kashi Ram, JT 2006(12)SCC 254

8. Trimukh Maroti Kirkan Vs St. of Mah., (2006) 10 SCC 681

9. Balvir Singh Vs St. of Uttarakhand in Ciminal Appeal No.301 of 2015 with Criminal Appeal No.2430 of 2014 decided on 06.10.2023,

10. Mohd. Hussain @ Julfikar Ali Vs St. of (Govt. of NCT of Delhi), (2012) 9 SCC 408

11. Ajay Kumar Ghoshal & ors. Vs St. of Bihar & ors., (2017) 12 SCC 699

(Delivered by Hon'ble Rahul Chaturvedi, J.)

[1]. Heard learned counsels named above appearing for respective appellants as well as learned Additional Government Advocate for the State of U.P. Perused the record.

[2]. Since all the appeals suffer from same legal vice and flaw, therefore, all the appeals after being clubbed together and for the sake of brevity and convenience, are being decided by a common judgment.

[3]. The moot legal questions to be adjudicated, in these appeals are; (i) as to whether the trial courts are justified in framing the charge u/s 498A, 304B I.P.C. & Section 3/4 of Dowry Prohibition Act with alternative charge u/s 302 I.P.C. simplicitor or 302/34 I.P.C.; (ii) as to whether the trial courts are justified while exonerating the accused-appellants from the primary charges of Sections 498A, 304B I.P.C. & Section 3/4 of Dowry Prohibition Act, but convicting them u/s 302/34 I.P.C. taking recourse of Section 106 of the Evidence Act?

As above is a pure legal issue, which deserves strict judicial scrutiny by this Court about the alleged addition of Section 302 I.P.C., in addition to pre-existing sections about dowry death and dowry related inhuman treatment. This exercise is being carried out by the learned Trial Judges as a mater of routine and in a most mechanical fashion, making the entire episode more grim and serious, without having any supporting documents or allegations. Adjudicating of instant legal proposition would have far-reaching implications upon all the pending trials before concerned Sessions Courts of the State, as we are now inclined to decide the aforesaid moot point at this threshold stage.

At this juncture, we may like to clarify that while deciding this bunch of Appeals, we are focussing our attention to above legal theorem only without touching the factual merit of the case. It is open for the trial court to decide entire spectrum of the cases after having proper evaluation of the evidence on its own.

[4]. Before entering into the legal arena, we find it necessary to give a bare skeleton facts of each case for better appreciation of every appeal at hand and the controversy involved in it, viz :

FACTUAL MATRIX OF RESPECTIVE APPEALS :

[5]. CRIMINAL APPEAL NO.1667 of 2021

(Rammilan Bunkar vs. State of U.P.)

(i) Appellant *Rammilan Bunkar* is facing incarceration since 09.02.2021

pursuant to judgment and order passed by the learned Additional Session Judge (F.T.C.), Lalitpur while deciding S.T. No.37 of 2017 (State vs. Rammilan Bunkar and 2 others), arising out of Case Crime No.113 of 2016, Police Station-Narahat, District Lalitpur. The appellant Rammilan Bunkar and 2 others were put to trial u/s 498A, 304B I.P.C. and Section ¾ D.P. Act with alternative charge u/s 302/34 I.P.C., but the learned Trial Judge have exonerated the accused-appellant from the charge u/s 304B I.P.C., but have convicted u/s 302 I.P.C. for life imprisonment with fine of Rs.10,000/-; u/s 498A I.P.C. for two years simple imprisonment with fine of Rs.3000/- and u/s 4 of D.P. Act for one year rigorous imprisonment and a fine of Rs.3000/- with default clause. In addition to this, remaining co-accused persons Lal Singh and Har Govind were also exonerated and acquitted from the charges u/s 498A, 304B, 302 I.P.C. & Section 4 D.P. Act.

(ii). As per prosecution case the informant Aunda s/o Pathola has given a written tehrir on 18.3.2016 that her daughter Anita @ Poonam (aged about 22 years) got married with Rammilan Bunkar about three years back. The marriage was solemnized as per their standards, but her in-laws were dissatisfied with the dowry given and they were demanding a motorcycle and sofa-set by way of additional dowry and on this score she was subjected to constant torture and ill-treatment. On 17.3.2016 around 03.00 in the day, they have taken away the deceased and Rammilan Bunkar, Lal Singh and Har Govind poured kerosene oil upon her and set her ablaze. On this, F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 of D.P. Act on 18.03.2016. Postmortem of the deceased was conducted on 18.3.2016, which reveals that she died on account of asphyxia and shock as a result of ante mortem burn injuries.

(iii) Being cognizable offence, the matter was remitted to the court of session and on 20.04.2017 charges were framed against the appellant u/s 498A, 304B I.P.C. and Section 3/4 of D.P. Act and alternative charge u/s 302/34 I.P.C. The prosecution has produced as many as five prosecution witnesses to prove its case along with certain documents.

(iv) Learned counsel for appellant has drawn attention of the Court to the testimony of P.W.-2 Manbai @ Manbhu (mother of the deceased) in which she stated that since her daughter was not carrying pregnancy despite of the treatment provided by her husband, she became introvert, sombre and hopeless. For this reason and on this account she has committed suicide by pouring kerosene oil upon her.

(v) The trial court in so many words has clearly indicated that the relevant postulates of Section 304B I.P.C. are completely missing in the present case and the prosecution has miserably failed to establish them, thus, no case u/s 304B I.P.C. or Section 4 of D.P. Act is made out, BUT in a most casual way the trial court has convicted the accused-appellant with alternative charge u/s 302 I.P.C. While adjudicating upon Issue No.5, the learned Trial Judge have taken the help and recourse of Section 106 of Evidence Act mentioning that her in-laws were not present over the site and the burden is upon the husband to explain the circumstances in which she died unnaturally. Since accused-appellant was unable to discharge his burden, as such, it would be presumed that the offence is committed by him and accordingly he was convicted for the offence u/s 302, 498A I.P.C.

(vi) As mentioned above, in the last paragraph of the judgment, in a most casual and capricious way without taking into account that the provisions of Section

302 I.P.C. are totally different and distinct and conviction cannot be recorded in a superficial way but the same has been done by the impugned order. This is the moot question to be adjudicated upon by this Court.

[6]. CRIMINAL APPEAL NO.5193 OF 2023 **(Meena Srivastava vs. State of U.P.)** & CRIMINAL APPEAL No.5671 OF 2023 **(Amit Srivastava @ Ashu vs. State of U.P.)**

(i) Appellants *Meena Srivastava and Amit Srivastava @ Ashu* are under incarceration pursuant to impugned judgment and order of conviction dated 24.9.2023 passed by the learned Additional Session Judge, Court No.9, Varanasi. Both the appellants have filed their separate appeals challenging a common judgment and order dated 24.9.2023, whereby the learned Trial Judge has convicted the appellants in S.T. No.410 of 2018 (State vs. Amit Srivastava and another), arising out of Case Crime No.621 of 2018, u/s 498A, 316, 302 I.P.C., Police Station Shivpur, District Varanasi and awarded sentence u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each; u/s 316 I.P.C. for seven years rigorous imprisonment along with fine of Rs.5,000/- each; u/s 498A I.P.C. for one year rigorous imprisonment along with fine of Rs.1000/- to each of the appellants.

(ii). As per the version of F.I.R., the informant Ramendra Kumar Srivastava has lodged the F.I.R. No.621 of 2018 on 20.9.2018 at Police Station Shivpur, District Varanasi, that his daughter Sakshi Srivastava was married to one Amit Srivastava @ Ashu, a year back, with a lot of fanfare and after giving sufficient amount of dowry and gifts. From the day one of marriage, the husband Amit Srivastava and mother-in-law Meena Srivastava used to taunt Sakshi for bringing scanty dowry. During her lifetime, Sakshi stated that her husband and mother-in-law were demanding Rs.3 lacs as additional dowry. The informant has shown his inability to meet out the demand of additional dowry. Her daughter was carrying pregnancy of seven months. On 19.10.2018 the informant got a call from his son-in-law, that the condition of her daughter Sakshi is not up to the mark and slowly deteriorating. She was got admitted in Ansh Neuro Hospital at I.C.U. and in the morning she was declared dead. Her body as well as head was having number of visible injuries.

(iii) In this case initially the F.I.R. was registered u/s 498A, 304B I.P.C. & Section 3/4 of D.P. Act at Police Station Shivpur, District Varanasi and after the investigation the police have submitted charge sheet under same sections. Being cognizable offence, the case was committed to the court of session and the learned Session Judge on 4.6.2019 has framed charge u/s 498A, 304B I.P.C. with alternative charge u/s 302 I.P.C. and Section 4 of D.P. Act, which were denied by the accused-appellants and insisted to be tried.

(iv) Perusal of the impugned judgment indicates that eventually the appellants were convicted for the offence u/s 498A, 316, 302 I.P.C. The interesting feature of the case is that the learned Sessions Judge have exonerated the accused-appellants u/s 304B I.P.C. and Section 4 of D.P. Act, but convicted u/s 498A, 316, 302 I.P.C. From the paragraphs 46, 47 and 48 of the judgment it is evident that the learned Sessions Judge has taken the help of Section 106 of the Evidence Act and arrived to the convenient conclusion, that this was under the special knowledge which is in possession of the accused-appellants as the deceased died at her marital place. How and under what circumstances the injuries

were inflicted upon the deceased, its burden lies upon the accused-appellants and since they have not discharged their burden, therefore, taking the recourse of Section 106 of the Evidence Act, they have been convicted u/s 302 I.P.C. and awarded sentence for life.

[7]. JAIL APPEAL NO.338 OF 2018
(Prem Chand vs. State of U.P.)

(i) In this appeal the appellant *Prem Chandra* is in jail pursuant to impugned judgment and order dated 29.3.2017 passed by the Additional Session Judge, Court No.5, Banda in S.T. No.173 of 2012 (Prem Chandra and 2 others vs. State of U.P.), arsing out of Case Crime no.499 of 2012, Police Station Kotwali Nagar, District Banda. Though the accused have faced the trial u/s 498A, 304B I.P.C. & Section 4 of D.P. Act with alternative charge u/s 302 I.P.C., BUT the learned Trial Judge while deciding aforesaid session trial have convicted the appellant Prem Chandra with alternative charge u/s 302 I.P.C. only, awarding sentence for life with a fine of Rs.10,000/-, exonerating him from the charges u/s 498A I.P.C. and ¾ of D.P. Act.

(ii) As per prosecution case, Shyam Babu has given a written tehrir (Ext. Ka-1) that his handicapped daughter Sangita got married with accused-appellant Prem Chandra on 5.11.2011, though she was educated girl, completed her Masters. This marriage was solemnized with a lot of fanfare and sufficient dowry/gifts were given by the informant to her daughter. It is further alleged that after the marriage, the girl was constant target of taunts and innuendoes from her husband and mother-in-law for being handicapped and scanty dowry. They demanded Rs.50,000/- more as additional dowry. On 23.8.2012 around 8.00 in the morning the informant received an information that his daughter died. After making inquiry, an information was gathered by them that the husband Prem Chandra by the small gas cylinder and some sharp edged weapon assaulted upon the her and thereafter fled away. In a precarious condition she was got admitted in the hospital where at 8.00 in the morning she died.

(iii) In paragraph-7 of the judgment it is mentioned that after hearing the parties the charges against Raj Bahadur, Prem Chandra and Surajkali were framed u/s 498A, 304B I.P.C. & 3/4 D.P. Act and also alternative charge u/s 302 I.P.C. However, the husband Prem Chandra too was acquitted from the charge u/s 498A I.P.C. & 3/4 D.P. Act and he was convicted u/s 302 I.P.C. and was awarded life sentence by the learned Additional Session Judge, Court No.5, Banda. The appellant is in jail since 29.3.2017 (date of judgment).

(iv) The Court has occasion to examine the impugned judgment. No doubt, the deceased died under unnatural circumstances at the residence of her husband. In paragraph 35 and 36 of the judgment, it is clearly mentioned that prosecution has miserably failed to establish the guilt of Section 498A, 304B I.P.C. & 3/4 D.P. Act against co-accused Raj Bahadur and Surajkali, but without attributing any cogent reason abruptly and whimsically the learned Trial Judge have convicted the appellant Prem Chandra u/s 302 I.P.C. Since all accused persons were exonerated from the charge u/s 498A, 304B I.P.C. & 3/4 D.P. Act, therefore, presumption contained u/s 113 of the Evidence Act would not come to help of prosecution. If accused is being tried for the offence u/s 302 I.P.C., entire burden is upon the prosecution to establish the guilt of accused beyond reasonable doubt. In the entire judgment, there is no whisper that appellant Prem Chandra was an author of

this unfortunate incident. However, Section 106 of the Evidence Act would come into play only after the prosecution establishes the case against the accused beyond the pale of reasonable doubt, then only the operation of Section 106 of Evidence Act starts operating against the accused.

[8]. CRIMINAL APPEAL NO.5071 OF 2018 **(Shiv Kumar vs. State of U.P.)** & CRIMINAL APPEAL NO.5069 OF 2018 **(Jamuna Devi and another vs. State of U.P.)**

(i) The appellants Shiv Kumar, Jamuna Devi and Shankar Lal are under incarceration pursuant to impugned judgment and order of conviction dated 09.08.2018 passed by the learned Additional District & Sessions Judge, Court No.3/Special Judge (DAA), Pilibhit. The appellants have filed two separate appeals challenging a common judgment and order dated 09.08.2018, whereby the learned Trial Judge has convicted the appellants in S.T. No.219 of 2017 (State of U.P. vs. Shiv Kumar and others) and S.T. No.272 of 2017 (State of U.P. vs. Shankar Lal), arising out of Case Crime No.277 of 2017, u/s 498A, 304B, I.P.C. and 3/4 of D.P. Act, Police Station Gajraula, District Pilibhit awarding sentence u/s 304B I.P.C. for life imprisonment; u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each and u/s 498A I.P.C. for three years rigorous imprisonment along with fine of Rs.3000/- to each of the appellants. Thus it is shocking that the learned Trial Judge have recorded conviction only to accused Shankar Lal (Husband) u/s 304B as well as 302 I.P.C. both and awarded u/s 304B I.P.C. for life sentence and u/s 302 I.P.C. for life sentence and fine of Rs.10,000/-, unmindful of the fact that both the sections operates in two different spheres, having two different sets of essential ingredients.

(ii). In this case too, initially the F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act against Shiv Kumar, Jamuna Devi and Rumla @ Urmila. Being cognizable offence the matter was committed to the court of session and the learned Trial Judge have framed the charge against the appellants u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C.

(iii). As per prosecution case, the informant's daughter Vimla (22 years) got married with Shankar Lal in April, 2016 whereby the informant has given dowry and gifts as per his capacity, but the in-laws were not satisfied and on account of scanty dowry there was a bad breath between them. The deceased's sister-in-law (nanad) Rumla @ Urmila got married with the maternal brother of Vimla and this was the sole reason for further animosity. In the intervening night of 15.6.2017 all the persons of in-laws throttled the neck of Vimla and wiped her off. Vimla was carrying the pregnancy of three months. Initially the F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act and the charge sheet was also submitted in same sections, but after committal of the case to the court of session, the learned Trial Judge have framed the charge against the appellants u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C. on 26.10.2017, which were denied by the accused-appellants and insisted for trial.

(iv). To establish the case of prosecution, the prosecution has produced as many as six prosecution witnesses along with certain documents. After the trial, sister-in-law of the deceased Rumla @ Urmila was acquitted from the charge u/s 498A, 304B I.P.C. & 4 D.P. Act with an

alternative charge u/s 302 I.P.C. BUT interesting feature of the case is that the learned Sessions Judge after thrashing the evidence have recorded the conviction of accused-appellants Shiv Kumar, Jamuna Devi and Shankar Lal u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C. In this judgment learned Trial Judge has given per se absurd finding and conviction, so much so, on the same set of facts the Trial Judge have recorded conviction u/s 304B and 302 I.P.C. simultaneously against Shankar Lal, the husband and accordingly convicted the husband for life in both the offences.

This indeed a strange judgment whereby the learned Trial Judge who is a senior judicial officer of Sessions Judge rank, has failed to appreciate that the sphere of operation of both the sections of 302 I.P.C. and 304B I.P.C. are entirely different and distinct. Except that there is loss of life in both the cases, there is nothing common or overlapping with each other.

This Court feels pity about the legal understanding of the concerned Trial Judge who convicted the Husband Shankar Lal for both the offences u/s 302 as well as 304B I.P.C.

[9]. Thus, from the aforesaid it is clear that there is specific pattern in all the impugned judgments whereby almost all the F.I.Rs. have been registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act, but the trial courts invariably in all the aforesaid cases have inserted Section 302 I.P.C. as an alternative charge. The peculiarity of all the appeals is that almost in all cases the learned Trial Judge has exonerated the accused-appellants from the charges u/s 498A, 304B I.P.C. & 3/4 D.P. Act, but taking recourse to Section 106 of Evidence Act all the respective appellants have been convicted for the alternate offence u/s 302 I.P.C. simplicitor or with the aid and help of Section 34 I.P.C.

[10]. It is argued by learned counsel for appellants that aforesaid legal fallacy is *dehors* of the settled principles of law in this regard that there is absolute big Zero to justify the addition of Section 302 I.P.C. for framing of the charge of "murder". It seems the learned Trial Judge have framed those charges in the faithful compliance of the Hon'ble Supreme Court's judgment in **Rajbir @ Raju and another vs. State of Haryana, decided in the year 2010,** which was later on explained in the year 2013 in yet another judgment of Hon'ble Apex Court in the case of **Jasvinder Saini vs. State (Government of NCT of Delhi), (2013) 7 SCC 256.**

LEGAL DISCUSSION :

[11]. From the aforesaid bunch of appeals, it is evident that there is common thread that in all the appeals the case was registered u/s 498A, 404B I.P.C. & 3/4 Dowry Prohibition Act, BUT the learned Sessions Judge while framing the charge have invariably added Section 302 I.P.C. simplicitor or 302 read with Section 34 I.P.C. in all the appeals. Interesting feature of all the appeals is that the learned Sessions Judge have exonerated the appellants from the charges u/s 498A/304B I.P.C. & 3/4 D.P. Act, but at the tale of their respective judgments the learned Sessions Judges cursorily but in oddish way taking the aid of Section 106 of Evidence Act have convicted all the appellants for the offence u/s 302 I.P.C. This is the LCM of all the appeals.

[12]. After doing slight research work, it has come to our knowledge that this practice has started with a judgment

pronounced by the Hon'ble Apex Court in the case of Rajbir alias ***Raju and another vs. State of Haryana, (2010) 15 SCC 116***, whereby the Hon'ble Apex Court, while relying upon its own judgments in the cases of Satya Narayan Tiwari vs. State of U.P., 2010 (13) SCC 689 and Sukhdev Singh vs. State of Punjab, 2010 (13) SCC 656, pleased to pass the following directions to all the trial courts :

"7. We further direct all the trial courts in India to ordinarily add Section 302 to the charge of Section 304-B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to the Registrars General/Registrars of all High Courts, who will circulate it to all trial courts."

[13]. We have an occasion to peruse the judgment of **Rajbir @ Raju** *(supra)* running into only seven paragraphs. No doubt that now-a-days the crime against women is quite rampant and the Hon'ble Judges of the Supreme Court have shown their concern about increasing graph of crime against women, but it seems that, it was a more of an emotional cry by the Apex Court to frame alternatively charge an accused u/s 302 I.P.C. so that the offender may be hanged or death sentence could be imposed upon such an offender, unconcern by the fact that there is no evidence even for the namesake to attract the essential ingredients of Section 302 I.P.C. which would justify the learned Trial Judge to frame an alternative charge u/s 302 I.P.C. Ignoring this vital legal fallacy, in order to obey the commands of the Hon'ble Supreme Court, a circular was issued pursuant to the aforesaid judgment, which is being scrupulously followed by the different trial courts in India since 2010 itself.

However, this proposition of law was later on explained by the Hon'ble Apex Court while pronouncing yet another judgment in ***Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256***. In this judgment while assessing the scope and ambit of Section 216 of Cr.P.C., it was held that, the courts have an unrestricted power to add or alter any charge whenever courts find that erroneous/defective charges have been framed which lately requires an addition or its dropping. Under Section 216 Cr.P.C. the scope and ambit of existing charges become necessary after commencement of the trial, but such change or alteration should be made before the pronouncement of the judgment.

In addition to this, if any alteration or addition is being made by the learned Trial Judge, it must primarily satisfy that there are sufficient material on record to justify the said addition or alteration of charge.

[14]. In the instant cases where there is *prima facie* allegation of dowry related harassment and unnatural demise of the bride within seven years of her marriage and the charges were accordingly framed, then addition of Section 302 I.P.C. mechanically without any supporting material is held to be unsustainable. In paragraphs 13, 14, 15 of ***Jasvinder Saini's*** case Hon'ble Apex Court have clarified the aforesaid paragraph-7 of Rajbir's judgment, which read thus :

"13. A reading of the order which the trial Court subsequently passed on 23rd February 2011 directing addition of a charge under Section 302 IPC makes it abundantly clear that the addition was not based on any error or omission whether inadvertent or otherwise in the matter of framing charges against the accused. Even

the respondents did not plead that the omission of a charge under Section 302 IPC was on account of any inadvertent or other error or omission on the part of the trial Court. The order passed by the trial Court, on the contrary directed addition of the charge under Section 302 IPC entirely in obedience to the direction issued by this Court in Rajbir's case (supra). Such being the position when the order passed by the trial Court was challenged before the High Court the only question that fell for determination was whether the addition of a charge under Section 302 IPC was justified on the basis of the direction issued by this Court in Rajbir's case (supra). The High Court has no doubt adverted to that aspect and found itself to be duty bound to comply with the direction in the same measure as the trial Court. Having said so, it has gone a step further to suggest that the autopsy surgeon's report was prima facie evidence to show that the offence was homicidal in nature. The High Court has by doing so provided an additional reason to justify the framing of a charge under Section 302 IPC.

14. Be that as it may the common thread running through both the orders is that this Court had in Rajbir's case (supra) directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court."

(Emphasised)

[15]. After reading the above relevant paragraph of the judgment in Jasvinder Saini's case *(supra)*, the Hon'ble Apex

Court clarified the legal proposition and the true import of Rajbir's case, that though in the cases of Dowry Death, is untimely and unnatural demise of the bride within seven years of her marriage. In such case, direction to add Section 302 I.P.C. against the accused who is already facing the charge u/s 304B I.P.C. is not a true import of the order passed in Rajbir's case *(supra)*. Charges are framed relying upon the nature of evidence collected during investigation and not only in air or whimsical way. In fact, our lower courts are under the commands or in some mistake notion of law, they keep on adding Section 302 I.P.C. as an alternate charge without any cogent material to justify the same, which would bound to lead a disastrous result qua the accused-appellant. All that court wants to say that in a case where a charge alleging dowry death u/s 304B I.P.C. is framed, additional charge u/s 302 I.P.C. can also be framed, if the evidence otherwise permits; meaning thereby, during investigation if the angle of murder is also surfaced, then the learned Trial Judge would be well within his right to frame the charge u/s 302 I.P.C. as main charge. Charge u/s 304B I.P.C. cannot be substantiated for the charge of murder punishable u/s 302 I.P.C. It is true that in the case of murder and case of dowry deaths, death of a person is involved. The offender would be prosecuted for the offence u/s 302 I.P.C. or 304B I.P.C., depends upon the fact, situation, circumstances and the material collected by the I.O. of that individual case.

[16]. If the evidence collected during investigation, direct or circumstantial, *prima facie* supports and justifies the addition of a charge u/s 302 I.P.C., then the learned Trial Judge can and indeed ought to have framed the charge of murder punishable u/s 302 I.P.C., then only it would be the main charge and not the alternative charge, as erroneously being assumed by the trial courts in State of Uttar Pradesh while framing the charge of Dowry Death. If the main charge of murder is not proved against the accused at the trial, the court then only switch over to look into evidence to determine whether the alternative charge of Dowry Death u/s 304B I.P.C. is established or not.

As mentioned above, the basic ingredients of both the offences operates in two difference spheres, demanding appreciation of evidence from the perspective relevant to such an individual offence. But as mentioned above, to frame the charge erroneously u/s 302 I.P.C. as alternative charge by the Trial Courts in St ate of U.P. is rampant and the learned Trial Courts are mechanically framing the charges, unmindful of the fact that there is no evidence even for namesake to justify the addition of Section 302 I.P.C. simply in faithful compliance of the judgment given in Rajbir's case *(supra)*. Though this erroneous interpretation of Section 216 Cr.P.C. has already been rectified and duly explained in yet another judgment of Jasvinder Saini's case *(supra)*, but no Sessions Judge has paid any heed to the clarification/explanation.

[17]. It would not be a patch work, that if the court imbibing the same reasoning of *Jasvinder Saini's* case, directing the investigating to hold a wide spectrum of investigation in allegedly Dowry Death's cases. They are supposed to examine the death of a lady from every possible angle which includes her death on account of murdering her by her husband and in-laws punishable u/s 302 I.P.C., then also examine, as to whether she has committed suicide on account of instigation or abetment by her husband or in-laws punishable u/s 306 I.P.C. Not only this, the

investigating agency would also ascertain by collecting material that she was subjected to inhuman behaviour or cruel treatment on account of scanty dowry by her husband and in-laws punishable u/s 304B I.P.C.

In such a substance, the investigating agency is not guided by F.I.R. alone, but they should also examine the murder case of a lady from every possible angle of the case and submit its report u/s 173(2) Cr.P.C. The trial Court then only after going through the material collected by the I.O. of the case, applying its own judicial mind should frame the charge against the offenders, and not guided by the so-called casual observations of Rajbir's case *(supra)* which was later on explained in Jasvinder Saini's case *(supra)*.

[18]. In yet another judgment of ***Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163,*** the charges of offences punishable under Section 304B read with Section 34 of IPC, Section 302 read with Section 34 of IPC, Section 498A of IPC and Section 201 of IPC were framed against the appellants. The charges were read over and explained to the appellants, who pleaded not guilty and claimed to be tried. The relevant extract of the judgment is being spelled out hereunder :

"16. Since, the victim in the case is a married woman and the death being within seven years of marriage, apparently, the court has gone only on one tangent, to treat the same as a dowry death. No doubt, the death is in unnatural circumstances but if there are definite indications of the death being homicide, the first approach of the prosecution and the court should be to find out as to who caused that murder. Section 304B of IPC is not a substitute for Section 302 of IPC. The genesis of Section 304B of IPC introduced w.e.f. 19.11.1986 as per Act 43 of 1986 relates back to the 91st Report of the Law Commission of India. It is significant to note that the subject was taken up by the Law Commission suo motu.

18. However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court should frame the charge under Section 302 of IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision."

In the case of ***Jasvinder Saini's*** case the Hon'ble Apex Court has further clarified in paragraph-20, which reads thus :

"20. Though in the instant case the accused were charged by the Sessions Court under Section 302 IPC as alternate charge, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry

death, it is the duty of the investigating officer to investigate the case under Section 302 I.P.C. and the prosecution to proceed in that regard and the court to approach the case in the perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial."

[19]. From plain reading of aforesaid judgment, it clearly indicates that when a married woman dies within 7 years of marriage, otherwise than normal circumstances, the F.I.Rs. are being lodged u/s 498A, 304B and other allied sections of I.P.C. There is no investigation or inquiry made by the police to see whether there is any evidence, direct or circumstantial, so as to justify whether the offence was within the realm of Section 302 I.P.C.? The Investigating Officer blindly and in the most mechanical fashion proceeded to investigate into the matter and filed his report u/s 173(2) Cr.P.C. only u/s 304B and other allied sections of I.P.C. It is the duty of I.O. of the case to investigate the matter from every angle of murder u/s 302 or 306 I.P.C. also and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim was a married woman, who has suffered unnatural death within seven years of her marriage and there is evidence that prior to her death she was subjected to cruelty and harassment on account of scanty dowry, the prosecution or the court, can not shut their eyes to examine the attending circumstances from the angle of culpable homicide or suicide. Meaning thereby, the I.O. of the case also required to hold a wide spectrum investigation to assess the entirety of facts, examining the case from every other possible angle and then assess the attending circumstances, so as to satisfy himself that case case in hand may also come within the purview of Section 302 or 306 or 304B I.P.C. If material indicates that essential features of Section 302 I.P.C. is also available, then the main charge would be u/s 302 I.P.C. and not alternative charge as popularly understood in some quarters.

The Investigating Officer never bothered to collect any evidence or examine the matter from the angle of murder of suicide so as to give even an indication that alleged incident might be a case of murder or suicide. No effort is made by the concerned I.O. to collect evidence keeping in view the ingredients of Section 300 I.P.C., therefore, in most of the cases, we observe that Section 302 I.P.C. is put as an alternative charge at the stage of framing of the charge, unmindful of the fact that there is hardly any material to substantiate or justify the framing of charge of murder or culpable homicide. All the trial courts are obediently adhering to this practice since 2010 in the light of the judgment of Rajbir's case *(supra)* which has been clearly explained and clarified by Hon'ble Apex Court in its subsequent judgment of Jasvinder Saini *(supra)*, but no effort has been made to circulate this judgment so as to put the record straight and clarify the legal position.

[20]. Now yet another aspect of the issue that if the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether alternative charge of dowry punishable u/s 304B I.P.C. is established or not. During investigation the

I.O. should be cautious enough to hold an in-depth investigation in the larger spectrum and collect the material as to whether the case falls within the ambit of Section 302 I.P.C. or secondarily it is a case of dowry death u/s 304B I.P.C. The legislation while promulgating the Act of 43 of 1986, the Statement of Object and Reasons while incorporating Section 304B I.P.C. reads thus :

"1. The Dowry Prohibition Act, 1961 was recently amended by the Dowry Prohibition (Amendment) Act, 1984 to give effect to certain recommendations of the Joint Committee of the Houses of Parliament to examine the question of the working of the Dowry Prohibition Act, 1961 and to make the provisions of the Act more stringent and effective. Although the Dowry Prohibition (Amendment) Act, 1984 was an improvement on the existing legislation, opinions have been expressed by representatives from women's voluntary organizations and others to the effect that the amendments made are still inadequate and the Act needs to be further amended.

2. It is, therefore, proposed to further amend the Dowry Prohibition Act, 1961 to make provisions therein further stringent and effective. ..."

[21]. That is how Section 304-B I.P.C. was incorporated in the Penal Code which is more of a legal fiction having six essential and peculiar ingredients which are known to all, whereas Section 302 I.P.C. provides punishment for murder. However, it has been defined in Section 299/300 I.P.C. which speaks about culpable homicide and murder. Thus, the area of operation of both the Sections 299/300 I.P.C. is different and distinct, and its requirement to establish the case under law is clearly different. They do not overlap or intercept with each other, except with a common thread that in both the cases a person looses his life.

[22]. Section 299 I.P.C. defines 'Culpable Homicide' as whoever causes death by doing an act with intention of causing death or with intention of causing such bodily injury as is like to cause death or with the knowledge that he is likely by such act to cause death, commit the offence of culpable homicide.

Section 300 I.P.C. defines Muder- Except in the cases hereinafter expected, culpable homicide is murder, if the act by which death is done with the intention of causing death.

Thus 'Culpable Homicide' as defined in Section 299 I.P.C. is bigger Phylum of which Murder (Section 300), Culpable Homicide not amounting to murder (Section 304), causing death by negligence (Section 304A), Dowry Death (304B), Abetment of suicide (Section 306) of I.P.C. are distinct and different species of bigger that Phylum where there is common thread that a person looses his life or, in other words they are different shades with own distinctive and specialized features in it.

SCOPE AND AMBIT OF SECTION 302 IPC : 304B IPC :-

[23]. It has been argued by learned counsel for appellants while referring to the judgment of ***Shamnsaheb M. Multtani vs. State of Karnataka (2001) 2 SCC 577*** on the proposition that when a person is charged for an offence u/s 302, 498A I.P.C. on the allegation that he has caused the death of a bride after subjecting her to cruelty with a demand of dowry within seven years of her marriage, a situation may arise, as in this case, that the offence of murder is not

established against the accused, nonetheless all the ingredients necessary for the offence u/s 304B I.P.C. would stand established. Can the accused be convicted in such a case for the offence u/s 304B I.P.C. without such offence forming the part of the charge? In other words, whether in a case where the prosecution has failed to prove the charge u/s 302 I.P.C., but on the facts the ingredients of Section 304B I.P.C. have winched to the fore, court can convict him of that offence in the absence of the said offence being included in the charge. This was a sole proposition of law which was determined by the Hon'ble Apex Court in the aforesaid judgment of *Shamnsaheb M. Multani (supra)*.

[24]. Before dealing with the aforesaid proposition of law, it is relevant to spell out the meaning of a technical expression of 'cognate offense', 'inchoate offense' and 'lesser included offense'.

Cognate offense : *A lesser offense that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category. For example, shoplifting is a cognate offense of larceny because both crimes require the element of taking property with the intent to deprive the rightful owner of that property.*

Inchoate offense. A step toward the commission of another crime, the step in itself being serious enough to merit punishment. The three inchoate offenses are attempt, conspiracy and solicitation. The term is sometimes criticized. Also termed anticipatory offense; inchoate crime; preliminary crime.

Lesser included offense. *A crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime-battery is a lesser included offense of murder-For double-jeopardy purposes, a lesser included offense is considered the "same offense" as the greater offense, so that acquittal or conviction of either offense precludes a separate trial for the other. Also termed lesser offense; included offense; necessarily included offense; predicate offense; predicate act.*

The aforesaid technical terms are being used in explaining the scope and ambit of Sections 302 and 304B I.P.C. and their sphere of operation.

[25]. During course of argument, a pure question of law cropped up as the appellant was not charged u/s 304B IPC, the question raised is, "whether an accused, who is charged u/s 302 IPC, could be convicted alternatively u/s 304B I.P.C., without the said offence being specifically put in the charge? The answer appeared, at the first blush ingenuous, particularly in the light of Section 221 of the Code of Criminal Procedure. There were divergent opinions of different courts, and therefore, this issue was decided by the three Hon'ble Judges of the Supreme Court; Hon'ble K.T. Thomas, Hon'ble R.P. Sethi and Hon'ble B.M. Agarwal, JJJ. In this regard Sections 221 and 222 of the Code of Criminal Procedure has to be looked into as they deal with the power of criminal court to convict an accused for an offence which is not included in the charge. The primary condition for application of Section 221 of the Code is that the Court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case, the section permits to convict the accused of the offence of which he is shown to have

committed, though he was not charged with it. But in the nature of the acts alleged by the prosecution in this case, there was absolutely no scope for any doubt regarding the offence under Section 302 IPC, at least at the time of framing the charge. Section 222(1) of the Code deals with a case when a person is charged with an offence consisting of several particulars. The Section permits the court to convict the accused of the minor offence, though he was not charged with it. Sub-section (2) of Section 222 Cr.P.C. deals with a similar, but slightly different, situation. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

[26]. Obvious question is as to what is meant by a 'minor offense' for the purpose of Section 222 of the Code? Although the said expression has not been defined in the Code, it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.

[27]. As referred above many times, the composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). So when a person is charged with an offence under Section 302 and 498A IPC on the allegation that he has caused the death of a bride after subjecting her to harassment with a demand for dowry, within 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge? This question is the basic and moot issue involved in the entire controversy at hand.

[28]. At this juncture, learned counsel for appellants have drawn attention of the Court to the statutory provisions of Section 464(1) of Cr.P.C. The crux of the matter is that would there be occasion for a failure of justice by adopting such a course as to convict an accused of the offence under Section 304B IPC when all the ingredients necessary for the said offence have come out in evidence, although he was not charged with the said offence? Section 464(1) of Cr.P.C. reads thus :

"464. Effect of omission to frame, or absence of, or error in, charge.

(1)No finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2)If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may –

(a)in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b)in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit :Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

[29]. In this context the Hon'ble Apex Court's judgment in ***Shamnsaheb M. Milttani*** have great importance and relevance, whereby the Hon'ble Apex Court has held thus :

"22. In other words, a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

24. One of the cardinal principles of natural justice is that no man should be condemned without being heard, (audi alterum partem). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.

25. We have now to examine whether, on the evidence now on record the appellant can be convicted under Section 304-B IPC without the same being included as a count in the charge framed. Section 304-B has been brought on the statute book on 9-11-1986 as a package along with Section 113-B of the Evidence Act.

27. The postulates needed to establish the said offence are: (1) Death of a wife should have occurred otherwise than under normal circumstances within seven years of her marriage; (2) soon before her death she should have been subjected to cruelty or harassment by the accused in connection with any demand for dowry. Now reading section 113B of the Evidence Act, as a part of the said offence, the position is this: If the prosecution succeeds in showing that soon before her death she was subjected by him to cruelty or harassment for or in connection with any demand for dowry and that her death had occurred (within seven years of her marriage) otherwise than under normal circumstances "the court shall presume that such person had caused dowry death".

28. Under Section 4 of the Evidence Act "whenever it is directed by this Act that the Court shall presume the fact, it shall regard such fact as proved, unless and until it is disproved". So the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the court. However it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross- examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both.

30. But the peculiar situation in respect of an offence under Section 304B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory

compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts on to him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence underSection 304B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a decoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304B, IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption."

[30]. In another judgment the Hon'ble Supreme Court has got an occasion to further amplify the ratio laid down in the judgment of *Shamnsaheb M. Milttani (supra)*, in the case ***of Kamil vs. State of***

U.P., AIR 2019 SC 45. In this judgment yet another angle was added while elaborating the import of Section 212, 215 and 464 of the Code of Criminal Procedure relevant to this case, which are :

"17. The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

[31]. Thus, the above judgment though is slightly on the different issue. In aforesaid case, the contention of the appellant was that the charge u/s 302 I.P.C. was not framed against him, therefore, the conviction of the appellants u/s 302 I.P.C. is not maintainable. The Hon'ble Apex Court dismissed that appeal on the ground that mere omission to frame the charge u/s 302 read with Section 34 I.P.C. would have no value in the eye of law till such time the accused appellant must establish the fact that this failure has occasioned in a "failure of justice" to him. In this appeal the High Court dismissed the appeal filed by the appellant affirming his conviction u/s 302 I.P.C. and for other offences and sentenced him for life imprisonment on the ground that after filing the charge sheet, the case was committed to the court of sessions. The Sessions Court has pointed out that the accused was charged with Section 302, 302/34, 323, 323/34 I.P.C., to which they have pleaded not guilty and insisted for the trial. The accused-appellant thus clearly understood that the charge has been framed against him u/s 302 read with Section 34 I.P.C. If really the appellant was under impression that no charge was framed against him u/s 302/34 I.P.C., the appellant would have raised his objection of his case for committal to the court of sessions.

[32]. The Hon'ble Apex Court got an opportunity to further explain the above mentioned moot question in yet another judgment of ***Vijay Pal Singh vs. State of Uttarakhand, (2015) 4 SCC (Cri) 595***, whereby the Hon'ble Supreme Court held

that *"since the victim in the case is a married woman and the death being within seven years of marriage, apparently, the court has gone only on one tangent, to treat the same as a dowry death. No doubt, the death is in unnatural circumstances but if there are definite indications of the death being homicide, the first approach of the prosecution and the court should be to find out as to who caused that murder. Section 304B of IPC is not a substitute for Section 302 of IPC. The genesis of Section 304B of IPC introduced w.e.f. 19.11.1986 as per Act 43 of 1986 relates back to the 91st Report of the Law Commission of India. It is significant to note that the subject was taken up by the Law Commission suo motu.*

[33]. It is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases, where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court must frame the charge under Section 302 of IPC as main charge relying upon the material collected by the I.O. during investigation though the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels relying upon the material on record. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision.

[34]. A reading of Section 304-B of IPC and Section 113-B of Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused- appellants as they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC.

This was the exact explanation by the Hon'ble Apex Court in the case of **Jasvinder Saini's** case *(supra)*.

[35]. Lastly while going through all the judgments mention above, this Court was literally flabbergasted to observe that in all these judgments there is common thread that

the trial courts invariably in all the cases have exonerated the accused persons from the charge u/s 304-B I.P.C. but with the aid and help of Section 106 of Evidence Act convicted the accused persons in a most casual and cursory fashion u/s 302 I.P.C. It seems that the trial courts are ignorant about the applicability of Section 106 of Evidence Act. To determine the scope and ambit of Section 106 of Evidence Act, it is desirable to reproduce the same as under :

"106-Burden of proving of fact ***"especially"*** *within the knowledge :*

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

[36]. Section 106 of Evidence Act states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. In fact this is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant. It cannot apply when the fact is such as to capable of being known also by a person other than the defendant. It is also the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. Section 106 of Evidence Act should be confined to those cases where a fact is especially within the knowledge of any person. When the matter is within the knowledge of defendant, he has to prove the same.

[37]. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fat is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 which lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

[38]. This aspect of the issue was elaborately discussed and explained in two landmark judgments of this Court as well as Hon'ble Supreme Court. In a recent judgment of ***Dr. (Smt.) Nupur Talwar vs. State of U.P. and another, 2017 10 ADJ 586*** the Division Bench of this Court while dealing with the scope of Section 106 of Evidence Act in paragraph 235 has held thus :

"235- Scope of Section 106 of the Indian Evidence Act was examined inconsiderable detail by the Apex Court in the case of Shambhu Nath Mehra versus State of Ajmer reported in AIR 1956 SC 404, wherein learned Judges spelt out the legal principle in paragraph 11 which read as under :

11."This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are preeminently or exceptionally within his knowledge."

[39]. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are, especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience.

[40]. The applicability of Section 106 of the Indian Evidence Act, 1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgment rendered in the case of ***State of Rajasthan v. Kashi Ram, JT 2006(12)SCC 254,*** which runs as here under :

"23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

[41]. Thus, after assessing the various judgment, this Court in aforesaid judgment of ***Dr. (Smt.) Nupur Talwar*** has observed that "when an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer.

[42]. In the case **of Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681**, the Hon'ble Apex Court while considering a similar case of homicidal death in the confines of the house has got an opportunity to express the following observation :-

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of

Public Prosecution [1944] AC 315 : [1944] 2 All ER 13 (HL)]- quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271: 2004 SCC (Cri)135].). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime..."

Thus, after illumined with the aforesaid decisions of the Hon'ble Apex Court, it is evident that the Court should apply Section 106 of the Evidence Act in any criminal trial with utmost care and caution. It cannot be said that it has got no application in criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.

Section 106 of the Evidence Act obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge, which would render the evidence of the prosecution nugatory. If in such a situation, the accused offers an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But, if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him.

[43]. Yet another recent judgment of the Hon'ble Apex Court in ***Balvir Singh v. State of Uttarakhand in Ciminal Appeal No.301 of 2015 with Criminal Appeal No.2430 of 2014 decided on 06.10.2023***, whereby the Hon'ble Apex Court has explained the import of Section 106 of Indian Evidence Act in the following way :

"41. Thus from the aforesaid decisions of this Court, it is evidence that the court should apply Section 106 f the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application t criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

42. Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden of the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a prima facie case is established by such evidence, the onus does not shift to the accused.

43. Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge which would render the evidence of the prosecution nugatory. If in such a situation, the accused gives an explanation which may be reasonable true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams :

"All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."

[44]. Thus, as mentioned above, in all the cases at hand the respective trial courts while passing judgments impugned, though have exonerated the accused-appellants

from the charge u/s 304B I.P.C., but after taking a convenient and mechanical recourse to Section 106 of Evidence Act, booked all the accused-appellants who are the husband of the deceased, for the offence u/s 302 I.P.C. We have already discussed the ratio laid down in **Balvir Singh's case** *(supra)*, whereby the Hon'ble Apex Court has observed that *Section 106 of Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence.*

Making a reference in one paragraph is not going to help the prosecution. To establish a case u/s 302 I.P.C., the prosecution has to establish its case by making a full-dressed trial producing various prosecution witnesses to establish the guilt of accused u/s 302 I.P.C. beyond the pale of any suspicion or doubt. Section 106 of Evidence Act cannot be used mechanically or as a tool in the hand of prosecution to convict the accused without discharging duty on its part. This finding with regard to conviction u/s 302 I.P.C. is palpably and *prima facie* erroneous and devoid of merit, and thus cannot be sustained.

[45]. From the above discussion, as we have already mentioned that Section 302 I.P.C. cannot be added as an alternative charge as contemplated in Jasvinder Saini's case *(supra)*, nor by taking a casual recourse to Section 106 of Evidence Act the accused-appellants could be condemned and convicted for the charge u/s 302 I.P.C., and therefore, on these score all the judgments impugned need to be scrapped and accordingly they are hereby quashed. Resultantly we hereby :

(i) Quash the Judgment and order dated 09.02.2021, impugned in Criminal Appeal No.1667 of 2021 (Rammilan Bunkar vs. State of U.P.), passed by the learned Additional Session Judge (F.T.C.), Lalitpur in S.T. No.37 of 2017 (State vs. Rammilan Bunkar and 2 others), convicting the appellant Rammilan Bunkar u/s 302 I.P.C. for life imprisonment with fine of Rs.10,000/-; u/s 498A I.P.C. for two years simple imprisonment with fine of Rs.3000/- and u/s 4 of D.P. Act for one year rigorous imprisonment and a fine of Rs.3000/- with default clause, but the appellant has been exonerated from the charge u/s 304B I.P.C.

(ii) Quash the Judgment and order of dated 24.9.2023, impugned in Criminal Appeal No.5193 of 2023 (Meena Srivastava vs. State of U.P.) and Criminal Appeal No.5671 of 2023 (Amit Srivastava @ Ashu vs. State of U.P.), which was passed by the learned Additional Session Judge, Court No.9, Varanasi in S.T. No.410 of 2018 (State vs. Amit Srivastava and another), whereby the learned Trial Judge has exonerated the appellants u/s 304B I.P.C. & Section 4 of D.P. Act, but taking the recourse of Section 106 of Evidence Act booked them u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each; u/s 316 I.P.C. for seven years rigorous imprisonment along with fine of Rs.5,000/- each; u/s 498A I.P.C. for one year rigorous imprisonment along with fine of Rs.1000/- to each of the appellants.

(iii) Quash the Judgment and order dated 29.3.2017, impugned in Jail Appeal No.338 of 2018 (Prem Chandra vs. State of U.P.), passed by the Additional Session Judge, Court No.5, Banda in S.T. No.173 of 2012 (Prem Chandra and 2 others vs. State of U.P.), whereby the learned Trial Judge

while deciding aforesaid session trial have convicted the appellant Prem Chandra with alternative charge u/s 302 I.P.C. only, awarding sentence for life with a fine of Rs.10,000/-, exonerating him from the charges u/s 498A I.P.C. and ¾ of D.P. Act.

In paragraphs 35 and 36 of this judgment the learned Trial Judge have blindly and most mechanical fashion recorded finding that the prosecution has failed to establish the case against Raj Bahadur and Suraj Kali for the offence u/s 498A, 304B I.P.C. & Section ¾ of D.P. Act and exonerated from those charges, but in a most cursory fashion convicted the appellant Prem Chandra for the offence u/s 302 I.P.C. As mentioned above, to convict an accused u/s 302 I.P.C. a full dressed trial has to be taken place. This Court fails to appreciate the judgment and order dated 29.3.2017 passed by the learned Additional Sessions Judge, Court No.5, Banda, as he out of blue has recorded the conviction of the appellant u/s 302 I.P.C. imposing sentence for life.

(iv) Quash the Judgment and order dated 09.08.2018, impugned in Criminal Appeal No.5071 of 2018 (Shiv Kumar vs. State of U.P.) and Criminal Appeal No.5069 of 2018 (Jamuna Devi and another vs. State of U.P.), passed by the learned Additional District & Sessions Judge, Court No.3/Special Judge (DAA), Pilibhit, whereby the learned Trial Judge has convicted the appellants in S.T. No.219 of 2017 (State of U.P. vs. Shiv Kumar and others) and S.T. No.272 of 2017 (State of U.P. vs. Shankar Lal) for the offence u/s 498A, 304B, I.P.C. and 3/4 of D.P. Act awarding sentence u/s 304B I.P.C. for life imprisonment; u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each and u/s 498A I.P.C. for three years rigorous imprisonment along with fine of Rs.3000/- to each of the appellants.

The most startling feature in this case is that the learned Trial Judge while deciding the sessions trial have convicted the appellants Shiv Kumar and Jamuna Devi u/s 304B I.P.C. awarding them life sentence and also u/s 302 I.P.C. awarding life sentence. Co-accused Shankar Lal too was convicted for the same offence u/s 304B and 302 I.P.C. and in both the offence he was awarded life sentence. As mentioned above, the Court wonders as to how the learned Trial Judge can convict an accused for the offence u/s 302 I.P.C. as well as 304B I.P.C. In the preceding paragraphs of the judgment it is clearly mentioned that both these offences operate in their own and distinctive spheres having distinctive and specialized features for them and none of the spheres overlap or intercept each other and thus the learned Trial Judge has palpably committed judicial blunder in convicting the appellants for both the offences. It reflects upon the legal acumen and knowledge of the concerned Trial Judge. He has shown and exposed himself his judicial immaturity at this stage of his career while holding the Session trial.

[46]. Though we have already quashed all the impugned judgment and orders mentioned herein above, but fact remains that this is a serious matter where respective married ladies died within 7 years of their marriage under suspicious and unnatural circumstances and therefore the truth must come out on the surface and guilty person must be punished and penalized. In order to obtain the larger good, rule of law must prevail at any cost, and therefore, this Court directs that all the sessions trials should be re-tried for which the court is duly empowered by Section 386 of Cr.P.C. to hold a retrial of the case. For convenience, at this juncture, Section 386 of Cr.P.C. is quoted herein below :

***"Section -386** : After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –*

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement;

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

[47]. The Court has laid its hands on the judgment of Hon'ble Apex Court in the case of ***Mohd. Hussain @ Julfikar Ali v. State of (Govt. of NCT of Delhi), (2012) 9 SCC 408***, whereby Hon'ble Apex Court has held as under :

"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The

nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

[48]. In yet another judgment of Ajay Kumar Ghoshal and others vs. State of Bihar and others, (2017) 12 SCC 699, wherein the Hon'ble Apex Court has observed thus :

"(i): Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice.

(ii) The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings.

(iii) An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard."

[49]. Evaluating and assessing the present controversy in its entirety where the respective trial courts supposedly have framed the charge under the dictate and command of Hon'ble Apex Court's judgment in the case of ***Rajbir alias Raju and another vs. State of Haryana, (2010) 15 SCC 116***, whereby the Hon'ble Apex Court has circulated the judgment to all the courts throughout the country. As mentioned earlier, in the small judgment running in only seven paragraphs there is no reasoning for giving a direction, but it seems that it was an emotional cry which was later on clarified by yet another judgment of Hon'ble Apex Court **in Jasvinder Saini's case** *(supra)*, but the learned Trial Judges in State of U.P. keep on fastening the alternative charge by way of adding Section 302 I.P.C., unmindful of the fact that whether sufficient material was collected during investigation or not for *prima facie* justifying the adding of alternative charge of Section 302 I.P.C.

Secondly, fastening of the provisions of Section 106 of Evidence Act indiscreetly just to condemn and convict the husband and his relatives with the aid and help of aforesaid provisions of law which is in stark contrast with the recent judgment of Hon'ble Apex Court in **Balvir Singh's** case *(supra)*.

[50]. Therefore, we are of the considered opinion that these are the apt cases where retrial could be ordered as the same has occurred after serious legal flaw and irregularity on account of the misconception of nature of proceedings. Accordingly, let the record of these cases be remitted back by the Registry of this Court within next 15 days to the concerned Sessions Courts for re-trial after recasting the "charges" framed against the accused-appellants strictly in accordance with the ratio laid down in the cases of ***Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256 and (ii) Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163***, after holding a day to day trial and conclude the same by 31st December, 2024 without granting any unreasonable adjournment to either of the parties. This Court would appreciate if the concerned learned Trial Judges would fix 2-3 days in a week to conclude the trial.

[51]. Since we are remitting the matter back for retrial, it is desirable that all the appellants, namely, ***Rammilan Bunkar, Prem Chandra, Meena Srivastava, Amit Srivastava @ Ashu, Shiv Kumar, Jamuna Devi and Shanka***r Lal shall be released on bail, who have been convicted and sentenced in aforesaid sessions trials, on their furnishing a personal bond and two heavy sureties (out of which one should be their close relative) each in the like amount to the satisfaction of the court concerned, with an undertaking to the concerned court that they would not seek any adjournment whatsoever and cooperate with the trial.

The fine amount awarded by the concerned trial courts under the impugned judgments shall remain stayed subject to final decision of the case after having full-dressed re-trial of the case as ordered earlier.

[52]. Registrar (compliance) of this Court shall forthwith communicate this order to the concerned trial courts who have passed the impugned judgment and orders. The original records of the cases received from the respective sessions divisions be also returned back.

[53]. Let the copy of this Judgment be circulated to all the Sessions Divisions by the Registrar General of this Court at the earliest, so that they must frame the charge and hold the trial strictly in accordance with the ratio laid down by Hon'ble Apex Court in *Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256 and (ii) Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163.*

[54]. In addition to above, let a copy of the judgment be placed before the Director General of Police, Lucknow by the Registrar General of this Court, so that suitable direction may be given to his subordinates, that in every case of Dowry related deaths, the I.O. of the case shall hold wide spectrum of investigation to examine and collecting the material during investigation so as to justify his report u/s 173(2) Cr.P.C. as to whether such unnatural death of the lady falls within the ambit of Section 302 I.P.C. or it is a plain and simple Dowry Death

punishable u/s 304B I.P.C. or it is a case of suicide punishable u/s 306 I.P.C. where the woman died on account of any abetment by her husband or in-laws.

The I.O. of the case must specify in its report u/s 173(2) Cr.P.C. about the material collected by him during wide spectrum investigation against the accused persons that the said unnatural death of the lady falls within the realm of Section 302 I.P.C. or falls within the ambit of Section 304B I.P.C. or comes within the scope of Section 306 I.P.C.

[55]. Last but not the least, we sought help from Shri Rajiv Lochan Shukla, learned Amicus Curiae as well as Shri Ghanshyam Kumar, A.G.A.-I and Shri Satendra Tewari, learned A.G.A., who rendered their valuable argument after doing lots of research work. The Court records its word of appreciation to all the Advocates, who assisted the Court in reaching to its logical conclusion.

[56]. The aforesaid appeals are partly allowed to the above extent.

(2024) 5 ILRA 227
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 2590 of 2017

Gaurav Yadav @ Phadka ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Govind Saran Hajela

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Section-376-The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989-Section 3(2)(v)-Criminal appeal against the judgment and order of conviction and sentence of life imprisonment-Victim is minor girl of five years, who has suffered brutally sexual assault-Victim specifically recognized the accused appellant as being the person who committed sexual assault on her-The police took photographs of various persons and all such photographs were shown to minor who identified the accused-process of identification cannot be said to be doubtful-Investigating Officer collected bloodstained underwear of victim on which semen was also found-If St.ment of rape victim inspires confidence and is found trustworthy and reliable no further corroboration is required-No evidence on record to even remotely suggest that the offence has been committed by the accused appellant upon the victim on account of her caste identity, therefore conviction and sentence under Section 3(2)(v) SC/ST Act is reversed-sentence of 14 years rigorous imprisonment would adequately serve the purpose.

Appeal allowed. (E-15)

List of Cases cited:

1. Ganga singh Vs St. of M. P. (2013) 7 SCC 278

2. Patan Jamal Vali Vs The St. of Andhra Pradesh, reported in (2021) 16 SCC 225

3. Gopal Rana Vs St. of U.P. being Criminal Appeal No.6934 of 2010

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

1. This appeal is by the accused appellant Gaurav Yadav @ Phadka challenging the judgment and order of conviction and sentence, dated 11.04.2017, passed by the Special Judge, Scheduled Caste/Scheduled Tribe (Prevention of

Atrocities) Act, Agra in Special Session Trial No. 44 of 2011 (State vs. Gaurav Yadav @ Phadka) arising out of Case Crime No. 94 of 2011, Police Station Chhatta, District Agra, whereby he has been convicted and sentenced to life imprisonment under section 376 IPC read with section 3(2)(V) of Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act with fine of Rs.10,000/- and in default of fine he is to undergo six months' additional imprisonment.

2. The prosecution case proceeds on a written report (Ex.Ka.1) given by the informant Bhagwan Das (PW-1), scribed by Deepak Khare, stating that on 3/4.5.2011 at about 10.00 pm the informant was sleeping outside his house alongwith his wife (PW-4) and 8 years old daughter (victim). The informant's wife woke up at about 02.00 in the night and found that her daughter was lying next her in a pool of blood. She (PW-2) screamed as a result of which informant and other family members woke up and rushed to the victim, who informed that a person took her while she was sleeping and subjected her to sexual assault and thereafter assaulted her with brickbat, so as to kill her and thinking that victim has died left her alone. Somehow the victim returned and lay next to her mother. The victim thereafter fainted. The victim was taken to emergency wing for treatment after informing the police. Her operation and treatment was going on when request was made to take appropriate action on the report.

3. On the basis of aforesaid written report First Information Report (Ex.Ka.7) got registered as Case Crime No.94 of 2011, under Sections 376, 307 IPC, Police Station Chhatta, District Agra on 04.05.2011 at 02.00 am. Investigation commenced in the matter. Recovery of bloodstain and plain earth was made from the spot vide Ex.Ka.2. Recovery of underwear of victim was also made vide Ex.Ka.3.

4. The victim was medically examined on 04.05.2011 at 04.20 am by the Medical Officer of Women Hospital wherein following condition of victim has been noticed:-

"For external injury referred to ED, SNMC, Agra for medico-legal examination if it has not been done and for admission and management.

G.C.- POOR, Breast not developed.

Internal Examination- Examination done under anaesthesia given by Dr. S. P. Singh. Pubic and axillary hair absent. Hymen torn. Fresh bleeding present. Swelling present. Tenderness present. Hymen and perineal tear present at 5 o'clock and 7 o'clock position including the vaginal mucosa, muscle and skin up to the anus. It is about 3x3cm and about 1 cm deep. 1 abrasion present at 6 o'clock position. Vaginal smear taken on glass slide and sent for examination for spermatozoa. For age she is referred to CMO, District Agra."

5. The letter by which the victim was referred for treatment to the hospital is Ex.Ka.5. Vaginal smear was also taken and sent for pathological examination vide Ex.Ka.6. Pathological report is also on record wherein no spermatozoa was seen. Supplementary report of the victim is also on record as per which the injury on the victim was caused by hard and blunt object. The age of victim was determined as about 5 years.

6. The recovered articles were sent for scientific analysis to the Forensic Science Laboratory vide Ex.Ka.13. As per the report

of FSL human blood was found on the recovered articles and semen was also found on the underwear of the victim.

7. The victim on account of traumatic experience suffered by her was not able to explain the incident or specify the name of accused. The Investigating Officer took photograph of three suspected accused and shown them to the victim who immediately identified the accused as being the perpetrator of crime. The victim identified the accused as Gaurav Uncle (appellant). Statement of victim (Ex.Ka.14) was also recorded under Section 164 Cr.P.C. wherein she identified the accused appellant as being the person who had committed sexual assault on her.

8. On the basis of evidence collected during the course of investigation charge sheet came to be submitted against the accused appellant under Sections 376, 307 IPC read with section 3(2)(V) SC/ST Act. The concerned Special Judge SC/ST Act took cognizance and framed charges against the accused appellant under aforesaid sections on 16.08.2011. The charges were explained to the accused appellant, who denied the same and demanded trial. Trial commended accordingly.

9. The informant (father of victim) has appeared as PW-1 and has fully supported the prosecution case. He has explained that on coming to know of the incident he rushed his daughter and admitted her in emergency wing where she was operated and regained her consciousness. She disclosed the name of accused as Gaurav Yadav. PW-1 has proved the written report. PW-1 has disclosed that he is Dhobi by caste and thus belongs to scheduled caste. In the cross-examination, PW-1 has stated that house of accused Gaurav Yadav is around 20-25 paces from his house. He had normal relations with him till the incident. They used to visit each other on social occasions. He woke up in the night hearing his wife's cries. Victim's face was crushed and she was bleeding. The Investigating Officer had asked all relatives to leave and inform him about the identify of accused, as is disclosed by victim. Victim tried to tell something but she was not clear and the Investigating Officer could not follow her initially. After 2-3 days of the incident the victim could disclose the name of accused. Three photographs were shown to the victim out of which the victim identified the accused appellant. PW-1 has admitted that in the FIR name of accused is not specified since it was not known to him as to who has committed the offence.

10. PW-2 is Satish, who is the neighbour of PW-1. In his testimony, he has stated that at around 02.00 in the night he heard screams of PW-1. On coming he found that the victim was lying in pool of blood and calling the name of Gaurav and later she fainted. They found bloodstains near the hand-pump close to Tara Niwas. Victim's underwear was also lying there. In the cross-examination, PW-2 has stated that there is a gap of only one house between the house of informant and his own house. His signatures were obtained by the Investigating Officer on various papers. His statement was recorded by police on the next morning. He was with the informant when the victim was taken to the hopsital.

11. The victim has been produced as PW-3, who has identified the accused as being Gaurav Yadav. He lives in her neighbourhood. She has specifically disclosed that accused took her in the night and when she resisted and asked the accused to leave her the accused gagged her mouth.

She called accused as uncle since he lives in the neighbourhood. Accused had taken the victim to the corner of house of Babuji and caused injuries by brickbat and committed sexual assault upon the victim. She later returned on her own. In the cross-examination, she disclosed that her mother memorized her to speak clearly and state that the accused Gaurav had committed rape on her. She was also told to identify and recognize the accused appellant. She alleged that when accused assaulted her with brickbat she screamed but none came to her rescue. She had not woken up her parents. She disclosed the name of accused to her mother in the hospital. Her father had shown the photograph of accused and told her to recognize accused as being Gaurav Yadav. At the time when Investigating Officer enquired from the victim about the identity of accused her grandfather, and grandmother and father were present. She was specifically told that on the asking she must disclose the name of Gaurav as being the person who committed rape on her. Her grandmother and father also told her to take the name of Gaurav Yadav. She has denied the suggestion that on the asking of family members she has falsely implicated the accused. She has proved her statement under Section 164 Cr.P.C.

12. The mother of victim has been produced as PW-4. She has stated that her daughter was sleeping next to her and when she touched her at around 02.00 pm she found her wet and felt cold. She woke up and switched on the light and found blood on the head of victim. The victim was semi-conscious and saying "Gau Gau". She was actually referring to accused. The accused was identified by the victim from hi photograph. Photograph was shown of 4-5 persons to the victim but she identified accused Gaurav. She has denied the suggestion that on the instigation of corporator Deepak Khare she has falsely implicated the accused Gaurav.

13. PW-5 is Dr. Chhaya Upadhyaya, who has proved the injury report and other medical papers of victim. She was examined under anaesthesia and her hymen was torned and fresh bleeding was present. Swelling and tenderness was also present. Hymen was torned in the position of 5 o'clock and 7 o'clock. There was tear stretch from vagina mucosa upto anus. She has stated that injuries on the victim could have been caused by hard and blunt object. As per the doctor these injuries could have come from male organ. In the cross-examination, PW-5 has stated that injuries on private parts could have been caused by blunt object also apart from male organ. She denied the suggestion that such injuries could not be caused by male organ.

14. PW-6 is Ram Sewak Verma, who was posted as Sub Inspector at the police station and was the Investigating Officer of the case. He has proved the document of recovery. He had recorded the statement of victim in the hospital on 06.05.2011. No permission was taken from doctor to record her statement. The victim was not in a condition to speak on 04.05.2011. SHO Rakesh Kumar was with him when he visited the victim. The accused was identified by the victim from photograph. Photograph of accused was given by victim's mother. On 06.05.2011 the victim took the name of accused and has also identified the accused. He has also proved the arrest of accused appellant on 06.05.2011.

15. PW-7 is S. I. Indrapal Singh, who has proved the G.D. entries. PW-8 (Ravindra Kumar Singh) was posted as

Circle Officer and conducted the investigation in the matter from 09.11.2011 onwards since allegation was also made under SC/ST Act. He has proved the charge-sheet. He, however, has not recorded the statement of witnesses.

16. Upendra Singh has been produced as Court Witness, who is the Principal of school where Gaurav Yadav studied. He has stated that accused's date of birth was 30.06.1995. He was admitted in the school on 05.07.1999. Accused passed 5th class on 07.05.2004. His name is mentioned in the scholar's register. In the cross-examination, CW-1 has admitted that there are cuttings in the date of birth. Transfer certificate was issued on 27.05.2015.

17. On the basis of evidence led in the matter the statement of accused appellant has been recorded under Section 313 Cr.P.C. wherein he has denied the accusations made against him. He has stated that the investigation is false and witnesses have made false statement against him. He has been falsely implicated due to enmity. In reply to question no.14 he has stated that he had differences with the local politician Deepak Khare, who had illicit relations with the victim's mother and that is why he has been falsely implicated in the matter.

18. The defence has also produced Kanta Yadav as DW-1, who has alleged that only on the basis of suspicion the accused appellant had been apprehended and later released by the police. He has stated that the accused appellant is innocent and has been falsely implicated and that the accused is a tempo driver and is a man of good character. He has no criminal antecedents. He has further stated that near the place of occurrence there is famous Pt. Tea shop and since transporters have their offices located nearby it remains open till 1-2 in the night. Truck drivers and conductors come to the tea shop to have tea. He has alleged that no incident was reported in the night. It was after 4-5 days that the accused appellant has been implicated under Section 376 IPC. In the cross-examination, DW-1 has admitted that she has been brought by the mother of accused and he has good relations with the family members of accused Gaurav.

19. Manish Bhardwaj has been produced as DW-2. Accused appellant and his father both are auto drivers with clean antecedents. The concerned police station had interrogated 13-14 persons including father of accused appellant and later accused was apprehended. There are offices of transporters where accused appellant lives. 40-50 persons, engaged as labourers, keep moving in the area as they work for the transporters.

20. On the basis of evidence so led in the matter the trial court has found the complicity of accused appellant to be established beyond reasonable doubt and consequently, the accused appellant has been convicted and sentenced vide impugned judgment and order of conviction and sentence.

21. Ms. Zia Naz Zaidi, learned counsel for the accused appellant submits that accused appellant has been falsely implicated in the present case; evidence on record has not been carefully scrutinized by the trial court; the accused appellant has been implicated merely on the strength of suspicion and on account of enmity with the scribe; victim in the facts of the present case was tutored as is clearly reflected from her testimony; the manner in which incident is said to have occurred is wholly improbable, inasmuch as in a densely populated area the

victim was thrashed with bricks and she raised an alarm but none heard her screams. This is highly improbable that no one would respond or come to the rescue of victim in such densely populated area. The fact that the victim came back on her own, did not wake up her mother and slept next to her mother is most unnatural. It is also submitted that the accused appellant in his statement under Section 313 Cr.P.C. has stated that he has been falsely implicated on account of enmity with the scribe. Learned counsel with reference to offence under Section 3(2)(V) SC/ST Act submits that there is no evidence on record to show that offence of rape upon the victim has been committed on account of her caste identity and, therefore, accused appellant's conviction under SC/ST Act is wholly without any evidence.

22. Shri R. P. Rajan, learned Amicus Curiae for the informant and Shri G. P. Singh, learned A.G.A. for the State have strongly opposed the appeal on the ground that the victim is five years old minor girl, who has been brutally assaulted and the nature of injuries caused to her has to be viewed with utmost disdain. It is argued that the victim had to suffer injuries beyond imagination at such young age which has virtually ruined her life and, therefore, the accused appellant deserves extreme punishment.

23. We have heard learned counsel for the parties and perused the material brought on record, including the original records of the trial court.

24. Five year old minor has been subjected to brutal sexual assault in this case while she was sleeping next to her parents. The incident has occurred at about 02.00 in the night. In sleep the mother touched the victim lying next to her and felt wet. She got up and switched on the light to find that victim had sustained injuries on her head and was bleeding both from her head and also from her private parts. The incident has been promptly reported to the police at about 02.30 in the night. At 02.30 itself a reference letter was prepared for the victim to be sent to the hospital. The victim has been medically examined and is found to have serious injuries on her private parts. There was tear stretch from vagina mucosa upto victim's anus. The victim had to be operated upon by the doctors. The doctor who has examined the victim has been produced as PW-5. She has fully supported the prosecution case with regard to sexual assault on the victim. Although the doctor has stated that injuries could have been caused by hard and blunt object but she has also categorically stated that such injuries on the victim could have been caused by male organ. Although it is faintly suggested that the incident could have occurred as a result of accident but we are not impressed by such argument. The injury report shows no injuries on the outer private parts of the victim. It would be difficult to conceive that an accidental injury could be caused torning hymen; fresh bleeding; hymen and perineal tear present at 5 o'clock and 7 o'clock position including vaginal mucosa, muscle and skin up to the anus of size of 3x3cm and 1 cm deep, without any visible marks of injury on the outer parts of victim's private region. The medical opinion clearly suggests that the injury could be caused by male organ. The plea of injury being accidentally caused is thus rejected. Semen was also found on the victim's underwear. The evidence on record, therefore, clearly indicates it to be a case of sexual assault on the minor.

25. In the facts of the case, the witnesses have also claimed that the victim was assaulted by brickbat and that she

sustained multiple injuries on head and she fainted on account of it. The accused appellant has been charge-sheeted also under section 307 IPC since the prosecution case is that the accused having committed offence of sexual assault on the minor victim also caused her injuries by brickbat so that she may not depose against the accused. As per the prosecution case the accused left her under the belief that victim has died. The prosecution witnesses are consistent on this count. The medical evidence in this regard, however, is absolutely lacking. There is nothing on record to show that any injuries were sustained by the victim on her face or head/scalp. Although prosecution witnesses have alleged that on account of such injuries caused on her head the victim suffered great pain but the medical report is conspicuously silent on this count. There is no reason why other injuries on the victim would not be noticed by the doctor or indicated in any of the reports. It is for this reason that the accused appellant has been acquitted under Section 307 IPC. This part of the prosecution case has been disbelieved by the trial court and we find no reason to doubt the conclusions drawn by the trial judge.

26. The thrust of submission of Ms. Zaidi on behalf of accused appellant is that the accused appellant has been falsely implicated and it is on the instigation of the family members that she had identified the accused appellant. This argument on behalf of appellant is based on the testimony of victim, who has admitted that her mother had told her to speak clearly and disclose in the court that the accused Gaurav committed the offence with her. She was also told to identify the accused appellant when he appears in the dock. The accused appellant was also got identified by the parents of the victim. She has also stated that her parents have told her to take the name of accused Gaurav as being the person who committed sexual assault on her.

27. In the facts of the case, we find that the victim is minor girl of five years, who has suffered brutally sexual assault. The tear of her private part extended right upto her anus. She was not only hospitalized but the witnesses have testified that she had to be operated. In such extreme sufferings of minor child some support of the family members would be natural and obvious. Though it is settled that a minor child may be prone to tutoring but that in itself may not be decisive in the facts of the present case.

28. We have carefully examined the testimony of victim and it is apparent that she has disclosed in detail about the incident suffered by her. From the questions posed to her the Court has recorded its satisfaction that the victim is capable of understanding the answers given by her. At the relevant time when she was produced in court she was studying in class 1st. She has been honest in acknowledging the assistance that she got from her family members in making her version clear and categorical to the court. She has, however, specifically recognized the accused appellant as being the person who committed sexual assault on her. She has denied the suggestion that it was someone else who had done such heinous act on her. She has also denied the suggestion that under family pressures she has implicated the accused appellant. The victim has also proved her statement recorded before the Magistrate under Section 164 Cr.P.C. wherein also she has specifically implicated the accused appellant.

29. The prosecution has also explained the manner in which the identity of accused appellant came to be established during the

course of investigation. Though the victim took the name as 'Gau Gau' when she regained consciousness but complete identity of accused could not be ascertained then. The police took photographs of various persons and all such photographs were shown to minor who identified the accused appellant. This is specifically recorded by the Investigating Officer in the case diary and explained in the testimony of Investigating Officer during trial. The process of identification cannot be said to be doubtful when we examine the age of victim and the extreme brutality which she has suffered. The trial court has ensured the competence of the PW-3 (the child victim) to depose before the court. She has clearly deposed that the accused appellant has committed sexual assault upon her. This fact finds support from the medical evidence on record. Parents of the victim as also the neighbours have supported the version of victim as per which she sustained injuries and was found bleeding from her private parts. The Investigating Officer during investigation collected bloodstained underwear of victim on which semen was also found. The bloodstained underwear has also been produced in court as material exhibit. We otherwise find that there is no specific reason furnished by the accused appellant for falsely implicating him in the matter. Though it is suggested that he had inimical relations with the scribe, but apart from saying so in his statement under section 313 Cr.P.C. no other credible evidence has been led in that regard. The defence witnesses although have suggested enmity but no reasons of such differences or enmity with the scribe have been furnished.

30. Taking into consideration the totality of circumstances we are not inclined to accept the argument on behalf of appellant that since the the victim has stated that her parents had told her to take name of the accused appellant or identify him in court would lessen the evidentiary value of prosecution evidence. The place of occurrence as well as presence of witnesses in night are not questioned. It is otherwise settled that the evidence of rape victim stands at par with the testimony of injured witness. The accused appellant otherwise lives close-by and his presence at the place of occurrence cannot be easily doubted.

31. It is also settled that if statement of rape victim inspires confidence and is found trustworthy and reliable no further corroboration is required. In the case of Ganga singh vs. State of Madhya Pradesh (2013) 7 SCC 278 the Supreme Court held that the victim of rape has to be given same weight as is given to injured witness and her testimony needs no corroboration. The prompt lodging of FIR; reference of victim to the hospital at 02.30 in the night; her medical examination soon thereafter by the doctor clearly persuades the Court not to doubt the veracity of prosecution case.

32. From the analysis of testimony of prosecution witnesses it is clear that the prosecution on the strength of evidence led by it has successfully established its case beyond reasonable doubts against the accused appellant. The medical evidence also corroborates oral testimony of victim. There is also no serious discrepancies in the testimony of PW-3 (victim) which may effect her reliability. In such circumstances, there is no reason to disbelieve the victim. The trial court has analysed the evidence on record in proper manner and has recorded the finding of guilt of accused appellant. The finding of trial court is, therefore, not shown to have suffered from any illegality or

perversity. Consequently, the conviction of accused appellant under Section 376 IPC is sustained.

33. So far as the conviction and sentence of accused appellant under Section 3(2)(V) of SC/ST Act is concerned, we find that none of the witnesses have anywhere alleged that the offence of rape was committed upon the victim on account of her caste identity. Except to state that the victim belongs to scheduled caste, there is absolutely no evidence on record to even remotely suggest that the offence has been committed by the accused appellant upon the victim on account of her caste identity.

34. In what manner an offence under Section 3(2)(v) SC/ST Act can be established has been dealt with extensively by the Supreme Court in Patan Jamal Vali Vs. The State of Andhra Pradesh, reported in (2021) 16 SCC 225. In para 62 to 64 of the report, the Supreme Court has clearly laid down that the prosecution must prove that the offence was committed on account of caste identity by the accused appellant. The observations of the Court are reproduced hereinafter:-

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

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

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

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

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

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

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

35. There is no evidence on record to show that the offence of rape was committed by the accused appellant on account of the caste identity of the victim. In the absence of any evidence in that regard, we are persuaded to accept the appellant's contention that the offence under Section 3(2)(v) SC/ST Act is not established against the accused appellant. The conviction and sentence of the accused appellant under Section 3(2)(v) SC/ST Act is, therefore, reversed and he has been acquitted in this offence.

36. Coming to the question of quantum of punishment under Section 376 IPC, learned counsel for the appellant submits that at the time when the incident occurred the minimum punishment for the offence under Section 376 IPC was 10 years and maximum punishment was life. Learned counsel has produced custody certificate of accused appellant as per which the actual custody undergone by him is 12 years 8 months 29 days as on 05.02.2024. Together with remission the period of incarceration is nearly 15 years as on date, which is above the minimum period of punishment prescribed for the offence of rape on a victim below 12 years of age. The accused appellant was around 25 years of age when his statement was recorded under Section 313 Cr.P.C. on 19.09.2016 and he was around 18-19 years at the time of incident. Argument is that considering the period of incarceration undergone by the accused appellant and the offence committed by him, his sentence be modified to the sentence already undergone by him.

37. Learned A.G.A. for the State, on the other hand, submits that in the facts of the case the accused appellant has committed heinous crime inasmuch as the victim has been subjected to brutal sexual assault on account of which she had to suffer immense pain and suffering. It is, therefore, submitted that the punishment of life imposed by the trial court is adequate and requires no interference.

38. Learned counsel for the appellant, in reply, submits that the accused appellant was only around 18-19 years of age at the time when incident occurred. He was a auto rickshaw driver and has no criminal antecedents. The mother of accused appellant is a vegetable seller and is extremely poor lady. Apart from the appellant there is no other earning member in the family. It is also submitted that though offence is serious for which the accused appellant has to be adequately punished, yet, the Court may also show leniency on account of abject poverty faced by the accused appellant as also his age at the time of incident. Learned counsel for the appellant has placed reliance upon a judgment of this Court in the case of Gopal Rana vs. State of U.P. being Criminal Appeal No.6934 of 2010 wherein the Court observed as under in paragraph nos.29 and 30:-

29. Reliance is also place upon a Division Bench judgment of this Court in Criminal Appeal No. 2433 of 2008 (Munawwar Vs. State of U.P.), wherein this court after sustaining the finding of guilt and consequently conviction of the accused appellant modified the sentence to the period actually undergone by the accused appellant. Reliance is also placed upon the judgments of Supreme Court in the cases of G.V. Siddaramesh v. State of Karnataka 2010 (3) SCC 152 and Hem Chand v. State of Haryana 1994 (6) SCC 727, wherein sentence of life awarded by the courts below was modified by the Supreme Court and reduced the sentence to the period already undergone of over 10 years. to sentence already undergone.

30. Having considered the facts of the present case as also the applicable judgments on the issu e as well as the nature of offence committed by the accused appellant and the sentence already undergone by him, we are of the considered view that in the facts of the case, the sentence awarded to the accused appellant be modified and that ends of justice will be served if the appellant be punished with period of sentence already undergone by him. The sentence awarded to the accused-appellant by the court below is modified to the above extent and the appeal is liable to be allowed, in part, to such extent.

39. Considering the above facts and circumstances, we are of the considered view that the accused appellant must be made to undergo punishment commensurate with the nature of guilt established against him. Considering the age of the accused appellant at the time of incident; his precarious financial position wherein his mother is a vegetable seller; there is no earning member in the family; accused is a first offender and possibility of his reformation cannot be ruled out, the sentence of 14 years rigorous imprisonment would adequately serve the purpose. Since the period of sentence undergone by the accused appellant with remission is nearly 15 years the life punishment imposed can be substituted with the sentenced already undergone by him under Section 376 IPC.

40. Consequently, the appeal succeeds and is allowed in part. The punishment of

life imposed upon accused appellant under Section 376 IPC is modified with the sentence already undergone by him. The accused appellant is reported to be in jail, he shall be released forthwith, unless is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2024) 5 ILRA 238
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Criminal Appeal No. 2759 of 2020

Pramod Pandey & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Kamlesh Singh

Counsel for the Respondents:
Avanindra Kumar Mishra, G.A.

Criminal Law-Indian Penal Code-1860-Sections-323, 504 & 506- The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989-Section 3(1)(x) - The Code of Criminal Procedure,1973-Section 227, 228 & 245(2)- The trial court is to pass an order either under Section 227 or under Section 228 Cr.P.c., the trial court is not required to pass two orders under the above two sections, i.e. firstly giving reasons for not discharging the accused and followed by another order relating to the framing of charges-The application moved by the appellants under Section 245(2) Cr.P.C. was not at all maintainable particularly, when the order issuing process against the accused-appellants in the complaint was never assailed by Appellants-For the purposes of framing of charges against the accused suspicion alone relating to alleged commission of offence is enough.

Appeal dismissed. (E-15)

List of Cases cited:

St. of Bihar Vs Ramesh Singh (1977) 4 Supreme Court Cases 39

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Appellants-Accused have filed this appeal under Section 14A(1) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 for setting aside the impugned order dated 21.9.2019 passed by the Special Judge (SC/ST Act), Deoria in Sessions Trial No. 50 of 2016; titled Raj Bahadur Chamar vs. Pramod Pandey, arising out of Case Crime No. 99 of 2012, under Sections 323, 504, 506 IPC and 3(1)X Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Lar, District Deoria, whereby their application under Section 245(2) Cr.P.C. for discharge has been dismissed.

2. The facts in brief leading to the appeal are that the opposite party no. 2-Raj Bahadur Chamar filed an application under Section 156(3) Cr.P.C. dated 1st December, 2011 before the Judicial Magistrate, Deoria for registration of FIR and investigation, whereupon vide order dated 8th February, 2012, a direction was issued and a Case Crime No. 99 of 2012 was registered against the accused persons (appellants) under sections 376, 511, 452, 504, 506 IPC and Section 3(1)X Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, at Police Station Lar, District Deoria. As per the allegations, on 29th March, 2011, when the complainant left his house around 10:00 am for work in his agricultural fields, his wife Usha Devi was alone at home. The co-villagers of the complainant namely Pramod Pandey and Sandeep entered his house with an intention

to do wrong act with his wife, and they gagged her mouth and attempted to undress her, but his wife shouted and gave them kick and fist blows, whereupon the accused fled away. Pursuant to the information given to the Police Station Lar, the place of occurrence was visited by the police officially.

3. On 1st April, 2011 at around 5:30 pm, Pramod Pandey, Ashok Pandey both sons of Indrasan Pandey, Vinit @ Ankur Pandey s/o Pramod Pandey, Sandeep Pandey, Mukesh both sons of Ramesh Pandey, Anil s/o Jagarnath Pandey and Rupesh s/o Umesh Pandey entered the house of the complainant and started giving kicks, fists and sticks blows to his wife Usha Devi, and when the complainant intervened to save her, he too was given beatings. The complainant and his wife got themselves medically examined at Primary Health Centre, Lar, and also gave information to S.H.O. for registration of the case, but no action was taken upon his complaint, so, he filed the application.

4. After registration of the case, the investigation was carried out and upon conclusion, a final report under Section 173(2) Cr.P.C. dated 12th March, 2012 was submitted before the court of competent jurisdiction, thereby exonerating the accused persons.

5. Aggrieved against this final report, the complainant preferred a protest application dated 6th June, 2012 and the Judicial Magistrate, Deoria entertained the same as a complaint case to follow the procedure enshrined under Chapter XV Code of Criminal Procedure. Thereafter, the statement of the complainant was recorded under Section 200 Cr.P.C. on 12.1.2015, and further in support of his case, the complainant examined his wife Usha Devi (PW-1) and Lakshmina (PW-2).

6. During the pendency of the proceedings, the SC/ST Act was amended and by virtue of Section 14 SC/ST Act, the Special Court was empowered to directly take cognizance of such offence, therefore, the case was sent before the Special Court (SC/ST Act), Deoria. Upon examining the protest petition as well as pre-summoning evidence adduced by the complainant, the process against the accused was issued vide order dated 12.01.2017 by the Special Court, Deoria.

7. It seems that pursuant to the summoning order, the accused did not appear before the Special Court, Deoria and vide order dated 28th September, 2018, non-bailable warrants were issued against the accused to secure their presence. The said order was challenged by accused before this Court through application under Section 482 Cr.P.C. bearing No. 46289 of 2018; titled Mukesh Pandey and another vs. State of U.P. and another, wherein this Court vide order dated 21.12.2018 refused to interfere with the impugned order issuing non-bailable warrants, but granted liberty to the accused to move an application under Section 245(2) Cr.P.C. subject to their putting in appearance before the trial court within a period of two weeks. Further a direction was also issued that the said application be decided expeditiously. In compliance of the order dated 21.12.2018, the accused persons moved an application dated 22.1.2019 and prayed for discharge in the criminal case.

8. The Special Court (SC/ST) Act, Deoria vide order dated 21.09.2019

dismissed the said application and fixed the case for framing of charges against the accused persons. Hence this appeal.

9. Vide order dated 24.08.2020, this Court had issued the notice to the opposite parties, and they filed their respective counter affidavits dated 8.12.2020 and 4.1.2021 to contest the appeal.

10. The reply by the State of U.P. is formal in nature, wherein it is pleaded that the complainant had given a false complaint, which was thoroughly investigated, and since, nothing incriminating was found against the accused, therefore, the report exonerating the accused was submitted. Lastly, it is pleaded that the impugned order dated 21.09.2019 is a reasoned order, which does not suffer from any illegality and prayer has been made to dismiss the appeal.

11. The response by the complainant has denied the grounds raised by the appellants, who pleaded that the investigation in the case was not conducted properly and the final report under Section 173(2) Cr.P.C. was filed to favour the accused, and it compelled the complainant to move a protest petition, whereupon sufficient evidence has been adduced to prima facie show commission of the alleged offences, therefore, the trial court not only rightly issued the process against the accused, but justifiably dismissed the application for discharge vide impugned order dated 21.09.2019. In the end, it is prayed that the appeal be dismissed.

12. Learned counsel for the appellants has argued that the case filed by the complainant is without any foundation, but the trial court had erroneously summoned the accused by ignoring the fact that the allegations contained in the FIR by the complainant were thoroughly investigated, wherein the statements of various witnesses were recorded, but nothing incriminating was found against the accused, therefore, the police filed the final report in favour of the accused. Learned counsel has argued that the witnesses are closely related to the complainant, therefore, their evidence alone would not be sufficient to prosecute the appellants, particularly, when the allegations of beatings are not supported by any cogent evidence. He submits that as per the medical report dated 1st April, 2011, no external injury was found on the person of Usha Devi, whereas the injury allegedly suffered by Raj Bahadur are artificial. He submits that the medical evidence does not match with the ocular version given by the complainant, therefore, it is evident that the version of the complainant is false.

13. According to the learned counsel, the Special Court (SC/SC Act), Deoria has not appreciated the facts and circumstances of the case carefully while dismissing their application under Section 245(2) Cr.P.C. for discharge through the impugned order dated 21.9.2019, and the said order deserves to be set aside. He prays that the impugned order dated 21.9.2019 be set aside and the appellants be discharged.

14. The prayer is opposed by the learned counsel for the complainant-opposite party no. 2, who has argued that the material on record sufficiently makes out a case for initiating the trial proceedings against the accused persons, and the evidence of the complainant is also supported with the medical evidence. Learned counsel for the opposite party no. 2 argued that at the stage of framing the charges, the trial court is required to find out, if, the evidence sought to be adduced by the prosecution makes out a prima facie case

for commission of alleged offences, and if, it is so, the accused cannot be discharged. He submits that the trial court has given valid reasons while passing the impugned order, therefore, the said order does not call for any interference by this Court.

15. Learned counsel for the parties have been heard and with their assistance, the case file has been perused carefully.

16. Framing of charges against an accused marks commencement of criminal trial in respect of the alleged offences, and at this crucial stage, it is mandatory for the trial court to not only examine the record of the case relied upon by the prosecution, but also to afford an opportunity of hearing to the accused. Based upon the classification of offences, the penal offences are either triable before the Court of Sessions or the Magistrate and the procedure in this regard is contained in Chapter XVIII and Chapter XIX, respectively of the Code of Criminal Procedure. In a trial before the Sessions Court, the relevant provisions are Sections 227 and 228 Cr.P.C., whereas in respect of the magisterial trial, the relevant sections would be Sections 239 and 240 Cr.P.C. These sections deal with the trial based upon a police report, whereas the procedure based upon a complaint case is slightly different, if, the trial is before the Magistrate and the said procedure is contained in Sections 244 and 245 Cr.P.C. onwards.

17. At this juncture, it would be relevant to note that in a sessions trial, even if, the prosecution of accused is arising from a complaint case, after appearance of the accused before the Court of Sessions either after committal of the case or otherwise, the proceedings take place as a State case. On the contrary, if, the trial is before the Magistrate, the procedure is different, wherein after appearance of accused pre-charge evidence is recorded under Section 244 Cr.P.C., and thereafter, considering the same, either the accused is discharged under Section 245(1) Cr.P.C. or charges are framed under Section 246 Cr.P.C. Of course, as per Section 245(2), the Magistrate has power to discharge the accused at any previous stage also. Thus, it is evident that even if, the initial process against the accused was issued by the trial court (Sessions Court) on the basis of the complaint and pre-summoning evidence, but thereafter, from the stage of discharge of the accused or framing of charges, it becomes a State case as contemplated by sections 225 and 226 Cr.P.C., and the proceedings are opened by the public prosecutor. Since, the present case also contains an offence punishable under Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, which is triable by Special Court (Sessions Court), therefore, the Special Court is required to follow the procedure envisaged under Chapter XVIII Cr.P.C.

18. Here, this Court deems it appropriate to examine the relevant provisions pertaining to discharge and framing of charge and the sections 227 and 228 Cr.P.C. read as under:-

*"**Section 227. Discharge.**- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

***Section 228. Framing of Charge.**- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion*

that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, 1[or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

19. A bare reading of the above provisions would reveal that while entering in the exercise of discharge or framing of charges, the trial court is only required to consider the record of the case including the documents relied upon by the prosecution, and, if, sufficient grounds exist for proceeding against the accused, the charge in respect of the alleged offence(s) has to be framed. And if, the trial court is of the opinion that no sufficient ground exists for proceeding against the accused, it shall discharge the accused in terms of Section 227 Cr.P.C. At this stage, the participation of the accused is mandatory and the only exception to the general rule is contained in Section 317 Cr.P.C., when the trial court may conduct proceedings in the absence of the accused subject to fulfilling certain conditions contained in the said provision. It is trite law that at the stage of considering the material on record for the purposes of discharge or framing of charges, the proposed defence of the accused is not to be analyzed. As a result, it is absolutely clear that the trial court is to pass an order either under Section 227 Cr.P.C. or under Section 228 Cr.P.c. In other words, the trial court is not required to pass two orders under the above two sections, i.e. firstly giving reasons for not discharging the accused and followed by another order relating to the framing of charges.

20. Here, it will be useful to refer the decision of the Hon'ble Supreme Court in ***State of Bihar vs. Ramesh Singh1***. The relevant observations by the Apex Court read as under:-

"4. Under section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. 'The Judge has to pass thereafter an order either under section 227 or section 228 of the Code. If "the Judge consider that there is not. sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by section 227. If, on the other hand, "the Judge is of opinion that there, is ground for presuming. that the accused has committed an offence which-

. . . . . (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused'-', as provided in section

228. Reading the two provisions together in juxta position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. .....xxx xxxxx....."

21. Notably, the Section 227 Cr.P.C. was inserted only in the Code of Criminal Procedure, 1973, and no such provision existed in the old Code of 1898. The procedure provided under the old Code, relating to the committal proceedings under Section 207-A before the Magistrate used to be exhaustive, being in the nature of an enquiry, and it required recording of evidence of prosecution witnesses, as well as their cross-examination by defence. After completion of this procedure, the Magistrate would ascertain by recording satisfaction, if, the alleged offences triable by Sessions Court are worth committal for the trial or not. If, the Magistrate would commit the accused for trial before Sessions Court. But, in order to expedite the criminal proceedings against the accused, certain amendments were carried out thereby omitting Section 207-A to shorten the committal proceedings, by further introducing Section 227 Cr.P.C. for discharge.

22. Thus, in view of the above discussion, it emerges that at the stage of considering the prosecution case either for discharge of the accused or for framing charges, the court is to examine the material relied upon by prosecution alone, and since, the proposed defence of the accused cannot be considered, who is to be only afforded an opportunity of hearing, therefore, there is even no necessity to file an application for discharge by the accused.

23. Concededly, the case in hand relates to the offences which are triable by the Special Court (Sessions Court), therefore, the application moved by the appellants under Section 245(2) Cr.P.C. was not at all maintainable. No doubt, this Court had granted liberty to the accused to move such an application vide order dated 21.12.2018, but even then, the application by the appellants could not have been entertained on merits, particularly, when the order issuing process against the accused-appellants in the complaint was never assailed by them. That apart, the order dated 21.12.2018 granting liberty to the accused to move an application for discharge was conditional, who were required to comply with the pre condition by submitting themselves before the Special Court, Deoria in order to maintain their plea of discharge, but during the course of hearing, it is not disputed by the learned counsel for the appellants that the accused did not comply with the said condition, who were only represented by their counsel. Further, learned counsel fairly states that the accused are yet to put in appearance before the Special Court, Deoria. Since, nothing has been shown to this Court that the personal appearance of the accused was ever exempted, therefore, the application moved by the appellants ought to have been rejected straight away on multiple grounds of maintainability.

24. Now, while examining the case of the appellants on merits as well, this Court finds that even the application for discharge moved by the complainant contains reference to the medical reports of the injured couple, therefore, the ground for discharge with a pleading that the medical record does not match with the ocular version is erroneous at this stage. By now, it is well settled that at the stage of framing of charges, the trial court is not to sift and weigh the record of the case, for the

purposes of building an opinion that it would lead to the conviction of the accused, as for the purposes of framing of charges against the accused suspicion alone relating to alleged commission of offence is enough.

25. Before parting with this judgment, this Court deems it necessary to observe that in many cases, such applications are filed by the accused before the trial courts and the such applications are decided by passing a separate order, which otherwise is incomplete in the absence of order framing charges, and the consolidated statutory exercise under sections 227 and 228 Cr.P.C. is split in two parts, thereby not only the trial courts are over burdened, but it also causes delay in conclusion of trial. Consequently, it is directed that the trial courts shall decide the prosecution case for the purposes of framing of charges by passing one common order, i.e either discharging the accused or framing charges against the accused by strictly complying with the statutory provisions contained in the Code of Criminal Procedure or any other applicable special statute.

26. Resultantly, in view of the above discussion, this Court has no hesitation in holding that the appeal is without any merit and the same is hereby dismissed.

27. Let a copy of this order be sent to all the District and Sessions Judges in the State of U.P. for further forwarding it to the Judicial Officers in their respective divisions.

(2024) 5 ILRA 244
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 2798 of 1988

Subedar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Malik Sayeed Uddin, C.K. Jha, Dilip Kumar Kesharwani, Prem Prakash

Counsel for the Respondent:
A.G.A.

Criminal Law-Indian Penal Code-1860-Sections-34, 302-Criminal appeal against judgment of conviction U/s 302/34 IPC- F.I.R. was registered by deceased himself in injured condition. He had clearly named Buddhu (since deceased) and appellant along with two other unknown persons as the assailants-No delay in reporting the matter to the police- Eye witness duly corroborated the version given in the F.I.R. that she had seen that accused- had fired upon her husband and appellant-Subedar along with two other persons gave him injuries with lathies-PW4 & PW6 who conducted the postmortem of the deceased also had St.d that injury was a firearm injury which was sufficient to cause death- Ocular version is duly corroborated by the medical evidence.

Appeal dismissed. (E-15)

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Present appeal is filed challenging the judgment of conviction dated 3.12.1988 vide which accused-Subedar and Buddhu were convicted for offence punishable under Section 302/34 of IPC and the order of sentence

dated 5.12.1988, vide which they were sentenced to life imprisonment.

2. It is worth noticing that this Court vide judgment dated 6.4.2017 dismissed the appeal of appellant-Subedar noticing that appellant-Buddhu had died somewhere in the year 1999 and no one represented appellant-Subedar. The appeal was heard without affording opportunity of hearing to the appellant. Thereafter, appellant-Subedar filed SLP (Criminal) No.6684 of 2020 which was later on converted into Criminal Appeal No.886 of 2020 in which, noticing the fact that the appellant was not afforded opportunity, the case was remanded back to this Court by the Supreme Court with a direction to dispose of the appeal expeditiously.

3. Heard Sri Shravan Kumar Yadav, learned Amicus Curiae for the appellant and learned A.G.A. for the State-respondent.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. The facts as stated by the informant in the complaint given on 4.4.1987 are as under:

"In the night, I along with my wife-Roopdevi and children was sleeping in the house. At about 2.00 am, on hearing the voice of barking dog, I woke up and found that from the side of a broken door, 3-4 persons were standing. When in the light of the torch, I asked them, one Buddhu resident of Kasumara and Subedar resident of Murab were seen. They were carrying country made pistol. Buddhu fired upon me which hit on my stomach and other accused gave me lathi blows. On raising voice, my neighbour Rameshwar Singh and Kallu Singh came and on seeing them, these persons ran away by challenging me."

6. On the basis this complaint, Chik F.I.R. was registered by Head Moharrir-Israr Ali at Case Crime No.80, under Section 307 IPC at Police Station- Aonla, District-Bareilly on 04.04.1987 at 04.30 A.M. The chik report is Ex.Ka.7. On the basis of chik report, a case was registered at G.D. No.3 on 04.04.1987 against the accused. Copy of GD entry is Exhibit Ka-8.

7. The case was initially registered under Section 307 I.P.C. The injured was sent to Primary Health Centre at Aonla for treatment and medical examination. Dr. Raj Kumar P.W.4 M.O. examined the injuries of Vedpal Singh on 4.4.1987 at 5.45 A.M. and prepared his injury Ex.Ka.4 The doctor found the following injuries on the person of the injured:-

1. A gunshot wound 1 cm x 1 cm x cavity deep left side of chest 14 cm below left nipple. This wound is surrounded by gunshot burns in an area of 5 cm x 4 cm. This injury is kept under observation and x-ray advised.

2. Lacerated wound 1.5 cm x 0.1 cm x muscle deep left side forehead 5 cm above left eyebrow.

3. Contusion 1 cm x 1 cm on right side skull 6 cm above right ear.

4. No any other visible injury seen but only complaint of pain all over the body.

8. In the opinion of the doctor, Injury no.1, could be caused by firearm, was kept under observation. X-ray was advised. The injury nos.2 and 3 were simple and could be caused by blunt weapon.

9. The injured Vedpal Singh was referred to District Hospital, Bareilly for

conducting x-ray of his injury no.1 and further treatment where Dr. S.P. Singh M.O. District Hospital, Bareilly P.W.6 attended to him. But in the meantime, Vedpal Singh succumbed to his injuries on 4.4.1987 at 8.45 A.M. in the District Hospital, Bareilly.

10. The postmortem on the dead body of the deceased was conducted by Dr. S.P. Singh P.W.6 vide postmortem report Ex.Ka.6 The Doctor found the following ante-mortem injuries on the dead body of the deceased:-

1. Lacerated wound 1 cm x 1 cm x scalp left side forehead 8 cm above eyebrow.

2. Three abrasions in an area of 8 cm x 6 cm on the back of left shoulder joint upper part..

3. Abrasion 3 cm x ½ cm on the top of the right shoulder joint.

4. Gunshot wound 2 cm x 1 cm x chest cavity deep left side chest 13 cm below and lateral to left nipple- margins inverted, blackening, tattooing and scorching present.

5. Circular interpeded abrasion left arm 3 cm in size.

11. In the opinion of the Doctor death was caused due to shock and haemorrhage on account of injury no.4.

12. The information regarding death of Vedpal Singh was sent to Police Station-Kotwali, District-Bareilly vide Ex.I on 4.4.1987 at 10.20 P.M. which was recorded in G.D., carbon copy of which is Ex. Ka-14. Inspector S.K. Sharma P.W.8 of Police Station- Kotwali was conducting inquest proceedings on the dead body of the deceased. After completing the inquest, he prepared photograph Ex.Ka.16, challan-report vide Ex.Ka.17, specimen seal Ex.Ka.18 and inquest report Ex. Ka.15. Later on, the case was converted under Section 302 I.P.C. vide G.D. entry Ex. Ka.13 and the investigation of the case was entrusted to S.I. Gandharv Singh Badhoria P.W.7 who recorded the statement of the informant, which is Ex.Ka.10. The I.O. also visited the place of occurrence and took possession of blood-stained dhoti vide memo Ex.Ka.1, torch vide memo Ex.Ka.2, two empty cell vide memo Ex.Ka.4. Then he also prepared site plan vide Ex.Ka.13. Thereafter, the investigation of the case was transferred to Senior Sub-Inspector police Sri O.P. Tyagi P.W.5 on 28.4.1987, who after usual investigation, submitted charge-sheet against the accused vide Ex.Ka.5.

13. Thereafter, *Chalan* was presented. The charges were framed under Section 302 read with Section 34 of IPC. In prosecution evidence, Roopwati (PW-1) stated on the line of the version given in the F.I.R. that out of four persons, Buddhu and Subedar were standing and she identified them. She further stated that Buddhu fired a gunshot onto her husband and other three accused gave lathi blows. In the meantime, Kallu Singh and Rameshwar Singh came and accused persons ran away. While leaving they fired second gunshot. Her husband got the complaint scribed through one Madan Pal Singh and gave it to the police which was exhibited as Ex.Ka-1. The F.I.R. was registered. The torch which was recovered was handed over to her and supurdginama was exhibited as Ex.Ka-2. In cross examination, this witness stated that Kallu Singh is nephew of her husband and he is indulged in the business of cultivation of opium.

14. Kallu Singh (PW-2) also stated on similar line that when his uncle, deceased-Vedpal was looking in the light of the torch, accused-Subedar and Buddhu were

standing. They were carrying country made pistol and total four persons were there. He identified the accused persons when his uncle asked, the accused fired upon his uncle which hit on him and other accused gave him lathi blows. In the meantime, his brother-in-law, Rameshwar Singh also reached there.

15. In cross examination, this witness admitted that he is indulged in the business of cultivation of opium but he did not do the sale or purchase of the same. He denied that deceased-Vedpal was helping him in his business. Vedpal was having small tea shop at Railway Station. He denied the suggestion that he had any enmity with Subedar or Buddhu. He also denied that Subedar is having his agricultural land abutting the land of this witness.

16. Madan Pal Singh (PW-3) stated that he scribed the complaint on the asking of Vedpal which is Ex.Ka-3. He stated that Vedpal was daily wager. He denied the suggestion that Kallu was doing cultivation of opium and Vedpal was working with him.

17. In cross examination, he stated that the field of Kallu was abutting his field and Kallu's field was also abutting the field of Subedar and one litigation is pending between Kallu and Subedar.

18. Dr. Raj Kumar (PW-4) stated that he has conducted the MLR of the victim. The injuries are already reported above.

19. O.P. Tyagi (SIS) (PW-5) stated that vide memo Ex.Ka-5, he had taken the dead body after postmortem.

20. Dr. S.P. Singh (PW-6) who conducted the postmortem stated about the injuries as reproduced above. In cross examination, this witness stated that injury No.4 alone is sufficient to cause the death which is a gunshot injury. However, injury No.1 to 3 & 5 alone in the absence of injury No.4 are not sufficient to cause the death.

21. S.H.O. Gandharv Singh, (PW-7) stated that he was the Investigating Officer and a report Ex.Ka-3 was submitted in the police station on which, Chik report was prepared vide Report No.3. The Chik Report was Ex.Ka-7 and report No.3 was Ex.Ka-8. This witness stated that vide letter (Ex.Ka-9), the injured was sent to the hospital and entry was made in the Case Diary (Ex.Ka-10). He recorded statement of Smt. Roop Devi, the eye witness and widow of deceased, who handed over her bloodstained dhoti which was tied around the body of her husband at the time of incident vide recovery memo Ex.Ka-1. The torch was recovered vide recovery memo Ex.Ka-2. One empty cartridge of 12 bore and one empty cartridge of 315 bore were recovered vide recovery memo Ex.Ka-11. Statement of eyewitness, Kallu Singh, was recorded and Naksha Nazri was also prepared which is Ex.Ka-12. Statement of Rameshwar Singh was also recorded. After the death of Vedpal, Section 302 of I.P.C. was added in G.D. (Ex.Ka-13). Accused-Subedar surrendered before the C.J.M., Bareilly on 16.4.1987. In cross examination, this witness further stated about the investigation carried by him.

22. Sub Inspector S.K. Sharma (PW-8) stated that he prepared the Panchayatnama/Inquest Report (Ex-1). Copy of which is Ex.Ka-14. He proved the photograph of the dead body (Ex.Ka-16), Chalan as Ex.Ka-17 and Sample Seal as Ex.Ka-18.

23. Sadat Ali (PW-9), Chief Pharmacist, proved the Bed head ticket of

deceased regarding his admission in District Hospital, Bareilly vide Ex.1. In cross examination, he stated that when accused was admitted, he was in garping stage and was unconscious and, therefore, no dying declaration was recorded.

24. On conclusion of the prosecution evidence, statement of the accused under Section 313 of Cr.P.C. was recorded in which, all the incriminating evidence was put to him. In all the questions, the accused gave reply that he do not know about the offence. Regarding Question No.4 that the Investigating Officer has submitted the Charge-sheet against him, accused-Buddhu replied that it is incorrect as all the witnesses are relative and gave false statements. In reply to Question No.16 why he has been nominated as an accused, he has stated that he has enmity with the police and even previously he was nominated in two cases. However, he was acquitted. He further stated that he want to lead defence evidence.

25. Similar is the statement of accused-Subedar who replied all the questions as having no knowledge and stated that he has been nominated because of enmity with Kallu Singh.

26. Thereafter, one Gyan Singh (DW-1) was produced who stated that on hearing noise, he had gone to the house of Vedpal. He was lying unconscious on a cot and his wife told him that someone has fired upon him but did not disclose the name. Thereafter, he accompanied Vedpal on a bullock cart to the Police Station from where, he was sent to the hospital. He stated that Subedar comes to my village, however, Buddhu never comes.

27. Thereafter, Trial Court, vide impugned judgment of conviction and order of sentence convicted the accused, Buddhu and Subedar, and sentenced them to life imprisonment under Section 302/34 of IPC.

28. As noticed above, one of the accused namely Buddhu has already died in 1999 and appeal qua him stands abated.

29. Counsel for the appellant submits that presence of the PW-1 at the spot is highly doubtful. It is doubtful that at about 2.00 AM in the morning, the victim had seen Buddhu and Subedar in torch light.

30. It is next argued that firearm injury was attributed to Buddhu which proved fatal whereas rest three persons were attributed lathi injuries. Counsel has referred to the statement of Dr.S.P. Singh (PW-6) who conducted the postmortem wherein he has admitted that injury No.4 which is a firearm injury attributed to Buddhu was alone sufficient to cause death. He further stated that injury Nos. 1 to 3 & 5, which are abrasions and lacerated wounds caused by a blunt weapon, independently are not sufficient to cause death as these are on non vital part of the body.

31. Counsel submits that injury attributed to the appellant-Subedar is only a lathi injury that too with other persons whose identity was never proved and, therefore, the appellant is not attributed the fatal injury.

32. It is next argued that the police investigation is highly unreliable as police never tried to identify the two other persons who were present at the spot as per the deceased-Vedpal, PW-1 or PW-2.

33. It is next argued that motive to commit the offence is not proved and there is no enmity with the deceased.

34. It is submitted that PW-2- Kallu Singh has denied that he was having any dispute with appellant -Subedar regarding their abutting land. It is submitted that in the absence of any motive, the Trial Court has wrongly convicted the appellant.

35. Learned counsel for the appellant further submits that PW-1-Roopwati has stated that after Buddhu has fired on her deceased husband which hit him on his stomach, another fire was made at the door of the house but it is not so mentioned in the FIR (Exhibit-Ka-13). It is also not mentioned in the statement under Section 161 Cr.P.C. It is next argued that as per PW-1, both Buddhu and Subedar were carrying country-made pistol however, no such recovery of pistol was effected from the appellant-Subedar and rather no such pistol attributed to the appellant was ever used in the commission of crime. It is submitted that false story has been cooked up as the deceased was murdered by some known persons and the petitioner has been falsely implicated.

36. Counsel further submits that Trial Court has not considered the statement of defence witness i.e. DW-1 who stated that when he heard the noise of firearm, he reached the house of Vedpal who was lying in an unconscious condition on a cot and his wife stated him that some unknown persons had fired upon him and she did not disclose anybody's name.

37. In reply, learned AGA for State submits that both the eye witnesses i.e. PW-1 and PW-2 have duly supported the prosecution version and the medical evidence of the deceased also corroborate the prosecution version.

38. It is next argued by learned A.G.A. that the matter was reported to the police without any delay. It is submitted that the initial complaint was given by deceased-Vedpal himself which was scribed by one Madan Pal Singh upon which Chik F.I.R. was registered and the deceased himself had stated that he had seen both appellant-Subedar and Buddhu at the spot and Buddhu had fired upon him.

39. Learned A.G.A. has further submitted that there was sufficient light as deceased was carrying a torch and the version given in the F.I.R. by the deceased himself is corroborated by both PW-1 (Roopwati-wife of deceased) and PW-2, Kallu Singh (an eye-witness).

40. Learned A.G.A. submits that PW-4 has stated that the deceased died of firearm injury No.4 which was sufficient to cause death. Counsel submits that even at the first instance, when deceased-Vedpal was brought to primary health centre, PW-4 conducted the medico legal examination and reported that Vedpal had suffered one firearm injury along with three other injuries and after the death of Vedpal, the same injuries were reported in the Postmortem report by PW-6. Therefore, the ocular version is duly supported by the medical version.

41. After hearing counsel for the parties and on re-appreciation of entire evidence, the Court finds no merit in the present case for the following reasons :

(a) The F.I.R. was registered by Vedpal (deceased) himself in injured condition. He had clearly named Buddhu (since deceased) and appellant-Subedar Singh along with two other unknown persons as the assailants. Therefore, neither there was any delay in reporting the matter to the police nor there is any discrepancy in the prosecution version.

(b) The case of the prosecution is duly proved by two eye-witnesses namely PW-1 and PW-2. PW-1, Roopwati (wife of the deceased), being an eye witness, duly corroborated the version given in the F.I.R. that in torch light, she had seen that accused-Buddhu had fired upon her husband-Vedpal Singh and appellant-Subedar along with two other persons gave him injuries with lathies. The testimony of this witness could not shattered by the defence.

Similarly, even the second eye-witness namely PW-2 (Kallu Singh-nephew of deceased) has also supported the prosecution version as stated by Vedpal in the F.I.R. Even in lengthy cross examination by the defence, his testimony could not be shattered.

(c) Madan Pal Singh (PW-3) who scribed the complaint forming basis of the Chik F.I.R. has also stated that Vedpal, in an injured condition, came to him and on his asking, he had scribed the complaint which was read over to him and then he put his thumb impression. Statement of this witness shows that complaint was given to the police promptly. Therefore, the version given in the F.I.R. is duly corroborated by the statement of PW-1, PW-2 & PW-3.

(d) Even statement of Vedpal (Ex.Ka-10) recorded under Section 161 of Cr.P.C. is also consistent regarding narration of the facts as per the written report scribed by PW-3 (Ex.Ka-3)

(e) Vedpal was medico legally examined at the first instance by PW-4 who had stated that he had suffered firearm injury and after his death PW-6, who conducted the postmortem of the deceased also had stated that injury No.4 was a firearm injury which was sufficient to cause death. Both PW-4 and PW-6, the two doctors, who conducted the medico legal examination and postmortem of the deceased-Vedpal are consistent with regard to a firearm injury sustained by Vedpal which proved to be fatal. Therefore, ocular version given by PW-1 & PW-2 is duly corroborated by the medical evidence.

(f) Statement of Gyan Singh (DW-1) more or less is a hearsay as he stated that when he reached at the spot, Vedpal was lying in unconscious condition on a cot and his wife (PW-1) told him that some unknown persons had fired upon him.

DW-1 is suppressing the correct fact, as contrary to his version, Vedpal was taken to the Police Station and in between he got the complaint scribed by Madan Pal Singh (PW-3) and, therefore, he was conscious till the time the complaint was scribed by PW-3 which falsified the version given by DW-3 that immediately after the incident when he reached the spot, Vedpal was lying in unconscious condition on a cot. Therefore, statement of DW-1 is not natural and trustworthy.

(g) The suggestion given to PW-2 that his land is abutting the field of accused-Subedar was denied and in defence neither any Sajra Map of the land nor the Khasra number was proved by way of leading any evidence.

42. From the evidence led by the prosecution, it is proved that both accused-Buddhu (since deceased) and Subedar had premeditated meeting of mind to commit the murder of Vedpal. Therefore, appellant-Subedar Singh, who has caused injuries on person of the deceased by using a lathi, and accused-Buddhu who has fired upon a gun shot injury which was sufficient to cause death in ordinary course, are responsible for committing the murder of Vedpal in view of the provisions of Section 34 of IPC. Accused-Subedar Singh has taken active part in commission of crime and the Trial Court has rightly held him guilty of offence punishable under Section 302/34 of IPC.

43. As no other point was raised from either side, we find that the Trial Court has passed the judgment in accordance with law while awarding imprisonment for life to both the accused under Section 302/34 of IPC.

44. Therefore, finding no merits in the present appeal, the same is dismissed. The impugned judgment of conviction and order of sentence are upheld. As noticed in the order dated 18.12.2020 passed by the Supreme Court in Criminal Appeal No. 886 of 2020 while remanding the case back to this Court for fresh decision that appellant-Subedar Singh has since been taken in custody, the appellant-Subedar will undergo the remaining part of the sentence.

45. Copy of this order along with record be transmitted to the Trial Court forthwith.

(2024) 5 ILRA 251
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 4116 of 2015
With
Criminal Appeal No. 3950 of 2015
With
Criminal Appeal No. 4087 of 2015

Chandrapal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Amit Kumar Srivastava, Chandra Kant Bharadwaj, J.S. Baghel, Sikander B. Kochar, V.P. Srivastava

Counsel for the Respondent:
Govt. Advocate, Ajay Panday, Vijay Tripathi

Criminal Law-Indian Penal Code-1860-Sections 147, 148, 149, 302 & 392-Criminal appeal against order of conviction- PW-1 has taken a complete somersault with regard to allegations in the FIR where a person was initially cited as a witness and then citied as an accused/ principal conspirator the version given by PW-1 regarding presence of all other accused is not reliable- the eye witness of the incident has not mentioned about any white colour ambassador car in which four accused persons had come- no weapon of the offence including the licensed rifle of deceased was recovered- neither there was recovery of any weapon nor blood stained earth, blood stained clothes of victim or PW-1 or his father or the empty cartridges were never sent for forensic science investigation, despite the fact that the deceased was Inspector in UP Police.

Benefit of doubt would go to the accused as case property like blood-stained earth, the clothes worn by the deceased or the bullet recovered from the spot or retrieved from the dead body or the car were never sent to forensic science examination and never produced before the trial court, on the plea that everything has been destroyed including the original case diary-Result-Order of conviction set aside.

Appeal allowed. (E-15)

List of Cases cited:

1. Javed Shaukat Ali Qureshi Vs St. of Guj.t, (2023) 9 SCC 164

2. Vadivelu Thevar Vs St. of Madras, 1957 0 AIR (SC) 614

3. Kaur Sain Vs St. of Pun., 1974 AIR (SC) 329

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. These appeals have been filed challenging the judgment of conviction dated 03.08.2015, passed by Special Court (S.C./S.T. Act)/ Additional Sessions Judge,

Court No.13, Bulandshahar holding the appellants Sanjay Dixit, Yogendra, Sanjay Kumar Sahni @ Sanjeev Kumar guilty of offence punishable under Sections 147, 148, 302/149 I.P.C., additionally accused Pramod Sharma and Chandra Pal were held guilty of offence under Section 147, 302/149 I.P.C. and accused Veerpal and Harpal were held guilty of offence under Sections 147, 148, 302/149, 392 I.P.C. whereas one of the accused Mahendra Kumar Kaushik was acquitted of the charge under Section 302 read with Section 120-B I.P.C. as well as the order of sentence dated 04.08.2015 by which the appellants were held guilty of offence and awarded life imprisonment under Section 302/149 I.P.C. along with a fine of Rs. 10,000/- each and in the event of non-payment of fine, to further undergo six months additional simple imprisonment and under Section 147 I.P.C., two years rigorous imprisonment along with Rs. 1000/- each, in default of payment of fine to further undergo one month additional simple imprisonment. Additional accused Sanjay Dixit, Yogendra, Sanjay Kumar Sahni and Harpal were sentenced to three years rigorous imprisonment under Section 148 I.P.C. with a fine of Rs. 1500/- each, in default of payment of fine to further undergo 45 days simple imprisonment. Accused Harpal was additionally sentenced 10 years rigorous imprisonment under Section 392 I.P.C. along with a fine of Rs. 5,000/- and in default of payment of fine to further undergo three months simple imprisonment. It was further directed that 50% of the fine recovered will be paid to the dependent of the deceased under Section 357 (1)(C) of Cr.P.C.

2. Heard Sri Bankim Kulshrestha, assisted by Sri Chandra Kant Bharadwaj, learned counsel for the appellant No.2, Sri Vivek Kumar Singh, learned counsel for the appellant No.4, Sri Vijay Tripathi and Sri Ajay Kumar Pandey, learned counsel for the informant (in Criminal Appeal No.4116 of 2015), Sri Kumar Parikshit, learned counsel for the appellant (in Criminal Appeal No.3950 of 2015), Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Rahul Kumar, Sri Bhavya Sahai, Sri Pawan Bhardwaj and Sri Abhey Singh Yadav, learned counsel for the appellant (in Criminal Appeal No.4087 of 2015) and learned A.G.A. for the State-respondent.

3. It is worth noticing that separate charges were framed under the aforesaid sections against Chandrapal, Mahendra Kumar Kaushik, Veerpal and Sanjay Sahni, Harpal and Yogendra on 11.09.2009, whereas charges were framed against Sanjay Dixit and Pramod Kumar on 16.01.2006. It is also worth noticing that as per the verification report submitted by the concerned C.J.M. Chandrapal accused died on 10.07.2022 whereas Sanjay Sahni died on 01.01.2016. The appeal of both these accused stands abated. It is also worth noticing that accused Chandrapal was granted bail on 30.10.2018, Sanjay Dixit and Harpal were granted bail on 24.10.2016 and Pramod Kumar was granted bail on 05.10.2016. **The third bail application of Yogendra was dismissed on 27.04.2024 directing that the main appeal be listed for final arguments on 06.05.2024 and this is how arguments in the main and connected appeals have been heard.**

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. The facts as stated by the informant in the FIR are as under:

"The brother of the informant Devendra Prakash Gaur, son of Kanti Prasad Gaur is serving in U.P. Police. He was having enmity with Yogendra, Sanjay Dixit and Veerpal etc. Previously they had fired upon his brother in police station- Naraura and FIR in this regard was registered in Police Station- Naraura. Today, at 09:45 AM, I along with my brother Devendra Prakash Gaur, my father Kanti Prasad Gaur and Mahendra Kumar Kaushik, Inspector, U.P. Police, presently resident of Naraura, in our car bearing no. DMC0966 were going from Naraura to Bulandshahar for some urgent work. When we reached on the Dibai railway crossing the gate was closed. In the meantime, on one bullet motorcycle driven by Pramod Kumar and Sanjay Dixit was sitting on the pillion seat along with one white colour ambassador car in which Yogendra, Veerpal, Harpal and Sanjay came and got down. Sanjay as well as Yogendra were carrying guns. Yogendra and Sanjay Dixit fired on my brother with their respective weapons. My brother was hit by the bullet and he fell down. We picked him up and made him lie down on the rear seat of the car, thereafter these persons picked up rifle of my brother which was lying in the car and then Harpal and Veerpal one by one fired shot upon him due to which my brother died at the spot. Pramod Kumar who is resident of Bhangiwara Dibai was keeping the motorcycle engine on and Chandrapal was keeping the car engine on. Both the vehicles were not having number plate. They escaped from the spot while taking away the rifle of my brother. My brother is lying on the rear seat of the car. Due to firing people got terrorised and by closing their shops ran away. Please take action.

Dated 09.10.1989."

6. On this Assistant Sub-Inspector, Charan Singh registered chik FIR. After registration of the FIR, the investigation was carried out by Prahlad Singh, Inspector. He visited the spot and conducted the Panchayatnama/Inquest Report of the deceased, recorded the statement of Narendra Kumar and father of the deceased Kanti Prasad Gaur. On the identification of both of them he prepared the site plan. Thereafter, dead body was recovered and was sent for post mortem from Chief Medical Officer. From the spot blood stained earth along with empty cartridge of a rifle were taken in possession by preparing the separate memos which were written in the handwriting of Assistant Sub-Inspector P.N. Dixit and efforts for the search of the accused was made. On 10.10.1989, statement of Yatendra Kumar Kaushik was recorded and from the spot the statement of the shopkeeper were also recorded. The post mortem report was recovered which was entered in the C.D. Some affidavits of people were received on 18.11.1989, which were sent to the Additional Superintendent of Police. On 15.03.1990, he was transferred to other Police Station and further investigation was carried out by Inspector, Ravindra Kumar Singh who has also recorded the statement of the witnesses and subsequently submitted the charge-sheet before the Court.

7. It is worth noticing that on the direction of the court the further investigation was handed over to C.B.C.I.D. and Inspector Satish Chandra Pachouri also conducted the investigation and recorded the statements of the parties.

8. Charges were framed on 11.09.2009 under Sections 147, 148, 120B, 302 read with 149 and 395 read with 149 I.P.C. and accused did not plead guilty and claimed trial. In prosecution evidence, PW-1 Narendra Gaur, brother of the deceased

Devendra Gour appeared and stated on the line of version given in the FIR. He has also given the details of the firing done by the accused persons. He has stated that his brother was having enmity with Yogendra, Sanjay Dixit, Chandrapal Singh, Harpal and Veerpal etc. On 09.10.1989, he along with his father Kanti Prasad Gaur and Mahendra Kumar Kaushik and deceased Devendra Prakash Gaur were travelling in Maruti Car No. DMC0966 from Naraura to Bulandshahar at about 09:45 A.M. they reached at Kaserkala railway crossing/ Dibai railway crossing which was closed. They stopped the car and his brother Devendra Prakash Gaur got down from the car and started eating tobacco. In the meantime, one bullet motorcyle came from the backside which was driven by Pramod Kumar and Sanjay Dixit was pillion rider. Sanjay Dixit was carrying a gun. One white colour ambassador car also came from the backside in which Veerpal, Yogendra, Harpal and Sanjay Sahni came. Yogendra was carrying a gun, Sanjay Sahni was carrying a country made pistol and Chandrapal was driving the car. Sanjay Dixit and Yogendra fired on his brother when he was about to sit in the car. When Devendra Prakash Gaur was hit by firearm, he and his father took his brother on the back seat of car. His brother Devendra's rifle lying in the car was picked by Veerpal and firstly Veerpal and then Harpal, one by one, from the same rifle fired on his brother Devendra Prakash Gaur which hit him and he died at the spot. The accused ran away after firing and taking away rifle of deceased. This witness further stated that about six months prior to the incident, Sanjay Dixit, Yogendra and Veerpal etc. had fired upon his brother in Police Station- Naraura and in this regard his brother has recorded a complaint in the police station.

9. He further stated that in November 1988, the election of Chairman- Naraura was held. His brother supported one Om Veer Singh, and Mahendra Kumar Kaushik and other accused were supporting Madan Kumar Vashisht. Mahendra Kumar Kaushik asked his brother Devendra to support the Madan Kumar Vashisht but his brother did not agree. In the election, Madan Kumar Vashisht had won. After the election, Kaushik, Sanjay and Veerpal etc. came to their house and fired upon and Devendra Prakash Gaur in this regard made a police to report. The houses of Mahendra Kumar Kaushik and Devendra Prakash Gaur were abutting each other and later on his father got compromised the matter between Mahendra Kumar Kaushik and Devendra Prakash Gaur but the accused were carrying enmity against him. This witness specifically stated that this murder was committed by Mahendra Kumar Kaushik in conspiracy with other accused. He exhibited his complaint made to the police as Ex.Ka.1. In cross-examination, this witness stated that he did not remember the date of the election. He further stated that regarding the incident of firing in the police station, he was not present there and came to know after three days. He pleaded ignorance if any arrest in this regard was made. However, his brother did not suffer any injury. He further stated that in 1992 one Banwari and his son were murdered in Kesopur Sarla in which PW-1, his father and nephew were nominated as accused and went to jail. His brother deceased Devendra Prakash Gaur remained S.O. of Baghpat. However, he pleaded ignorance that at that time the infamous Maya Tyagi murder scandal took place and he and his other police officials faced a trial under Section 302 I.P.C. However, he stated that his brother obtained stay order from the High Court. He further pleaded ignorance that the other police officials were convicted by the court and sentenced to life imprisonment. He further

stated that his brother has constructed a house in Naraura and has purchased 100 Bigah of land after constructing the house. He further pleaded ignorance that deceased was having a share in the contract of lifting sand in Naraura or that the deceased was having a share in the liquor vends. He further stated that he did not know, on the date of incident where deceased Devendra Prakash Gaur was posted. Regarding the incident, he has stated that Sanjay Dixit and Yogendra fired from the driver side whereas Pramod Kumar kept the engine of motorcyle on and Chandrapal was keeping the engine of the car on. Veerpal took away the rifle of the deceased from the left side and fired from that side whereas Harpal fired from same rifle from the side of driver. He further stated that he did not remember if he has mentioned in the complaint that his brother got down from car to eat tobacco. He stated that when Yogedra fired, his brother after taking tobacco, was about to sit in the car and when the fire hit, his body was outside the car. He denied that he has made a statement to the I.O. that after taking tobacco, his brother did not sit in the car. He stated that he did not remember when he and his father picked up deceased and kept him on the rear seat of the car and he was bleeding. He stated that his clothes and his father's clothes were blood stained but I.O. did not take their clothes in possession. The backside of the car was also blood stained but he did not remember, if any, empty cartridge fell inside the car or not. On the rear seat, there were marks of the bullets. This witness further stated that on 11.10.1989, he has taken back the possession of car from the S.H.O. and further stated that he did not remember if any memo in this regard was prepared. He further stated that he did not remember whether the car was with him or sold out. He further stated that Sanjay Sahni with the country made pistol was covering him and his father and none of the accused fired upon them and only extended threat. He further stated about the conspiracy hatched by Mahendra Kumar Kaushik. He has informed the I.O. in this regard but did not know why this fact was not recorded. He further stated that after 20-25 days of the incident, he has moved an application for transfer of the case to C.B.C.I.D. He further stated that in the FIR, it is not mentioned that Veerpal has taken away the rifle of his brother. It is also not mentioned in the FIR that firstly Veerpal by picking the rifle fired. He further stated that he had given the car no. as DNC0966 but he does not know how the I.O. has written the car no. in his statement as DMC0966. On a specific question under what authority he has taken the possession of the car, this witness stated that being younger brother of the deceased, he has given an application for releasing the car. At this stage of cross-examination, on the request of the counsel of the accused, the trial court tried to locate the application given by PW-1- Narendra Kumar Gaur for taking the car on Supurdginama/ release deed but the same was not found in General Diary.

10. This witness further stated that in the Supurdginama/ release deed of the car is Ex.Ka.14. This witness stated that the car was given to him and on his application, he has endorsed regarding the recovery of the car. It was stated in Ex.Ka.14 that as and when directed by the court, he will produce the car and he has received a notice from the court for producing the car. However, he admitted that despite notice he could not produce the car, as he does not know to whom the children of the deceased have sold the car. This witness further stated that he has given an application on 27.05.2010 that the car was destroyed in fire in the year 2008

and the application is at S.No. 128-B. On a specific question as to whose name the car was registered and witness stated that he has no knowledge. Regarding the rifle of his brother this witness further stated that the license of the rifle was with his brother and after the incident he has never seen the license. He denied a suggestion that his brother was not having any license or licensed gun.

11. PW-2- Dr. P.K. Agarwal who conducted the post mortem of the deceased Devendra Prakash Gaur and reported the following injuries:

"मृत्यु पूर्व चोटों का विवरण

(1) आग्नेआस्त्र द्वारा गोली के घुसने व निकलने का घाव साइज 16 X 14 से०मी० X मस्तिष्क तक गहरा दाये कान के ऊपर स्थित। ऊपर से नीचे की तरफ जाता हुआ। दोनों कान के पीछे से। घुसने वाली चोट के चारों तरफ कलौंच, झुलसन मौजूद थे। उसके किनारे फटे हुए व अन्दर को मुड़े हुऐ व निकलने वाले घाव के किनारे बाहर आते हुए फटे हुए बिना कलौंच व झुलसन के। इन दोनो के मध्य की खाल हड्डी व मस्तिष्क फटा व टूटा पाया गया। हड्डियों के टुकड़े मस्तिष्क का भाग इस चोट से बाहर आता हुआ। अन्दर व बाहर जाने वाले भाग एक चोट के ही भाग है।

(2) आग्नेआस्त्र का प्रवेश व घुसने का घाव साइज 3 X 3 से०मी० X केविटी तक गहरा छाती पर सामने की ओर दोनो निपल के बीच मे। किनारे अन्दर को मुड़े व फटे हुए। कालिका व झुलसन के निशान के साथ थी। यह चोट पीछे ऊपर कमर की तरफ जाती हुई सीधी दिशा में ऊपर के पीछे की ओर।

(3) आग्नेआस्त्र का बाहर निकलने का घाव 5 X 4 ½ से०मी० X गुहा तक गहरा सीधी तरफ कमर के ऊपरी हिस्से में कन्धे की तरफ। किनारे बाहर को मुड़े व फटे हुए। खून बाहर निकलता हुआ। बिना कालिस व झुलसन लिये।

चोट सं० 2 व 3 एक दूसरे से सम्बन्धित थी।

(4) आग्नेयास्त्र अन्दर जाने वाला घाव 1 X 1 से०मी० X गुहा तक गहरा चोट सं०-2 से 6 से०मी० नीचे। कालिस व झुलसन सहित किनारे अन्दर को मुड़े व फटे हुए, जो पीछे कमर की ओर बांये तरफ जाते हुए थे।

(5) आग्नेयास्त्र का *Exit* घाव साइज 5 से० X 4 ½ से०मी० X गुहा तक गहरा बांयी तरफ कमर पर ऊपर स्केपुलर रीजन मे कन्धे की तरफ जाता हुआ। किनारे बाहर को निकले हुये। खून झलकता हुआ। चोट संख्या-4 व 5 एक दूसरे से संबंधित थी।

(6) आग्नेयास्त्र घाव निकलना व घुसना एक सीध में 12 X 6 X मांसपेशी तक गहरा, दांयी ऊपर भुजा पर कालिख व झुलसन इन्ट्री पर था। इन्ट्री अन्दर को व *exit* बाहर को निकला हुआ।

(7) आग्नेयास्त्र की चोट *exit & entry 5 X 3 X* मांसपेशी तक गहरा सभी जाँघ पर बाहर से अन्दर को आती थी। इन्ट्री पर जलन झुलसन थी।

(8) आग्नेयास्त्र 2 X 1 X मसल डीप बांयी हसली गर्दन पर नीचे की तरफ। कालिख व झुलसन सहित। एक बड़ी धातु की गोल गोली इस चोट के नीचे से प्राप्त हुई।

(9) कई आग्नेयास्त्र के छर्रो के घाव खाल पर 8 X 6 से०मी० एरिया में बांयी जांघ पर प्रत्येक 2 X 2 से०मी० से 3 X 3 सेंटीमीटर तक थे।"

12. This witness stated that one big size mettled bullet, which was recovered from the neck of the deceased, was kept in the sealed packet along with a pellets of the bullet recovered from the right thigh and were sealed and were given to the constable who had come for the post mortem. In cross-examination this witness stated that the injury no.1 can be received if the person firing is having his hand over the head of the injured. However, he could not give any specific opinion in this regard if the deceased was in a lying position and is fired from the side of the head, he can sustain such injury. Regarding injury no.1, he stated that an entry and exit wound are in similarity. Regarding injury no.2, he stated that the same can be sustained if the person firing is having his hand below the body of the injured. He further stated that if the injured is in lying situation and if the bullet is fired from the side of his feet, this injury can be sustained. The injury has directions up moves. Regarding injury no.5, the direction is from upper side to lower side with an entry wound. He further stated that he did not know whether any sample seal was given to him along with dead body as he

could not find the sample seal in the file. He denied the suggestion that the report was later on changed. He further stated that he did not mention in the post mortem report that any gun powder smell was emitting from the wound. With regard to the nature of the weapon used this witness stated that only a ballistic expert can tell about the weapon used for injury no. 1. He cannot tell the nature of the weapon regarding injury no.2. He further stated that regarding injury no. 9 there is no symptom of fire arm injury. This witness stated that he has not seen 306 bore rifle therefore, he cannot say any that any bullet injury was received from 306 bore rifle.

13. S.I. Charan Singh (PW-3) stated that he was posted as Computer Clerk in Police Station-Dibai and on the complaint of Narendra Kumar Gaur, he prepared Chik F.I.R. No. 292 of 1989. This witness proved the Chik F.I.R. (Ex.Ka-3) and entry the in GD No. 22 dated 9.10.1989 as Ex.Ka-4. The report of record keeper for sending a copy to office of Superintendent of Police was Ex.Ka-5. This witness stated that at the time when the informant came for lodging the F.I.R., Inspector M.K. Kaushik was accompanying him. In further cross examination, he stated that in the G.D. for registration of F.I.R., there is no mention of sending S.R. (Special Report). He further stated that in Ex.Ka-3 addressed to C.O. Anoopshahr bears his signature but there is no date though there is a date on the endorsement by the Chief Judicial Magistrate, Bulandshahr dated 16.10.1989.

14. Prahlad Singh (PW-4), Sub Inspector (Retd.) stated that on 9.10.1989, he was posted in Police Station-Dibai, District– Bulandshahr and the case was registered in his presence by C.C. Charan Singh and he along with other police officials had gone to the place of occurrence. At the spot, he recorded statement of Narendra Kumar and his father-Kanti Prasad Gaur and prepared Naksha Nazri (Ex.Ka-6). The Panchayatnama/Inquest Report (Ex.Ka-7) was prepared by Sub Inspector P.N. Dixit and other documents regarding the recovery of dead body, letter to C.M.O., photographs etc. were also prepared by Sub Inspector P.N. Dixit which are Ex.Ka-8 to Ex.Ka.-11. The bloodstained earth and one empty cartridge of rifle were taken by the police vide separate memos which are Ex.Ka-12 and Ex.Ka-13. This witness identified the signature of S.I. P.N. Dixit on the same. He further stated that on 10.10.1989, statement of one Yatendra Kumar Kaushik was recorded and statements of some shopkeepers of nearby area of the place of incident was recorded in the C.D. On 18.11.1989, affidavits of some persons were received which were sent to Superintendent of Police and their details were mentioned in the C.D. He conducted investigation till 15.3.1990 when he was transferred. In cross examination, this witness stated that it is correct that in the C.D., there is no mention that Special Report was sent on the date of incident. He further stated that he did not remember on which date copy of the F.I.R. was sent to the concerned Court. He further stated as under :

"This is correct that at the time of incident, Mahendra Kumar Kaushik was with Devendra Prakash Gaur. This is also correct that Mahendra Kumar Kaushik in his statement told him that at the time of incident, brother of deceased, Narendra Kumar Gaur, and his father were not present at the place of occurrence."

15. He stated that he did not remember if Narendra Kumar Gaur when came to the police station, he was wearing bloodstained

clothes or not. He further stated that, this is correct if clothes worn by Narendra Kumar Gaur were bloodstained, he would have taken them in possession. This witness stated that Narendra Kumar Gaur had made a wrong statement that his clothes were bloodstained and were taken by Investigating Officer (PW-4). This witness further stated as under :

"When I reached at the place of occurrence, the dead body of the deceased was lying inside the vehicle. I have inspected the vehicle thoroughly but I do not remember if on the seat or roof of the vehicle, there was bloodstain or not. I do not remember if there was any mark of bullets on the body of the vehicle or the seat etc. I do not remember if any smell of gun powder was emitting from the vehicle. It is correct that make of the car is not mentioned in the C.D. The detail of place of occurrence was inadvertently not mentioned in the C.D. It is correct that no empty cartridges or pellet was found inside the vehicle. I did not find any evidence that the deceased-Devendra Prakash Gaur was murdered inside the car, therefore, I did not get photography of the car from outside or inside. I did not even get the inspection of the vehicle done from ballistic expert."

16. This witness denied a suggestion that photography and inspection by ballistic Expert was not done because the car was not present at the place of occurrence. This witness further stated as under :

"Narendra Gaur had given an application dated 11.10.1989 to me for taking Car No. DMC0966 on Supurdginama. I have rightly recorded in C.D. that Maruti Car No. DMC0966 of deceased Devendra Prakash Gaur is parked in premises of Police Station and informant has given an application for taking the same on Supurdgi, as the vehicle is not connected with the commission of offence of murder, therefore, as per Rules, the vehicle be released in favour of the informant on Supurdgi."

17. This witness further stated that Supurdginama/ release deed (Ex.Ka-14) was prepared on his direction. He further stated that he has not taken in possession any document relating to ownership of the car and has not seen the registration certificate to verify whether it is in the name of deceased-Devendra Prakash Gaur or any other family member.

18. This witness further stated as under :

"It is correct that I had no legal right to hand over the case property to anyone on Supurdginama as this right lies only with the concerned Court. He further self stated that I had committed a mistake. It is correct that while giving car to Narendra Kumar Gaur on Supurdginama I have not taken any surety bond. I do not know at present this vehicle is with whom. It is correct that due to releasing the vehicle on Supurdginama in favour of Narendra Kumar Gaur, against the provisions of law, an important evidence is destroyed."

19. He denied that in collusion with Narendra Kumar Gaur, he prepared the Supurdginama to show the presence of the car at the spot and further denied that he has planted the empty cartridge and, therefore, no ballistic expert opinion was taken. This witness further stated as under :

" This is correct that I recorded statement of Mahendra Kumar Kaushik on 10.10.1989. Mahendra Kumar Kaushik

stated that in the car, apart from him, Yogendra, Jeevan Singh and Pankaj Chaudhary were there. However, I did not try to investigate regarding Chaudhary and even did not try to search for him. In C.D. No.2, I have recorded a conclusion that people knew about known criminal history of deceased-Devendra Prakash Gaur and, therefore, no person came forward to make statements. Till now, as per the investigation at the spot, only two persons came on a bullet motorcycle and after firing on Devendra Prakash Gaur, they had gone towards Khokha. However, this is not verified at the spot and further deep investigation is going on. Devendra Prakash Gaur was a known person of criminal history. I do not know at the time of incident, he was posted in which police station. I did not know that he was under suspension for the last three years prior to the incident or not. I do not know how many cases were pending against Devendra Prakash Gaur and how many were pending in the Court. I do not know that he had taken stay from the High Court in Maya Tyagi Scandal Case and the other accused were sentenced to life imprisonment. I do not know that two accused Sub Inspectors in Maya Taygi Scandal Case were murdered and relatives of Pankaj Chaudhary were named in the said case or not."

20. This witness further stated as under :

"This is correct that on the basis of the statements of the people at the place of occurrence and of Narendra Kumar Gaur and Kanti Prasad Gaur, I came to a conclusion that the presence of ambassador car at the spot was not verified. It is correct that till the time the investigation was with me, I did not find any believable evidence that ambassador car came at the spot and by firing upon Devendra Prakash Gaur, his rifle was taken away."

21. This witness further stated in cross examination as under :

"This is correct that statements of people around the place of occurrence namely, Ram Kishor, Veer Singh, Sheodan, Nawab Harpal, Balvir Singh, Agwan Singh, Om Prakash and Munne Khan were recorded and none of them told me the number of Maruti Car. The incident reported in the First Information Report was not fully proved. None of the above named had supported this statement that in the ambassador car Veer Pal etc. came with a rifle and had committed murder of Devendra Prakash Gaur and had snatched his rifle. These persons did not support presence of Narendra Gaur and Kanti Prasad at the time of incident, at the place of occurrence. Mahendra Kausik was an eye-witness. After recording statement of Mahendra Kaushik, I did not record statement of Narendra Gaur as to how he was present at the stop at the time of incident. I have mentioned in the Case Diary and attached all the affidavits of people given to me during investigation. I did not record their statements in the C.D."

22. This witness further stated that it is correct that after recording of the case, the G.D. report was not sent along with documents for the post mortem. In the Panchayatnama regarding departure from the police station there is no mention of G.D. Number and there is overwriting of Section 147, 148, 149 & 302 I.P.C.. However, he denied that till the time the Inquest report was prepared, the F.I.R. was not registered

and, therefore, the sections 147, 148, 149 & 302 I.P.C. were added later on.

23. Sub Inspector Uday Singh (PW-5) stated that he had prepared Ex.Ka-14 for handing over Maruti Car No. DMC 0966 belonging to deceased-Devendra Prakash Gaur in favour of his brother Narendra Kumar Gaur son of Kanti Prasad Gaur. This witness admitted in cross examination that on record, there is no such order issued by the then Inspector directing him to release the case on Supurdgi in favour of Narendra Kumar Gaur.

24. S.H.O. Ravindra Kumar Singh (PW-6), Police Station – Dibai stated that he has submitted report of recovery of the articles before the Court. The report was prepared by Head Moharir Vinod and is Ex.Ka.15. In cross examination, this witness stated that on 27.5.2010 while giving Ex.Ka-15 in the Court, no recovered articles of Case No. 292 of 1989 were in custody of the police station. In custody register, at S.No.69 dated 14.8.1999, there is an endorsement that entire case property is destroyed. He further stated that the empty cartridge cannot be destroyed.

25. R.K. Sharma (Retired Inspector) (PW-7) stated that he received the further investigation from Inspector Mahesh Chandra Gautam and stated about arrest of accused persons and submitting of the challan report (Ex-Ka-16). He also stated about recording of statement of Inspector-Prahlad Singh and other police officials which are recorded in the C.D. In the cross examination, he stated that on an application given by Harish Kumar Sahni, the Investigating Officer investigation was further transferred to C.B.C.I.D. In the application, Harish Kumar Sahni has mentioned that deceased Devendra Prakash Gaur was an accused in an infamous Maya Tyagi scandal case and he is an accused of rape and murder in many police station. This witness stated that he had not inspected the car in which deceased was travelling nor the same was sent for ballistic inspection. This witness further stated as under:

" It is correct that before my investigation, statement of the people nearby the place of incident, namely, Shami Ullah, Shankar lal, Amarpal Kumar, Chandra Dutt, Banvari and Mahaveer were recorded and none of them have stated that at the time of incident, Veer Pal was present and his name was not found in the incident. It is also correct that the above named witnesses did not inform the car number as well as the presence of Narendra Kumar Gaur and Kanti Prasad Gaur at the place of occurrence at the time of incident. It is correct that Narendra Kumar Gaur and Kanti Prasad Gaur are resident of village Kesopur Sathla and Devendra Prakash Gaur used to reside in Naraura there is distance of 60-70 km. Narendra Kumar Gaur and Kanti Prasad Gaur have no property or business in Naraura."

26. He further stated that he has recorded the statement of Mahendra Kumar Kaushik. He further stated that regarding the rifle used in the commission of murder, he has not made any investigation and the wife of deceased or any other family members, despite asking for providing original documents or license, could not provide the same.

27. Amar Pal Singh, Constable (PW-8) stated that he had worked with Inspector Satish Chandra Pachauri who had died in a road accident. He has prepared two

documents which are Ex.Ka.17 and Ex.Ka18 and he identified his handwriting.

28. It is worth noticing that the statement of PW-7- Constable Jograj Singh was recorded for the second time (i.e. this PW-7 number was given to two witnesses) in which he has stated that he has brought the register for the year 1988-90 at S.No. 69, the details of the recovery is entered which are one packet of blood stained earth, plain earth, one packet of empty cartridge and one car bearing no. DMC0966 which was handed over to the brother of the deceased by the I.O. There is entry of post mortem report of the clothes of the deceased and bullets received from the body of the deceased. These articles were deposited in P.S.- Dibai. On 02.05.2013, it is entered that the entire case property is destroyed. This report is signed by one H.M.- Usman Ali and verified by S.H.O.- Ambika Prasad. He had identified their signatures and the copy of which is Ex.Ka.21. The entry of burning and destroying of the case property is at S.No. 69 copy of which is Ex.Ka.22. He stated that the case property was not destroyed under the order of any court or higher police officer. Regarding the Car DMC0966 which was given to Narendra Kumar Gaur on Spurdginama was never called back from him and he was not asked to produce it in the court. He denied the suggestion that the entry regarding destroying of the case property is manipulated in order to create fake evidence.

29. Thereafter, the statement of accused under Section 313 Cr.P.C. was recorded separately in which all the incriminating evidence was put to them.

30. Accused Sanjay Dixit stated that he has been falsely implicated due to political rivalry in village-Naraura and denied all the evidence. Similarly, accused- Harpal denied all the questions put to him and also stated that he has been falsely implicated on account of political rivalry in Naraura. Accused Pramod Kumar and Sanjay Dixit, Yogendra and Chandrapal also made similar statements.

31. Accused-Mahendra Kumar Kaushik who was acquitted by the Trial Court, in his statement under Section 313 Cr.P.C. stated that at the time of incident, he was posted in the police vigilance department and his children were residing in Naraura and due to party faction, he is falsely implicated.

32. In defence Yogendra produced three witnesses. Bhagwan Singh (DW-1) stated that about 20 years ago Devendra Pratap Gaur was murdered near Kaserkala Railway crossing when the railway gate was closed. Two unknown persons did firing. He was having a medical store and had seen from inside the door that unknown persons came on the motorcycle and ran away. This witness stated that the S.H.O. got his signature on the memo Ex.Ka.7. He stated that he informed the S.H.O. that two unknown persons fired upon the deceased. He signed on 09.10.1989 and later on came to know that the deceased is a police officer who was involved in Maya Tyagi scandal case. Till the time police arrived at the spot, there was no family member of the deceased. In cross-examination by public prosecutor, he denied that Yogendra was a history-sheeter and under his influence he has given the statement. He further stated that he did not know him previously.

33. DW-2 Balraj Singh stated that on 09.10.1989, he had a shop near the railway crossing in Kaserkala. On that day, at about

09:10 AM, one suspended S.H.O. was murdered. He was sitting in his shop and person who fired were unknown. This witness was asked to identify unknown Yogendra that he was at the spot. The witness stated that this person was not at the spot and he had seen him for the first time. The crowd gathered at the spot and police came after half an hour then he came to know that the deceased is one Gaur. This witness stated that on that day it was Navami Day and there was a fair due to which there was huge crowd. He had signed memo on 09.10.1989 i.e. Ex.Ka-7. In cross-examination, he denied the suggestion that he came to give statement on the asking of Yogendra.

34. DW-3- Yogendra Kumar Kumar stated that he along with deceased Devendra Prakash Gaur and Mahendra Kumar Kaushik started from Naraura. He had to go to Shikarpur and the others have to go further. Around 9:45 the car was near Kaserkala railway crossing, Devendra Prakash Gaur got down from the car to eat tobacco and he got down to buy cigarette. When Devendra Prakash Gaur was about to sit in the car, two unknown persons came and fired upon Devendra Prakash Gour and he died at the spot. At that time, his brother Narendra Kumar Gaur and his father Kanti Prasad Gaur were not there. This witness was asked to identify Yogendra and on seeing him, he stated that he was not there who fired on the deceased. He further stated that Devendra Prakash Gaur was involved in Maya Tyagi scandal case in which two S.H.O.s' were also murdered and accused were convicted by the court and were sentenced for death. He stated that Mahendra Kumar Kaushik is his cousin brother, and he used to visit him frequently. He denied a suggestion that being cousin of Mahendra Kumar Kaushik or under the influence of Yogendra, he is making wrong statements.

35. Thereafter, vide impugned judgment, the trial Court held the appellants guilty for the offence punishable under Sections 302,147, 148, 149 and 392 of I.P.C whereas one of the accused Mahendra Kumar Kaushik was acquitted of the charge. All the accused were also acquitted of charge under Section 120-B of I.P.C.

36. The accused persons were further sentenced to undergo substantive sentence of life imprisonment along with fine and the aforesaid three appeals have been filed.

37. Learned counsel for the appellant-Yogendra has argued that the deceased was having a chequered criminal history as it has come in the statement of the Investigating Officer that he was involved in number of cases of rape and murder. It is also stated that he was an accused in one Maya Tyagi scandal case, where he had filed a petition before the High Court and a stay was granted. However, the other police officials involved in that case were convicted to life imprisonment. The main thrust of argument of the counsel for appellant is that the presence of PW-1-Narendra Kumar Gaur, who is brother of Devendra Prakash Gaur at the spot is highly doubtful and therefore, he is not a reliable witness.

a) Learned counsel for the appellant submits that at the first instance when the FIR was registered, it is stated that in the Maruti car, informant-PW-1 along with his brother deceased-Devendra Prakash Gaur, father Kanti Prasad Gaur and Mahendra Kumar Kaushik, Inspector of U.P. Police were travelling, however, later on PW-1 took a somersault after 25 days by stating that the murder of his brother was

committed by Mahendra Kumar Kaushik in conspiracy with other accused. PW-1 has attributed a motive towards Mahendra Kumar Kaushik that in the election of Chairman, Naraura, the deceased was supporting one Omveer Singh whereas Mahendra Kumar Kaushik and other accused were supporting Madan Kumar Vashisht who won the election and thereafter the accused person came to the house of deceased and indulged in the firing. However, later on, the matter was got compromised by father of PW-1, but the accused were carrying enmity in their mind. Thus, PW-1 by changing the entire version of FIR is not a reliable witness.

b) Learned counsel for the appellant submits that on the scrutiny of the entire evidence, the trial court found that testimony of PW-1 is not reliable so far the allegation of conspiracy against Mahendra Kumar Kaushik is concerned and, therefore, he was acquitted of the charge. Learned counsel argued that on the same set of allegation, the other accused though acquitted of charge of conspiracy, however, have been wrongly convicted.

c) Learned counsel for appellant has referred to the statement of Mahendra Kumar Kaushik which is recorded after moving an application under Section 315 Cr.P.C. The statement dated 7.8.2012 under the signature of Mahendra Kumar Kaushik regarding the incident read as under :

" On the date of incident, I along with deceased- Devendra Prakash Gaur were going in a car from Naraura to Bulandshahr. At that time in the car, father of Devendra Prakash Gaur, Kanti Prasad Gaur or his brother Narendra Kumar were not there. At about 10:00 A.M., two unknown assailants committed murder of Devendra Prakash Gaur. He had gone to the Police Station Dibai immediately and from Dibai through wireless message, the family members of Narendra Kumar Gaur from village Kesopur Sathla were called. From the police station, I had gone to my house at Naraura and regarding this incident, my statement was recorded by the Inspector, P.S.- Dibai and I have given the same statement to him. The family members of Devendra Prakash Gaur has put pressure on me in this case to record a false statement against the accused persons. When I refused, in a false conspiracy, I have been nominated in this case. I have no connection with the accused persons."

d) Learned counsel for the appellants submits that this written statement given by Mahendra Kumar Kaushik before the Court by following the procedure of law is duly corroborated from the statement of PW-4-Prahlad Singh, Inspector of Police (Rtd.), who was the first Investigating Officer and from his investigation, the presence of PW-1 was not verified. It is next argued that PW-1 has stated that his clothes as well as clothes of his father were blood stained when the deceased Devendra Prakash Gaur was put inside the car, however, PW-4 has stated that when PW-1- Narendra Kumar Gaur came to the police station, his clothes were not blood stained and if there was any blood on his clothes, he would have taken his clothes in possession.

e) It is next argued that as per the version given by the PW-1, at the first instance, when their car reached near a railway crossing which was closed, his brother deceased Devendra Prakash Gaur got down from the car to eat tobacco and two accused came on a bullet motorcycle and four on white colour ambassador car, they were carrying firearms. Pramod Kumar kept the engine of motorcycle on and Chandrapal kept on engine of car on. First, Sanjay Dixit and Yogendra opened fire on his brother and

when he and his father kept his brother inside the car, Veerpal Singh took the rifle of his brother which was kept in the car and then Veerpal and Harpal one by one from the same rifle fired upon Devenda and he died at the spot.

Learned counsel submits that it has come in the statement of first Investigating Officer i.e. PW-4 as well as of second Investigating Officer, PW-7 that from the statements recorded during the investigation of the shopkeepers who were having their shops nearby the place of incident, which is near to a railway crossing, neither the presence of PW-1 was verified nor the presence of white colour ambassador car was proved. Both these witnesses have named five persons/ shopkeepers, Ram Kishor, Veer Singh, Sheodan, Nawab Harpal, Balvir Singh, Agwan Singh, Om Prakash and Munne Khan etc. who have not stated that in the ambassador car, accused came and even did not support that PW-1 Narendra Gaur or his father Kanti Prasad Gaur were present at the spot.

f) It is next argued that the presence of PW-1 also stands falsified at the spot for the reason that the incident is of 09.10.1989 in which, it is stated that in one Maruti Car No. DNC0966, the deceased and PW-1 were travelling when the deceased Devendra Prakash Gaur was murdered. However, in a strange manner, without there being any order of the court, PW-4 released the said car on the Spurdginama in a favour of the informant. It has come in the statement of the PW-4- I.O. that he could not found any evidence regarding involvement of Maruti Car in the case and therefore, he has released the car in favour of the informant within three days of his own. Special reference is drawn to the cross-examination whether this witness clearly admitted that it was not in his legal domain to release this car and only the competent court can only release the car. This shows that false evidence is created to introduce the car at spot.

g) Learned counsel further submits that this car was never subsequently produced before the trial court despite issuance of a notice by court and PW-1 gave an explanation that in a fire incident the car was destroyed in 1988. Counsel argues that though it is stated by PW-1 that accused Veerpal, picked the rifle of the deceased, when PW-1 and his father had kept the deceased in an injured condition on the rear seat of the car, firstly Veerpal fired from the licensed gun of the deceased and then Harpal from the same rifle fired upon his deceased brother one by one and he died at spot. Learned counsel submits that in cross-examination this witness has stated that there were marks of blood stain on the seat of the car and there were marks of bullet inside the car. However, PW-4 has clearly stated that when he inspected the car, neither he found the blood stained marks nor any marks of bullet on the body of the car or inside the car, therefore, he had released the car in favour of the informant- PW-1. Learned counsel aruged that this raises a suspicion that car no. DMC0966 was ever used by the deceased or PW-1 for travelling and the deceased being the police officials, the police manipulated the entire evidence.

h) Learned counsel further submitted that even the presence of the second vehicle, namely, white colour ambassador car is not verified by I.O. during the investigation on the basis of the statements of the aforesaid six persons as noticed above and therefore, the presence of the accused persons is highly doubtful.

i) It is next argued that Mahendra Kumar Kaushik who is the eye witness of the incident and later on, was nominated as the accused by PW-1 by making improvements in the FIR version has also

not supported the presence of PW-1 at the spot in view of his written statement dated 07.08.2012 made before the trial court wherein he has stated that neither father of the deceased Kanti Prasad Gaur nor Narendra Kumar Gaur was present at the spot and two unknown motorcycle-borne assailants committed the murder of Devendra Prakash Gaur. Learned counsel further submits that it is stated by Mahendra Kumar Kaushik that when he went to the police station to give an information regarding the incident, on a wireless message PW-1 and his family members were informed and only thereafter, they came in the police station. In the meantime, police has reached the spot and started the inquest proceedings. Learned counsel submits that since in the inquest proceedings, there is no details of the FIR, therefore, there is overwriting regarding relevant sections of the I.P.C. in the inquest report which proves that the FIR was ante timed and the inquest proceedings were conducted in a manner that unknown persons have committed the murder of deceased Devendra Prakash Gaur and later on, the accused persons were nominated in the case. Learned counsel next argued that even after the transfer of the case to C.B.C.I.D. which was conducted by PW-7, it is not proved that PW-1 was present at the spot or that the ambassador car carrying four accused persons came at the spot. It is argued that in the investigation of both PW-4 and PW-7 it has come that two unknown motorcycle-borne persons came and committed the offence.

j) It is next argued that the car no. DMC0966 was released in favour of the informant within three days of the incident and was never subjected to ballistic examination also raises a suspicion about the presence of PW-1 at the spot. It is further argued that PW-1 regarding the allegation of the conspiracy against co-accused Mahendra Kumar Kaushik stands disbelieved by the trial court and therefore, he is an witness who cannot be believed with regard to the statement against the other accused persons. Learned counsel next argued that it has come on record that no recovery of any weapon of offence was effected from any of the accused which also proves that they are not involved in the commission of offence.

k) Learned counsel submits that though PW-1 states that a licensed rifle of deceased was taken away by Veerpal after he and Harpal fired from the same yet it has come in the statement of PW-7 that despite asking the family members of the deceased including PW-1 to produce original license of the gun, the said was not produced and therefore, there is absolutely no evidence on record that the deceased was either having a license to hold the rifle or was in fact holding a gun at the time of the incident.

l) It is also argued that as per the statement of PW-4, the entire case property i.e. the recovery memo etc. were destroyed in the police station due to an act of god and were not produced. Learned counsel submits that in the absence of any such evidence, the benefit of doubt should be given to the appellant as in fact no such documents were prepared by the police and since the deceased was a police official, the I.O. has created the evidence in favour of the informant.

m) Learned counsel further submits that another witness Kanti Prasad Gaur, father of deceased was never appeared before the trial court as a witness. It is next argued that PW-1 is not an eye witness and he is planted as an eye witness. It is also submitted that no reliability can be placed on PW-1 as he has even taken a somersault by changing his version in the FIR and nominating the eye witness Mahendra

Kumar Kaushik as an accused being a conspirator who was ultimately acquitted by the trial court.

n) It is next argued that there is no scientific investigation conducted in the case to connect the appellants with the commission of offence. It is argued that as per own version of the I.O. the entire recovery effected with any was destroyed in fire and no weapon of offence was recovered from the appellant.

o) Learned counsel further submits that even the empty bullet which was recovered at the spot was also not sent for forensic science examination and the entire case is based on the solitary statement of PW-1 which is not at all reliable.

p) Learned counsel for the appellant further argued that it has come in the statement of PW-7 that the entire case property was destroyed due to fire including the metal empty cartridge which cannot be destroyed. It is argued that incriminating evidences of case property like car no. DMC0966 in which the deceased was travelling along with the empty bullet and case diary of the police station were destroyed and therefore in the absence of the same, the appellants have wrongly been convicted. It is submitted that PW-4 has stated that if PW-1was wearing the blood stained clothes, he would have taken it to the custody but even the clothes were not produced before court.

q) It is next argued that looking from all angles, the presence of PW-1-Narendra Kumar Gaur at the place of occurrence is not proved, therefore, he is not an eye witness. Learned counsel submits that this witness has even made material improvements as the fact stated by him in court that deceased got down from the car to eat tobacco is not mentioned in the FIR. Similarly, the fact that accused Sanjay Sahni has covered him and his father and they did not receive any injury, is also not mentioned in the FIR; PW-4 has stated that as per his verification PW-1- Narendra Kumar Gaur and his father-Kanti Prasad Gaur were not present at the place of occurrence and even in the statements made by Mahendra Kumar Kaushik in terms of Section 315 Cr.P.C. also, he categorically stated that PW-1 was not present at the spot and all these factors were not considered by the trial court. Learned counsel submits that PW-1 was introduced later on, just to cover up the case against the accused person is also apparent from the prosecution evidence that **Firstly**, within three days of the incident PW-4 released the car which was case property without there being any order of the competent court as admitted by him by saying that he has committed a mistake**. Secondly**, as per PW-7, the entire case property was destroyed which is entered in Case Diary at S.No. 69. **Thirdly,** it is submitted that in fact there was no such recovery and rather only evidence is created in this regard**. Fourthly**, even there is no recovery of any weapon from any of the accused which shows that they had been falsely implicated. **Fifthly,** as per PW-4, the special report sent to superior officers bears no date, however, it bears the endorsement of CJM dated 16.10.1989 which means it was sent after delay of nine days after manipulating the evidence. It is **lastly** argued that the deceased had chequered criminal record and it has come in the prosecution evidence that he was involved in number of cases of murder and rape including one infamous Maya Tyagi scandal case, wherein, other police officials were convicted and subsequently two police officers were murdered and there is every possibility that in the same manner, the deceased was murdered by unknown persons and on account of personal enmity the accused persons were named in the FIR.

The counsel has submitted that the testimony of PW-1 is not reliable. The counsel relies ***upon Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164*** to submit that it is held by the Supreme Court while relying upon earlier judgment in **Vadivelu Thevar Vs. State of Madras, 1957 0 AIR (SC) 614** that generally speaking, oral testimony of a witness can be classified into three categories namely (i) Wholly reliable; (ii) Wholly unreliable and (iii) Neither wholly reliable nor wholly unreliable. Therefore, this Court finds that the statement of PW-1 is not at all reliable.

Learned counsel further relied upon the decision in **Kaur Sain Vs. State of Punjab, 1974 AIR (SC) 329** wherein in paragraph no. 4, it is observed that defence witnesses are often untrustworthy but it is wrong to assume that they always lie and the prosecution witnesses are always trustworthy, the prime infirmity from which the judgment of the high court suffers consists in this double assumption. It is submitted that the trial court has given no weightage to the defence evidence led by the appellants to prove that firstly they were not present at the spot and secondly even PW-1 was not present at the spot and he is not an eye witness. Learned counsel further submits that the statement of three defence witnesses DW-1 to DW-3 if read in the light of the statement of the two I.Os. PW-4 and PW-7 it becomes apparently clear that even during investigation both the Investigating Officers found that PW-1 or his father-Kanti Prasad Gaur was not present at the spot. It is submitted that even Mahendra Kumar Kaushik, an eye witness of the incident, in his statement before the trial court which is under Section 315 Cr.P.C. has stated that two unknown persons committed murder of deceased Devendra Prakash Gaur and the accused persons were not there and even PW-1 or his father was not present at the spot in the car.

r) Learned counsel submits that even there is no forensic evidence to connect the case of the prosecution with the appellants as it has come in the statement of PW-4 that he did not even get the Maruti car inspected from any ballistic expert as he did not find any evidence that the car was hit by any bullet inside or outside and there were no blood stains in the car. It is also argued that PW-4 has stated that the clothes of the PW-1 were not blood stained and therefore, he has not taken the same in custody which also falsified the statement of PW-1 as if he and his father have picked up the deceased in an injured condition and he was kept in the backside of the car. It is also argued that the story set up by the prosecution that the accused Veerpal took away the licensed gun of the deceased Devendra Prakash Gaur. It is also not proved in evidence that any documents or license of rifle could be produced before the I.O. despite his asking from family members of the deceased.

38. The learned counsel appearing for the other accused have additionally argued that no evidence has come on record that rifle was recovered from him and in the absence of any forensic science lab or ballistic report to prove the nature of injury sustained by the rifle, the prosecution case is highly doubtful.

i) It is further argued that though in the FIR it is stated by the informant that on the previous occasion the accused persons fired upon the deceased at P.S.-Naraura and similarly firing incident took place after the candidates supported by Mahendra Kumar Kaushik won the election, and the candidate of the deceased lost election, however, except for the bald statement of PW-1 neither any G.D.R. nor

any FIR in this regard registered with the police station is placed on record which falsify the plea of motive. Learned counsel further submits that the plea set up by the informant that Mahendra Kumar Kaushik conspired the murder of his brother after the 25 days of this incident, is already disbelieved by the trial court. It is submitted that testimony of PW-4 to PW-7 regarding the presence of PW-1 at the place of occurrence is corroborated by DW-1 to DW-3 who are natural witnesses as they are having shop near railway crossing where the incident took place.

ii) Learned counsel submits that while cross examining DW-1 to DW-3 by the State counsel, no suggestion was given either that they do not have a shop nearby the railway crossing or they were not present at the spot. It is also submitted that both PW-4 and PW-7 has nowhere stated that accused persons were either present at the spot or perpetuated the crime. Learned counsel further submits that finding recorded by the trial court that as per the opinion of PW-2-Doctor who conducted the post mortem, multiple weapons were used, is not supported by any ballistic expert report and rather trial court has misread the statement of the doctor as he has nowhere stated that multiple weapons were used rather he has pleaded ignorance in cross-examination about the nature of the weapon used. It is submitted that the most important piece of evidence, the Maruti Car in which the deceased was travelling was never produced before the trial court despite the directions issued by the court. Therefore, the identity of the car is not proved and even no independent recovery memo of this car was prepared by the I.O. as stated by PW-7 that after it was recovered by the I.O., it was released in favour of the PW-1 on Supurdginama. It is also submitted that in the site plan Ex.Ka.6 which is prepared at the instance of PW-1, nowhere depicts the presence of the accused persons and rather it depicts the Khokha, small shops of various persons whose statement was recorded by the I.O. who come to a conclusion that PW-1was not present at the spot. It is also submitted that in site plant Ex.Ka.6, it is also not mentioned at what place the assailants were standing and from where the PW-1 has seen them which also shows that he was not present at the spot. It is also submitted that it is admitted case of the prosecution as PW-4 the first I.O. that accused Mahendra Kumar Kaushik was present at the spot but he was not cited as a witness as later on, on the application given by the informant he was made an accused, however, he made a written statement before the court under Section 315 Cr.P.C. completely destroying the evidence of PW-1. Similarly, the second I.O.- P.W.-7 has not stated that any independent person of the vicinity has verified that PW-1 was present at the place of occurrence and rather the defence witnesses have proved that there were two shooters who came on a motorcycle, corroborate the version of PW-4 and PW-7. It is also submitted that even in the case diary the I.O. has noticed that two unknown shooters have committed the murder. It is submitted that no credibility can be given to PW-1 as nothing has come on record at what place or time or date the accused conspired to commit the murder of deceased Devendra Prakash Gaur.

iii) It is argued that the FIR is ante timed. Counsel has submitted that at the time of preparation of inquest report the FIR was not inexistence, a reference is drawn to inquest report is Ex.Ka.7 where above Sections 302, 395, 147, 148 and 149 I.P.C. are mentioned. It is argued that in the FIR sections were written as 147, 149, 302, 392 I.P.C. in one sequence and this demonstrates that in the inquest report sections were

added later on. It is also submitted that similarly in Ex.Ka.9- letter to CMO, Ex.Ka10- letter to R.I., Ex.Ka.11- photo of the dead body and Ex.Ka.8- form no.13 entered in police report where Sections 147, 148 and 149 I.P.C. are added later on which show that all these documents were prepared prior to registration of the FIR which is ante timed and this also raises suspicion on the prosecution case.

iv) It is also argued that as per Ex.Ka.9 police form no. 13, the time to send the dead body in the hospital is 20:10 minutes which show that for a period of seven and a half hours the dead body was not sent to the hospital. This also demonstrates that till the time inquest proceedings were completed, the FIR was not registered. Counsel submits that the trial court has wrongly recorded the finding that since Devendra Prakash Gaur has died therefore, I.O. was not in a hurry to take his body to hospital and only after completing the inquest proceedings, information was sent to head office from where the mortuary van was arranged which reached at the spot and took the dead body to the hospital. Another argument is raised that in the FIR, it is mentioned that five persons have looted the rifle, however, in the FIR, only Section 392 I.P.C. is mentioned instead of Section 395 I.P.C. which also shows that at the time of registration of the FIR less than five persons have committed the offence.

v) Counsel submits that as per the copy of the FIR was sent to Magistrate on 16.10.1989 whereas the same was required to be sent to the concerned Magistrate immediately. Counsel submits that the trial court has recorded wrong finding that the I.O. was busy in searching for the accused person as the police official was murdered therefore, the I.O. sent report on the next date to the Magistrate. It is next submitted that the Magistrate endorsed on the FIR on 16.10.1989 by writing 'seen' and therefore, this aspect also reflect that the FIR is ante timed. It is also submitted that neither PW-3 nor PW-4 could explain the delay in sending the report to the Magistrate on 16.10.1989 i.e. after seven days.

vi) Counsel further submits that trial court has wrongly taken notice of two letters at S.No. 173-B regarding a copy of the license issued from D.M.- Pilibhit whereas this document was neither proved by the informant or by the I.O. Counsel has next argued that the defence has produced two documents Chik A.7/1 and A.7/3. Chik Ex. A.7/1 bearing no. 65 in Case Crime No. 82-A under Section 394, 406 I.P.C. is attached in which one Govind Ram Kumar has registered the case against deceased Devendra Prakash Gaur. Vide Ex.A.7/2 Chick No. 101, Case Crime No. 82-C under Sections 147, 148, 149, 307, 394, 323, 504 I.P.C. is registered in which one Sanjay son of Shyam Bihari has registered case against deceased Devendra Prakash Gaur, his father and others for extending threat and opening fire by unknown persons. In that case, accused Yogendra was cited as a witness. In Ex.A.7/3 Chik No. 66, Case Crime No. 82-B under Sections 147, 148, 307, 342 I.P.C. was registered in P.S.- Naraura by one Satya Prakash Agarwal. Similarly, vide Ex.A.7/5 one Ganga Sharan Kumar has registered FIR in P.S.- Naraura stated that he had gone to a tent house for depositing the articles and when he was coming back along with Jayanti Prasad and Ram Bharose and 2-3 labourers when reached the house of Inspector, Mahendra Kumar Kaushik, some miscreants did firing and declared that Devendra Prakash Gaur is done away. Those persons encircled them and snatched licensed gun of Ram Gopal and then they ran away. Counsel submits that all these documents were not considered by the trial court by observing that they have not been properly proved.

39. In reply, learned counsel for the informant has argued that the FIR pertains to the year 1989 whereas the charges were framed after 10 years as some of the accused were arrested later on. The trial was concluded after a long time and, in the meantime, in the month of March 2008, Kanti Prasad Gaur, father of the victim and PW-1, had died, prior to framing of the charges therefore, he could not be examined as a witness. Learned counsel has placed reliance upon the affidavit of the informant to submit that as many as 32 cases were pending against Yogendra and some other cases are also pending against the other accused and this fact is noticed while dismissing the bail application of Yogendra. It is also argued that the narration of the events, the manner in which the accused have committed the offence with their respective weapons is explained by PW-1 who is the natural witness as he was accompanying his brother-Devendra Prakash Gaur (deceased) in the car. It is also argued that no independent witness came forward and therefore, the police could not record the statement of any witness. Learned counsel submits that the offence was committed in broad day light and a prompt FIR was registered. Counsel submits that medical evidence by way of statement of PW-2 who conducted the post mortem of the deceased duly support that the deceased died due to firearm injuries. It is also argued that the accused have not disputed the date, time and place of occurrence where the deceased was murdered. It is also submitted that no suggestion was given to PW-1 that accused persons were not present at the spot. Counsel submits that DW-1 to DW-3 which are produced by the defence are interested witnesses and their statement has been rightly not relied upon by the trial court. Learned counsel further argues that on account of the faulty investigation by the I.O. in not keeping the case property in tact or not preparing the site plan properly is not a fault of the informant and no benefit can be taken by the accused person.

Counsel further submits that even if a ballistic expert was not called to examine the car by I.O. does not make prosecution case doubtful. Similar arguments are raised by learned counsel appearing for the State that the defence could not make a dent on the credibility of PW-1 who is a natural witness.

40. In reply, learned counsel for the appellant has argued that in pursuance to the statement of PW-1 neither any motorcycle was recovered which was used by accused Pramod Kumar in commission of the crime nor any ambassador car was recovered from accused Chandrapal which was also used in the crime. Even no firearm were recovered from any of the accused including the licensed rifle of the deceased and therefore, the testimony of PW-1 is not reliable and in the absence of corroborating evidence, and appellants are entitled to be acquitted. It is also argued that as per supplementary affidavit, accused Yogendra stands acquitted in number of cases or has undergone sentence in petty offence cases.

41. After hearing learned counsel for the parties and on perusal of the judgment of the trial court, the following points were framed and decided.

(i) Whether there is a delay in recording the FIR and start of investigation? The trial court recorded that there is no delay on the part of the prosecution.

(ii) Whether the FIR is ante timed? The trial court recorded the FIR is not ante time.

(iii) Regarding the previous enmity it is held that the prosecution has

failed to produce any document that there was previous enmity between the parties.

(iv) Regarding the credibility of the sole eye witness-PW-1, the trial court recorded that this witness was present at the time of the occurrence.

(v) Regarding the corroboration of the medical evidence with prosecution version, the trial court has recorded the finding that the same corroborates occular version of PW-1.

42. So far as motive is concerned, the trial court recorded the finding that prosecution has failed to prove any motive against all the accused and they were acquitted of charge under Section 120-B I.P.C. including Mahendra Kumar Kaushik who is also acquitted under Section 302 I.P.C. Thus, the trial court recorded the finding that the motive is not proved.

43. After hearing the counsel for the parties and carefully going through the trial court
record and on re-scrutinizing the entire evidence, we find merit in the present appeal for following reasons:

A) Reliability of PW-1

All the counsel for the appellants-accused have hammered on the credibility of PW-1 and the court find merit in the same as:

(a) At the first instance, PW-1 recorded the FIR that his brother- Devendra Prakash Gaur (deceased) was having enmity with Yogendra, Sanjay Dixit, Chandrapal, Harpal and Veerpal etc. and when he along with his father and brother and Mahendra Kumar Kaushik were travelling in car no. DMC0966 and reached near a railway crossing which was closed, his brother got down to eat tobacco in the meantime one Bullet Motorcycle driven by accused Pramod Kumar and Sanjay Dixit as pillion driver came from backside, Sanjay Dixit was having a gun. Pramod Kumar kept the engine of the motorcycle on. Similarly, one white colour ambassador car also came from the backside in which Veerpal, Harpal, Yogendra and Sanjay Sahni came. Yogendra was carrying a gun, Sanjay Sahni was carrying a country made pistol, Chandrapal kept the car engine on. Thereafter, Sanjay Dixit and Yogendra fired on his brother who was about to sit in the car and when he was injured by firearm, PW-1 and his father took his brother on the back seat of the car. His brother's rifle was lying in the car and Veerpal picked up the gun and fired upon his brother and then Harpal from the same licensed rifle fired on his brother Devendra Prakash Gaur and he died at the spot.

However, it is a matter of record that after 25 days of the incident, PW-1 changed the story and gave an application for transfer of the investigation to C.B.C.I.D. stating that Mahendra Kumar Kaushik is the principal conspirator who got his brother murdered. Thereafter, the investigation was transferred to C.B.C.I.D. and two challans were presented before the court and charges were framed under Section 302 read with Section 120-B of I.P.C. against all the accused including Mahendra Kumar Kaushik. The trial court while disbelieving the statement of PW-1 with regard to Mahendra Kumar Kaushik acquitted him that the charge under Section 120-B I.P.C. is not proved against him as well as other accused. However, the trial court believed the version of PW-1 with regard to other accused while holding them guilty.

Once PW-1 has taken a complete somersault with regard to allegations in the FIR where Mahendra Kumar Kaushik was

cited as a witness and then citing him as an accused/ principal conspirator, this court has carefully re-scrutinized the statement of PW-1 in the light of partial disbelief by the trial court and find that the version given by PW-1 regarding presence of all other accused is not reliable.

(b) Mahendra Kumar Kaushik- the eye witness has nowhere stated that any of the accused came either on the motorcycle or on white ambassador car and committed the offence rather he has taken up the stand that family members of informant were putting pressure on him to name other accused persons and when he refused, even he himself has been nominated as an accused falsely. It appears to be plausible explanation. Mahendra Kumar Kaushik, after recording his statement under Section 313 of Cr.P.C. has also moved an application for recording his statement in terms of Section 315 of Cr.P.C. by way of an affidavit and in the said affidavit dated 07.08.2012, he has stated that he along with deceased Devendra Prakash Gaur were going in the car from Naraura to Bulandshahar and at that time in the car neither the father of Devendra Prakash Gaur, namely, Kanti Prasad Gaur nor his brother Narendra Kumar Gaur- PW-1 were there. At about 10:00 AM, two unknown persons committed the murder of Devendra Prakash Gaur and he has gone to P.S.- Dibai immediately to report the matter and police gave wireless message to the family of the deceased Devendra Prakash Gaur who reached later on at the spot.

This statement has some evidential value on the case as at no point of time Mahendra Kumar Kaushik had stated either before the two I.O.s or in his statement under Section 313 of Cr.P.C. that the other accused/ present appellants were present at the spot and committed the offence.

(c) It has come in the statement of both the I.O.s as PW-4 stated that he has recorded the statement of shopkeepers who were having small vends near the railway crossing and they have stated that both PW-1- Narendra Kumar Gaur and his father- Kanti Prasad Gaur were not present at the spot. They have also not stated that any of the accused came or committed the offence. PW-1 has stated that he has even collected the affidavits of all these 6-7 shopkeepers whose name are mentioned above who have not stated that the accused came in an ambassador car and the affidavits were recorded in C.D. and sent to higher police officers.

(d) Very strangely and surprisingly within three days, after the incident dated 09.10.1989, Maruti car no. DNC0966 in which PW-1 was allegedly travelling with his father and deceased brother- Devendra Prakash Gaur was released on Supurdari in favour of PW-1 without making it a case property though, in a statement PW-1 has stated that they all were travelling together in the Maruti car and stopped at the railway crossing. Even, PW-1 has stated that they put Devendra Prakash Gaur in the back seat of the car, when he was already hit by bullets and PW-1 and his father's clothes were blood stained and after he was lying in the car accused Veerpal took out licensed rifle of the deceased lying in the car and then fired upon him and subsequently Harpal from the same rifle also fired upon deceased and he died at the spot. All facts relating to the car were never proved before the trial court. PW-1 has stated that he has taken the car on Supurdari from the I.O. PW-4 and later on the car was destroyed in a fire. PW-4 clearly admitted that he had no legal authority to release car in favour of PW-1 and only competent court of law could release it but still he released the car vide Ex.Ka.14. PW-

1 could not produce any document of registration of ownership of the car. He admitted that he has received summon from the court to produce the car but the same was not produced. This all makes prosecution case highly doubtful whether the car no. DMC0966 was actually used by the deceased while travelling along with PW-1 and his father.

(e) The details of the car were never given by Mahendra Kumar Kaushik-the eye witness. Even PW-4 in cross-examination admitted that he had no authority to release the car on Supurdari in favour of the accused. Though, he has taken the car in a possession as case property. He gave an explanation that due to mistake he has given the car though it can be given by the Magistrate only. Therefore, the provisions of Section 451 of Cr.P.C. were not at all complied with by the I.O. which also raises suspicion about the identity of the car. PW-4 has even gone to the extent by stating that he inspected Maruti car at the spot, but he could not find any evidence of blood stains on the rear seat or any outer body of the car. Similarly, he has stated that he also could not find any mark of Bullets either outside or inside the body of car. This falsify the version of PW-1 that when he and his father kept deceased Devendra Prakash Gaur on the rear seat of the car, accused Veerpal picked the licensed gun of the deceased and fired from the left side of the car and then Harpal from the right side of the car fired upon the deceased. In such eventuality, there should be blood stains on the clothes of PW-1 or his father and on the body of the car especially the seat and the doors. As per the post mortem report, there were bullet marks and exit wound, however, no such evidence was found inside the car.

(f) PW-4 has stated that when informant PW-1 has come to report that matter, his clothes were not blood stained and if there was any blood on his clothes, he would have taken the same in custody. Even the clothes of father of PW-1 were not produced before the police. PW-1 has clearly admitted that when they picked up the deceased Devendra Prakash Gaur to keep him inside the car, he was already injured and therefore, their clothes were blood stained. However, this important link of evidence is missing and not proved and raise doubt about presence of PW-1 at spot.

(g) PW-4 has even gone to the extent that he did not deem it appropriate to call the ballistic expert to inspect the car for this purpose and therefore, the reliability of PW-1 for this part of the incident, qua use of Maruti car and presence of PW-1 and his father becomes doubtful.

(h) Even the presence of white colour ambassador car in which four accused persons namely Yogendra, Veerpal, Harpal and Sanjay Sahni allegedly came is not verified in the investigation by both the Investigating Officers. As per the verification conducted by both the Investigating Officers from the shopkeepers, who were having their shop vends nearby the railway crossing, the presence of white colour ambassador car was not proved, rather it has come on record that it was a Navami day and there was a fair at the place of incident and a huge crowd has gathered and two unknown assailants came on a motorcycle and after committing murder ran away.

(i) Even Mahendra Kumar Kaushik, who is the eye witness of the incident, either his statement under Section 313 Cr.PC or in written statement before the Court, the date 7.8.2012 has not mentioned about any white colour ambassador car in which four accused persons had come.

(j) Even during the investigation, after the arrest of the accused persons, no weapon of the offence including the licensed

rifle of deceased Devendra Prakash Gaur was recovered. Devendra Prakash Gaur was an Inspector in UP Police. Similarly, Mahendra Kumar Kaushik is also an Inspector in UP Police, who was an eye witness and, therefore, it cannot be believed that two Investigating Officers, one from the State police and another from C.B.C.I.D. i.e. (PW-4 and PW-7), on their custodial investigation could not recover any weapon including the licensed rifle which was allegedly taken by Veerpal and Harpal. This also raises suspicion on the prosecution version.

(k) From the spot, only one empty cartridge was recovered and as per the statement of PW-2, one cartridge was recovered from the neck of the deceased, who has conducted post mortem of the dead body but were never sent for forensic examination.

(l) Similarly, neither there was recovery of any weapon nor blood stained earth, blood stained clothes of victim or PW-1 or his father or the empty cartridges were never sent for forensic science investigation, despite the fact that the deceased was Inspector in UP Police. Even during investigation, no licence of the gun was recovered by the police, though it has come that a copy of the letter from the District Magistrate, Pilibhit regarding one licence is produced, but it was not exhibited in accordance with law, by either of the Investigating Officers, who have stated that despite their asking the family of the victim, did not produce any such evidence, and therefore, the trial court has wrongly relied on a letter, which not proved and exhibited by the informant PW-1 and two Investigating Officers (PW-4 and PW-7 respectively).

(m) In the absence of recovery of rifle, the licence of rifle cannot be matched with the gun which is allegedly looted by Veerpal and Harpal.

(n) It has come in the statement of PW-7 Jograj Singh (wrongly numbered twice) that the entire case property was destroyed due to fire and therefore there is nothing on record to connect the appellant with the commission of offence. The trial court has wrongly discarded this argument by observing that maintenance of the record room where the case property is kept is not good in State of U.P. and therefore, it may have been destroyed due to lapse of time. However, in our opinion, benefit of doubt would go to the accused as case property like blood stained earth, the clothes worn by the deceased or the bullet recovered from the spot or retrieved from the dead body or the car were never sent to forensic science examination and never produced before the trial court, on the plea that everything has been destroyed including the original case diary etc.

(o) It is stated but not mentioned in FIR by PW-1 that his brother got down from the car to eat tobacco. It is also not stated in FIR that when deceased was about to sit in the car, Yogendra fired upon his brother. However, an explanation is given that he does not know why police has not mentioned this fact. Therefore, it is an improvement made by PW-1 in the court. As even at the time when the application was moved after 25 days of arraying, Mahendra Kumar Kaushik as an accused such plea was not taken. PW-1 also not admitted in the FIR it is not stated that at the first instance, Veerpal picked up the licensed rifle of the deceased and fired upon him and again stated that he does not know why police has not recorded. It is also not recorded in FIR as stated by PW-1 that accused Sanjay Dixit gave cover to him and his father. There is a discrepancy of number of the car as well. As PW-1 stated that he has given the car no. as

DNC0966 whereas it was recorded as DMC0966. PW-1 further admitted that without any order of the court he has taken the car on Supurdgari, though, it was taken in possession by police.

(p) PW-1 admitted that in the release deed/ Supurdari Ex.Ka.14 there was an endorsement that he will produce the car before the court as and when required and despite receiving the notice from the court he failed to produce the car by saying that it was in possession of the children of the deceased and he does not know whether they have sold the car and rather stated that car was destroyed in the fire in the year 2008. No evidence of such firing incident like a D.D.R. with the police is placed on record. This also makes the case of the prosecution highly doubtful.

(q) Nothing has come on record regarding the ownership of the car in which the deceased was travelling. I.O. did not try to verify and conduct investigation in this regard which suggest that this car was just introduced as an evidence and by showing that it has been released on Supurdari to PW-1 within three days of the incident and later on an explanation is given that the car was destroyed in fire appears to be an after thought, just to create evidence as the deceased was a police inspector. It is admitted case that there is no FSL report regarding the cartridge, picked up from the spot as well as retrieved from the body of the deceased which show that there is no corroboration of the occular version of the prosecution, at the cost of repetition it may be noticed that no weapon of offence was recovered from any of the accused after their arrest despite custodial investigation and even the licensed gun of the deceased which was allegedly taken away by accused Veerpal and Harpal was also not recovered and even no license of gun in this regard was proved in accordance with law. All this show that PW-1 is not a reliable witness and rather prove that he or his father were not present at spot and PW-1 is not an eye-witness.

(r) PW-2- Dr. P.K. Agarwal who conducted the post mortem in cross-examination had admitted that he cannot tell about the nature of the weapon used for the injuries and only an expert can tell. On a question whether he has seen 306 bore rifle, this witness stated that he has no knowledge about the bullet fire from 306 bore rifle and thus, this important medical evidence was withheld by the prosecution and the version given by Mahendra Kumar Kaushik that two unknown motorcycle-borne assailants fired upon deceased- Devendra Prakash Gaur resulting into his death seems to be plausible from the investigation carried out by Investigating Officers PW-4 and PW-7. Thus, from the entire evidence, the statement of the PW-1 is not reliable that he was present at the spot and has given a natural eye witness account. The trial court has totally disbelieved the motive on a part of any of the accused while recording a finding that the charge under Section 120B is not proved and therefore, in the absence of any motive, the benefit of doubt is to be given to the accused persons that they have not committed the offence.

(s) The trial court has wrongly discarded the statement of DW-1 to DW-3. **Firstly,** because in cross-examination no suggestion was given by A.D.G.C. that they are not having any shop near the railway crossing and they were not present at the spot. **Secondly,** it has come in the statement of PW-4 that he has collected the affidavit of DW-1 and DW-2 along with some other persons who have stated that the accused were not present at the spot and even white ambassador car was not seen at the spot. The A.D.G.C. did not put any question to these witnesses asking them to identify the other

accused person, however, to the contrary DW-1 and DW-2 have stated that accused Yogendra was not present at the spot. In view of judgment of ***Kaur Sain Vs. State of Punjab (supra)***, the statement of DW-1 and DW-2 could not be discarded outrightly when read along with the statement of PW-1, PW-4 and PW-7 and therefore, both these witnesses are natural witnesses and have stated that they are having shops near the railway crossing where the incident took place and both PW-1 and his father were not there at the spot when two unknown motorcycle-borne assailants fired upon the deceased- Devendra Prakash Gaur. Statement of the defence witnesses is also corroborated by the written statement made by Mahendra Kumar Kaushik (an eye witness) who was later on was assigned as accused that PW-1 and his father were neither travelling in the car nor present at the spot when the incident took place.

49. The prosecution could not explain the cuttings made at the inquest report thereby adding relevant sections of I.P.C.

50. The FIR gives all the sections of I.P.C. in a sequence whereas Sections 147, 148 and 149 I.P.C. added later on, in the inquest report and other documents which were prepared at the spot which also raise a suspicion about the investigation conducted by the police and support the version of the defence that these were added later on as the deceased was a police inspector and murdered by unknown person. Similarly, no explanation is given by I.O. regarding adding of Sections 147, 148 and 149 I.P.C., subsequently, in letter written to the C.M.O. is Ex.Ka.9, letter to R.I. is Ex.Ka.10, photographs of dead body is Ex.Ka.11 as well as form no. 13 is Ex.Ka.8 which also makes the prosecution case suspicious. The trial court has recorded a finding that sending of the dead body for post mortem to hospital vide Ex.Ka.9, after seven and a half hours of delay was due to the fact that the deceased has already died and the I.O. was not in a hurry to take his body to the hospital and he has completed the inquest report is not plausible. Even the prosecution could not explain that the incident which is of dated 09.10.1989 and special report was sent to the Magistrate on 16.10.1989, why it was not sent promptly also raises a suspicion as endorsement by the Magistrate on the FIR is dated 16.10.1989 i.e after seven days.

51. It has also come in evidence that deceased was an accused in one Maya Tyagi scandal case in which number of police officials were convicted and sentenced life imprisonment, however, the trial of the deceased was stayed by the High Court. It has also come in the statement of I.O. that the deceased was an accused in some cases of murder and rape and he was under suspension for the last three years.

52. It has also come in the evidence that two of the police officials in Maya Tyagi scandal case were murdered and therefore, there is a force in the argument raised by the defence counsel that the possibility of murder of Devendra Prakash Gaur who was Inspector of Police in a similar fashion committed by unknown assailants and the appellants have been falsely nominated in the case.

53. So far the charge under Section 392 I.P.C. is concerned neither the rifle in question was recovered nor any license of gun was proved that the deceased Devendra Prakash Gaur was in fact holding a valid gun license or was owner of a gun and therefore,

the trial court has wrongly recorded the finding holding the appellants- Veerpal and Harpal guilty of offence under Section 392 I.P.C.

54. The appellants Chandrapal and Veerpal have already died, therefore, their appeal stands abated. The appellants- Sanjay Dixit, Veerpal and Pramod Kumar Sharma are already on bail whereas Yogendra was never granted bail and as per custody certificate dated 05.11.2022, he is in jail for more than 13 years.

55. In view of above, we find merit in all these appeals. Accordingly, the same are **allowed.** The impugned judgment of conviction and order of sentence are set aside. The appellants are acquitted of the charges. Let appellant-Yogendra be released from custody if he is not required in any other case. A copy of this order along with the trial court records be transmitted forthwith.

(2024) 5 ILRA 277
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 4849 of 2024

Informant/Victim ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Ashutosh Mishra, Kripa Kant Pandey

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Sections-376, 504 & 506-The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989-Sections 3(2)(v) 14-A & (10) -The Code of Criminal Procedure,1973-Section 372-Criminal Appeal **by** prosecutrix/victim against order of acquittal of Accused/Respondent from charges under Section 376, 504, 506 IPC and Section 3(2)(v) of SC/ST Act-Internal medical examination is an integral part of investigation and the its absence the prosecution looses its credibility-Nothing on record to establish this flimsy allegation that her brother was kidnapped by the accused/ respondent and on this score she has denied for any medical examination-Highly unlikely that the accused-respondent have trapped the victim in the false pretext of marriage-When victim is already married and that marriage still subsist, then any amount of promise to marry would automatically gets evaporated.

Appeal dismissed. (E-15)

List of Cases cited:

1. Anurag Soni Vs St. of Chhatisgarh reported in AIR 2019 SC 1857

2. Dr. Dhruvram Murlidhar Sonar Vs St. of Mah. 2019(18)SCC191

3. Naim Ahamed Vs St. (NCT of Delhi) 2023 LiveLaw (SC) 66

4. Maheshwar Tigga Vs St. of Jharkhand 2020 (10) SCC 108

5. Bannareddy & ors.Vs St. of Karn. & ors., (2018) 5 SCC 790

6. Jayamma Vs St. of Karn., 2021 (6) SCC 213

7. Virendra Singh Vs St. of UP & ors., 2022 (3) ADJ 354 DB

8. Rajesh Prasad Vs St. of Bihar & anr., (2022) 3 SCC 471

9. Mallapa & ors.Vs St. of Karn.

(Delivered by Hon'ble Rahul Chaturvedi, J.

&

Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Ashutosh Mishra, Sri Kripa Kant Pandey, learned counsel for the appellant and Learned AGA for the State.

2. The instant appeal is under Section 14(A)(1) of the SC/ST Act 1989 read with Section 372 Cr.P.C. spear headed against Judgement and Order of acquittal dated 08.02.2024 passed by Additional Sessions Judge, SC/ST Act, Court No.14, Prayagraj, whereby learned Sessions Judge while deciding SST No. 15(706) of 2020 (State Vs. Madan Yadav) arising out of Case Crime No. 1008 of 2019 under Section 323, 504, 506 and 376 IPC and Section 3(2)(V) of SC/ST Act, P.S. Colonelganj, District Prayagraj have convicted Madan Yadav only under Section 323 IPC and awarding six months S.I. and Rs. 1000/- fine only acquitting him from all the serious charges under Section 376, 504, 506 IPC and Section 3(2)(v) of SC/ST Act.

3. Aggrieved by the aforesaid Judgement and Order the prosecutrix/victim of Case Crime No. 1008 of 2019 is proposing to invoke the powers of this Court under Section 372 Cr.P.C. read with Section 14(A)(1) of SC/ST Act, with the following prayer:-

It is therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present criminal appeal against the acquittal of the opposite party no.2 and set aside the judgement and order dated 08.02.2024 passed by the Additional Special Judge (SC/ST Act), Court No.14, Prayagraj in Sessions Trial No. 15(706) of 2020 (State of U.P. Vs. Madan Yadav) arising out of case crime no. 1008 of 2019 under Section 323, 504, 506, 376 IPC and Section 3(2)(v) Scheduled Caste and Scheduled Tribes (Prevntion of Atrocities) Act, 1989, Police Station Colonelganj, District Prayagraj, whereby the accused/opposite party no.2 has been acquitted for the offence under section 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and has only awarded lessor conviction under section 323 of IPC for six months simple imprisonment along with fine of Rs. 1000/- and in default of fine one months additional convict and sentence the opposite party no.2 as according to law.

d/or pass such other and further order as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

4. We have heard Sri Ashutosh Mishra and Sri Kripa Kant Pandey, learned counsel for the appellant to their satisfaction and learned AGA for the State and perused the impugned Judgement and Order.

5. After hearing learned counsel the appellant on the admission, we are proposing to decide the appeal at this stage itself.

6. Before coming to the merit of the case, it is imperative to give a bare skeleton facts of the case, so as to appreciate the controversy in its correct perspective.

7. The accused-respondent Madan Yadav is a charge sheeted accused under Section 323, 504, 506 and 376 IPC and Section 3(2)(V) of SC/ST Act.

8. Vide Ext. (Ka-1) an application was given by the Prosecutrix to SSP, Prayagraj, that during her educational days, she met with Madan Yadav in the year 2014. On the pretext of helping her in her studies and

providing notes etc. they developed certain amount of intimacy. During passage of time, this relationship have crossed all the limits of decency and they got involve in pre-marital sex with each other. Not only this, for the purposes of helping her studies, the accused often call her to 'Yadav lodge', Laxmi Chauraha, Allahabad for 2-3 days and thereafter leave her. As per prosecution story, during this time he has extended promise that he would marry her. Meanwhile, for the purposes of education, she left to Lucknow, and has taken admission in some other University. Even then, Madan Yadav came to Lucknow and called her to 'Nayan Atithigrih' and 'Hotel Katiyar International' near PGI, Lucknow and have a sex with her. In the year 2018, Madan Yadav got a service in C.M.P. Degree College, Allahabad. Thereafter, there was a change in his behaviour and attitude qua her. On 17.10.2019, when she reached to C.M.P. Degree College to meet Madan Yadav, then he candidly informed her that he would not marry her. Now, he is a Faculty in the said Degree College and committed *maar-peet* with her. Dr. Prahlad was aware of their relationship. On 05.11.2019 when she visited to Madan's place then Madan and his mother pushed her derogatorily and told her that they are 'Yadav' by caste and you are 'Chamar (Scheduled Caste)' and they would not permit her to even enter in her house. Thereafter she tried to pacify the situation and both of them met in Azad Park for 2-3 hours, where he keep on scolding her and uttered filthy 'caste related abuses' to her.

9. The aforesaid factual story was given by her to SSP, Prayagraj against Madan Yadav and his mother with a prayer to lodge an FIR under the approriate section of the IPC and SC/ST Act may be ordered. Accordingly in the G.D. Entry no. 35 on 18.11.2019 was registered at 14.29 hours.

10. After registering the case the police investigated the matter and has jotted down her 161 Cr.P.C. and 164 Cr.P.C. statement of the prosecutrix and thereafter holding indepth probe into the matter, charge sheet was submitted against 'Madan Yadav' only dropping the name of his mother from the charge sheet.

11. Being the cognizable offence specially relates to the SC/ST Act, the case was committed to the Special Judge, SC/ST Act on 28.01.2020 and the learned Trial Judge on 14.02.2020 has framed the charges under Section 376, 504, 506, 323 IPC and Section 3(2)(V) SC/ST Act.

12. In order to substantiate the allegations the prosecution has produced following witnesses whose oral testimonies were recorded supporting the prosecution story. They are :-

(I) PW-1/The victim/informant herself

(II) PW-2/Gyan Chandra Maurya witness of fact

(III) PW-3/Arun Kumar witness of fact

(IV) PW-4/Dr. Pallavi Pandey, doctor who examined the victim

(V) PW-5/Head Constable Sharda Prasad, who is witness of Chick and G.D. Entry and lastly

(VI) PW-6/ACP Satyendra Prasad Tiwari.

13. In addition to this number of documents, original tehrir, 164 statement of the prosecutrix, Ext Ka-3 (Medical Examination Report), Ext. Ka-5 Chick FIR, Ext. Ka-7 Charge sheet etc. etc. are the

documents which were produced to support the prosecution case.

14. After the prosecution witnesses were over, the accused was called upon to record his statement under Section 313 Cr.P.C., who broadly denied the prosecution case and have submitted that on the aid and advise of her counsel she has cooked up a false story with malicious intention to rope him in the heinous offence of rape. The entire prosecution story is purposive and in order to blackmail him. He further states in his 313 Cr.P.C. statement that in the year 2016 he was engaged as Lecturer in Economics in Raghuvar Dayal Pathak Inter College and the prosecutrix met her and concealing her caste and projecting herself as 'Yadav' by caste, sought a support and cooperation in her studies. She was having different design in her mind, having a malicious intention and she has made an offer to marry accused-respondent.

In order to establish the defense version the accused-respondents has produced DW-1 Saurabh Singh, DW-2 Bihari, DW-3 Kamlesh Kumar, DW-4 Kamla Chandra Gautam, DW-5 Atul Srivastava, DW-6 Hari Shankar Yadav and DW-7 Manjeet Yadav @ Panna Lal.

In addition to above, number of other documents establishing the real identity and the caste of the prosecutrix were produced to establish the fact that she has conceal her real caste and projected herself that she belongs to the 'Yadav Community' to develop the relationship. The prosecutrix is a notorious lady wants to drag the accused-respondent in a vicious web of sexual offence against the accused-respondent.

15. Thus, the long and short of the prosecution case that on the false pretext of marrying her, a consent was extracted from the victim/prosecutrix by accused-respondent. Since the consent extracted was not a free consent and in fact, it was on false pretext of marring her. As per prosecutrix, the accused-respondent was not sincere with this relationship and he was using the victim as toy or tool to quench his lust, thus his this action qua her would term as Rape. In addition to above, the prosecutrix was insisting to marry her but the accused respondent hurled the filthy abuses related to her caste in a derogatory way and committed *maar-peet*, thus it was prayed that accused-respondent should be suitably punished for the offence under Section 376 IPC and section 3(2)(v) of SC/ST Act.

16. Per contra the defense has submitted that for the first time the incident has taken place in the year 2014 and the FIR was registered after inordinate delay of five years in the year 2019. In fact the accused-respondent was trapped in a 'Honey-Trap'. In-fact, he was under the constant threat of lodging of false FIR since 2014 itself. The prosecutrix use to blackmail her and demanding illegal money from him. In fact the accused-respondent is a victim of nefarious design of prosecutrix. It is further submitted that the prosecutrix herself projected to be a 'Yadav' by caste and maintain the relationship. Both of them are major started living together in a live-in relationship, but after coming to know her real caste, which is one of the major consideration to marry, he declined to marry her. Then she has woven an imaginary and false story of rape upon her by the accused-respondent. In fact, this relationship is out of sweet & free will which lasted up to 5 good years. As mentioned above, both of them are major and knowing fully well the far-reaching repercussion of pre-marital sex, they maintain the relationship for five good years without any hesitation, objection or

resistance. There is nothing to attract the provision of SC/ST Act. The prosecutrix herself declined to have an extensive medical test, so as to substantiate the allegation of rape upon her. The charge sheet submitted by the police after holding the superficial and perfunctory investigation without lifting the veil of the prosecutrix and her ulterior motive.

Assessment Of The Allegation In View Of Medical Evidence:-

17. PW-4 Dr. Pallavi Pandey, deposed in her testimony, that on 22.11.2019, she was posted as E.M.O., Women Hospital and the prosecutrix was brought before her around 11.00 in the day by Constable Sunita Pandey. After conducting her primary external examination of the prosecutrix viz: about her identification mark and monthly cycle etc. etc. Not only this the prosecutrix maintain her sexual relationship with accused-respondent after using 'condom', a male contraceptive. Meaning thereby she was conscious of the fact that that she should not conceive and therefore she insisted her male partner to use male contraceptive. She told to the doctor that she maintain the physical relationship with accused-respondent Madan Yadav at number of occasions as she was having a friendly relationship since 2014 and both of them have decided to marry but when Madan Yadav got a service in the C.M.P. Degree College then there is a change in his attitude and behaviour qua her.

18. Surprisingly, she did not permit her to have an internal pathological examination nor has given any pathological sample. When Dr. Pallavi Pandey was put for cross examination by the defence, then she candidly states that the protectrix has declined to get her internal examination or pathological examination and not even for the x-ray examination. When the doctor have insisted to carry out the aforesaid examination, she has refused to do so after putting her signature and the date over it. Under such circumstances, the doctor is not in a position to give any candid opinion that she was ever subjected to ant sexual offensive against her by the accused-respondent as alleged. It is also suggested that by not permitting her to carry out the aforesaid tests and examination the victim deliberately wants to hide something very substantial which touches the core issue.

To, have internal medical examination is an integral part of investigation and the its absence the prosecution looses its credibility considerably.

The interesting feature, is that the prosecutrix gave a strange explanation that since her brother was kidnapped by the accused-respondent and he was in the constant threat, that is the reason behind, she has never admitted herself for any desired medical examination. She further states that accused-respondents have extended threat to her that if she admit herself for the medical examination, her brother would be eliminated. In order to save the life of her brother, she has declined to get herself for any medical examination. She admits that she has never permitted herself for any internal medical examination.

The interesting feature, is that there is nothing on record to establish this flimsy allegation that her brother was kidnapped by the accused-respondent and on this score she has denied for any medical examination. No complaint, written or oral to the local police official is on record to indicate that she or her brother is under threat, that's reason for avoiding internal medical examination.

In this circumstances, when there is no medical report with regard to the alleged allegation of serious sexual offensive against her by the accused-respondent goes, unsubstantiated in the absence of medical examination report. The explanation is a vain attempt on the part of the victim prosecutrix to cover up and hide something substantial which touches the core issue.

19. In paragraph 16.5 of the impugned judgement attained significant, in which it has been mentioned that both the parties after attaining the age of majority establish a physical relationship among them in the year 2014 which lasted up to 2019. In such type of cases the consent of the prosecutrix attains important and significance. If the relationship is consensual, then the physical relationship would not come within the mischief of rape. But in the instant case, the entire castle of the prosecution case is based upon that on the false pretext of marriage the consent of the prosecution was extracted and after using her and after quenching the sexual lust the accused-respondents started ignoring her. In this regard Section 90 of the IPC which reads thus:-

"90. Consent known to be given under fear or misconception*- A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."*

Thus, no consent is defined in IPC and shall be construed, in common parlance. Consent, given by the person under fear of injury OR misconception of fact is not a valid consent in the eye of law. Then the Court has to gather from the individual's conduct and attending circumstances.

Assuming and admitting for the sake of argument, that accused-respondent extended a promise that, he would marry her and on this promise she consented to have pre-marital sex. Later on, she wriggled out from his promise then, could it be said, that he extracted her consent under misconception of fact ?

The facts of the present case indicates that this relationship starts from 2014 and lasted upto 2018. Both of them met several times, in hotel, lodges, guest houses at Allahabad or at Lucknow and spent quality time with each other. Is it a normal behaviour of a girl ? She is surrendering her body and soul to a person who allegedly non-serious about their relationship. During this long period of five years, she never insisted to solemnise formal marriage first. Only after her break-up with the accused-respondent after five years period, she came to know that his partner was non-serious about his commitment. This story is nothing but a cock & bull story, for one's own satisfaction.

20. Learned counsel for the appellant after spelling out the entire factual series of the fact submits that the poor victim is a subject of fraud and misconception by the accused-respondent. The accused-respondent has initially developed a relationship with her, on a pretext of providing the study material and guiding her for her examinations. But lateron, this relationship got serious and has crossed the limit of decency when the girl visited 'Yadav Lodge' near Laxmi Chauraha, Allahabad where they have maintained physical relationship. The girl is not in a position to spell out the date and month of her first sex with accused-respondent. It is alleged that the base of this relationship is a

non-serious false pretext of marriage given by the accused-respondent to her and she believed that promise as true and surrender her body and soul before accused-respondent.

In her testimony, she states that he often extend threat to her either 'he will commit suicide or kill' her in the event she does not allow her body. In the testimony is also being surfaced that lateron she joined the Ambedkar University, Lucknow for her further studies but the accused-respondent reached at Lucknow and call her. Both of them visited number of hotels. As mentioned above, this relationship is lasted for almost 4-1/2-5 years without any resistance, hesitation or objection. This relationship was maintained at Allahabad, thereafter in different hotels and lodges at Lucknow. Madan used to visit Lucknow and after engaging a hotel on his own I.D., the prosecutrix also joined him in the hotel. She is unable to give the name, number and dates of the hotels, where both of them spent quality time.

21. On this, learned counsel for the appellant, has relied upon the judgemen of Hon'ble Apex Court in the case of **Anurag Soni Vs. State of Chhatisgarh** reported in **AIR 2019 SC 1857** . The relevant extract of the judgement is quoted hereinbelow:-

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance bythe accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.

15. Now, so far as the submission on behalf of the accusedappellant that the accused had marriage with Priyanka Soni on 10.06.2013 and even the prosecutrix has also married and, therefore, the accused may not be convicted is concerned, the same cannot be accepted. The prosecution has been successful by leading cogent evidence that from the very inspection the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception."

22. The Court has occasion to go through the entire judgement. Facts of the aforesaid case is entirely different from the facts of the present case. In Anurag Soni's case the family of the prosecutrix and the accused were known to each other therefore, even prosecutrix and accused were known to each other. The accused was to marry another girl Priyanka Soni, the accused continue to talk of marriage with the prosecutrix and continued to give the promise that he will marry the prosecutrix. On 28.04.2013, the accused called the prosecutrix telephonically and responding to his call, she came to his place by train on 29.04.2013 and accused took her to the place of residence. During her stay, in his house during 29.04.2013 and 30.04.2013 they have established

physical relationship thrice and thereafter on 20.06.2013 appellant telephonically informed the prosecutrix that now he has already married.

23. On this score Hon'ble Apex Court that the appellant Anurag Soni has already engaged to marry to some other girl, he make a false promise to Priyanka Soni and therefore observed that the appellant was rightly convicted for the offence under Section 376 IPC. Thus, it is clear that the aforesaid judgement is clearly distinguishable on the facts of the case and as such is of no help to the prosecutrix/appellant.

24. So far as the consent part of the prosecutrix in the instant case, there are number of authorities, which is akin to the facts of the present case. The first and foremost is **Dr. Dhruvram Murlidhar Sonar Vs.State of Maharashtra** reported in **2019(18)SCC191**. The brief facts of the case are :-

"In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February, 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even there- after, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time."

Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

There is no straitjacket formula for determining whether the consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under the misconception of the fact, whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances each case has to be its own peculiar facts, which may have bearing on a question whether the consent was voluntary or was given under the misconception of fact. There is clear distinction between rape and a consensual sex. The Court in such cases carefully examined whether accused actually wanted to marry with victim or had a malafide motive and had made a false promise to this effect to satisfy his lust, as latter false ambit of cheating or deception. There is a distinction between breach of promise or not fulfilling the promise.

25. In yet another judgement in the case of **Naim Ahamed Vs. State (NCT of Delhi)** reported in **2023 LiveLaw (SC) 66:**- Difference between giving a false promise

and committing breach of promise by the accused- In case of false promise , the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceited the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfil his promise.

26. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Second of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry with the prosecutrix and would have cheated or deceited the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court.

27. In this regard yet another judgement in the case of **Maheshwar Tigga Vs. State of Jharkhand** reported in **2020 (10) SCC 108** in which Hon'ble Apex Court while dealing the question of Section 90 IPC and Section 376 IPC opined that :-

"13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eyes of law. In the facts of the present case we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

14. Under Section 90 IPC**, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by**

her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deepseated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday (supra) are considered relevant:

"25…**It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship.** This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

28. In the light of the aforesaid legal pronouncement of Hon'ble Apex Court, it is imperative to bring on record the facts of the present case and test it on the aforesaid parameters with regard to the consensual relationship or the said consent was allegedly extracted by the accused after befooling her or rather on a false promise of marriage ?

29. In paragraph 16.6 of the impugned judgement that the consent was taken from the prosecutrix after playing fraud upon her on the false promise of marriage. It is urged by the counsel for the appellant that relying upon his false word, she has surrender her body and soul before the accused-respondent. However, this argument gets nullify to the extent that the prosecutrix was already married woman with one Om Prakash in the year 2010 and that marriage is still hold good. To establish this fact DW-2 Bihari was examined, who states that the prosecutrix belongs to his family and she is his niece and who got married in 2010 with one Om Prakash Bantariya. This marriage continued for two years and since then she is residing all alone. He states he has attended the said marriage. DW-4 Kamla Chandra Gautam, Gram Panchayat Adhikari have produce the 'Parivar Register' in which column no. 13, the prosecutrix and name of Om Prakash has mentioned. However, the prosecutrix has denied the factum of marriage with Om Prakash and pleaded ignorance as to how her name has mentioned in Parivar Register. On this score, the learned Trial Court has rightly given a finding that under circumstances, it is highly

unlikely that the accused-respondent have trapped her in the false pretext of marriage. Secondly, assuming for the sake of argument, that some promise was extended to her but after the emergence of this new fact, that victim is already married to Om Prakash and that marriage still subsist, then any amount of promise to marry would automatically gets evaporated.

30. In paragraph 19 of the impugned judgement, so far as applicability of Section 3(2)(v) of the SC/ST Act, it is stated that the prosecutrix herself has projected that she is belongs to "Yadav Community" and when the accused-respondent came to know about her real caste, then he declined to marry her. In our society, the caste of the parties attains significant, which plays a vital role in giving a permanence to any relationship. It was revealed by prosecutrix herself that village Dharampur Nyay Panchayan Visanpur Block Saidpur, District Ghazipur in the voter list her father's name is Hari Lal Yadav and in her own voter card her father's name is Hari Lal Yadav and the prosecutrix has unable to clarify the situation. Therefore, it can be easily inferred that a lady who is already married and without dissolution of her earlier marriage and concealing her caste has maintained the physical relationship for good 5 years without any objection and hesitation and both of them have visited numbers of hotel, lodges at Allahabad and Lucknow and enjoyed the company of each other. It is difficult to adjudicate who is befooling whom ?

31. No doubt, chapter XVI "Sexual Offences", is a womensentic enactment to protect the dignity and honour of a lady and girl and rightly so, but while assessing the circumstances, it is not the only and every time the male partner is at wrong, the burden is upon both of them. It is unswallowable proposition that a weaker sex is being used by the male partner for five good years and she keep on permitting him on so called false pretext of marriage. Both of them are major and they understand the gravity of the situation and the far reaching repercussion of pre-marital sex and still they maintained this relationship at different places, different cities, which clearly indicates that this acquisitions that she was subjected to sexual harassment and rape cannot be accepted and learned Trial Judge rightly so have given a benefit of doubt to the accused-respondent and relieved from the major charges pasted against accused-respondent.

32. In the case of **Bannareddy and others vs. State of Karnataka and others, (2018) 5 SCC 790,** in paragraph 10, the Hon'ble Apex Court has considered the power and jurisdiction of the High Court while interfering in an appeal against acquittal and in paragraph 26 it has been held that "the High Court should not have re-appreciated the evidence in its entirety, especially when there existed no grave infirmity in the findings of the trial Court. There exists no justification behind setting aside the order of acquittal passed by the trial Court, especially when the prosecution case suffers from several contradictions and infirmities."

33. In **Jayamma vs. State of Karnataka, 2021 (6) SCC 213**, the Hon'ble Supreme Court has been pleased to explain the limitations of exercise of power of scrutiny by the High Court in an appeal against an order of acquittal passed by a Trial Court.

34. In a recent judgement of this Court in **Virendra Singh vs. State of UP and others, 2022 (3) ADJ 354 DB,** the law on the issue involved has been considered.

35. Similar view has been reiterated by Hon'ble Apex Court in **Rajesh Prasad vs.**

State of Bihar and another, (2022) 3 SCC 471.

36. Since, it is a government appeal against the acquittal, it will be relevant to note the principles of law laid down by the Apex Court with regard to the appreciation of evidence in the appeal against the acquittal. Recently, in the case of **Mallapa and others Vs. State of Karnataka**, the Apex Court has held as under :-

"36. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

(i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive ? inclusive of all evidence, oral or documentary;

(ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

(iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

(iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

(v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court."

37. Thus, after thrashing the entire evidences on record and after critically analyzing the submissions advanced and the findings recorded by the learned trial Court, we are of the considered opinion that the judgment of the trial court does not suffer from any illegality or non appreciation of evidence. The reasoning adopted by the learned trial Judge is quite sound and suitable which do not warrant any interference.

38. We, therefore, find that the trial court has taken a plausible and possible view of the matter on appreciation of entire evidence on record, which cannot be substituted by this Court by taking a different view as per the law discussed above. We also do not find that the findings recorded by the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable.

39. We have critically examined the entire judgement given by the learned trial judge and we are in the agreement with the conclusion drawn by the learned trial judge, which deserves no interference from this Court in exercise of power under Section 372 Cr.P.C. The judgement and order is firm footed and this appeal is devoid of merit and liable to be **REJECTED**.

40 Accordingly, the instant appeal lacks merit and is hereby **REJECTED.**

(2024) 5 ILRA 289
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 5696 of 2022

Ujagar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Rajeev Upadhyay, Vikas Singh

Counsel for the Respondent:
G.A., G.P. Singh

Criminal Law-Indian Penal Code-1860-Section-302-Criminal appeal against the judgement and order whereby the accused/appellants have been convicted under Section 302 I.P.C. and sentenced to life imprisonment- Evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution- The deposition of all the witnesses of fact reveal that prosecution has failed to prove by any cognate and credible evidence the last seen part of the prosecution case- that none of the prosecution witnesses has proved the fact that they have seen appellants calling and taking away the deceased from his house, the very genesis of prosecution case has not been proved, which destroyed the very edifice of the prosecution case- deceased was last seen with the appellants has also not been proved- there is no prosecution witness who has seen appellant killing the deceased-No specific role attributed to any of the appellants in authoring the crime- No weapon of assault has been recovered from any of the appellants or on his pointing.

The deceased was murdered in a barbarous and ruthless manner, but mere heinous and gruesome crime is not enough to punish appellant. Suspicion howsoever, strong it may be, cannot take place of legal proof- Prosecution has completely failed to establish such a chain of circumstantial evidence as would fasten the guilt of the accused/ appellants leaving no room of reasonable doubt-Result- Accused appellants are acquitted of all the charge.

Appeal allowed. (E-15)

List of Cases referred-;

1. Dalip Singh & ors. Vs St. of Pun., AIR 1953 SC 364

2. Piara Singh Vs St. of Pun. (1977) 4 SCC 452

3. Kamta Yadav Vs St. of Bihar (2016) 16 SCC 164

4. Nand Kumar Vs St. of Chhatisgarh (2015) 1 SCC 776

5. Hari Obula Reddy V/s St. of A.P. (1981) 3 SCC 675

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

7. Sharad Birdhi Chand Sarda Vs St. of Mah., (1984) 4 SCC 116

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

1. The instant criminal appeal is directed against the judgment and order dated 24.05.2022, passed by the learned Additional Sessions Judge, Court No. 14, Bareilly, in Sessions Trial No. 1018 of 2012, arising out of case crime no. 242 of 2012 (State Vs. Ujagar and others), whereby each of the accused / appellant namely, Ujagar, Ram Prasad and Kalyan have been convicted under Section 302 I.P.C. and sentenced to life imprisonment and fine of Rs. 20,000/- and in default each of them had to serve additional simple imprisonment of six months.

2. The prosecution case proceeded on the basis of an application, under Section 156 (3) Cr.P.C. (Ext. Ka-1), moved by the first informant Roop Lal (PW- 1), Resident of village Bilauwa P.S. Faridpur, District-Bareilly, in the court of CJM, Bareilly, alleging therein that on 08.10.2011 at about 5.00 p.m. his co-villagers Ujagar, Kalyan and Ram Prashad called his son Rukampal from the house and took him away. At that time, his mother Smt. Bhagga and sister Kalawati were at the house. These people had stated that Rukampal is being taken for some work. Rukampal did not return to the house in the night. On 09.10.2011 in the morning he and other family members went to the house of Ujagar, Kalyan and Ram Prashad to inquire the whereabouts and location of Rukampal, but they did not give any satisfactory answer and equivocated. They queried/ inquired from co-villagers also. Thereafter at about 12.00 P.M. he was informed by the villagers that dead body of Rukampal is lying near Mulberry tree (Shahtoot) near village Nagariya. They rushed at the spot and identified the dead body of Rukampal, there were many injuries on his body. He (PW-1) immediately informed the Police Station, Faridpur. He (PW-1) was illiterate, police did not register his report. However, police launched inquest proceedings on 9.10.2011 at about 8.00 p.m. Inquest report is on record as Ext Ka- 11 and sent the corpse for autopsy. The post mortem was conducted on 10.10.2011 at 2.30 p.m. by Dr. S.C. Sundriyal (PW- 3). Duly proved, PMR is on record as Ext. Ka2.

3. Neither report of the informant was written, nor any action was taken by the police, against the accused persons. Hence, he gave an application to the Police Station Faridpur, Superintendent of Police (Rural) and Senior Superintendent of Police, Bareilly, but all in vain, no action was taken against the accused persons. The accused were roving around saying that Rukum Pal had opposed Ujagar in Pardhani elections, hence they killed him. On 08.10.2011 Kamlesh s/o Pothiram and Smt. Prema w/o Ganga Ram, had seen Rukampal with the accused persons. During conversation accused persons disclosed Prema that they had done Rukampal to death. Thus these accused have murdered his son Rukampal.

4. In view of the above, complainant Roop Lal moved an application (Ext Ka-1) under Section 156(3) Cr.P.C. for investigation of the matter, before the Chief Judicial Magistrate, Bareilly on 8.11.2011, Consequently, on the basis of the order passed on this application, FIR was registered on 24.4.2012, as case crime no. 242 of 2012, under Section 302 IPC, police station Faridpur, District Bareilly, against the accused persons. Needful entries were made in kaimi G.D., carbon copy is on record as Ext. Ka-5 and chik FIR Ext. Ka-3.

5. Initially, investigation was entrusted to S.I. Gajendra Singh Tyagi. In due course, he was transferred and another I.O. replaced him. I.O. has recorded the statement of witnesses under section 161 Cr.P.C, prepared site plans and arrested accused and later after due investigation, collecting credible and clinching evidence, showing the complicity of the accused appellants in the murder of Rukampal, S.S.F. P.N.Mishra, submitted charge sheet on 05.07.2012, under Section 302 IPC against the accused/ appellants namely Ujagar, Ram Prasad and Kalyan, in the court of Chief Judicial Magistrate, Bareilly.

6. Chief Judicial Magistrate, Bareilly took the cognizance of the case. Being exclusively triable by the court of Sessions, he committed it to Sessions, where it was

registered as S.T. No. 1018 of 2012 and in the course of time Sessions Judge transmitted the same to the court of Additional Sessions Judge, Court No. 14 Bareilly, for trial.

7. The learned trial judge framed Charges against the accused Ujagar, Ram Prasad and Kalyan, under section 302 IPC. Accused abjured the charge, pleaded not guilty and claimed to be tried.

8. To bring the charge home, prosecution has adduced testimonies of following witnesses as ocular evidence:-

(i)- Pw-1 Roop Lal (complainant), (ii)- PW-2 Nanhe (village chaukidar), (iii)- PW-3 Dr. S.C. Sundriyal (Autopsy sergion), (iv)- PW-4 C- Shiv Kumar Singh, (v)- PW-5 Prema, (aunt of the deceased), (vi)- PW-6 S.I. Ganga Das Sagar (part I.O.), (vii)- PW-7 Kamlesh (independent witness), (viii)- PW-8 S.I. Gajendra Sinigh Tyagi (part I.O.), (ix)- Gajraj (witness of fact) and (x)- PW-10 C- Devi Dayal (formal witness).

9. Besides, the prosecution has also produced following documentary evidences:-

Sl. No.	Particular of Documents	Proved by	Ext. Nos.
1.	Application u/s 156(3) Cr.P.C.	PW-1	Ext Ka-1
2.	Post mortem Report	PW-3	Ext Ka-2
3.	Chik FIR	PW-4	Ext Ka-3
4.	Application to S. P.	PW-	Ext Ka-4
5.	Kaimi G. D.	PW-4	Ext Ka-5
6.	Sample Seal	PW-6	Ext Ka-6
7.	Challan Lash	PW-6	Ext Ka-7
8.	Photo Lash	PW-6	Ext Ka-8
9.	Request to R.I.	PW-6	Ext Ka-9
10.	Letter for CMO	PW-6	Ext Ka-10
11.	Inquest Report	PW-10	Ext Ka-11
12.	Charge sheet	PW-4	-

10. On conclusion of the prosecution evidence, accused/appellants were confronted with the evidence led against them during trial, and recorded their statements under Section 313 Cr.P.C. wherein all the accused/ appellants denied the prosecution evidence and allegations against them. They stated and asserted that they have been falsely implicated on account of enmity and village partibandi. They had pleaded innocence. They did not adduce any defence witness.

11. Learned trial court after examining the testimony of the prosecution witnesses and other material on record, came to the conclusion that the accused/ appellant are guilty of committing the murder of Rukampal Singh and accordingly convicted them under section 302 IPC and sentenced for life imprisonment and fine with default clause, vide judgment and order dated 24.05.2022. Felt aggrieved, the appellants preferred the present appeal.

12. Heard learned counsel for the appellant Sri Rajeev Upadhyay and learned AGA for the State and Sri G.P. Singh, learned counsel for the informant. Perused the record.

13. Learned counsel for the accused/ appellants has urged that prosecution has not assigned to any of the appellants any specific role of causing fatal injuries to which deceased succumbed. There are material inconsistencies and discrepancies in the prosecution version. Some of the prosecution witnesses had made

improvements in their deposition and had narrated the manner of incident in such a way, which cannot be perceived in ordinary course of diligence and prudence. The investigation was also done in a pedantic and lackadaisical manner with the oblique motive of implicating the accused appellants, on the undue pressure of complainant. No incriminating article has been recovered from any of the appellants or on their pointing. It creates prosecution story highly improbable, untrustworthy and dubious. There is no material from the side of the prosecution to evince that the accused appellants had harbored vengeance to eliminate Rukampal (now deceased). The presence of the prosecution witnesses at the place of occurrence has not been proved, hence their testimony is highly doubtful and incredulous and not really commends any acceptance. No tangible material is elicited from the evidence of the prosecution witnesses in cross examination by which their testimony was found to be highly doubtful and untrustworthy. The chain of evidence and circumstances is also not complete, so as to conclusively establish that the accused appellants are the actual perpetrator of dreadful crime of murder of Rukampal. The victim Rukampal was a man of felonious nature and was having to his credit so many antagonists. Some unknown persons were nurturing animus and grudge against him, they succeeded in their venomous and filthy design of liquidating him in the darkness of night. The appellants had no animus against the deceased Rukampal. It is also argued that the prosecution could not prove any motive against the accused/ appellants which actuated them to take such a drastic step. There is no independent and impartial witness to support the prosecution version. Many of them turned hostile. The evidence of some of them is not consistent with the hypothesis of the guilt of the accused/ appellants. There is general and omnibus allegation in the first information report. The charge sheet has also been submitted relying upon such evidence which is not even formally proved. There is not an iota of evidence pointing towards the guilt of the accused appellants. The trial court wrongly drew the inference that the appellants are the mastermind to commit the murder of Rukampal. The trial court has not analyzed and appreciated the evidence objectively and proper perspective. The prosecution has failed to prove its case beyond reasonable doubt. Therefore appeal deserve to be allowed.

14. Per contra, learned A.G.A. has submitted that there is no embellishment in the prosecution version. The victim died on account of inflicting of injuries on his person by the appellants. The entire incident has been narrated in a very intrinsic and natural way. It is a case of homicidal death. The murder has taken place in a planned manner. The prosecution witnesses had supported the case completely. Whosoever had turned hostile, is on account of undue pressure of the accused persons and his adherents. There is a chain of evidence to demonstrate that Rukampal was inflicted serious injuries on the vital part of body with gunshot in a fit of anger and ire, as a result of which he succumbed to injuries. The causing of injury on the vital part is sufficient to demonstrate that the accused appellants had already nurtured animus and grudge to eliminate the victim. The accused appellants are influential person and had good approach, on account of which FIR was not registered while on information, the police personnel had come at the spot. The inquest report was prepared by the police personnel after appointing witnesses of the inquest. The post mortem had also been done in presence

of police personnel. The non-registration of first information report in such a gruesome and diabolical case by police personnel shows their utter recklessness and irresponsibility. In case there is any variation or omission in the examination, cross examination or examination in chief that will not destroy the entire prosecution version and will not absolve the accused /appellants from the charge.

15. Aforesaid rival submissions of the learned counsels of appellant as well as learned counsel for informant and A.G.A., has to be tested upon the touchstone of evidence adduced by the parties.

16. Elaborating his arguments, learned counsel for appellants, has urged that prosecution has failed to produce any independent witnesses and the witnesses produced are not trustworthy. They are interested and partisan witnesses. Hence, their evidence could not be relied upon. Learned A.G.A. opposed the contention.

17. The law relating to evaluation of relative, interested and partisan witnesses was considered elaborately by the Apex Court, in Dalip Singh and others V/s State of Punjab, AIR 1953 SC 364, wherein the testimonies of the two women witnesses were impeached on the ground that they were close relatives of the deceased. the Hon'ble Apex Court observed that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person. His/ her evidence can only be discarded when it is established that the witnesses has a cause, due to enmity to implicate him falsely. **Dalip Singh** (supra) has been followed and reiterated in a series of the cases. A reference may also be made **Piara Singh V/s State of Punjab (1977) 4 SCC 452, Kamta Yadav vs. State of Bihar (2016) 16 SCC 164 and Nand Kumar vs. State of Chhatisgarh** (2015) 1 SCC 776.

18. In **Hari Obula Reddy V/s state of A.P. (1981) 3 SCC 675**, the Apex Court observed as under :-

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

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

"12. …..Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an 22 of 24 innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

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

This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

20. Thus, we find unbroken line of authorities to the effect that the evidence of eye-witness, if found forceful, can not be discarded simply because witness is a relative of the deceased. The only caveat is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, close scrutiny of testimony of eye-witness is required, to reach the conclusion that they have seen the incident, in question.

21. Learned counsel for the appellant has submitted that present case is based on circumstantial evidence and plea of last seen. So far as 'last seen' segment of the occurrence goes, as per prosecution case, on 08.10.2011 at about 5 o' clock appellants Ujagar, Kalyan and Ram Prasad, resident of bilauwa had called the son of the complainant Rukampal from his house on the pretext of some work and taken him away. At that time, mother (Smt. Bhagga) and sister (Kalwati) of the deceased Rukampal,were present in the house. The prosecution has examined three witnesses regarding last seen. PW- 1 Roop Lal, is the father of the deceased, PW-2 Nannhe claimed to be independent witness, PW- 5 Smt. Prema wife of Ganga Ram, who is the brother of complainant and aunt of the deceased Rukam Pal and further she is sister in law of PW-1 Roop Lal, PW- 7 Kamlesh is the cousin of the complainant, PW- 9 Gajraj claimed to be independent witness of fact. They are also claimed to be witnesses of facts. The argument is that PW-1 Roop Lal and PW-5 Smt. Prema and PW-7 Kamlesh are close relatives of the deceased. Their testimonies are not credible.

22. P.W-1 Rooplal is the father of the deceased. He no where in his statement acceded that in his presence appellants came to his house and took away his son Rukampal. Rather, in his cross examination, he has admitted that, at that time he was not present at his house. He was at some other place and out of his house. The other persons, mother (Smt. Bhagga) and sister (Kalawati) of the deceased, who are said to be present at that time in the house, have not been examined by the prosecution. PW- 2 Nanhe, who is village chaukidar and who informed the occurrence to police station, has also not averred that on the day of occurrence he saw Rukampal going with the appellant. PW-5 Prema Devi, who is the aunt of the deceased has deposed that she was at her home at the time of occurrence. She turned hostile by saying that in her presence no one called Rukampal and took him from his house. PW-7 Kamlesh, who is the cousin of complainant and who was in constant touch with the complainant has also disowned his presence at the time of happening of incident. PW-9 Girja Shanker has also acceded that he has not seen the incident or appellants coming to the house of the deceased Rukampal and took him away for some work. Thus the prosecution has failed to prove the genesis of the incident. PW- 1 complainant, PW- 2 Nanhe, PW- 5 Prema Devi, PW- 7 and PW- 9 are not the eye witnesses, nor have seen the appellant taking away the deceased from his house at 5.00 P.M. on the day of occurrence. PW- 5 Smt. Prema, PW-7 Kamlesh and PW-9 Girija Shankar has turned hostile and nothing could be elicited from them supporting prosecution case. Besides, as discussed above, PW- 1, PW- 5, PW- 7 are related to the deceased in one way or the

other. So, their evidence is not credible and worthy of reliability in the absence of corroboration. Rest of the witnesses are formal, their evidence has to be minutely scrutinized. The deposition of all the witnesses of fact, mentioned above, would reveal that prosecution has failed to prove by any cognate and credible evidence the last seen part of the prosecution case. Anyway, only last seen evidence cannot form the basis for conviction. Thus prosecution has failed to prove its last seen story.

23. So far the second segment of the prosecution case, i.e. participation of the appellant in murdering the Rukampal and other relevant facts goes, it will be pertinent to describe relevant prosecution evidence in this behalf.

(1)- PW-1 complainant Roop Lal, has deposed that about five years ago, the accused persons namely Ujagar, Kalyan and Ram Prasad called to his son Rukampal and took him away for some work. At that moment, his daughter Kalawati and his wife Bhagga Devi, were present in the house. When Rukampal did not come back at night, he along with other members of the family went at the residence of the accused persons on the next morning, to inquire about his where about. The accused persons equivocated and avoided talking about the where about of his son Rukampal. They enquired from the native villagers also and came to know at about 12 o'clock, that the corpse of Rukampal was lying near a Mulberry (Shahtoot) tree near Nagariya. He reached at the place stated by the informers in Nagariya, he saw the corpse of his son Rukampal. There were multiple injuries on his person. There was a gunshot wound on the backbone. He informed to the police station concerned, about the incident. The police personnel came on the spot and launched inquest of the dead body and after preparing relevant documents sealed the dead body and handed over to police constables to deliver it to the district hospital for autopsy. Since the complainant was highly nervous and upset, he could not take notice whether the first information report was lodged at the police station or not. When the accused persons were roaming undauntedly and were extending threats to him, he raked up his grievance by submitting application before the higher police authorities. The accused persons were murmuring and buzzing in the village that Rukampal had been done to death on account of being in opposition to Ujagar in the pradhani election. On the fateful day of occurrence, Kamlesh s/o Pothiram and Prema Devi w/o Ganga Ram had seen Rukampal going in the company with accused persons. The first information report with respect to the said incident was registered pursuant to the order of the court. He proved his thumb impression on the application given by him in the court of CJM. He duly proved the application, as Ext.Ka.1. Thereafter the Station Officer concerned recorded the statement of the complainant. The complainant went to the spot of inspection done by the investigating officer concerned.

(1-a)- During cross examination, PW-1 averred that he had two brothers. One of them have died and the second is Ganga Ram, whose wife is Prema Devi. Prema Devi is his sister-in-law. The complainant was well familiar with Kamlesh s/o Pothi Ram, Vimlesh, as well as Chheda Lal. They are his cousins. Those persons were in contact with him, because of their living in the same locality. Deceased Rukampal was married to Geeta. She had gone to her parental house, before fifteen days of the occurrence. There were amicable and cordial relation between Rukampal and his

wife. Geeta had immediately come to her in-laws on getting the information with respect to murder of her husband. The deceased Rukampal was neither fond of gambling nor drinking. It was disclosed by the complainant that there was a criminal case against Rukampal launched by Nanhe Lal. The wife of complainant was burnt three /four days before the incident on account on pushing of chirag (lamp) with the tail of bullock, but she did not lodge any report with respect to demand of dowry against the deceased. He had seen that his son Rukampal was called and taken away by the accused person at about 5.00 p.m. The complainant went at the house of the accused again and again, at about 6.00 p.m., 7.30 p.m. and 9.30 p.m., but they did not meet. He had enquired from their family members also, however, he added that they met on that very day at 9.30 p.m. at their residences, they avoided to meet him, showing their non-presence. Jagat's mother told him about laying of the dead body of the Rukam Pal in the Jungle. Jagat's mother has expired. He came to learn about the dead body at about 12.00 o'clock next day. He acceded that I.O. has correctly recorded his statement about his going to the field on 08.10.2011 and returning to home at 5.00 p.m. After registration of the first information report, the station officer concerned recorded his statement. Later he acceded that his statement was recorded on 8.10.2011. He reached at the place where the corpse of Rukampal was lying at about one o' clock, there was a gathering of villagers including Chheda Lal, Chandra Pal, Mihilal, Gajram etc. The distance of place, where the corpse of Rukampal was lying from his house, is about half kilometer. He, along with the chaukidar of the village, reached at the police station at about 1.00 o' clock and informed about the incident and the dead body, thereafter returned back to the dead body. The police had reached at the house of complainant at about nine o' clock. The dead body of Rukampal was lying in the field till the arrival of police personnel. The panchayat nama was conducted after bringing the corpse on the road. The police personnel did not make any enquiry from the complainant and took away the dead body of Rukampal. Ujagar Lal and Natthoo Pradhan did not come at the place where the corpse of Rukampal was lying. The corpse of Rukampal was handed over to the complainant after autopsy. The first information report was registered pursuant to the order of the learned Magistrate. The complainant had heard about the murder of his son Rukampal committed by Ujagar Lal, Kalyan and Ram Prasad after six or seven days. The complainant had confirmed that the dead body of Rukampal was lying in the field near (Mulberry tree) Shahtoot. He had seen the dead body of the Rukampal. His body was turned. There was a gunshot injury on the back of neck. The inquest report was prepared by the police within fifteen minutes. When the police personnel took the dead body of Rukampal at the police station, the complainant had also joined them. Natthoo Pradhan did not join him. The station officer concerned had recorded the statement of the complainant and witnesses at the police station concerned. There has not been any litigation between complainant and the accused persons barring this case. There has been some quarrel between the complainant and the accused persons at the time of election. It was also stated by him that the brother of Vijendra namely Brij Lal was done to death. The first information report was lodged by Vijendra naming to the complainant (Roop Lal), Prem Pal, Chandra Pal and Suresh in the murder of Brij Lal. The complainant was sent to jail in the said murder. Munni Devi w/o Sannoo had got a

first information report registered against Rukampal under section 325 IPC.

(2)- Prosecution has examined PW-2 Nanhe, who stated that he was discharging the duty of Chawkidar on 9.10.2011. On that day he got an information at about 4.30 p.m. that the corpse of Rukampal was lying in the field of Bhagwan Das. The victim used to drink liquor occasionally. He had seen the corpse of Rukampal. He, in association with P.W.1 Roop Lal and others had gone at the police station concerned. The station officer had prepared the inquest and recorded his statement. It was stated by Nande P.W.2 that he had been discharging the duty of Chawkidar for the last twenty years. He was well conversant with Rukampal.

(2-a)- In his cross examination PW-2, divulged that Rukampal used to drink liquor but had never quarreled in intoxication. He had got information about the dead body of Rukampal at about 4.30 p.m. from the murmuring and buzzing in the village. When he reached at the place of occurrence,there was a gathering of his village folk and also people of Nagaria. The family members of Rukampal were also present there. He does not remember that the accused persons were present at the spot or not. He had informed to the Station Officer concerned on telephone . At the behest of Station Officer concerned, he reached at the police station in the company of family members of deceased Rukampal. In addition to oral information, written information was also given by Roop Lal at the police station. Roop Lal did not mention name of any accused in the written information. He did not come to know about the assailants of Rukamlal in the murmuring of village folk. It was not within his knowledge that there was any quarrel between Ujagar and the family members of Rukampal.

(3)- In corroboration of occurrence and oral evidence, prosecution has also examined P.W.3 Dr. S.C.Sundriyal, who has deposed that during his posting as Sr. Consultant Eye Surgeon, District Hospital Bareilly on 10.10.2011, he was on post mortem duty. He had conducted post mortem of Rukampal, whose corpse was brought by C.P. Devi Dayal and C.P. Rajeev Kumar, Police Station Faridpur, in a sealed cover with requisite papers. He had tallied the seal. The constables identified the dead body of the deceased Rukampal and after being satisfied, conducted the post mortem of Rukampal at 2.30 p.m.on 10.10.2011 and prepared post-mortem report in his handwriting and signature. He proved P.M. R. as Ext. Ka- 2 .

(3-a). As per PW- 3 Dr. Sundriyal, he noticed following facts about the corps of Rukampal during autopsy;-

(I)- **internal examination**: Dr. noted fracture of cervical vertebrate, membrances congested,,brain congested , base fractured, spinal cord opened, ,left and right lung congested, pericardium congested, heart right full , left empty wt. 180 gm. Small and large intestines empty congested, gall bladder full, liver congested ,spleen congested, kidney congested.

(II**)- External Examination**: rigor morti was absent from both extremities.

(III)- **Ante-mortem Injuries**; A fire arm wound of entry about 3 cm x 3 cm on the posterior aspect of root of neck in line with scapula muscle uper border, in middle region of margins of wound inverted and lacerated. Blackening seen,11 pieces of metallic and a plastic wad recovered from the body.

(IV)- Doctor opined that the **Cause of Death** was due to coma as a result of ante mortem fire arm injury. Organs/ Viscera was preserved for chemical examination. Death of deceased is possible

to happen on 08.10.2011 after 5.00 o' clock by fire-arm.

(V)- Pw- 3 Dr. Sundriyal has further stated that the metallic pieces and plastic wad were sealed by him and returned to police personnel.

(4). The prosecution has also examined, PW-4, C.P. 1244 Sheo Kumar Singh. He stated that, at that time he was posted as Constable Clerk at Police Station Faridpur District Bareilly. Pursuant to the order of Chief Judicial Magistrate Bareilly, passed on the application under section 156 (3) Cr.P.C. he had registered case crime No. 242/12 under section 302 IPC against Ujagar and others and necessary enteries were made in kaimi GD no. 38 at about 20.30. Original GD was destroyed ,the carbon copy of GD which was prepared in the same process with original marked as Ext.Ka.5, which is on record. Entries were also entered and the chik FIR (Ext.Ka.3) was prepared . The copy of the order passed by the Chief Judicial Magistrate Bareilly was received on 24.4.2012 by Dak.

(4-a)- In his cross-examination the PW-4 has divulged that at the time of registration of the first information report, the complainant was not present at the police station. Investigating officer S.S.I., P.N.Mishra has expired. He was posted with him, he is aware of his hand writing. S.I. P.N.Mishra had taken over the charge of investigation of this case after transfer of erstwhile investigating officer Gavendra Mishra. The witnesses of inquest namely Gauram;, Mihilal, Ganga Ram ,Krishna Pal and Tikaram were entered in the Parcha No. 5 on 25.5.2012. He had also entered the description of affidavits given by Roop Lal, Vimlesh Dutta Sharma,Kamlesh, Chheta Lal etc. in the C.D. The name of complainant Rooplal, and the witnesses Smt. Prema, Kamlesh, Vimlesh and Chheda Lal were entered in the case diary. The site plan was prepared on the pointing of the complainant Roop Lal. The site plan and charge sheet were prepared by S.S.I., P.N.Mishra, whose writing and signature were identified by him. He had given detail of investigation in Parcha no.11. On the basis of material collected during investigation, charge sheet was submitted against the accused Ujagar, Kalyan and Ram Prasad under section 302 IPC. However, site plan paper no. 7Ka and charge sheet paper no. 6Ka has not been formally given any Ext. Number. However, he verified the investigation done by S. S. I., P. N. Mishra as secondary evidence.

(5)- P.W.5 Smt. Prema, is the wife of Ganga Ram and aunt of the deceased Rukampal. She stated on oath that 6-7 years ago, she was present at her house. Nobody had called to Rukampal in her presence in the house. She came to know in the morning that Rukampal had been done to death. The people of the locality had gone to see him. She disowned the paper no.16Ka/13 kept in the record in the shape of affidavit dated 28.5.2012. Prosecution has declared her hostile. She did not support the prosecution case rather denied her statement recorded under section `161 Cr.P.C.

(6). The prosecution has also examined P.W.6 S.I.Ganga Sagar. He stated on oath that he was posted at Bareilly as Sub-inspector on 9.10.2011. On the fateful day, on the information given by Nannhe (Chawkidar) he along with HM constable Devi Lal and Rajeev Kumar reached at the place of occurrence. He saw the corpse of Rukampal s/o Roop Lal lying in the field of Bhagwan Das. He conducted the inquest of the corpse of Rukampal. He had prepared the papers in relation to Panchnama namely . Specimen of seal Ext. Ka- 6, Challan Lash Ext. Ka- 7, Photo Lash Ext. Ka- 8, report to R.I. Ext. Ka- 9, request to CMO Ext. Ka- 10.

Prepared inquest report in his writing and signature. Signature of the witnesses of inquest were obtained on the panchayatnama and proved it as Ext.Ka.11.

(7)- The prosecution further examined Kamlesh as P.W.7. He stated on oath that the said incident had taken place about quarter to eight years before. The corpse of Rukampal was lying in the east of Nagariya village , near the tree of mulberry. He had gone and seen the corpse of Rukampal. He had come to know that Rukampal was done to death. He is not an educated person. He identified and proved his thumb impression on paper no. 16Ka/5 but disowned his presence at the time of happening of incident. Prosecution has declared him, hostile and cross examined him.

(7-a) PW-7 in his cross examination did not support prosecution. He disowned his statement recorded under section 161 Cr.P.C. that on 08.10.2011 he have seen at five o' clock in the morning Rukampal going with Ujagar, Kalyan and Ram Prasad out of village and on that night Rukampal did not return home, next day his dead body was found in the field of village. He also denied furnishing of any affidavit to the police personnel.

(8)- P.W.-8 S.I. Gajendra Singh Tyagi has deposed that on 24.4.2012 he was posted as sub-inspector at Police station Faridpur District Bareilly. On that day, he was entrusted with the investigation of aforesaid case. He had entered in parcha no.1 the application moved under section 156 (3) Cr.P.C. He entered the order of the Judicial Magistrate Bareilly in the G.D. He received the copy of Panchayatnama from the police station concerned. He recorded the statement of scribe of F.I.R. On 26.4.2012, he recorded the statement of complainant vide parcha no.11.Subsequent thereto, he was transferred. The investigation was entrusted to someone else. The panchayatnama and post mortem report of the deceased, on the direction of Dy. Inspector General was consigned to record, by Sub-inspector Ganga Das Sagar. He disproved the paper no. 14Ka/2. S.I. Ganga Das Sagar had submitted the panchayatnama and post mortem report on the score that the deceased Rukampal had committed suicide. He had not recorded the statement of Ganga Sagar during investigation.

(9)- P.W.9 Gajraj on 24.9.2019 stated that the corpse of Rukampal was lying in the field. He could not remember the date. Panchayatnama was prepared in his presence and his signature was obtained on the report alongwith other witnesses. He proved the preparation of panchayatnama (Ext Ka-11). On the suggestions of the witnesses of inquest, post mortem was done in order to know real cause of death. In his cross examination he has stated that the dead body of the deceased Rukumapal was recovered near shrub at village Nagariya. The body was recovered at about half-a-km from the village of the deceased. He proved his presence at the time of preparation of panchyatnama as well as recovery of corpse of Rukampal in village Nagariya in the shrub. The corpse of Rukampal was seen by the people of village Nagariya and on their information, the people of his village came to know about the death of Rukampal. When he reached near the corpse of Rukampal, a number of people were already present there. The police personnel were not present there. The police personnel had come after 1 or 1.5 hours later. He did not confirm who had informed to police personnel. The father of Rukampal and other persons were present in the vicinity of corpse.

(10)- To substantiate the charge levelled against the accused the prosecution has examined P.W.10 constable Devi Dayal. He stated on oath that on 9.10.2011 he was

posted as Constable at Police Station Faridpur. On the fateful day from 8 o'clock to 10 o'clock ,the inquest of Rukampal was conducted . The panchayatnama was duly signed by all the witnesses after completing the necessary formalities. The signatures of P.W.10 Devi Dayal and Rajeev Kumar were also obtained on the same which is marked as Ext.Ka.11. After completion of necessary formalities, the corpse of Rukampal was handed over to him and Balajeet Kumar for carrying it to the mortuary.

(10-a). In his cross examination, P.W.10 C-Devi Dayal could not ascertain as to whether the father of the deceased Rukampal was present at the moment of preparing panchayatnama, as he could not identify him. The panchayatnama of deceased Rukampal was done on the intimation of Chawkidar Nanhe. The station officer concerned had called to the father of deceased Rukampal while filing up the Panchayatnama but he was not there. He has stated that there was no person of the locality, except the witnesses of Panchayatnama present, while carrying out the formalities of inquest. He confirmed that there were injuries on the person of deceased Rukampal.

24. On receiving the information that the dead body of Rukampal is lying near mulberry tree (shahtoot) situated near the village Nagariya, they reached there and witnessed dead body of Rukampal lying there in the field of Bhagwan Das. PW-2 Nannhe informed to the police station concerned. Police personnel reached there and completed formalities regarding the corpse of the Rukampal. Rest of the witnesses PW- 2 Nanhe, PW- 3 Dr. Sundryal, PW- 4 constable Shiv Kumar, is chik and G.D. writer, PW- 6 S.I. Ganga Sagar prepared formal papers for autopsy, PW-8 S.I. Gajendra is part I.O., PW-9 Gajraj is witness of inquest witness and PW-10 constable retired Devi Dyal is also the witness of inquest, are the formal witnesses. They have proved various papers relating to prosecution and autopsy surgeon or part I.O. None of them has deposed that, they have seen appellants taking away the deceased and they have seen them on the very day of the incident. The formal witnesses tried to support prosecution but discrepancies in their statements are glaring on the record are highly fatal to the prosecution case showing involvement of the appellant in the commission of the crime. None of them attributed any overt act to any of the appellants. Learned counsel for the appellant has urged that there is no independent and impartial witness to support the prosecution version. Pw- 1 Rooplal, is the father, while Pw- 5 Prema is the aunt of the deceased Rukampal and PW-7 Kamlesh is the cousin of complainant, who was well in touch with him, as he was living in the same locality. These are claimed to be eye witnesses and the witness of facts, but they are related and interested witnesses. Therefore, as discussed above their testimony is not reliable.

25. Learned counsel for the appellants submitted that the present case hinges upon the circumstantial evidence, coupled with the plea of last seen. There is no eye witness account. None of the witnesses has seen appellants committing the gruesome murder of the Rukampal. Therefore it is apposite to bear in mind the settled legal proposition about the quality of evidence required for recording a finding of guilt against the accused persons in view of circumstantial evidence.

26. In most celebrated case, **Sharad Birdhi Chand Sarda v. State of Maharashtra, (1984) 4 SCC 116**, in para

153 (of the judgment), the Apex Court, have postulated five golden principles regarding the appreciation of circumstantial evidence. Whenever the case is based on circumstantial evidence the following principles are required to be complied with to convict the accused:-

"(i)- The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

(ii)- The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent innocence of the accused and must show that in all human probability the act must have been done by the accused."

27. It is also a settled proposition of law that suspicion, howsoever strong, cannot take the character of proof.

28. Thus, in a case of circumstantial evidence each and every circumstance has to be proved by independent and cogent evidence. Each circumstance must be connected with each other as to complete the chain of event. Learned counsel for the appellants contended that in the present case chain of circumstances is broken at several places. The allegations against the appellant taking away Rukampal on the day of incident, could not be proved. None of the circumstance in the present matter have been independently proved and there is failure to establish a complete chain of circumstances by prosecution. Learned A.G.A. has refuted the argument and argued that it is a case of homicidal death. The victim died on account of inflicting injuries on his person by appellants. The murder had taken place in a planned way. It was a gruesome murder by causing serious injuries on the vital part of his body. The entire incident has been narrated in a very intrinsic manner. Although some of the witnesses turned hostile, but it may be remembered that appellants are influential persons. They took them under their pressure. Resultantly they turned hostile.

29. Scrutinizing the prosecution evidence in the aforesaid backdrop of legal scenario, it transpires that none of the prosecution witnesses has proved the fact that they have seen appellants calling and taking away the deceased from his house. Thus the very genesis of prosecution case has not been proved, which destroyed the very edifice of the prosecution case. The deceased was last seen with the appellants has also not been proved. It may be mentioned that there is no eye witness account of murdering the Rukampal by appellants. Verily, there is no prosecution witness who has seen appellant killing the deceased. Prosecution has not attributed any specific role to any of the appellants, in authoring the crime. No weapon of assault has been recovered from any of the appellants or on his pointing. In these circumstances the argument of learned counsel for the complainant regarding gruesome nature of the murder of the deceased cannot take the place of proof, thus deceased was done to death by the appellants does not inspire confidence. Similarly, the argument of learned A.G.A

that witnesses turned hostile under the influence and pressure of the appellants is also not sustainable.

30. Learned AGA has argued that Rukampal was murdered gruesomely and this statement find support from the medical evidence, inquest report Ext. Ka- 11 and post mortem report Ka- 2. There was gun shot injury on the person of the deceased. There was a fracture of cervical vertebrate, membranes congested, brain congested, base fractured, spinal cord opened, left and right lung congested, pericardium congested, heart right full, left empty wt. 180 gm. Small and large intestines empty congested, gall bladder full, liver congested, spleen congested, kidney congested. Thus the deceased was murdered in a barbarous and ruthless manner, but as discussed above mere heinous and gruesome crime is not enough to punish appellant. Suspicion howsoever, strong it may be, cannot take place of legal proof. Prosecution has miserably failed to furnish satisfactory explanations about the serious infirmities, inconsistencies and contradiction in the prosecution case.

31. In the present case, the incident occurred on 08.10.2011 at about 5.00 P.M. the information about the dead body of Rukampal lying in the field of Bhgwandas nearby a mulberry tree, near the village Nagariya, to the witnesses of prosecution. PW-1 complainant, PW-5 Smt. Prema PW-7 Kamlesh and PW-9 Ganga Sagar also reached there and saw the dead body of the deceased Rukampal. According to PW-1 Roop Lal, who is the father of the deceased, he received the information on 09.10.2011 at about 01.00 p.m. from one mother of the Jagat. While PW-2 Nannhe (the village Chaukidar) stated that he got the information regarding lying of the dead body of the deceased Rukampal near mulberry tree at the Nagriya and informed PS concerned. He was directed to reach the PS by the police personnel along-with complainant at 04:30 p.m. He , in association with Rooplal had gone to the police station. Police reached at the place and conducted inquest and send the body for autopsy and that time there were many people including Informant Rooplal were present at the spot. He had received the information from the murmuring and buzzing in the village. According to PW- 2 he got the information on the murmuring and buzzing in the village at about 12:30 PM. Later he improved his statement by saying that he received the information from the mother of Jagat at about 12:00 P.M. In this gap of about 4.30 hours where was the complainant and what he was doing, it was not explained by the prosecution. These inconsistencies and contradiction goes to the root of the prosecution case. Thus, one of the witnesses is stating that he received information out of buzzing and murmuring of the people. Strongly, staying in the village the complainant could not know about the place where of dead body of Rukampal was found. This is highly improbable. Be that as it may, none of the prosecution witnesses have seen either of the appellants committing the murder of Rukampal.

32. It is also urged by the learned counsel for the appellant that the prosecution could not prove any motive against the accused appellants which actuated them to take such a drastic step. It is a trite law that in the case of direct evidence, the motive looses its significance. If the evidence of the eye-witness is trustworthy, there is no need to establish any motive. Since prosecution has failed to prove any role of the appellants in the incident, it is said that motive lies in the

heart of the accused and if accused is falsely implicated this fact will also be within the knowledge of the complainant Rooplal, as to why he had implicated appellants and had roped them falsely in the present case. Learned counsel for the appellant has submitted that prosecution has failed to prove the motive behind the incident, which actuated accused appellant for committing such a brutal incident. In a case of circumstantial evidence motive occupies importance. As per prosecution case accused were roving by stating that Rukampal has opposed Ujagar in Pradhani election so he killed him but the same has not been proved by any credible evidence. However, the complainant in his application u/s 156(3) Ext. Ka- 1 has stated that after the incident appellant were roving and stating that Rukampal has opposed Ujagar in Pradhani Election hence, he killed him but prosecution has not proved this fact. So prosecution has failed to prove any motive against the appellant. There were some other statements of witnesses that there were some criminal cases instituted by both the parties against each other, but no evidence is on record in this respect also. In the absence of any proved motive there is no reason as to why the appellants would kill Rukampal.

33. So far recovery of the dead body of the deceased is concerned it was stated to be found about half a km away from the house of the deceased, near a mulberry (Shahtoot) tree, situated near village Nagariya on 09.10.2011 at about 12.00 o' clock. Pw- 1 complainant has deposed that he was informed by the villagers about the dead body lying at the place near village Nagariya. On being specifically questioned as to who furnished this information to him, he stated that mother of Jagat Pal has given this information to him. Mother of Jagat Pal has already expired. Yet another version about the source of information has been disclosed by PW- 1 complainant Rooplal and PW- 2 Nanhe (the village chaukidar). Pw- 2 stated that he received the information about the dead body at about 4.30 P.M. Then he reached at the place where the dead body was lying, thereafter PW- 1 Roop Lal and PW- 2 Nanhe went to police station and informed about the dead body of Rukampal. In this respect as per prosecution case the complainant was in search of missing Rukampal. One of the lady, the mother of Jagat, had informed him, but prosecution has not examined the so called lady mother of Jagat. On the other hand, Pw- 2 Nannhe the village chaukidar in his testimony stated that he got information at about 4.30 P.m. on 09.10.2011 that corpse of Rukampal was lying in the field of Bhagwan Das. On this information, He had informed to the station officer concerned on telephone. Leaving the dead body at the place where it was found, both of them had gone to police station concerned. He further stated that he had got information on the murmuring and buzzing in the village and when he reached at the place of occurrence, there was a gathering of village people and villagers of Nagariya. The family members of Rukampal were also present there. Thus, the evidence about the source of information as to who and how complainant came to know about the place where the dead body was found is contradictory. There is material contradiction and inconsistencies in the statement of PW- 1 and -PW 2 in this respect. According to PW- 2 he got the information on the murmuring and buzzing in the village at about 12.30 PM. Later he improved his statement by saying that he received the information from the mother of Jagat at about 12.00 P.M. In this gap of about 4.30 hours where was the complainant and what he was doing, it was not explained by the prosecution. These inconsistencies

and contradiction goes to the root of the prosecution case.

34. There is no eye witness account of the fact appellants committing murder of the Rukampal. PW- 1 Roop Lal and all other prosecution witnesses of facts has only visited the place and dead body, where it was found lying i.e. near mulberry tree in the vicinity of Nagariya. They have also seen the condition of the body and the manner in which the crime was committed. PW-5 Smt. Prema has turned hostile. She is wife of the younger brother of the deceased Ganga Ram and aunt of the deceased. PW- 7 Kamlesh claimed to be independent witness. In his deposition, he has stated that he has not seen, deceased Rukampal going with the appellants on 08.10.2011 at 5.00 P.M. however, he saw the dead body of the deceased Rukampal, on 09.10.2011, but he has not seen occurrence. Similarly PW- 9 Gajraj has also not seen any culprit murdering Rukampal. He simply stated that he is the witness of Punchnama Ext. Ka- 11. He only witnessed the dead body of the deceased. Thus, this witness also do not throw any light about the murder, murderer or the manner in which the crime was committed and deceased was done to death by appellants.

35. From the facts and the circumstances of the case it emanates that the crime has been committed in a very brutal and diabolical manner shaking the conscience and heart of public at large. Multiple injuries were inflicted on the vital part of the victim with an intent to eliminate him. Thus, the victim Rukampal has been killed in a barbarous and ruthless manner. The nature of injuries inflicted on the person of the victim unleashed a reign of terror in the locality illustrating inhuman and barbarous slay of Rukampal. The circumstances were compatible with the innocence of the accused appellants as the witnesses of fact as well as witnesses of court did not support the prosecution version. No prosecution witness of facts has supported prosecution case. In fact they were not eye witness account. For the sake of argument if their testimony is accepted, this by itself will not lead to inference that it was accused appellant who has committed the said crime. There must be something more establishing connectivity between the accused and the crime. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis except that of the guilt of accused appellants.

36. Every criminal trial is a voyage of discovery in which truth is the quest. A duty is cast on the Presiding Officer to explore every avenue in order to discover the truth and advance the cause of justice. The learned trial judge has not analyzed the evidence on record in correct and right perspective. The learned trial Judge has passed the order of conviction and sentence on a fragile and feeble evidence. This Court is not in agreement with the view taken by the learned trial judge. The circumstances indicating the complicity of accused appellants be compared with the role of the accused appellants in the commission of the said crime. Accordingly, the judgment and order passed by the learned Special Judge may be sustained or upheld.

37. Learned counsel for appellant has argued that the first information report has been lodged after one month pursuant to the order of learned Magistrate passed on the application under section 156 (3) Cr.P.C. There is no convincing and credible explanation covering the delay. The name of the accused appellants surfaced after much

consultation and deliberation. There is material laches in the investigation which has been done in a very pedantic and lackadaisical manner. The learned trial judge had cited a catena of decisions to buttress his verdict which are on different set of facts and circumstances and cannot be a basis for conviction. The prosecution has completely failed to prove the guilt beyond reasonable doubts against the accused appellants. The discrepancies in the evidence on the record are highly fatal to the prosecution case showing involvement of the accused appellants in the commission of crime, as no overt act has been attributed to any of the appellants. Thus, the appeal may be allowed and the accused appellants may be set at liberty.

38. Learned counsel for the appellants has argued that prosecution has not produced some of the central witnesses e.g. mother Smt. Bhagga and sister Kalawati and some other witnesses. In this respect it may be mentioned that court is not required to insist on plurality of witnesses in proof of any facts, it will be directly encouraging subornation of witnesses, if the situation and circumstance do arise that there is only a single person available to give evidence in support of the prosecution version, the court naturally has to weigh it carefully and cautiously such a testimony and if the court is satisfied that the evidence is trustworthy, reliable and free from all taints and flaws, then a duty is cast upon the court to act upon such testimony. In case the witnesses are not found to be reliable and there are some circumstances which may show that credibility is shaken by adverse circumstance, then the court will not insist upon such evidence. It is a platitude to elaborate here that it is the quality and not the plurality of witnesses who are required to prove the testimony. The dispensation of justice would be affected and hampered if number of witnesses are to be insisted upon.

39. Learned counsel for the appellants has stated that appellants were falsely implicated due to village partibandi. The evidence transpires that Ujagar fought election against deceased, the appellants in their statement under Section 313 Cr.P.C. has taken the same plea. However, the complainant has denied any enmity with the deceased. It is well known that enmity is a double edged weapon. It may be the actual reason for the incident and it may also be the basis of false implication. So it will depend upon the facts and circumstances of each case whether accused appellants were falsely implicated due to enmity. The defence has not adduced any evidence about the enmity with the deceased nor the complainant has established any such kind of enmity which could have resulted in to the murder of complainant son Rukampal.

40. Learned trial judge misread and mis-appreciated the entire evidence in convicting and sentencing the accused appellants under section 302 IPC. The circumstances from which the conclusion of guilt is to be drawn is not fully established. The prosecution has failed to show that in all human probability, the act must have been done by the accused appellants only. The conviction and sentence awarded to the appellants under section 302 IPC is not sustainable and the impugned judgment and order dated 24.5.2022 may be quashed and the accused/ appellants may be set at liberty. The witnesses of fact does not form a chain pointing towards the guilt of the accused appellants. The chain of circumstances are broken at several places. The allegation against the appellants taking away Rukampal on the day of incident, could not be proved. None of the circumstances in the

present matter have been independently proved and there is failure to complete the chain of circumstances.

41. The non-examination of any witness who was illustrated in the list of charge sheet will not destroy the prosecution version in entirety. On appreciation of evidence, unless it is shown that a particular accused caused these injuries, no-one can be held responsible and guilty. Mere heinous and gruesome crime is not enough to punish the accused. Suspicion however, strong it may be, can not take place of legal proof. There is no satisfactory explanation about the serious infirmities, inconsistencies and contradictions in the prosecution case.

42. In the light of prolix and verbose discussion of evidence made herein above and also regard being had to the entire facts and circumstances of the case, we are of the opinion that the prosecution has completely failed to establish such a chain of circumstantial evidence as would fasten the guilt of the accused/ appellants leaving no room of reasonable doubt. The trial court has accepted the prosecution evidence holding the accused appellants guilty for the offence punishable under section 302 IPC on fragile and feeble evidence, while there are material contradictions in the statements of prosecution witnesses, medical testimony etc which does not inspire confidence .

43. Resultantly, the appeal is **allowed**. The conviction of the accused appellants under section 302 IPC and the sentence passed thereon by the trial court vide judgment and order dated 24.5.2022 are set aside. The accused appellants are acquitted of all the charges. They shall be released forthwith, if not required to be detained in any other offence.

44. Lower court record be sent back.

(2024) 5 ILRA 306
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 137 of 1983

State ...Appellant
Versus
Ram Naresh Gupta & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Ram Shiromani Shukla

Criminal Law-Indian Penal Code-1860-Sections 302/34, 323- Government Appeal against the impugned judgment and order whereby accused-appellants have been convicted for the offence under section 323/34 I.P.C and acquitted from the charges under Sections 302, 302/34 I.P.C- Major contradictions in the testimonies of the witnesses to the extent that the accused Ram Naresh snatched the female child from the lap of P.W.-6 Kabutari and thereafter threw her on the ground due to which she died, which has also not been supported by the medical evidence-It is also impossible to believe that if a man snatches a one year-old girl from the lap and throws her on the ground from about five palm length, she will definitely sustain any mark of injury. Absence of any injury having been found on the body of the deceased Lilawati makes the prosecution version fabricated and doubtful.

Initially charge against the accused Ram Naresh Gupta has been framed by simply under Section 302 I.P.C. and not under Section 302 r/w Section 34 I.P.C., whereas on the same day another charge has been framed by the trial court against the accused-respondents under Section 302 I.P.C. r/w Section 34 I.P.C. and Section 323 r/w

Section 34 I.P.C. Such alteration in the charge framed against the accused-respondents on the same day has not been explained by the prosecution, which also makes the prosecution case doubtful- Result-Government **Appeal dismissed**. (E-15)

List of Cases cited:

Bhajandas Vs Emperor reported in Cr.L.J. Reports 1923 Lahore High Court 421

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. We have heard Mr. Purshottam Upadhyay, learned Additional Government Advocate for the State-appellant and Mr. Nikhil Kumar, learned Amicus Curiae, for the accused-respondents as well as perused the materials available on trial court's record.

2. This Government Appeal is directed against the impugned judgment and order dated 30.09.1982, passed by IVth Additional Sessions Judge, Mirzapur in Sessions Trial No. 7 of 1981 (State Vs. Ram Naresh Gupta and others), whereby accused-appellants Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta have been convicted for the offence under section 323/34 I.P.C. and sentenced to undergo three months rigorous imprisonment alongwith fine of Rs. 150/- each; in default thereof, they have to further undergo 15 days additional imprisonment each. By the impugned judgment, the accused-respondents have been acquitted from the charges under Sections 302, 302/34 I.P.C.

3. During pendency of the instant Government Appeal, accused-respondent nos. 1, 2 and 4, namely, Ram Naresh Gupta, Basdeo Gupta and Madan Gupta have already died, hence the instant Government Appeal at their behest have also been abated by this Court vide order dated 6th May, 2024.

4. As per the prosecution case, there was enmity between the accused persons and Mahendra Prasad (complainant/P.W.-1) with regard to some land situated in village Khetkatawa. On 4.7.1979 a first information report (Ex. Ka-17) was lodged by P.W.-1 Mahendra Prasad at Police Station Kon, District Mirzapur against accused persons, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan registered as Case Crime No. 16 of 1979 under Sections 148, 149, 302 and 323 of I.P.C. at Police Station-Kone, District Mirzapur, as per which on 4.7.1979 at about 6:00 a.m. the accused persons went to the village Khetkatawa and asked the complainant (P.W.-1) as to why he had set up hut (Mandai) on the land which the accused persons claimed to be their own. The complainant is alleged to have replied that he erected the hut (Mandai) to look after his land. An altercation ensued, whereafter the accused Basudeo is alleged to have wielded a lathi on the complainant's brother Rajendra and when complainant Mahendra went to rescue Rajendra, accused Madan Gupta attacked him with lathi, wife of Rajendra Smt. Kabootari also rushed to the spot to rescue him but Ram Naresh Gupta beat her with lathi and also snatched the female child Lilawati aged about 9 months from her lap and threw her on the ground. Ramnath stuck a lathi on Halkeri, father of the complaint and he too was injured. In the meantime, other villagers arrived there and on their intervention, the accused ran away from the place of incident. Thereafter, the complainant Mahendra Prasad took all the injured persons along with the female child to the police station Kone, District-

Mirzapur. While going to the police station, the female child died on the way.

5. On the basis of the written report, chick first information report Ex. Ka-17 was prepared. Details of the incident were entered in the general diary of 4.7.1979 at Rapat No. 7 at 6:45 a.m. and the crime was registered at No. 16/1979, under Sections 148, 149, 302, 323 I.P.C..

6. After registration of the first information report, Sub-Inspector Dharmdeo Singh prepared the inquest report (Ex. Ka-2) of the dead body of the deceased female child. He also prepared the photo lash (Ex. Ka-11) and sealed the dead body and sent it for post-mortem by Constable Ram Gopal.

7. An autopsy of the dead body of the deceased Lilawati has been conducted by Dr. R.A. Mishra (P.W.-4) on 5th July, 1979 at 02:00 p.m. He did not found any visible injury on the body of the deceased. He opined that the death of the deceased is shock and haemorrhage due to rupture of enlarged spleen.

8. P.W.-4 has also medically examined the injured Halkhori on 5th July, 1979 at 11:00 a.m. and found following injuries on her body:

"1. Lacerated wound 3 ½ cm. x 2 cm. x ½ cm. on middle of head, 11 cm. above root of nose. Pus present.

2. Contusion abrasion 4 cm. x 1 cm. on back of left forehand, 5 cm. above wrist joint."

9. The injuries of injured/complainant/P.W.-1 Mahendra Prasad has also been examined by Dr. R.A. Mishra, P.W.-4 and he found following injuries on his person:

"1. Contusion with swelling 3 cm. x 1 cm. on back and middle of right palm.

2. Contusion 6 cm. x 1 ½ cm. on back of left chest. 8 cm. below lower part of scapula.

3. Contusion 2 cm. x 1 cm. on left chest on its back 6 cm. below shoulder joint.

4. Contusion 2 cm. x 1 cm. on back of right elbow joint.

5. Contused abrasion 1 cm. x ½ cm. on left side of head, 12 cm. above the left ear."

10. Following injuries have also been found by the same doctor i.e. P.W.-4 on the person of injured Rajendra Prasad P.W.-2:

"1. Lacerated wound 6 cm. x 1 cm. x bone deep on left side of head. 5 cm. above left eye brow.

2. Lacerated wound 2 cm. x ½ cm. x ½ cm. on right side of head 12 cm. above right ear.

3. Contusion 2 cm. x 1 cm. on back of left forearm 6 cm. above wrist joint.

4. Contusion 16 cm. x 1/2 cm. on back of chest crossing middle at level of 6 cm.

5. Contusion 10 cm. x 1½ cm. on back of chest crossing middle transic 8 cm. below injury No. 4.

6. Contusion 10 cm. x 1 cm. on back of left chest, 4 cm. below injury No. 5.

7. Contusion 4 cm. x 1 cm. on left thigh, 8 cm. above left knee joint."

11. P.W.-4 found following injury on the person of injured Smt. Kabutari (P.W.6) :-

"1. Lacerated wound 5 cm. x 1 cm. x bone deep on right side of head, 7 cm. above right ear."

12. The injury reports of the injured persons have been exhibited as Ex. Ka-3, Ka-4, Ka-5, Ka-6 and post mortem report of the deceased has been exhibited as Ex. Ka-7.

13. The investigating officer made spot inspection and prepared the site plan (Ex. Ka-13). The injured were also sent for their medical examinations. The statements of the witnesses were recorded by the investigating officer. Thereafter, the investigation of the case was taken over by the Station House Officer, Sri Ram Dular Ram. He recorded the statements of Sarjoo, Ramjeth and Nankakoo.

14. After completion of the statutory investigation under Chapter XII Cr.P.C., Sri Ram Dular Ram, the investigating Officer submitted charge-sheet (Ex. Ka-14) against all the accused persons under Sections 302/323 I.P.C.

15. On the basis of material so collected and produced by the prosecution, the trial court on 23rd June, 1981 following charge was framed against the accused-respondent Ram Naresh Gupta:

"I, U.S. Pandey, Vth Addl. Sessions Judge, Mirzapur hereby charge you Ram Naresh Gupta as follows:

That you on 4.7.1979 at about 6.00 A.M. in village Khetkatawa within police circle Kon, District Mirzapur did commit murder by intentionally causing the death of Lilawati, a child aged about one year and thereby committed an offence punishable under section 302 I.P.C. and within my cognizance.

And I hereby direct that you be tried by me on the said charge."

16. On the same day i.e. 23rd June, 1981 following charges were framed against the accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta jointly:

"I, U.S.Pandey, IVth Addl. Sessions Judge, Mirzapur hereby charge you Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta, and Madan Gupta as follows:

Firstly that you on 4.7.1979 at about 6.00 A.M. in village Khetkatawa within police circle Kon, District Mirzapur in furtherance of your common intention in commit murder by intentionally causing the death of Lilawati, a child aged about one year and thereby committed an offence punishable under section 302/34 1.P.C. and within my cognizance.

Secondly, that you on the same date, time and place and in-furtherance of the same common intention caused simple hurt to Halkhori, Mahendra Prasad, Rajendra Prasad and Smt. Kabutari and thereby committed an offence punishable under section 323/34 I.P.C. and within my cognizance.

And I hereby direct that you be tried by me on the said charges."

The charges were read over and explained to the accused persons in Hindi, who pleaded not guilty and claimed to be tried.

17. During the course of trial, the prosecution has produced following documentary evidences:-

"1. F.I.R. dated 04.07.1979 is exhibited as Ex. Ka-17.

2. Written Report dated 04.07.1979 is exhibited as Ex. Ka.-16.

3. Written Report dated 04.07.1979 is exhibited as Ex. Ka-15.

4. Written Report dated 04.07.1979 is exhibited as Ex. Ka-1.

5. Injury Report of Halkhori dated 05.07.1979 is exhibited as Ex. Ka-3.

6. Injury Report of Mahendra Prasad dated 05.07.1979 is exhibited as Ex. Ka-4.

7. Injury Report of Rajendra Prasad dated 05.07.1979 is exhibited as Ex. Ka-5.

8. Injury Report dated Smt. Kabootari 05.07.1979 is exhibited as Ex. Ka-6.

8. Post mortem report of deceased child Km. Lilawati dated 05.07.1979 is exhibited as Ex. Ka-7.

9. Charge Sheet mool dated 28.07.1979 is exhibited as Ex. Ka-14.

10. Site Plan with index dated 07.07.1979 is exhibited as Ex. Ka-13."

18. The prosecution also examined total nine witnesses in the following manner:-

"(1). P.W.-1/Informant, namely, Mahendra Prasad, who is the informant and received injuries in the incident.

(2). P.W.-2, namely, Rajendra Prasad, who is the father of the deceased female child namely Km. Lilawati and also received injuries in the incident;

(3) P.W.-3, namely, Sarju Prasad, who is stated to be the eye-witness of the incident.

(4) P.W.-4, namely, Dr. R. A. Mishra, who has medically examined the injured persons and also conducted the post mortem report of the deceased female child namely, Km. Lilawati on 5h July, 1979 at C.H.C., Robertsganj, Mirzapur.

(5) P.W.-5, namely, Halkhori Saav, who is the father of the informant, grand-father of the the deceased female child namely, Km. Lilawati and also received injuries in the incident.

(6) P.W.-6, namely, Kabutari, who is the mother of the deceased female child namely, Km. Lilawati and also received injuries in the incident.

(7) P.W.-7, namely, Dharmdev Singh, who was the first investigating officer; has prepared the panchayatnama and recorded the statements of Rajendra Prasad, Halkhori, Kabootari

(8) P.W.-8, namely, Ramdular, who was the investigating officer and submitted the charge-sheet against the accused persons.

(9) P.W.-9, namely Ramvilas Singh, Constable."

19. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta, while giving their statements in the Court, denied the prosecution evidence and stated that they have been falsely implicated on account of harbouring grudges qua land in question.

20. On the basis of above evidence oral as well as documentary adduced during the course of trial, on the issue whether the female child Kumari Lilawati had been snatched from the lap of P.W.-6 Smt. Kabutari by the accused Ram Naresh and thereafter he had thrown her on the ground due to which the child sustained internal injuries and died on the way of police station, the trial court, relying upon the version as unfolded in the first information report, testimonies of P.W.-1/Informant Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-3 Sarjoo Prasad, P.W.-5 Halkhori and P.W.-6 Smt. Kabutari Mahajan, has opined that the prosecution evidence qua forcibly

throwing down of Smt. Kabutari after receiving lathi blow is self contradictory. The trial court further recorded its finding that after receiving lathi blow Smt. Kabutari fell down and as soon as she fell down, the female child had also slipped from her lap on the ground. Automatically, the female child would have fallen down from her lap on the ground.

21. Further while dealing with the testimony of witnesses a question arose as to whether mere falling down from the lap would cause the death of the female child or not, the trial court while relying upon the testimony of P.W.-4 Dr. R.A. Mishra, recorded its finding that the spleen of the female child would rupture if the female child had fallen down on the ground from the lap of PW.-6 Kabutari, while the latter had fallen down on receiving lathi blows on her head.

22. On the basis of such finding, the trial court has come to the conclusion that the prosecution has failed to prove beyond reasonable doubt that the accused Ram Naresh had snatched the female child from the lap of P.W.-6 Smt. Kabutari and threw her on the ground which caused rupture of her spleen resulting in her death. The trial court also opined that there is no evidence on record that the accused Ram Naresh had any knowledge about the weakness or illness of the deceased female child, as such, even if it is taken to be correct that the accused Ram Naresh had snatched and threw the female child on the ground which resulted in her death would not amount to murder. Relying upon the judgment of the Lahore High Court in the case Bhajandas Vs. Emperor reported in Cr.L.J. Reports 1923 Lahore High Court 421, the trial court also opined that the accused would be guilty only of causing simple injury and from that view also, the charge under Section 302 of I.P.C. hereby fails and further the charge under Section 302 read with Section 34 of I.P.C. also fails.

23. On the basis of such finding, the trial court has held that the accused are found guilty of the charge under Section 323/34 I.P.C. Consequently, the trial court convicted the accused Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 323/34 I.P.C. and sentenced them to undergo three months rigorous imprisonment along with fine of 150/- each and in case default of fine, they have to further undergo 15 days additional rigorous imprisonment.

24. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the State has preferred the present Government Appeal against the impugned judgment of acquittal of accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta by the trial court.

25. Assailing the impugned judgment and order of conviction, the learned A.G.A. for the State in the present government appeal, has advanced following submissions:

(i). The first information report (Exhibit-ka/17) lodged on 4th July, 1979 at 06:00 a.m. in the morning on the basis of written report (Exhibit-ka/1) given by the first informant/P.W.-1 Ram/Mahendra Prasad on 4th July, 1981 is prompt first information report.

(ii) There is clinching and direct evidence against the accused by way of testimonies of ocular-cum-injured witnesses i.e. P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-5 Halkhori Saav and

P.W.-6 Kabutari, and independent eye witnesses i.e. P.W.3 Sarju Prasad and the same has also been supported by the medical and other material evidence as available on trial court record.

(iii) Since the incident occurred in broad day light i.e. at 06:00 a.m., all the prosecution witnesses have correctly identified the accused persons while commissioning of the alleged offence and also assigned their role in such offence successfully.

(iv) There is strong motive for the accused-respondents to commit the alleged offence including the heinous murder of one year female child, namely, Lilawati, as there was long standing dispute pending before the prescribed authority under Section 145 Cr.P.C. with regard to title and possession over the land over the plot no. 118Ka (the new number of which was 267 Ka, Kha, Ga, Gha.

(iv) Except the minor inconsistencies/contradictions, the testimonies of all the prosecution witnesses including injured and independent eye-witnesses i.e. P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari are throughout consistent either in their-examination--in-chief and also in their cross-examinations, which have also been supported by the other prosecution witnesses like Investigating Officer, who conducted the investigation of the case and the Doctor who conducted the post-mortem examination of the body of both deceased and the Doctor who conducted the medical examinations of the four injured prosecution witnesses.

(v) The site plan also supports the prosecution case.

(vi) The defence has failed to establish its theory of private defence. It is a not case of cross case in which it is alleged by the defence that they have committed the offence in private defence, as no case or complaint has been lodged by the defence side.

vii. On the basis of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye witnesses, namely, P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari who are consistent throughout in their examination-in-chief and the cross-examinations inspire confidence in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of the deceased Lilawati and the same has also been supported by the medical evidence in all material particulars, therefore, trial court has committed gross error in acquitting the accused-respondents for the offence under Section 302/34 I.P.C. The trial court while ignoring the entire evidence produced by the prosecution, has passed the impugned judgment, which suffers from illegality and perversity. As such the same is liable to be set aside and the accused-respondents are liable to be convicted for the offence punishable under Section 302/34 I.P.C. also. Hence, the instant Government Appeal filed by the State is liable to be allowed.

26. On the other-hand, learned counsel for the accused-respondents have advanced following counter submissions:

(i). The first information report lodged on 8th July, 1981 at 04:50 p.m. on the basis of written report of the first informant/P.W. dated 8th July, 1981 is ante time.

(ii) Non recovery of crime weapon i.e. lathi or any other weapon makes the prosecution case doubtful.

(iii) There are major contradictions in the testimonies of the prosecution witnesses.

(iv) Instead of the defence, the prosecution has motive to falsely implicate the accused in the present case.

(v). The prosecution side is aggressor in commissioning of the alleged fight (maarpeet) in which the injured persons have sustained simple injury, as they have illegally encroached upon the land of the accused by making a hut, of which litigation is pending before the appropriate court of law. Qua the said fight, the accused Ram Naresh Gupta gave a letter to the Superintendent of Police, Mirzapur and Deputy Superintendent of Police, Turi (Renukut), District Mirzapur for lodging of the first information report against the members of prosecution.

(vi). During the alleged fight (maarpeet), the accused have exercised their right of private defence of their property.

(vii). As per the post-mortem report, no visible injury was seen on the body of the deceased Lilawati. The Autopsy Surgeon has opined that the cause of death of the deceased is shock and haemorrhage due to enlarged spleen. Therefore, the prosecution version specially the prosecution eye witnesses that the accused Ram Naresh Gupta had snatched the deceased Lilawati from the lap of her mother i.e. Kabutari (P.W.-6) and threw her on the ground due to whichshe died on the way to the Police Station, has no legs to stand.

On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that the instant case is based on weak piece of evidence, therefore, the impugned judgment and order of acquittal under Section 302/34 I.P.C. does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present Government Appeal filed by the State is liable to be dismissed.

27. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

28. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of evidence on record beyond reasonable doubt? And secondly, whether impugned judgment of the trial court, which on the basis of evidence oral as well as documentary led during the course of trial has acquitted the accused-respondents under Sections 302/34 I.P.C. is legally sustainable or not?

29. Before entering into the merits of the case set up by the learned counsel for the accused-appellant in criminal appeal, learned counsel for the accused-respondent in government appeal and the learned A.G.A. as also the learned counsel for the first informant in both the appeals qua impugned judgment and order of acquittal passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses as well as the defence witnesses.

30. Firstly, we may refer to the versions as unfolded in the first information report on the basis of written report given by the first informant/P.W.-1 Mahendra Prasad, which read as follows:

"Today i.e. on 4-7-79, at 6:00 o'clock in the morning, everyone was present inside and outside the hut of the

farm along with the family. Tehsildar Survey Settlement has registered the case qua the land in dispute between his father Halkhori Sah and the accused Basdeo. Because of the said case, there was animosity between his family and the accused. Ram Naresh Gupta, Basdeo, Ramnath Gupta and Madan Gupta reached at his hut and asked as to why they have erected the hut on the land in dispute on which the first informant/P.W.-1 and his family members replied that they had set up the said hut for protecting their field. Consequently, altercation started between them. In the meanwhile, the accused started beating his brother Rajendra Prasad (P.W.-2) by lathi due to which he fell down. When the first informant went to rescue him, accused Madan started beating him with a stick. When the wife of Rajendra, namely, Kabutary (P.W.-6), who was having about one year female child in her lap, ran to rescue them, the accused Ram Naresh Gupta hit her by lathi due to which she sustained injuries on her head and also the accused Ram Naresh Gupta snatched the female child of Kabutari from her lap and threw her on the ground. When the first informant and his family members came to the police station, the female died. His father Halkhori Sah was also beaten by Ramnath Gupta with a stick due to which he sustained injuries on his head and neck. Sarju Prasad, Nanhku and Ram ji saw the incident and several other people of the village came to their rescue and the accused persons ran away towards the east."

31. P.W.-1/first informant Mahendra Prasad stated in his examination-in-chief that it was 06:00 o'clock in the morning, when he was inside his hut and his brother Rajendra, his father Halkhori Saav, wife of Rajendra, namely, Kabutari having his female child aged about one and half years in her lap, were also present there. At the relevant time, all the accused persons, namely, Ram Naresh Gupta, Ram Nath, Basdeo and Madan being armed with lathi in their hands, reached there. All the accused persons abusing the first informant/P.W.1, his brother Rajendra, his father Halkhori Saav, wife of Rajendra, namely, Kabutari asked as to why they have constructed hut on the land in question. The first informant replied that they were present there for taking care of their field. Thereafter, altercation started between them and meanwhile the accused Basdeo abusing his brother Rajendra, started hitting him with lathi. When he ran to rescue him, then the accused Madan hit him with lathi. The accused Ram Naresh gave one blow of lathi to Kabutari and snatched her daughter from her lap and threw her on the ground. The accused Ram Nath hit his father with lathi. Ram Ji, Nanhku, Sarju etc. witnessed the entire incident. The aforesaid witnesses intervened and rescued them. After beating them, all the accused ran away towards east. The first informant took the daughter of Kabutari. Rajendra and other injured persons to the Police Station, however, on the way she died.

32. In the cross-examination, this witness stated that Rajendra's daughter, i.e. the deceased, who was killed was not sick, but was healthy. This witness further stated that the accused persons did not enter into the hut. There was a fight on the east side of the hut. He could not disclose as to whether there was blood on the ground or not. At the time of the incident, P.W.-6 Kabutari was inside and they were outside. When the fight started, she also came out. **When the accused Ram Naresh hit P.W.-6 Kabutari with a stick, she fell down. After hitting P.W.-6 Kabutari, the accused Ram Naresh snatched the female child (deceased) and threw her and then**

pushed her due to which she fell down. He further stated that the female child was pulled from the side of P.W.-6 Kabutari by the accused Ram Naresh and thrown. The female child was thrown from a height of five palm length. The female child was picked up after being thrown. There was no visible injury on the body of female child. The clothes of the female child and her body were covered with dust. They took the female child to the police station in the same clothes. No blood was coming out from any part of the body of the female child from anywhere.

(Emphasis added)

33. On deeper scrutiny of the above testimony of P.W.-1, it is apparent that there is no inconsistency or contradiction in his testimony that when P.W.-1 and his family members were present in the hut, all the accused persons came and altercation/fight took place for constructing the said hut on the land in dispute and thereafter all the accused had beaten P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari by lathi due to which they sustained simple injuries. As per their medical examination reports and testimony of P.W.-4 Dr. R.A. Mishra who medically examined them, all the injuries found on the bodies of the injured were simple in nature and caused by blunt object like lathi. The said testimony of P.W.-1 has been supported by the medical as well as other oral and documentary evidence. However, in the testimony of P.W.-1 to the extent that the accused Ram Naresh first hit P.W.-6 Kabutari by lathi on her head and snatched her female child from her lap and threw her on the ground, there are major contradictions.

34. Similarly, there is no inconsistency or contradiction in the testimonies of the other prosecution eye witnesses i.e. P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari who are consistent throughout in their examination-in-chief and the cross-examinations that all the accused persons had beaten them with their lathis as a result of which they sustained simple injuries as per their medical examination reports. However, in their testimonies to the extent that the accused Ram Naresh snatched the female child from the lap of P.W.-6 Kabutari and thereafter threw her on the ground due to which she died later on the way of police station, there are major contradictions, which has also not been supported by the medical evidence.

35. For examining the said prosecution version that the accused Ram Naresh Gupta after snatching the female child of P.W.-6 Kabutari from her lap, threw her on the ground due to which she died on way to the Police Station, on the litmus test, we are required to refer relevant statements of the prosecution eye witnesses:

"The testimony of P.W.-1 Mahendra Prasad (cross-examination):

"रामनरेश ने कबूतरी को लाठी मारा तो वह गिर गई। कबूतरी को मारने के बाद रामनरेश ने लड़की को छीन कर पटक दिया फिर धक्का दे दिया जिससे वह गिर गई। उस लड़की को रामनरेश ने बगल से खींचकर पटक दिया था। पाँच बीता की ऊँचाई से लड़की। को पटका था। पटकने के बाद लड़की उठाया था। लड़की के शरीर पर कोई जाहिरा चोट नहीं थी। लड़की कपड़ा व बदन में धूल लग गई थी। थाने हम लोग लड़की के उसी कपड़े में लेकर गए थे। लड़की को कहीं से खून नहीं निकल रहा था।"

The testimony of P.W.-2 Rajendra Prasad (cross-examination):

"चोट खाकर मैं जमीन पर गिर गया था। मेरी औरत लाठी खाकर नहीं गिरी थी। जब रामनरेश ने मेरी लड़की को पटक दिया और मेरी औरत को ढकेल दिया तब वह गिर गई थी। ऐसी बात

नही है कि रामनरेश मेरी लड़की को छीन रहे थे और मेरी औरत छीनने नहीं दे रही थी। लड़की को रामनरेश ने जोर से पटका था यह धीरे से यह मैं नही बता सकता। लड़की रामनरेश से 2-4 हाथ पर गिरी थी। मुझे याद नही है कि लड़की मुंह के बल गिरी थी या पीठ के बल जमीन वहां ककरीली पथरीली नही थी। यह कहना गलत है कि मैं झूठ बयान दे रहा हूं"

The testimony of P.W.-3 Sarju Prasad (cross-examination):

"रामनरेश ने कबूतरी को एक लाठी सर पर मारा था। लाठी की चोट से राजेन्द्र व हलखोरी गिर पड़े थे और कोई नही गिरा था। इस मारपीट में कबूतरी नही गिरी थी, ढकेलने के बाद गिरी थी। रामनरेश ने जब लीलावती को फेंका तो 2-1 कदम पर वह गिरी। यह कहना गलत है कि रामनरेश आदि से रंजिश के कारण मैं मुल्जिमान के विरूद्ध गवाही दे रहा हूं।"

The testimony of P.W.-5 Halkhori (cross-examination):

रामनरेश के लाठी लगने पर कबूतरी चोट खाकर गिरी नहीं। दरोगा जी के बयान में यह बयान कि "वह चोट खाकर गिर गई कि - - - मैंने नहीं' दिया था, अगर लिखा है तो कोई वजह नहीं बता सकता।

……."लीलावती पहले से बीमार नहीं थी। 4-5 फीट ऊपर से रामनरेश ने लीलावती को गोदी से खीचकर पटका था। यह कहना गलत है कि मैं लीलावती को रामनरेश द्वारा गोद से खीचकर पटकने वाली बात मैं गलत कह रहा हूँ। यह भी कहना गलत है कि मैं खेत लेने के लिए कत्ल का झूठा मुकदमा चलाया और झूठा बयान दिया।"

The testimony of P.W.-6 Kabutari (examination-in-chief):

रामनरेश ने हमको मारा था। मेरे माथा पर चोट लगी थी। जब मुझे मारा तो उस समय मेरे गोद में मेरी लड़की लीलावती थी। वह 2-2/2 वर्ष की थी। रामनरेश ने लड़की को मेरे गोद से छीनकर पटक दिया।

(Cross-examination)

"मुल्जिमान जब आए तब उस समय मैं मड़ई में थी। जब मैं बाहर निकली तो मारपीट हो रही थी। बाहर निकलते ही रामनरेश की लाठी मेरे सर पर लग गई। मारपीट के पहले मेरे ससुर, मैसुर? व मेरे पति से मुल्जिमान में क्या बाते हुई थी मुझे नहीं मालूम। लाठी लगने पर मैं गिर पड़ी थी। उसके बाद उठ गई थी। रामनरेश ने जब लाठी मारा था उस समय लडकी मेरी गोद में ही थी। किस किस मुल्जिम ने कितनी कितनी लाठी चलाई थी मैं नही बता सकती। किसकी लाठी कहा कहा लगी मैं यह भी नही बता सकती।"

36. Apart from the above contradictions in the testimonies of prosecution eye witnesses, the said prosecution version has not been supported by the post-mortem examination report of the deceased and also by the testimony of P.W.-4 Dr. R.A. Mishra, who conducted the post-mortem examination of the body of the deceased.

37. P.W.-4, while conducting the post-mortem examination of the body of the deceased Lilawati, found that there was no external injury on the body of the deceased. On internal examination, this witness found that the spleen was torn at a distance of 2 cm x 1/2 cm. In his opinion the cause of death was shock and haemorrhage caused by rupture of an enlarged spleen. Further in his opinion the above ruptured spleen could have resulted in death.

38. In the cross examination, this witness has opined that the deceased girl was lean and thin and pale. Considering the principles mentioned in the Modi Legal Jurisprudence/Laws, he further opined that a lot of force was required for a normal spleen to rupture. He again opined that the enlarged spleen sometimes bursts due to contraction of the stomach or by coughing or sneezing.

39. The above testimony of P.W.-4 read with the post-mortem examination report completely discards the prosecution version that the accused Ram Naresh Gupta has committed the murder of deceased Lilawati by snatching her from the lap of her mother Kabutari (P.W.-6) and thereafter throwing her on the ground due to which she died after short interval enroute to the Police Station.

40. It is also impossible to believe that if a man snatches a one-year-old girl from her lap and throws her on the ground from about five palm length, she will definitely

sustain any mark of injury. Absence of any injury having been found on the body of the deceased Lilawati makes the prosecution version fabricated and doubtful.

45. Apart from the above, we may also record that initially charge against the accused Ram Naresh Gupta has been framed by the trial court on 23.6.1981 simply under Section 302 I.P.C. not under Section 302 read with Section 34 I.P.C., whereas on the same day on 23.6.1981 another charge has been framed by the trial court against the accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan under Section 302 I.P.C. read with Section 34 I.P.C. and Section 323 read with Section 34 I.P.C. Such alteration in the charge framed against the accused-respondents on the same day has not been explained by the prosecution, which also makes the prosecution case doubtful.

46. However, after considering the facts and circumstances of the case and examining the findings recorded by the trial court in acquittal of accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 302/34 I.P.C., we are of the view that the trial court has examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents can be legally sustained. The prosecution has not fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The acquittal of the accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 302/34 I.P.C. is consequently, affirmed.

47. We are also in full agreement with the finding returned by the trial court that the prosecution has fully established its case beyond the reasonable doubt against the accused-respondents under Section 323/34 of I.P.C.

48. In view of the aforesaid facts and the findings recorded by us herein above, we are of the firm opinion that the finding of the Court below with regard to accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta is correct and the guilt of the accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 323/34 I.P.C. has been proved beyond reasonable doubt by the prosecution, which is sustainable.

49. Consequently, in view of the deliberations held above the Government Appeal filed on behalf of the State stands dismissed.

50. There shall be no order as to costs.

51. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Mirzapur, henceforth, for necessary compliance.

(2024) 5 ILRA 317
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 205 of 1984

State of U.P. ...Appellant

Versus

Sughar Singh ...Respondent

Counsel for the Appellant:
A.G.A., Purushottam Dixit, Ramesh Chandra Yadav

Counsel for the Respondents:
Keshav Sahai, A.B.L.Gaur, Ashok Kumar Singh, Keshav Sahai, P.C.Sharma, Prabhat Chandra Sharma, Pratibha Singh, Purushottam Dixit, Rajeev Sharma, P.C.Mishra

Criminal Law-Indian Penal Code-1860-Sections-34, 109, 302 & 307 - Government Appeal against the judgment by which the accused-respondent has been acquitted by the trial court-contradictions in the testimonies of P.W.-1 and P.W.-2 at various levels referred to above makes the entire testimonies doubtful and raises a big question mainly about the genesis of the entire prosecution case-There were inimical relationship between the accused persons, therefore it is impossible to believe that the accused Ashok @ Ranjit would associate himself with the other accused in commission of the alleged crime in any manner -Non production of brother of the accused and uncle and brother of the first informant and deceased respectively as prosecution witnesses during the course of trial also makes the prosecution case weak-Crime weapon which is alleged to have been used in commissioning of the alleged offence and has recovered have not been sent for their chemical examination to the concerned Forensic Science Laboratory in order to establish that the pellets, empty cartridge and the gun were actually used in the commission of the alleged offence.

Appeal dismissed. (E-15)

List of Cases cited:

Ballu & anr. Vs St. of M. P. 2024 SCC OnLine SC 481

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. We have heard Shri Jitendra Kumar Jaiswal, learned A.G.A. for the State/ appellant, Shri Purshottam Dixit, learned counsel for the first informant, Shri P.C. Sharma, learned counsel for the accused-respondent nos. 2 & 3 Nagendra and Sahdev, Shri Rajiv Sharma, learned counsel for the accused- respondent no. 4 Ashok as well as perused the material available on trial court record.

2. The instant Government Appeal is directed against the judgment and order dated 4th October, 1983 passed in Criminal Sessions Trial No. 80 of 1983 (State Vs. Sughar Singh & 3 Others), arising out of Case Crime No. 183 of 1982, under Section 302/34, 307/34, 302, 307 & 109 of I.P.C., Police Station-Kotwali, District-Etah, whereby the accused-respondents Sughar Singh, Nagendra, Sahdev and Ashok @ Ranjit have been acquitted from all the charges levelled/framed against them.

3. During the pendency of the instant Government Appeal, the accused-respondent no.1 Sughar Singh has already passed away and the same has already been abated qua accused-respondent no.1 by this Court vide order dated 7th May, 2018.

4. The accused-respondent Sughar Singh the father of the other accused, namely, Nagendra and Sahdev, whereas the accused Ashok is their close friend and residents of same village.

The prosecution case as cropped up from the records of above Government Appeal is that on a written report given by the informant/P.W.-1 Satdeo Singh dated 10th March, 1982 (Exhibit-ka/7), first information report (Exhibit-Ka/3/1) came to be registered on 10th March, 1982 at 05:45 p.m. at Police Station-Kotwali, District-Etah against the accused-Sughar Singh, Sahdeo Singh, Nagendra Singh and Ashok under Sections 302, 307 and 120-B of I.P.C. In the

written report, it has been alleged by the informant/P.W.-1 that about 15 days back, there was a fight between his father Gopal Singh and accused Sahdev and Nagendra resident of his village for taking water because they had stopped the water, which was flowing in his gram field. When his father objected, they ran to attack his father and threatened to kill him. On 10th March, 1982 at around 04:00 p.m., when fight was going on between father of the accused Nagendra and Sahdev Singh, namely, Sughar Singh and their uncle, namely, Durveen Singh near the house of Jorawar Singh, the uncle of the first informant, namely, Sangram Singh intervened to stop the said fight, then, the accused Nagendra and Sahdeo, who were along with their father Sughar Singh, started abusing his uncle. When the first informant objected not to abuse his uncle, heated conversation took place between them. Meanwhile, his father Gopal Singh came to the spot and inquired about the matter, then the accused Nagendra Singh exhorted the accused Sahdev to kill them as earlier they stopped the water flowing into their field. On the said exhortation, the accused Sahdev ran and went to the house of accused Ashok, whose house was adjacent to the house of Jorawar and brought his licensed gun and fired upon father of the first informant on his eye, who was standing near the house of Jorawar. Thereafter the accused Sahdeo fired second shot upon the first informant but the said shot did not hit him and his father died on the spot. The first informant, Jaiveer Singh resident of his village and Yatendra Singh, Sangram Singh and Narendra Singh resident of Ghilauwa, Police Station Kotwali, Etah saw the entire incident of shooting. His father was lying dead on the spot. He came to the Police Station to lodge the first information report.

5. After lodging of the same, the Head Moharrir, namely, Laxman Singh Verma (P.W.-6) prepared the chik first information report (exhibit-ka/1) and made G.D. entry on 10th March, 1982 at 05:45 p.m. The investigation of the case was handed over to P.W.-4 Sri Brahma Singh, the then Sub-Inspector of Police Station Kotwali Etah, in whose presence the case was registered at the Police Station. He proceeded with the investigation after registration of the case and recorded the statements of P.W.-6 Laxman Singh Verma, first informant/P.W.-1 Satdeo Singh and witness Sangram Singh at the Police Station. Thereafter P.W.-4 went to the place of occurrence along with Sub-Inspector Prahlad Singh (P.W.-7) and Sub Inspector Yogendra Singh. P.W.-4 conducted the inquest of the dead-body of the deceased Gopal Singh. On the instruction of P.W.-4, P.W.-7 Sub-Inspector Prahlad Singh prepared the inquest report (Ext. Ka-5), the diagrams of the dead-body (Ext. Ka-6), the challan report Ext. Ka-7), the letter for post-mortem examination of the body of the deceased to Chief Medical Officer (Ext. Ka-8), letter to Reserved Inspector (Ext. Ka-9) and the sample of seal (Ext. Ka-10) on the instruction and supervision of the Investigating Officer (P.W.-4). The dead-body of the deceased was sealed in presence of the witnesses on the spot and it was then sent for postmortem examination through Constables Udaivir Singh and Hari Ram with necessary document.

6. Dr. A.K. Malpani (P.W.-3), the then Acting Superintendent of District Hospital, Etah, conducted an autopsy of the body of the deceased Gopal Singh on 11th March, 1982 at 11:00 a.m. He opined that the cause of death of the deceased Gopal Singh is coma, haemorrhage and shock as result of following ante-mortem injuries:

"1. Abrasion 1 cm. x 3/4 cm. over the middle of right eye brow.

2. Gunshot wound of entry 1 cm x 1 cm. x brain deep over the middle of the right upper eye lid. No blackening and no charring seen. On dissection, right eye-ball found grossly lacerated. On further dissection, the orbital cavity having commuted fracture. Muscles of eye-ball lacerated. On further dissection the membrane of brain and brain matter found lacerated and clotted blood present. A big pellet recovered from the posterior fossa on right side. No wound of exit seen.

3. One gunshot wound of entry 1 cm. x 1 cm. over the right side of face, 3.5 Cm. lateral to outer angle of right eye. No blackening and no charring seen. On dissection the wound is brain deep. The muscles membrane and, brain matter grossly lacerated and a big pellet recovered from the left cravical cavity, middle part of the brain. Direction right to left and backward. No wound of exit seen.

4. Lacerated wound 1.5 cm. x 0.5 cm. x scalp deep on the superior occipital protuberance."

7. P.W.-4/Investigating Officer inspected the place of occurrence and prepared the site plan (Exhibit-ka/11) on the same day i.e. 10.3.1982. He also collected from the place of occurrence a blank cartridge and chad (Tikli) (Exhibit-ka-4) and also blood stained earth and plain earth (Ext.-Ka- 5) and prepared their recovery memos (Ext. Ka-12 and Ka-13) respectively. He also recorded the statement of eye-witnesses like Jaivir Singh etc. on the same day at the place of occurrence.

8. On 11.3.1982, the Investigating Officer (P.W.-4) also inspected the place where the scuffle took place between deceased Gopal Singh and accused Nagendra and Sahdev about 15 days prior to the present occurrence. He prepared another site-plan (Ext. Ka-14) of that place also. He found the mends of the drain broken and filled with fresh earth. Thereafter the investigation was handed over to P.W.-5 Sub Inspector Yogendra Singh on 12th March, 1982 by the then Station House Officer. On 18th March, 1982 P.W.-5 Yogendra Singh reached the jail and recorded the statements of the accused Ashok @ Ranjit, who surrendered before the court concerned and was sent to jail. On the disclosure of accused Ashok, his relative (Behnoi) Om Prakash gave the licensed gun to P.W.-5 of which recovery memo (Exhibit-Ka-15) was prepared by him.

9. After conclusions of the statutory investigation under Chapter XII Cr.P.C. P.W.-5 Yogendra Singh has submitted the charge-sheet (Exhibit-Ka/16) against the accused persons, namely, Sughar Singh, Nagendra Singh, Sahdeo Singh and Ashok @ Ranjit before the court concerned.

10. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. First, on 19th July, 1982, the concerned Court framed following charges against the accused Sahdev:

"CHARGES

I, S. K. Gupta, III Addl. Sessions Judge, Etah hereby charge you Sahdev as follows:-

FIRST- that you, on 10.3.1982, at about 4.00 p. m., near the house of Zorawar Singh, in village Ghilaua, Police Station Kotwali, district Etah, did commit murder by intentionally or knowingly causing the death of Gopal Singh, and thereby committed an offence punishable under

section 302 of the Indian Penal Code, and within the cognizance of this Court.

SECONDLY- that you, on the aforesaid date, time and place, did an act, to wit, fired at Satya Dev Singh with a gun, with such intention or knowledge and under such circumstances that if by that act you had caused the death of said Satya Dev Singh, you would have been guilty of murder, and thereby committed an offence punishable under section 307 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried on the said charge by this court."

11. On the same day i.e. 19th July, 1983, following charges were framed against the accused Sughar Singh, Nagendra and Ashok:

"CHARGE

I, S.K. Gupta, III Addl. Sessions Judge, Etah hereby charge you (1) Sughar Singh, (2) Nagendra and (3) Ashok as follows:

FIRST- that, on 10.3.1982, at about 4.00 p.m., near the house of Jorawer Singh, in village Ghilaua, Police Station Kotwali, district Etah, shaped and common intention with co-accused Sahdeo to commit murder of Gopal Singh in furtherance of such common intention, co-accused Sahdev did commit murder by intentionally or knowingly causing the death of Gopal Singh, and you thereby committed an offence punishable under section 302 read with section 34 of the Indian Penal Code, and within the cognizance of this Court.

SECONDLY; that, on the aforesaid date, time and place, in furtherance of common intention of all co-accused, Sahdev did an act, to wit, fired at Satya Dev Singh with a gun, with such intention or knowledge and under such circumstances that if by that act he had caused the death of said Satya Dev Singh, he would have been guilty of murder, and you thereby committed an offence punishable under section 307 read with section 34 of the Indian Penal Code, and within the cognizance of this court.

Alternatively I also charge you as follows:

FIRST- that you, on the aforesaid date, time and place, abetted the commission of the offence of murder of Gopal Singh by co-accused Sahdev, which was committed in consequence of your abetment, and thereby committed an offence punishable under section 109 & 302 of the Indian Penal Code, and within the cognizance of this Court.

SECONDLY that you, on the aforesaid date, time and place, abetted the commission of the offence of attempt to murder Satya Dev Singh by co-accused Sahdev, which was committed in consequence of your abetment and thereby committed an offence punishable under section 109 & 307 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried on the said charge by this court."

12. The charges were read out and explained in Hindi to the accused, who pleaded not guilty and claim to be tried.

13. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Satdeo (complainant) (son of the deceased Gopal Singh)/eye witness as per the prosecution	P.W.-1
2	Jaiveer Singh (resident of village Chhilauwa, Police Station-Kotwali)/independent eye witness as per the prosecution	P.W.-2
3	Dr. A.K. Maalpani, Superintendent District Hospital, Etah, who conducted the autopsy of the person of the deceased	P.W.-3

4	Sub-Inspector Braham Singh, who initially conducted the investigation i.e. the first Investigating Officer	P.W.-4
5	Sub-Inspector Yogendra Singh, who conducted the investigation after P.W.-4 and submitted the charge-sheet	P.W.-5
6	Laxman Singh Verma, Head Moharrir, who prepared the chik first information report	P.W.-6
7	Sub-Inspector Prahlad Singh, who prepared the inquest report of the deceased, photo lash, letter to R.I. etc. on the direction of P.W.-4	P.W.-7
8	Constable Udai Veer Singh, who took the sealed dead body of the deceased to the mortuary	P.W.-8

14. The defence has also produced following witnesses in support of its case:

1	Girraj Prasad, the then Judicial Assistant Collector, Etah	D.W.-1
2	Constable Balak Ram who has proved the G.D. No.9 dated 11th March, 1982 of Police Lines, Etah which shows that the papers for post-mortem examination were submitted to the R.I.	D.W.-2

15. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 10th March, 1982	Ex.Ka.-1
2	First Information Report dated 10th March, 1982	Ex.Ka.-3 & Ex.Kha-1
3	Recovery memo of empty cartridge & Tikli dated 10th March, 1982	Ex. Ka.-12
4	Recovery memo of blood stained and plain earth dated 10th March, 1982	Ex. Ka/13
5	Inquest report	Ex.Ka.-5
6	Diagram of the dead body of the deceased	Ex.Ka.-6
7	Chalan of the dead body of the deceased	Ex.Ka.-7
8	Letter to the Chief Medical Officer for post-mortem examination	Ex.Ka.-8
9	Letter to the R.I.	Ex.Ka.-9
10	Sample of seal	Ex.Ka.-10
11	Post-mortem examination report of the deceased dated 11th March, 1982	Ex.Ka-2
12	Site plan with index dated 10th March, 1982	Ex.Ka-11
13	Site plan with index dated 11th March, 1982	Ex.Ka-14

16. The defence has also produced following documentary evidence in support of its case:

1	Charge-sheet dated 27th February, 1977 submitted in Crime No.22, under Sections 147, 148, 149 and 307 I.P.C.	Ex.Kha-3
2	Copy of the F.I.R. dated 14th November, 1978 as Crime No. 1068 under Sections 147, 148 and 307 I.P.C.	Ex.Kha-4
3	Copy of the application filed by the Additional Public Prosecutor for summoning the accused Sughar Singh as witness	Ex.Kha-5
4	Copy of the order passed by the Magistrate dated 28thAugust, 1982 summoning the witnesses including Sughar Singh	Ex.Kha-6
5	Copy of the Khatauni of Consolidation Settlement in order to show that the Gopal Singh (deceased herein) and witnesses Sangram Singh, Jagdish Singh, Ranvir Singh and Ramesh Chndra were co-tenants.	Ex.Kha-7
6	Two copies of Khewats 1347 Fasli and 1901 Fasli filed to prove that the witnesses and deceased	Exts.Kha-8 and 9

	Gopal Singh belonged to the same family	

17. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused persons, while giving their statements in the Court, denied all the allegations made by the prosecution and also traversed their complicity in the alleged crime. They alleged that they have been falsely implicated on account of harbouring grudges as there were enmity between the complainant and the witnesses. For establishing the same, the defence have two oral as well as seven documentary evidences referred to above.

18 . On the basis of above evidence oral as well as documentary adduced during the course of trial, the trial court, while referring various infirmities in the prosecution evidence led during the course of trial has opined that the prosecution has not succeeded in bringing home any of the charges framed against the accused persons beyond all reasonable doubts and they deserves to be acquitted. Accordingly, the trial court while passing the impugned judgment, has hold that the accused Sughar Singh, Sahdev, Nagendra and Ashok @ Ranjit are not guilty of any of the charges levelled against them and they are hereby acquitted.

19. Being aggrieved with the impugned judgment and order of acquittal of the accused persons, namely, Sughar Singh, Sahdev, Nagendra and Ashok @ Ranjit, the State of U.P. has preferred the present Government Appeal.

20. Assailing the impugned judgment and order of acquittal of the accused-respondents, namely, Sughar Singh, Sahdev Singh, Nagendra Singh and Ashok @ Ranjit, the learned A.G.A. for the State in the instant Government Appeal has advanced following submissions:

i) . As per prosecution case as unfolded in the first information report, specific role of exhortation has been assigned to the accused Nagendra Singh and role of causing fire arm injuries to the deceased Gopal Singh has been attributed to the accused Sahdev Singh on the exhortation of Nagendra Singh. The said prosecution version has also been supported by the prosecution witnesses, namely, P.W.-1, Satyadeo and P.W.-2, Jaiveer Singh in their respective testimonies.

ii). P.W.-1 and 2 are the eyewitnesses, who have proved the prosecution case beyond reasonable doubt but trial Court erred in passing the impugned judgment and order of the acquittal.

iii). Injuries on the person of deceased- Gopal Singh have been caused by fire arm which is fully corroborated by medical evidence i.e. post mortem examination report of the deceased. Dr. A.K. Malpani P.W.-3/Autopsy Surgeon has found four gun shot injuries on the person of deceased- Gopal Singh, which also support the prosecution case.

iv). Motive alleged in the F.I.R. has also been proved by P.W.-1 and P.W.-2 in their respective testimonies, who are alleged to be the eye-witnesses of the incident.

(v). There are no inconsistencies or contradictions in the testimonies of the prosecution witnesses.

(vi). Since the incident took place at 04:00 p.m. i.e. broad day light and the members of prosecution as well as defence were of the same village, the accused could be identified very well by the prosecution witnesses and there was no occasion to

doubt the identification of the accused persons by prosecution witnesses.

(vii). Though there were recovery of gun i.e. crime weapon and pellets were also recovered from the body of the deceased but that were not sent to the Forensic Science Laboratory concerned for their ballistic reports. It is no doubt true that there are no ballistic reports with regard to pellets and the recovered gun but there is ocular evidence to prove the prosecution case. P.W.-1 and P.W.-2 are the eyewitness account, who have supported the prosecution story. Non production of F.S.L. report is not fatal to the prosecution case. Since P.W.-2 is an independent eye witness, therefore, his evidence is more creditworthy.

21. On the basis of above submissions, learned A.G.A. submits that the prosecution has fully established its case beyond reasonable doubt against the accused-respondents by oral as well as documentary evidence but the trial court has not examined the same and passed the impugned judgment of acquittal of accused-respondents, namely, Sughar Singh, Sahdev, Nagendra Singh and Ashok @ Ranjit and therefore, the same is per-se illegal and is liable to be quashed. The learned A.G.A. and learned counsel for the first informant further submit that in support of the above argument, learned counsel for the accused-respondent has failed to produce any documentary as well as oral evidence before this Court as well as trial court. There exist direct evidence against the accused-respondents. As such, the Government Appeal filed by the State is liable to be allowed by reversing the impugned judgment of the trial court and convicting and sentencing the accused-respondents for the offence under Section 302 I.P.C. The learned A.G.A. also submits that since the Government Appeal qua the accused-respondent Sughar Singh has already been dismissed as abated, nothing is required to be said in his case.

22. Supporting the impugned judgment and order passed by the trial court acquitting the accused-respondents, the learned counsel for the accused-respondents submits as under:

(a) Motive as alleged in the F.I.R. has not been established and proved by the prosecution evidence adduced during the course of trial.

(b). P.W.1/first informant-Satyadeo has admitted in his cross-examination that prior to this incident, one cross case under Section 307 I.P.C. was lodged between the accused- Ashok and accused Nagendra. Although, it is alleged that after some time both the accused compromised and the cases instituted against each other culminated into their acquittal. Even though both the accused entered into compromise, but there were no cordial relations between the Ashok and the accused Nagendra nor they were friend. As such, in these circumstances, it is impossible to believe that the accused-Ashok exhorted, associated or helped the accused Sahdeo and Nagendra in commissioning of murdering of the deceased Gopal Singh in any manner.

c). P.W.-1 has also stated in para-34 of his cross-examination that accused-Ashok was not present on the spot. Similarly P.W.-2, Jaiveer Singh also stated that accused- Ashok was not present on the place of occurrence. He then also stated that he has not heard that Ashok asked the accused Sahdev to bring his gun kept in his sitting place (Baithaka) and kill the deceased Gopal Singh from it, whereas, P.W.-4 investigating officer, Sri Brahm Singh stated in paragraph-29 that P.W.-2 Jaiveer stated in his statement that " Ashok asked Sahdeo to

bring his gun which was kept in sitting place (Baithaka) and kill him (Gopal Singh).

d). As per F.I.R., accused- Ashok was also in the company of the accused persons, Sughar Singh, Sahdeo Singh and Nagendra Singh at the time of occurrence but P.W.-1 and P.W.-2 have denied the presence of Ashok on the place of occurrence at the time of incident. From the above contradiction in the prosecution evidence, it is apparent that the genesis of crime is wholly untrustworthy as the same creates a major dent in the prosecution story.

e). There is also no F.S.L. report with regard to recovered cartridges and tikli. In these circumstances prosecution has not been able to established its case beyond reasonable doubt, hence, judgment of acquittal passed by Trial Judge is well reasoned and sound.

On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that as this is a case of weak type of evidence, the impugned judgment and order of acquittal of any of the charges framed against the accused-respondent does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present Government Appeal filed by the State is liable to be dismissed.

23. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

24. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.

25. Before entering into the merits of the case set up by the learned counsel for the accused-appellant in criminal appeal, learned counsel for the accused-respondent in government appeal and the learned A.G.A. as also the learned counsel for the first informant in both the appeals qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses as well as the defence witnesses.

26. The first informant Satyadeo Singh son of the deceased Gopal Singh has been examined as P.W..-1. He stated in his examination-in-chief that the deceased Gopal Singh was his father, whereas the accused persons, namely, Sughar Singh, Nagendra, Sahdev, Ashok @ Ranjit were residents of his village. Accused Sahdev Singh and Nagendra Singh were the son of accused Sughar Singh. The present murder incident took place on Holi (festival of colours) one year and five months back. About 15 days before the incident, accused Nagendra and Sahdev had cut off the drain water flowing in his gram field due to which his crops got damaged. Because of the same, there was an altercation between his father Gopal Singh and accused Nagendra and Sahdev and the aforesaid accused threatened his father to face evil consequences.

27. This witness further stated that it was around 4 o'clock in the evening, there was an altercation, which was going on between the accused Sughar Singh and his brother Durbin Singh regarding some land and the accused Nagendra and Sahadev were also involved in it. During the same fight, this witness and his uncle Sangram Singh also reached there. When his uncle Sangram Singh tried to intervene, accused Nagendra and Sahdev started abusing his

uncle. Further when this witness objected not to abuse him, they also abused him, on which he also started abusing them, as he became very angry with him. At the same time, father of this witness came there from the east of Prem Shankar's house and was standing between the vacant land of Prem Shankar's house and Zoravar's house, he asked as to why they were fighting. When the said altercation was going on between the first informant/this witness and the accused, then the witnesses Jaiveer Singh, Yatendra Singh, Narendra Singh were also present on the spot. Seeing the father of P.W.-1, the accused Nagendra exhorted the accused Sahdeo to kill him as he was one of the enemy, who had stopped their water on other day. On the said exhortation, the accused Sahdev ran and brought Ashok's licensed gun and fired at his father, which hit his father directly on his eyes and face. When his father fell down, the accused Sahdev fired another shot at P.W.-1, which narrowly missed him because he sat down. The witness raised an alarm and seeing the crowd gathering, the accused ran away towards the south-west of the well. The deceased died on the spot due to bullet injury. He himself (P.W.-1) had written a report regarding the incident and took it to the police station for registration of the case.

28. In the cross-examination, this witness stated that there was a cross case under Section 307 of I.P.C. between the accused Ashok and accused Nagendra. This witness further stated that there was gram crops in his 8 bighas of land and some of which lost. 15 days before the incident, the accused had cut off the chak nali water flowing in his field due to which huge damage was caused.

29. This witness further stated that accused Nagendra was cashier in the District Cooperative Bank, Nidhauli and he lived there. He used to visit the village once or twice in a week. He had been informed by his father about the fight between his father and the accused Nagendra and Sahdeo due to flow of water but his father has not disclosed the date and time of such fight.

30. This witness further stated that at the time of the incident, Durbin Singh, with whom quarrel was taking place initially, left the place of occurrence and heated conversations were exchanged between them. It took about 10 minutes in exchange of hot conversations between them and firing of gun shot upon his father i.e. deceased. He further stated that at the time of incident, he was going towards chaupal and he stopped there after seeing the fight between Durbeen Singh and the accused. When he reached the place of occurrence, his uncle Sangram Singh also accompanied him.

31. This witness again stated that he did not witness accused Ashok at the spot. He did not give any statement to the Investigating Officer that Ashok asked accused Sahdeo to bring his gun from his sitting place and kill him, consequent to which the accused Sahdev immediately ran away. However, he cannot explain as to how the Investigating Officer has recorded his such statement.

32. This witness further stated that the Sahdev brought the gun from the accused Ashok's sitting place of which he had no idea when Sahdev ran to get the gun and fired it in the presence of so many people. When he was running to get the gun, 15-20 people were gathered at the spot.

33. P.W.-2 Jaiveer Singh, who is alleged to be an independent eye witness

stated that at around 4 o'clock in the evening, he was standing near the well situated south-west of house of one Zorawar. Many witnesses like Yatendra Singh, Sangram Singh, Narendra Singh etc. were also standing there. At the relevant time, there was an altercation between Durveen Singh and the accused Sughar Singh, Nagendra Singh and Sahdev Singh on some issue. Meanwhile Sangram Singh intervened, then the accused Nagendra abused him, on which the first informant/P.W.-1 Satyadev objected not to abuse his uncle i.e. Sangram Singh due to which heated conversations were exchanged between them. Meanwhile, father of first informant, namely, Gopal Singh came from the east side of Prem Shankar's house and asked as to why they were fighting on which the accused Nagendra exhorted the accused Sahdev to kill him as he was his enemy. On such exhortation, the accused Sahdev ran and brought the gun of accused Ashok from his sitting place and standing near the Bachan Singh's platform, fired a shot upon the deceased Gopal Singh due to which he sustained fire arm injuries and fell down. Face of the deceased was hit by fire. Whereafter the accused Sahadev fired upon the first informant/P.W.-1 Satyadev but it did not hit him as he moved a little away. When the crowd gathered, the accused left the spot towards the west side. Gopal Singh died on the spot.

34. In his cross-examination, this witness stated that accused Nagendra exhorted to shoot. At the relevant time, none of the accused were having any weapon. The accused Ashok was not present at the spot. He did not overheard the accused Ashok saying the accused Sahdev to bring the gun from his sitting place and kill them. Regarding the aforesaid fact, he did not give any statement to the Investigating Officer.

35. This witness further stated that he saw the accused Sahadev running to bring the gun but it did not occur to him that he would bring the gun and fire it. The sitting place of the accused Ashok was visible from where they stood but the same was not visible from where the deceased Gopal Singh was standing. Till the first shot was fired by the accused Sahdeo, he could not see that the accused Sahdev had brought the gun because his attention was towards the accused Nagendra and others abusing each other. This witness further stated that his attention was drawn towards that when the first fire was made. The second cartridge was fired by accused Sahdev in front of him. The first cartridge turned out to be empty which fell on the spot and then Sahadev loaded the second cartridge in front of him. By the time he shouted as to what he was doing, the accused Sahdev fired another shot.

36. This witness denied the fact that the incident took place in the dark night in which the deceased Gopal Singh was killed and no one was present at the time of the incident. He also denied that he has not seen any incident and was deposing falsely because of his relationship.

37. P.W.-3 Dr. A.K. Malpani, Superintendent District Hospital Etah, District Etah, in his examination-in-chief stated that he found as many as four ante mortem injuries on the body of the deceased. He took out two big pellets from the body of the deceased and after getting the said pellets sealed, the same were handed over to the Police Constable. While conducting an autopsy on the corpse of the deceased, he opined that the cause of death of the deceased was shock and excessive bleeding due to ante-mortem injuries. These injuries in ordinary course of nature were usually

sufficient to cause death. He further opined that there could be a difference of 6 hours in the duration of injuries on either side. In his opinion, injury no. 4 could be caused due to fall over some hard object. He then opined that the injuries were possible only when the killer and the deceased were standing at almost the same level.

38. P.W.-4 Sub-Inspector Brahm Singh initially conducted the investigation, who in his examination-in-chief stated that the investigation of the case was first handed over to him. Whereafter he recorded the statements of first informant/P.W.-1, witness Sangram Singh. He further stated that on 11th March, 1982, he inspected the field and a fight was alleged to have taken place between the deceased Gopal Singh and the accused about 15 days prior to the incident. After examining the evidence of first informant Satyadev, he prepared the site plan which has been proved by him in the Court. On such inspection, he found the bund (Medh) of the chak nali was broken at two places, which seemed to be clogged with fresh soil. He next stated that on 12th March, 1982, the investigation was entrusted to Sub Inspector Yogendra Singh as per the order of the then Station House Officer.

In his cross-examination, this witness further stated that the first informant/P.W.-1 Satyadev had given his statement under Section 161 Cr.P.C. that the accused Ashok exhorted the accused Sahdeo to bring his gun from his sitting place (Baithaka) and kill them. On such exhortation, the accused Sahadev immediately ran away.

39. Further this witness stated that he also recorded the statement of witness Durveen Singh in which he stated that the accused Ashok exhorted the accused Sahdeo to bring the gun, which was kept in his sitting place (Baithaka) and kill them.

40. P.W.-5 Sub-Inspector Yogendra Singh stated in his examination-in-chief that he took over the investigation of the case from P.W.-4 Sub-Inspector Brahma Singh on 12th March, 1982. On 18th March, 1982 he went to the district court and recorded the statement of accused Ashok, where he surrendered and on his asking, his brother-in-law (Behnoi), namely, Om Prakash deposited his gun in the Police Sttaion where its recovery memo has been prepared by this witness.

41. This witness further stated that he did not send the gun of the accused Ashok to the ballistic expert for its matching because a long time had elapsed since the incident and the gun was still in the possession of the accused. This witness further stated that he wanted to take the accused Ashok on police remand only for recovery of his gun because he was informed that firing was done by the gun of the accused Ashok.

42. P.W.-6 Laxman Singh Verma, Head Muharrir, Police Station-Patiani, Etah has been produced by the prosecution. This witness stated that he prepared the chik report and made entry in General Diary in that regard. He denied that the special report was not sent on 10th March, 1982 and the chik report was prepared much later. He also denied that the general diary was kept withheld and relevant entries were subsequently made.

43. P.W.-7 Sub-Inspector Prahlad Singh stated in his examination-in-chief that he prepared all the documents qua inquest of the body of the deceased and for sending the body for post-mortem examination, on the

spot under the direction of the Investigating Officer P.W.-4 in his presence.

44. P.W.-8 Constable Udayveer Singh took the dead body of the deceased to the Mortuary along with necessary documents.

45. Shri Girraj Prasad, Judicial Assistant, Collectorate, Etah has been produced as D.W.-1 by the defence. He proved the order of the District Magistrate, Etah dated 12th March, 1982 for receiving the special report at his office.

46. The defence has also produced Constable Balak Ram as D.W.-2, who proved the G.D. No.9 dated 11th March, 1982 of Police Lines, Etah which mentions that the papers for post-mortem examination of the deceased were submitted to the R.I. on 11th March, 1982 at 0720 hours.

47. On the deeper scrutiny of the above evidence led during the course of trial, we find that there is major contradictions in the testimonies of the prosecution star eye witnesses. There is also faulty investigation. Such contradictions and faulty investigation cast a serious dent in the entire prosecution case.

48. Now it is important for us to refer to such contradictions in the testimony of first informant/P.W.-1 Satya Deo son of the deceased i.e. the first eye witness.

49. In the written report (Exhibit-Ka/1) of the first informant/P.W.-1 on the basis of which the first information report has been lodged (Exhibit-ka/3), it has been stated as under:

"मेरे पिता जी गोपाल सिंह से आज से करीब 15 दिन पहले मेरे गांव के सहदेव व नागेन्द्र पुत्र सुगड़ सिंह से पानी ले जाने के सम्बन्ध में झगड़ा हो गया था क्योंकि इन लोगों ने मेरे चने के खेत में पानी काट दिया था मेरे पिता ने उनसे कहा तो ये लोग मेरे पिता जी पर मारने दौड़े और जान से मारने की धमकी और कहा कि साले कभी तुझको देखेंगे आज दि० 10.3.82 को करीब 4 बजे नागेन्द्र व सहदेव सिंह के पिता सुगड़ सिंह और उनके चाचा दुर्बीन सिंह में जोरावर सिंह के मकान के पास झगड़ा हो रहा था मेरे चाचा संग्राम सिंह ने बीच बचाव किया कि उपरोक्त नागेन्द्र वा सहदेव सिंह भी अपने पिता के साथ थे नागेन्द्र व सहदेव ने मेरे चाचा को गालियों दी मैंने इन लोगों से गाली देने से मना किया कि मेरे चाचा को गाली क्यों दे रहे हो इस बात पर मुझसे तू तू मैं मैं हो गयी इतने में मेरे पिता जी गोपाल सिंह मौके पर आ गये उन्होंने कहा कि क्या बात है इतने में ही नागेन्द्र सिंह ने अपने भाई सहदेव से कहा कि अब क्या देख रहा है। दुश्मन सामने आ गया मार दो सालों को इसी ने उस दिन हमारा पानी रोका था तभी भागकर सहदेव गया और अशोक पुत्र स्वरूप सिंह जिसका मकान जोरावर के मकान में मिला हुआ है। अशोक की लाइसेंसी बंदूक ले आया और जोरावर सिंह के मकान के पास खड़े मेरे पिता जी को सहदेव ने गोली मार दी जिससे मेरे पिता जी के आंख पर गोली लगी है। तथा सहदेव ने दूसरा फायर मेरे ऊपर किया जिससे मैं बाल बाल बचा हूँ मेरे पिता जी को घटनास्थल पर ही मृत्यु हो गयी है। यह सारा बाका तथा गोली मारते मैंने व मेरे गांव के जैवीर सिंह पुत्र वावू सिंह, यतेन्द्र सिंह पुत्र रनवीर सिंह व संग्राम सिंह पुत्र आलम सिंह व नरेन्द्र सिंह पुत्र रमेश चन्द्र निवासीगण धिलौआ थाना कोतवाली एटा तथा गांव के बहुत से लोगों ने सारा वाका देखा है।"

50. From perusal of the aforesaid version of first informant/P.W.-1 it is apparently clear that only role assigned to cause fire arm injuries to the deceased Gopal Singh is upon the accused Sahdeo, whereas the role of exhortation has been assigned to accused Nagendra Singh. The accused Sughar Singh has been assigned to accompany the aforesaid accused, whereas the accused Ashok has been implicated in the present case because his gun was used in causing such fire arm injuries. From the aforesaid version it is also not clear as to whether the accused Ashok was present on the spot at the time of incident or not. It is also clear that 15 days prior to the said incident, there was altercation between the deceased Gopal Singh and the accused

Nagendra and Sahdeo over watering of the gram crops of the deceased.

51. In the statement recorded under Section 161 Cr.P.C. by the Investigating Officer, the first informant/P.W.-1 Satyadeo has stated as under:

''आज होली रंग का दिन है गांव में जगह जगह आदमी इकट्ठे हो रहे है करीब 4 बजे शाम के हमारे गांव के जोरावर सिंह के मकान के पास सुघड़ सिंह और दुर्वीन सिंह में झगड़ा हो रहा था जिस का बीच बिचाव मेरे चाचा संग्राम सिंह ने कराया था वही पर सुघड़ सिंह के लड़के नागेन्द्र व सहदेव भी थे बीच बिचाव कराते वक्त नागेन्द्र व सहदेव ने मेरे चचा को गालिंया दे कर कहा कि तुम साले हमारे बीच बिचाव कराने वाले कौन होते हो मैंने गालियां देने को मना किया इस पर मुझसे तू-तू मैं-मैं हो गई इसी बीच मेरे पिता जी गोपाल सिंह आ गये उन्होंने पूंछा कि क्या बात है इतने में ही नागेन्द्र सिंह ने अपने भाई सहदेव से कहा कि अब क्या देख रहा है दुश्मन सामने आ गया है साले को गोली मार दो इसी ने उस दिन हमारा पानी रोका था तभी ***अशोक पुत्र सरुप सिंह जिस का मकान बैठक जोरावर के मकान से मिली है ने कहा कि बैठक से मेरी बन्दूक उठा ला और मार दो कि एक दम से सहदेव भाग कर गया और अशोक वाली बन्दूक और कारतूस ले आया और जोरावर के मकान के पास खड़े हुए मेरे पिता जी को गोली मार दी*** *जो मेरे पिता जी की आंखो पर लगी तथा एक फायर और सहदेव ने मेरे ऊपर जान से मारने की नियत से किया जिससे मैं बाल बाल बचा, मेरे पिता जी गोली लगते ही खतम हो गये,* ***मेरे पिता जी को गोली लगवाने में नागेन्द्र व सहदेव के पिता सुघड़ सिंह का भी हाथ रहा जो मौके पर गोली लगते समय मौजूद थे*** *मुलजिमान को गोली मारते वहीं मौके पर खड़े हुए मैंने व मेरे चचा संग्राम सिंह व गांव के जयवीर सिंह पुत्र बाबू सिंह व यतेन्दर सिंह पुत्र रनवीर सिंह व नरेन्द्र सिंह पुत्र रमेश चन्द तथा गांव के बहुत से लोगों ने देखा है दुरवीन सिंह हमारी तू-तू मैं-मैं होते ही मौके स चला गया था मेरे पिता जी की लाश मौके पर पड़ी है इस घटना की तहरीर मैंने स्वयं लिखी और अपने चचा संग्राम सिंह को साथ लेकर थाना आया तहरीर देकर मैंने अपना मुकदमा दर्ज कराया। ''*

52. The statement of Sangram Singh, brother of the deceased Gopal Singh, who has not been produced during the course of trial, recorded by the Investigating Officer under Section 161 Cr.P.C. is extracted hereunder:

''आज होली में रंग का दिन था गांव में जगह जगह लोग इकट्ठे होकर त्यौहार मना रहे थे करीब शाम के 4 बजे नागेन्दर व सहदेव सिंह के पिता सुघड़ सिंह और इनके चाचा दुर्वीन सिंह में हमारे ही गांव के जोरावर सिंह के मकान के पास रास्ते में आपस में जमीन के ऊपर गाली गलौज व झगड़ा हो रहा था दुर्वीन सिंह कह रहा था कि मुझे जमीन कम दी है यह झगड़ा देखकर कि त्यौहार का दिन है और बात न बढ़े मैंने उनमें बीच बिचाव कराया कि नागेन्दर व सहदेव ने मुझे गालियां दी कि तुम बीच में हमारा फैसला करने वाले कौन होते हो और मुझे गालियां देते हुवे देखकर सत्यदेव से न रहा गया जिस पर सत्यदेव से भी उन की तू-तू मैं-मैं हो गई इसी बीच दुर्वीन सिंह वहां से चला गया और मेरे भाई गोपाल सिंह भी वहीं मौके पर आ गये और हम लोगों के बीच तू-तू मैं-मैं व गाली गलौज होते देख कहा कि क्या बात है मेरे भाई गोपाल सिंह के यह कहते ही नागेन्द्र सिंह ने अपने भाई सहदेव से कहा कि अब क्या देख रहा है दुश्मन सामने आ गया है साले को गोली मार दो इसी ने उस दिन हमारा पानी रोका था तभी अशोक पुत्र सरुप सिंह ने कहा कि बैठक से मेरी बन्दूक उठा ला और मार दो यह सुनते ही सहदेव भाग कर गया और अशोक की बैठक से कारतूस व बन्दूक उठा लाया और जोरावर के मकान के पास रास्ते पर खड़े हुए मेरे भाई गोपाल सिंह को गोली मार दी नागेन्द्र, सहदेव व अशोक के पास ही सुघड़ सिंह भी खड़े थे कि सहदेव ने तुरन्त ही दूसरा फायर सत्यदेव के ऊपर जान से मारने के लिये किया जो बाल बाल लगने से बचा यह घटना मुलजिमान द्वारा गोली मारते हुए वहीं मौके पर खड़े हुए मैंने व सत्यदेव व गांव के जैवीर सिंह पुत्र बाबू सिंह, यतेन्द्र सिंह पुत्र रनवीर सिंह व नरेन्द्र सिंह पुत्र रमेश चन्द्र तथा गांव के बहुत से लोगों ने देखी है। ''

53. In the aforesaid two statements of P.W.-1/first informant and Sangram Singh, son and brother of the deceased, it is for the first time, the allegation of exhortation has been assigned to accused Ashok and also upon the accused Sughar Singh that he was also involved in commissioning of the alleged offence. Similarly, the other witness

Sahveer Singh son of Babu Singh, P.W.-2 Jai Veer Singh son of Babu Singh, Yatendra Singh son of Ranveer Singh, Narendra Singh son of Ramesh Chandra has reiterated the same statements under Section 161 Cr.P.C. as stated by P.W.-1/first informant Satyadeo and Sangram Singh as quoted above. Except P.W.-2 Jai Veer Singh, no other witnesses above have been produced by the prosecution during the course of trial. The relevant portion of their statements under Section 161 Cr.P.C. about the involvement of the accused Ashok in commissioning of the alleged incident is quoted herein below:

''अशोक उर्फ रंजीत सिंह जो वहीं पर खड़ा था ने सहदेव से कहा कि मेरी बन्दूक मेरी बैठक में रखी है भाग कर उठा ला और मार दे साले को कि सहदेव तुरन्त भाग कर गया और अशोक की बन्दूक व कारतूस उठा लाया और गोपाल सिंह जो जोरावर सिंह के मकान के पास रास्ते पर खड़े थे को सहदेव ने गोली मार दी।''

54. During the course of trial, P.W.-4 i.e. first Investigating Officer has also proved aforesaid statements of P.W.-1 and P.W.-2 recorded under Section 161 Cr.P.C. in his cross-examination during the course of trial.

55. For ready reference, the same is reproduced hereunder:

"वादी सत्यदेव ने यह व्यान दिया था कि अशोक ने कहा कि बैठक से मेरी बंदूक उठा ला और जान से मार दो। इस पर सहदेव एकदम भागकर गया- ऐसा कहना सही नहीं है कि मैने यह बयान अपनी तरफ से लिख लिया हो।

सत्यदेव ने यह बयान नहीं दिया था कि "- सुघड़ सिंह ने कहा कि भीड़ इकट्ठी हो गई है भाग चलो।

जयवीर गवाह ने यह बयान नहीं दिया था कि "मैं और यतेन्द्र सिंह नगला ? में चौपाई सुनने जा रहे थे और कुंआ के पास झगड़ा होता हुआ देखकर रूक गये।" अजखुद कहा कि इस गवाह ने यह बताया था कि यह भी घटना के समय मौजूद था। जयवीर गवाह ने यह बयान दिया था कि "आज होली का रंग का दिन था गांव के लोग जगह- जगह त्योहार मनाने में इकट्ठा थे। मैं, यतेन्द्र सिंह व नरेन्द्र सिह के मकान के पास है, घर पर मौजूद थे और सत्यदेव, संग्राम सिंह, बचान सिंह के मकान के चबूतरे के नीचे मौजूद थे। कि यही पर 4 बजे शाम को सुघड़ सिंह और उसके भाई दुर्बीन सिंह में जमीन के बटवारे के मामले में गाली गलौज और झगड़ा होने लगा।"

उसने यह भी बयान दिया था कि "अशोक ने सहदेव से कहा कि मेरी बंदूक मेरी बैठका में रक्खी है भागकर उठा ला और मार दो साले को।"

56. However, during the course of trial, in his examination-in-chief, the first informant/P.W.-1 has reiterated the same version as given in his written report (Exhibit-ka/1), which is quoted herein above. In his cross-examination, this witness has given a different statement by stating that the accused Ashok was not present on the spot at the time of incident. For ready reference, the same is extracted hereunder:

"मैंने अशोक मुलजिम को मौके पर नहीं देखा। दरोगा जी ने मेरा बयान घटनास्थल पर लिया था फिर मुझे ध्यान नहीं कि किस किस का बयान और लिया। मैने दरोगा जी को यह बयान नहीं दिया था कि "अशोक ने कहा कि मेरी बन्दूक बैठक से उठा लाओ और मार दो कि एकदम सहदेव भाग कर गया ।" अगर दरोगा जी ने ऐसा मेरे बयान में लिख दिया है तो मैं इसकी कोई वजह नहीं बता सकता हूँ।

मैंने रिपोर्ट में यह लिखा था व दरोगा जी को बताया कि सुघड़ सिंह ने कहा कि भीड़ इकट्ठी हो गई है भाग चली। अगर नहीं लिखा है तो मैं इसकी कोई वजह नहीं बतला सकता हूँ। सहदेव मुलजिम अशोक की बैठक से बन्दूक दौड़कर लाया था। जब सहदेव बन्दूक लेने दौड़ा था तब मुझे यह अंदाज नहीं हो पाया था कि इतने आदमियो में बंदूक लाकर चला देगा।"

57. Like wise, during the course of trial in his examination-in-chief P.W.-2 has reiterated the version of P.W.-1 as given his

written report as well as in his examination-in-chief. In his cross-examination, P.W.-2 has also reiterated the same version as stated by PW..-1 in his cross-examination about the presence of accused Ashok at the time of incident. The statements of P.W.-2 given in his examination-in-chief as well as in his cross-examination reads as follows:

In examination-in-chief

"पिछली होली से एक होली पहले की बात है करीब एक साल 5 महीने पहले यह घटना घटी थी। करीब 4 बजे शाम मैं जोराबर के मकान के दक्षिण-पच्छिम कुँआ के पास खड़ा था। वहीं पर गवाहान यतेन्द्र सिंह, संग्राम सिंह, नरेन्द्र सिंह वगैरह कई आदमी खड़े थे। उस समय दुर्वीन सिंह और मुलजिमान सुघड़ सिंह नागेन्द्र सिंह व सहदेव सिंह में किसी बात पर कहा सुनी हो रही थी। संग्राम सिंह ने बीच विचाव किया। तब मुलजिम नागेन्द्र ने गाली गलौज किया जिस पर सत्यदेव ने कहा कि मेरे चाचा को क्यों गाली देते हो इस पर मुलजिमान मे और सत्यदेव मैं आपस में कहा सुनी हुई।

इसी बीच सत्यदेव के पिता गोपाल सिंह पूरब ओर से प्रेम शंकर के मकान की तरफ से आए और कहने लगे कि क्यों झगड़ रहे हो। इस पर नागेन्द्र ने सहदेव से कहा कि अब क्या देख रहे हो दुशमन सामने खड़ा है मार दो। इस पर सहदेव दौड़कर अशोक की चौपाल से बंदूक अशोक की ले आया और बचान सिंह के चबूतरे के पास खड़े होकर गोपाल सिंहके उपर फायर कर दिया और गोपाल सिंह घायल होकर गिर गये। गोपाल सिंह के फायर चेहरे पर लगा था। सहदेव ने दूसरा फायर सत्यदेव पर किया लेकिन थोड़ा सत्यदेव के हट जाने से उसके लगा नहीं। इसके बाद सुघड़ सिंह ने कहा कि अब भाग चलो अब भीड़ इकट्ठी हो रही है। तब मुलजिमान पच्छिम साईड को घटनास्थल से चले गये। गोपाल सिंह घटनास्थल पर ही मर गये।"

In cross-examination:

s *"नागेन्द्र ने कहा था कि गोली मार दो। उस वक्त मुलजिमान में से किसी पर कोई हथियार नहीं थे। घटनास्थल पर मुलजिम अशोक मौजूद नहीं था। मैंने अशोक को वहां पर यह कहते नहीं सुना कि सहदेव से कहा "मेरी बंदूक मेरी बैठक (में रक्खी है भाग कर उठा लो और मार दे साले को।" यह व्यान मैंने दरोगा जी को नहीं दिया है। मैं नहीं कह सकता की दरोगा जी ने मेरा यह बयान कैसे लिख लिया।"*

58. The aforesaid contradictions in the testimonies of P.W.-1 and P.W.-2 at various levels referred to above makes the entire testimonies of P.W.-1 and P.W.-2 doubtful and raises a big question mainly about the genesis of the entire prosecution case and renders a serious doubt about the truthfulness of the testimony of P.W.-1 and P.W.-2 and as such, their testimony is liable to be discarded.

59. It is also important to note here that as per the testimony of P.W.1/first informant (cross-examination)/prosecution version, earlier there was a fight between the two accused, namely, Ashok @ Ranjit and Nagendra and both of them instituted cases against each other under Section 307 I.P.C. but subsequently, they entered into compromise and the said cases were withdrawn by them. During the course of trial the defence also filed a copy of the charge-sheet dated 27th February, 1977 (Exhibit-kha-3) in case crime no. 22 under Section 147, 148, 149 and 307 I.P.C. wherein the accused Sughar Singh was complainant and the accused Ashok @ Ranjit was one of the accused along with other witnesses during the course of investigation of the instant case.

60. From the aforesaid facts, it is quite evident that there were inimical relationship between the accused Sughar Singh along with his sons Nagendra and Sahdeo and the accused Ashok @ Ranjit. Therefore it is impossible to believe that the accused Ashok @ Ranjit would associate himself with the other accused Sughar Singh, Nagendra Singh and Sahdeo Singh in commission of the alleged crime in any manner. This fact also casts a serious dent in the prosecution case and makes it highly doubtful.

61. The defence has also succeeded to prove that they have been falsely implicated

in commissioning of the alleged crime. In support of the said plea, during the course of trial, the defence filed a copy of the F.I.R dated 14th November, 1978 (Exhibit-kha/4) registered as case crime no. 1068 under Sections 147, 148 and 307 I.P.C. lodged by one Nirankar Singh against the prosecution witnesses during the course of investigation, namely, Ranvir Singh, Yatendra Singh, Gajendra Singh, Narendra Singh and Gopal Singh (present deceased), wherein the accused Sughar Singh was one of the witnesses of prosecution in that case. During the course of trial, the defence also filed a copy of the Khatuani (Exhibit-kha/7) wherein the deceased Gopal Singh and witnesses of investigation, namely, Sangram Singh, Jagdish Singh, Ranvir Singh, Ramesh Chandra were co-tenants, in order to prove that they belonged to the same family. The aforesaid facts also create a doubt in the prosecution case.

62. The non production of Durveen Singh brother of the accused Sughar Singh and uncle and brother of the first informant and deceased respectively as prosecution witnesses during the course of trial also makes the prosecution case weak. When as a matter of fact they could be star witnesses of the prosecution side, as they were the persons with whom initially there were altercation with the accused Sughar Singh, Nagendra Singh and Sahdeo Singh as per the prosecution version. Withholding of the said witness, for no rhyme or reason, further makes the prosecution story doubtful.

63. We may also record that there is faulty investigation in the present case because the pellets recovered from the body of the deceased, empty cartridge recovered from the place of occurrence and the crime weapon i.e. gun, which is alleged to have been used in commissioning of the alleged offence and has recovered from the brother-in-law of accused Ashok have not been sent for their chemical examination to the concerned Forensic Science Laboratory in order to establish that the pellets, empty cartridge and the gun were actually used in the commission of the alleged offence, which further creates a serious dent in the prosecution story and makes it doubtful.

64. We also take note of the judgment of the Apex Court in the case of **Ballu & Another Vs. State of Madhya Pradesh** reported in *2024 SCC OnLine SC 481***,** wherein it has been held that it is impermissible for the High Court to interfere with the acquittal unless trial court's view is perverse or impossible. The relevant portion whereof reads as follows:

"20. The High Court could have interfered in the criminal appeal only if it came to the conclusion that the findings of the trial Judge were either perverse or impossible. As already discussed hereinbefore, no perversity or impossibility could be found in the approach adopted by the learned trial Judge.

21. In any case, even if two views are possible and the trial Judge found the other view to be more probable, an interference would not have been warranted by the High Court, unless the view taken by the learned trial Judge was a perverse or impossible view.

22. In that view of the matter, we find that the judgment passed by the High Court is totally unsustainable in law."

65. After considering the facts and circumstances of the case, law laid down by the Apex Court referred to herein above and examining the findings recorded by the trial court in acquittal of accused-respondents Sughar Singh, Nagendra Singh, Sahdeo

Singh and Ashok @ Ranjit of all the charges levelled against them, we are in full agreement with the findings recorded by the trial court. The trial court has fully examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents can be legally sustained. The prosecution has not fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The acquittal of the accused-respondents, Sughar Singh, Nagendra Singh, Sahdeo Singh and Ashok @ Ranjit of all the charges framed against them, is consequently, affirmed.

66. Consequently, in view of the deliberations held above the Government Appeal filed on behalf of the State stands dismissed.

67. There shall be no order as to costs.

(2024) 5 ILRA 334
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 1809 of 1984

State of U.P. ...Appellant
Versus
Chandra Pal & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Prakash Gupta

Criminal Law-Indian Penal Code-1860-Sections 302/34)- Government Appeal against the impugned judgment and order whereby accused-Respondents acquitted for the charge under Section 302/34 I.P.C- Factum of conversation between the deceased and his wife is too far-fetched and is highly doubtful-Material inconsistency in the St.ment of the witnesses P.W.-1 & P.W.-2 regarding the catching hold of the victim, whether after the assault has been made by the knife or before inflicting the knife blow on the chest of the deceased-The testimonies of P.W.-1 and P.W.-2 assigning the role of catching hold qua accused-respondent the same has been St.d for the first time in court and not been disclosed to the Investigating Officer at the time of recording their St.ment under Section 161 Cr.P.C., which shows that there is a clear improvement in the St.ment of both the witnesses regarding the role of catching hold.

The scope of interference by an appellate court for reversing the judgment of acquittal recorded by the trial court in favour of the accused has to be exercised within the four corners of the following principles:- (i). That the judgment of acquittal suffers from patent perversity; (ii)That the same is based on a misreading/omission to consider material evidence on record; (iii)That two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

Government Appeal dismissed. (E-15)

List of Cases cited:

1. Darshan Singh Vs St. of Pun. (2024) 3 SCC 164

2. Gadadhar Chandra Vs St. of W. B.l (2022) 6 SCC 576

3. Ramashish Yadav & ors.Vs St. of Bihar (1999) 8 SCC 555

4. Sadhu Saran Singh Vs St. of U.P. (2016) 4 SCC 397

5. Harljan Bhala Teja Vs St. of Guj. (2016) 12 SCC 665

6. Rajesh Prasad Vs St. of Bihar & anr.Criminal Appeal No. 111113 of 2015 (SC)

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri J.P. Tripathi, learned AGA for the State/ appellant, Shri Ravi Pandey, holding brief of Shri Rahul Kumar Sharma, learned counsel for the accused-respondents and perused the record.

2. The instant government appeal has been filed against the judgment and order dated 20.03.1984 passed by Special Judge/ Additional Sessions Judge, Aligarh in Sessions Trial No. 291 of 1983 (State of U.P. Vs. Yad Ram and 3 Others), arising out of Case Crime No. 96 of 1983, under Section 302 IPC, Police Station Sasani, District Aligarh, by which the accused-respondents have been acquitted for the charge under Section 302 read with Section 34 IPC.

3. During the pendency of the said government appeal, accused-respondent no.2 Hira Lal has already passed away on 06.03.2005 and as such, the instant government appeal qua accused-respondent no.2 Hira Lal has been abated and now, it survives only for accused-respondent no.1 Chandra Pal.

4. The prosecution story as unfurled in the FIR is that a litigation regarding partition of land was pending between the first informant Lala Ram, Raghubir and Ram Prasad, on one hand and Chandra Pal, Hira Lal, Yad Ram and Babu, on the other.

5. It is further alleged that on the joint land, a grove of mango and guava, measuring 16 bigha, was under the control and use of Yad Ram, Babu, Chandra Pal and Hira Lal, whereas on the joint land, measuring 10 bigha, there was another grove, which was in the possession and use of the first informant Lala Ram and his nephew Raghubir (Deceased).

6. It is further alleged that on 14.04.1983 at about 8:00 AM, Lala Ram alongwith his son Ganga Saran and Leela and his nephew Raghubir were present in the grove, where Yad Ram, armed with knife and Babu, armed with lathi, Chandra Pal and Hira Lal, who were unarmed, reached the grove and asked the first informant Lala Ram and his nephew Raghubir as to why they are keeping a watch on the grove and started hurling abuses. In the meantime, Hira Lal and Chandra Pal caught hold of his nephew Raghubir. Babu, who was armed with lathi, exhorted Yad Ram to kill Raghubir, who poses to be very arrogant, consequent thereto, Yad Ram, with an intention to kill Raghubir, assaulted him with a knife blow below his left armpit in the chest. On the alarm being raised, all the four assailants ran away towards Champa Bagh. After some time, his sons Dalbir and Karan Singh also reached the place of incident and took the injured Raghubir on a cot towards Government Hospital, Sasani, where Raghubir succumbed to his injuries.

7. On the basis of the said allegations, a written report, which has been proved and marked as Exhibit Ka-1, was scribed by one Satya Dev, which was taken to the Police Station Sasani and handed over to the Head Moharrir Ram Swaroop Singh, who, on the basis of said written report, lodged a first information report, which has been proved and marked as Exhibit Ka-16, corresponding G.D. entry of which was drawn vide G.D. Report No.14, which has been proved and marked as Exhibit Ka-17.

8. After registration of the first information report, the investigation of the said case was entrusted to S.I. Ram Murti Yadav, who was present at the Police Station. He reached the spot and prepared the inquest report alongwith other relevant documents, including photo lash, challan lash, chitthi R.I., chitthi C.M.O. and sealed samples, which have been proved and marked as Exhibit Ka-11 to Exhibit Ka-13. The investigating Officer also collected the blood-stained earth and plain earth from the place of incident and kept it in a container and prepared its fard recovery memo, which has been proved and marked as Exhibit Ka-14. Thereafter, the corpse was wrapped in a cloth by preparing sample seal and thereafter, dispatched the dead body for the post-mortem. An autopsy was conducted on the person of the deceased by Dr. G.P. Varshney (PW-4). The Doctor has noted following injuries on the person of the deceased :-

(i). Stab wound 1" x 1/2" x cavity deep on the left side of chest in axillary line, 5" below and downward to left nipple. Dry blood sticking to the wound and on chest side.

(ii). Abrasion 1/4" x 1/4" on the inner side of left leg, 6" below knee joint.

In the opinion of the Doctor, the death was due to shock and haemorrhage, as a result of ante-mortem injuries mentioned above.

9. The Investigating Officer thereafter collected the relevant material and after recording the statement of the witnesses and concluding the investigation, submitted charge-sheet against the accused persons, which has been proved and marked as Exhibit Ka-10. On submission of the said charge-sheet, learned Magistrate had taken cognizance, however, since the case was exclusively triable by the court of Sessions, committed the case to the court of Sessions, where it was registered as Sessions Trial No. 291 of 1983 (State of U.P. Vs. Yad Ram and 3 Others).

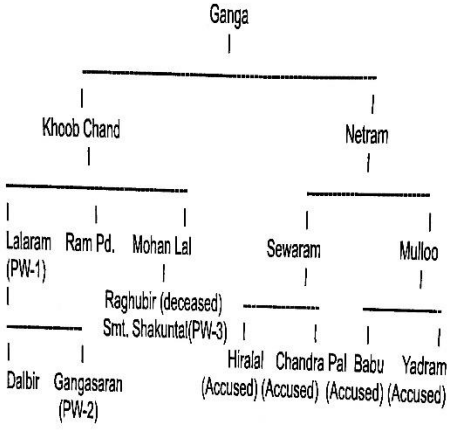
10. The trial court thereafter framed the charges under Section 302 read with Section 34 IPC against the accused-respondents and the said charges were read out to them, who abjured the charges, did not plead guilty and claimed to be tried.

11. In order to prove the guilt against the accused persons, the prosecution examined as many as six witnesses; Lala Ram (PW-1), Ganga Saran (PW-2) and Smt. Shakuntala (PW-3), wife of the deceased Raghubir as witnesses of fact, while PW-4 Dr. G.P. Varshney was the Medical Officer, who conducted the post-mortem, PW-5 S.H.O. Vijay Singh, the second Investigating Officer, PW-6 S.I. Ram Murti Yadav, being the first Investigating Officer and PW-7 Constable Brij Mohan, who proved the first information report alongwith its corresponding G.D. entry.

12. After recording of the entire evidence, the statement of the accused persons was recorded under Section 313 CrPC and thereafter, the trial court vide impugned judgment and order dated 20.03.1984 has acquitted both the accused persons, against which, present government appeal has been filed with the prayer to reverse the acquittal of the accused-respondents and to convict them for the offence charged with.

13. In order to appreciate the controversy, in question, involved in the present government appeal, it would be apt to discuss the statement of the witnesses, in brief, recorded during the course of trial.

14. PW-1 Lala Ram is the uncle of the deceased as well as first informant of the case. From his testimony, we find that the first informant as well as accused-respondents belongs to one and the same family and their inter-se relationship is quite clear.



15. PW-1 has further stated that about seven months back at about 8:00 AM, he alongwith his son Ganga Saran (PW-2) and his nephew Raghubir were present at their grove, where accused persons Yad Ram, Chandra Pal, Babu and Hira Lal came. Accused Babu was armed with lathi, Yad Ram was armed with knife, whereas Chandra Pal and Hira Lal were empty handed. Accused persons Chandra Pal and Yad Ram questioned him as to why they are keeping a watch over the grove, to which, Raghubir replied that they are the owner of the grove and therefore, they are keeping a watch over it, consequent to which, accused persons started hurling abuses. Meanwhile, accused Babu asked Yad Ram that Raghubir is posing to be very arrogant, then Chandra Pal and Hira Lal held his nephew Raghubir by his hands and Yad Ram inflicted a knife blow and ran away. On alarm being raised, the assailants threatened him by flashing his knife and made their escape good towards Champa Bagh. The said knife blow was given at the instigation of Babu. After accused persons had left the place of incident, Smt. Shakuntala Devi, wife of the deceased Raghubir, also reached there. Thereafter, Dalbir and Karan Singh reached the place of incident and there was some conversation between Raghubir and his wife Shakuntala. The injured Raghubir thereafter was kept in a cot and taken to the hospital, however, he succumbed to his injuries and then, he was brought to the Police Station, where the first information report was scribed by one Satya Dev, which was read out to him and thereafter, the first information report was registered.

16. During cross-examination, he stated that when Yad Ram reached the place of incident, he was having a knife in his pocket, however, he had not disclosed this fact to the Investigating Officer. He further stated that he had seen Yad Ram taking out the knife from his pocket, the blade of which was five inch long. He further stated that when Hira Lal and Chandra Pal caught hold of Raghubir, he did not expect that they would quarrel with them to this extent. The victim tried to get released. Yad Ram gave only one knife blow to the deceased but did not attempt the second blow and ran away towards Champa Bagh and thereafter, Shakuntala reached at the spot. He further stated that he had disclosed to the Investigating Officer in his statement under Section 161 CrPC about the factum of reaching of Shakuntala at the place of incident but could not state as to why the Investigating Officer had not mentioned the said fact in his statement. He further denied the suggestion that incident took place in the dark and further denied the suggestion that he has not witnessed the incident and Raghubir was killed by some unknown

person and that he was not present at the time of incident.

17. PW-2 Ganga Saran is the son of PW-1 Lala Ram. He, in his testimony, has stated that on the fateful day at about 8:00 AM in the morning, he alongwith his father Lala Ram were present in the grove, where Chandra Pal, Hira Lala, Babu and Yad Ram came and started hurling abuses. The deceased Raghubir stated that they are keeping a watch over the grove and the grove belongs to them, on which, Babu instigated to kill him by the knife as he poses to be very arrogant. He further stated that Hira Lal and Chandra Pal were empty handed, whereas Babu was armed with lathi and Yad Ram was armed with a knife. Yad Ram gave a knife blow to the deceased. Hira Lal and Chandra Pal then held him by his hands. The knife blow hit him below the left armpit in the chest. After inflicting the knife injury, they ran away towards Champa Bagh, thereafter, Shakuntala, wife of the deceased Raghubir, reached there followed by Dalbir and Karan Singh.

18. During cross-examination, he stated that he alongwith Raghubir reached at the grove at 5:30 in the morning. After lodging of the report, the Investigating Officer had recorded his statement. He further stated that due to fear, he did not make any attempt to save the victim. When Yad Ram entered in the grove, the knife was in his pocket or in his hands was not seen by him. After Hira Lal and Chandra Pal caught hold of the victim, Babu exhorted to kill Raghubir, then Yad Ram took out the knife from his pocket and gave a knife blow. He further stated that before taking out the knife from the pocket, he had not seen it, however, he has not touched Raghubir. On being questioned, if he, in his statement to the Investigating Officer, had disclosed the fact that after the knife blow, the victim was speaking or not, to which, he replied that "he was already dead". He had further denied the suggestion that he had not seen the incident and before his reaching at the grove, Raghubir was dead.

19. PW-3 Smt. Shakuntala Devi is the wife of the deceased Raghubir. She, in her statement, has categorically stated that she was going from her house to give the food to her husband and had seen Yad Ram, Babu, Chandra Pal and Hira Lal running away from the place of incident towards Chamba Bagh. She further stated that on questioning, her husband informed her that Chandra Pal and Hira Lal caught hold of him and Yad Ram at the instigation of Babu, inflicted a knife blow to him.

20. During cross-examination, she stated that it is wrong to state that she had not seen Chandra Pal, Babu, Yad Ram and Hira Lal running away from the place of incident and that there was no conversation with her husband. She further denied the suggestion that incident had taken place in the dark and she is falsely implicating the accused persons.

21. PW-4 Dr. G.P. Varshney is the Medical Officer, who had conducted an autopsy on the person of the deceased, who had noted the injuries and the post-mortem examination report has also been proved by him, which has been marked as Exhibit Ka-2.

22. During cross-examination, he stated that injury no.2 could be caused by fall and the injury No.1 was sufficient in the ordinary course of nature to cause death.

23. PW-5 S.H.O Vijay Singh is the second Investigating Officer. Earlier, the

investigation was done by PW-6 S.I. Ram Murti Yadav, however on 24.04.1983, he had taken over the investigation and interrogated one of the accused persons. He collected the relevant documents relating to copies of Khasra and Khatauni and had sent the blood-stained earth and plain earth for the chemical examination and after concluding the investigation, submitted the charge-sheet.

24. PW-6 S.I. Ram Murti Yadav is the first Investigating Officer and in whose presence, the first information report was registered at 9:15 AM on 14.04.1983. He conducted the inquest on the person of the deceased and prepared the other relevant papers and thereafter, despatched the dead body for the post-mortem.

25. During cross-examination, he categorically stated that PW-1 Lala Ram in his statement under Section 161 CrPC did not disclose. To quote :- लालाराम ने मुझे निम्नलिखित ब्यान नहीं दिया "इस पर मृतक रघुवीर ने कहा कि बाग हमारा है हम रखायेगें। न ये बयान दिया कि मृतक का एक हाथ चन्द्रपाल मुल्जिमान ने पकड़ा व एक हाथ हीरा लाल मुल्जिम ने पकड़ा" न यह ब्यान दिया। लाला राम ने मुझे यह भी नहीं बताया "कि मौके पर शकुन्तला मुल्जिमान के जाने के बाद खाना लेकर आई थी।"

"रघुवीर मृतक व उसकी बीवी की बातचीत हुई थी। मुझे यह भी ब्यान नहीं दिया। चारपाई चम्पा बाग से लाये थे।"

"गवाह नं० 2 यानी गंगा शरण ने भी उपरोक्त सारी बातें अपने ब्यान में नहीं बताई थी।"

26. PW-7 Brij Mohan is the Constable, who has proved the chik FIR and the corresponding G.D. entry, which was drawn by Head Moharrir Ram Swaroop Singh at the relevant date and time, however, he has not been cross-examined.

27. Learned AGA for the State/appellant has submitted that evidence of P.W.1 Lala Ram and P.W.2 Ganga Saran coupled with medical evidence would show that the prosecution has proved its case beyond all reasonable doubt, yet the trial court, on the basis of surmises and conjectures, has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

28. Learned AGA has further submitted that from the evidence adduced during the course of trial, it is proved beyond all reasonable doubt that the accused-respondent Chandra Pal in furtherance of the common intention with all the accused, has committed the instant offence and therefore, he is liable to be convicted under Section 302 read with Section 34 IPC, however, the trial court completely misjudged the evidence on record and has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

29. Per contra, learned counsel for the accused-respondents has submitted that trial court has appreciated the material and evidence available on record in right perspective. He has further submitted that from the entire evidence adduced during the course of trial, the role of catching hold assigned to the accused-respondents, is highly doubtful, which is further fortified from the circumstance that role of "catching hold" assigned to the accused-respondent Chandra Pal has been stated for the first time in court by P.W.1 Lala Ram and P.W.2 Ganga Saran and they had not disclosed the said factum to the Investigating Officer, who recorded their statements under Section 161 Cr.P.C. and as such, there is clear improvement in the statement of P.W.1 Lala Ram and P.W.2 Ganga Saran qua the role of catching hold assigned to the accused-

respondents, which makes their testimony highly unreliable and creates serious dent in the prosecution story as held by the trial court in the impugned judgment and order, which finding is just, proper and legal and do not call for any interference.

30. Learned counsel for the accused-respondents has further submitted that Section 34 of IPC qua accused-respondent is not attracted in the present case. He has further submitted that prior concert or pre-arranged plan to kill the deceased has not been established and only act assigned to the accused-respondent is of catching hold, which too is highly doubtful. It was co-accused Babu, who had exhorted the co-accused Yad Ram to kill the deceased and on his exhortation, Yad Ram had given a knife blow to the deceased causing his death.

31. Learned counsel for the accused-respondents has further submitted that accused-respondents were unarmed and from the testimony of P.W.1 Lala Ram and P.W.2 Ganga Saran, it is borne out that accused-respondent Yad Ram suddenly took out the knife from his pocket and gave a single knife blow to the deceased, which was not within the knowledge of the accused-respondent and thus, it is urged that by no stretch of imagination, Section 34 of IPC would be applicable to the accused-respondent and the finding recorded by the trial court in this respect is just, proper and legal and do not call for any interference.

32. Having considered the rival submissions made by the parties and having gone through the record, we find that the instant case was a result of dispute between the two parties, who were relatives amongst themselves, over the control and use of the grove, Accused persons reached at the place of incident and started hurling abuses and thereafter, it is alleged that accused-respondents Hira Lal and Chandra Pal caught hold of the deceased Raghubir by his hands and on the exhortation of co-accused Babu, accused Yad Ram gave a knife blow to the deceased Raghubir on his chest causing his death.

33. In support of its case, the prosecution has produced P.W.1 Lala Ram and his son P.W.2 Ganga Saran to be the eye-witnesses of the incident. It is further stated that after the incident of assault, when the assailants had run away, Smt. Shakuntala Devi, wife of the deceased Raghubir, also reached there and had a conversation with the deceased Raghubir.

34. When we go through the testimonies of PW-1 Lala Ram and PW-2 Ganga Saran, we find that presence of PW-3 Smt. Shakuntala Devi, wife of the deceased Raghubir, at the time of incident is highly doubtful, which finds corroboration from the fact that PW-1 Lala Ram, in his statement under Section 161 CrPC, has not disclosed to the Investigating Officer about the presence of Smt. Shakuntala at the time of incident.

35. Further, the testimony of PW-3 Smt. Shakuntala Devi that her husband had a conversation with her is falsified from the statement of PW-2 Ganga Saran, wherein, on being questioned as to whether he had disclosed to the Investigating Officer, that the victim was speaking after being inflicted with a knife blow, to which, he stated that he had already died. To quote :- "प्रश्न- क्या आपने दरोगा जी को अपने ब्यान में यह बात बताई थी कि चाकू लगने के तुरन्त बाद बोलता था या नही? उत्तर- वह तो मर गया था।"

36. Even from the statement of PW-4 Dr. G.P. Varshney, who had conducted the

post-mortem, it is clear that after receiving the said injury, a man may become unconscious and looking to the nature of the injury caused to the deceased, we are of the opinion that factum of conversation between the deceased Raghubir and his wife Smt. Shakuntala Devi is too far-fetched and is highly doubtful. Even P.W.-6 S.I. Ram Murti Yadav, in his cross-examination, has categorically stated that neither P.W-1 Lala Ram nor P.W.-2 Ganga Saran had disclosed to him that there was a talk between the deceased and his wife. To quote: "लालाराम ने मुझे यह भी नहीं बताया कि मौके पर शकुन्तला मुल्जिमान के जाने के बाद खाना लेकर आई थी रघुवीर मृतक व उसकी बीबी की बातचीत हुई थी। मुझे यह ब्यान भी नही दिया था। गवाह नं० 2 गंगाशरण ने भी उपरोक्त सारी बाते अपने ब्यान में नही बताई थी। "

37. Thus, from the said statement, it is evident that the presence of P.W.-3 Smt. Shakuntala Devi at the time of incident is highly doubtful. Her testimony, in the backdrop of the said circumstance, is not worth credence and in our opinion, she is a wholly unreliable witness and rightly discarded by the trial court.

38. Now, coming to the testimony of P.W.1 Lala Ram and P.W.2 Ganga Saran, we find that they are father and son and highly partisan and interested witnesses and related to the deceased also. Even, as per the statement of P.W.-1 Lala Ram and P.W.-2 Ganga Saran, the only role assigned to the accused-respondents is that of catching hold. Even, while assigning the said role, there is apparent inconsistency in their statements. As per the statement of P.W.-1 Lala Ram, accused Chandra Pal along with Hira Lal, first of all caught hold of the deceased by his hands and thereafter, on the exhortation of Babu, Yad Ram gave a knife blow to the deceased. To quote: "बाबू मुल्जिम ने यादराम से कहा देख क्या रहा है यह बहुत हेकड़ बन रहा है और एक हाथ रघुबीर मृतक का चन्द्रपाल मुल्जिम ने पकड़ा और एक हाथ हीरा लाल मुल्जिम ने पकड़ा। याद राम ने रघुवीर के चाकू मारा और फिर यह भागे हमने हल्ला गुल्ला मचाया। इस पर हमे चाकू दिखाते हुये कहा कि खत्म कर देंगे। यह चारो लोग चम्पा बाग में भाग गये। यह चाकू बाबू के कहने से मारा था।

39. While, P.W.-2 Ganga Saran, in his examination-in-chief, has stated that "बाबू ने कहा मार दो साले को चाकू यही दम में दम भरता है। हीरा लाल व चन्द्र पाल खाली हाथ थे बाबू पर लाठी थी और यादराम पर चाकू था।

यादराम ने चाकू मार दिया हीरा लाल और चन्द्र पाल ने मृतक रघुवीर के हाथ पकड़े। चाकू बाई बगल के नीचे लगा। चाकू मारने के बाद ये लोग चम्पा बाग की तरफ भाग गये।"

40. Thus, from the statement of P.W.2 Ganga Saran, it is borne out that on the exhortation of Babu, Yad Ram had given a knife blow to the deceased Raghubir, whereas Chandra Pal and Hira Lal were empty handed and after the assault by a knife, they are said to have held the victim by his hands.

41. Thus, there is material inconsistency in the statement of P.W.-1 Lala Ram and P.W.-2 Ganga Saran regarding the catching hold of the victim, whether after the assault has been made by the knife or before inflicting the knife blow on the chest of the deceased.

42. Furthermore, the role assigned to the accused-respondents of catching hold is falsified from the statement made by P.W.-6 S.I. Ram Murti Yadav, Investigating Officer, wherein it has been categorically stated that " लालाराम ने मुझे निम्न लिखित ब्यान दिया " इस पर मृतक रघुवीर ने कहा कि बाग हमारा है। हम रखायेंगे। न यह ब्यान दिया था कि मृतक का एक हाथ चन्द्रपाल मुल्जिम ने पकडा व एक हाथ हीरा लाल मुल्जिम ने पकड़ा। लालाराम ने मुझे ये भी नही बताया था कि मौके पर शकुन्तला, मुल्जिमान के जाने के बाद, खाना लेकर

आई थी। गवाह नं०2 गंगासरन ने अपने ब्यान में ये सारी बात नही बताई थी। ”

43. Thus, from the said testimonies of P.W.-1 Lala Ram and P.W.-2 Ganga Saran assigning the role of catching hold qua accused-respondent Chandra Pal is concerned, it is evident that the same has been stated for the first time in court and has not been disclosed to the Investigating Officer at the time of recording their statement under Section 161 Cr.P.C., which shows that there is a clear improvement in the statement of both the witnesses P.W.-1 Lala Ram and P.W.-2 Ganga Saran regarding the role of catching hold assigned to the accused-respondent Chandra Pal, which makes their testimony highly doubtful and unreliable.

44. The Hon’ble Apex Court in a recent decision reported in (2024) 3 SCC 164 Darshan Singh Vs. State of Punjab, has held that if the prosecution witnesses fail to mention in their statement under Section 161 Cr.P.C. about the involvement of an accused, their subsequent statement before the court during trial, regarding involvement of that particular accused cannot be relied upon and, similarly, prosecution cannot seek to prove a fact during trial through eye-witness, which such witness had not stated to police during investigation and, thus, evidence of that witness regarding the said improved fact is of no significance as in the present case, which we have discussed above.

45. In the light of the principles laid down by the Hon’ble Apex Court in the aforesaid decision, we are of the opinion that role of catching hold assigned to the accused-respondent Chandra Pal is highly doubtful as rightly held by the trial court and his participation in the incident as alleged in the prosecution story becomes highly unreliable and not worth credence.

46. Now, only question, which is left for our consideration is whether in the facts and circumstances of the present case, accused-respondent Chandra Pal can be convicted under Section 302 with the aid of Section 34 IPC as submitted by the learned AGA for the State.

47. It is well settled principle of law as held by the Hon’ble Apex Court in the case reported in (2022) 6 SCC 576, Gadadhar Chandra Vs. State of West Bengal, wherein it has been held that the common intention pre-supposes prior concert, it requires meeting of minds, a pre-arranged plan before a man can vicariously be convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused.

48. Now, applying the said principle of law, as laid down by the Hon’ble Apex Court in the case of Gadadhar Chandra (Supra), we find that from the testimonies of P.W.-1 Lal Ram and P.W.-2 Ganga Saran, it is clearly borne out that they were unarmed and both the aforesaid two eye-witnesses P.W.-1 Lala Ram and P.W.-2 Ganga Saran in their statement has categorically stated that Yad Ram at the time of assaulting the deceased, suddenly took out the knife from his pocket and gave a knife blow to the deceased after being exhorted by the co-accused Babu. Even, the role of exhorting Yad Ram to kill Raghubir has not been assigned to him, rather only role of catching hold the victim by his hands is alleged to be made against them. In support of which, there is material inconsistency in the statement of two eye-witnesses P.W.-1 Lala Ram and P.W.-2 Ganga Saran, as to whether they held the deceased after the knife blow

was given to the deceased or held him before the knife blow was given, which has already been discussed above.

49. Thus, from the attending facts and circumstances of the case and the settled principle of law laid down by the Hon'ble Apex Court, we find that the accused-respondent Chandra Pal at the relevant point of time, did not have the common intention to cause the death of the deceased and therefore, in our opinion, he has rightly been acquitted by the trial court, which order, in our opinion, is just, proper and legal and do not call for any interference, more so, by reversing the acquittal.

50. Moreover, the Hon'ble Apex Court in the case reported in (1999) 8 SCC 555 Ramashish Yadav and Others Vs. State of Bihar, has held that for common intention, prior concert of meeting of minds is essential. Even, if an offence is committed at the spur of the moment, prior concert must be there. Merely because two persons had held the deceased while other two, had given gandasa blows to the deceased, it cannot be held that the two persons, who had held the deceased, shared common intention with the other two, to murder the deceased. Even, on the aforesaid principles of law laid down by the Hon'ble Apex Court, the accused-respondent, in our opinion, is entitled for acquittal.

51. It is well settled principle of law that there is a presumption of innocence in favour of the accused-respondent Chandra Pal, which further has been concretised by recording the finding of acquittal against the accused-respondents.

52. The law with regard to interference by the appellate court is very well crystallized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments, which are as reproduced below:-

(i). In the case of Sadhu Saran Singh Vs. State of U.P. (2016) 4 SCC 397, the Hon'ble Apex Court has held that:-

"In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction in law to review and re-look the entire evidence on which the order of acquittal is founded."

(ii). Similarly, in the case of Harljan Bhala Teja Vs. State of Gujarat (2016) 12 SCC 665, the Hon'ble Apex Court has held that:-

"No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open far the appellate court to express the

right conclusion after re-appreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused."

53. The Hon'ble Apex Court in Criminal Appeal No. 111113 of 2015 (Rajesh Prasad Vs. State of Bihar and Another) has encapsulated the legal position covering the field after considering various earlier judgments and held as under:-

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415].

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:-

(i) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(ii) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(iii) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(iv) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

54. Thus, it is beyond the pale of doubt that the scope of interference by an appellate court for reversing the judgment of acquittal recorded by the trial court in favour of the accused has to be exercised within the four corners of the following principles:-

(i). That the judgment of acquittal suffers from patent perversity;

(ii). That the same is based on a misreading/omission to consider material evidence on record;

(iii). That two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

55. The appellate court, in order to interfere with the judgment of acquittal, would have to record pertinent findings on the above factors, if it is inclined to reverse the judgment of acquittal rendered by the trial court.

56. In our opinion, the trial court has passed a well reasoned and detailed order, which, in view of settled principle of law regarding reversal of acquittal, needs no interference by this Court. The view taken by the trial court cannot be said to be perverse, impossible and illegal and as such, present Government Appeal filed by the State has no force and is accordingly dismissed.

57. Let a copy of this judgment and order be forwarded to the court concerned alongwith trial court record for information and necessary compliance.

(2024) 5 ILRA 345
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 3433 of 1985

State of U.P. ...Appellant
Versus
Hariprasad & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
N.K. Saxena, Rakesh Kr. Verma

Criminal Law-Indian Penal Code-1860-Sections 307 - The Arms Act-1959-Section 25 - The Code of Criminal Procedure, 1973-Section 313 & 378-- Government Appeal against the judgment and order whereby the accused-respondents have been acquitted of all the charges- Police constables were in plain dress and not in police uniform at the time of alleged incident and were armed with 12 bore guns and not with their rifles as alleged in the F.I.R which adversely effects the very genesis of the prosecution story that the police personnels had gone to discharge their picketing duties in the village- Victim-deceased being in plain clothes is further fortified from the inquest report wherein it has been pointed out that the investigating officer has not found any clothes on his person.

Accused-respondent Lal Diwan suffered pellet injuries on his person and his injuries has been proved by D.W.-2, however the prosecution has miserably failed to tender any explanation in respect of the said injuries received by Lal Diwan-Pellets injuries could not be caused by a rifle shot- Testimony of the pocket witnesses of the police cannot be said to be of impeccable nature-The St.ment of the accused u/s 313 Cr.P.C. cannot be read in evidence so as to convict him

Appeal Dismissed. (E-15)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar & anr.

2. H.D. Sundara & ors. Vs St. of Karn.

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Sri Arun Kumar Pandey, learned AGA assisted by Sri Kamlesh Kumar Nishad, learned brief holder for the State-appellant and Sri Sanjeev Kumar Khare, learned counsel for the accused-respondents.

2. The instant Government Appeal has been filed against the judgment and order dated 4.9.1985 passed by 4th Addl. Sessions Judge, Hamirpur in Session Trial No. 246 of 1978 (State Vs. Halkey and 3 others) arising out of Case Crime No. 120 of 1978, under Section 307 IPC, Case Crime No. 121 of 1978, under Section 25 Arms Act and Case Crime No. 122 of 1978, under Section 25 Arms Act, by which the accused-respondents have been acquitted of all the charges framed against them.

3. During pendency of the said appeal, accused-respondent No. 1 Har Prasad had passed away, as such the instant government appeal qua appellant No. 1 has been abated vide order dated 10.12.2021 passed by this Court. Now the appeal survives only in respect of accused-respondent No. 2 Lal Diwan.

4. Shorn of unnecessary details, the prosecution case as unfurled in the first information report dated 15.8.1978 is that one Ali Hasan, police constable of Police Station Rath, District- Hamirpur has lodged a first information report based on the recovery memo, wherein it is alleged that on the fateful day, he alongwith constable Suresh Singh and constable Krishna Swaroop had set out for picketing duty after getting issued one rifle alongwith 30 cartridges each. After completing the picketing duty in village Galiha they proceeded towards village-Mawai, however as soon as they crossed the boundaries of village-Galiha and reached near the canal culvert, they were informed by the informer that Halkey Darji of village- Akauna alongwith his companions, armed with illegal weapons is proceeding towards village-Mawai. Believing the said information, they picked up three witnesses, Shri Chandra, Jhagru and Maheshwari, who were sitting on the culvert alongwith informer proceeded towards village-Mawai. As soon as they reached near the grove of Aadhar at about 6 p.m., the miscreants, who were sitting in the grove stood up. The informer pointed towards them to be the miscreants. The police party exhorting, proceeded further. In the meantime one of the miscreant fired a shot upon them and all the miscreants proceeded towards the east, however the shot fired by the miscreants narrowly missed the target. The police party tried to chase them, however again the miscreants, with an intention to kill them, resorted to firing, consequent to which, they in order to defend themselves also fired one shot from their respective rifles. In the meantime, one of the shot fired by miscreants hit constable Suresh Singh who after receiving injuries fell down. In the meantime, Har Prasad and Lal Diwan, who were having guns tried to escape towards Suklahari, whereas the other two miscreants, who were armed with gun and country made pistol ran towards Mawai, who were chased and two of the miscreants were apprehended, whereas other two miscreants armed with guns succeeded in running away. On interrogation, the arrested accused-persons disclosed their names to be Halkey son of Paltu, R/o Akauna and other name disclosed to be Narayan son of Gyasi, R/o Village-Kurra of Police Station- Rath. On their search being made, SBBL gun were recovered from the right hand of Halkey alongwith three cartridges and from the right hand of apprehended accused Narayan, a country made pistol of 12 bore was recovered alongwith two cartridges, which were taken in possession by the police and sealed in a bundle. On the basis of said recoveries, fard recovery memo was prepared and the injured constable was taken at the police station- Akauna. On the basis of said recovery memo, a first information report is said to have been lodged at police station- Rath, District- Hamirpur registered vide Case Crime Nos. 120, 121 and 122 of 1978 respectively under Section 307 IPC and 25 Arms Act, which has been proved and marked as Exbt. Ka-1. The Corresponding G.D. entry was also prepared vide G.D. Report No. 22 at 9.10 p.m., which has been proved and marked as Exbt. Ka-9 and 10.

5. Thereafter, the arrested accused persons were lodged in lock-up and the

investigation of the said case was entrusted to (P.W.-7) Gaya Prasad in whose presence the FIR was registered who thereafter set out for the place of incident alongwith Ali Hasan and recorded the statement of constable Ali Hasan and made spot inspection of the case and prepared its site plan, which has been proved and marked as Exbt. Ka-12. During spot inspection, the Investigating Officer recovered seven cartridges alleged to be fired by miscreants, which were taken in possession and prepared its recovery memo, which has been proved and marked as Exbt. Ka-13, however blood stained earth could not be taken as on account of heavy rain the blood had already been wiped out. On 20.8.1978 statement of S.O. V.K. Sinha was recorded who informed that the physical condition of constable Suresh is serious and he is admitted in Hallet Hospital, Kanpur. On 30.8.1978 statement of Shri Chand (P.W.-3) and Jhagru (P.W.-2) was recorded. On 30.8.1978, itself a death memo was received from the office of Deputy C.M.O., Kanpur informing about the death of injured constable Suresh, which was reduced in writing vide G.D. Report No. 9 at 8.55 a.m.

6. Thereafter, on the basis of said information, P.W.-4 Netrapal Singh, S.O. Police Station Swarup Nagar reached at the hospital and conducted the inquest on the person of the deceased and prepared the inquest memo, which has been proved and marked as Exbt. Ka-4. At the time of inquest other relevant documents including challan-nash, photonash, chitthi R.I., chitthi C.M.O. and sample sealed were prepared, which has been proved and marked as Exbt. Ka-5, 6 and 7. After conducting the inquest, the body was wrapped and sealed in a cloth and despatched for post-mortem.

7. An autopsy was conducted on the person of the deceased on 30.8.1978 at 4.50 p.m. and the doctor has noted the following injuries on the person of the deceased :-

1. Healing wound with granulation tissue on the dorsal aspect of the right forearm near the wrist 1.5 cm x 1 cm.

2. Healing wound with granulation tissue 1 cm x 0.75 cm on the dorsal aspect of right forearm 2 cm above injury no. 1.

3. Healing wound 1 cm x 1 cm with granulation tissue on right forearm on dorsal aspect 9 cm above injury no. 2.

4. Healing wound 1 cm x 0.75 cm of flexor aspect of right forearm 7 cm above the right wrist joint.

5. Healing wound 1 cm x 0.75 cm on flexor aspect of right forearm 8 cm above injury no. 4 with a scab.

6. Healing wound with granulation tissue on the right iliac chest 2 cm x 1 cm, 4 cm lateral to right anterior superior iliac spine on probing abdominal cavity deep directed from right to left and slightly upwards and backwards.

7. Healing wound granulation tissue 2 cm x 1 cm, 6 cm above & lateral injury no. 6, abdominal cavity deep directed from right to left and backwards.

8. Healing wound 2 cm x 1.5 cm with granulation tissue in the right hypo condition just below the costal margin in the anterior axillary line. Abdominal cavity deep directed backwards and medially.

9. Healing wound 1.5 cm x 1 cm with granulation tissue on right side lower part of chest 3 cm above and lateral to injury no. 8, directed backwards and medially muscle deep.

10. Healing wound 2 cm x 1.5 cm on right lumbar region back 4 cm, above the lumbosacral joint abdominal cavity deep directed from left to right, downwards and forward in direction to injury no. 6.

8. While making internal examination, the doctor has recovered three pieces of metallic pellets recovered from spine, one metallic pellet recovered from muscles of back in the para spinal region under injury No. 1 mesentery found stitched at several places with pieces of pus present, one and a half litre blood mixed with pus and faecal matter in the abdominal cavity. The cause of death has been noted to be septicaemia and toxemia as a result of injuries described.

9. On 01.9.1978 an information about the death of constable Suresh was received at the police station and the case was converted from Section 307 IPC to 302 IPC. After concluding the investigation and recording the statement of other relevant witnesses, charge-sheet was filed against all the accused persons on 8.10.1978 under Section 302 IPC and further against Halkey and Narayan a charge sheet was also filed under Section 25 Arms Act, which has been proved and marked as Exbt. Ka-14, 15 and 16. Relevant sanction for prosecuting Halkey and Narayan u/s 25 Arms Act was also obtained from the District Magistrate.

10. On submission of the charge sheet, learned Magistrate had taken cognizance and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial, where it was registered as Session Trial No. 246 of 1978 (State vs. Halkey and 3 others). The trial court framed the charges against all the accused-respondents under Section 302 read with Section 34 IPC on 07.09.1979 and further against Halkey and Narayan u/s 25 Arms Act. The said charges were read out and explained to the accused-respondents in hindi, who abjured the said charges, pleaded not guilty and claimed to be tried.

11. The trial court thereafter recorded the statement of seven witnesses, out of them P.W.-1- Krishna Swaroop, P.W.-2 Jhagru and P.W.-3- Shri Chand are the witnesses of fact, whereas P.W-4- Netrapal Singh, P.W-5- Shyam Swarup, P.W-6- Narayan Das Dwivedi and P.W.-7- Gaya Prasad are the formal witnesses. The Court has also recorded the statement of C.W-1- Shyam Lal Dixit, C.W-2- Ram Sajivan Singh and C.W-3- S.K. Shukla. The accused-respondents in their defence produced D.W.-1- Balak Ram Pandey and D.W.-2- Narottam Kumar.

12. To appreciate the entire evidence and material brought on record during the course of trial it would be apt to discuss in brief the statement of the witnesses.

13. Krishna Swaroop (P.W.-1) is the constable and member of the police party. He, in his statement has stated that on 15.8.1978, he was posted as constable in police station- Rath. Constable Ali Hasan and constable Suresh Singh were also posted at the said police station. At about 4.10 p.m. pursuant to G.D. Report No. 15, they had set out from the police station for picketing duty of village- Galiha. After completing their picketing duty in village-Galiha, they had proceeded towards village-Mawai and when they reached near the culvert of the canal, an information was given by an informer that the gang of Halkey Darji armed with illegal weapon is coming from Mawai. Jhagru (P.W.-2), Maheshwari (not examined) and Shri Chand (P.W.-3) were also sitting on the culvert, who were asked to accompany them as witnesses towards Mawai.

14. It is further stated that when they reached near the grove of Adhar at about 6 p.m., four miscreants were found sitting in the grove, who were pointed out by the informer. The miscreants also saw them and immediately resorted to firing, who were

chased. The miscreants with an intention to kill continued the firing, as such they, who were three in numbers, also opened fire from their respective rifles and fired one shot each. The shot fired by the miscreants, hit constable Suresh Singh and he fell down. The miscreants were chased and two of the miscreants Halkey and Narayan present in the Court were arrested, however Lal Diwan and Har Prasad made their escape good towards village- Suklahari, who were armed with guns. From the possession of Halkey, a 12 bore DBBL gun alongwith live cartridges and from the possession of Narayan, a 12 bore country made pistol alongwith cartridges were recovered. The recovered articles were taken in possession and its fard recovery memo was drawn, which has been proved and marked as Exbt. Ka-2 and thereafter injured constable Suresh was brought at the police station on a cot and an FIR was registered on the basis of fard recovery memo on 15.8.1978. The arrested accused Halkey and Narayan were lodged in lockup. However on 30.8.1978 Constable Suresh died in Hallet Hospital, Kanpur.

15. During cross examination, he stated that on the fateful day they had set out for picketing duty at 4 p.m. and they had first reached village- Galiha and thereafter proceeded to Mawai. All the three constables were armed with rifles and none had 12 bore gun. They stayed in Galiha for about half an hour and then they were proceeding to Mawai, where the informer met them. They were in police uniform and not in plain clothes. The witnesses met on the culvert. The informer was not Asharfi and was not acquainted with Asharfi of Mawai. He further stated that prior to the day of incident, he had never visited Mawai. He further stated that he was not aware if there was parti-bandi between Asharfi and Har Prasad. It is wrong to state that information given by the informer was received at the bridge of the canal. He had disclosed to the investigating officer that when they reached near the bridge canal of Galiha, then informer met them. Where they met the informer witnesses were also sitting. The informer first saw the miscreants followed by them and when the informer pointed out towards the miscreants, then they saw the accused sitting there.

16. He has further categorically stated that the witnesses and the informer were unarmed. On exhortation, miscreants fired a shot and then ran away, however they could not see as to who amongst the miscreants fired, nor they could see if it was fired by a country made pistol or a regular gun. As soon as the miscreants fired, they were chased and in their self defence they also opened fire. The witnesses were chased for about 80-90 paces. The miscreants stopped ahead and again fired, which hit constable Suresh and then there was no firing. During this incident, no other villagers reached there and two miscreants ran away towards Suklahari and two miscreants towards Mawai. Two of the miscreants were arrested alongwith country made pistol and gun, which were taken in possession and it's fard recovery memo was prepared at the spot and weapons were sealed, however in the meanwhile constable Suresh was lying in an injured condition. Thereafter, they straightway went to the police station alongwith the recovered articles.

17. He has further stated that prior to the incident, he was not acquainted with Har Prasad and Lal Diwan of Mawai and never went to identify them, who themselves surrendered in the Court. He further denied the suggestion that there was enmity between police personal and Asharfi. The shot fired by them did not hit any of the

miscreants. He did not know if there was any enmity between Asharfi on one hand and Har Prasad and Lal Diwan on the other. It is wrong to state that Asharfi had taken them for encounter of Lal Diwan. It is wrong to state that they were in plain dress and armed with 12 bore gun and had gone to kill Lal Diwan. It is wrong to state that the fire made by them, hit Lal Diwan and he in his defence fired a shot. It is also wrong to state that by showing fake recovery from Lal Diwan and Har Prasad, the instant case has been cooked up.

18. Jhagroo (P.W.-2) is another eye witness of the incident. He has stated that he was acquainted with accused persons Har Prasad, Lal Diwan, Halkey and Narayan present in the Court. About two and a half years back, Suresh was murdered at about 7 p.m. At the relevant time, he was sitting on the culvert of the canal alongwith Shri Chand (P.W.-3) and Maheshwari, when three police constables alongwith an unknown person came and asked to accompany them for apprehending the miscreants and when they reached near the grove of Adhar the police constables exhorted, then the accused persons, who were sitting in the grove opened fire from the grove. Suresh Singh was hit by the fire, then police personnels also opened fire and miscreants tried to escape by running away, who were chased by the police personnels and two miscreants were apprehended who disclosed their names to be Narayan and Halkey. Lal Diwan and Har Prasad made their escape good but were identified. From the possession of Halkey, a gun was recovered alongwith cartridges, whereas from the possession of Narayan, a country made pistol alongwith cartridges were recovered, which were sealed in a bundle and the recovery memo was prepared.

19. During cross examination, the said witness stated that village- Mawai is situate at a distance of 3 'kos' from his village and two 'kos' from village-Galiha. P.W.-3 Shri Chand had taken him for the purpose of purchasing bulls and was staying there for the last 2-3 days but did not purchase any bull, however the said factum was not disclosed to the investigating officer. While he was sitting at the culvert, the police reached there. Three police personnels alongwith one unknown person had reached there. They were acquainted with the police constables and the other unknown person was “Asharfi of Mawai”. The said witness has further categorically stated that all three police constables were in plain dress and not in uniform. All the three constables were having 12 bore guns and were not having any rifle.

20. He further stated that he understands the difference between a rifle and a gun. From culvert they proceeded towards village-Mawai and when reached near grove of Adhar close to which, the well belonging to Lal Diwan is situate lying in his own chak, where he was present. As soon as they reached near the grove, Asharfi pointed out his presence and police personnel immediately opened fire on him. Lal Diwan received pellets injuries, who thereafter ran towards village-Suklahari. While he was running, the police personnels further made 2-3 fires. While running Lal Diwan in his self defence made a fire, which hit constable Suresh. Thereafter, immediately a cot was called and he was taken to the police station on the cot.

21. He further categorically stated that on the plain paper, his thumb impression was obtained. He further stated that he did not know that there was any enmity between Lal Diwan and Har Prasad on one hand and

Asharfi on the other. The said witness further categorically stated that from the side of the police, he earlier appeared as a witness in 2-3 cases and in case of State Vs. Balshan and State Vs. Param Lal, he has already deposed on behalf of the police and he cannot re-collect the other case, in which, he has been made a witness.

22. Shri Chand (P.W.-3) is the another eye witness of the incident and had stated that he was acquainted with the accused Har Prasad, Halkey, Narayan and Lal Diwan present in the Court but is not acquainted with constable Suresh, who has been done to death. About 2 ½ -3 years back at about 6 p.m., constable Suresh was done to death. At the relevant time, he was sitting on the culvert of canal near village- Galiha alongwith Jhagroo and another person of village-Galiha. At about 5.30 p.m., three police constables came and informed that Halkey alongwith some miscreants, who are coming, are to be apprehended, then they proceeded towards Mawai and when reached near the grove of Adhar, all four assailants were sitting there. Seeing the assailants the police constables exhorted then the assailants opened fire. The police personnel told him that Suresh has been hit, however he had not seen the assailants opening fire, then the police personnel chased the miscreants and apprehended Halkey and Narayan, however two other assailants made their escape good. On their search being made, a gun alongwith three cartridges were recovered from the possession of Halkey, whereas a country made pistol alongwith two cartridges were recovered from the possession of Narayan. On the basis of said recoveries, fard recovery memo was prepared and signed by the witnesses and then recovered material was sealed in a bundle and brought at the police station.

23. During cross examination, the said witness stated that 2-3 days prior to the incident, he was staying in Galiha accompanied with Jhagroo (P.W.-2), who had gone to visit their relatives and there was no specific reason for their stay. At the time of incident, apart from two of them, one another person was sitting at the culvert, however till date he could not know his name. He further stated that he did not disclose to the investigating officer that the 3rd person was Maheshwari Khangar of village- Galiha. He further stated that there were three police personnel alongwith unknown person, however he cannot state if the unknown person was Asharfi of village-Mawai. The said witness then pointed out towards the accused persons Har Prasad, Lal Diwan and stated that he is not acquainted with them as he had never seen them earlier and only after the incident, he had seen the accused persons in the lock up, because he was also involved in criminal case and was put in the lock up, where he had met the two assailants who disclosed their names to him. The police personnels took him towards south of the culvert. He further stated that he did not disclose to the investigating officer that at the relevant time Har Prasad and Lal Diwan of village-Mawai, who were armed with guns ran towards village-Suklahari and he cannot state as to how the investigating officer recorded his such statement. It is further stated that when they were sitting on the culvert the sun had not set and from there they reached the grove within half an hour.

24. He further stated that police personnels were not armed with guns but with rifles and that he understands the difference between a rifle and a gun. On the exhortation made by the police personnels miscreants fired a shot then police personnels fired. The first fire made by miscreants did not hit anyone. On the firing

made by police personnels, the miscreants did not run away but they also fired. The miscreants in the second round, made four fires but police did not made any fire. The police personnel fired upon the assailants only when they were sitting in the grove, however when the miscreants started running away, then the police personnel did not make any fire. He further stated that he had stated to the investigating officer that "when the miscreants proceeded towards the east, then they narrowly escaped by the firing and tried to chase them, the police personnels then in their self defence fired one shot each from their rifles, which is correct. The statement given today in Court that "while running police personnels did not open fire has inadvertently been stated by him. At the place of incident in all four fires were made. Three were made by police personnels and four by the miscreants. He was not accompanying Suresh who was 10-12 paces ahead of him. When firing was made in the grove then Suresh was not hit. He is not aware if any miscreants was hit by fire. When miscreants fired to run away, then Suresh chased them for about a furlong towards village Sukhlahari. Miscreants were at a distance of about 2 furlongs when the fire hit Suresh. The police was chasing the assistants while they were running away, then Suresh was hit by a fire. Two miscreants were running towards Mawai, whereas two other were running towards Suklahari. On Suresh being hit then a cot was called from Mawai and he was taken to the hospital.

25. It is further stated that when fire was made from the grove, then it was dark. As soon as the cot reached there, Suresh was immediately taken to the police station and he accompanied them at the police station. A paper was scribed at the police station which was signed by him. He further stated that prior to this incident, he has not been a police witness in any case, however he is an accused in a case under Section 307 IPC and also involved in two other cases. He further denied the suggestion that he had not seen the incident and under the pressure of the police, he is falsely deposing.

26. Netrapal Singh (P.W.-4) at the relevant time was posted as S.I. Swaroop Nagar, Kanpur and on 30.8.1978 had received a memo from the office of Deputy Chief Medical Officer, Kanpur informing about the death of constable Suresh Singh, which was registered vide G.D. Report No. 9 at 8.55 a.m. and proved and marked as Exbt. Ka-3. On getting the said information, he reached the Hallet Hospital and conducted the inquest on the person of the deceased and prepared the inquest report, which has been proved and marked as Exbt. Ka-4. Alongwith inquest report, he also prepared other relevant documents like photo-nash, challan-nash, chitthi R.I., chitthi C.M.O., which has been proved and marked as Exbt. Ka-5 to Ka-7 and thereafter sealed the dead body in a cloth and prepared sample seal and despatched the dead body for post-mortem examination.

27. During cross examination, he has categorically pointed out that at the time of inquest, the deceased was not wearing any clothes and his corpse was covered with a bed sheet, however he did not make any investigation as to where his clothes had gone, which the deceased was wearing at the time of incident.

28. Shyam Swarup (P.W.-5) is the medical officer, who conducted an autopsy on the person of the deceased on 30.8.1978 at Ursala Hospital, Kanpur and had noted the injuries, which has already been described above and need not to be repeated.

29. During cross examination, he stated that from the dead body, it appears that the victim was operated upon in some hospital, where he was admitted. As mentioned in the death memo alongwith the dead body, there is no injury report available on the file.

30. Narayan Das Dwivedi (P.W.-6) was the Head Moharrir at the relevant time in police station- Rath and on the basis of fard recovery memo, which has been proved and marked as Exbt. Ka-2, he had drawn the chik FIR, which has been marked as Exbt. Ka-9. Corresponding G.D. Entry No. 22 at 9:10 p.m., which has been marked as Exbt. Ka-10, has also been drawn and the FIR was registered under Section 307 IPC and 25 Arms Act. He has further stated that accused Halkey and Narayan were put in the lock up and recovered articles were kept in the malkhana and injured constable Suresh Singh was sent for medical examination. On 1.9.1978, an information was received about the death of constable Suresh Singh and, as such, case was converted form Section 307 IPC to section 302 IPC vide G.D. Report No. 29, which has been proved and marked as Exbt. Ka-11.

31. During cross examination, he stated that constable Suresh was brought at the police station alongwith constable Ali Hasan and constable Krishna Swarup. Accused Halkey and Narayan were also brought with them. After receiving injuries, Suresh Singh first reached at the police station and then was sent to the hospital. While preparing the G.D., clothes worn by constable Suresh Singh were not noted though his injuries were noted. It is wrong to state that his clothes were hidden. It is wrong to state that Halkey and Narayan were brought in the police station and put in the lock up and false case was registered against them.

32. Gaya Prasad (P.W.-7) is the investigating officer and at the relevant time was posted as S.I. Second at P.S. Rath and in his presence said case was registered, who was entrusted with the investigation of the said case. After recording the statement of Head Moharrir Narayan Das Dwivedi, he proceeded to the place of incident and after making spot inspection prepared the site plan at the pointing out of the constable Ali Hasan, which has been proved and marked as Exbt. Ka-12. During inspection of the site plan, he recovered seven cartridges said to be fired by the miscreants, which were taken in possession and its recovery memo was prepared, however blood stained earth was not taken in possession. Since due to heavy rains, no blood was found, which was wiped out. After concluding the investigation, P.W.-7 submitted the charge sheet on 8.10.1978.

33. During cross examination, he has stated that the said case was registered in his presence at the police station and at the time of incident, constables Ali Hasan and Krishna Swarup were present at the police station, however at the relevant time, he had not recorded their statements on account of constable Suresh being hit by fire arm. He also did not record the statement of victim Suresh as he was hit by firearm. The statement of other two police constable was also recorded on next day at Galiha. He further stated that S.O. V.K. Sinha, who had gone to the hospital alongwith constable Suresh and had taken the clothes, which he was wearing at the time of incident and drawn the fard recovery memo relating to constable Suresh however, the same is not mentioned in the case diary not the same is available in the Court file. Even what

clothes were taken in possession has not been recorded. He had also not seen the said clothes and even in the case diary, it has not been mentioned as to whether the clothes were police uniform or plain clothes.

34. He has categorically stated that he is not aware of the fact whether constable Suresh at the time of incident, was wearing plain clothes or was in police uniform as such the said clothes are deliberately being hidden. He further stated that about one year prior to the incident, he was posted at police station - Rath and several times visited village- Mawai. He was also aware of the fact that they were daggers drawn enmity and parti-bandi between Lal Diwan and Har Prasad on one hand and Asharfi on the other. He has further stated that P.W.-3- Shri Chand has stated to him that Maheshwari Khangar of village-Galiha was also present at the place of incident, extract of which, he has filed as Exbt. Kha-1. He has also filed the statement of P.W.-2 Shri Chand marked as Exbt.Kha-2.

35. Shyam Lal Dixit (C.W.-1) is the Head Moharrir posted at police station- Rath at the relevant time. He stated that he has brought Malkhana Register of the year 77 to 79. Two bundles of articles collected during the course of investigation is not available. Information in respect of which, was also given to the higher authority by making a note in the register. During cross-examination he further stated that it is wrong to state that the articles collected during the course of investigation, has deliberately been got misplaced as that would have adversely affected the case. The articles of other cases has also been misplaced.

36. Ram Sajivan Singh (C.W.-2) is the S.I. and at the relevant time, he was posted at police station- Rath and got the proclamation under Sections 82 and 83 Cr.P.C. against the co-accused Narayan, however since the said accused was absconding for the last 2-3 years and his whereabouts could not be known, as such the process issued against him was returned back to the Court. There is no chance of accused Narayan being arrested.

37. S.K. Shukla (C.W.-3) is the S.I. of Police Station- Rath, who is in his testimony, stated that on 20.3.1983, he was posted at Police Station- Rath and had received attachment/ warrant orders of accused Halkey and tried to serve it but since he had no moveable property, as such warrants/attachment proceedings could not be executed. He further stated that accused Halkey is absconding and there is no chance of his arrest in near future, as such the said two persons could not be tried.

38. After concluding the aforesaid evidence, the statement of the accused respondents were recorded under Section 313 Cr.P.C. by putting all the incriminating circumstances to them. In his statement recorded under Section 313 Cr.P.C., accused-respondent Lal Diwan stated that on 15.8.1978 at about 6 a.m., he was present at his chak, where a well is situate and at the relevant time he was getting his work done. Asharfi, Rameshwar, Loknath alongwith three unknown persons were with them. All were armed with weapons. After seeing they challenged him, as such he tried to run away. While running they fired a shot upon him, which hit him on his back, then another fire was made, which did not hit him. While running he turned and saw that the fire made by Asharfi hit him on his forehead and deltoid. In his defence he also fired a shot and then ran away. Number of fires were made on him, however they did not hit him. All the accused persons were having 12 bore

guns. Unknown persons were in plain dress. Kishore, Chandra Bhan and Raghunath were present at the place of incident. Subsequently, he came to know that his fire hit constable Suresh, who was in plain dress. After recording of his statement under Section 313 Cr.P.C. the accused-respondent entered into his defence and produced D.W.-1 Balak Ram Pandey and D.W.-2 Narottam Kumar as defence witnesses.

39. Balak Ram Pandey (D.W.-1) in his statement has stated that in the year 1978, he was posted at the Collectorate as Sawal Navees. On 19.8.1978, he had typed an application on behalf of Lal Diwan son of Gulam on his dictation, which is signed by him. The said application was read out to the Lal Diwan and thereafter his signature was obtained and given to him, which has been proved and marked as Exbt. Kha-1.

40. During cross examination, the said witness stated that he does not maintain any register for the application and further denied the suggestion that the said application has been typed subsequently by him by making it anti-dated i.e. 19.8.1978.

41. Narottam Kumar (D.W.-2) was the compounder in District Jail Hamirpur at the relevant time. He stated that the injury register dated 19.8.1978 has been brought by him. On the said date, Lal Diwan son of Gulam was medically examined by doctor S.N. Dixit at District Jail Hamirpur and in the said register, injuries of Lal Diwan has been noted by him in the hand writing of Dr. Dixit, a copy of which is being filed and marked as Exbit. Kha-9.

42. During cross examination, he stated that the duration of injuries cannot be pointed out by him nor could he state as to by which weapon the said injuries has been caused. Injured is not before him nor he is acquainted with him. Dr. S.M. Dixit is alive and posted at Baranabki. The accused subsequently appeared before the Court.

43. After recording the said evidence, the trial court acquitted the accused-respondents by holding that in the said incident, cross report has also been lodged by the accused-respondent Lal Diwan, which has been marked as Exbit. Kha-1, however the investigating officer did not make any investigation on the said application. He has also recorded the finding that the prosecution has not given any explanation of the injuries received by accused-respondent Lal Diwan. It has been further noted that the empty cartridges fired by the police were not produced before the Court nor the police uniform said to be worn by the deceased at the time of incident has been produced before the Court nor there is any mention of the same in the relevant G.D. Even at the time of conducting the inquest, no clothes were found on the person of the deceased and it has been stated by the investigating officer (P.W.-7) that he does not know if at the time of incident, constable Suresh Singh was in police uniform or in plain dress.

44. The trial court has further stated that P.W.-2 and P.W.-3 has admitted the fact that they are the pocket witnesses of the police. They deposed their evidence in several cases and as such, in the absence of any independent testimony, the testimony of P.W.-2 and P.W.-3, who are pocket witnesses of the police, cannot be relied upon. The trial Court has further placed reliance upon the testimony of P.W.-2, wherein in his cross examination, he has categorically stated that all the three police personnels were in plain clothes and were not having rifles but were armed with 12

bore guns. The said witness has further stated that when they reached near the grove of Adhar and Asharfi pointed out to the police that the person sitting near the well, is Lal Diwan, the police personnels opened fire causing pellets injuries to Lal Diwan, who ran away towards the village, then police personnels fired 2-3 shots more upon him. Lal Diwan in his defence also fired a shot, which hit Suresh Singh.

45. It is further pointed out in the testimony of Shri Chand (P.W.-3), wherein he has stated that he was not earlier acquainted with accused Har Prasad and Lal Diwan and had seen them only in the lock up after the incident and then for the first time their names were disclosed to him. When he was also detained in the lock up in another criminal case. In the backdrop of the said circumstances, the trial court has held that the prosecution has miserably failed to prove its case beyond reasonable doubt because from the statement of the witnesses, the factum of police party going on picketing duty and firing upon the accused persons in their defence is also not proved. Furthermore, the factum of police personnels going in plain clothes for their duty armed with 12 bore guns, creates serious dent in the prosecution story, which makes it highly doubtful, as such acquitted the accused respondent Lal Diwan of all the charges framed against him.

46. Being aggrieved and dissatisfied by the said order, the present government appeal has been filed.

47. Learned AGA on behalf of the State/appellant has submitted that the trial court has not appreciated the evidence and material on record in right perspective and on the basis surmises and conjectures, has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and liable to be set aside.

48. Learned AGA for the appellant has further submitted that from the testimony of P.W.-2 and P.W.-3, who were present with the police personnel at the time of incident, the prosecution story has been established beyond doubt against the accused respondent. Even P.W.-1 the police constable corroborated the prosecution story, however the trial court on the basis of surmises and conjectures has disbelieved their testimony and recorded the finding of acquittal, which is bad in law and liable to be set aside.

49. Learned AGA has further drawn the attention of the Court to the statement of accused-respondent Lal Diwan and has submitted that in his statement recorded u/s 313 Cr.P.C., accused-respondent Lal Diwan has clearly stated that "बाद में मुझे पता लगा कि मेरा फायर सुरेश सिपाही को लग गया है, जो सादा वर्दी में था।"

Thus, from the said statement, he had confessed that a shot fired by him hit the constable Suresh, who later died and thus on the said confession of the accused-respondent, he is liable to be convicted, however the trial court completely over looked it and has illegally recorded the finding of acquittal, which is bad in law and liable to be set aside.

50. Per contra, Sri Sanjeev Kumar Khare, learned counsel for the accused-respondents has submitted that the trial court has appreciated the entire evidence and material on record in right perspective and on the basis of evidence adduced the factum of police personnels going on picketing duty and opening fire upon accused-respondents in defence is not proved and, as such has

rightly acquitted the accused-respondents by extending benefit of doubt to them.

51. Learned counsel for the accused-respondents has further submitted that from the evidence adduced during the course of trial, P.W.-2 in his statement has clearly stated that all the three police personnels were in plain clothes and not in police uniform. Further all the three police constables were having 12 bore guns with them and not rifles. This clearly shows that the police personnel were not discharging their picketing duties and were not even armed with their rifles and fired upon the accused-respondents from their 12 bore guns, which hit the victims causing injuries. Thus, police personnels were not discharging their picketing duties rather had gone to encounter Lal Diwan at the instance of Asharfi as stated by the accused-respondent Lal Diwan in his statement recorded u/s 313 Cr.P.C., which finds corroboration from the evidence adduced by witnesses.

52. Learned counsel for the accused-respondents has further submitted that statement of P.W.-2 and P.W.-3 has rightly not been relied upon by the trial court in view of the fact that they themselves have admitted that earlier also in 2-3 cases they had deposed on behalf of the police and thus, they are the pocket witnesses of the police. Even P.W.-3 in his statement has stated that he is also involved in a case under Section 307 IPC and 2-3 other criminal cases. He, in his testimony, has further categorically stated that prior to the incident, he was not acquainted with the accused-respondents nor had ever earlier seen them but had for the first time seen them in the lock up. He categorically stated that after the incident he also had been in jail in a criminal case, where they met him and then their names were disclosed to him. Thus, from the said testimony, it is evident that both P.W.-2 and P.W.-3 are the pocket witnesses of the police and, therefore, they cannot be relied upon as rightly held by the trial court and, therefore, the finding of acquittal recorded by the trial court against the accused respondent is just, proper and legal and do not call for any interference by this Court.

53. Learned counsel for the accused-respondents has next submitted that the trial court has not relied upon the testimony of P.W.-2 and P.W.-3 being the pocket witness of the police, as such in the absence of the testimony of any reliable independent witness, the testimony of police constable P.W.-1, who is most interested and partisan witness cannot be relied upon more so on account of serious inconsistencies in his statement with P.W.-2 in material particulars, as such the finding of acquittal recorded by the trial court needs no interference by this Court and is liable to be upheld.

54. Having considered the rival submissions made by the learned counsel for the parties and appreciating the material on record, it is evident that in the instant case from the testimony adduced during the course of trial, it transpires that the police party though is alleged to have gone for picketing duty on the relevant date and time, however from the testimony adduced particularly that of P.W.-2, wherein he has clearly stated that :-

"तीनो सिपाही सादी पोशाक में थे पुलिस वर्दी में न थे। तीनों सिपाही 12 बोर बन्दूके लिए थे। राइफल नहीं लिए थे। राइफल व बन्दूक में फर्क जानते है।"

55. From the said testimony of P.W.-2 , it is evident that the police constables were in plain dress and not in police uniform at

the time of alleged incident and were armed with 12 bore guns and not with their rifles as alleged in the first information report, which circumstance creates a serious dent in the prosecution story and makes it wholly unreliable and adversely effects the very genesis of the prosecution story that the police personnels had gone to discharge their picketing duties in the village. The circumstance about the victim-deceased being in plain clothes is further fortified from the inquest report wherein it has been pointed out that the investigating officer has not found any clothes on his person. Even the Head Moharrir, who has drawn first information report, on the basis of fard recovery memo has clearly stated in his cross examination that constable Suresh Singh after receiving injuries was brought at the police station and then taken to hospital. While making G.D. Entry, the clothes of Suresh Singh has not been noted though his injuries has been noted. To quote :

"चोट लगने के बाद सुरेश सिंह पहले थाने आया फिर अस्पताल गया। जीडी में सुरेश सिंह के कपड़ो का इन्द्राज नहीं किया लिखने की आवश्यकता नही समझी सुरेश की चोटे दर्ज की थी।"

Further, Gaya Prasad (P.W.-7), the investigating officer in his testimony has further stated that :-

"मुझे यह जानकारी नही है का० सुरेश (मृतक) घटना के समय सादे कपड़े पहने था या पुलिस वर्दी पहने था इसलिए उन कपड़ो को जानबूझ कर छिपाया गया है।"

57. Thus, from the entire testimony, it is evident that memo for the recovery of clothes said to be prepared, has not been placed on record before the trial court. All the aforesaid circumstances creates a serious doubt about the factum that the police personnel at the relevant time were on picketing duty when the incident is said to have taken place as alleged by the prosecution, which factum creates a serious dent in the prosecution story and makes it highly doubtful as rightly held by the trial court.

58. It is further relevant to point out here that during the course of trial, it has been brought on record that in the said incident even accused-respondent Lal Diwan suffered pellet injuries on his person and his injuries has been proved by D.W.-2, which has been marked as Exbt. Kha-9, however the prosecution has miserably failed to tender any explanation in respect of the said injuries received by Lal Diwan, which further creates a serious doubt about the genesis of the prosecution story and makes it doubtful.

59. Furthermore, even the complaint lodged by accused-respondents, which has been exhibited as Kha-1, has also not been investigated by the investigating officer, which further creates serious dent in the prosecution story. It is further noticeable from the testimony of P.W.-2 and 3 that they are pocket witnesses of the police and are involved in other criminal cases and, therefore, also their testimony cannot be said to be of impeccable nature as rightly held by the trial court while recording the finding of acquittal against the accused respondent, which order in our opinion, does not suffer from any illegality or infirmity and is also affirmed by us.

60. Moreover, having carefully gone through the testimony of P.W.-2 and P.W.-3, we find material contradictions in their testimony particularly in respect of the clothes worn by the police personnel at the time of incident and the weapons they were carrying. P.W.-2 in his statement has categorically stated that police personnels were in plain clothes and were having guns in their hands while P.W.-3 stated that they

were in police uniform and armed with rifles with which the fire was made upon the victim causing injuries to him.

61. Further, when we go through the testimony, P.W.-2 he in his statement has categorically stated that Lal Diwan suffered pellets injuries on his person, which, in any manner, could not be caused by a rifle shot as stated by P.W.-3. Thus the material inconsistencies pointed above in the statement of P.W.-2 and P.W.-3 makes the prosecution story further doubtful as held by the trial court, while recording the finding of acquittal, which in our opinion do not require any interference by this Court at this stage.

62. We may further note that from the entire evidence adduced during the trial if we take a holistic view of the sequence of events in the instant case, we find that there has been daggers drawn enmity between accused respondent Lal Diwan on one hand and one Asharfi on the other, who is also stated to be present at the time of incident as per the statement of P.W.-2 Jhagru and it transpires that on account of the said enmity Asharfi, in order to settle personal scores with the accused respondent Lal Diwan had colluded with the police to eliminate him and in the said backdrop, on the fateful day had accompanied the police personnels, who are stated to be in plain dress and armed with guns had reached the grove of Aadhar and on pointing out of Asharfi identifying Lal Diwan the police personnels fired upon the accused respondent, who in order to save himself ran towards Sukhlahari and received pellet injuries and it is alleged that the accused respondent also resorted to firing which hit constable Suresh Singh who received injuries and later died in the hospital, however subsequently the police personnels in their defence cooked up a false prosecution case implicating the accused respondent to have killed the deceased Suresh Singh which in the backdrop of the entire facts and circumstances as led by the prosecution do not inspire much confidence and probablises the defence taken by the accused respondent which appears to be more truthful in the facts and circumstances of the case. Thus, we are of the opinion that in the instant case, the prosecution has not been able to prove its case beyond reasonable doubt against the accused respondent and he is entitled to benefit of doubt by recording the finding of acquittal, as also held by the trial court which finding in our opinion is just, proper and legal and do not call for any interference moreso by reversing the finding of acquittal, which we accordingly affirm. For better understanding of the discussion made above it would be apt to quote the statement of P.W.-2 Jhagru in regard to the aforesaid facts :-

" जब मै आया तो लाल दिवान उसी कुएं पर था। जैसे ही बगिया के पास पहुंचे तो अशर्फी ने कहा यही है और कहते ही पुलिस वालो ने उस पर गोली चला दी। लाल दिवान के छर्रे लगे थे। फिर लाल दिवान सुकलही गांव की तरफ भागा। भागते में पुलिस वालो ने फिर 2,3 फायर किया। उसी समय भागते मे अपनी वचत में लाल दिवान ने एक फायर किया। वही फायर सुरेश सिपाही को लग गया। "

63. Now coming to the arguments of learned AGA while relying upon the statement of accused-respondents under Section 313 Cr.P.C. wherein he had stated that "बाद में मुझे पता लगा कि मेरा फायर सुरेश सिपाही को लग गया है, जो सादा वर्दी में था।" which amounts to admission of the accused-respondent and on the said admission, he is liable to be convicted, however, when we go through the said statement, we find that it is highly vague and in admissible in evidence.

64. It is well settled principle of law that the statement of the accused u/s 313

Cr.P.C. cannot be read in evidence so as to convict him as it cannot be regarded as a substantive piece of evidence. Thus, we do not agree with the said submission of learned AGA in this behalf and his argument is liable to be repelled.

65. Now coming to the scope of reversal of acquittal in Govt. Appeal, we may say that the Hon'ble Apex Court in several of its decisions has laid down the principles governing the scope of interference by the High court in an appeal filed by that state for challenging the acquittal of the accused recorded by the trial court. This Court in the case of ***Rajesh Prasad v. State of Bihar and Another*** encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not distrub the finding of acquittal recorded by the trial court."

66. Further, in the case of ***H.D. Sundara & Ors. v. State of Karnataka*** this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -

"8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is

entitled to reappreciate the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

67. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

a) That the judgment of acquittal suffers from patent perversity;

b) That the same is based on a misreading/omission to consider material evidence on record;

c) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

68. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court.

69. In the light of above settled proposition of law when we go through the impugned judgment and order, we find that the trial court had given cogent and convincing reasons for recording the finding of acquittal against the accused-respondent and that the acquittal of the accused-respondent is plausible and justifiable view emanating from the discussion of the evidence available on record and does not suffer from any infirmity or perversity. Therefore, we are of the opinion that the impugned judgement and order passed by the trial court is just, proper and legal and do not call for any interference by this Court.

70. The present government appeal lacks merit and is accordingly **dismissed.**

71. Trial court's record be remitted back forthwith.

(2024) 5 ILRA 361
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 1807 of 2015
connected with
Matters Under Article 227 No. 1806 of 2015

State of U.P. & Ors. ...Petitioner
Versus
Smt. Kamla Negi & Ors. ...Respondents

Counsel for the Petitioner:
Dr. Madhu Tandon

Counsel for the Respondents:
K.K. Arora, Archit Mehrotra, Pankaj Rai

Civil law – Civil Procedure Code – Sections 47, 50, 51, 146 & 151 - O.9 - Rule13 - O.21 R.16, O.21 R.32, - Limitation Act, 1963 -

Article 135 - Decree holder was in possession of suit property, while in possession, had transferred said property to assignees, who were dispossessed by judgment-debtor/St., during pendency of second appeal against judgment and decree passed by trial court, affirmed in first appeal dismissing their suit for permanent injunction - The assignees of decree holder having a decree of perpetual injunction, dispossessed and execution case filed for restoration of possession - Judgment debtor didn't challenge ex parte judgment and decree - Filed a separate suit for permanent prohibitory injunction on basis of title, suit was dismissed on 24.01.2007, also first appeal was dismissed on 02.06.2008 and against which Second Appeal dismissed – Aforesaid orders challenged in SLP, dismissed on 16.09.2023 - Two execution applications being filed one after another, it would not vitiate execution proceedings, provided it is initiated within time - In the instant case, the executing court rejected the objection filed by judgment-debtors u/s 47 C.P.C., thereafter pass orders u/s 151 C.P.C. directing for Amin report regarding delivery of possession - Matter is remitted to decide afresh, in relation to performance of decree of perpetual injunction. (Para 21, 22, 23, 38, 50, 60)
Petition partly allowed. (E-13)

List of Cases cited:

1. Thazhapattathillath Krishnan Namboo-Diri Vs Thazhapattathillath Damodaran Namboodiri (died); AIR (KER)-2005-0-328

2. Dhani Ram Gupta Vs Lala Sri Ram; 1980 (2) SCC 162

3. Dwar Buksh Sirkar Vs Fatik Jali; ILR 26 Cal 250, 253, 254

4. Prabhakar Adiga Vs (2017) 4 SCC 97

5. Rajbahadur Yadav & ors.Vs Rizvi ESt.s & Hotels Pvt. Ltd.; 2014 (Suppl.) CCC 613 (Bombay)

6. Pentapati China Venkanna & ors. Pentapati Bangararaju & ors; 1964 SCC OnLine SC 250

7.Bandhu Singh Vs Kayastha Trading Bank; (1931) ILR 53 All 419

8. N.S.S. Narayana Sarma & ors. Vs Goldstone Exports (P) Ltd. & ors; (2002) 1 SCC 662

9. Kapoor Singh Vs Om Prakash; AIR 2009 P&H 188

10. Chakradhar Paital Deceased by LRs Vs Gelhi Bawa, AIR 2012 Ori 44

11. Ashok Kumar & ors. Vs Khyali Ram & ors; 2023 SCC OnLine Del 2882

12. Nanu Vs Ammalukutty Amma; 1962 KER LT 223

13. Arjun Singh Vs Mohindra Kumar; AIR 1964 SC 993

14. K.K. Velusamy Vs N. Palanisamy; (2011) 11 SCC 275

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

1. Heard Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Sanjay Kumar Singh and Sri Madhu Tandon, learned Standing Counsel for the petitioners and Sri K.K. Arora, learned counsel appearing for the decree holder-respondents.

2. The petition bearing No.1807 of 2015 under Article 227 arises out of an order dated 25.08.2014 passed by the executing court in execution case No.70 of 2010 directing for delivery of possession of the property in question to the assignees of the decree holder in performance of the decree of permanent prohibitory injunction affirmed in revision No.67 of 2014 whereas petition bearing No.1806 of 2015 arises out of an order dated 29.03.2014 passed by the executing court dismissing the misc. case under Section 47 C.P.C. instituted by the judgment-debtors/ State petitioners,

affirmed in revision petition No.66 of 2014. Since pleadings have been exchanged in petition No.1807 of 2015, the same is taken to be leading petition for the purposes of statement of facts and pleadings raised before the court below and before this Court with consent of learned advocates for the parties and thus both the petitions are being decided simultaneously.

3. Petitioners before this Court are the State of U.P. through District Magistrate, Moradabad, Sub Divisional Magistrate, Moradabad and Tehsildar of Tehsil Sadar district- Moradabad.

4. These petitions invoking supervisory/ superintending jurisdiction of this Court under Article 227 of the Constitution has been filed against the order passed by the Executing Court dated 19.03.2014 and 25.08.2014 in Execution Case No.70 of 2010 (Ashok Kumar Gupta & ors v. State of UP & ors) rejecting the objection filed by the State-petitioners and direction for parvana *bedakhli* inviting Amin report and the order dated 26.03.2015 passed by the Additional District Judge, Court No.5, Moradabad dismissing the two revision petitions of the petitioners against the above two orders.

5. Briefly stated facts as pleaded in the petition are that a suit being O.S. No.705 of 1992 instituted by one Smt. Kamla Negi for permanent prohibitory injunction in respect of suit property impleading the petitioners as defendants, came to be decreed *ex parte* against the petitioners. This *ex parte* decree was never appealed against and the State respondents have just preferred an application under Order IX Rule 13 of C.P.C. seeking recall of *ex parte* order but the same has remained pending consideration by the court concerned. Subsequently, the suit property came to be sold away by the plaintiff, Smt. Kamla Negi to Mr. Ashok Kumar Gupta and Rajiv Kumar (respondents) vide registered sale-deed dated 01.09.2003. It is Smt. Kamla Negi and these very respondents (subsequent purchasers) who instituted execution case for getting the *ex parte* decree for permanent perpetual injunction.

6. The plaint case as was set up by Smt. Kamla Negi in the suit was that suit property was owned by her father Late S.D Singh who executed a Will in her favour on 20.11.1968 and this is how this building in a dilapidated condition came to be owned by her which was later on repaired and improved upon by Smt. Kamla Negi, the plaintiff and her husband out of their own money and also got the electricity connection sometimes in the year 1985-86. It was claimed that earlier her husband, who was working in Tehsil department, was living in an official accommodation provided to him but when this building got renovated, he shifted in this building and the official accommodation of Nayab Tehsildar which he was occupying was handed over to Sukh Ram Singh. The necessity arose to institute a suit because the then Tehsildar Jitendra Bahadur Singh was envious of her husband and was insisting upon him to vacate the premises of official accommodation which her husband was earlier occupying and then ultimately sent notice on 02.11.1992 asking him to vacate the premises in question. It was also pleaded that later on at around 06.00PM on 03.11.1992, the staff of the Teshil came to the house of petitioner and tried to physically evict the plaintiff and her husband from the house. The petitioners (defendants in the suit) did file their written statement but failed to contest the case by ensuring appearance in their behalf and this

is how the suit continued *ex parte* since 28.08.1997 and got decreed accordingly on 26.11.1997. It is this decree that was put to execution.

7. Besides above, certain more facts had been pleaded by the contesting respondents in this case who were pursuing execution case that these State petitioners had also instituted a suit in respect of the property in question showing it to be a part of plot No.57 as adjacent to it plot No.56 was a government property recorded as women hospital.

8. The aforesaid suit instituted for permanent prohibitory injunction impleading Ashok Kumar and Rajiv Kumar Trehan was dismissed on merits on 24.01.2007. A regular civil appeal being Civil Appeal No.28 of 2007 preferred by the State (petitioners herein) came to be dismissed on 02.01.2008. Against the said order, a second appeal No.829 of 2008 was filed before this Court on the plea that substantial questions of law were involved but the Court declined to entertain the appeal and dismissed the same on 18.03.2010, against which Special Leave to Appeal (Civil) being CC No.14763 of 2012 was filed which was also dismissed by Supreme Court vide order dated 16.09.2013. It is pleaded also in the counter affidavit that two execution cases came to be filed: one being 10 of 2010 and other being 70 of 2010 arising out of same judgment and decree, dated 26.11.1997 passed in O.S. No.705 of 1992.

9. In the objection filed by the petitioners under Section 47 C.P.C., plea was taken that judgment and decree dated 26.11.1997 was inexecutable. A suit for perpetual injunction was instituted for the purposes of possession claimed by Smt. Kamla Negi and, therefore, the injunction was to be in personam. It is, thus, pleaded that decree for injunction on the basis of possession would operate inter se parties to the suit and upon any third party rights being created, the decree would not stand transferred to the third party automatically to be executed. It was pleaded, if parties seeking execution came in possession later then all the more execution application was not maintainable because it was a decree on the basis of possession of plaintiff. It was further pleaded that as a matter of fact, Smt. Kamla Negi was never in possession, therefore, even if the sale-deed was executed, the possession cannot be taken to have been transferred by Kamla Negi to these very respondents.

10. These very objections were opposed by Smt. Kamla Negi and other respondents taking the plea that false statements of fact have been made. An objection was also taken that if petitioners were in possession of the property and were claiming rights, then they would have succeeded in their original suit No.721 of 2003 which had been dismissed on merits upto the Supreme Court.

11. Thus, according to decree holders, all these objections were being taken to delay the execution of the decree and it was pleaded that Section 47 objection deserved rejection.

12. After hearing the parties to the execution case, upon Section 47 objection filed by the judgment debtors, it was held by the executing court that execution case was rightly filed and since the plaintiff was dispossessed during pendency of the second appeal before the High Court arising out of an unsuccessful suit filed by judgment-debtors, then the decree holder was entitled

to restoration of possession. The Court held that the objection raised under Section 47 of C.P.C. to resist the execution of the decree, was meritless and accordingly, rejected the same vide order dated 29.03.2014. After rejecting the objection, the executing court directed vide order dated 25.08.2014 to Amin Commissioner to submit a report on 02.09.2014 regarding status of the suit property and restoration of possession with the help of police force. This order came to be passed upon a miscellaneous application filed under Section 151 of C.P.C. Two revision petitions were filed against these two orders passed by the executing court that were admitted on 05.09.2014 as Civil Revision Nos. 66 of 2014 and 67 of 2014 and interim protection was also granted to the petitioners. However, both the revision petitions were ultimately dismissed on merits by the Court vide detailed common judgment and order dated 26.03.2015 holding that a decree of permanent injunction was executable by assignees in view of provisions contained under Order 21 Rule 16 of C.P.C. The Court did not find any merit in the argument raised on behalf of revision applicants-petitioners that in light of miscellaneous case being Case No.5/2009 registered under Order IX Rule 13 CPC seeking to set aside the *ex parte* judgment and decree, the execution of such *ex parte* decree be put on hold.

13. Assailing these two orders before this Court in these two petitions, the first argument advanced by learned Additional Advocate General was that execution application for a decree for permanent perpetual injunction was filed beyond the prescribed period under Article 135 of the Limitation Act. The second argument was that the execution of a decree could be made in the manner and method prescribed under Order 21 Rule 32 C.P.C. In other words, it had been argued that if specific provision providing for execution was there prescribed under Order 21 Rule 32 C.P.C., no order for restoration of possession could have been passed upon an misc. application filed under Section 151 C.P.C. The third argument advanced was that the injunction was always relating to the land of which the possession was continuing with the decree holder and with the transfer of land, possession if transferred and the decree of injunction was neither transferable nor enforceable by a third party.

14. It was argued by Sri Chaturvedi, learned Additional Advocate General that looking to the provisions contained under Order 21 Rule 32, only attachment of the property could have been made to ensure performance of decree on the part of judgment-debtor. Learned Additional Advocate General has relied upon judgment of Kerala High Court in the case of ***Thazhapattathillath Krishnan Namboo-Diri v. Thazhapattathillath Damodaran Namboodiri (died); AIR (KER)-2005-0-328.***

15. It was further argued by learned Additional Advocate General that the interpretation as had been made of the provisions contained under Order 21 Rule 16 C.P.C. by the Court sitting in revision under the order impugned was an erroneous one. The argument, therefore, was that execution case was not maintainable at the instance of assignees.

16. Yet another argument was that two execution applications were not maintainable at the same point of time being No.10 of 2010 and 70 of 2010 one by Smt Kamla Negi with assignees and other by assignees alone for execution of the same decree. It was also pleaded that *ex parte*

decree in respect of the government property was inexecutable as the trial court that had passed the judgment had no jurisdiction to try a suit of more than valuation of Rs.1 Lac.

17. Meeting the arguments, Sri Arora defended the orders passed by the executing court as well as court sitting in revision and contended that all these legal aspects had been dealt with in detail by the court sitting in revision more especially dealing with principle as contained under Order 21 Rule 32 C.P.C. read with Order 21 Rule 16 C.P.C. He had argued that assignees were equally entitled to get the decree of injunction executed. He had further submitted that as far as limitation to file execution case was concerned, in view of Article 135 of the Limitation Act, 1963 there ws no limitation for executing a decree of perpetual injunction. He had contended that though title as such was not declared by the executing court but since the decree was passed on the basis of possession, such a decree was executable.

18. On the question of application filed under Section 151 C.P.C., Mr. Arora argued that inherent powers contained under Section 151 C.P.C. are independent of all the provisions and in order to arrest any miscarriage of justice, the Court had been vested with such inherent power. On the question of restoration of possession, learned Advocate, Mr. Arora argued that for executing a decree of perpetual injunction, the executing court can put back into possession the decree holder, especially in the circumstances when it was established that decree holder was dispossessed by committing trespass at the end of judgment debtors. He had submitted that it was admitted position that during pendency of appeal before this Court arising out of OS. No.721 of 2023, that decree holders were dispossessed.

19. Besides above, additionally it had been argued by Mr. Arora that petitioners were non suited in their own suit for permanent prohibitory injunction filed by them on the basis of title and possession. This suit being No.721 of 2023 in respect of the same suit property, it did not lie in the mouth of the petitioners to suggest now that they were title holder of the property and therefore, they could have resisted execution of a decree of an earlier suit passed by the decree holder. He had argued that judgment of the trial court as well as court sitting in appeal arising out of Suit No.721 of 2003 was on merits and the High Court had very much dismissed the second appeal having found no substantial question of law to be arising. All these orders had come to be affirmed in Special Leave to Appeal by the Supreme Court and, therefore, now any claim in respect of the suit property in question by the petitioners, did not survive. He had also argued that there was no error apparent in the judgments passed by the executing court as well as the court in revision so as to warrant interference by this Court under Article 227 of the Constitution.

20. Having heard learned counsel for the respective parties and their arguments raised across the bar, I find following points to be arising for consideration by this Court:

(i) Whether execution in question of a decree upon an injunction was barred by time;

(ii) Whether subsequent purchasers/assignees could have maintained the execution case.;

(iii) Whether two execution applications were maintainable in respect of one decree; and

(iv) Whether in the face of the provisions contained under Order 21 Rule 32 C.P.C., the executing court was justified in invoking its inherent jurisdiction/power under section 151 C.P.C. directing for restoration of possession of the decree holders.

21. The above points are to be considered in light of admitted factual background of the case. Admitted fact was that the decree holder was in possession of the suit property and while in possession, had transferred property in question with possession to the assignees and it was assignees who were dispossessed by the judgment-debtor/State-petitioners during pendency of such second appeal against judgment and decree passed by the trial court affirmed in first appeal dismissing their suit for permanent injunction. This specific plea has been taken in paragraph 54 of the counter affidavit and which has not been specifically denied. This fact position also gets confirmed from the objections raised by the judgment-debtor that in execution case, an order for restoration of possession cannot be passed in favour of decree holder for a decree of perpetual injunction. It is also pleaded that land belonged to the State. This plea has been taken in paragraph 51 of the rejoinder affidavit filed in reply to paragraph 54 of the counter affidavit.

22. Thus, it is clear that the assignees of decree holder though having a decree of perpetual injunction and yet came to be dispossessed subsequently and that is how this execution case came to be filed for restoration of possession.

23. Yet another admitted position is that the State petitioners- judgment debtor did not challenge the *ex parte* judgment and decree in O.S. No.705 of 1992 passed on 28.08.1997. However, they chose to file a separate suit for permanent prohibitory injunction being O.S. No.721 of 2003 on the basis of title as per the records of Khatauni, which they had pleaded before the executing court also, but the said suit came to be dismissed on 24.01.2007 against which first appeal being Civil Appeal No.28 of 2007 was dismissed on 02.06.2008 and against which Second Appeal No.829 of 2008 also got dismissed by this Court. These orders passed by the trial court, court of first appeal and second appeal were all challenged in Special Leave to Appeal which also got dismissed on 16.09.2023 by the Supreme Court.

24. Thus, the judgment debtor lost their case not only for prohibitory injunction against the respondents but also failed to get the *ex parte* decree recalled.

25. In so far as first point (i) is concerned, the limitation for execution of any decree other than the mandatory injunction is prescribed in Article 136 of the Schedule of the Limitation Act, 1963. This Article 136 is reproduced hereinunder in its entirety:

Description of suit	*Period of limitation*	*Time from which period begins to run*
136. For the execution of any decree (other than a decree granting	*Twelve years*	*When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made*

a mandatory injunction) or order of any civil court.		*at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place.* ***Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation."***

26. From a bare reading of the aforesaid provision, it is clear from the proviso that an application for enforcement or execution of a decree granting a perpetual injunction, is not subjected to any period of limitation. There is no dispute between the parties to the execution case that the decree sought to be executed is in the nature of prohibitory perpetual injunction restraining the judgement-debtors from interfering with the possession of the plaintiffs qua the land in suit. It is this land in suit in respect of which the enforcement of injunction is sought by instituting the present execution case. It is admitted position of a fact that the assignees of the judgment-debtors who acquired possession in the year 2003 were dispossessed in the year 2008 by the State-respondents/judgment-debtors during pendency of their second appeal before this Court. The execution application was accordingly filed in the year 2010 so that the decree of injunction was violated in the year 2008 only and within two years' time, the execution case was filed.

27. Thus, there being no limitation to get the decree executed for perpetual injunction, I do not see any limitation coming in the way of the executing court in entertaining the execution case for execution of decree.

28. Coming to the point no. (ii) whether the transferee as assignees, the original decree holder could have maintained an execution case or not, the legal position again is very clear that once the property in suit has been transferred by an instrument of sale to a third party along with possession then such third party is entitled to get the decree enforced. Under Order 21 Rule 16 C.PC, a transferee can apply for execution of decree. Order 21 Rule 16 CPC for ready reference is reproduced hereinunder:

"16. Application for execution by transferee of decree.

Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree in transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed if, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided also that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one

of them, it shall not be executed against the others.

Explanation-

Nothing in this rule shall affect the provisions of Section 146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule."

(emphasis added)

29. Thus, the only requirement for the executing court is to hear the other side to whom the notice is sent besides the objections also. It is necessary to refer here 146 CPC at the same time which runs as under:

"146. Proceedings by or against representatives: *Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."*

30. A harmonious reading of the two provisions as contained under Order 21 Rule 16 and Section 146 of the C.P.C. would lead to a construction that any right created in the property by operation of law or by an instrument recognied under the law, would bind such party under the obligation arising out of such property and would hold entitled an assignee to all interest arising out of such property. Thus, if by sale of an immovable property duly registered as per requirement of law under the Transfer of Property Act, executed in favour of the party and that property is subject to a decree by a court of law, then such assignee/transferee would be bound by obligations attached to the property and also eligible to rights arising out of such property as recognised under law.

31. It is further interesting to note here that the sale-deed was executed in favour of the assignees in the year 2003 with the transfer of possession but forceful dispossession of these assignees took place in the year 2008 while the second appeal was pending before the High Court. It is also worth mentioning here that the execution application was initially filed by the original decree holder and the assignees and was registered as Execution Case No.10 of 2010.

32. In a judgment in the case of ***Dhani Ram Gupta v. Lala Sri Ram; 1980 (2) SCC 162***, the Supreme Court citing the judgment of Calcutta High Court in the case of ***Dwar Buksh Sirkar v. Fatik Jali; ILR 26 Cal 250, 253, 254*** held thus:

"the only provision in the Code referring expressly to the assignment of a decree is contained in Section 232, and that no doubt contemplates a case in which the assignee applies for execution. In such a case the Court may, if it thinks fit, after notice to the decreed older and the judgment-debtor, allow the decree to be executed by the assignee. If, however, there is an assignment pending proceedings in execution taken by the decree-holder, I see nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution. The recognition of the Court is no doubt necessary before he can execute the decree, but it is the written assignment and not the recognition which makes him the transferee in law. The omission of the transferee, if it was an omission, to make a formal application for execution, was merely an error of procedure and does not affect the merits of the case. ..... It is argued

for the respondent that the transferee's title was not complete as express notice of the transfer had not been given to the judgment-debtor. As already observed, the transfer, as between transferor and the transferee, is effected by the written assignment. If the judgment-debtor had no notice of the transfer and being otherwise unaware of it paid the money to the decree-holder, the payment was, of course, a good payment, and he cannot again be held liable to the transferee."

(emphasis added)

33. The issue whether injunction was enforceable by a third party and whether a decree of injunction would end with the land transferred to a third party has been raised on the principle that right to injunction with a person ends with that person extinguishing his rights in the property and does not get transferred to transferee or assignee.

34. Sri Chaturvedi, learned Senior Advocate had cited the judgment of Supreme Court in the case of ***Prabhakar Adiga v. (2017) 4 SCC 97,*** relying upon a maxim *"actio personalis moritur cum persona"*. The Court in that case had held that the maxim was not applicable because the decree was binding upon the heirs of the deceased-judgment debtor under Section 50 C.P.C. read with Order 21 Rule 32 C.P.C. The court there in that case gave a harmonious construction of Section 50 C.PC. read with Section 146 C.P.C. and Order 21 Rule 16 C.P.C read with Order 21 Rule 32 C.P.C. and held that legal representatives of judgment-debtor would be bound under Order 21 Rule 32 for the performance of decree. Section 50 arrests a situation from a decree getting frustrated if the judgment-debtor dies and, therefore, to meet that contingency, it has provided specific powers for execution of decree by legal representatives and heirs. The legal representatives and heirs may not be transferees strictu sensu but the transferees by virtue of transfer once stepped into the shoes of the vendor, therefore, whatever rights and obligations are there with the vendor become binding upon the vendees as well in view of Section 146 C.P.C.

35. In the case of ***Rajbahadur Yadav & ors v. Rizvi Estates & Hotels Pvt. Ltd.; 2014 (Suppl.) CCC 613 (Bombay)***, a Single Judge of the Bombay High Court dealt with various provisions of C.P.C. and held that it was not necessary for the decree holder to assign the decree in favour of the subsequent purchaser. The Court observed that subsequent purchaser who purchases the property in respect of which decree has been passed, acquires a right to execute the decree.

36. Reading down section 51(3) with Section 146 C.P.C., Order 21 Rule 16 C.P.C. and Order 21 Rule 32 (5) C.P.C., the Court has an ample power to get the decree executed in the manner it is required including power to ensure delivery of possession to dispossess the decree holder.

37. Therefore, in my considered view, the execution application by the transferee/assignees in the present case was maintainable. Point no.(ii) is decided accordingly.

38. So far as the point No.(iii) is concerned regarding two execution applications being filed one after another, whether it would vitiate the execution proceedings, I would hold that two applications would not vitiate the entire execution proceedings. In one execution application being No.10 of 2010 both the decree holder and the assignees/transferees

are party while in the second execution application being 70 of 2010, only assignees/transferees are applicants. In both the execution applications, State respondents/ judgment-debtors are party and the property is the same. When no new cause is shown in the subsequent application filed and they relate to the same decree merely because a subsequent application has been filed by assignees alone, it would not vitiate the execution proceedings provided of-course, the execution proceedings have been initiated well within time.

39. In the case of ***Pentapati China Venkanna & ors Pentapati Bangararaju & ors; 1964 SCC OnLine SC 250***, such an issue arose about two execution petitions filed being Nos.58 of 1953 and 13 of 1939. Though of course in that case, about the same property in suit, one execution was filed for one part earlier and for another part, execution case was filed subsequently but the property remained the same. The Court held that *a comparison of the two execution petitions shows that the parties are the same: the new parties added in the present execution petition are either the legal representatives of the deceased parties or the representative of a party who has become insolvent. In the present execution petition the decree-holders are not proceeding against any property against which they did not seek to proceed in the earlier proceeding; they only omitted some of the properties.* The Court distinguished the judgment of **Bandhu Singh v. Kayastha Trading Bank; (1931) ILR 53 All 419** *wherein the execution application was filed after 12 years and so was taken a fresh application to be barred by time but where both the applications relate to same subject matter of a decree, then subsequent application cannot be treated to be a fresh application and order can be passed thereupon. The second application was taken to be only continuation of earlier application. Vide paragraph 10, the Court held thus;*

"10. In this case, as we have pointed out, the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meantime of Section 48 of the Code. It is only an application to continue EP No.13 of 1939 which is pending on the file of the executing court."

40. In view of above, I do not find any error in the order passed by the executing court rejecting the objection of State respondents, the opposite parties in Execution Case No.70 of 2010 while the earlier execution application had remained pending. Thus, point no.(iii) is decided in favour of the respondents.

41. As far as the point no.(iv) for consideration is concerned, it is to be seen whether for execution of a decree for perpetual injunction, a restoration of possession could have been ordered or not. Order 21 Rule 32 C.P.C. is reproduced hereinunder:

"32. Decree for specific performance for restitution of conjugal rights, or for an injunction.

(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by

the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunctions been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation s it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or here, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

[Explanation: For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.]"

42. From the bare reading of sub-rule (1) of Rule 32, it is absolutely clear that a decree for an injunction is enforceable and for enforcing the same, vide sub-rule (2) of Rule 2 property can be attached. Even for satisfaction of decree, it can be sold out. Sub-rule (5) empowers the executing court to direct an act required to be done may be done, as far as the practicable. The explanation attached to the sub-Rule (5) states that the expression 'act required to be done' covers prohibitory as well as mandatory injunction.

43. In my considered view, the legislature has very consciously and rightly so in its wisdom empowered the executing court to get the performance of decree achieved, whatever manner it is feasible and possible. The intendment behind incorporation of sub-Rule (5) and the explanation attached to it is that even in the case of prohibitory or mandatory injunction, the Court has to ensure full satisfaction of the decree. In other words, the court has to ensure a decree does not go to waste. The attachment of the property, as has been argued by learned Additional Advocate General, does not warrant delivery of possession to the decree holder, appears to me a highly misplaced argument. The attachment of the property basically as contemplated under sub-rule (3) and directing for its sale by the court is intended only to ensure decree of specific performance of contract. This coercive measure, therefore, will ensure performance

of decree where a judgment debtor does not perform as per the decree for specific performance of contract. The legal position, therefore, would be that in the matter of mandatory/perpetual/prohibitory injunction, the Court can exercise power to direct for delivery of possession of the property by the judgment-debtor to the decree holder if he is dispossessed after the decree is passed in the suit.

44. In the case of ***N.S.S. Narayana Sarma & ors v. Goldstone Exports (P) Ltd. & ors; (2002) 1 SCC 662***, Supreme Court has very categorically held that any objection if raised as to the execution of a decree, has to be decided by the executing court to ensure that litigation finally ends in the matter of objections raised resisting possession by the judgment debtor. Supreme Court has discussed and laid down the scope of provisions contained under the Order 21 Rule 32 CPC and held that the executing court shall be dealing with all these issues relating to execution of the decree and the resistance to possession and their right to recover possession by the decree holder. The court observed that legislature has enacted the provision with a view to remove as far as possible technical objections of an application filed by an aggrieved party whether he is decree holder or any other person in possession of the immovable property in execution and has vested power with the executing court to deal with all questions arising out in the matter whether the court otherwise has jurisdiction to entertain a dispute in the nature.

45. In the case of ***Kapoor Singh v. Om Prakash; AIR 2009 P&H 188,*** a Division Bench of Punjab and Haryana High Court interpreted the provisions as contained under Order 21 Rule 32 CPC and held that *"in the event of violation of a decree for prohibitory injunction by way of dispossession of the decree holder by the judgment-debtors, the executing court has jurisdiction to restore possession in favour of the decree holder as cannot be compelled to file another suit. The contention of the learned counsel for the petitioners that sub-rule (5) with its Explanation has no application to a decree for prohibitory injunction therefore fails."*

46. Again, in the case of ***Chakradhar Paital Deceased by LRs v. Gelhi Bawa, AIR 2012 Ori 44***, the Court interpreted Sub-Rule (5) of Rule 32 thus:

"5. It is evident from Sub-rule (1) of Rule 32, as quoted above, that a decree of injunction, be it a mandatory injunction or a prohibitory injunction, may be enforced by detention of the judgment-debtor in the civil prison or by attachment of his property, or by both. No other specific mode of execution of an injunction decree has been provided for in the procedure. However, Sub-rule (5) of Rule 32 of Order 21, C.P.C. provides for enforcement of an injunction decree, which has not been obeyed by the judgment-debtor, directing the decree-holder or any other person to do the required act that will have effect of enforcement of such decree, at the cost of the judgment-debtor. This mode of enforcement can be directed by the Court in lieu or in addition to the other modes of enforcement prescribed under Sub-rule (1) of Rule 32.

6. Relying on the decision of this Court reported in ILR 1979 (I) Cuttack 474; Fakira Pradhan v. Urdhaba Pradhan, the learned Counsel for the petitioners submits that the manner of enforcement of an injunction decree in accordance with Sub-rule (5) of Rule 32 is limited only to a decree for a mandatory injunction and not prohibitory injunction. No doubt, the

aforesaid decision supports the contention of the learned Counsel for the petitioners. Placing reliance on the decisions of several other High Courts, this Court in the aforesaid case held as under:

"..... Sub-rule (1) of Rule 32 of Order 21, Civil Procedure Code, applies both to mandatory as well as prohibitory injunctions. Sub-rule (5) of Rule 32 on the language used Neutral Citation Number: 2023:DHC:3376 under Sub-rule (5) has been qualified by the words 'has not obeyed' and the rule says that in the event of disobedience of the injunction, the Court may, direct that the act required to be done may be done so far as practicable by the decree holder. This could only be a mandatory direction. A prohibitory direction would be not to do an act. A prohibitory injunction is a negative one restraining the defendant from doing a particular act. The difference between the two is obvious and Rule 32(5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions....."

7. The aforesaid interpretation of Sub-rule (5) of Rule 32 would not, however, hold good after the incorporation of the Explanation thereto by the Amendment Act of 2002. The Explanation has explicitly made it clear that the expression, 'the act required to be done' in Sub-rule (5) covers both prohibitory as well as mandatory injunction. In case, it is held that Sub-rule (5) with the Explanation will have application to the present case then the decision in Fakira Pradhan (supra), will have no application. Learned Counsel for the petitioners has submitted that the C.P.C. Amendment Act of 2002 will not apply to the present execution case in which the decree passed in the year 1995 is being sought to be executed. In this context, he has relied upon the decisions of the Apex Court, reported in 2007 (I) OLR (SC) 406, State Bank of Hyderabad v. Town Municipal Council and I (2007) CLT 541 (SC) : IX (2006) SLT 373 : (2006) 13 SCC 295 : AIR 2007 SC 663, Kamla Devi v. Kushal Kanwar. The first decision cited by the learned Counsel for the petitioners relates to amendment of pleadings in a suit filed in the year 1998 where the applicability of the proviso appended to Order 6 Rule 17, C.P.C. by the C.P.C. Amendment Act, 2002 which debars amendment of pleadings after commencement of trial of the suit unless the party is able to satisfy the Court that in spite of due diligence he could not have pleaded the new facts prior to the commencement of trial. It was held therein that the proviso will have no application to pleadings filed prior to the proviso came into force as Section 16(2)(b) of the 2002 Amendment Act so provides by way of repeal and saving. In the case of Kamla Devi (supra), it was held that a letters patent appeal which was filed prior to coming into force of the C.P.C. Amendment Act of 2002 that inserted Section 100-A prohibiting such appeal would be maintainable as Section 100-A has no retrospective application.

8. This execution case had been filed in 2009 when the judgment-debtors disobeyed the decree of permanent injunction by encroaching upon the suit land and dispossessing the decree holders. Explanation to Sub-rule (5) of Rule 32 of Order 21 C.P.C. came into force with effect from 1.7.2002 and this execution case having been filed after the Explanation came into force, Sub-rule (5) will have application and the decree of prohibitory injunction in question can be enforced by way of recovery of possession where the judgment-debtors have disobeyed the said decree. This Court also in the decision reported in (2006) (II) CLR 368, Sabitri Khuntia v. Ram Neutral Citation Number:

2023:DHC:3376 Avatar Modi, has held that a decree for prohibitory injunction can be executed taking recourse to Sub-rule (5) of Rule 32 by removing a cowshed raised by the judgment-debtors in violation of the decree. It is also held in the decision reported in AIR 2009 Punj & Har 188, Kapoor Singh v. Om Prakash, that in the event of violation of a decree for prohibitory injunction by way of dispossession of the decree holder by the judgment-debtors, the executing Court has jurisdiction to restore possession in favour of the decree holder, who cannot be compelled to file another suit. The contention of the learned Counsel for the petitioners that Sub-rule (5) with its Explanation has no application to a decree for prohibitory injunction therefore fails."

47. Following these judgments, very recently the High Court of Delhi at New Delhi in the case of ***Ashok Kumar & ors v. Khyali Ram & ors; 2023 SCC OnLine Del 2882*** held that executing court taking recourse to the provisions of sub-rule (5) of Rule 32 of Order 21 would entertain the complaint and the executing court was justified in issuing warrants of possession of the suit property while executing a decree of permanent injunction. In the case before Delhi High Court, the decree holders were not in possession and, therefore, the executing court issued a warrant for possession.

48. Thus, in view of above exposition of law, in my considered view, it cannot be held that the executing court cannot direct for delivery of possession of the suit property.

49. However, the question as to whether such power could have been exercised independently under Section 151 C.P.C. raises a serious issue even while the court has proceeded to reject the objection under Section 47 C.P.C. of the judgment-debtors. As I have already discussed above that sub-rule (5) of Rule 32 of Order 21 specifically provides procedure and method to ensure compliance of decree of prohibitory perpetual injunction and that being the specific provision contained in C.P.C., the Court should not be exercising power under Section 151 C.P.C. taking it as a substantive provision for the court to proceed independently.

50. The language of sub-rule (5) of Rule 32 is clear that court would be requiring the judgment-debtor to perform the decree and it is in the event judgment-debtor still denies to make necessary compliance then he can be arrested or the property can be directed to be attached for the decree holder. So therefore, an opportunity of hearing with an opportunity to perform the decree should be given to the judgment-debtor. Had the court followed this procedure after rejecting the objection under Section 47C.P.C., there would not have been any ground or plea available to judgment debtors to complain about. But in the instant case, I find that the executing court while on one hand rejected the objection filed by the judgment-debtors under section 47 C.P.C., immediately thereafter proceeded to pass orders under Section 151 C.P.C. directing for Amin report regarding delivery of possession.

51. It is true that at times if the executing court is there seized with the matter and misc. case is filed under section 151 C.P.C., may be it is filed separately under Section 151 C.P.C., the court in order to do substantial justice, may pass orders. But then it could not have by-passed the procedure prescribed for under sub-rule (5) Rule 32 Order 21. The judgment of the

Kerala High Court deals with the situation. The Kerala High Court in the case of ***Thazhapattathillath Krishnan*** (supra), cited an earlier judgment of that very court, Nanu v. Ammalukutty Amma; ***1962 KER LT 223***, wherein the Court had held thus:

"There were conflicting views expressed in various decisions of different High Courts as to the applicability of Order XXI Rule 32 in respect of decrees for prohibitory injunction. Some of the High Courts took the view that sub-rule (5) of Rule 32 of Order XXI cannot be invoked to enforce a decree for prohibitory injunction, while some other High Courts took the view that as in the case of decree for mandatory injunction, sub-rule (5) of Rule 32 of Order XXI can be invoked for enforcing prohibitory decrees as well. The statement of objects and reasons to the Code of Civil Procedure (Amendment) Act, 2002 makes the position clear that the Explanation to Rule 32 was added on the basis of the report of Law Commission and that this amendment is only clarificatory in nature. Therefore, there can be no doubt that sub-rule (5) of Rule 32 of Order XXI can be applied and used to enforce and implement even a decree for prohibitory injunction. With respect, I do not agree with the view taken by the Delhi High Court in AIR 1986 Delhi 297 and in AIR 1981 Delhi 85.

The Travancore Cochin High Court had taken the view that Section 151 can be invoked for enforcing a decree for perpetual injunction, in the decision reported in AIR 1954 TRA.CO.117 (supra)."

52. The judgment of the Supreme Court in the case of ***Arjun Singh v. Mohindra Kumar; AIR 1964 SC 993*** was distinguished on facts and circumstances of that very case citing that in that case Court had taken the view that specific provision in the Code of Civil Procedure being there jurisdiction under section 151 could not be invoked. The Kerala High Court held that though there was a specific provision and recourse to Section 151 C.P.C. could not have been taken but what were the provision is lacking to meet the particular contingency to get the decree enforced or order, court could not be rendered powerless by holding that inherent power under Section 151 would not be invoked.

53. In my considered view, there is no dispute regarding proposition of law as discussed by the Kerala High Court but it will depend upon facts of each case. The view taken by Kerala High Court cannot be taken as a general view to be made applicable as law in every case.

54. It is true that no court can be held to be powerless to remain passive spectator of violation of a decree even while execution case is pending. It is to be seen always whether the power was there and court failed to exercise that power to ensure performance of decree or there was no power and court could not have directed for performance of execution of decree but for section 151 C.PC. In the present case, the power was available to the executing court under sub-Rule (5) of Rule 32 of Order 21 C.P.C., but I do not see from the recitals of the order impugned passed by executing court on 25.08.2014 that any such step was taken prior to passing the order.

55. In ***K.K. Velusamy v. N. Palanisamy; (2011) 11 SCC 275,*** the Court has exhaustively dealt with the scope of Section 151 C.P;C. and vide paragraph 12 has held thus:

"12. The respondent contended that Section 151 cannot be used for re-

opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that Section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions (See : Padam Sen vs. State of UP-AIR 1961 SC 218; Manoharlal Chopra v. Seth Hiralal - AIR 1962 SC 527; Arjun Singh v. Mohindra Kumar - AIR 1964 SC 993; Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhay Lal - AIR 1966 SC 1899; Nain Singh v. Koonwarjee - 1970 (1) SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India - AIR 1976 SC 1152; Jaipur Mineral Development Syndicate v. Commissioner of Income Tax, New Delhi - AIR 1977 SC 1348; National Institute of Mental Health & Neuro Sciences v. C Parameshwara - 2005 (2) SCC 256; and Vinod Seth v. Devinder Bajaj - 2010 (8) SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is `right' and undo what is `wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted,

when such exercise is to meet the ends of justice and to prevent abuse of process of court."

(emphasis added)

56. From careful reading of the paragraph 12 above, it is clear that if the provision dealing with particular points/aspects, either expressly or by necessary implication exhausting the scope of power of the court or jurisdiction then that power may be exercised in relation to that matter and inherent power cannot be invoked.

57. Thus, the fundamental rule of judicial procedure is that when a provision is there and it prescribes for a power to be exercised in a particular manner then it should be exercised in that manner alone.

58. In view of above, the point No.(iv) stands partly decided in favour of the judgment-debtor, State-petitioners before this Court.

59. Thus, in view of above, petition filed as Matter under Article 227 No.1806 of 2015 directed against the order dated 29.03.2024 passed by the executing court and the order of the revisional court in Civil Revision No.66 of 2014 arising out of the same, dated 26.03.2015 is ***dismissed*** and the petition filed as Matter under Article 227 No.1807 of 2015 against order dated 25.08.2014 passed by the executing court upon misc. case filed under section 151 C.P.C. and the order of the revision court affirming the same, dated 26.03.2015 is hereby allowed. The order passed by the executing court dated 25.08.2014 and that of the revisional court are hereby set aside.

60. Matter is remitted to the executing court to be decided afresh in so far as performance of decree of perpetual injunction is concerned in terms of the provisions as contained under order 21 Rule 32 (5) read with Section 51(3) C.P.C. in accordance with law, as expeditiously as possible preferably within a period of three months from the date of production of certified copy of this order.

(2024) 5 ILRA 378
ORIGINAL JURISDICTION
CIVILL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 3470 of 2020

Jyoti @ Heera ...Petitioner
Versus
Omwati @ Sato & Ors. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Singh, Shreya Gupta

Counsel for the Respondents:
Siddhartha Srivastava

Civil Law – Civil Procedure Code,1908 – Section 9 - O. 8 - Rule 6-A - O. 20 - Rule 5- O. 20 R. 19 (1) and (2) - Limitation Act, 1963 - Section 14 - Petitioner instituted a suit for permanent prohibitory injunction - On suit property, relief claimed, valuation declared was Rs. 50 lacs - Respondent nos. 1 & 2 filed written St.ment, counter claim, valuation was declared at Rs. 16 lacs – Trial court dismissed the suit, decreed the counter claim of respondents - Petitioner filed first appeal before High Court, on the ground that valuation being Rs. 50 lacs, it executed the pecuniary limit of jurisdiction of District Judge which being only Rs. 25 lacs - Regarding decree of counter claim, petitioner preferred first appeal before District Judge – Objection by respondents on maintainability of appeal, on the ground that for purposes of jurisdiction, valuation

of suit will matter, therefore, appeal would lie before High Court - District Judge held that appeal not be maintainable in its court – Impugned order – Held, for purpose of payment of court fees, valuation of decreed counter claim will be relevant, but for purpose of jurisdiction so as to select a forum of appeal, valuation of suit would be relevant – Petition lacks merit, dismissed. (Para 2, 3, 11, 31)

Petition dismissed. (E-13)

List of Cases cited:

1. Cantonment Board Vs Shakuntala Devi, 2018 (5) ADJ 647

2. Jag Mohan Chawla & ors.Vs Dera Radha Swami Satsang & ors., (MANU/SC/0565/1996)

3. Ashok Kumar Singh Sengar Vs Om Prakash Chaturvedi, 2016 All. C.J. 1394

4. Govind Singh Vs Rajendra Prasad Gupta, 2018 All. C.J. 1941

5. Pampara Philip Vs Koorithottiyil Kinhimohammed, 2007 0 AIR (Ker) 69; 2006 0 Supreme (Ker) 680

6. Teofilo Barreto Vs Sadashiva G. Nasnodkar & Others, 2007 (3) Civil Court Cases 565 (Bombay)

7. Iqbal Banu Vs Ramesh & ors., 2018 LawSuit (Raj) 933

8. Kazi Syed Saifuddin Vs Kasturchand Abhayrajji Golchha, 2000 (4) BOMCR 582

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

1. Heard Ms. Shreya Gupta and Sri Ashish Kumar Singh, learned counsel for the petitioner as well as Sri Siddhartha Srivastava, learned counsel for the contesting respondents.

2. Briefly stated facts of the case are that plaintiff/ petitioner before this Court, instituted a suit for permanent prohibitory injunction being Original Suit No. 719 of 2010 and looking to the suit property and the relief claimed, the valuation declared was Rs. 50 lacs. In the said suit the defendant/ respondent nos. 1 & 2 filed their written statement as well as counter claim to which the valuation was declared at Rs. 16 lacs. There was never a dispute raised regarding valuation of the suit as well as the counter claim.

3. By common judgment and decree dated 26.11.2018 the trial court while dismissing the suit, decreed the counter claim of the defendant/ respondent nos. 1 & 2. Resultantly, petitioner preferred a first appeal before the High Court against the judgment dismissing his suit on the ground that valuation being Rs. 50 lacs, it executed the pecuniary limit of jurisdiction of District Judge which being only Rs. 25 lacs. First Appeal came to be registered as First Appeal No. 157 of 2019. In so far as the decree of the counter claim is concerned, the plaintiff/ petitioner preferred a first appeal before the District Judge. The defendant/ respondent nos. 1 & 2 took an objection as to the maintainability of the appeal on the ground that for the purposes of jurisdiction it is the valuation of the suit which will matter and therefore, the appeal would lie before the High Court and not before the District Judge. This objection was upheld by the District Judge, Bareilly under his order dated 13.03.2020 holding the appeal to be not maintainable in the court of District Judge on account of pecuniary limit of Rs. 25 lacs to exercise the jurisdiction. Thus, the Misc. Case No. 54 of 2020 was disposed of. It is this order which is under challenge before this Court.

4. It had been argued by learned counsel for the petitioner Ms. Shreya Gupta

that the learned District Judge had wrongly interpreted the relevant provisions of C.P.C. to hold that appeal would lie in a court having pecuniary jurisdiction for valuation of the suit. It was argued that a harmonious construction of the provisions contained under Order VIII Rule 6-A and Order XX Rule 19(2) of C.P.C. would lead to the conclusion that the counter claim for being treated as an independent suit for adjudication, therefore, its valuation would matter in choosing a forum for appeal arising out of the judgment of trial court. It is argued that Order VIII Rule 6-C itself provides that a counter claim cannot exceed the pecuniary limit of the jurisdiction of the court where the suit is pending.

5. So any counter claim with higher valuation would not lie before the concerned court trying the suit.

6. According to Ms. Gupta, therefore, the counter claim inviting an independent adjudication may be by way of common judgment by the trial court, would have to be taken as independent suit for all purpose including its valuation to chose a forum of appeal.

7. The next argument submitted was that Order XX Rule 19(1) and (2) of C.P.C. did not prescribe for regular appeals but for cases where the money decree was passed. It was also argued additionally, that Order XX Rule 19(1) of C.P.C. was only for the purposes of drawing a decree and not for providing a forum of appeal. According to her, the manner and method of drawing a decree has been the object for incorporating the relevant provisions under Order XX of C.P.C. by the legislature. According to learned Advocate Order XX Rule 1 and 2 of C.P.C. had nothing to do with Order XLI of C.P.C.

8. In support of her argument, learned counsel had relied upon the judgment of coordinate bench in the case of **Cantonment Board v. Shakuntala Devi, 2018 (5) ADJ 647,** a Supreme Court judgment in the case of **Jag Mohan Chawla & Others v. Dera Radha Swami Satsang & Others, Civil Appeal No. 8275 of 1996** (arising out of S.L.P. (C) No. 22254 of 1994 decided on 07.05.1996 (MANU/ SC/ 0565/1996).

9. *Per contra* Sri Siddharth Srivastava learned Advocate had submitted that provisions regarding counter claim to be decided like a suit came to be incorporated by way of inserting Rule 6-A under Order VIII vide amending Act No. 104 of 1976 and simultaneously vide same amending Act, Order XX Rule 19(1) and 19(2) also came to be amended incorporating the words and expression "or counter claim" at various places. Thus, according to him whether it was a decree in a suit instituted or in the event counter claim was allowed against the plaintiff, appeal arising out of such decree shall be subject to the same provisions as applicable in respect of appeals, if no counter claim had been set up. He has also drawn the attention of the Court to first proviso to sub rule (1) of Rule 6-A of Order VIII that counter claim exceeding the pecuniary limits of the jurisdiction of the Court where the suit was pending, shall not be entertained. Thus, according to him it was ultimately the valuation of the suit that would be a determinative factor for jurisdiction of a court whether decree in suit is challenged or decree in a counter claim of the same suit.

10. Learned counsel for the respondent Mr. Siddharth Srivastava has relied upon the judgment of coordinate bench of this Court in the case of **Ashok Kumar Singh Sengar**

vs. Om Prakash Chaturvedi, 2016 All. C.J. 1394, Division Bench of this Court in the case of **Govind Singh vs. Rajendra Prasad Gupta, 2018 All. C.J. 1941**. Judgment of Kerala High Court in the case of **Pampara Philip vs. Koorithottiyil Kinhimohammed, 2007 0 AIR (Ker) 69 = 2006 0 Supreme (Ker) 680; Teofilo Barreto vs. Sadashiva G. Nasnodkar & Others, 2007 (3) Civil Court Cases 565 (Bombay).**

11. Having heard learned counsel for the parties and having perused the records, pleadings raised, the order impugned, the relevant provisions of C.P.C. placed before me, I find the only issue to be, as to whether an appeal in the event of a decree passed by the trial court decreeing the counter claim would lie on the basis of valuation of counter claim or valuation of the suit. In order to appreciate the argument advanced by learned counsel appearing for the respective parties, it is necessary to reproduce the provisions as contained under Order VIII Rule 6-A of C.P.C. which is quoted herein below:

*"**6-A. Counter-claim by defendant.**--(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:*

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

(Emphasis added)

12. From the provisions as quoted above, it is clear that the defendant has been vested with a right to set up a counter claim to the claim set up in the plaint. Sub rule (1) of Rule 6-A is very clear that once the suit has been brought in by the plaintiff whether before bringing the suit or after bringing the suit, if the defendant has a cause of action to set up a counter claim against the plaintiff, he may do so. So, he need not file a separate suit but to set up a counter claim, obviously the purpose being same and the suit property being same.

13. Sub rule (2) clearly provides that if such counter claim is set up then it will be treated for the purposes of adjudication like a cross suit so as to enable the court to pronounce the judgment on its own merit independent of the merit of the claim set up by the plaintiff and so in these circumstances, sub rule (3) provides for the plaintiff to file a written statement to the counter claim. The counter claim thus, has been directed to be treated as a plaint and shall be governed by rules applicable to the plaints. This is perhaps the reason why it has been held repeatedly by the court that the counter claim cannot be by way of pleadings seeking amendment in the written statement.

14. Though a counter claim can be set up along with the written statement as a plaint case for the defendant but what is very interesting in the provision is the first proviso to sub rule (1). The proviso does not permit a counter claim to exceed the pecuniary limit of jurisdiction of the court. Obviously the jurisdiction of the court means where the suit has been instituted, so any counter claim, if it is to be tried as per rule 6-A, it is to be within the pecuniary limits as far as jurisdiction of the court is concerned where the suit is pending.

15. Now it is also necessary to go through the relevant provisions as contained under Rule 19 of Order XX and its sub rules. The Rule 19 of Order XX is reproduced hereunder:

*"**19.. Decree when set-off [or counter-claim] is allowed**.--(1) Where the defendant has been allowed a set-off [or counter-claim] against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.*

*(2) Appeal from decree relating to set-off **[or counter-claim].**--Any decree passed in a suit in which a set-off [or counter-claim] is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if not set-off [or counter-claim] had been claimed.*

(3) The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise."

(Emphasis added)

16. The heading of the rule 19 shows the words and expression "or counter claim" in caption and also so in sub rule (1) and (2). The caption part is linked to the amendment introduced in C.P.C. in these provisions vide amending Act No. 104 of 1976.

17. Interestingly rule 6-A of Order VIII is also inserted vide Amending Act No. 104 of 1976. This goes, therefore, to show clearly that legislature since was introducing a provision to enable the defendant in a suit to set up counter claim to be tried as an independent suit, wanted that appeal against the decree allowing the counter claim should be subject to same provisions as applicable to appeals arising out of the decrees in suit. Order XX talks of judgment and decree when to pronounce and how to pronounce. It also provides the format of the judgment and also to be signed by the Judge. Rule 5-A was also inserted in Order XX vide amendment Act No. 104 of 1976, which provides for the Judge while announcing the judgment in the event it is subject to appeal to inform the parties, as to the court to which the appeal lies and also the period of limitation for filing such appeal and also shall place on record the information so given to the parties. Thus, Order XX deals with appeals to be filed against the judgment at least to put the learned Judge under obligation to intimate the parties.

18. In so far as the judgment in the case of **Cantonment Board** *(supra)* is concerned, I find that in the said judgment the issue was entirely different. In the said case two suit proceedings were instituted while in one suit proceedings, the counter claim came to be allowed which was appealed against unsuccessfully in the first appeal then in second appeal and thus, the decree in the counter claim became final, but the opposite party Cantonment Board tried to raise a question as to the validity of the decree of the counter claim during the pendency of appeal arising out of the second suit. The court had held that once the counter

claim had become final after the decree stood affirmed in the first appeal and second appeal and so it was not open for the cantonment board to raise question as to the maintainability of the counter claim in second appeal arising out of another suit. So it is in that context the court held the right of claim in respect of the cause of action accruing before the defendants against the plaintiff either before or after filing of the suit but of course, before the defendant had delivered his defence or before the time for delivering defence had expired. The court dealt with the issue and dismissed the appeal. Vide paras 23, 24 and 31 the court has held thus:

"23. With regard to the counter claim of the defendant-respondent no. 2 seeking a declaration against the Cantonment Board it is to be noted that the trial court by the impugned judgment decreed the counter claim of the defendant-respondent no. 2. Though a first appeal was filed by the Board against the judgment of the trial court decreeing the counter claim of the defendants the appellate court dismissed the appeal and no second appeal has been preferred against the said decree, decreeing the counter claim and therefore, the decree of the trial court with regard to the counter claim set up by the defendant-respondent no. 2 has become final and cannot be questioned in the present second appeal.

24. Even otherwise, the contention of the learned counsel for the appellant that the counter claim itself was not maintainable is wholly fallacious. Order VIII Rule 6-A of the Code of Civil Procedure provides that a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing before the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time for delivering defence has expired.

31. The right to set up a counter-claim was introduced in the Code of Civil Procedure by Amendment Act no. 104 of 1976 w.e.f. 1.2.1977 introducing Rule 6-A in Order VIII. Likewise the amendment in Order XX Rule 19 providing for appeal against a counter-claim was also introduced by the Amendment Act no. 104 of 1976 and Sub Rule 2 of Rule 19 clearly provides that any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject, if no set-off or counter-claim had been claimed. Thus, when the counter-claim set up by the defendant-respondent no.2 had been decreed by the trial court it cannot be said that, that decree can be examined in the present second appeal without preferring any second appeal against the said decree. Having not preferred any second appeal against the decree in the counter-claim of the defendant-respondent no. 2 and the decree of the trial court decreeing the counter-claim of the defendant-respondent no. 2 having become final, in my opinion, it is not open for the appellants to question the same in the present second appeal."

(Emphasis added)

19. Order XX Rule 6 provides for contents of decree and as a sequel to the same Rule 19 provides for appeals and after inserting the words and expression 'counter claim' these provisions are also applicable to the judgment passed in counter claim.

20. In so far as the judgment in the case of **Jag Mohan Chawla** *(supra)* cited by Ms. Gupta, is concerned, the court in that case

has also gone into this aspect of the matter that a the counter claim as has been conceived of and contemplated under Rule 6-A to 6-G of Order XX is virtually a cross suit to be adjudicated upon like an original suit and it may not relate through or connected with the original cause of action or pleadings raised by the plaintiff. The court held that the defendant may set up a cause of action which accrued to him even after the institution of suit.

21. I do not find any dispute to this above preposition of law. The provisions as contained under sub rule (1) of Rule 6-A clearly provides for maintaining the counter claim of the defendant may be for a cause of action prior to or subsequent to institution of the suit.

22. Now coming to the judgment cited by learned counsel for the respondents Mr. Srivastava in the case of **Ashok Kumar Singh Sengar** *(supra)*, I find that a coordinate bench of this Court has very exhaustively dealt with the provisions as contained under Order XX Rule 19(2) of C.P.C. The coordinate bench relied upon the judgment of Full Bench of Bombay High Court and Kerala High Court that had been cited before me as well. The Court dealt with the provisions as contained under Order XX Rule 19 C.P.C. along with Rule 6-A of Order VIII of C.P.C. and ultimately held that for the purpose of maintaining appeal in the event a decree passed in counter claim was challenged, it was the valuation of the plaint that would matter. Vide paras 20, 21, 22, 23, 24, 27 & 28 the court held thus:

"20. Order 20, Rule 19(2) specifically provides that any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed. Therefore, on a plain reading if any decree passed in a suit shall be subject to the same provisions in respect of appeal to which it would have been subject.

21. It is evident therefrom that where there is any set-off or counter-claim actually preferred, the decree would be subject to the same provisions in respect of appeals, as if no set-off or counter-claim had been claimed.

22. Now the provisions relating to appeals in respect of decree is not only governed by the provisions contained in Section 96 and Order XLI of the C.P.C., 1908, but also subject to the provisions contained in the Bengal, Agra and Assam Civil Courts Act 1887, the Limitation Act, 1963 and Court Fees Act, 1870.

23. Section 21 of the Bengal, Agra and Assam Civil Courts Act says that an appeal from a decree or order of a Civil Judge shall lie (a) to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed five lakhs rupees (enhanced to 25 lakhs rupees for purposes of filing appeals to the District Judge vide U.P. Act 14 of 2015 w.e.f. 7 December, 2015) and that for the purpose of finding the forum of appeal it is the value of the original suit which has to be determined and not the value of the appeal itself, and if the value of the original suit is more than five lakhs rupees, whatever the value of the appeal may be, the appeal shall lie to the High Court. The subject matter of an appeal is valued according to the provisions of the Suits Valuation Act and the Court Fees Act. It is not governed by the Bengal, Agra and Assam Civil Courts Act. (Vide-Sri Purshottam Das Tandon and others Vs. Sri Shyam Nath Segal and others, (1952 AWR 450), Smt. Shalu sharma Vs.

Ajay Sharma (AIR 2003 (All) 18) and Gaya Prasad and others Vs.Ram Charan (AIR 1939 (All) 273).

24. The Full Bench of Bombay High Court in Kazi Syed Saifuddin Vs. Kasturehand Abhayrajji Golchha (2000 (4) Bom.C.R. 582); held that once the suit is valued and the jurisdiction of the Court is thus determined at the stage when the suit is instituted, that will be the valuation for the subsequent proceedings in the suit also. Obviously, therefore, the appeal being continuation of the suit, the valuation will govern appeal as well and for the purpose of forum of appeal. It was further held that where both suit and counter claim are dismissed, the subject matter of the appeal would be the plaint. Hence valuation would be as per the valuation of the plaint and Court fee as payable on the plaint, would be as due and payable thereon. The plaintiff cannot be made to value his appeal on the basis of the combined valuation of the plaint and counter claim, in respect of which he makes no claim. The report was subsequently followed in Teofilo Barreto Vs. Sadashiva G. Nasnodkar and others (2007 (4) Bom.C.R. 830).

27. The jurisdiction of the Appellate Court cannot be made dependent on the fluctuating valuation of the claim in appeal. The valuation of claim in appeal has relevance only for the purposes of court fee. The valuation for the purposes of determining jurisdiction and for the purpose of court fee are two distinct factors. They need not be identical or common. The appellant may restrict or relinquish part of the claim and accordingly pay proportionate court fee thereon.

28. The courts below in my opinion have correctly held that valuation of the suit would be valuation of the appeal for determining the jurisdiction of appellate court and not the combined value of the suit and counter claim."

(Emphasis added)

23. The Division Bench of this Court in the case of Govind Singh *(supra)* has held that jurisdiction of appeal has to be governed by the valuation of the suit and not that of the cross appeal as the valuation of suit is normally static but that of appeal may vary depending upon the relief granted or refused by the court of first instance. Therefore, it could be a case where the suit of higher valuation is dismissed but the counter claim of lesser valuation is decreed in the said suit by a common judgment and decree. So far the purposes of payment of court fees the valuation would vary but as far as the jurisdiction is concerned, it will depend upon the valuation of the suit. Vide paras 13, 14, 15, 16 & 17 the Division Bench has held thus:

"13. Section 21 of the Act as amended vide U.P. Civil Laws (Amendment) Act, 2015 provides for the appeals from Civil Judges and it inter alia lays down that an appeal from a decree or an order of a Civil Judge shall lie to the District Judge where the value of the original suit does not exceed from Rs.5,00,000/- or such higher amount not exceeding Rs.25,00,000/- as the High Court may fix from time to time by notification in the official gazette. It means that appeals from Civil Judges would lie to the District Judge if the value of the original suit from which it arises is between Rs.5,00,000/- to Rs.25,00,000/- and the appeals arising from original suits of higher valuation would thus lie to the High Court.

14. A simple reading of the aforesaid Section 21 of the Act indicates that it is the value of the original suit that governs the jurisdiction of the appeal and not of the valuation of the appeal.

15. It may be noted that the valuation for the purposes of jurisdiction and for the purposes of court fees are two distinct factors.

16. The jurisdiction of the appeal has to be governed by the valuation of the suit and not that of the appeal as the valuation of the suit is normally statistic but that of the appeal may vary depending upon the relief granted or refused by the court of first instance. Thus, if the jurisdiction of appeal is made dependent upon the value of the appeal it will keep fluctuating.

17. It is therefore, to avoid such fluctuation in the jurisdiction of the appellate court that Section 21 of the Act provides that for the purposes of jurisdiction of appeal value of the original suit alone is relevant."

(Emphasis added)

24. In the case of **Iqbal Banu v. Ramesh and others, 2018 LawSuit (Raj) 933,** learned Single Judge of Rajasthan High Court (Hon'ble Justice Arun Bhansali, as his Lordship then was) has dealt with the aspect of the matter as to whether one appeal would be maintainable if decree is one dismising the suit and decreeing the counter claim, and held that if the decree is one then while challenging the decree passed in suit, the appellant can also challenge the decree passed in counter claim in the same appeal as there is no necessity to file a separate appeal. Vide paras 17, 18 & 19 the court has held thus:

"17. However, the judgments of Himachal Pradesh High Court in the case of Parso (supra) and H.P.State Forest Corporation (supra) as well as both the learned counsel appearing for the parties did not notice the statutory provisions contained in Order XX Rule 19 CPC, which reads as under:

"19. Decree When set-off or counter-claim is allowed.-

(1) Where the defendant has been allowed a set-off or counter claim against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Appeal from decree relating to set-off or counter claim.- Any decree passed in a suit in which a set-off or counter claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed.

(3) The provisions of this rule shall apply where the set- off is admissible under rule 6 of Order VIII or otherwise."

18. A bare look at the above provision would reveal that where the defendant is allowed a counter claim against the claim of the plaintiff, the decree shall state so. The crucial provision is sub-rule (2) of Rule 19 which deals with appeal from the decree relating to (7 of 7) [CFA-166/2018] counter claim, which expressly provides that any decree passed in a suit in which a counter claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subjected, if no counter claim had been claimed.

19. Language of the provision is explicit, wherein, it has expressly provided that in an appeal from decree passed in suit where a counter claim has been claimed, the appeal would be filed as if no counter claim had been claimed, which necessarily means that the appeal would be against the decree passed in the main suit and the appellant would be entitled to question the passing of the decree on counter claim in the same appeal and, therefore, there is absolutely no necessity of filing separate appeal in case

where the counter claim preferred in a suit has been decreed by the trial court."

(Emphasis added)

25. It is clear that if one appeal lies then one set of court fee will be payable and so also the jurisdiction of that court will get attracted where appeal is maintainable against decree passed in Suit. So it will result in dichotomy both in theory and propriety to hold that appeal against decree in suit will lie in a court of higher pecuniary jurisdiction for valuation of suit and appeal in the matter of counter claim would lie to a court inferior in hierarchy for lower valuation of counter claim. This neither appeals to logic nor, could be an intendment of the legislature.

26. In the case of **Teofilo Barreto** *(supra)* an issue arose as to forum to prefer appeal in the event suit is dismissed and counter claim is allowed and the learned Single Judge of Bombay High Court relied upon the Full Bench judgment of that very court in the case of **Kazi Syed Saifuddin vs. Kasturchand Abhayrajji Golchha, 2000 (4) BOMCR 582,** to hold that the forum of appeal would be determined on the basis of valuation of a suit and not the counter claim. In that case the Bombay High Court has held that in the provisions contained under Order XX Rule 19 of C.P.C. as have come to be amended, the set up off and counter claim are treated at par and have been brought on the same platform with the equal status, same treatment is to be given to the counter claim for the purposes of appeal as is given to a decree of set off. So the provisions for appeal would be the same as applicable to the decree of the suit as if no counter claim has been filed. The Court therefore, concluded that *"If the legislative view is that the decree wherein the set off is claimed should go before the same Appellate Forum to which it would have been subject in normal course in absence of claim for set-off; then so far as the counter-claim is concerned; the same treatment will have to be accorded to a decree passed in a suit where counter-claim was preferred. As an extension of the same principle, the cross objection arising from the decree of set-off and/or counter-claim will have to be given similar treatment in the matter of determination of Appellate Forum."* This same principle and analogy was made to apply to the cross objection.

27. Thus in view of the above exposition of law, the argument advanced by learned counsel for the petitioner that since the cause of action is relating to decree passed in counter claim is relating to the pleadings in the counter claim and the decree incorporates valuation of counter claim, it is this valuation would be relevant for determination of forum, is rejected. The principal proceedings being suit proceedings and a counter claim being an added advantage given to the defendant to get his claim tried also against the plaintiff but within the jurisdiction in which the suit has been instituted, would mean that it is the valuation of the suit which will determine the forum of appeal.

28. Applying the principle of analytical jurisprudence to the concept of law with which legal provisions have been structured by legislator in the Code of Civil Procedure, I find section 9 to be a substantive provision that provides for institution of a suit in a court of competent jurisdiction. Once the suit is instituted, different orders with rules provide for procedure to be followed and likewise for execution of a decree. Section 96, another section provides for first appeal and section 100 provides for second appeal. Order 41

provides for method of filing appeal and order 43 provides for misc. civil appeals against various orders, passed by court of first instance. Order VIII Rule 6-A provides for counter claim to be tried in a suit but puts a rider that counter claim will not exceed in its valuation so as to be beyond the pecuniary limit as to jurisdiction of trial court where suit is going on. Thus, it is well thought of provision to maintain that any counter claim to plaintiff's suit would be triable by the same court. Had there not been a suit, there would have been no counter claim except a fresh suit by such defendant. The legislation, therefore, in its wisdom rightly made valuation of suit to be a determination factor to maintain a counter claim as to forum for adjudication.

29. Again, therefore, legislature amended Order XX Rule 19 to include counter claim. Virtually a counter claim is like a set off claimed by defendant against claim for money set up by the plaintiff. The decree to uphold set off in a money suit is one and so also decree dismissing the suit and decreeing the counter claim is one and it is the decree which is appealable at a higher forum should also be a forum to question set off and so also decree passed in counter claim. So if plaintiff would chose a forum to challenge a decree dismissing the suit, shall have to chose that same forum for appeal against that very decree decreeing the counter claim. Plaintiff can not chose two forums to question a common decree on the basis of two different valuations qua suit and counter claim.

30. To address this issue from different angle is also necessary. If two forums are allowed to question a common decree, it may invite contrary judgments in appeal or in other words a court lower in hierarchy may be asked by higher court to wait for its judgment. This, if happens, will certainly frustrate the purpose with which right to file counter claim was vested in a plaintiff's suit. The argument by Ms. Gupta that right to second appeal will be lost if the order impugned is upheld, does not appeal to reason. Ms. Gupta's client has already filed first appeal before the High Court, and will have no opportunity of second appeal against that very judgment. Legislative action to provide for pecuniary jurisdiction to a court, cannot be a matter of debate. This is all done so in the wisdom of legislature and one cannot be permitted to question wisdom of legislature, the ultimate law makers.

31. Thus, for the purpose of payment of court fees the valuation of decreed counter claim will be relevant but for the purpose of jurisdiction so as to select a forum of appeal, it is the valuation of suit which would be relevant. The District Judge therefore, rightly held that appeal was not maintainable.

32. Petition thus on this count lacks merit as no error of law is seen in the judgment passed by the District Judge. However, it is left open for the petitioner to either seek amendment in the first appeal pending before this Court or file a separate first appeal challenging the decree allowing the counter claim and move an appropriate application also along with that seeking benefit of Section 14 of Limitation Act, 1963.

32. Thus, this petition decided accordingly.

(2024) 5 ILRA 389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 6031 of 2024

Gopal Ji Agrawal ...Petitioner
Versus
Anurag Kumar Dixit & Ors. ...Respondents

Counsel for the Petitioner:
Kamlesh Kumar Tiwari

Counsel for the Respondents:
Manoj Singh Rathaur, Udayan Nandan

Civil Law – Civil Procedure Code,1908 – Section 47 - O. 13 - Rule 10(1) - SCC Suit was filed by landlord/petitioner on 8.12.1981, dismissed, not accepting tenant landlord relationship - SCC Revision was filed by petitioner, dismissed - Writ Petition was filed challenging both orders, allowed - Thereafter, Review Application was filed by tenant/defendant, dismissed - S.L.P. was filed before Hon'ble Apex Court by tenant, dismissed - Issue attained finality - Tenant filed application u/s 47 CPC - Executing court dismissed - Tenant filed SCC Revision, dismissed – Both orders challenged in High Court, dismissed – Application under O. 13 R. 10(1) filed by defendant, for summoning record - Dismissed – Revision filed by tenant – Stayed – Impugned Order – Held, revision must be confined to facts mentioned in original application - Passing the interim order, considering new fact beyond original application under O. 13 R. 10(1) CPC is bad in law – Hence, impugned order quashed (Para 3, 5, 19, 22)

Petition allowed. (E-13)

List of Cases cited:

1. Pradeep Mehra Vs Harijivan J. Jethwa (since deceased THR. LRS.) & ors. (Civil Appeal No. 6375 of 2023)

2. Shri Jagdamba Prasad (Dead) Thr. Lrs. & ors.Vs Kripa Shankar (Dead) Thr. Lrs. & ors.; 2014(5) SCC 707

3. Jagbir Singh Vs VIth Additional District and Sessions Judge Bijnor & ors.; 1997(30) ALR 358

4. Haryana Vidyut, Parsaran Nigam Limited & anr. Vs Gulshan Lal & ors.; 2009 (13) SCC 354

5. Mr. Love Jain Vs Sh. Manak Chand Jain; 2010(173) DLT 534

6. Satya Narain & ors.Vs District Judge, Churu & ors.; 2009 (1) W.L.N. 520

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Kamlesh Kumar Tiwari, learned counsel for petitioner and Sri Sashi Nandan, learned Senior Counsel assisted by Sri Udayan Nandan along with Sri Chandan Sharma, learned counsel for respondents.

2. Present petition has been filed with following relief;

" It is therefore most respectfully prayed that this Hon'ble Court may be pleased to set aside entire proceeding of Civil Revision No. 4/2024 (Anurag Kumar Dixit Vs. Sitaram and others) pending in the court of District Judge, Azamgarh and also further be pleased to set aside the impugned order dated 25.1.2024 passed by In-charge District Judge, Azamgarh in Civil Revision No. 4/2024 Anurag Kumar Dixit Vs. Sitaram and others)."

3. Brief facts of the case are that SCC Suit No. 8 of 1981 was filed by landlord/petitioner on 8.12.1981 and after hearing the parties, the same was dismissed

on 27.11.1991 not accepting the tenant landlord relationship. Against the said order, SCC Revision No. 1 of 1992 was filed by the landlord/ petitioner, which was also dismissed vide order dated 20.07.1992. Civil Misc. Writ Petition No. 42284 of 1992 was filed before this Court challenging both the orders, which was allowed vide order dated 18.09.2008. Thereafter, Civil Misc. Review Application No. 250566 of 2008 was filed by the tenant, which was dismissed on 23.03.2010. S.L.P. No. 16223-16224/2010 was also filed before Hon'ble Apex Court by the tenant against the orders dated 18.09.2008 and 23.03.2010, which was dismissed on 7.2.2017. Issue attained finality.

4. As matter was remanded, SCC Court has again heard the case and SCC Suit No. 8 of 1981 also decreed on 22.03.2010. Thereafter, execution case no. 3 of 2010 was also filed by the landlord/ petitioner on 13.10.2010. Tenant filed SCC Revision No. 98 of 2010 challenging the order/ decree dated 22.3.2010. After hearing both the parties SCC Revision No. 98 of 2010 was dismissed vide order dated 23.01.2016. The aforesaid two orders were assailed by filing Misc. Petition U/A 227 No. 2639 of 2016 before this Court, which was dismissed vide order dated 18.10.2019. Matter attained finality as no SLP was filed.

5. Thereafter, defendant/tenant has also filed application to adjourn the case for filing objection under Section 47 CPC. After hearing the application filed by the tenant, executing court dismissed the objection on 5.5.2022. The order dated 5.5.2022 was assailed by the tenant/ defendant by filing SCC Revision No. 55 of 2022, which was also dismissed on 3.8.2022. The orders dated 5.5.2022 & 3.8.2022 were assailed by the tenant/defendant by filing Misc. Petition No. 6945 of 2022 on 17.8.2022. On 2.11.2022, Misc. Petition No. 2639 of 2016 and Misc. Petition No. 6945 of 2022 were clubbed together and dismissed after hearing the parties.

6. Thereafter, one another application was filed by tenant/ defendant under Order 13 Rule 10(1) CPC for summoning the record of Original Suit No. 35 of 1958 in which landlord/ decree holder has filed objection. On 18.01.2024, executing court after hearing the objection filed by decree holder bearing 251 Ga2, dismissed the application. Thereafter, tenant/ defendant challenged the order dated 18.01.2024 by filing revision before District Judge, Azamgarh and vide order dated 25.01.2024, order passed by executing court dated 18.01.2024 was stayed.

7. Learned counsel for the petitioner submitted that application No. 251 Ga2 has been filed under Order 13 Rule 10(1) CPC only to delay the execution proceeding, which was rightly rejected by execution court vide order dated 18.01.2024 observing the same.

8. He next submitted that against that Civil Revision No. 4 of 2024 was filed by the tenant/ defendant entirely on different facts, which are not the part of earlier application filed under Order 13 Rule 10(1) CPC in which revisional court has incorrectly stayed the order dated 18.01.2024 in execution proceeding. He firmly submitted that first of all, record so summoned through application under Order 13 Rule 10(1) CPC is not relevant for present controversy as the execution court may not travel beyond the judgment and decree passed by SCC Court. Secondly, revision may not be filed on a new fact about the pendency of application filed under

Section 47 CPC, which is not the part of application filed under Order 13 Rule 10(1) CPC. In fact, in this application, there is no whisper about the pendency of application under Section 47 CPC. Therefore, on both the counts, revision absolutely lacks merit and liable to be dismissed, but contrary to this, it was entertained and order of stay has also been passed in teeth of settled provisions of law. Therefore, present petition may be allowed and impugned order dated 25.01.2024 may be quashed. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as different judgments of other Court in the matters of ***Pradeep Mehra Vs. Harijivan J. Jethwa (since deceased THR. LRS.) & Others (Civil Appeal No. 6375 of 2023) decided on 30.10.2023, Shri Jagdamba Prasad (Dead) Thr. Lrs. & others Vs. Kripa Shankar (Dead) Thr. Lrs. & others; 2014(5) SCC 707, Jagbir Singh Vs. VIth Additional District and Sessions Judge Bijnor and others; 1997(30) ALR 358, Haryana Vidyut, Parsaran Nigam Limited & another Vs. Gulshan Lal & others; 2009 (13) SCC 354, Mr. Love Jain Vs. Sh. Manak Chand Jain; 2010(173) DLT 534 & Satya Narain & others Vs. District Judge, Churu & others; 2009 (1) W.L.N. 520`.***

9. Learned Senior Counsel could not dispute the fact that pendency of Section 47 CPC has not been raised in application under Order 13 Rule 10(1) CPC and first time raised in revision, but only submitted that once application under Section 47 CPC is pending, execution proceeding may not be completed, therefore, revisional court has rightly stayed the process (parwana).

10. I have considered the rival submissions advance by learned counsel for the parties and perused the record as well as judgments relied upon.

11. From the perusal, it is apparently clear that two rounds of litigation had taken place. First round was about the tenant- landlord relationship, matter went up to the Apex Court and decided in favour of petitioner-landlord. Likewise in second round was for disposal of suit on merits, the matter was again decided in favour of petitioner-landlord, which attained finality at the stage of High Court as order of High Court has never been challenged before the Apex Court.

12. Now coming to the issue present before this Court. Undisputedly, in application under Order 13 Rule 10(1) CPC, defendant/ tenant are praying for summoning the record of Original Suit No. 35 of 1958 (Fern Rekhchand and others Vs. Sitaram and others), which is not relevant as the present execution proceeding was initiated to execute the judgment and decree dated 23.03.2010 in SCC Suit No. 8 of 1981. In fact, record of Original Suit No. 35 of 1958 cannot be taken into consideration for the very simple reason that executing court cannot travel beyond the judgment and decree for which execution proceeding has already been initiated. Therefore, this Court is of the firm view that filing of application under Order 13 Rule 10(1) CPC is nothing, but an attempt to adopt delay tactics.

13. The very similar issue was before the Apex Court in the matter of ***Pradeep Mehra*** *(supra)*. Relevant paragraph is quoted below;

"A bare perusal of the aforesaid provision shows that all questions between the parties can be decided by the executing

court. But the important aspect to remember is that these questions are limited to the "execution of the decree". The executing court can never go behind the decree. Under Section 47, CPC the executing court cannot examine the validity of the order of the court which had allowed the execution of the decree in 2013, unless the court's order is itself without jurisdiction. More importantly this order (the order dated 12.02.2013), was never challenged by the tenants/ judgment debtors before any forum."

14. This matter was also before this Court in the matter of **Jagbir Singh** *(supra)*. Relevant paragraphs are being quoted below;

"10. Executing court can not go behind the decree is a well settled principle of law. The executing court is not invested with the right to determine controversial questions which are the basis of the decree to be executed. It can not go into such questions and act as a trial court.

11. The power of the executing court travels only to the extent of interpreting the decree or to identify the propriety. Even for the purpose of identifying the property or interpreting the decree it can not take additional evidence. It was so held in the case of Lalmani v. Shiv Shanker, AIR 1980 Patna 134 and Sheshwar Bhartia v. Udiasthree, (1994) Civil Law Journal 297 (Ori.) when a new right is claimed, which requires adjudication of a right in the property and thus indirectly seeking to avoid the decree passed, is in effect an adjudication leading to go behind the decree. In the case of Sarwan Lal v. Kami Prasad, AIR 1986 Allahabad 1, it was held that the objection to executability of decree which boils down to challenging the maintainability of suit can not be taken before the executing court. A mixed question of law and fact can not be raised for the first time in execution case Bhawarao v. Saritribai, AIR 1991 Bombay 55 at page 59 Objection tending to show that the decree is erroneous can not be raised under Section 47 CPC. In Manful Hussain v. Kiran Rano, (1993) 2 Civil Law Journal 456 (M.P.) in V.D. Modi v. R. Rahman, AIR 1970 Supreme Court 1475 the Apex Court held that the general rule is that an executing court can not go behind the decree. It must take the decree as it is and must proceed to execute it. It can not entertain an objection that the decree is incorrect in law or facts. In Addison Pains v. Sant Bux, AIR 1976 Delhi 137, it was held that Section 47 does not entitle the court to investigate into the question of validity of the decree when on the face of it there is nothing illegal in it."

15. Apex Court has also considered the same matter in the ***Haryana Vidyut, Parsaran Nigam Limited*** *(supra)*. Relevant paragraphs are being quoted below;

"20. As indicated hereinbefore, for the purpose of allowing an objection filed on behalf of a judgment debtor under Section 47 of the Code of Civil Procedure, it was incumbent on him to show that the decree was ex facie nullity. For the said purpose, the court is precluded from making an indepth scrutiny as regards the entitlement of the plaintiff with reference to not only his claim made in the plaint but also the defence set up by the judgment- debtor. As the judgment of the Trial Court could not have been reopened, the correctness thereof could not have been put to question.

It is also well known that an Executing Court cannot go behind the decree. If on a fair interpretation of the judgment, Order and decree passed by a court having appropriate jurisdiction in that behalf, the relief sought for by the plaintiff

appear to have been granted, there is no reason as to why the Executing Court shall deprive him from obtaining the fruits of the decree.

In Deepa Bhargava v. Mahesh Bhargava, 2009(1) RCR (Civil) 507: 2009(1) RAJ 202 : [2008(16) SCALE 305], this Court held as under:

"11…. An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. A default clause contained in a compromise decree even otherwise would not be considered to be penal in nature so as to attract the provisions of Section 74 of the Indian Contract Act."

22. We are not oblivious of the fact that the respondents legally would not have been entitled to the reliefs prayed for by them. However, as a decree has been passed, we do not intend to go behind the same. The Executing Court shall, it goes without saying, execute the decree strictly in terms thereof."

16. From perusal of judgments referred hereinabove, it is apparently clear that executing court cannot sit in appeal over the judgment and decree, which is to be executed and cannot examine the validity of judgment and decree. Execution Court has no jurisdiction to travel beyond the judgment and decree, but to execute the same. Therefore, Execution Court has rightly rejected the application under Order 13 Rule 10(1) CPC.

17. Now coming to the scope of revision, this Court is of the view that in a question of fact, which has not been raised in original application cannot be raised while filing revision.

18. The similar issue was before the Apex Court in the matter of ***Shri Jagdamba Prasad (Dead)*** *(supra)*. Relevant paragraph is being quoted below;

"According to the legal principle laid down by this Court in the case mentioned above, the power of the Revisional Authority under Section 48 of the Act only extends to ascertaining whether the subordinate courts have exceeded their jurisdiction in coming to the conclusion. Therefore, if the Original and Appellate Authorities are within their jurisdiction, the Revisional Authority cannot exceed its jurisdiction to come to a contrary conclusion by admitting new facts either in the form of documents or otherwise, to come to the conclusion. Therefore, we answer point no. 1 in favour of the appellants by holding that the Revisional Authority exceeded its jurisdiction under Section 48 of the Act by admitting documents at revision stage and altering the decision of the subordinate courts."

19. In present case, undisputedly, in application under Order 13 Rule 10(1) CPC, there is no whisper about the pendency of objection under Section 47 CPC rather the same was filed to summon the record of Original Suit No. 35 of 1958 except that nothing has been stated therein, therefore, pendency of application under Section 47 CPC cannot be a ground to be entertained by the revisional court. The revision must be confined to the facts mentioned in the original application. Passing the interim order considering any new fact beyond the original application under Order 13 Rule 10(1) CPC is bad in law. Therefore, revisional court has erred while entertaining the revision and staying the order dated 18.01.2024. Apex Court has also taken the same view that revision cannot be

entertained beyond the facts, which is not the part of original application.

20. In fact after two rounds of litigation, which are attained finality at the level of Apex Court as well as High Court, filing of such application before the Execution Court is nothing but misuse of process of law. Similar issue was before the Delhi High Court in the matter of ***Mr. Love Jain*** *(supra)* and Delhi High Court has taken the same view. Relevant paragraphs are being quoted below;

"24. In the present case, petitioners having lost up to Supreme Court, now in the second round of litigation have filed frivolous objections just to deny the fruits of award which was made in favour of the respondent.

25. Present petition under Article 227 of the Constitution of India is nothing but gross abuse of process of law. A strong message is required to be sent to those litigants who are in the habit of filing bogus and frivolous objections in the execution proceedings and thereby deprive the decree holder fruits of the award passed in its favour."

21. Rajasthan High Court in the matter of ***Satya Narain*** *(supra)* has also considered the similar dispute that continuance of such proceeding entertaining the frivolous application amount to abuse of process of law. Relevant paragraphsd are being quoted below;

"17. Here in this case, when the facts are not in dispute and the facts show that judicial pronouncements by the courts either attained the finality or the applicant could not get the relief in his own suit and appeal and further appeal, then he submitted this application under Section 151 CPC before the court which cannot entertain the application for the relief prayed and there is no plea even for namesake how the application of the respondent is maintainable, then this Court is not inclined to reject the writ petition of the petitioners to perpetuate the harm which may be caused by the continuation of the proceedings in the court below initiated on the application filed by the respondent. At this juncture, this fact cannot be ignored that the judgment debtor in the civil original suit no.17/2004 is not a stranger but alleged to be closely associated with the present respondent Bajrang Lal and it is alleged that both Bhagwati Prasad and Bajrang Lal were members of the management committee governing the school in question.

18. ***Satya Narain & Ors. vs. District Judge, Churu & Ors.*** *The further reason for entertaining this petition is that the respondent's suit itself has been dismissed by the trial court under Order 7 Rule 11 CPC and that dismissal has been upheld by this Court vide detail judgment dated 3.7.2006 and the Hon'ble Apex Court rejected the respondent's prayer for grant of interim relief. The respondent, therefore, is virtually trying to undo what has been done by the orders of the Court in his own suit by the trial court by judgment and decree dated 13.1.2006 and by this Court by judgment dated 3.7.2006 and furthermore, when injunction application has been dismissed by the Hon'ble Apex Court. How the respondent, who is pursuing his suit, can during pendency of that suit, seek a relief under Section 151 CPC which will necessarily involve determination of his right, title or interest in the property in question. It is case of rarest of rate nature because of the reason that the plaintiffs who were successful in the litigation initiated in the year 1994 after consuming ten years in the trial court and thereafter successful in*

the High Court wherein this Court dismissed the appeal of the judgment debtor and the respondent lost in his SB Civil Writ Petition No.1052/2008 Satya Narain & Ors. vs. District Judge, Churu & Ors. suit and regular appeal and the Hon'ble Apex Court specifically refused the interim relief, the High Court may under Article 227 of the Constitution of India exercise jurisdiction in pending proceedings in civil court in rarest of rate case and it is one of such case where the continuation of the proceedings in the trial court will amount to abuse of process of the court."

22. Therefore, under such facts and circumstances of the case, the impugned order dated 25.1.2024 passed by Revisional Court/ In-charge District Judge, Azamgarh is hereby quashed and petition is **allowed**. Execution Court is directed to proceed in accordance with law and complete the execution proceeding at the earliest considering this fact that SCC Suit for eviction was filed in 1981.

23. No order as to costs.

(2024) 5 ILRA 395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Matters Under Article 227 No. 9451 of 2023

Indu Awasthi @ Sarvendra Awasthi & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Mahesh Pandey, Narendra Kumar Singh, Santosh Kumar Pandey

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 – Section 306 – The Code of Criminal Procedure, 1973 - Sections 173(8), 156(3) - On application u/s 156(3) Cr.P.C. by informant, the learned Special Judge directed the Station Officer to register a criminal case, in compliance of this, an F.I.R. u/s 306 IPC was registered against seven named persons and one unknown person including present petitioners - Police submitted charge-sheet – Application for further investigation - Rejected by Magistrate - Scope of Section 173(8) Cr.P.C. - Held, an application to conduct further investigation moved by accused was misconceived, without any right provided to accused by law - Case was thoroughly investigated by I.O. and he noticed that one earlier application was moved by informant alleging the same facts therein , he conducted the investigation accordingly and mentioned this fact in charge-sheet - Power to make order as to further investigation is available to Magistrate u/s 156 (3) CrPC even at post-cognizance stage until trial commences i.e. charges are framed – It can exercised suo motu by Magistrate himself, depending on facts of each case - No locus standi to move application – Hence, no illegality in impugned order and accordingly dismissed. (Para 3, 4, 34, 36, 38, 39)

Petition dismissed. (E-13)

List of Cases cited:

1. Babubhai Vs St. of Gujarat & ors., 2010 AIR SCW 5126

2. St. Through Central Bureau of Investigation Vs Hemendhra Reddy & anr., Etc., 2023 SCC Online SC 515

3. Vinay Tyagi Vs Irshad Ali @ Deepak & ors. reported in (2013) 5 SCC 762

4. Ram Lal Narang Vs State (Delhi Admn.), AIR 1979 SC 1791

5. Nirmal Singh Kahlon Vs St. of Pun. & ors., (2009) 1 SCC 441

6. Sri Bhagwan Samardha Sreepada Vs Venkata Vishwandadha Maharaj Vs St. of Andhra Pradesh & Others, AIR 1999 Supreme Court 2332

7. National Multi Commodity Exchange of India Ltd. Vs St. of Guj. & anr. (Special Criminal Application (Quashing) No. 1359 of 2014

8. Nitinbhai Mangubhai Patel Vs St. of Guj. & ors. reported in 2013 LawSuit(Guj) 1124

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

1. Heard Sri U.K. Saxena, Senior Advocate assisted by Sri S.K. Pandey, learned counsel for the petitioners and learned Additional Government Advocate appearing for the State-respondent.

2. By way of present petition under Article 227 of the Constitution of India, the petitioners have made a prayer to issue an order / direction to stay the effect and operation of the impugned order dated 29.08.2023 passed by Judicial Magistrate, Hawali, Farrukhabad whereby the application in Case Crime No.111 of 2021 under Section 306 IPC, P.S. Kotwali Fatehgarh, District Farrukhabad bearing Case No.04 of 2023 (State Vs. Gunjan Awasthi and others) for further investigation, under Section 156 (3) Cr.P.C. read with Section 173 (8) Cr.P.C. moved by the petitioners was rejected. Further prayer has been made that the Investigating Agency be directed by order / direction to make further investigation under Section 173 (8) Cr.P.C. in the case mentioned here-in-above.

3. It is submitted by learned counsel for the petitioners that on an application under section 156 (3) Cr.P.C. moved by the informant Rachna Singh being Criminal Misc. Case No.139/12/2021, the learned Special Judge (D.A.A.) / III Addl. Session Judge, Farrukhabad passed an order dated 25.8.2021 directing the Station Officer, Police Station Kotwali, Farrukhabad to register a criminal case under relevant sections on the aforesaid application and in compliance of the said order of the court, an F.I.R. as case crime no.111 of 2021 under Section 306 IPC was registered against seven named persons and one unknown person including the present petitioners at Police Station Kotwali - Farrukhabad, District Farrukhabad.

4. It is further submitted that after investigation, the police submitted charge-sheet dated 12.4.2021 under section 306 IPC against six accused persons including the present petitioners and the investigation was continued against one of the accused persons Amit Shukla.

5. It is further urged that Crl. Misc. Writ Petition No.10539 of 2022 was preferred by the present petitioners before this Court with a prayer to command the respondents / Investigating Officer to make further investigation under section 173 (8) Cr.P.C. in the above mentioned case crime number wherein this Court, after examining and determining the question involved therein, came to the conclusion that to pass direction for further investigation in this matter was not required and the relief was declined to the petitioners, but however the petitioners were left on liberty to pursue their remedy before the Magistrate if necessary ingredients for invoking such jurisdiction is shown to exist in the matter, vide order dated 10.8.2022.

6. Another submission is that before the Court of Magistrate concerned, an

application under Section 156 (3) read with 173 (8) Cr.P.C. was moved praying for further investigation in Case No.1108 of 2021, which was rejected by the Magistrate vide order dated 29.8.2023.

7. It is further submitted by the learned counsel for he petitioners that meanwhile the cognizance order of the Magistrate dated 11.6.2021 after submission of charge-sheet into the matter, was also challenged before the Sessions Judge, Farrukhabad by way of Criminal Revision No.70 of 2021 by the present petitioners, but after hearing, the same was dismissed by the Sessions Judge, Farrukhabad vide order dated 5.10.2021.

8. Advancing his argument the learned counsel for the petitioners vehemently submitted that from the perusal of application under section 156 (3) Cr.P.C. moved by the informant Smt. Rachna Singh, prima facie no offence was made out against the present petitioners under section 306 IPC and surprisingly after lodging of the F.I.R., no investigation was made on the point of abetment or instigation on the part of the petitioners to the deceased, which led him to commit suicide and charge-sheet was submitted in haste by the Investigating Officer without ascertaining the fact that prima facie the ingredients to establish an offence under section 306 IPC were absolutely not existing against the present petitioners and that is why the petitioners were compelled to move an application under section 173 (8) Cr.P.C. for further investigation into the matter to find out whether any act of abetment or instigation by the petitioners to the deceased was made out and prima facie evidence in this connection was available to the Investigating Officer or not, but the learned Magistrate did not appreciate the contentions raised by the petitioners and in an illegal manner and without considering the applicability of relevant laws on the point, rejected the said application of the petitioners which again compelled the petitioners to move present petition before this Court.

9. Another limb of argument put forth before this Court by the learned counsel for the petitioners is that the impugned order is illegal, perverse and erroneous both on fact and law. This is the matter which certainly requires superintending authority and command of the High Court to be acted upon.

10. Per contra, learned A.G.A. opposed the prayer made in the petition and it has been vehemently argued that the power to further investigate into the matter after submission of police report under section 173 (2) Cr.P.C. lies with the investigating agency under section 173 (8) Cr.P.C. and the permission of the court is not required in all cases.

11. Before adverting to the rival submissions made by the learned counsel for the parties, apt would be to determine as to what is the actual scope of the provisions of section 173 (8) Cr.P.C.

12. It is provided under section 173 (8) Cr.P.C. that –

"Section 173 (8) *- Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report*

or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

13. The police report submitted to the Court under section 173 (2) Cr.P.C. is, in fact, a bundle of facts and evidence, which is collected by the Probe agency during investigation. The concluding remark of the I.O. of the case on the basis of the collection of relevant facts and evidence may be termed as police report filed under section 173 (2) Cr.P.C. whether it supports the F.I.R. version or not. Normally if it supports the prosecution version given in the F.I.R., it is called a charge-sheet in popular terms and if not, it is taken as a final report or closure report although, interestingly both the words i.e. charge-sheet and final / closure report have not been used under any provision of Cr.P.C. The court, which is competent to take cognizance upon the police report under section 190 (1) (b) of Cr.P.C., takes the police report as a base whereupon it takes cognizance of the case and proceeds with the case for further action.

14. The question which arises in the case in hand takes the case one step further to the submission of the charge-sheet and drives the Court into the sphere of further investigation, which means an investigation, which is prayed for after the police report under section 173 (2) Cr.P.C. has already been submitted, but not a re-investigation into the case.

15. Since the learned State counsel has specifically mentioned that the order for further investigation could not be passed by the Court where the police report under section 173 (2) Cr.P.C. was submitted and it was the prerogative of the Investigating Agency to make further investigation into the matter or not, he was intending to submit that the learned Magistrate made no mistake in rejecting the application for further investigation at the instance of accused persons / present petitioners as they were not entitled to move any application for further investigation into the matter before the court. Learned State counsel in this way tried to restrict the power of the court, which could be invoked under section 173 (8) Cr.P.C. and at the same time the liberty of the accused to move an application with the prayer for the same has also been put to question. The matter certainly requires consideration.

16. In **Babubhai vs. State of Gujarat and others, 2010 AIR SCW 5126**, Hon'ble the Apex Court had an occasion to look into the scope of further investigation and it was so held that –

"The Scheme of investigation, particularly, Section 173 (8), provides for further investigation and not of re-investigation. Therefore, if the Court, comes to the conclusion that the investigation has been done in a manner with an object of helping a party, the Court may direct for further investigation and ordinarily not for re-investigation. The expression "ordinarily" means normally and it is used where there can be an exception. Thus, in the exceptional circumstances, the Court in order to prevent the miscarriage of criminal justice, if considers necessary, it may direct for investigation de novo wherein the case presents exceptional circumstances."

17. Further, in **State Through Central Bureau of Investigation Vs. Hemendhra Reddy & Another, Etc., 2023**

SCC Online SC 515 (Criminal Appeal Nos.1300 - 1302 of 2023, decided on April 28, 2023) examining the scope of power of the Court and investigating agency in respect of a matter relating to further investigation and also power of Court to take cognizance on a charge-sheet submitted by the Probe agency as an outcome of further investigation after once submission of final report into the matter, it was held that even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. There is no bar against conducting further investigation under Section 173(8) of the CrPC after the final report submitted under Section 173(2) of the CrPC has been accepted. Prior to carrying out further investigation under Section 173(8) of the CrPC it is not necessary that the order accepting the final report should be reviewed, recalled or quashed. Though the order passed by the Magistrate accepting a final report under Section 173 is a judicial order, there is no requirement for recalling, reviewing or quashing the said order for carrying out further investigation under Section 173(8) of the CrPC. There is nothing in the CrPC to suggest that the court is obliged to hear the accused while considering an application for further investigation under Section 173(8) of the CrPC. Mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial and effective justice.

18. It was further clarified that further investigation is merely a continuation of the earlier investigation, hence it cannot be said that the accused are being subjected to investigation twice over. Investigation cannot be put at par with prosecution and punishment so as to fall within the ambit of Clause (2) of Article 20 of the Constitution. The plea of double jeopardy would, therefore, not be applicable to further investigation.

19. A rider was provided on the power of police to carry further investigation in **Vinay Tyagi vs. Irshad Ali alias Deepak and Others reported in (2013) 5 SCC 762** wherein it was cautioned that a police officer can carry on further investigation even after a report under section 173 (2) of the Cr.P.C. is submitted, in view of section 173 (8) of the Cr.P.C., but only rider being that the police should seek formal permission from the Court.

20. The same view was earlier expressed in **Ram Lal Narang vs. State (Delhi Admn.), AIR 1979 SC 1791** wherein it was observed that further investigation is not altogether ruled out merely because cognizance has been taken by the court. When defective investigation comes to light during course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light.

21. The controversy involved in the matter in hand at this juncture leads the Court to some factual aspect of the matter. In the present case, F.I.R. was lodged by the order of the Court of Special Judge (D.A.A.) / III Additional Session Judge, Farrukhabad vide order dated 25.8.2021 on an application moved by the informant Rachna Singh under section 156 (3) Cr.P.C. In the said application it was alleged that Gunjan Awasthi son of Indu Awasthi made a telephonic call to Mangal Singh, husband of

the informant, and told him to come to his house whereupon he along with his friend Deepu went to the house of Gunjan Awasthi. The aforesaid Deepu was returned back by Gunjan Awasthi and some other persons including a servant and his elder brother Gaurav Awasthi and subsequently her husband Mangal Singh was bitterly assaulted after being tied up with a chair and when Raj Pratap Singh, the friend of her husband reached there on call, her husband was again assaulted before him as well, who anyhow rescued and informed the informant about the incident. On intimation given by the informant to the police, the police reached the house of Gunjan Awasthi and her husband was released, who was kept confined wrongfully in the house of Gunjan Awasthi for many hours and they also looted about Rs. 6000/- from her husband and also threatened him for life. After the said incident, her husband was threatened and pressurized illegally by the accused persons and he was also harassed and subjected to cruelty physically and mentally both by them and subsequently he committed suicide on 16.3.2021.

22. After lodging of the F.I.R. at case crime no.111 of 2021 under section 306 IPC against a total number of 8 persons (six named, one unknown and one servant of accused Gunjan Awasthi) based upon an application under section 156 (3) Cr.P.C. moved by Smt. Rachna Singh, investigation started, which culminated into charge-sheet under section 306 IPC against the aforesaid accused persons except the absconding accused Amit Shukla against whom the investigation was kept pending and cognizance of the case was taken by the court and in the said charge-sheet, it was also mentioned by the I.O. that on the basis of same facts, another F.I.R. as case crime no.745 of 2021 under sections 395, 342, 306 IPC was also lodged by the same informant in respect of the same incident. In the matter which was initiated on an application under section 156 (3) Cr.P.C. moved by the deceased Mangal Singh himself (in amended manner which was made by Smt. Rachna Singh), F.I.R. was also lodged as case crime no.745 of 2021 under sections 395, 342, 306 IPC and after investigation a final report was submitted into the matter. The I.O. mentioned therein that as an outcome of the investigation, case under section 395, 342 IPC was found to be false and so far as the offence under section 306 IPC is concerned, since a charge-sheet had already been submitted by the police for the said offence earlier in case crime no.111 of 2021, final report no.143 of 2021 dated 14.9.2021 is being submitted.

23. Now the outcome of the entire investigation was that offence under section 306 IPC was prima facie found to be made out against the present petitioners and charge-sheet in respect of the said offence was submitted by the police.

24. The application for further investigation in case crime no.111 of 2021 after submission of charge-sheet was though entertained by the court, but it was rejected by the impugned order dtd. 29.08.2023 passed by Judicial Magistrate, Hawali, Farrukhabad.

25. In the aforesaid application for further investigation, it was alleged that the whole story disclosed in the application under section 156 (3) Cr.P.C. which subsequently was reproduced in the F.I.R. lodged under the order of the court, is false and fabricated and it was alleged that an agreement to sale was executed between the deceased and Amit Shukla, but when the deceased did not play his role in the

agreement, he was pressurized by Amit Shukla for executing the sale deed in his favour, who had already given Rs.6,80,000/- to him on 21.6.2018 and the outstanding amount of Rs.7,50,000/- was to be paid by Amit Shukla, but subsequently Mangal Singh (deceased) refused to execute the sale deed in his favour and committed suicide on 16.3.2021. Subsequent to that, another agreement to sale was executed by Smt. Rachna Singh and Munshi Lal without refunding the money to the tune of Rs.6,80,000/-. During investigation, statement of Sunil Kumar Singh Rathore, advocate and Pawan Singh @ Sonu was recorded by the police and in the application for further investigation, it was alleged by accused Indu Awasthi @ Sarvendra Awasthi that Advocate Sunil Kumar Singh Rathore was involved in criminal activities and extorting money from many persons. He also tried to extort amount for a sum of Rs.80 lakh and F.I.R. was lodged in that case and charge-sheet was also submitted against the petitioner Indu Awasthi. He was also said to be an eyewitness of the incident which happened with the husband of the informant, but still he filed his vakalatnama on behalf of the complainant on 17.8.2021. It was further alleged that Pawan Singh, who is junior advocate of Sunil Kumar Singh Rathore, was also an eyewitness of the incident.

26. The further investigation was prayed for on the ground that Sunil Kumar Singh Rathore was in inimical terms with the petitioner and he tried to grab money from him by lodging false and frivolous F.I.R with the help of the informant Smt. Rachna Singh and he also used his status of advocacy in pressurizing the investigating agency for submitting the charge-sheet against the petitioner and other persons. It is further mentioned in the said application for further investigation that in an application u/s 482 Cr.P.C. registered as Application No.614 of 2022 (Indu Awasthi @ Sarvendra Awasthi vs. State of U.P. and others), an order was passed by the High Court in favour of the applicant Indu Awasthi on 16.4.2022 and during the course of hearing, both the parties consented for mediation and accordingly order was also passed by this Court, but however mentioning that the complainant of the case was not interested to participate in the mediation proceedings, the application for settlement of dispute filed by the applicant Indu Awasthi was rejected by the Magistrate concerned. Punitive process were issued by the Magistrate Court concerned against the applicant Indu Awasthi and a complaint was also made against Sunil Kumar Singh Rathore, advocate. The further investigation was prayed for mentioning the aforesaid facts and also highlighting this fact that only two witnesses were interrogated by the I.O. namely Sunil Kumar Singh Rathore and Pawan Solanki, who were the men of the informant Rachna Singh. The police / I.O. falsely implicated the applicant Indu Singh in the said case for taking Rs.20 lakh for compromise in the case. This is the said application which was rejected by the Court of Judicial Magistrate, Hawali, Farrukhabad by the impugned order dtd. 29.08.2023.

27. Referring to the provisions of section 306 IPC it was also alleged in the said application for further investigation that the complete missing of all the essential ingredients to constitute an offence under section 306 IPC was absolutely overlooked by the I.O. of the case.

28. Now coming back to the point which was being discussed above, this Court can safely rely upon a very pertinent and guiding observation made by the Hon'ble

Apex Court in **Nirmal Singh Kahlon vs. State of Punjab and Others, (2009) 1 SCC 441** is necessary to be quoted where it was held as under –

"68. An order of further investigation in terms of Section 173(8) of the Code by the State in exercise of its jurisdiction under Section 36 thereof stands on a different footing. The power of the investigating officer to make further investigation in exercise of its statutory jurisdiction under Section 173(8) of the Code and at the instance of the State having regard to Section 36 thereof read with Section 3 of the Police Act, 1861 should be considered in different contexts. Section 173(8) of the Code is an enabling provision. Only when cognizance of an offence is taken, the learned Magistrate may have some say. But, the restriction imposed by judicial legislation is merely for the purpose of upholding the independence and impartiality of the judiciary. It is one thing to say that the court will have supervisory jurisdiction to ensure a fair investigation, as has been observed by a Bench of this Court in Sakiri Vasu v. State of U.P. [(2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440], correctness whereof is open to question, but it is another thing to say that the investigating officer will have no jurisdiction whatsoever to make any further investigation without the express permission of the Magistrate."

29. In the case in hand Ram Lal Narang (supra) and Vinay Tyagi (supra), it has already been settled that the police has power to conduct further investigation after submission of the charge-sheet, but it should take / seek formal permission from the Court.

30. The legal issue has also been settled in **Sri Bhagwan Samardha Sreepada V. Venkata Vishwandadha Maharaj vs. State of Andhra Pradesh & Others, AIR 1999 Supreme Court 2332** wherein it was clarified by the Hon'ble Apex Court that -

"Power of the police to conduct further investigation, after laying final report, is recognised under Section 173 (8). Even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. In such situation power of Court to direct police to conduct further investigation cannot have any inhibition. There is nothing in Section 173 (8) to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the Court would only result in encumbering it with burden of searching for all potential accused to be afforded with the opportunity of being heard."

31. The aforesaid legal dictum promulgated by the Hon'ble Apex Court makes it clear that to hear the accused while making an order for further investigation under section 173 (8) of Cr.P.C. is not required for the Court and at the same time it is also settled that if the police wants to conduct further investigation under section 173 (8) of Cr.P.C. after submission of the police report, it has to take a formal permission from the Court and further investigation is the power of the Court undoubtedly. Now the issue whether further investigation can be done at the instance of the accused, finds its answer on the basis of the aforesaid discussion which negates the power of the accused to knock at the door of the Court to pass an order for performing further investigation into a matter.

32. In **National Multi Commodity Exchange of India Limited Vs. State of Gujarat & another (Special Criminal Application (Quashing) No. 1359 of 2014**

decided on 21.04.2015, his Lordship of Gujarat High Court discussing the law over the subject held like this –

"40. A learned Single Judge of this Court in the case of **Nitinbhai Mangubhai Patel v. State of Gujarat and others reported in 2013 LawSuit(Guj) 1124** h ad the occasion to consider the issue on hand. I may quote the relevant observations of the learned Single Judge as under:

Considering section 173 (8) of the CrPC, there cannot be any further investigation at the instance of the accused on the grounds which infact are their defences which are required to be considered at the time of trial and that too after the IO has submitted the charge sheet against the accused having found prima facie case which requires further trial and more particularly on the very grounds the accused submitted the discharge applications which not only came to be rejected by the learned CJM but even the same was confirmed by the learned Sessions Court. Section 173 (8) of the CrPC permits the IO / officer in charge of the police station for further investigation in respect of an offence after report under subsection (2) of section 173 has been forwarded to the Magistrate. Therefore, there cannot be a further investigation as provided under section 173 (8) of the CrPC after a report under subsection (2) of section 173 of CrPC has been forwarded to the Magistrate and that too on the grounds which are the defence of the accused. The powers which are available for further investigation under section 173 (8) of the CrPC would be available only to the IO / officer in charge of the police station."

33. It is pertinent to mention here that in the aforesaid case, further investigation was ordered at the instance of the accused and his Lordship held that the learned revisional court committed material error in not appreciating the scope of further investigation under section 173 (8) of Cr.P.C. that too at the instance of the accused and when the charge-sheet was already filed and even the grounds which were invoked were virtually the defences of the accused.

34. From a co-joint reading of all the legal views discussed here-in-above in the peculiar facts and circumstances of this case, this Court finds itself in a position to draw a conclusoin that an application to conduct further investigation moved by the accused Indu Awasthi was totally misconceived and without any right provided to the accused by law. The case was thoroughly investigated by the I.O. and he also noticed that one earlier application was already moved by the informant alleging the same facts therein and that is why he conducted the investigation of the case in hand accordingly and also mentioned this fact in the charge-sheet. It is also not be incorrect to say that the grounds on which further investigation was sought for by the accused Indu Awasthi are really the defences of the accused which may be taken by him at any subsequent stage of the trial and in fact the perusal of the application for further investigation indubitably confirms that the accused wants the investigating agency to investigate the case from particular angle which suits the accused and he has also included in his application the allegations against other persons who have not been arrayed as accused by the I.O.

35. Article 227 of the Constitution of India, which embodies power of High Court to have superintendence over all Courts of the State, provides as hereunder.

"227. Power of superintendence over all courts by the High Court - (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision or any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

36. The issue as to whether a Criminal Court is armed with the power to order further investigation after submission of the charge-sheet has been well clarified in Vishnubhai Haribhai Malaviya vs. State of Gujarat, (2019) 17 SCC 1 wherein it has been promulgated by the Hon'ble Apex Court that power to make order as to further investigation is available to Magistrate under Section 156 (3) CrPC even at post-cognizance stage until trial commences i.e. charges are framed. The power can also be exercised suo motu by the Magistrate himself, depending on the facts of each case.

37. In the present petition, further investigation into the matter has been prayed for on two points. Firstly, that the first informant Smt. Rachna Singh was having unfair relations with Sunil Kumar Singh Rathore, advocate, which was protested by the deceased Mangal Singh, but she was not ready to break her relations with him and the second point for further investigation in the present petition is that the deceased Mangal Singh and Pawan Awasthi had borrowed a huge amount of money from several persons for business purpose, but they were not in a position to return it back and they had concealed themselves here and there and were planning to shift in some other district and Pawan Awasthi was shifted as well in another district, but Mangal Singh was harassed by the money lenders from whom he had borrowed a huge amount of money and he died in suspicious circumstances and the present petitioners had no concern with all his affairs. It is notable that so far as the first ground is concerned, it was never mentioned in the original application for further investigation moved by the petitioners / accused themselves and now surprisingly the first ground was introduced in the present petition for the first time before any Court. The second point finds place in the application for further investigation as detailed here-in-above, but this Court is of the considered view after considering the facts and circumstances of this case that this is nothing but an attempt on the part of the accused just to create future defence in the case in hand, which is not permissible under law.

38. Hence the present petition under Article 227 of the Constitution of India is

liable to be dismissed on all the grounds whether it is legal or factual. The accused / petitioners have no locus standi to move application for further investigation before the Magistrate and in the facts and circumstances of the case, if the Magistrate found that the application was not worth credit and he rejected it accordingly, no legal or factual error was committed by the concerned Magistrate.

39. Considering the entire facts and circumstances of the case, the submissions advanced by learned counsel for the parties and also keeping in view the above stated legal position, there is no such illegality, perversity or any error of jurisdiction in the impugned order so as to warrant exercise of powers under Article 227 of the Constitution of India by this Court. There is no justification warranting any interference with the impugned order in this petition. Consequently, the present petition is liable to be dismissed.

40. Accordingly, the instant petition under article 227 of the Constitution is hereby dismissed.

(2024) 5 ILRA 405
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 125 of 2024

Prof. Soniya Nityanand & Ors.
...Petitioners
Versus
Prof. Ashish Wakhlu ...Respondent

Counsel for the Petitioners
Lal Prasad Misra, Shubham Tripathi

Counsel for the Respondent:
Sandeep Kumar Ojha

A. Contempt Law – Constitution of India – Article 215 – Contempt of Courts Act, 1971 – Section 23 – Contempt proceeding – Nature – Standard of proof – Held, contempt proceedings are quasi criminal in nature and the standard of proof is beyond reasonable doubt. These proceedings carry a rigor much more than any other judicial proceedings for adjudication of disputes. These proceedings are in exercise of powers of the High Court to punish for its contempt and that of the subordinate courts. Therefore, they should be exercised with circumspection and due and proper application of mind even at the stage of initiation of such proceedings. (Para 23)

B. Contempt Law – Contempt of Courts Act, 1971 – Section 23 – Contempt proceeding – Scope of punishment – Prima facie satisfaction – Necessity – Non existence of jurisdictional facts – Effect – Notice was issued altogether with allowing the impleadment of appellant – Legality challenged – Held, Issuance of notice in a contempt matter is not a causal or routine procedure. It requires due and proper application of mind – Ordinarily, when an application for impleadment is filed in a pending contempt proceedings, practice has been to issue notice to the proposed opposite party before considering it so that they may have an opportunity to inform the contempt court about the correct facts, unless from the facts placed and documents annexed, an exceptional case is made out, *prima facie*. – Division Bench gave liberty to the appellants to move an application before Single Bench for discharge of notices issued against him. (Para 23, 24 and 27)

Appeal disposed of. (E-1)

List of Cases cited:

1. Midnapore Peoples' Coop. Bank Ltd. & ors. Vs Chunilal Nanda & ors.; (2006) 5 SCC 399

2. High Court of Judicature at Allahabad through its Registrar Vs Raj Kishore Yadav & ors.; (1997) 3 SCC 11

(Delivered by Hon'ble Rajan Roy, J.)

(1) Heard Dr. L.P. Mishra, learned Senior Counsel assisted by Sri Shubham Tripathi, learned counsel for the appellants and Sri Sandeep Dixit, learned Senior Counsel assisted by Sri Sandeep Kumar Ojha, learned counsel for the respondent.

(2) This is an appeal by the Vice-Chancellor and Members of the Executive Council of King George's Medical University, Lucknow under Chapter VIII Rule V of the Allahabad High Court Rules, 1952 challenging an order passed by the Contempt Court on 08.05.2024 in Contempt Application (Civil) No.963 of 2020 [Prof. Ashish Wakhlu vs. Prof. M.L. Bhatt Vice-Chancellor, K.G.M.C., Lucknow & Ors.] In fact an application filed by the respondent for impleadment of the appellants herein has been allowed and then notices have been issued to them. The said impugned order reads as under:-

"(Order on Impleadment Application i.e. I.A./26/2024)

1. Heard Shri Sandeep Dixit, learned Senior Advocate assisted by Shri Sandeep Kumar Ojha, learned counsel for the applicant.

2. This is an application filed for seeking impleadment.

3. Cause shown in the affidavit filed in support of the impleadment application is sufficient.

4. Accordingly, the impleadment application is allowed.

5. Learned counsel for the applicant is permitted to carry out necessary impleadment, forthwith.

(Order on Contempt Application)

1. Let notice be issued to newly impleaded respondents i.e. respondent nos. 11 to 23 within a week to show cause as to why they should not be punished for wilfull disobedience of the directions of this Court, returnable within two weeks failing which the charges may be framed after summoning the contemnors.

2. Office is directed to send a copy of this order along with the notice.

3. List this case on 09.07.2024 within top ten cases. "

(3) The contention of learned counsel for the appellant is that jurisdictional facts which have to necessarily preexist the issuance of any notice in a contempt proceedings were absolutely absent in the case at hand yet learned Single Judge without satisfying himself, *prima facie*, about any civil contempt having been committed by the appellants has not only allowed the application for impleadment but also issued notice to them for showing the cause as to why they should not be punished for willful disobedience of this Court, failing which, charges may be framed after summoning the contemnors. The contention is that the contempt petition was filed in the year 2020 alleging that the Executive Council of the University by passing a Resolution dated 08.06.2020 had violated an interim order passed on 01.12.2018 in Writ Petition No.35784 (S/S) of 2018 filed by the respondent. The appellants whose impleadment has been allowed and notices have been issued by the impugned order were not Members of the Executive Council on 08.06.2020. In fact, appellant no.1 has been appointed as Vice-Chancellor much

later, that is, in August, 2023. The other appellants have become Members of the Executive Council much after 08.06.2020 and none of these appellants had any role to play in the passing of the Resolution dated 08.06.2020 which according to the respondent was contemptuous. In fact, in the affidavit in support of the application for impleadment, there is no averment whatsoever as to how the appellants herein had committed civil contempt but ignoring all these facts and without recording any prima facie satisfaction, the Contempt Court has passed the impugned order in the absence of jurisdictional facts which would give jurisdiction to the learned Single Judge to initiate contempt proceedings against the appellants and in the absence of any prima facie satisfaction recorded by the Contempt Court regarding existence of such jurisdictional facts. The contempt Court has, thus, committed a jurisdictional error.

(4) The submission was that contempt proceedings are quasi criminal in nature and the standard of proof is beyond reasonable doubt. These are very harsh proceedings and therefore, their initiation should not be a casual act as has happened in this case. This was not a case where proceedings could have been initiated against the appellants without even recording any satisfaction as to how, even prima facie, they have committed any civil contempt. In the facts of the case, apparently, no contempt has been committed by them as they were not part of the Executive Council when the Resolution dated 08.06.2020 was passed.

(5) It was also submitted that, in fact, the Resolution dated 08.06.2020 has been challenged by the respondent by means of a separate Writ Petition bearing No.3840 (S/S) of 2021 along with a challenge to the order terminating his services dated 10.06.2020 but there is no interim order therein. Now, by impleadment of the appellants, the respondent veritably wants to arm twist them and secure his reinstatement in contempt proceedings, thereby, seeking relief which he has not yet got in the writ proceedings. In any case, so far as contempt by the appellant is concerned, even prima facie, the same is not made out by any stretch of imagination.

(6) In fact, learned counsel for the respondent submitted that on 06.05.2024 an application was submitted before the Vice-Chancellor i.e. appellant no.1. On the aforesaid application, the Vice-Chancellor informed the respondent on 06.05.2024 itself that the above matter will be placed before the Executive Council of the University at the earliest since it is the appointing authority. But on that very date i.e. on 06.05.2024, the respondent filed the application for impleadment which was allowed within three days i.e. on 08.05.2024. The respondent acted in haste just as the order impugned was passed.

(7) It was further submitted that as far as dismissal of Civil Appeal No (S).5455-5456/2022 on 24.04.2024, the same was filed by Prof. Lt. General (Retd.) Dr. Bipin Puri & Anr. and the said appeal does not decide any issue qua the appellants herein, at best, the said order would bind the appellants of the said appeal who were the other opposite parties in the contempt proceedings and the said order cannot be used against the appellants to make a case for contempt which has to be considered independently especially as contempt proceedings are against the person who is alleged to have committed the contempt.

(8) It was also contented that it is not a case where some direction was issued and it remained uncomplied and in the meantime, the person holding the post

demitted office as, in such case one who succeeds will be bound to comply the said order but it is a case where contempt alleged is against certain Members of the Executive Council who had passed the Resolution dated 08.06.2020 which according to the respondent is in the teeth of the interim order passed by this Court in a writ petition which is still pending wherein a stay vacation application is also pending. Now, in this scenario, as none of the appellants were Members of the Executive Council at the relevant time when the Resolution dated 08.06.2020 was passed nor did they have any role to play in that regard, on the face of it, they could not have been subjected to the rigour of contempt proceedings. None of this has been seen and a jurisdictional error has committed in passing the impugned order. It was contended that the right course for the contempt court was to issue notice on the impleadment application to the proposed opposite parties/ alleged contemnors whereupon the correct facts would have been placed before the Contempt Court and this situation would have been avoided. The appellants have been subjected to initiation of contempt proceedings unjustifiably.

(9) On the other hand, Sri Sandeep Dixit, learned counsel for the respondent submitted that the special appeal itself is not maintainable as the impugned order did not qualify within the meaning of the term 'judgment' used in Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952. He placed reliance on a Supreme Court's judgment rendered in the case of 'Midnapore Peoples' Coop. Bank Ltd. & Ors. vs. Chunilal Nanda & Ors.' reported in (2006) 5 SCC 399 and certain other decisions. His submission was that the appellants were under an obligation to rectify the contempt already committed by the predecessors and not having done so they are liable to be prosecuted for contempt. We pointedly asked Sri Dixit to point out any order of the writ court in any of the writ petitions pending between the parties wherein the Resolution dated 08.06.2020 or the order terminating the services of the respondent on 10.08.2020 may have been stayed or for that matter any direction may have been issued to the University to reinstate the respondent or for that matter to withdraw the Resolution dated 08.06.2020 and the order of termination from service, he could not point out any such order.

(10) He referred to the earlier proceedings before the Contempt Court wherein an application for deferment of hearing by the earlier Vice-Chancellors was rejected against which a Special Leave Petition bearing No.6899-6900 of 2022 was filed after framing of charge on 08.02.2022 by the then Vice-Chancellor and others and though, initially interim orders were passed by Hon'ble the Supreme Court but ultimately, the special leave petition after being converted into Civil Appeal No(s).5455-5456/2022 was dismissed. This aspect of the matter has already been addressed by Dr. L.P. Mishra, learned counsel appearing for the appellants as noticed earlier.

(11) In response, learned counsel for the appellants submitted that the respondent is resorting to arm-twisting measures by filing an application for impleadment with intent to intimidate the Members of the Executive Council and brow beat them into doing something and granting such relief to him which in fact he has not been able to secure through the process of law in the writ petition wherein the Resolution dated 08.06.2020 and the order of termination of his service has been challenged. According to him, the impugned

order amounts to an interim judgment as it virtually decides the jurisdiction of the Contempt Court to proceed and initiate the contempt proceedings against the appellants, therefore, the appeal is maintainable.

(12) We have heard learned counsel for the parties and perused the records.

(13) The power to punish for contempt is vested in the High Court as an inherent power and it flows from a constitutional provision contained in Article 215 of the Constitution of India by virtue of which it is a court of record having plenary powers including the power to punish for its contempt. The Contempt of Courts Act, 1971 does not supersede or abrogate the inherent powers vested in it under Article 215 of the Constitution of India and legal position in this regard is well settled. Reference may be made to a decision reported in (1997) 3 SCC 11 'High Court of Judicature at Allahabad Through its Registrar vs. Raj Kishore Yadav and Ors' in this regard wherein vires contained in Chapter XXXV-E of the Allahabad High Court Rules, 1952 pertaining to contempt proceedings were under challenge. The said Chapter of the Rules, 1952 contains rules framed under Section 23 of the Contempt of Courts Act, 1971. But before referring to the said Rules, we may refer to the definition of 'civil contempt' contained in Section 2 (a) and (b) of the Contempt of Courts Act, 1971 which reads as under:-

"(a) "contempt of court" means civil contempt or criminal contempt;

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;"

(14) As per Rule 1 of Chapter XXXV-E of the Rules, 1952, the Rules contained in the said Chapter shall govern presentation and hearing of Contempt of Court cases coming to the High Court under the Contempt of Courts Act, 1971. The impugned order has been passed in proceedings for civil contempt and there is no dispute about it. In this context, Rule 5 of Chapter-XXXV-E of the Rules, 1952 is relevant which reads as under:-

"5. Issuance of notice :- Such allegations contained in the petition as appears to the Court to make out a prima facie case of contempt of Court against the person concerned, shall be reduced into charge or charges by the Court against such person, and notice shall be issued only with respect to those charges :

Provided that the Court shall not issue notice if more than a year has elapsed from the alleged act of contempt of court. "

(15) On a bare reading of Rule 5, it is evident that there have to be allegations contained in the petition making out a *prima facie* case of contempt of court against the person concerned, meaning thereby, the person who is arrayed as an opposite party. This condition is also required to be satisfied in the case of an impleadment application if it is to be allowed because there have to be allegations in the application for impleadment making out a prima facie case for contempt of court against the proposed party only then it can be allowed.

(16) Rule 5 further provides that if there are such allegations in the contempt petition the same shall be reduced into charge or charges by the Court against such person, and notice shall be issued only with respect to those charges. Some flexibility in the procedure to be followed in this regard

may be permissible but it has to be in consonance with the principles of natural justice and fairness keeping in mind the rigor of the proceedings. But existence of jurisdictional facts and prerequisites and due and proper application of mind to the same is a sine qua non at the stage of issuance of notice under Rule 5.

(17) In the case at hand apart from impleadment of the appellants being allowed as opposite parties/ alleged contemnors, the writ court has also issued notice for initiation of contempt proceedings.

(18) As per Rule 5, the Court has to be prima facie satisfied about contempt having been committed by alleged contemnors. It is then required to issue notice on such satisfaction.

(19) In this context, the contention of learned counsel for the appellants is that on a bare reading of the affidavit in support of the application for impleadment, no allegation as to how the appellants herein have committed any civil contempt is made out. He further contended that no satisfaction was arrived at nor recorded as is required at the time of issuance of notice as per Rule 5.

(20) We have also perused the affidavit in support of the application for impleadment. Without expressing any conclusive opinion on the issue, we do not find any such specific allegation as to how the appellants have committed willful contempt of the interim order dated 01.12.2018 passed in the concerned writ petition. We have also quoted the order passed by the Contempt Court. We say no more at this stage as the contempt proceedings are still pending and the application for impleadment has already been allowed and notices issued to the appellant.

(21) There are certain jurisdictional facts/ prerequisites which must exist prior to initiation of contempt proceedings against a person by issuance of notice in terms of Rule 5 of Chapter-XXXV-E of the Rules, 1952 as already discussed. They can be summarized as under:-

(a) There has to be an order of a Court or an undertaking before it whether it be the High Court or the subordinate court for proceedings under the Act, 1971 as contemplated in Section 2(b) of the said Act.

(b) Such order should have been communicated to the alleged contemnor calling upon him to comply the same.

(c) There has to be some action or inaction or undertaking which may amount to willful disobedience or flouting of such order or undertaking so as to constitute civil contempt.

(d) There have to be allegations in the contempt petition or in an application for impleadment mentioning the existence of aforesaid jurisdictional facts/prerequisites making out a prima facie case of deliberate and willful disobedience or violation of the order or undertaking by the alleged contemnors/opposite parties or proposed opposite parties.

(e) The contempt court has to arrive at a prima facie satisfaction about existence of the aforesaid jurisdictional facts/ prerequisites making out a prima facie case of contempt of court by the concerned persons, before issuing notice.

(22) Only on the aforesaid satisfaction, notices have to be issued to the alleged contemnors in terms of Rule 5 of Chapter-XXXV-E of the Rules, 1952. Same analogy

applies while considering and allowing an application for impleadment in pending contempt proceedings.

(23) Issuance of notice in a contempt matter is not a causal or routine procedure. It requires due and proper application of mind to the aforesaid facts and issues. We must keep in mind that contempt proceedings are quasi criminal in nature and the standard of proof is beyond reasonable doubt. These proceedings carry a rigor much more than any other judicial proceedings for adjudication of disputes. These proceedings are in exercise of powers of the High Court to punish for its contempt and that of the subordinate courts. Therefore, they should be exercised with circumspection and due and proper application of mind even at the stage of initiation of such proceedings.

(24) This apart, ordinarily, when an application for impleadment is filed in a pending contempt proceedings, practice has been to issue notice to the proposed opposite party before considering it so that they may have an opportunity to inform the contempt court about the correct facts, unless from the facts placed and documents annexed, an exceptional case is made out, prima facie. This is a time tested procedure and a procedural requirement which should ordinarily be adhered.

(25) This appeal raises important questions as to initiation of such proceedings and whether, at least in the facts of this case. There are jurisdictional issues involved, whether the jurisdictional facts/prerequisites for initiation of such proceedings against the appellants did exist or they did not, and whether the Contempt Court without due and proper application of mind not only allowed the application for impleadment without notice to the proposed opposite parties but even issued the contempt notices which are impugned herein. We were tempted to enter into and adjudicate these important issues raised by the appellants and the respondent but considering the fact that contempt proceedings are still pending and the appellants have an opportunity to seek discharge of the notices issued to them taking all such pleas as have been raised herein, we are of the opinion that it is the Contempt Court itself which should first take a call on these issues and thereafter, if the occasion so arises we can consider the same at the appropriate stage as per law.

(26) In these circumstances, we find it appropriate to request the Contempt Judge to kindly consider the pleas of the appellants on an application for discharge being moved by them and take a considered decision in this regard as per law. If after such decision is taken on the question as to whether the appellants are liable to be proceeded for contempt of court in the facts of the case, the appellants still have a cause, they can avail the remedies prescribed in law.

(27) We accordingly *dispose* of this appeal with liberty to the appellants to move an application for discharge of notices issued to them to which respondent shall have a right to respond and we request the Contempt Judge to consider relevant aspects of the matter as to whether the appellants are liable to be proceeded under the Act, 1971 and the inherent powers of the High Court for having committed civil contempt.

(28) All pleas are open for being raised before the Contempt Judge and they are open for being considered by the Contempt Court.

(29) This order shall be placed before the learned Contempt Court.

(2024) 5 ILRA 412
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 312 of 2020

Saurabh Gupta ...Appellant
Versus
The Unique Identification Authority of India, New Delhi & Ors. ...Respondents

Counsel for the Appellant:
Sri Sankalp Dewari, Sri Abhishek Bose, Sri Lalit Shukla, Sri Mohd. Shujauddin Waris, Sri Praveen Kumar, Sri Sachin Chaturvedi

Counsel for the Respondents:
A.S.G., Lakshmi Gurung, Sri Varun Pandey

A. Service Law – Aadhaar (Targeted delivery of Financial and other subsidies, benefits and services) Act, 2016 – Section 54 – Unique Identification Authority of India (appointment of officers and employees) Regulations, 2020 – Permanent Absorption – Deemed absorption on expiry of three year of deputation was claimed – Instead of absorption, authority passed the order for premature repatriation – Validity challenged – Held, there is no concept of 'deemed absorption' or 'automatic absorption' as these are terms absolutely foreign to service jurisprudence – Absorption has to be done as per the rules & regulations and the law on that aspect stands settled that, even if a person is found to be eligible it does not mean that he would be absorbed as a matter of right. Thus, when eligibility does not guarantee a deemed absorption, how can merely completing a particular tenure of service on deputation amount to 'deemed' or 'automatic absorption' – The absorption/transfer in the borrowing organisation would be complete only when the borrowing company passes an order absorbing the deputationist. An affirmative action is required from both the lender as well as the borrowing department for absorption of a government servant in the borrowing department. (Para 12 and 31)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. Civil Appeal Nos. 9252-9253 of 2022; Kerala St. Electricity Board & ors. Vs Thomas Joseph @ Thomas M. J. & ors. decided on 16.12.2022

2. Appeal (Civil) No. 5027 of 1999; Nathi Devi Vs Radha Devi Gupta decided on 17.12.2004

3. Civil Appeal No. 152 of 2022; Employees' St. Insurance Corporation Vs U.O.I.decided on 20.01.2022

4. U.O.I.& anr. Vs Shardinhu; (2007) 6 SCC 276

5. St. of A.P Vs Subbarayudu V.C. & ors.; 1998 (2) SCC 516

6. Brij Mohan Lal Vs U.O.I.& ors.; (2012) 6 SCC 502

7. Kunal Nanda Vs Union of India; AIR 2000 SC 2076: (2000) 5 SCC 362

8. Pawan Kumar & ors. Vs U.O.I.& ors.; 2018 SCC OnLine Del 12615

9. Chandra Mohan Singh Bhandari Vs U.O.I.& ors.; 2019 SCC OnLine Del 10002

10. Prasar Bharti & ors.Vs Amarjeet Singh & ors.; 2007 (2) SCALE 486

11. St. of U.P. Vs Ashok Kumar Saxena; AIR 1998 SC 925

12. Mohd. Masood Ahmad Vs St. of U.P. & ors.; JT 2007 (12) SC 467

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Lalit Shukla and Shri Praveen Kumar, learned Counsel representing the appellant, Ms. Shraddha Deshmukh assisted by Shri Varun Pandey, learned Counsel representing the respondent No.1 and Shri Vaibhav Tewari, learned Counsel representing the other respondents.

(2) This special appeal has been filed by the appellant under Rule 5, Section-C of Chapter-VIII of the Allahabad High Court Rules impugning judgment/order dated 01.10.2020 passed by the learned Single Judge of this Court in Writ Petition No. 8234 (S/S) of 2020. Apparently, the learned Single Judge, vide impugned Judgment, due to various reasons, did not find the case of the appellant fit for exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and as such, dismissed the writ petition.

(3) It would be apt to mention herein that the appellant in writ petition No. 8234 (S/S) of 2020 had sought to challenge the curtailment of his deputation and repatriation from the Unique Identification Authority of India (herein after referred as **'UIDAI'**) to his parent Corporation, namely, Metals and Minerals Trading Corporation, Jaipur (hereinafter referred as 'MMTC') and in that regard, the appellant had challenged two orders, (i) dated 16.03.2020 which is the notice of his repatriation; and (ii) by an amendment in the said writ petition, another order dated 28.05.2020 passed by the Chief Executive Officer (CEO) of UIDAI rejecting the petitioner's representation against the order dated 16.03.2020.

Brief facts

(4) First to the factual exposition. This Court abjures from a detailed narrative and refer to only those facts and to the extent, as is necessary and is well captured in the writ petition. The appellant being an employee of MMTC, Jaipur and in view of the OM dated 10.10.2013 inviting applications from eligible persons for filling up various posts in UIDAI on deputation basis at its regional office, Lucknow, applied, and was selected for such deputation. He was appointed on deputation as Deputy Director at the regional office of UIDAI, Lucknow vide an order dated 05.02.2014 for a period of 3 years from the date of taking over charge of the post or until further orders, whichever event takes place earlier. The terms and conditions of deputation in UIDAI were to be governed by the Department of Personnel and Training (herein after referred as **'DoPT**') OM dated 17.06.2010, as was also mentioned in the order of deputation dated 05.02.2014 and the OM dated 10.10.2013.

(5) Pursuant to his selection on deputation basis as Deputy Director, the appellant joined at the regional office of UIDAI at Lucknow in 2014 itself and his initial tenure came to expire on 19.02.2017, however, his deputation was extended on yearly basis from time to time. It is apparent from records that last yearly extension was granted by the Chief Executive Officer of the UIDAI wherein his approval for extension of the appellant's tenure was granted for a further period of one year from 18.02.2020, that is, upto 18.02.2021. Albeit, in the intervening period in August, 2019, the Deputy Director General of UIDAI sought explanation from the appellant regarding his day to day work and the reasons for non-submission of reports on time. Although, the appellant submitted a written reply on 30.08.2019, however, his reply was not found to be satisfactory and, accordingly, a comment was recorded by the Deputy Director General, who incidentally

was also the head of the regional office at Lucknow.

(6) In the meantime, on 21.01.2020, the Unique Identification Authority of India (appointment of officers and employees) Regulations, 2020 (hereinafter referred to as **'2020 Regulations'**) was framed under Section 21 (1) read with Sub-section 1 of Section 54 and Clause (x) of Sub-section 2 of Section 54 of the Aadhaar (Targeted delivery of Financial and other subsidies, benefits and services) Act, 2016 (herein after referred as Act, 2016), as amended vide the Aadhaar and Other Laws (Amendment) Act, 2019 (herein after referred as Act, 2019), were notified.

(7) Pursuant to the notification of the aforesaid regulations, on 29.01.2020, applications were invited from eligible candidates for permanent absorption in the cadre of UIDAI under Regulation 5 of the Regulations, 2020 with standard stipulations, including that mere fulfilment of the eligibility criteria by a candidate and submission of application form by him/her would not confer a right to get him/her absorbed in the cadre of UIDAI, which was to be contingent upon the recommendations of the selection Committee, etc.

(8) The appellant claiming himself to be eligible for such permanent absorption is said to have applied on 07.02.2020 and his application was forwarded by his superior officer on 12.02.2020. However, admittedly, the absorption process did not take place as it was held up in view of certain queries made by the Officers' from the UIDAI which in turn made queries in this regard from the concerned departments, but the said queries have not been resolved. However, in the interregnum on 13.02.2020. the appellant's deputation was extended for a further period of one year from 18.02.2020, that is, upto 17.02.2021.

(9) Furthermore, it has come on record that on 26.02.2020 and 27.02.2020, two complaints were received by UIDAI against the appellant, one lodged by Shri Devashish Bhatt, Assistant Section Officer and the other by Shri Praveen Dixit, Driver in the general pool. Both were employees working at the regional office at Lucknow and in both the complaints, misbehaviour and improper conduct by the appellant towards them was alleged. The Deputy Director General, being Head of the regional office, constituted an internal inquiry committee on 27.02.2020 comprising of Shri Dev Shankar, Assistant Director General, Regional Office, Ranchi and Shri Anil Kumar, Deputy Director, Regional Office, Ranchi (at Patna). The aforesaid two-member fact finding inquiry committee is said to have recorded the statement of aforesaid complainants as well as other Officers and employees of the Regional Office and submitted its report on 04.03.2020 which was found to be averse to the appellant.

(10) It has come on record that in the meantime, Shri Vivek Kumar Daksh came to be posted as Assistant Director General in the Regional Office, Lucknow on 05.02.2020 and from the said date he became the Reporting Officer of the Appellant and as such on 02.03.2020, while the aforesaid fact finding inquiry against the appellant, instituted on 27.02.2020, was still pending, an explanation was called from him by the aforesaid reporting officer relating to huge pendency of grievances/ complaints, which, as per the work distribution order dated 21.12.2018, the appellant was required to dispose of. The said letter invariably alleged that the review

of work as on 28.02.2020, revealed that more than 10000 cases were pending for exceptional handling of date of birth cases in the Regional Office at Lucknow, wherein many cases were pending for more than a year which had caused substantial delay in disposal of sensitive public complaints. It was alleged that the appellant had neither taken any prompt action to dispose of these cases at his end as Supervisor nor reported this issue to his superior for prompt handling. Further, allegations have been levelled to the effect that the appellant had failed to devise any mechanism to supervise this issue at regular intervals at his level as Deputy Director and even the coordination mechanism among staff which was handling this issue was also not put in place. Consequently, the appellant was asked for an explanation of the aforesaid non-monitoring, non-reporting and non-disposal of pendency, within 3 days.

(11) Although, the appellant replied on 05.03.2020, however, as aforesaid, since a day prior to this i.e., on 04.03.2020, the report of the fact finding internal inquiry committee came to be submitted; the Assistant Director General (Admn./HR) in the office of Deputy Director General, Regional Office, Lucknow on 05.03.2020 itself, sought inputs from the reporting Officer-Shri Vivek Kumar Daksh, Assistant Director General regarding performance of the appellant and apparently on 06.03.2020 the said reporting Officer commented that the work of the appellant was unsatisfactory and not up to the mark.

(12) Thus, in the aforesaid background, the Deputy Director General, Regional Office, Lucknow vide letter dated 06.03.2020, addressed to the Assistant Director General (Admn./HR), UIDAI Headquarters, New Delhi recommended for appellant's premature repatriation to his parent Department/Office. Apparently, on 12.03.2020, the competent authority, who is said to be the Chief Executive Officer, granted approval for premature repatriation of the appellant and the same was conveyed to the Regional Office, Lucknow.

(13) Coincidently, on the same date i.e., 12.03.2020, the absorption process was also put on hold on account of certain unresolved issues by the Headquarters of UIDAI, New Delhi, as mentioned earlier and on 16.03.2020, the order curtailing the deputation of the appellant and giving notice for his repatriation citing Clause 9 of the OM dated 17.06.2010 was issued and subsequently, as the notice period was 3 months, the appellant was relieved on completion of the said period during the pendency of the Writ Petition. However, the said relieving was subject to final orders in the said Writ petition, in view of certain interim orders passed in favour of the appellant.

(14) The records reveal that against the aforesaid order dated 16.03.2020 for repatriation, the appellant preferred a representation to the Chief Executive Officer of UIDAI, which came to be rejected on 28.05.2020 and the said order also had been impugned by the appellant in the writ petition along with the original order dated 16.03.2020.

(15) The learned Single Judge objectively dealt with each and every contention of the parties therein, and vide a very reasoned Judgment dated 01.10.2020, the learned Single Judge dismissed the writ petition of the appellant. It is this order,

which has been sought to be challenged in the present appeal.

Contention of the parties

(16) The learned Counsel for the appellant Mr. Lalit Shukla has vociferously argued that the appellant was not on deputation on the date of the impugned order dated 16.03.2020 as he had already got absorbed in the UIDAI, by rule of immediate absorption with effect from expiry of three years of deputation on 19.02.2017. The learned Counsel in this regard has submitted that the appellant was recommended for appointment on deputation for three years from 19.02.2014 to 18.02.2017 and in view of a letter dated 23.12.2016 from MMTC to UIDAI, obtained by the appellant under the provisions of RTI, MMTC, has stated that the appellant would reach the maximum deputation period of three years on February 18, 2017. Thus, it has been sought to be argued by the appellant that since UIDAI instead of repatriating the appellant before the aforesaid expiry of deputation period, sought the appellant's cadre clearance from MMTC, which was promptly obliged, but without obtaining exemption from the "Rule of Immediate Absorption" for the post of Deputy Director, he should be deemed to be absorbed with the obtaining of his cadre clearance from MMTC.

(17) The edifice of the argument of the learned Counsel for the appellant seems to be built on the proposition that, since clause 6 & 9 of the Office Memorandum dated 31.10.2007 issued by the Department of Pension & Pensioner's Welfare, specifically provided, that if a Central Government servant is allowed to proceed to a Central Autonomous body on deputation basis *without obtaining specific exemption for the post,* the Official will have to be treated as having resigned from the Central Government and absorbed in the Central Autonomous body.

(18) The learned Counsel has relied on DoPT OM dated 17.06.2010, which provided for the period of deputation as per the recruitment rules of the ex-cadre post or 3 years in case no tenure regulation exists for the ex-cadre post. According to the learned Counsel, when the said OM is read along with the proviso to Fundamental Rule 13, it is ample clear that "no lien" of a Government servant would be retained, where he has proceeded on immediate absorption basis and in case his deputation is beyond the maximum limit admissible under the orders of the government issued, from time to time. Therefore, drawing an inference, it has been submitted that in absence of exemption for the post of deputy director in the Authority, the appellant stands already absorbed in services of UIDAI with the cadre clearance by MMTC with effect from 19.02.2017 and since he stands already absorbed, his lien in the parent organisation/MMTC also got terminated from the date of absorption in UIDAI. According to the appellant, the respondents very well knew of the aforesaid legal position; although, instead of issuing an order of absorption, the appellant had been arbitrarily extending the deputation, even though the said extension was not permissible as per law.

(19) It has also been argued that Regulation 4 of the Regulations, 2020 enacted with effect from 21.01.2020, is in violation of Section 58 of the Aadhar Act, inasmuch as, it failed to consider employees as part of initial cadre who had already been absorbed into its services through the rule of immediate absorption during the operation

of Section 58 of the Aadhar Act. The learned Counsel in this regard has relied on the judgment of **Kerala State Electricity Board & Ors. Vs Thomas Joseph Alias Thomas M. J. & Ors.** (Civil Appeal Nos. 9252-9253 of 2022, decided on 16.12.2022) to urge that regulations cannot violate the parent Act.

(20) The next argument addressed by the learned Counsel for the appellant is to the effect that CEO is not competent to terminate statutory appointment of appellant. According to him, before 25.07.2019, the appointing authority of the appellant was Chairman of UIDAI, who had approved initial appointment from 19.02.2014 and after the amendment, UIDAI itself by virtue of Section 21 (1) is the appointing authority and not any Officer or CEO in absence of any delegation of such powers to make appointment by general or special orders, to either CEO or any other Officer under section 51 of the Aadhar Act. Thus, it has been argued that in case the CEO is considered as an appointing authority as defined in Regulation 2(1)(b) of the Regulations, 2020, then such interpretation would render Section 51 of the Aadhar Act redundant and bad in eyes of law and in this regard, he has relied on the Constitutional Bench judgment of the Apex Court in **Nathi Devi Vs Radha Devi Gupta** [Appeal (Civil) No. 5027 of 1999, decided on 17.12.2004] to argue that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. As such, according to him, the CEO is not competent authority to pass the impugned order of repatriation as the same is vested only in the authority i.e., UIDAI.

(21) The third line of argument addressed by the learned Counsel for the appellant is that OM dated 17.06.2010 is not applicable after 21.01.2020. According to the learned counsel, UIDAI in exercise of powers under section 21 of the Aadhar Act notified two regulations, namely, Appointment Regulations 2020 and Service Regulations 2020, to regulate appointment and all other service conditions of employees of UIDAI with effect from 21.01.2020 and as such, in the absence of any saving clause in these regulations and according to him, even the Removal of Difficulty Order 2016 notified by the respondents under Section 58 of the Aadhar Act does not help, as the same was for a limited time period i.e., upto 3 months effective from 12.07.2016 or until all provisions of Aadhar Act and regulations became effective or in force, whichever is earlier. Thus, according to him since the Aadhar Act came to be enforced with effect from 21.01.2020, the OM dated 17.06.2010 came to be stopped and therefore, the impugned order dated 16.03.2020 passed under the said non-existing OM dated 17.06.2010 is illegal and in violation of Section 21 of the Aadhar Act and in that regard, he relied on the judgment of the Apex Court in the case of **Employees' State Insurance Corporation Vs. Union of India** (Civil Appeal No. 152 of 2022, decided on 20.01.2022).

(22) The fourth line of argument is based on the premises that inquiry was in violation of statutory Regulation 60 of UIDAI service Regulations 2020 under section 21 of the Aadhar Act. According to the learned Counsel, the impugned order dated 16.03.2020 was issued based on inquiry report dated 04.03.2020 for misconduct allegations, through two complaints and a report of inefficiency dated 06.03.2020. But in eventualities of misconduct and inefficiency, inquiry was to be held by disciplinary authority only in

accordance with regulation 60 and in this regard, he has relied on the judgment of the Apex Court rendered in the case of **Union of India and another Vs Shardinhu : (2007) 6 SCC 276.** The competence of the inquiry committee was also doubted and according to him, the approval of such constitution of inquiry committee was not done by the disciplinary authority of appellant and as such, the same is illegal and bad in law. Further, according to him, although misconduct is a ground of repatriation, the same does not find any mention in the preliminary inquiry nor the same was reported anywhere in the finding that the two complaints were found to be correct. Thus, according to the appellant, the said complaints were manipulated for obvious reasons and shows collusion of the respondents and has, as such prayed for quashing the judgment of the learned Single Judge and allowing the present appeal.

(23) Per contra, Ms. Shraddha Deshmukh learned Counsel in her own eloquent manner appearing for UIDAI, has defended the impugned order by submitting that a very detailed reasoning has been recorded by the learned Single Judge while dismissing the writ petition of the appellant and it does not call for any interference. Ms. Deshmukh after narrating the factual matrix of the present case, has taken this court through the provisions of Unique Identification Authority of India (Appointment of Officers and Employees) Regulations, 2020, which came into operation on 21st of January, 2020. According to her, the appellant cannot take benefit of the regulations for permanent absorption into the cadre of UIDAI, as complaint of misdemeanour and unsatisfactory performance, was raised prior to the coming into force of the said regulations and most importantly, the regulation itself states that mere fulfilment of the eligibility criteria by a candidate and his submission of application form does not confer a right to him/her to be absorbed in the cadre of UIDAI.

(24) Ms. Deshmukh has vociferously contended that the regulations clearly mention that absorption in the cadre is contingent on the recommendation of the selection committee and the concurrence of the parent organisation/cadre, as well as, the decision of the appointing authority and availability of vacancy in the respective post. She has taken this Court through the declaration dated 07.02.2020 filed by the appellant in this regard, while preferring the application seeking absorption. Anyhow, it has been stated by the learned Counsel appearing for UIDAI, that a policy decision has been taken by UIDAI to keep the absorption policy in abeyance vide OM dated 12.03.2020, which had not only affected the Appellant but across pan-India, and as a matter of fact, no employee of UIDAI has been absorbed into the cadre under the regulations of 2020 and therefore, there could be no question of arbitrariness on the part of UIDAI.

(25) The learned Counsel for the respondent thereafter, has pointed the attention of this Court to regulation 5 of the 2020 regulations, which provides for constitution of the initial constitution of the cadre, wherein various requirements have to be fulfilled by a person to be considered for absorption. According to her, when a regulation is already at place, the appellant or for that matter, any person claiming absorption in the UIDAI has to fulfill the requirement of regulation 5 of the 2020 regulations, which is mandatory in nature. Ms. Deshmukh lays emphasis on the point that as per regulation 5, offer of absorption

can be given only to those persons who are holding any post provided under the schedule and meet the requirements as specified in regulation 5(2)(3) and (4), which according to the learned Counsel for UIDIA is not being fulfilled by the appellant and as such, he cannot claim any right of absorption.

(26) The learned Counsel for UIDAI has also submitted that the appellant has not challenged the policy decision of UIDAI for keeping the absorption policy at abeyance and per se, any argument running contrary to the said policy decision should not be entertained by this court and to fortify her stand, she has relied on the judgment of the Hon'ble Apex Court in **State of A.P Vs. Subbarayudu V.C. and others : 1998 (2) SCC 516 and Brij Mohan Lal Vs Union of India and others** : (2012) 6 SCC 502. Further, the learned Counsel has also relied on the judgment of **Kunal Nanda Vs. Union of India** : AIR 2000 SC 2076 and other cases to argue that there is no vested right in any person to continue for long deputation or get absorbed in the department to which he had gone on deputation. Thus, it has been summed up by her that no grounds have been made out by the appellant and the present appeal may be dismissed.

Discussion & Findings

(27) Having heard the parties at length, this Court must at the very outset record that, after the order of repatriation of the appellant, which is the subject matter engaging the attention of this court in the present appeal, it has come on record that the parent organisation of the appellant, namely, MMTC, vide its emails dated 11.01.2021 and 22.02.2021, requested the appellant to join his parent organisation. Apparently, it seems that the appellant did not join the services of MMTC and as such disciplinary proceedings have been initiated against the appellant on the ground of misconduct. This Court was informed during the course of hearing that a writ petition bearing No. 8943/2022 has been filed by the Appellant, which is pending before the learned Single Judge of this court, wherein although a notice had been issued to the Respondents, however no stay against the said departmental proceedings have been granted in favour of the petitioner. This Court, vide order dated 14.12.2023 requisitioned the said writ petition. However, during the course of hearing, this Court expressed its reservation to hear the said writ petition along with the present appeal, as any decision in that writ petition would not only cause prejudice to the Appellant for losing a chance of appeal (Special Appeal), but would also result in non-joinder of issues as the grounds espoused by the appellant in the present appeal are at variance to the grounds mentioned in the writ petition. Thus, this Court vide an order 27.04.2024 has delinked the writ petition No. 8943/2022, which shall be decided on its own merit by the learned Single Judge and without being influenced by any observation made by this court in the present appeal.

(28) First & foremost, it is not in dispute that after the establishment of UIDAI under Section 11 of the Act, 2016, it has become a statutory authority and is no longer an attached office of the Government of India or the Planning Commission nor is it in dispute, that the parent corporation of the appellant is also an autonomous body, therefore, both the lending and borrowing corporation/authority are not departments of the Government of India but are autonomous bodies as of now and were so,

on the date of passing of the impugned order of repatriation dated 16.03.2020 and disposal of representation dated 28.05.2020.

(29) The hinge of the argument addressed by the learned Counsel for the appellant belies the factual matrix. It has been contended that the appellant was not on deputation on the date of the impugned order dated 16.03.2020 as he had already been absorbed in the UIDAI by rule of immediate absorption with effect from expiry of three years of deputation on 19.02.2017. The learned Counsel has tried to develop a concept of "deemed absorption" or "automatic absorption" and in that regard has given various corollary arguments. The first argument being that clause 6 & 9 of the OM dated 31.10.2017 issued by the Department of Pensions & Pensioner's Welfare, provided, that in case a central government servant proceeds to a central autonomous body on deputation basis without obtaining specific exemption for the post, the official would be treated as having resigned from the central Government and absorbed in the central Autonomous body. Apparently, it has come on record that although in the appellant's case no specific exemption for the post was obtained, but he was never treated to have resigned from his parent organisation, which is fortified from the issuance & request email dated 11.01.2021 and 22.02.2021, wherein MMTC has requested the appellant to join his parent organisation. The said OM was issued for preparation of shield that, in case no specific exemption for the post is obtained, then in that case, the person would be treated to have resigned, so that there is no lien created on the post held by that particular person in the parent organisation, which would give a meaningful & purposive understanding of the tenure of service for consideration of service benefits, including pensions, etc. According to this Court, the said OM is of no help to appellant as he has not been treated as having resigned from MMTC.

(30) Further, the contention of the learned Counsel for the appellant that DoPT OM dated 17.06.2010 provided for a maximum tenure of 3 years and since the appellant has been on deputation in UIDIA for close to seven years and fundamental Rule 13 provides, that in case a person is on deputation beyond the maximum limit admissible, there would be "no lien" on the post held by that person/Government servant in the parent organisation. At the first blush, the contention of the appellant seems to be appealing, however on a closer look, it is apparent from the facts of the present case that the proposition is out of context. The said rule prescribed for an eventuality when a government servant is given only two choices i.e., either return to the parent organisation within the prescribed period or there would be "no lien". Unfortunately, in the present case, the deputation has been extended by UIDAI much beyond the prescribed period and the appellant had been accepting the said extension. Further, there had been no endeavour by MMTC to put to notice the appellant to either return or loose the lien in his parent organisation. Apparently, all the parties have been working in tandem with each other and it is only when UIDAI repatriated the appellant, the controversy crept. In any case, it is borne from the record itself that "lien" existed on the post held by the appellant in his parent organisation-MMTC on his repatriation from UIDAI and by itself, even this OM is of no help to the appellant.

(31) Anyway, it has to be understood that there is no concept of

"deemed absorption" or "automatic absorption" as these are terms absolutely foreign to service jurisprudence. One has to understand that deputation or permanent absorption, is a bilateral phenomenon. There is no provision under law, of deemed absorption. Pertinently, absorption has to be done as per the rules & regulations and the law on that aspect stands settled that, even if a person is found to be eligible it does not mean that he would be absorbed as a matter of right. Thus, when eligibility does not guarantee a deemed absorption, how can merely completing a particular tenure of service on deputation amount to 'deemed' or 'automatic absorption'. It has to be understood, that, merely applying for absorption as per the regulations also does not give a right for being absorbed as it would depend on various factors, including suitability and most importantly, the necessary NOC and/or the permission of the parent department/organisation. The absorption/transfer in the borrowing organisation would be complete only when the borrowing company passes an order absorbing the deputationist. An affirmative action is required from both the lender as well as the borrowing department for absorption of a government servant in the borrowing department and as such, it can be safely understood that deemed absorption or automatic absorption is not permissible under service law and nothing has been brought on record by the appellant to demonstrate any rule or regulations akin to the said concept.

(32) The next argument addressed by the learned Counsel for the Appellant is Regulation 4 of the Regulations 2020 is in violation of section 58 of the Aadhar Act, as it fails to consider employees as part of initial cadre, who has already been absorbed into its services through the rule of immediate absorption during the operation of Section 58 of the Aadhar Act. This ground presupposes that the appellant had already been given immediate absorption with the lapse of his tenure of three years, which this could have already been held to be untenable in the eyes of law.

(33) As regards the other ground of the appellant that the CEO is not competent to terminate the statutory appointment of the appellant is concerned, this court finds that a co-joint reading of section 18 (4) of the Aadhar Act, 2016 and Regulation 2 (1) (b) of the Regulations, 2020 sufficiently indicates that the Chief Executive Officer (CEO) had administrative control over the officers and other employees of the Authority. Further, Regulation 3 of the Regulations, 2020 empowered the Chief Executive Officer to implement the said Regulations. Apparently, the decision communicated to the Appellant vide order dated 16.03.2020 for repatriation had been taken with the approval of the Chief Executive Officer who was competent to take a decision in this regard, as such, the contention of the appellant appears to be untenable both, on facts and in law.

(34) As regards the contention of the appellant relating to non-applicability of OM dated 17.06.2010 as the same became redundant after the enforcement of the Aadhar Act and the notice of repatriation dated 16.03.2020 having been issued under the said non-existing OM and in violation of section 21 of the Aadhar Act is concerned, this Court finds that the learned Single Judge has very extensively dealt with the said ground and has returned a finding to the following effect;

"At this very stage it needs to be mentioned that the petitioner came on

deputation in the year 2014 when UIDAI was still functioning as an attached office of the Planning Commission of the Government of India and his selection as also tenure of deputation were governed by the aforesaid DoPT OM's dated 17.06.2010 which was subsequently modified by OM dated 17.02.2016 and this fact was mentioned in the OM dated 10.10.2013 in pursuance to which the petitioner applied for being appointed on deputation as also in the order of his deputation dated 05.02.2014. Clause 6 of the DoPT OM dated 17.02.2016 therefore did not make these OM's inapplicable, at least till 11.07.2016 i.e. prior to Act, 2016 coming into force, if not, even thereafter.

It is not out of place to mention that the Act, 2016 came into force on 12.07.2016 and the UIDAI was established by a notification under Section 11 of the said Act on 12.07.2016 itself. However, all the provisions of the Act, 2016 were not notified in terms of Section 1 (3) of the said Act, instead, Section 11 - 20, 22 - 23 and Section 48 - 59 came into force on 12.07.2016 as per notification issued in this regard under Section 1 (3) of the Act, 2016. Section 1 - 10 and 24 - 47 of the said Act came into force on 12.09.2016 vide a notification of the same date under Section 1 (3) of the Act, 2016.

Section 21 of the Act, 2016 dealing with terms and conditions of service of officers and employees of UIDAI was not notified as per Section 1 (3) of the said Act at that time nor any regulations as are referred therein were framed prescribing the terms and conditions of service of officers and employees. In fact, the said provision, without being notified, was amended vide Act, 2019, which was published in the Gazette on 23.07.2019 and Section 1 to 30 of the Act, 2019 came into force on 25.07.2019 by a notification of the same date issued under Section 1 (2) of the Act, 2019. By the amendment in Section 21, the requirement of approval of the Central Government as was required under the unamended Section 21 was done away with.

The regulations as are referred in Section 21 of the Act, 2016 were framed and notified only on 21.02.2020. Regulations no. 1 of 2020 which has already been referred earlier are relevant for the case at hand.

In this context Section 59 of the Act, 2016 is relevant and it reads as under:-

" 59. Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act."

In view of the above quoted provision, as UIDAI functioned as an office of the Central Government therefore, any action taken under the notification dated 28.01.2019 by which it was established as an attached office of the Planning Commission and the subsequent notification dated 12.09.2015 by which it was made an attached office of DIET, Government of India, are to be deemed to have been validly done or taken under the Act, 2016. The exercise of selection and appointment of the Appellant on deputation was initiated by UIDAI after its constitution by the notification dated 28.01.2009 but prior to 12.07.2016, therefore, this action is to be treated as validly done under the Act, 2016 in view of Section 59.

In view of the above as unamended Section 21 of the Act, 2016 had

not been notified under Section 1 (3) of the said Act and as no regulations had been framed as referred therein regarding terms and conditions of service of officers and employees of UIDAI, the tenure of deputation of the petitioner continued to be governed by the DoPT OM's dated 17.06.2010 and 17.02.2016 in accordance with the terms of deputation mentioned in the OM dated 10.10.2013 and the order of deputation of the petitioner dated 05.02.2014 at least till 21.02.2020, when, the regulations namely UIDAI (appointment of officers and employees) Regulations, 2020 were notified under Section 21 of the Act, 2019.

(35) Further, this court finds that a very pertinent question in the context was framed by the learned Single Judge in the impugned order, which inter-alia says:

"Question is, whether, once the Regulations, 2020 were notified, the OM's dated 17.06.2010 and 17.02.2016 became inapplicable? and, whether, in the absence of any provision for repatriation or curtailment of deputation in the Regulations, 2020, the impugned order of repatriation dated 16.03.2020 is illegal?

(36) The aforesaid question framed by the learned Single Judge was dealt very vividly covering all aspects of the matter and returning a finding in the following words;

"On perusal of the Act, 2016, the Court finds that there is no specific provision of recruitment and appointment including by a way of deputation instead there is a general provision contained in Section 21 as amended by the Act, 2019 which speaks of determination/specification of terms and conditions of officers and employees of UIDAI by regulations to be made by the UIDAI. Section 54 of the Act also empowers the UIDAI to frame such regulations.

As already stated, Regulations, 2020 made by UIDAI were notified on 21.02.2020. Regulation 11 thereof deals with deputation and reads as under:-

" 11. Deputation.- (1) The posts which are to be filled up by the method of deputation would be widely circulated among such Ministries or Departments of the Central Government, State Governments, Administration of Union Territories, Public Sector Undertakings and Statutory and Autonomous Bodies which are expected to have people with the qualifications and experience matching the requirements of the Authority and willing to join the Authority on deputation.

(2) The selection of candidates for appointment on deputation basis shall be made on the recommendations of the Selection Committee.

(3) All appointments made on deputation in the Authority under these regulations shall initially be for a period not exceeding five years which may be extended for such period and in such manner as prescribed by the Authority from time to time."

As per Sub-regulation (3) initially all appointments made on deputation are required to be made for a period not exceeding 5 years which may be extended for such period and in such manner as prescribed by the authority i.e. UIDAI from time to time. No such decision of the "authority" as defined in Section 2 (e) of the Act, 2016 i.e. UIDAI, has been placed before the Court prescribing any period beyond 5 years up to which the deputation under Regulation 2020 could be extended nor the manner of such extension as having been prescribed by UIDAI has been placed before the Court. It being a specific power

of regulation of the terms and conditions of service vested with the UIDAI, it has to be performed by it and none else.

If the argument of the petitioner's Counsel that DoPT OM's dated 17.06.2010 and 17.02.2016 became inapplicable w.e.f. 21.02.2020, in view of Regulations, 2020, then, the logical corrollary of it would be that he would have to be repatriated, as his term of 5 years expired in February, 2019 and no such decision of the authority as defined in Section 2 (e) of the Act, 2016 has been brought on record prescribing the permissible period of extension of deputation beyond 5 years and the manner of doing it under Regulation 11 (3) of the Regulations, 2020. Thus, the extension of petitioner's deputation vide order dated 13.02.2020 wherein an OM dated 23.02.2017 has been referred which according to the opposite party is in continuation of the OM's dated 17.06.2010 and 17.02.2016 will itself fall in jeopardy being contrary to Regulations, 2020.

Irrespective of the aforesaid, there is nothing in the Regulations, 2020 which may persuade this Court to hold that a person on deputation cannot be repatriated, not even on grounds of unsuitability and unsatisfactory work even though he has not been absorbed in UIDAI under the said Regulations. The scheme of the Regulations, 2020 do not lend support to such a view, which is also contrary to the general concept of deputation and repatriation as already discussed."

(37) The learned Single judge after recording and examining all the purviews of the applicability of the OM's after the enforcement of the Aadhar Act, went on to hold that,

"Now coming to the applicability of the OM's, once the UIDAI became a statutory authority under Section 11 of the Act, 2016 w.e.f. 12.07.2016 then it became an autonomous body and did not remain an office of the Government of India and DoPT OM's were not automatically applicable to it from 12.07.2016, however, in view of Section 59 of the Act, as the actions of the Central Government taken in respect of UIDAI prior to 12.07.2016 under the notification dated 28.01.2009 and 12.09.2016 were protected as being validly taken under the Act, 2016, therefore, as UIDAI functioned as an attached office of the Planning Commission and DIET, Government of India prior to 12.07.2016 when the petitioner was taken on deputation in UIDAI by the order dated 05.02.2014 according to which his tenure of deputation was to be governed by DoPT OM dated 17.06.2010 (which was modified by OM dated 17.02.2016), therefore, in view of Section 59 of the Act, 2016, the said OM's, in the absence of any regulations under Section 21 of the Act, 2016 to the contrary, continued to govern the terms of his deputation at least till 20.01.2020 and they continued to apply to his deputation to the extent they were not inconsistent with the Act, 2016, which they were not.

If the aforesaid OM's are held to be inapplicable w.e.f. 12.07.2016 then it would create a situation where in the absence of notification of Section 21 of the Act, 2016 under Section 1 (3) thereof and in the absence of any regulations made by UIDAI under the said provision, there would be no provision for bringing persons on deputation to the UIDAI, as there was no such procedure in the Act, 2016, whereas, in the very nature of establishment of UIDAI most of the officers and employees were to be brought on deputation from other departments/organisations, and the terms and conditions of the deputationist who had

already been brought to UIDAI prior to 12.07.2016 would also be put in jeopardy which can never be the intent of the rule making authority or of this Court.

As the terms of deputation applicable to the petitioner's tenure of deputation vide order dated 05.02.2014 were in no manner in conflict with the Regulations, 2020 so far as repatriation is concerned, they continued to be applicable by of the order of deputation.

Even if the OM's referred above were inapplicable w.e.f. 21.02.2020, it does not help the petitioner as even under the Regulations, 2020 which came into effect from 21.02.2020, for the reasons already given hereinabove, repatriation of the petitioner was permissible, therefore, merely because the order of repatriation dated 16.03.2020 refers to Clause 9 of the OM dated 17.06.2010, it cannot be held to be illegal whether repatriation was permissible and justified on facts is another aspect."

(38) This Court is in full agreement with the findings returned by the learned Single Judge and does not find any rationale behind the contention of the appellant that the OM's by virtue which he was appointed on deputation in the borrowing organisation became non-existent while repatriating him to the lender/parent origination.

(39) Further, the appellant has raised the issue of violation of regulation 60 of the UIDAI Service Regulations of 2020 issued under section 21 of the UIDAI Act. According to the appellant, in eventualities of misconduct and inefficiency, inquiry was required to be held by disciplinary authority. Additionally, the appellant had doubted the veracity of the inquiry committee in as much as, there was no finding by the said committee that there was any misconduct on the part of the appellant.

(40) This Court finds that the learned Single Judge distinctively dealt with the aforesaid issue in great detail and considered the displeasure remark given to the appellant regarding his functioning in August, 2019 and has recorded in the impugned order itself that there was no improvement in the appellant's functioning till 28.02.2020, leading to (i) the show cause letter dated 02.03.2020 relating to the allegation of huge pendency in cases relating to date of birth, name/gender change and other exception cases. The learned Single Judge after appreciating the inputs given by the Asst. Director General on 06.03.2020 observed that,

"The fact that petitioner's deputation was extended in the interregnum on 13.02.2020 does not wash off what is evident from the records as aforesaid regarding the working of the petitioner. This apart, there was a report of an internal inquiry committee dated 04.03.2020 against the petitioner which was in the nature of a fact finding report. One of the complainants Shri Devashish Bhatt was Assistant Section Officer under the petitioner with one Rajeev Srivastava as an intermediary officer between the two and the contention that he was not under his direct control is nothing but an eye wash."

(41) Thus, the learned Single Judge after recording that a complaint had also been lodged by a Driver of a general pool, wherein again the Appellant conducted himself in a manner not befitting an officer of his rank. Apparently, the learned Single Judge went on to quote, the conclusion of the internal inquiry committee report dated 04.03.2020 as herein under:-

"Recommendations: Committee feels that in an office like UIDAI where project work in being completed in a mission mode and officers have to interact with various eco partners including residents, cordial behaviour is utmost required. The behaviour of Shri Gupta, as intimated by various officials is undesirable and may hamper the work flow and ultimately damage the image of the organization."

(42) After appreciating the evidence on record, this Court finds that the learned Single Judge, returned a finding in the following manner:

"The Court has perused the statement of the petitioner recorded by the internal inquiry committee wherein there is a reference to the complaints being shown to him while putting a question to him and he being confronted with its contents. Therefore, it is incorrect to say, as was stated by the learned Counsel for the petitioner that he came to know about the complaints only through the counter affidavit. The material aforesaid forms the basis for recommending the premature repatriation of the petitioner on the ground of unsatisfactory work and unsuitability for continuation on deputation in UIDAI.

Based on the said recommendations, the Chief Executive Officer took the decision and approved the same on 12.03.2020 for premature repatriation of the petitioner. Consequently the impugned simplicitor order dated 16.03.32020 was issued mentioning the approval by the competent authority. No proceedings preliminary or otherwise were initiated against the petitioner by the disciplinary authority for punishing the petitioner for any misconduct, therefore, reliance placed by the learned Counsel for the petitioner in this regard on the decision of the Supreme Court in Chandra Prakash Shahi's case (Supra) does not help his cause, specially considering the status of the petitioner which was that of a deputationist even if based on selection as he was liable to be repatriated on account of unsatisfactory work or unsuitability even as per the decision in S.N. Maity's case (supra) and the decision in Ashok Kumar Patel's case (supra).

In these circumstances, especially in the absence of any allegation of personal malafide against any officer or employee of UIDAI who may have been involved in the decision making process or in the process leading to it, it cannot be said that the repatriation of the petitioner is punitive or arbitrary. The reasons and material mentioned in the counter affidavit as noticed hereinabove may have been the motive but not the foundation of the order. In view of the above discussion, the impugned order cannot be said to be punitive. It is an order simplicitor."

(43) This Court is again with full agreement with the findings returned by the learned Single Judge. Pertinently, the learned Single Judge has nowhere missed the 'woods of the tree' and returned the findings which are plausible and reasonable in the given peculiar facts and circumstances of the case.

(44) This court finds that it is a settled principle of law that absorption cannot be claimed as a matter of right. For an absorption to be carried out, there has to be consent of the Lender Organisation as well as the Department in which the absorption is sought. In this regard, reference may be made to **Kunal Nanda Vs. Union of India and others** : (2000) 5 SCC 362 wherein the Supreme Court has

succinctly explained the legal position concerning absorption:

"6. ...It is well settled that unless the claim of the deputationist for permanent absorption in the department where he works on deputation is based upon any statutory Rule, Regulation or Order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation."

(45) The Judgment in Kunal Nanda (Supra) has been reiterated in the judgment of the Supreme Court in **Union of India Vs. V. Ramakrishnan** : (2005) 8 SCC 394 and decisions of Division Benches of this Court **in Pawan Kumar & Ors. Vs. Union of India & Ors.** : 2018 SCC OnLine Del 12615 and **Chandra Mohan Singh Bhandari Vs. Union of India and Others** : 2019 SCC OnLine Del 10002. In Pawan Kumar (Supra) a Division Bench of the Delhi High Court rejected the relief of absorption sought by the petitioners therein, who were working as Constables in various departments of the CAPFs and were sent on deputation with CBI for a long period of time. Relying on the dicta of the Supreme Court in Kunal Nanda (Supra), the Court held as under:

"23. Petitioners plea of legitimate expectation is also without merit. Merely because the Petitioners continued to be on deputation for a period of seven years or more, it cannot be said that a right has accrued in their favour. The delay on the part of CBI to complete this absorption process was also on account of the earlier circulars being contrary to the Recruitment Rules. Mr. Chibber relies on the Judgment of the Supreme Court in the case of Ram Pravesh Singh v. State of Bihar, (2006) 8 SCC 381. This judgment is distinguishable from the facts of the present case. The Appellant therein were working for the Futwah-Phulwarisharif Gramya Vidyut Sahakari Samiti Ltd. (for short "the Society"). This society was brought into existence by the Bihar Government and the Bihar State Electricity Board by issuing a license to the Society under the State Electricity Act. Thereafter the license issued to the society was revoked and it was merged with the Board. On account of this merger, the Appellants claimed a right to be absorbed relying on the doctrine of legitimate expectation.

Conclusion

(46) Thus, it is concluded that the Appellant has been rightly repatriated to his parent organisation- MMTC and this court does not find any plausible ground to upset the well-reasoned and descriptive order passed by the Learned Single Judge, who has extensively touched each and every aspect of the matter. An affirmative action is required from both the lender as well as the borrowing department for absorption of a government servant in the borrowing department and as such, it can be safely concluded that deemed absorption or automatic absorption is not permissible under service law and nothing has been brought on record by the Appellant to demonstrate any rule or regulations akin to the said concept.

(47) Further, the concept of transfer and deputation has been explained by the Apex Court in **Prasar Bharti and Others**

Vs. Amarjeet Singh and Others : 2007 (2) SCALE 486 and it has been held, that a person sent in a cadre outside his substantive cadre has no right to continue in the borrower organisation and can be repatriated to his parent cadre at any point of time without assigning any reason.

(48) The law also stands settled that the authorities cannot be required to assign any reason, whatsoever, in an order of repatriation and such power cannot be fettered by requiring them to record reason. Which employee should be posted where is absolutely within the domain of the authority concerned and unless it is shown that an order of transfer/repatriation is contrary to the statutory rules or is otherwise mala fide or has been passed by the incompetent authority, only then the Court may interfere and not otherwise. (See: **State of U.P. Vs. Ashok Kumar Saxena** : AIR 1998 SC 925, **Mohd. Masood Ahmad Vs. State of U.P. & others** : JT 2007 (12) SC 467).

(49) For all the aforesaid reasons, this Court does not find any merits in the appeal and as such the same is **dismissed.** However, it is made clear as has also been stated hereinabove, that dismissal of this appeal shall not have any impediment on the pendency of the writ petition No. 8943 (S/S) 2022, which shall be decided on its own merits, without being influenced by passing of this Judgment.

(50) There shall be no orders as to Cost.

The judgment is pronounced today in open Court in terms of Chapter VII sub-rule (2) of Rule (1) of the Allahabad High Court Rules, 1952.

(2024) 5 ILRA 428
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Special Appeal No. 537 of 2024

State of U.P. & Ors. ...Appellants
Versus
Manoj Kumar Jain & Anr. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Hritudhwaj Pratap Sashi

A. Service Law – Constitution of India – Article 29 & 30 – UP Intermediate Education Act, 1921– Regulations framed under Act, 1921 – Ch. III Reg. 101 – Minority institution – Post of Clerk – No prior approval of DIOS was taken – Effect – How far minority institution enjoy exemption – Held, Regulation 101 would also be applicable to the minority institutions, which are on grant-in-aid list of the St. Government – Article 29 and 30 (1) of the Constitution of India, which deal with the right to establish and administer minority institution, do not preclude the St. to regulate the conditions of employment – Since the selection process was initiated without any prior approval from DIOS as mandated in Regulation 101, the selection process stood vitiated since its inception. (Para 48, 50 and 53)

Special Appeal allowed. (E-1)

List of Cases cited:

1. Writ Petition No.45060 of 2015; Principal Abhay Nandan Inter College & ors. Vs St. of U.P. & ors. decided on 19.11.2018

2. Civil Appeal No. 865 of 2021; St. of U.P. & ors. Vs Principal Abhay Nandan Inter College & ors. decided on 27.09.2021

3. Udai Veer Singh & anr. Vs District Inspector of Schools Deoria & anr.; 2001 All.L.J. 122

4. Civil Misc. Writ Petition No. 50286 of 2000; Amit Kumar Vs District Inspector of Schools, Jaunpur decided on 21.11.2000

5. St. of U.P. & ors. Vs Rachna Hills & ors.; 2023 (41) LCD 1291

6. Krishna Kant Vs St. of U.P. & ors.; 2018 (11) ADJ 419

7. Committee of Management, Swami Lila Shah Adarsh Sindhi Inter College & anr. Vs St. of U.P. & ors.; 2017 (2) ADJ 377 (FB)

8. St. of U.P. Vs Principal, Abhay Nandan Inter College & ors.; 2021 (15) SCC 600

9. Harpal Singh Vs St. of U.P.; 2015 (3) ADJ 236

10. Abhishek Tripathi Vs St. of U.P.; 2014 (4) ADJ 270

11. Mohanlal Goenka Vs Benoy Krishna Mukherjee; AIR 1953 SC 65 (SC)

12. St. of West Bengal Vs Hemant Kumar Bhattacharjee; AIR 1966 SC 1061

13. St. of U.P. Vs Manager, Committee of Management, Islamia Inter College & ors.; 2022 (2) AWC 1788

14. Sister Meera Vs St. of U.P.; 2013 (10) ADJ 310

15. Mohd. Faizan Vs St. of U.P.; 2013 (5) ADJ 471

16. Committee of Management, Swami Lila Shah Adarsh Sindhi Inter College & Anr. Vs St. of U.P. & ors.; 2017 (2) ADJ 377 (FB)

17. Sindhi Education Society & anr. Vs Chief Secretary, Government of NCT of Delhi & ors.; (2010) 8 SCC 49

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

1. Heard Shri Fuzail Ahmad Ansari, learned Standing Counsel and Shri Ashish Mohan Srivastava, learned Standing Counsel for State-respondents-appellants and Shri Sankalp Narain, learned counsel for petitioner-respondent no.1.

2. This Court vide order dated 23.5.2024 has condoned the delay in filing the appeal and has directed to accord regular number to the appeal.

3. Present intra court appeal under Chapter VIII Rule 5 of the High Court Rules has been preferred assailing the validity of the judgment and order dated 9.5.2022 passed by learned Single Judge in Manoj Kumar Jain v. State of U.P. & Ors.1, whereby the writ petition was allowed; orders dated 21.5.2019 and 9.7.2019 passed by District Inspector of Schools (DIOS), Aligarh have been quashed; the appointment of the petitioner on the post of Assistant Clerk in the institution has been upheld and the respondent no.3 was directed to grant financial sanction to the appointment of the petitioner on the post of Assistant Clerk and to make payment of arrears of salary w.e.f. 3.7.2018, the date of first disapproval of selection of the petitioner and to pay his month to month salary forthwith. For ready reference, the operative portion of the judgment and order dated 9.5.2022 is reproduced as under:-

"The orders impugned passed by District Inspector of Schools, Aligarh, are hereby quashed.

The appointment of the petitioner on the post of Assistant Clerk in the institution is upheld and the respondent no.3 is directed by means of a positive mandamus

as per the judgement of Apex Court in case of Comptroller And Auditor General of India & Another Vs. K.S. Jagannathan & Another, (1986) 2 SCC 676 to grant financial sanction to the appointment of the petitioner on the aforesaid post, within three months from today and make payment of arrears of his salary w.e.f., 3.7.2018, the date of first disapproval of selection of the petitioner, within same period and pay his month to month salary forthwith.

In case arrears of salary payable to the petitioner is not paid to him within the time provided by this Court, the petitioner would be entitled to get 12% interest on the arrears of the amount due.

The State Government shall be free to recover the amount of interest from the public servant/servants, who is/are found responsible for the delay.

The writ petition is allowed.

FACTS

4. Brief facts giving rise to the present appeal is that there is an educational institution known as 'Shri Udai Singh Jain Kanya Inter College, Udai Singh Jain Road, Aligarh'2, which is a minority institution and is governed by the U.P. Intermediate Education Act, 19213 and the various Regulations framed thereunder from time to time. The institution also received grant-in-aid from the State Government and as such the Payment of Salary Act, 1971 is also applicable upon the institution. The clerical cadre of the institution comprises one post of Head Clerk and four posts of Asstt. Clerks. It is claimed that the sanctioned strength has already been determined in view of the Government Order dated 15.6.2012, which was issued in compliance of the direction dated 22.5.2012 passed by this Court in the case of Dhruv Narain Singh v. State of U.P. & Ors.4. Therefore, it is claimed that the sanctioned strength of teaching and non-teaching staff in the institution has been determined. After superannuation of one Suresh Chandra Saxena, Head Clerk, substantive vacancy occurred on 28.8.2017 and on the said post promotion was accorded to one Adan Kumar Jain. Consequently, one substantive vacancy (direct recruitment) of Asstt. Clerk fell vacant in the institution.

5. It is claimed that the advertisement of the said post was published in the newspaper 'Amar Ujala' on 10.12.2017 inviting applications from eligible candidates for the post of Clerk. The petitioner-respondent claiming to be fully qualified and eligible applied in pursuance of the said advertisement. He had also participated in the interview, which was scheduled on 15.1.2018 and he was selected as best suited candidate. Consequently, the Committee of Management passed a resolution on 19.1.2018 for granting appointment to the petitioner-respondent. The Manager of College had also issued an appointment letter dated 22.1.2018 to the petitioner. Pursuant to the said appointment letter, the petitioner also joined the institution on 27.1.2018 and it is claimed that since then he has been continuously working.

6. Thereafter, all relevant papers pertaining to the selection of the petitioner has been forwarded to DIOS for according financial sanction. On the paper so submitted the DIOS by communication dated 17.2.2018 made certain queries from the management. The query so raised was forthwith replied by the Manager of the institution on 27.3.2018. Eventually on 3.7.2018 reiterated on 11.9.2018 the DIOS has declined to accord financial sanction upon an allegation of the contravention of

Regulation 101 of Chapter III of the Regulations framed under the Act, 1921.

7. The said orders dated 3.7.2018 and 11.9.2018 were challenged by the petitioner in Manoj Kumar Jain v. State of U.P. & Ors.5, which was allowed by learned Single Judge on 26.3.2019 with following observations:-

"Heard learned counsel for the petitioner, Sri K. M. Asthana, learned counsel for the Managing Committee and learned Standing Counsel for the State authorities.

Petitioner claims to have been appointed as a Class III employee in Shri Udai Singh Jain Kanya Inter College, Aligarh, which is a recognized intermediate institution under the provisions of U.P. Intermediate Education Act, 1921 and the provisions of U.P. Act No.24 of 1972 are also applicable. The institution also is a minority institution.

It is alleged that appointment of petitioner has been made after the vacancy was duly advertised in newspaper 'Amar Ujala'. Learned senior counsel for the petitioner states that vacancy was also advertised in newspaper 'Times of India' which meets the requirement of a valid publication of vacancy itself. It is also stated that there exists a vacancy and a fair procedure has been followed, and therefore, mere non obtaining of prior permission from the Director in terms of regulation 101 would not be fatal. Reliance is placed upon a judgment of this Court in Abhishek Tripathi v.s State of U.P. and others, 2016 (1) ADJ 603 to contend that claim of appointment ought to have been examined on merits by the authority concerned.

Although time was allowed to learned Standing Counsel to file a counter affidavit way back on 25.9.2018, but no counter affidavit has been filed as yet. Considering the nature of order proposed to be passed, no further opportunity is liable to be granted to learned Standing Counsel to file a counter affidavit.

The order impugned in the present writ petition would go to show that there is no conscious determination by the authority concerned with regard to legality of petitioner's appointment in terms of the applicable provisions of law. The authorities were expected to determine as to whether there existed any vacancy; a fair procedure for recruitment was followed and; petitioner possessed requisite qualification etc. Since this has not been done, the order of the authority concerned refusing to grant approval to petitioner's appointment cannot be sustained.

Writ petition, accordingly, succeeds and is allowed. Orders dated 3.7.2018 and 11.9.2018 stands quashed. The matter is remitted to respondent no.3 for passing a fresh order, keeping in view the observations made in the case of Abhishek Tripathi (supra), after affording opportunity of hearing to the parties concerned, within a period of three months from the date of presentation of certified copy of this order."

8. The aforesaid order was served upon the DIOS, who in turn issued notices upon the Manager of the institution on 9.4.2019 fixing date of hearing on 16.4.2019. Consequently, the order dated 21.5.2019 was passed by the DIOS rejecting the claim of the petitioner for grant of financial sanction on the post of Asstt. Clerk in the institution. Thereafter, the Manager of the institution moved a representation before the DIOS on 27.5.2019 requesting therein to reconsider the decision with regard to grant of approval to the appointment of the petitioner. However, the same was also

rejected by the DIOS vide order dated 9.7.2019.

9. The petitioner challenged the orders passed by the DIOS on 21.5.2019 and 9.7.2019 by means of Writ Petition No.13182 of 2019. The DIOS has rejected the claim of the petitioner mainly on four grounds, which are averred in para 28 of the writ petition as under:-

I. No prior permission in terms of Chapter -III Regulation 101 was taken by the Principal of the Institution before initiating the selection proceedings which culminated in the appointment of the petitioners.

II. The selection committee did not comprise of one nominee of the District Magistrate and one nominee from the reserved category.

III. Applications were to be received from the candidates via registered speed post but on the contrary in the selection proceedings which culminated into the appointment of the petitioners, the applications were not received by registered speed post and no further information has been given so as to how the petitioners were served with the appointment letters.

IV. In the selection process rather than awarding quality points marks grading system was adopted by the Appointing Authority and further no waiting list was prepared, consequently the selection proceedings were not carried out in accordance with law.

10. The above writ petition was allowed by learned Single Judge by the order impugned dated 9.5.2022, which has been assailed in the present intra Court appeal. Learned Single Judge had considered the aforementioned four grounds taken by the DIOS while rejecting the financial approval and answered the aforesaid objections. Learned Single Judge has answered the first objection with following observation:-

Regarding the first ground of lack of permission before initiation of selection proceedings of the petitioner as per Chapter III, Regulation 101 of the Act of 1921, this Court finds that in the earlier round of litigation before this Court in Writ-A No. 20601 of 2018 decided on 26.3.2019, this Court examined the issues and found that mere non-obtaining of permission from the District Inspector of Schools in terms of Regulation 101 would not be fatal. This Court directed the District Inspector of Schools to pass a fresh order after affording opportunity of hearing to the parties. District Inspector of Schools has ignored the observations of this Court dated 26.3.2019. District Inspector of Schools has simply reiterated his earlier stand, which was turned down by this Court in the earlier ground of litigation. In the case of Mohd. Faizan and others (supra) this Court has clearly held that there is no specific provisions for applying Regulation 101, Chapter III of the Intermediate Education Act to the minority institution. Even assuming that it is regulatory in nature, it does not means prior approval as explained by the Division Bench of this Court in the case of Jagdish Singh vs. State of U.P. and others, (2006) 2 UPLBEC 1851. Hence it is reiterated that prior permission for conducting the selection process of the petitioners in the minority institution was not required in terms of Regulation 101, Chapter III of the Intermediate Education Act.

11. Learned Single Judge has also answered the second objection with following observations:-

The second ground for rejecting the claim of the petitioner is that one nominee of the District Magistrate and one

nominee from reserved category concerned was not included in the selection Committee. In minority institution, there was no such requirement as held by the Full Bench of this Court in the case of Harpal Singh Vs. State of U.P., reported in 2015 (3) ADJ Pg. 236. Such procedure was applicable for non minority institution. The constitutional Bench of the Apex Court in the case of T.M.A. Pal Foundation Vs. State of Karnataka, reported in 2002 (8) SCC Pg. 481 and another constitution Bench Judgement in the case of P.A. Inamdar Vs. State of Maharastra, reported in 2005 Vol-VI SCC Pg. 537 has laid down certain guidelines with regard to the functioning of a minority institution. A perusal of the aforesaid pronouncement of the Hon'ble Apex Court would indicate the fact that inter alia it has explicitly been held that the State Government is not empowered to interfere with the functioning of the minority institution in the matters relating to appointment of teaching staff and also non teaching staff.

The State Authority cannot under the garb of adopting regulatory measure destroy the administrative autonomy of a minority educational institution or start interfering with the administration and the management of the institution so as to render the right of administration of the institution concerned nugatory or illusory. The State Government cannot regulate the method or procedure for appointment of teachers of a minority educational institution. Once the teacher possessing the requisite qualification prescribed by the State or the University has been selected by the management of the minority education institution by adopting the procedure of selection, the State Government or the University would have no right to vitiate the selection of such teacher.

Even the U.P. Secondary Education Service Section Board Act, 1982 is also not applicable upon a minority institution in terms of Section 30 of the said Act.

In view of the aforementioned examples it can be concluded that the the Staff Rules of 1985 with regard to the procedure for appointment of Class -III and IV employees in a recognized intermediate institution even though would apply on a non-minority institution in terms of the Full Bench pronouncement of this Court in the case of Harpal Singh (supra) but would not apply upon a minority institution which enjoys certain privileges in terms of Articles 29 & 30 of the Constitution of India.

Even otherwise the position of law is that as to whether any order or statutory provision would apply in a particular set of institution, there has to be a specific mention in the Statute itself that it shall apply upon a minority institution and that a provision ipso facto shall not be deemed to apply upon a minority institution in terms of Article 29 and 30 of the Constitution. Thus it can be held that the District Inspector of Schools has manifestly erred in returning a finding that there was no nominee of the District Magistrate from the reserved category in the selection committee which proceeded to appoint the petitioner on Class-III post in the institution.

12. Learned Single Judge has considered and answered third objection with following observations:-

Coming to the third ground taken in the impugned order in regard to receiving of the application, it is held that the said ground is hyper-technial and that no prejudice was caused to any other candidates who took part in the selection proceedings due to the fact that the

application of the petitioner was not received vide registered post. Many candidates applied pursuant to the advertisement published in news paper and after due consideration of merit by the duly constituted selection committee, a decision was taken to appoint the petitioner on Class III post.

13. Learned Single Judge has answered fourth objection with following observations:-

Regarding the fourth and final ground, with regard to the fact whether quality points were allotted in the selection proceedings or not, it is appears that the selection would not be vitiated on the face of it as the job of the selection committee was of consideration the merits of all the eligible candidates and that no prejudice was caused to any candidate in the way in which the selection proceedings were carried out by the selection committee.

SUBMISSIONS OF STATE-APPELLANTS

14. Shri Fuzail Ahmad Ansari, learned counsel for State-respondents-appellants has vehemently urged that the provisions of Regulation 101 and other Regulations framed under the Act, 1921 are for regulating appointments and conditions of service and disciplinary proceeding framed for non-teaching staff and are applicable to all aided and recognised institutions including minority institutions. The institution in question is admittedly aided and recognised minority institution. He submits that the object of the Act, 1921 is to regulate and supervise the High School and Intermediate institutions. Sub-section 4 of Section 9 of the Act, 1921 empowers the State Government to pass appropriate orders or to take adequate action consistent with the provisions of the Act. He has also placed reliance upon Section 16G of the Act, 1921, which deals with the conditions of service of the head of the institutions, teachers and other employees. For ready reference, Section 16G is reproduced as under:-

"Section 16G- Conditions of Service of Head of Institutions, teachers and other employees (1) Every person employed in a recognized institution shall be governed by such conditions of service as may be prescribed by regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of this Act or with the regulations shall be void.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), regulations may provide for-

(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion and punishment 2[(including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry or trial in any criminal case for an offence involving moral turpitude)] and the emoluments for the period of suspension and termination of service with notice;

(b) the scales of pay and payment of salaries;

(c) transfer of service from one recognized institution to another;

(d) grant of leave and Provident Fund and other benefits; and

(e) maintenance of record of work and service."

15. He submits that Regulation 101 was inserted on 28.8.1992 and the same was notified by the State Government on 30.7.1992, which provides, "Appointing Authority except with prior approval of

Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution." The subsequent notification was issued on 2.2.1995, which provides as under:-

"Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution:

Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector."

16. He submits that later on there was again an amendment in Regulation 101 made on 31.12.2009, which reads as under:-

"The appointing authority shall not fill any vacancy of the non- teaching staff of recognised aided institutions, except with the approval of Inspector, subject to a restriction that District Inspector of Schools shall make available total number of vacancies to Director of Education (Secondary Education), and showing the number of students put forth justification for the filling of the vacancies. On receipt of order from the Director of Education (Secondary Education), the District Inspector of Schools shall, for filling said vacancies, give permission to the appointing authority; and while giving such permission he shall ensure to follow the reservation rules specified by the government and the prescribed norms in justification for the posts.

The aforesaid amendment in the Regulation shall come into force immediate effect."

17. Taking into consideration the recommendations made by the Sixth Central Pay Commission, Government Orders were passed on 8.9.2010 and 6.1.2011 making it applicable to all Government Departments and aided schools, thus, deciding not to go for fresh recruitment of Class-IV employees and further directing that any arrangement concerning the post to be vacated may be made only through 'Outsourcing'. The communications, in this regard, were sent to all the stakeholders intimating them of the decision taken. Following the said decision, Regulation 101 was once again amended by Government Order dated 4.9.2013, which was accordingly notified on 24.4.2014. The effect of the said amendment is to make the post of Class-IV employees, which was hitherto supposed to be filled up by the institutions through 'Outsourcing'. Therefore, the permanent posts were accordingly abolished, thereby, replacing the method of appointment by way of 'Outsourcing'. An exception has been carved out only for the dependents of those employees died in harness during employment. The amended Regulation 101 (as applicable on date) is reproduced hereunder:-

AMENDED REGULATION:

"101. The appointing authority, except for the prior approval of the inspector, shall not fill any vacant post of non-teaching staff (clerical cadre) in any recognised, aided institution; with the restriction that the District Inspector of Schools shall make available the total number of vacancies to the Director of Education (Secondary Education) and also put forth justification for filling of the posts, showing the strength of the students in the institution. On receipt of the order from Director of Education (Secondary Education), the District Inspector of Schools shall give permission to the appointing authority for filling the said vacancies (except the vacancies of

Class-IV posts) and while giving the permission, he shall ensure compliance of the reservation rules specified by the government as also of the prescribed norms in justification for the posts.

With respect to the Class-IV vacancies, arrangements shall be made by way of outsourcing only; but the relevant rules, 1981, as amended from time to time, for recruitment of dependants of teaching or non-teaching staff of the nongovernment aided institutions dying in harness shall be applicable in relation to the appointments to be made on the vacant posts of Class-IV category."

18. Shri Fuzail Ahmad Ansari, learned Standing Counsel invited attention of this Court to the terms 'any recognised, aided institution' used in Regulation 101. He submits that the term 'recognition' has been defined in Section 2 (d) of the Act. The term 'institution' has been defined in Section 2 (b) of the Act. He submits that there is no exception carved out in the Regulation 101 regarding its non-applicability upon a minority institution in as much as the term used in Regulation 101 is 'any recognised, aided institution'. And all the institutions recognised and/ or aided will come under the ambit of Regulation 101.

19. He further submitted that the term 'minority institution' although used in Section 16FF of the Act, has not been defined anywhere in the Act. He, therefore, submitted that the savings available to minority institutions are referable to Article 30 (1) of the Constitution of India.

20. To elaborate his submissions, Shri Ansari, learned Standing Counsel next submitted that Article 30 (1) of the Constitution of India only deals with right to establish and administer minority institutions and in no way preclude them from the regulatory measures undertaken by the State Government to efficiently regulate the abovesaid rights.

21. Learned Standing Counsel also drawn our attention to the following Regulations 102, 103 and 104 of the Chapter III of the Act, which all contains the same terminology i.e. 'किसी मान्यता प्राप्त, सहायता प्राप्त संस्था' i.e. 'any recognised, aided institution'. He further drawn our attention to Regulation 110, which starts from 'अल्पसंख्यक संस्थाओं को छोड़कर' i.e. 'apart from the minority institution'. Hence he submits that wherever the applicability of the regulations are saved upon the minority institution, it has been expressly given in the Act. For example Section 16FF and Regulation 110.

22. Shri Fuzail Ahmad Ansari, learned Standing Counsel, therefore, submitted that once it is apparent from the plain reading of Regulation 101 read with Section 16FF and Regulation 110, there is no scope of doubt that Regulation 101 does apply upon the minority institutions and the procedure given therein has to be strictly adhered to without any classification or distinction as to minority or non-minority institutions.

23. Learned Standing Counsel has vehemently submitted that in the instant case there is no such material on record to show that the alleged appointment was made by the appointing authority after obtaining prior approval from the DIOS. He submitted that the amendment in Regulation 101 dated 24.4.2014 was held as unconstitutional by the Division Bench of this Court in **Principal Abhay Nandan Inter College & Ors. v. State of U.P. & Ors.6** vide order dated 19.11.2018. The same was subjected to challenge by the State Government before

Hon'ble the Apex Court in **State of U.P. & Ors. v. Principal Abhay Nandan Inter College & Ors.7**. Hon'ble the Apex Court vide judgment dated 27.9.2021 had approved the entire Regulation 101.

24. Shri Ansari, learned Standing Counsel emphatically submitted that while approving the amendment in Regulation 101, Hon'ble the Apex Court has held that in case institution is aided, there is no need for any sub-classification by separating them as minority and non-minority institutions and held that the Regulation is sought to be enforced against all aided institutions. Learned Standing Counsel has placed reliance upon para 53 of the said judgment, which is reproduced as under:-

"53.The counsel appearing for the respondents did place reliance upon few decisions of this Court. Having gone through the said decisions and in the light of our discussion, we do not find any help flowing from them, strengthening the contentions raised by them. Reliance has been made on the decision rendered by this Court in Matankara Syrian Catholic College vs. T. Jose, (2007) 1 SCC 386. Having gone through the said judgment, we do not find that the same has got any application to the case at hand. The said decision deals with the right of the minor institutions to choose the Principal of its choice. We have already held that we are dealing with the case of aided institutions and, therefore, there is no need for any sub-classification by separating them as minority and non-minority institutions. The impugned regulation is sought to be enforced against all the aided institutions. It is also to be noted that this decision was taken into consideration by this Court in S.K. Md. Rafique's case (supra)."

25. Learned Standing Counsel submitted that the Regulation 101 of Chapter-III of the Act, 1921, therefore, applies with full force on minority institutions as well. The framers have not carved out any distinction or classification between minority and non-minority institution under the Act, 1921.

26. He has also placed reliance upon Section 16FF of the Act, 1921, which for ready reference is quoted as under:-

16-FF. Savings as to minority institutions-

(1) Notwithstanding anything in sub-section (4) of section 16-E, and section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in clause (I) of Article 30 of the Constitution shall consist of five members (including its Chairman), nominated by the Committee of Management :

Provided that one of the members of the Selection Committee shall —

(a) in the case of appointment of the Head of an Institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director ;

(b) in the case of appointment of a teacher be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless —

(a) in the case of the Head of an Institution the proposal of appointment has been approved by the Regional Deputy Director of Education ; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section, the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of a teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final.

"16-चच- अल्पसंख्यक संस्थाओं के प्रति अपवाद

(1) धारा 16-ङ की उपधारा (4) में और 16-च में किसी बात के होते हुए भी, संविधान के अनुच्छेद 30 के खण्ड (1) में निर्दिष्ट अल्पसंख्यक द्वारा स्थापित और प्रशासित संस्था के प्रधान या अध्यापक की नियुक्ति के लिये चयन समिति में प्रबन्ध समिति द्वारा नाम-निर्दिष्ट (सभापति को सम्मिलित करते हुये) पाँच सदस्य होंगेः

प्रतिबन्ध यह है कि चयन समिति के सदस्यों में से एक-

(क) संस्था के प्रधान की नियुक्ति के मामले में निदेशक द्वारा विशेषज्ञों की तैयार की गई नामिका में से प्रबन्ध समिति के द्वारा चुना गया विशेषज्ञ होगा;

(ख) अध्यापक की नियुक्ति के मामले में सम्बद्ध संस्था का प्रधान होगा।

(2) उपधारा (1) में निर्दिष्ट चयन समिति के द्वारा अनुसरणीय प्रक्रिया वह होगी जो विहित की जाय।

(3) इस धारा के अधीन चुने गये किसी व्यक्ति को तब तक नियुक्त नहीं किया जायगा, जब तक—

(क) संस्था के प्रधान के मामले में सम्भागीय शिक्षा उपनिदेशक ने नियुक्ति के प्रस्ताव का अनुमोदन न कर दिया हो; और

(ख) अध्यापक के मामले में निरीक्षक ने ऐसे प्रस्ताव का अनुमोदन न कर दिया हो।

(4) सम्भागीय शिक्षा उप-निदेशक या निदेशक, यथास्थिति, इस धारा के अधीन चयन का अनुमोदन नहीं रोकेगा जबकि चुना गया व्यक्ति विहित न्यूनतम अर्हताओं से युक्त और अन्यथा पात्र हो।

(5) जहाँ सम्भागीय शिक्षा उप-निदेशक या निरीक्षक, यथास्थिति, इस धारा के अधीन चुने गये अभ्यर्थी का अनुमोदन नहीं करता है वहां प्रबन्ध समिति ऐसे अनुमोदन की प्राप्ति के दिनांक से तीन सप्ताह के भीतर संस्था के प्रधान के मामले में निदेशक को और अध्यापक के मामले में सम्भागीय शिक्षा उप निदेशक को अभ्यावेदन कर सकती है।

(6) उपधारा (5) के अधीन अभ्यावेदन पर निदेशक या सम्भागीय शिक्षा उपनिदेशक द्वारा पारित आदेश अन्तिम होगा।"

27. He submitted that the framers have consciously nowhere made any distinction in the entire Act qua minority and non-minority institutions but only provided savings clause as to Minority Institution in Section 16FF of the Act, 1921. He also vehemently submitted that various regulatory provisions are contained in Chapter-III of the Regulations safeguarding the interest of teachers/ employees against the arbitrary actions of the management. The Regulation clearly demonstrates that there are sufficient guidelines to the DIOS for according or refusing to grant approval in the matter of appointment. Even the regulatory provision of termination is also provided under Section 16 G (3) (a) of the Act, which applies to the minority institution as well.

28. Shri Ansari, learned Standing Counsel, in support of his submissions, has placed reliance upon paragraphs 5, 6 and 8 of the judgment in **Udai Veer Singh & Anr. v. District Inspector of Schools Deoria & Anr.8,** wherein the Court has held that the

regulatory provisions under Section 16G of the Act and Chapter III of the Regulations, Regulation 2 (1), 21, 31, 32, 33, 35, 36, 37, 39 (2), 40, 41, 44, 44-A, 45, 46, 47, 48, 49, 50, 51, 52, 68, 99, 100 and other regulation applied by it, 101 and 102 would apply to non-teaching staff of a minority institution. The Court also held that as per Regulation 101 prior approval of the DIOS for appointment of non-teaching staff in the aided minority institution is mandatory. Merely obtaining prior approval from DIOS for making appointment does not infringe the minority status of the institution.

29. He submits that nowhere the framers have made any such provisions under the Act or its Regulations to curtail the liberty to appoint any suitable employee by the management in the minority institution. Even after appointment of non-teaching staff (Class-III), papers have to be forwarded to the DIOS for according financial approval, if the post is sanctioned and the candidate possesses essential qualifications and the appointment has been made in accordance with law. He submitted that in absence of any financial approval accorded by DIOS, no salary can be disbursed. It is not in doubt that the DIOS does not control the selection and appointment made by appointing authority or the management of a minority institution and the management is absolutely free to select and find out best suitable person and appoint him in the institution but the regulatory measures provided in Regulation 101 has to be followed.

30. He has also drawn our attention to the alleged publication made in 'Amar Ujala' dated 10.12.2017. For ready reference, the same is reproduced as under:-

"समाचार पत्र "अमर उजाला"

दिनांक 10.12.2017

श्री उदय सिंह जैन कन्या इंटर कालेज

उदय सिंह जैन रोड, अलीगढ़।

आवश्यकता है।

सहायक लिपिक पुरुष (कम्प्यूटर एवं पत्राचार में दक्ष) पद 01 योग्यता व वेतनमान उ०प्र० शासन द्वारा निर्धारित तथा उ०प्र० माध्यमिक शिक्षा परिषद शिक्षा अधिनियम-1921 में वर्णित नियमों के अनुसार अर्हताधारी अभ्यर्थी स्वलिखित, आवेदन पत्र एवं वेतनमान रंगीन पासपोर्ट साइज फोटोग्राफ व बैंक शुल्क रुपये दो सौ (बैंक ड्राफ्ट) आवेदन पत्र प्रबंधक पद के नाम उपरोक्त पते पर विज्ञापन तिथि से 20 दिन दिनांक 29.12.2007 तक के अंदर भेजें। आवेदन पत्र पंजीकृत डाक द्वारा ही स्वीकार किया जायेगा।

प्रबंधक

श्री उदय सिंह जैन कन्या इंटर कालेज

उदय सिंह जैन रोड, अलीगढ़।"

31. Reliance has also been placed on the alleged appointment letter dated 22.1.2018, which for ready reference, is reproduced as under:-

"श्री उदयसिंह जैन कन्या इण्टर कालिज

उदय सिंह जैन रोड, अलीगढ़-202001

दिनांक 22.01.2018

पत्रांक-360-64/2017-18

सेवा में,

श्री मनोज कुमार जैन

पुत्र श्री विनोद कुमार जैन

नि० बाजार …. (आशियन)

जलेसर, (एटा)

संदर्भः सहायक लिपिक पद पर नियुक्ति।

आपको सहर्ष सूचित किया जाता है कि चयन समिति द्वारा आपका चयन सहायक लिपिक के पद पर गया है। संस्था की प्रबंध समिति ने अपना संकल्प संख्या-02 दिनांक 19.01.2018 द्वारा आपको 24,500/- रुपये के मानक्रम में 5200-20200 रुपये के प्रारंभिक वेतन तथा नियमावली के अधीन तथा अनुमन्य महंगाई भत्ते पर एक वर्ष की परिवीक्षा पर …… तथा अस्थाई रूप से सहायक लिपिक के रूप में नियुक्त कर लिया है।

आपसे इस पत्र के प्राप्ति के दिनांक से दस दिन के भीतर संस्था की प्रधानाचार्या/प्रबंधक के समक्ष उपस्थित होने और कार्यभार

ग्रहण करने की अपेक्षा की जाती है। यदि आप ऊपर विनिर्दिष्ट समय के भीतर कार्यभार ग्रहण नहीं करते हैं तो इस नियुक्ति को रद्द किया जा सकेगा।

आपकी नियुक्ति श्रीमान् जिला विद्यालय निरीक्षक, अलीगढ़ से अनुमोदन प्राप्त होने पर ही वैध होगी व वेतन भी अनुमोदन की तिथि से देय होगा।

ह० अपठनीय
(एस०के० जैन)
प्रबंधक .
श्री उदय सिंह कन्या इंटर
कालिज, अलीगढ़।

प्रतिलिपिः

1. श्रीमान् जिला विद्यालय निरीक्षक, अलीगढ़
2. श्रीमान् संयुक्त शिक्षा निदेशक (मा०), अलीगढ़।
3. श्रीमान् उप शिक्षा निदेशक, अलीगढ़ को सूचनार्थ अग्रसारित।
4. वित्त एंव लेखाधिकारी, कार्यालय जिला विद्यालय निरीक्षक, अलीगढ़।

ह० अपठनीय
(एस०के० जैन)
प्रबंधक
श्री उदय सिंह कन्या इंटर
कालिज, अलीगढ़।''

32. He submits that the alleged publication dated 10.12.2017 is an eye wash. In the said advertisement, age, qualification, pay scale or any other essential qualifications were not mentioned to substantiate the claim that the said publication was made as per law with categorical information. All the relevant information were missing. Surprisingly, the alleged appointment letter was issued without any address. Even the said document was also fabricated. These aspects have been considered by the DIOS while passing the order dated 21.5.2019. The relevant portion of the order dated 21.5.2019 is reproduced as under:-

''……..5. शिक्षा अधिनियम 1921 के अध्याय 3 विनियम 101 में स्पष्ट उल्लेख किया गया है कि नियुक्ति प्राधिकारी निरीक्षक के पूर्वानुमोदन के सिवाय मान्यता प्राप्त सहायता प्राप्त संस्था के शिक्षणेत्तर पद की रिक्ति को नहीं करेगा, प्रतिबन्ध यह है कि जिला विद्यालय निरीक्षक समस्त रिक्तियों की संख्या शिक्षा निदेशक, माध्यमिक को उपलब्ध करायेगा तथा संस्था में छात्र संख्या दर्शाते हुए पदों को भरे जाने के औचित्य को भी स्पष्ट करेगा। शिक्षा निदेशक माध्यमिक से आदेश प्राप्त होने पर जिला विद्यालय निरीक्षक उक्त रिक्तियों को भरने हेतु नियुक्ति प्राधिकारी को अनुमति प्रदान करेगा और अनुमति प्रदान करते समय शासन द्वारा निर्धारित आरक्षण नियमों/पदों के औचित्य के लिये निर्धारित मानकों का पालन करायेगा।

6. संस्थाधिकारियों द्वारा उक्त अनियमित नियुक्ति के अनुमोदन हेतु प्रस्तुत अभिलेखों का परीक्षण किये जाने पर यह स्थिति स्पष्ट हुयी है कि उनके द्वारा चयन एवं नियुक्ति की जो प्रक्रिया अपनायी गयी है वह अनियमित एवं विहित प्रक्रिया के अन्तर्गत नहीं है, यथाः-

1. संस्थाधिकारियों द्वारा शिक्षा अधिनियम 1921 के अधीन निर्मित अध्याय 3 में वर्णित विनियम 101 के अन्तर्गत बिना अनुमति प्राप्त किये दैनिक समाचार पत्र 'अमर उजाला' एवं 'टाइम्स आफ इण्डिया' में प्रकाशित विज्ञप्ति पूर्ण विवरण पर आधारित विज्ञप्ति नहीं कही जा सकती है, जिसमें न्यूनतम योग्यता, आयु, वेतनमान आदि का स्पष्ट उल्लेख नहीं किया गया है, जिसके फलस्वरूप उक्त प्रकाशित विज्ञप्ति के द्वारा न्यूनतम अर्हता आयु, वेतनमान न होने के कारण स्वीकार किये जाने के योग्य नहीं है। उक्त विज्ञप्ति ही अपूर्ण है।

2. संस्थाधिकारियों के द्वारा प्रश्नगत नियुक्ति के चयन हेतु चयन समिति का गठन विहित प्रक्रिया के अन्तर्गत नहीं किया गया है, जिसके अन्तर्गत उन्हें जिलाधिकारी द्वारा नामित 01 सदस्य तथा अनुसूचित जाति के सदस्य को चयन समिति में नहीं रखा गया, बल्कि विद्यालय के ही शिक्षक एवं प्रधानाचार्य द्वारा चयन की कार्यवाही मिलकर सम्पन्न कर ली गयी है, जिससे उक्त चयन प्रक्रिया में पारदर्शिता का अभाव है, इससे स्पष्ट होता है कि संस्थाधिकारियों ने कूटरचना कर याची श्री मनोज कुमार जैन की नियुक्ति की है, जो स्वीकार किये जाने योग्य है।

3. विज्ञापन में आवेदन पत्र पंजीकृत डाक के माध्यम से मांगे गये हैं, किन्तु अभ्यर्थियों के आवेदन पत्र प्राप्त करने के विवरण में पंजीकृत डाक का कोई विवरण उल्लिखित नहीं है तथा अभ्यर्थियों के प्राप्त आवेदन पत्रों के सापेक्ष साक्षात्कार हेतु अभ्यर्थियों को बुलाये जाने का पत्र प्रेषित किये जाने की प्रति एवं उसके प्रेषण का स्रोत भी स्पष्ट नहीं किया गया है। यह भी उल्लेख नहीं है कि कितने आवेदन पत्र प्राप्त हुए हैं तथा कितने अभ्यर्थी उपस्थित हुए।

4. चयन प्रक्रिया एवं साक्षात्कार में किसी प्रकार के गुणांक एवं अन्य आधार स्पष्ट नहीं किये गये हैं, बल्कि उपस्थित दर्शाये गये 39 अभ्यर्थियों में से चयनित अभ्यर्थी श्री मनोज कुमार जैन का चयन कर लिया गया है। उक्त चयन किये जाने का आधार एवं औचित्य स्पष्ट नहीं किया गया है। इस प्रकार उक्त चयन प्रक्रिया किसी प्रकार से उपयुक्त, पारदर्शी एवं न्याय संगत नहीं है।

निष्कर्ष .

प्रकरण में की गयी विवेचना एवं पत्रावली में उपलब्ध अभिलेखों के आधार पर मैं इस निष्कर्ष पर पहुँचा हूँ कि संस्थाधिकारियों ने सहायक लिपिक के रिक्त पद का विज्ञापन विभाग से बिना अनुमति प्राप्त किये दैनिक समाचार पत्र अमर उजाला एवं टाइम्स आफ इण्डिया में प्रकाशित विज्ञप्ति पूर्ण विवरण पर आधारित विज्ञप्ति नहीं कही जा सकती है जिसमें न्यूनतम योग्यता, आयु, वेतनमान आदि का स्पष्ट उल्लेख नहीं किया गया है, जिसके फलस्वरूप उक्त प्रकाशित विज्ञप्ति के द्वारा व्यापक प्रचार प्रसार एवं पद व उसकी विहित अर्हताओं के अभाव में विज्ञप्ति ही अनियमित है। प्रश्नगत नियुक्ति के चयन हेतु संस्थाधिकारियों ने चयन समिति का गठन विहित प्रक्रिया के अन्तर्गत नहीं किया है, जिसके अन्तर्गत उन्हें जिलाधिकारी द्वारा नामित एक सदस्य तथा अनुसूचित जाति के सदस्य को चयन समिति में नहीं रखा गया बल्कि विद्यालय के ही शिक्षक एवं प्रधानाचार्य द्वारा चयन की कार्यवाही मिलकर सम्पन्न कर ली गयी है, जिससे उक्त चयन प्रक्रिया में पारदर्शिता का पूर्ण अभाव है। विज्ञापन में आवेदन पत्र पंजीकृत डाक के माध्यम से मांगे गये हैं, किन्तु अभ्यर्थियों के आवेदन पत्र प्राप्त करने के विवरण में पंजीकृत डाक का कोई विवरण उल्लिखित नहीं है और न अभ्यर्थियों के प्राप्त आवेदन पत्रों के सापेक्ष साक्षात्कार हेतु अभ्यर्थियों के बुलाये जाने का पत्र प्रेषित किये जाने के प्रति एवं प्रेषण का स्रोत भी स्पष्ट नहीं है। चयन प्रक्रिया एवं साक्षात्कार में किसी प्रकार के गुणांक एवं अन्य आधार स्पष्ट नहीं किये गये बल्कि उपस्थित दर्शाये गये 39 अभ्यर्थियों में चयनित अभ्यर्थी श्री मनोज कुमार जैन को दर्शाकर चयन कर लिया गया है। इससे स्पष्ट है कि याची श्री मनोज कुमार जैन की नियुक्ति संस्थाधिकारियों द्वारा कूटरचना कर की गयी है। इसमें पारदर्शिता का पूर्ण अभाव है। उक्त आधार पर याची की नियुक्ति को अनुमोदित किये जाने का कोई औचित्य नहीं है।

निर्णय

मा० उच्च न्यायालय, इलाहाबाद में योजित याचिका संख्या-20601/2018 में पारित आदेश दिनांक 26.03.2019 के अनुपालन में याची के प्रत्यावेदन दिनांक 01.04.2019 का उक्तवत् निस्तारण करते हुये संस्थाधिकारियों द्वारा की गयी नियुक्ति को अनानुमोदित किया जाता है।

जिला विद्यालय निरीक्षक

अलीगढ़

पत्रांकः-1915-18

दिनांक-21.05.2019

पृष्ठांकन संख्या व तिथि उक्तवत्।

प्रतिलिपि निम्नांकित की सेवा में सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1. रजिस्ट्रार मा० उच्च न्यायालय इलाहाबाद।

2. वित्त एवं लेखाधिकारी (मा०शि०) अलीगढ़।

3. प्रबन्धक/प्रधानाचार्य श्री उदय सिंह जैन कन्या इण्टर कालेज, अलीगढ़।

4. याची श्री मनोज कुमार जैन सहायक लिपिक श्री उदय सिंह जैन क०इ० कॉलेज अलीगढ़।

जिला विद्यालय निरीक्षक

अलीगढ़। ”

33. Shri F.A. Ansari, learned Standing Counsel while placing reliance upon the judgment in Udai Veer Singh & Anr. v. District Inspector of Schools Deoria & Anr. (Supra) submitted that the petitioner has not filed any material on record to show that his appointment has been made by the appointing authority after obtaining prior approval from the DIOS. He relied upon the decision of this Court in **Amit Kumar v. District Inspector of Schools, Jaunpur9**, wherein it has been held that Regulation 101 is mandatory. He further argued that for direct recruitment on non-teaching post the rules applicable to Government institutions would be applicable as provided under Regulation 2 (1) of Chapter III of the Act. He submits that the Subordinate Officers Ministerial Staff (Direct Recruitment) Rules, 1985 would apply to direct recruitment of Class-III employees and for Class-IV employees the Group ‘D’ Employees Service Rules, 1985 was applicable prior to its amendment, now it is through outsourcing . In support of his submissions he has placed reliance upon Paras 5, 6, 7 and 8 of **Udai Veer Singh & Anr. v. District Inspector of Schools, Deoria & Anr.** (Supra).

34. Shri F.A. Ansari, learned Standing Counsel, in support of his submissions, has also placed reliance upon the judgment rendered in the case of **State of U.P. & Ors. v. Rachna Hills & Ors.10,** wherein Hon'ble the Apex Court while considering the Regulation 16FF regarding appointment of teachers in minority institution has held that without obtaining mandatory approval of DIOS, there is no vested right of a candidate to be appointed. He has heavily relied upon paras 19, 20, 23, 29, 32 and 33 of the said judgment.

35. He has also placed reliance upon the judgment in **Krishna Kant v. State of U.P. & Ors.11**, wherein the Court had considered Chapter III Regulation 2 (1) and held that Rule of promotion as prescribed for under the Regulation are applicable to the minority institution. The Court in the said judgment has also relied upon the Full Bench judgment in **Committee of Management, Swami Lila Shah Adarsh Sindhi Inter College & Anr. v. State of U.P. & Ors.12**, wherein it is held that the permissible regulations are always applicable and can be framed in respect of minority institution. Learned Standing Counsel has placed reliance upon para 6 of the judgment in Krishna Kant v. State of U.P. & Ors. (Supra). He submitted that the objection of the petitioner-respondent that for Class-III post no procedure is prescribed, is not tenable as Regulation 2 (1) provides that for appointment on Class-III post in the institution, minimum educational qualification would be the same as laid down for Class-III employees of Government Higher Secondary School time to time.

36. Learned Standing Counsel has submitted that there is no vacuum as the Subordinate Officers Ministerial Staff (Direct Recruitment) Rules, 1985 would apply to direct recruitment of Class-III employees. Later on Government Orders dated 25.11.2021 and 7.12.2023 had also been issued, wherein detailed procedure is provided for appointment of Class-III employees.

37. Reliance has also been placed on the judgment in **State of U.P. v. Principal, Abhay Nandan Inter College & Ors.13**, (Para 7, 8, 10, 12 and 32). He submits that learned Single Judge has erred in law while holding that DIOS has ignored the distinction between minority and non-minority institution and neglected the privileges, which are enjoyed by the institution in question in terms of Art.29 and 30 of the Constitution of India. He has further submitted that learned Single Judge has relied upon the Full Bench judgment of this Court in **Harpal Singh v. State of U.P.14**, wherein the Full Bench has held that in the minority institution there is no requirement that in the selection committee there should be one nominee of the District Magistrate and one nominee from reserved category concerned. He submits that in the present matter even the petitioner has not pleaded such relief. Therefore, there was no reason or occasion to adjudicate the said issue in view of law propounded by Hon'ble the Apex Court in State of U.P. v. Principal, Abhay Nandan Inter College & Ors. (Supra) and State of U.P. & Ors. v. Rachna Hills & Ors. (Supra). The only question for consideration before learned Single Judge was whether the mandatory provisions of Regulation 101 of Chapter III of the Regulations framed under the Act, 1921 was followed or not. The issue of applicability of Regulation 101 upon minority institution is no more res integra and as such the judgment passed by learned Single Judge is liable to be set aside.

SUBMISSIONS OF PETITIONER-RESPONDENT

38. Per contra, Shri Sankalp Narain, learned counsel for petitioner-respondent no.1 has vehemently opposed the present appeal and submitted that no prior permission as per Chapter III Regulation 101 of the Act, 1921 is required before making selection on the post of Asstt. Clerk in the institution in question. In support of his submissions, he has heavily placed reliance upon the judgment in Abhishek Tripathi v. State of U.P.15. He submits that the petitioner had applied against the vacancy, which was duly advertised in 'Amar Ujala' and it is not in dispute that the vacancy was in existence. It is also not in dispute that the sanctioned strength of the institution has already been determined by the Director in pursuance of G.O. dated 15.6.2012, which was issued in compliance of the direction issued in Dhruv Narain Singh v. State of U.P. & Ors. (Supra). In view of the law laid down in Abhishek Tripathi (Supra), there was no such requirement for getting any prior permission for initiation of selection process. Moreover, the said objection is not available to the respondents-appellants in view of the judgment and order dated 26.3.2019 passed in Writ-A No.20601 of 2018.

39. Shri Sankalp Narain, learned counsel for the petitioner-respondent next submitted that in the said writ petition, the petitioner has assailed the validity of the order dated 3.7.2018 and 11.9.2018 on the ground that the post was duly advertised and fair procedure was adopted, therefore, mere non-obtaining prior approval from the DIOS in pursuance of Regulation 101 would not be fatal. In the said proceeding, inspite of time accorded to the respondent-appellants no counter affidavit was filed and the Court opined that there was no conscious determination by the authority concerned with regard to legality of the petitioner's appointment in terms of the applicable provisions of law. The Court also observed that the Authorities were expected to determine as to whether there existed any vacancy; a fair procedure for recruitment was followed and the petitioner possessed requisite qualification etc. The Court observed that since this has not been done and as such the order of the authority concerned refusing to grant approval to the petitioner's appointment was not sustainable. Therefore, at the said stage, the matter was relegated to the respondents-appellants for passing fresh order keeping in view of the observations made in Abhishek Tripathi (Supra) after affording opportunity of hearing to the parties.

40. In this backdrop, he further submitted that subsequently the respondents-appellants could not take objection that the vacancy was not there or the advertisement was not in accordance with law. He submitted that the parties are bound by earlier judgment, which attained finality. Even erroneous decision can operate as resjudicata. In support of his submissions, he has placed reliance in **Mohanlal Goenka v. Benoy Krishna Mukherjee16 and State of West Bengal v. Hemant Kumar Bhattacharjee17**. He submitted that the appointment of an employee can only be questioned on the ground of lack of requisite qualification. In the order, which was impugned in the writ petition, nowhere the DIOS has observed that the petitioner was not having requisite qualification qua the post. In support of his submissions, reliance has also been placed on **State of U.P. v. Manager, Committee**

of Management, Islamia Inter College & Ors.18 and Sister Meera v. State of U.P.19.

41. Shri Sankalp Narain, learned counsel for the petitioner-respondent has vehemently submitted that the DIOS has erred in law with regard to seek prior permission before initiation of selection process in terms of Chapter III Regulation 101 of the Act, 1921. In the previous round of litigation, said objection was taken by DIOS while non-suiting the claim of the petitioner for grant of approval. However, while remanding the matter to DIOS, fresh decision was required to be taken in the light of judgment in Abhishek Tripathi (Supra). But even thereafter the DIOS has again erred in law and neglected the categorical observation made by the writ Court. It is submitted that even for the sake of argument it is presumed that the selection proceedings were carried out without seeking prior permission but at the time of grant of approval to the appointment of such employee, all such questions with regard to validity of appointment, the post on which such appointment was being sought and all such relevant issues can be gone into by the DIOS. Therefore, in view of ratio laid down by this Court in Abhishek Tripathi (Supra) and **Mohd. Faizan v. State of U.P.20,** it may be concluded that the provisions regarding seeking prior permission in terms of Chapter III rule 101 is not mandatory provisions so far as minority institutions are concerned.

ANALYSIS

42. Heard rival submissions advanced by learned counsel for the parties, perused the record and respectfully considered the judgments cited at Bar. **The short question that arises for consideration is whether the mandatory provision of Regulation 101 of Chapter III of the Regulations framed under the Act, 1921 applies to a minority institution or not?**

43. Hon'ble the Apex Court in Rachna Hills & Ors. v. Rachna Hills & Ors. (Supra) has considered the appointment of teachers in minority institution without obtaining mandatory approval of District Inspector of Schools under Section 16FF of the Act, 1921. The question that arose for consideration before Hon'ble the Apex Court that once the management forwarded names for approval to the DIOS, whether selection process concluded and candidates acquired vested right to be appointed before amendment of the Regulations. The Supreme Court held 'No'. It further observed that sub-section (3) of Section 16 FF says that no person selected and proposed to be appointed as a teacher by Management shall be appointed unless proposal is approved by DIOS. Hon'ble the Apex Court has framed three issues for consideration, which are reproduced as under:-

"(i) Whether the selection process concluded, and the candidates acquired a vested right to be appointed before the amendment of the Regulations?

(ii) Whether the Act, read with the Rules and Regulations made thereunder, contemplates 'deemed appointment' if the approval of the DIOS is not given within a period of 15 days?

(iii) Whether the posts of teachers could be filled as per the Rules and Regulations that existed when the vacancies arose and not as per the amended Regulations?"

44. So far as issue no.1 is concerned, the same is answered by Hon'ble the Apex Court in paragraphs 18, 19, 20 and

21, which for ready reference, are reproduced as under:-

"18. To consider the submissions of the Respondents that the candidates whose names are recommended by the Management for approval by the DIOS acquire a vested right to be appointed as Teachers, it is necessary to examine Section 16-FF:

"16-FF. Savings as to minority institutions

(1) Notwithstanding anything in sub-section (4) of section 16-E, and section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in clause (I) of Article 30 of the Constitution shall consist of five members (including its Chairman), nominated by the Committee of Management:

Provided that one of the members of the Selection Committee shall —

(a) in the case of appointment of the Head of an Institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless —

(a) in the case of the Head of an Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section, the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of a teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final." (emphasis supplied)"

19. Sub-section (3) of Section 16-FF of the Act provides that no person selected and proposed to be appointed as a teacher by the Management shall be appointed till the proposal is approved by the DIOS. If the expressions 'no person', 'shall be appointed', and 'unless' employed in sub-section (3) are given their ordinary meaning, which is the foremost of the linguistic canons of construction of legislation, we have no hesitation in holding that appointment is subject to the mandatory approval of DIOS. The process of appointment cannot be said to have been concluded without obtaining the mandatory approval of the DIOS, and as such, there is no right, much less a vested right, of the candidate to be appointed.

20. This Court had the occasion to examine the effect of approval by the DIOS in Raj Kumari Cecil (Smt.) v. Managing Committee of Laxmi Narain Bhagwati Devi

Vidya Mandir Girls' High School, (1998) 2 SCC 461, while holding that the appointment of the petitioner therein was unsustainable and incomplete, as the statutory pre-condition for the appointment, i.e., approval from the DIOS, was not obtained, it was observed:

"4. There is no dispute that the appellant did not possess the qualifications for being appointed as a Principal of the Higher Secondary School. It is also not disputed that the appointment is subject to approval of the competent authority under the Intermediate Education Act. It is correct that the competent authority has power to relax the qualification but then again it is not disputed that the competent authority did not relax the qualification for the appointment of the appellant as Principal of the Higher Secondary School of the respondent….

....

13. ... The appellant ceased to be Headmistress on upgradation of school of the respondent to the Higher Secondary School as the post was upgraded. She did not possess qualifications to be appointed as Principal of the Higher Secondary School. Her qualifications were not relaxed. The competent authority under the Intermediate Education Act did not grant approval for her appointment as a Principal which is a precondition under the law. Since the appointment itself was not approved it was not necessary for the Managing Committee of the school to get consent of the authority concerned for the termination of her services as a Principal."

(emphasis supplied)

21. In view of the clear statutory mandate under Section 16-FF (3) of the Act, we are of the opinion that the High Court has committed an error in coming to the conclusion that the Respondent nos. 1 to 3 have acquired a vested right to be appointed."

45. So far as issue no.2 is concerned, the same is answered by Hon'ble the Apex Court in paragraphs 22 to 27, which are also reproduced as under:-

"22. Respondents have relied on Regulation 18 to argue that if the DIOS fails to grant his approval within 15 days of the proposal made by the Management, the proposed candidates shall be deemed to have been appointed. Regulation 18, is as under:

"(1) Within fifteen days of the receipt of the recommendation of the Selection Committee constituted under sub-section (1) or (2) of Section 16-F, and in case of an institution referred to in Section 16-FF, the approval of the authority specified therein, the Manager shall, on authorisation under resolution of the Committee of Management, issue an order of appointment by Registered Post to the candidate in the form given in Appendix 'B' requiring the candidate to join duty within ten days of the receipt of such order, failing which the appointment of the candidate will be liable to cancellation.

(2) In case of promotions and ad hoc appointments also a formal order of promotion or appointment in the form as near as possible to the form referred to in Clause (1) shall be issued to the person concerned under the signature of the Manager.

(3) A copy of every order referred to in Clauses (1) and (2) shall be sent to the Inspector and in case of appointment of the head of institution, a copy thereof shall also be sent to the Regional Deputy Director of Education."

23. We have noticed that appointments are to be made under Section 16-E of the Act. Section 16-F of the Act

provides for the constitution and recommendation of Selection Committees and Section 16-FF therein specifically relates to minority institutions. Regulation 18 (1) provides for the time within which an order of appointment is to be issued by a Manager to the selected candidate. According to which, where the recommendation is made by a Selection Committee constituted under sub-section (1) or (2) of Section 16-F of the Act, an order of appointment is to be issued within 15 days of the receipt of the recommendation of the Selection Committee. Whereas, in the case of an institution referred to in Section 16-FF of the Act, i.e., a minority institution, as in the instant case, it is to be issued within 15 days of the receipt of the approval of the authority specified therein. Neither Section 16-FF of the Act nor Regulation 18 provides the period within which approval is to be accorded. Further, neither of the two provisions provide for deemed appointment in the event of delay in granting approval. Therefore, unless the approval contemplated under Section 16-FF(3) is accorded, no appointment could take place.

24. In any case, when the relevant statutory provision, i.e. Section 16-FF(3) itself makes approval by DIOS mandatory for appointment to the post of teacher, a Regulation made under the Act could not have provided for a 'deemed appointment'. Subordinate legislation cannot transcend the prescription of a statutory provision.

25. Additionally, sub-section (4) of Section 16-FF of the Act has to be read in conjunction with Section 16-FF(2) therein, which provides that "[t]he procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed". It is only in the cases where the selection procedure, as prescribed in the Regulations, is followed, that there cannot be a disapproval unless there is a lack of requisite eligibility and qualifications. Thus, the question of deemed appointment does not arise under Section 16-FF (4) of the Act.

26. If the statutory provisions read with relevant Regulations were to provide for 'deemed appointment', there would not have been a further remedy against an order of disapproval by the DIOS. Sub-section (5) of section 16-FF provides the remedy to the College Management in the event the DIOS does not grant an approval. As per this, the Management can within three weeks from the date of receipt of disapproval, make a representation to the Regional Deputy Director of Education.

27. In view of the legal provision as obtained under Section 16- FF of the Act, read with Regulation 18, we reject the submissions of the Respondents' that there is a 'deemed appointment' of selection under Regulation 18."

46. So far as issue no.3 is concerned, the same is answered by Hon'ble the Apex Court in paragraphs 28 to 33, which for ready reference, are reproduced as under:-

"28. The Division Bench, as well as the Single Judge of the High Court, accepted the submission of the selected candidates that the vacancies to the post of teachers could be filled only as per the Rules and Regulations that operated when the vacancies arose and not as per the Regulations that came to be amended thereafter.

29. We have already held that approval of DIOS is mandatory and that the Act injuncts the appointment of a Teacher without such approval. We have also held that the legal regime concerning the appointment of Teachers does not contemplate any concept of deemed

appointment if the DIOS does not decide upon the proposal within 15 days. Under these circumstances, the reference to and reliance on the principle that Rules that existed at the time when vacancies arose will govern the appointments is misplaced.

30. In any event, it is now a settled principle of law that a candidate has a right to be considered in the light of existing Rules, which implies Rules in force as on the date of consideration. This principle is affirmed by this Court in Deeepak Agarwal and Anr. v. State of U.P. and Ors. (2011) 6 SCC 725, as below:

"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V.Rangaiah case lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment."

31. While reaffirming the above referred principle, in a subsequent case of Rajasthan State Sports Council and Anr. v. Uma Dadhich and Anr. (2019) 4 SCC 316, (in which one of us was a member Dr. D.Y. Chandrachud, J., as he then was). This Court noted:

"5. There is merit in the submission which has been urged on behalf of the appellants that the respondent had no vested right to promotion but only a right to be considered in accordance with the rules as they existed on the date when the case for promotion was taken up. This principle has been reiterated in several decisions of this Court. (See H.S. Grewal v. Union of India, Deepak Agarwal v. State of U.P., State of Tripura v. Nikhil Ranjan Chakraborty and Union of India v. Krishna Kumar."

(emphasis supplied)

32. In a recent decision, in State of Himachal Pradesh and Ors. v. Raj Kumar and Ors. 2022 SCC OnLine SC 680, after reviewing a number of decisions on the same subject, this Court formulated the following principles:

"70. A review of the fifteen cases that have distinguished Rangaiah would demonstrate that this Court has been consistently carving out exceptions to the broad proposition formulated in Rangaiah. The findings in these judgments, that have a direct bearing on the proposition formulated by Rangaiah are as under:

1. There is no rule of universal application that vacancies must be necessarily filled on the basis of the law which existed on the date when they arose, Rangaiah's case must be understood in the context of the rules involved therein.

2. It is now a settled proposition of law that a candidate has a right to be considered in the light of the existed rules, which implies the "rule in force" as on the date consideration takes place. The right to be considered for promotion occurs on the date of consideration of the eligible candidates.

3. The Government is entitled to take a conscious policy decision not to fill up

the vacancies arising prior to the amendment of the rules. The employee does not acquire any vested right to being considered for promotion in accordance with the repealed rules in view of the policy decision taken by the Government. There is no obligation for the Government to make appointments as per the old rules in the event of restructuring of the cadre is intended for efficient working of the unit. The only requirement is that the policy decisions of the Government must be fair and reasonable and must be justified on the touchstone of Article 14.

4. The principle in Rangaiah need not be applied merely because posts were created, as it is not obligatory for the appointing authority to fill up the posts immediately.

5. When there is no statutory duty cast upon the State to consider appointments to vacancies that existed prior to the amendment, the State cannot be directed to consider the cases."

(emphasis supplied)

33. In view of the clear enunciation of the law, we have no hesitation in rejecting the submission made by the learned counsels for the Respondents, that the vacancies that existed prior to the amendment of Regulation 17 of Chapter II, must be governed by unamended rules."

47. In State of U.P. & Ors. v. Principal Abhay Nandan Inter College & Ors. (Supra), the State of U.P. had challenged the judgment of Division Bench of this Court dated 19.11.2018 holding that Regulation 101 framed under the Act, 1921 as amended is 'unconstitutional'. Hon'ble the Apex Court has considered the entire Regulation 101 and held that in case the institution is on grant-in-aid, then there is no difference between minority and non-minority institution. The relevant paragraphs 32, 33 and 53 of the said judgment is reproduced as under:-

"……...32.When it comes to aided institutions, there cannot be any difference between a minority and non-minority one. Article 30 of the Constitution of India is subject to its own restrictions being reasonable. A protection cannot be expanded into a better right than one which a non-minority institution enjoys. Law has become quite settled on this issue and therefore does not require any elaboration.

33.Thus, on the aforesaid issue we have no hesitation in reiterating the principle that an institution receiving aid is bound by the conditions imposed and therefore expected to comply. Once we hold so, the challenge made on various grounds, falls to the ground……..

53. The counsel appearing for the respondents did place reliance upon few decisions of this Court. Having gone through the said decisions and in the light of our discussion, we do not find any help flowing from them, strengthening the contentions raised by them. Reliance has been made on the decision rendered by this Court inMatankara Syrian Catholic College vs. T. Jose, (2007) 1 SCC 386. Having gone through the said judgment, we do not find that the same has got any application to the case at hand. The said decision deals with the right of the minor institutions to choose the Principal of its choice. We have already held that we are dealing with the case of aided institutions and, therefore, there is no need for any sub-classification by separating them as minority and non-minority institutions. The impugned regulation is sought to be enforced against all the aided institutions. It is also to be noted that this decision was taken into consideration by this Court in S.K. Md. Rafique's case (supra)……." .

(emphasis supplied)

48. In the aforesaid judgment, Hon'ble the Apex Court has approved the entire Regulation 101 as amended. Therefore, at this stage, it is not in dispute that Regulation 101 would also be applicable to the minority institutions, which are on grant-in-aid list of the State Government.

49. In the aforesaid circumstances, the question is whether the mandatory provisions of Regulation 101 would mandatorily apply to aided minority institution or not. This Court in Amit Kumar v. District Inspector of Schools, Jaunpur (Supra) has held that Regulation 101 is mandatory. For direct recruitment on non-teaching post (Class-III) the Rules applicable to Government institutions would be applicable. The Subordinate Officers Ministerial Staff (Direct Recruitment) Rules, 1985 would apply to direct recruitment of Class-III employees. In the present matter, it is not in dispute that the appointing authority/ Management did not obtain prior approval of DIOS for alleged appointment of petitioner-respondent on Class-III post. The argument of Shri Sankalp Narain, learned counsel for petitioner-respondent that there being no guidelines for DIOS in the matter of grant of prior approval, the Regulation 101 would not apply to minority institutions, does not appear to have any substance. Regulation 101, as mentioned above, provides that the appointing authority should not fill any vacancy of non-teaching staff except with prior approval of DIOS. The judgment of Abhishek Tripathi (Supra), which has been heavily relied upon by learned counsel for the petitioner-respondent is also distinguishable as the same was decided in the light of sanctioned strength determined by the Joint Director of Education pursuant to G.O. dated 14.6.2012, which was issued in compliance of the direction dated 22.5.2012 issued by this Court in Dhruv Narain Singh (Supra). Learned Single Judge in para 16 of the judgment in Abhishek Tripathi (Supra) has held that before appointment of an incumbent on a non-teaching post, information is required to be given to the DIOS concerned regarding the sanctioned strength, who is under obligation to examine the sanctioned strength in the institution and report the same to the Director of Education (Madhyamik). Only after satisfying itself to the sanctioned strength and the vacancy position, the DIOS can grant approval for initiating the process of selection for filling up the vacancy. The judgment in Abhishek Tripathi (Supra) was passed under the backdrop that no serious efforts were made by the respondents to determine the cadre for about 39 years. Only to meet out that exigency, the judgment of Dhruv Narain Singh (Supra) was passed and later on physical survey was conducted and cadre strength of the institutions district wise in the entire State of U.P. has been determined. The judgment in Abhishek Tripathi (Supra) nowhere gives an impression that the Regulation 101 has been diluted.

50. The Division Bench of this Court in Principal Abhay Nandan Inter College & Ors. V State of U.P. & Ors. (Supra) while dealing with the matter of outsource employees for Class-IV post, had held the Regulation 101 qua Class-IV as 'unconstitutional'. Later on Hon'ble the Apex Court in State of U.P. & Ors. v. Principal Abhay Nandan Inter College & Ors. (Supra) vide judgment and order dated 27.9.2021 had approved the entire Regulation 101. Regulation 101 provides that Appointing Authority should not fill

any vacancy of non-teaching staff except with the prior approval of the DIOS. The only requirement under the Regulation is that the appointing authority shall apply to the DIOS intimating him that the vacancy in non-teaching post is to be filled by the appointing authority for which permission be granted. We find the reason for obtaining prior approval is that a person appointed in the aided institution is entitled for salary from grant-in-aid received from the Government sanctioned for the institution. The basic reason behind the said provision is that the DIOS must have information that the non-teaching post is to be filled up by appointing authority after prior approval is granted by DIOS and thereafter the appointing authority proceeds to fill up Class-III post. The minority institution is free to advertise the post in accordance with law and make selection and appoint the candidate, who according to appointing authority is the most suitable candidate. Therefore, Article 29 and 30 (1) of the Constitution of India, which deal with the right to establish and administer minority institution, do not preclude the State to regulate the conditions of employment. For ready reference, Articles 29 and 30 (1) of the Constitution of India are reproduced as under:-

"Article 29 – Protection of Interests of Minorities

This article is intended to protect the interests of minority groups.

Article 29(1):This provides any section of the citizens residing in India having a distinct culture, language, or script, the right to conserve their culture, language and script.

Article 29(2):The State shall not deny admission into educational institutes maintained by it or those that receive aid from it to any person based only on race, religion, caste, language, or any of them.

Article 30(1):All religious and linguistic minorities have the right to establish and administer educational institutions of their choice."

51. Regulation 101 provides for the DIOS to find out whether the post is created or not, to verify the sanctioned strength in the institution and to verify whether as per the standards fixed by the department teaching and non-teaching staff is surplus in the institution or not. We are of the opinion that merely obtaining prior approval from the DIOS for making appointment does not infringe the minority status of the institution. The said provisions nowhere infringe the right of the minority institution to appoint any suitable employee by obtaining prior approval for appointment. This Court in Udai Veer Singh & Anr. v. District Inspector of Schools, Deoria & Anr. (Supra) has considered Regulation 101 and 16FF. The relevant paragraphs 7 and 8 of the said judgment is reproduced as under:-

"……..7. There is another reason for holding that Regulation 101 applies to minority institutions. In Section 16FF of the Act, it has been provided that a teacher or head of a minority institution can be appointed by the management committee of the institution but such an appointment, in case of head of institution, has to be approved by the Regional Deputy Director of Education and in case of teachers. It has to be approved by the D.I.O.S. If further provides that approval shall not be withheld where the person selected possesses minimum qualification prescribed and is otherwise eligible. After a person is appointed, the D.I.O.S. has to grant financial approval to the appointment as the salary is paid from government fund. He has

to be satisfied that appointment is made of a qualified person and the post is a sanctioned post. The D.I.O.S. does not control the appointment nor he has got any say in the matter of appointment. But after the appointment, the papers have to be forwarded to the D.I.O.S. for grant of financial approval. If post is sanctioned and the candidate possesses the essential qualifications and appointment has been made in accordance with law, financial approval would be granted by the D.I.O.S. The D.I.O.S. does not control the selection and appointment made by the appointing authority or the management of a minority institution, which is free to select and find out the best suitable person and appoint him in the institution. The appointment of such employees is totally at the discretion of the management. Same principle applies to employees.

8. The learned counsel for the petitioner lastly urged that the provisions of Act and Regulations would not apply in matters of recruitment as there is no provision either in the Act or Regulations, which provide the mode and the manner of direct recruitment. Regulation 2 (1) of the Regulations provides that for appointment on a Class-III or IV post in an institution, the minimum educational qualification would be the same as laid down for Class-III and IV employees of Government Higher Secondary Schools from time to time. Regulation 2 (1) of the regulations is extracted below :

''2. (1) किसी संस्था में नियुक्ति हेतु लिपिक एवं चतुर्थ वर्गीय कर्मचारियों की नयूनतम शैक्षिक योग्यता वही होगी जो राजकीय उच्चतर माध्यमिक विद्याालयों के समकक्षीय कर्मचारियों के लिए समय≤ पर लिर्धारित की गई हो ।''

It is true that neither under the regulations nor in the Act detailed procedure has been prescribed laying down the manner of direct recruitment, selection and appointment. Apart from Regulation 2 (1) and 101 of the regulations, there is no other provision either under the Act or the regulations which provides the criteria for recruitment of a Class-III or Class-IV employee in an aided institution. The question is, if there is no provision either in the Act or the regulations providing the mode of direct recruitment to Class-III or IV posts, what method of recruitment should be followed. Regulation 2 (1) clearly provides that educational qualification for appointment of Class-III or Class IV employee would be the same as of similar category of employees in the Government Higher Secondary Schools. The learned additional chief standing counsel has rightly pointed out that in absence of any statutory rule either in the Act or regulation, the direct recruitment rules framed by the State Government which are applicable to similar Class-III and IV employees working in the Government Higher Secondary Schools would apply to general institutions as well as to minority institutions. "The Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985" would apply to direct recruitment of Class-III employees. And for Class-IV employees "The Group 'D' Employees Service Rules, 1985" would be applicable. Both the rules are general rules. They have an overriding effect. They provide detailed procedure for direct recruitment. The language of both the rules are wide and comprehensive enough to include all State and subordinate services and posts except to the extent otherwise expressly provided by the rules. Therefore, in appointments of non-teaching posts in aided institutions recognised under the Act. The Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 would apply to recruitment of Class-III employees. And The Group 'D' Employees Service Rules, 1985

would be applicable for Class-IV employees……."

52. Similarly in the matter of Krishna Kant v. State of U.P. & Ors. (Supra) the Court was dealing with the matter of promotion in the minority institution. In the said judgment, reliance has also been placed on the judgment of this Court in Committee of Management, Swami Lila Shah Adarsh Sindhi Inter College & Anr. v. State of U.P. & Ors.21. The Court had also taken note of judgment passed by Hon'ble the Apex Court in Sindhi Education Society & Anr. v. Chief Secretary, Government of NCT of Delhi & Ors.22, which deals with linguistic minority institution. The relevant paragraphs 6 and 7 of Krishna Kant v. State of U.P. & Ors. (Supra) are reproduced as under:-

"…….6. Learned counsel for the petitioner has relied upon Full Bench judgment of this Court in Committee of Management,Swami Lila Shah Adarsh Sindhi Inter College & Anr v. State of U.P. & Ors, 2017 (2) ADJ 377 (FB), wherein, this Court has held that the permissible regulations are always applicable and can be framed in respect of minority Institution. The principle laid down by Full Bench is sound principle of law in terms of service jurisprudence where the employees of same department or same Institution are to attain the benefits of promotion and those employees having been appointed by Committee of Management or working under the Management cannot be denied incidental benefits and other service conditions which definitely includes promotion as well. Full Bench referred relevant para 97 of the judgment of the Supreme Court in Sindhi Education Society & Anr v. Chief Secretary, Government of NCT of Delhi & Ors, (2010) 8 SCC 49 reads as under:

"It is not necessary for us to examine the extent of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the judgment. No doubt, right conferred on minorities under Article 30 is only to ensure equality with the majority but, at the same time, what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. The permissible regulations, as afore-indicated, can always be framed and where there is a mal-administration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law. The minimum qualifications, experience, other criteria for making appointments etc. are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable."

7. In view of above, now the legal position stands settled that rule of promotion as prescribed for under the regulation are applicable to the institution in question herein this case, out of five posts, therefore, three posts would fall in quota of promotion and since only two persons are working by way of promotion, the third position will definitely be taken as a vacancy under promotional quota and therefore, I am of the considered opinion that in case if the petitioner is otherwise eligible to be considered for promotion, his claim is liable

to be considered within the framework of the regulations and other eligibility criteria……."

CONCLUSION

53. Since the selection process was initiated without any prior approval from DIOS as mandated in Regulation 101, the selection process stood vitiated since its inception. We have discussed in detail about the alleged publication, which was made in 'Amar Ujala' dated 10.12.2017 and the appointment letter dated 22.1.2018. From bare perusal of the said publication dated 10.12.2017, it is apparent that the same was bereft of necessary information. The said publication nowhere provides for any educational qualification, pay scale or any other essential qualifications and the same is absolutely an eye wash. The relevant information were missing there.

54. We also find that the appointment letter does not contain even the address of the petitioner, which also creates doubt regarding genuineness of such appointment. Therefore, we hold that the publication was not in accordance with law. We also hold that the entire exercise of appointment is doubtful and as such the same is unsustainable in the eyes of law.

55. In the aforesaid facts and circumstances, we find that learned Single Judge has erred in law in holding that the provisions of Regulation 101 Chapter III of the Act, 1921 would not be applicable on the minority institution. Therefore, in view of the above, we hold that Chapter III Regulation 101 is fully applicable on the aided, recognised institutions without any classification of minority or non-minority. Accordingly, the judgment and order impugned passed by learned Single Judge is set aside.

56. The special appeal stands **allowed** accordingly.

(2024) 5 ILRA 454
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 879 of 2024

Dr. Sanjay Kumar Bhat & Ors. **...Petitioners**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Gaurav Mehrotra, Anant Khanna, Ritika Singh, Vivek Kumar Rai

Counsel for the Respondents:
C.S.C., Anupras Singh

A. Service Law – UP Educational Instructions (Reservation in the Teachers Cadre) Act, 2021 – Section 3(1) – Post of Assistant Professor – Recruitment – Reservation – Act of 2021 provide that the institute will be taken as a unit for applying reservation on the various faculty position – No Rules regarding reservation of post in direct recruitment could be framed as required u/s 3(1) of the Act – Effect – Held, the respondent-institute proceeded for appointment, without being any St. prescription, regarding the manner and extent of applying reservation as per section 3(1) of the Act 2021 more so, the opposite parties have failed to demonstrate any procedure or manner as is prescribed by notified any Rules in the Gazette. (Para 31)

B. Service Law – U.P. Public Services (Reservation for Economically Weaker Sections) Act 2020 – S. 20(b) – Circular dated 24.11.2023 and GO dated 18.01.204 – Post of Assistant Professor – Recruitment –Economic Weaker Section (EWS) Category – Advertisement was issued allowing the Senior Resident, whom salary is admittedly around 1 Lakh per month, to apply under EWS Category – Permissibility – Held, EWS reservation ought not to have been applied in the impugned advertisement dated 01.12.2023 on account of peculiar eligibility criteria for the post, so advertised, which per-supposes gross annual income to be more than almost Rs. 12 lacs, while any candidate having gross annual family income of more than eight lacks, is not covered within the definition of EWS as per the Act, 2020. (Para 37)

C. Service Law – U.P. Public Services (Reservation for Economically Weaker Sections) Act 2020 – Post of Assistant Professor – Recruitment – Unfulfilled vacancies of EWS category – Special Recruitment issued treating these unfulfilled vacancies as backlog vacancies – Permissibility – Held, Section 3(2) of the Act of 1994 speaks that for the unfilled vacancies the employer St. is at liberty to fill up the backlog vacancies by means of special drive. However, there is no pari-materia provision in the Act of 2020, which inter-alia governs the manner in which EWS reservation is to be provided, rather Section 3(6) of Act 2020, categorically provides that the unfilled vacancies of the EWS category are not ought to be left vacant and ought to be filled up by unreserved candidates. (Para 38 and 39)

D. Interpretation of Statute – UP General Clauses Act, 1904 – S. 33-A – Word 'Prescribed' used in Section 3(1) of the Act, 2021 – Meaning – The word 'prescribed' shall mean prescribed by the rules made under the Act, in which the word occurs. (Para 25)

Writ petition allowed. (E-1)

List of Cases cited:

1. Rajjan Lal Vs St. & anr.; AIR 1961 ALL 139 (FB)

2. Bharat Sanchar Nigam Ltd. & anr. Vs BPL Mobile Cellular Ltd. & ors.; (2008) 13 SCC 597

3. Nawal Kishore Mishra & ors.Vs High Court of Judicature of Allahabad; (2015) 5SCC 479

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

1. Heard Shri Satish Chandra Mishra, learned Senior Advocate assisted by Shri Gaurav Mehrotra, learned counsel for the petitioners, Shri Anupras Singh, learned counsel for Dr. Ram Manohar Lohia University, Shri Shailendra Kumar Singh, Chief Standing Counsel, Vivek Shukla, Additional Chief Standing Counsel and Shri Tushar Verma, learned counsel for the State.

2. Challenge is made to the advertisement bearing no. DrRMLIMS/ER/Rect-F/2023/1217 dated 01.12.2023 (hereinafter referred to as 'impugned advertisement') issued by the Dr. Ram Manohar Lohia Institute of Medical Sciences (hereinafter referred to as 'Institute') thereby, applications have been invited from eligible candidates for appointment of faculty on regular/deputation basis, vide the special recruitment drive for the post of Professors/Associate Professors and Assistant Professors in various departments and further the order bearing no. DrRMLIMS/ER/Estb.1-F2/2024/1589 dated 19.01.2024 is also assailed whereby, the application of the petitioners has impliedly been rejected.

3. Contention of counsel for the petitioners is that 'the Institute' is an autonomous super specialty post graduate

institute, fully aided by the Government of U.P. The institute is creation of statute namely, Dr. Ram Manohar Lohia Institute of Medical Sciences Act 2015 (hereinafter, referred to as the 'Act 2015') and it is discharging public function.

4. Further submission is that the petitioners are not the outsiders, but are the faculty members working on the post of the Professors(Junior Grade)/Additional Professors in the institute whose description are given as follows:-

Sr No.	Name	Present Post
1.	Dr Sanjay Kumar Bhatt	Professor(Jr Grade)
2.	Dr Vineet Kumar	Professor(Jr Grade)
3.	Dr Neetu Singh	Professor(Jr Grade)
4.	Dr Rajni Bala Jasrotia	Professor(Jr Grade)
5.	Dr Abhilash Chandra	Professor(Jr Grade)
6.	Dr Manish Kulshrestha	Professor(Jr Grade)

5. Next submission is that the work and conduct of the petitioners were always above-board as they perform their duties to the best of their ability, sincerity and commitment to the institution.

6. Vide impugned advertisement dated 01.12.2023, applications were invited from eligible persons for the appointment of faculty on regular/deputation basis through special recruitment drive, however, there are various anomalies in the advertisement. He argued that prior to promulgation of *Uttar Pradesh Educational Instructions* (Reservation in the Teachers Cadre) Act 2021 (hereinafter referred to as the 'Act 2021'), the department concerned of the Universities and statutory medical institutes were taken as a unit for applying reservation however, after coming into the existence of the aforesaid new enactment i.e. the Act 2021, the institute is taken as a unit for applying reservation on the various faculty position and further section 3(1) of the Act 2021 categorically provides that the reservation on the post of direct recruitment in the institution is to be provided to the extent and in a manner 'prescribed' by the State Government, but the State Government never prescribed any procedure regarding reservation of post in direct recruitment out of sanctioned strength in the teacher cadre which creates great anomaly and this goes to the root of the matter.

7. He further argued that the recruitment exercise initiated by the respondent institute vide impugned advertisement dated 01.12.2023 is not incongruence with the existing guidelines of the Medical Council of India and the same is based on the old guidelines of the Medical Council of India of year 2020 whereas, in year 2023, the guideline of National Medical Commission (hereinafter referred to as 'NMC') (erstwhile MCI) reduced the strength of faculty and therefore, the strength of faculty members in the institute is liable to be re-determined as per the 2023 guidelines of NMC and therefore, the advertisement is published ignoring the new guidelines.

8. Further contention of counsel for the petitioners is that there was no need of applying EWS category reservation for the post so advertised in the impugned

advertisement dated 01.12.2023 as the same would affect right of such person who can get the benefit of reservation as per the roster prescribed under the Act 1994.

9. He added that though, the institute has received a huge amount of Rs. 2,885 lacs from the Prime Minister Ayushman Bharat Health Infrastructure Managemnet for construction of 100 beds critical care block, but no post has been advertised to fill up, including Assistant Professor, Associate Professor or Professor whereas, fact remains that on 06.06.2018 one Dr Chandra Kant Pandey (unreserved category) was appointed as professor in the department of critical care as a permanent faculty member in the institute and when he resigned, no regular appointment is made and even at this time when the post of all the faculties are advertised, the critical care department has been left, the reason best known to the responsible authorities of the institute though, the same would adversely affect the right of those candidates who could have been considered if, the post would have been advertised for critical care department.

10. It has further been submitted that the standardization of Government Order dated 30.11.2022 is out dated for the reason that it is based on old MCI guidelines however, subsequently, the aforesaid guidelines have been superseded and new guidelines have been promulgated vide order dated 16.08.2023 issued by NMC and thus, in this view of the matter also, the impugned advertisement is faulty.

11. While continuing with his arguments, he submits that the advertisement is named as the Special Recruitment which only can be done for the backlog seats, but so far as the act meant for the EWS category, known as 'Constitution (One Hundred and Third Amendment) Act, 2019 do not provide any mechanism for filling the vacancy while carrying out special drive, contrary it is provided in the act that if, there would be no candidate in the EWS category those will be treated as seats of General Category, which is not pari-materia to the provisions prescribed in the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 (hereinafter referred to as 'Act 1994').

12. Concluding his arguments, he submits that since, the advertisement is hit by various anomalies, as no procedure prescribed by the State under Act 1921, no mode is prescribed for EWS category and since, the teachers of the faculty starting form Assistant Professor are getting more then 8 lacs of salary and therefore, applying EWS category reservation, is wholly unjustified and therefore, the advertisement dated 01.12.2023 as well as the impugned rejection order dated 19.01.2024 may be quashed and the respondents may be directed to issue afresh advertisement in accordance with law.

13. Refuting the contention of counsel for the petitioners, the counsel appearing for the respondent-institute submitted that from perusal of section 3 of the Act 2021, discloses the purpose of legislation, for applying reservation, treating the State Educational Institutions as one unit. The reservation under this Act, is to be done as per existing norms laid down by the State Government however, the prescription regarding extent and manner of the reservation has been provided by the legislature in Act 1994 and the Act 2021 and they are in consonance with each other and there is no contradiction at all. He added that

section 3(1) of the Act 2021 provides reservation of post in direct recruitment in Teachers' cadre in State Educational institution to the extent and in a manner as prescribed by the State Government, which clearly indicates the conscious decision is taken by the State Legislature by putting the word as 'prescribed' not the words 'may be prescribed' or 'shall be *prescribed'* or 'to be prescribed' and therefore, the procedure which has already been prescribed for applying the reservation would be taken care of nothing else and that too has been done while publishing the advertisement by the institution.

14. In support of his contention, he has place reliance on the full bench judgment of the Allahabad High Court, in case **of Rajjan Lal Vs. State and another, reported in AIR 1961 ALL 139 (FB),** wherein, it has been held that unless the word 'prescribed' is qualified by appropriate words, it means prescribed by any law. Further, the Hon'ble Supreme Court in case of **Bharat Sanchar Nigam Limited and Another Vs. BPL Mobile Cellular Limited and Others reported in (2008) 13 SCC 597** has held that when the word 'prescribed' is not defined, the same would mean that 'prescribed' in-accordance with law and not otherwise.

15. Adding his arguments, he submits that the law rendered by Apex Court in case of **Nawal Kishore Mishra and Others versus High Court of Judicature of Allahabad (2015) 5SCC 479**, it has categorically been held that section 3(1) of the Act 1994 specifically provides for the extent of reservation for SC/ST/OBC and the absence of any other prescription regarding application of reservation, the Act 1994 would apply.

16. He submits that the reservation in favour of economically weaker section (EWS) candidates came into existence vide the U.P. Public Services (Reservation for Economically Weaker Sections) Act 2020 which provides that 10% of the vacancies shall be reserved in favour of the persons belonging to EWS therefore, the post which are reserved for EWS category in the impuged advertisement, are according to the reservation roaster as prescribed by the State Government and that has to be necessary reserved for the EWS category and it is not open to 'the institute' to take any other view on its own, while taking a decision not to reserve the post in favour of EWS category.

17. He has also clarified that the vide Government Order dated 09.09.2016, the State Government keeping in view the need of Institute and requirement of the patient, sanctioned one post of Professor(Critical Care Medicine) in the institute and the Institute appointed Professor Chandra Kant Pandey against the sanctioned post of Professor, while duly publishing the advertisement on 19.05.2017 and Mr Pandey joined on 06.06.2018, however, he submitted his resignation and was relieved from the institute on 30.11.2019. Adding his arguments, he submits that the clause 2(12) of the G.O. dated 05.09.2022 provides that if, any post is previously sanctioned and is not included in the standardization(Mankikaran) then, those posts will be treated as nil/surrendered, after the incumbent occupying these posts, demit the office, though, subsequently the post of professor (Critical Care) is stated to be nil as the same was not included in the standardization however, looking into the interest and need of patient care one Dr. Sashi Srivastava who had superannuated form Sanjay Gandhi Postgraduate Institute of Medical Sciences,

Lucknow, was appointed as a Professor on re-employment basis in the department of Anesthesiology, who joined on 04.07.2023 and thus, there is neither any post of Professor in Critical Care Medicine nor there is any person working as a Professor(Critical Care Medicine) in the institute.

18. Replying the contention of counsel for the petitioners, he submits that all though, the number of post sanctioned in the Government Medical Institution is based on minimum recommendations made by statutory bodies like MCI/NMC, but it is not the sole criteria for determining the number of post sanctioned by the Government for proper functioning of Institute as well as for providing the patient care, as required, but in addition, the requirement for patient care, training, research, teaching and administration are also the ancillary ground of consideration.

19. He submits that the number of posts advertised by the institute is based on the number of posts available with the institute and further, keeping in view the requirement of the institute while, controverting the plea taken by the petitioners he submits that the special recruitment cannot be carried out while, special recruitment has been undertaken to balance the reservation for faculty position, considering the institute as a unit and the seats reserved for the candidates belonging to the SC/ST/OBC/EWS categories have been balanced out by the advertising seats vide advertisement for special recruitment and those are not the backlog seats, as the advertisement also do not speak like that. He next added that the post of Professor, Department of Clinical Hematology has been advertised under the special recruitment and not as backlog post. He sum up his arguments while submitting that the advertisement dated 01.12.2023 issued by the institute for appointment of faculty on regular basis is strictly in-accordance with the statutory provisions as well as the directions issued by the state Government, regarding reservation which is perfectly in-accordance with law therefore, submission is that no interference is warranted.

20. Having heard learned counsels for the parties, the following questions arises for consideration.

a. Whether, the respondent-institute could have proceeded to apply the reservation in the impugned advertisement dated 01.12.2023, without there being any manner 'as prescribed' by the State Government' as provided under section 3(1) of the Act 2021?

b. Whether, there could have been any applicant belonging to EWS category, who would have applied for the post of Assistant Professor, Associate Professor and Professor, admittedly, having more than 8 lacs of income?

c. Whether, there can be any special recruitment drive for EWS or other categories without there being any procedure prescribed under the Act 2020 and the Act 2021?

d. Whether, the standardization Government Order dated 30.11.2022 is outdated for the reason that it is based on old MCI guidelines of 2020, however, subsequently, those have been superseded vide order dated 16.08.2023, issued by NMC?

21. Before enactment of U.P. Educational Instructions (Reservation in the Teachers Cadre) Act 2021 the department concerned of the University and the Statutory Medical Institutes were taken as a unit for applying reservation, but now the

Institute is taken as a unit for applying reservation.

22. Section 3(1) of the Act 2021 provides that there shall be reservation of post in direct recruitment out of the sanctioned strength in Teachers Cadre in a State Educational Institution to the extent and in the manner as prescribed by the State Government.

23. Section 3(1) of the Act 2021 is extracted as under:-

"Notwithstanding anything in any other law of the State of Uttar Pradesh for the time being enforced, there shall be reservation of posts in direct recruitment out of the sanctioned strength in Teachers cadre in a State Educational institution to the extent and in the manner as prescribed by the State Government".

24. The above noted provision do not speak about any 'manner already prescribed', but it says 'as prescribed'.

25. The statement of objects and reasons of the Act 2021 make the intention of legislature amply clear that it has been decided that the previous Government Order for application of reservation for teaching post be replaced by the Act 2021, so far as the definition of word prescribed given under section 33-A of the U.P. General Clauses Act 1904 is concerned, it says that the word prescribed shall mean prescribed by the rules made under the Act in which the word occurs. As the word prescribed occurs in the Act 2021 therefore, the rules for prescribing the extent and manner ought to have been made under the Act 2021 and which could have been made only after the promulgation of the Act 2021 however, admittedly no such rules have ever been made by the State under the Act 2021, till date. Section 33-A of U.P. General Clauses Act 1904 is extracted as under:-

"prescribed" shall mean prescribed by rules made under the Act in which the word occurs.

26. This Court has also noticed that in counter affidavit filed by the respondent-institute as well as the State, no rules, Government Order or the Prescription has been brought on record which could show that any rule or procedure is prescribed, further section 6 of the Act 2021 also provides that every notification made by the State Government under the Act shall be laid as soon as after it is made before both houses of the State Legislature. Section 6 of the Act 2021 is transcribed as under:-

"Every notification made by the State Government under this Act shall be laid, as soon as may be after it is made, before both Houses of the State Legislature."

27. The U.P. Public Services (reservation for Scheduled Caste, Scheduled Tribe and Other Backward Classes) further, section 3(5) of the Act 1994 provides that the State Government for applying the reservation under sub-section (1) by a notified order issue a roaster comprising total cadre strength of the public service. Section 3(5) of the Act 1994 is reproduced hereinunder:-

"The State Government shall for applying the reservation under subsection (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running

account from year to year until the reservation for various categories of persons mentioned in sub-section (1) is achieved and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster."

28. In the provision of section 29-A of the U.P. General Clauses Act 1904, it is provided that the word 'notification' or 'public notification' shall mean a notification published in the Gazette of the State and the word 'notified' shall be construed accordingly. Section 29A of the Act 1904 is reproduced hereinunder:-

"notification" or "public notification" shall mean a notification published in the Gazette of the State, and the word "notified" shall be construed accordingly;

29. Thus, it emerges that the prescription is to be made by the State Government by promulgating Rules made under the Act 2021 by virtue of provision contained in section 6 of the Act and needs to be laid before both the houses of legislature. It is also borne out that as per the provision of section 3(1) of the Act 2021 read with section 29A of the U.P. General Clauses Act 1904, the prescription ought to have published by a notified order in an official gazette.

30. This Court is also aware about the judgment and order rendered in case of **Bharat Sanchar Nigam Limited and Another Vs. BPL Mobile Cellular Limited and Others (Supra),** wherein, it has been held that ordinarily the word 'prescribed would mean prescribed by Rules.' When the word prescribed is not defined, the same would mean that prescribed in-accordance with law and not otherwise. Paragraph 45 of the above-said judgment is reproduced hereinunder:-

"For invoking Clauses 4.1 and 19.5 of the licence agreement, we may notice that the word "prescribed" is not defined. It has not been defined even in the Telegraph Act. It has not been defined in the licence. The said hprovision unlike Clause 18.14 does not use the words "from time to time". A contract entered into by the parties, it will bear a repetition to state, must be certain. It must conform to the provisions of the Contract Act. Ordinarily, the word "prescribed" would mean prescribed by rules. Section 7(2)(ee) of the Telegraph Act provides for the rule-making power for the purpose of laying down the tariff. We may not be understood to be laying down a law that in absence of any statutory rule framed under the Telegraph Act, no contract can be entered into. In absence of any statutory rule governing the field, the parties would be at liberty to enter into any contract containing such terms and conditions as regards the rate or the period stipulating such terms as the case may be. The matter might have been different if the parties had entered into an agreement with their eyes wide open that the circular letter shall form part of the contract. They might have also been held bound if they accepted the new rates or the periods either expressly or sub silentio. When on the basis of terms of the contract, different rates can be prescribed, the same must be expressly stated. When the word "prescribed" is not defined, the same, in our opinion, would mean that prescribed in accordance with law and not otherwise."

31. Further in full bench of this Court in Case **of Rajjan Lal Vs. State and another (Supra)**, it has been held that

unless the word prescribed is explained in the provision, the general sense, as a meaning would be, 'prescribed by any law whatsoever.' Thus, reply to the issue no. (a) is that the respondent-institute proceeded for appointment, without being any State prescription, regarding the manner and extent of applying reservation as per section 3(1) of the Act 2021 more so, the opposite parties have failed to demonstrate any procedure or manner as is prescribed by notified any Rules in the Gazette, as is prescribed under sections 5 and 6 of the Act 2021, thus, the issue (a) is replied in negative.

32. Coming to the issue (b) as framed above, it is apparent that posts advertised vide impugned advertisement dated 01.12.2023 of the Assistant Professors, Associate Professors and Professors, which are higher in ranking than that of a Senior Resident and experience of three year as a senior resident is essential eligibility for the post to become Assistant Professor and three years as Assistant Professor experience is mandatory to be eligible for Associate Professors, while three years as Associate Professor experience is mandatory to be eligible for Additional Professors and further the experience of four years as Additional Professor is required for the post of Professor.

33. Fact remains that the salary of the Senior Resident is around 1 lakh per month, in all most every Government/Private institution and therefore, there can be no applicant belonging to EWS category, who would be eligible for applying for the post of Assistant Professor. As per the provision of Section 2(b) of the Act 2020, it is provided that 'Economically Weaker Section of Citizens' means persons belonging to Economically Weaker Section as defined in the office memorandum dated 19.01.2019 of DoPT, Ministry of Personnel and Public Grievance and Pension, Government of India and as per the same, the persons whose family has gross annual income is below Rs.8 lacs are to be identified as Economically Weaker Section for the benefit of reservation. Paragraph 2 of the office memorandum dated 19.01.2019 is extracted as under:-

"Persons who are not covered under the existing scheme of reservations for the Scheduled Castes, the Scheduled Tribes and the Socially and Educationally Backward Classes and whose family has gross annual income below Rs. 8.00 lakh are to be identified as EWSs for the benefit of reservation. Family for this purpose will include the person who seeks benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years. The income shall include income from all sources i.e. salary, agriculture, business, profession etc. and it will be income for the financial year prior to the year of application. Also persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWSs, irrespective of the family income

i 5 acres of Agricultural Land and above;

ii. Residential flat of 1000 sq. ft. and above:

iii. Residential plot of 100 sq. yards and above in notified municipalities:

iv. Residential plot of 200 sq. yards and above in areas other than the notified municipalities."

34. In fact, the respective applicants for the aforesaid positions of the Associate

Professors, Additional Professors and Professors cannot belong to EWS category, by virtue of the experience required for the same, thus, there is no occasion of advertising the EWS category post for Assistant Professors, Associate Professors and Professors.

35. The circular bearing no. M.I.-3/2023 dated 24.11.2023 issued by the Director General Medical Education and Training, with regard to employment of candidates under the compulsory government service bond was laid down, which categorically provides that annual income of the Junior Resident/Senor Resident, working in the Government/Autonomous Medical Colleges/Institutes of the State is more than Rs. 8 lacs, which is the eligibility prescribed by the Government Orders related to EWS category, therefore, they do not fall within the EWS category thus, the seats reserved for EWS category of the vacant post of the Senor Resident have been included in the unreserved category and the benefit of reservation of EWS category will not be allowed to any candidate. The circular dated 24.11.2023 is extracted as under:-

"शासनादेश संख्या-85 / 2019/2625/71-1-2019-जी-71/2011टी०सी० दिनांक 16 अक्टूबर 2019 द्वारा प्रदेश के राजकीय मेडिकल कालेजों में कार्यरत जूनियर एवं सीनियर। रेजीडेण्ट चिकित्सकों के वेतनमान अभिवृष्वि / संशोधन करते हुए जूनियर रेजीडेण्ट को ग्रेड वेतन रू0 5400/- तथा सीनियर रेजीडेण्ट को ग्रेड वेतन रू0 6600/- तथा अन्य अनुमन्य भत्ते राज्य सरकार द्वारा निर्धारित दरों पर अनुमन्य किया गया हैं।

उक्त से स्पष्ट है कि प्रदेश के राजकीय / स्वशासी मेडिकल कालेजों / संस्थानों में कार्यरत जूनियर रेजीडेण्ट / सीनियर रेजीडेण्ट की वार्षिक आय रु 8.00 लाख से अधिक होती है, जो आर्थिक रूप से कमजोर श्रेणी (E.W.S.) से संबंधित शासनादेश द्वारा निर्धारित अर्हता की परिधि में नहीं आते हैं। अतः उक्त वर्णित तथ्यों के दृष्टिगत सीनियर रेजीडेण्ट के रिक्त पदों की ई०डब्लू०एस० श्रेणी हेतु आरक्षित सीटों को अनारक्षित श्रेणी में सम्मिलित किया गया है तथा एउक्त काउंसिलिंग हेतु किसी भी अभ्यर्थी को ई०डब्लू०एस० श्रेणी के आरक्षण का लाभ अनुमन्य नहीं होगाI"

36. Further the Government Order bearing No. I/475904 of 2024 dated 18.01.2024 is also issued wherein, it is provided that the seats reserved for the EWS category of Assistant Professors in DM/MCH occurs, will be filled up by the candidates of unreserved category and the reason is assigned that such students of DM/MCH or having more than 8 lacs of annual income. It is noticeable that the Government Order dated 18.01.2024 and circular dated 24.11.2023 have been issued by the Director General Medical Education himself and therefore, there can be no any other view that these orders are irrelevant for the purposes of considering the EWS reservation in the institute.

37. Ultimately, the reservation for EWS category is not only creating unnecessary confusion in the mind of the candidates, but it also changes the texture of the roaster so applied in the impugned advertisement dated 01.12.2023, so the reply to issue no. (b) is that the EWS reservation ought not to have been applied in the impugned advertisement dated 01.12.2023 on account of peculiar eligibility criteria for the post, so advertised, which per-supposes gross annual income to be more than almost Rs. 12 lacs, while any candidate having gross annual family income of more than eight lacks, is not covered within the definition of EWS as per the Act 2020, more so, in the event that the institute is proceedings in absence of any procedure or manner prescribed by the State Government, including the applications of EWS category, while notifying any rule, resultantly, the issue no. (b) is also decided in negative.

38. While coming to the issue no. (c), section 3(2) of Act 1994 is reproduced herein under:-

"If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub- section (1);] 23 where a suitable candidate belonging to the Scheduled Tribes or Scheduled Castes, as the case may be, is not available in a recruitment either under sub-section (1) or sub-section (2) the vacancy reserved for him may be filled in such recruitment, from amongst the suitable candidates belonging to the Scheduled Castes or Scheduled Tribes, as the case may be, and as soon as a vacancy earmarked in the roster referred to in sub-section (5) for the Scheduled Castes or Schedule Tribes, as the case may be, arises such person belonging to Scheduled Castes or Scheduled Tribes, as the case may be, shall be adjusted against such vacancy of his own category.]"

39. The above-said provision speaks that for the unfilled vacancies the employer state is at liberty to fill up the backlog vacancies by means of special drive. However, there is no pari-materia provision in the U.P. Public Services, Reservation for EWS Act 2020 which inter-alia governs the manner in which EWS reservation is to be provided, rather section 3(6) of Act 2020, categorically provides that the unfilled vacancies of the EWS category are not ought to be left vacant and ought to be filled up by unreserved candidates. Section 3(6) of the Act 2020 is reproduced hereinunder:-

"section 3 (6) Where in any particular recruitment year any vacancy earmarked under sub-section (1) for Economically Weaker Sections cannot be filled up due to non availability of a suitable candidate belonging to Economically Weaker Sections such vacancies shall not be carried forward to the next recruitment year as backlog and the said vacancy shall be filled by the eligible candidates of unreserved category."

40. From perusal of the advertisement dated 01.12.2023, it indicates that the same is an special recruitment advertisement, but in absence of any provision of the Special Recruitment drive in the Act 2020, the same is unsustainable and against the law therefore, the reply to the issue no. (c) is that along with the backlog vacancies (Special Recruitment) for reserved categories i.e. SC,ST and OBC vacancies, but the vacancies for EWS category could not have been advertised in the Special Recruitment carried out vide impugned advertisement dated 01.12.2023 and further, without there being any rules or any procedure prescribed with respect to the 'Special Recruitment,' the same could not have been done.

41. Now dealing the issue no. (d), it is apparent that there is anomaly which makes the recruitment exercise initiated by the respondent institute vide impugned advertisement dated 01.12.2023, faulty, as in the year 2020 guidelines were issued by the then Medical Council of India and later on re-constituted as National Medical

Commission (hereinafter referred to as 'NMC') and based on the 2020 guidelines, the respondent no. 3, vide Government Order dated 30.11.2022 determined the sanctioned strength of various faculty positions in the respondent institute subsequently, the above noted guidelines are superseded and new guidelines have ben issued vide the order dated 16.08.2023 and if, those are applied, there would be material changes as per the guideline of 16.08.2023. The sanctioned strength of institute needs to be reconsidered by the State Government as the earlier Government Order dated 30.11.2022 has been superseded and therefore, the standardization Government Order issued subsequently, would materially change the sanctioning strength of the faculty members. Thus, this Court finds that applying the standardization Government Order dated 30.11.2022, which is said to be based on old MCI guidelines of 2020 is an incorrect and erroneous approach as subsequently, the new guidelines have been issued on 16.08.2023, while superseding the earlier one.

42. Apart from abve, this Court also noticed that on 06.08.2018, Dr Chandra Kant Pandey was appointed as Professor in the department of critical care against an unreserved category post of Professor and after some period of time, Dr Pandey resigned and the fact has not been denied that huge grant has been accepted for construction of Critical Care Unit, but no post is advertised for Critical Care Unit department, though, the aforesaid fact is disputed by counsel for the Institute, while stating that there is no sanctioned post in critical care department in the institute and therefore, the institute is not empower to advertise any vacancy, without being any sanctioned post .

43. In view of the aforesaid submissions and discussion, this Court finds merit in the writ petition, thus, the impugned advertisement dated 01.12.2023 and the rejection order dated 19.01.2024 issued by respondent no. 6 are hereby quashed.

44. The writ petition is **allowed** accordingly.

45. It is open to the 'Institute' to issue a fresh advertisement, while strictly following the provisions, relevant laws and seeking instructions from the State Government regarding the procedure and manner, mandated to be prescribed under section 3(1) of the 'Act 2021.'

(2024) 5 ILRA 465
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 1736 of 2024

Krishna Kumar Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi

Counsel for the Respondents:
C.S.C., Raj Kr. Singh Suryavanshi, Surendra Pratap Singh

A. Service Law – UP Intermediate Education Act, 1921 – Regulations framed under the Act, 1921 – Reg. 21 – Benefit of academic session – GO dated 30.12.2014 and Order dated 29.03.2022 – Applicability – Petitioner's age of retirement was extended to 65 years due to being St. Teachers Awardee – Benefit of academic

session claimed after 65 years – Permissibility – Held, in the order dated 29th March 2022, the further benefit of the 'academic session' is not granted for the St. Awardees Teachers, who are given the extension of service, up till age of 65 years, and therefore, in absence of any provision for grant of benefit of academic session, the same cannot be allowed to the petitioner. (Para 20)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Dr. Murli Shyam Pathak Vs St. of U.P & ors.; 2019 7 ADJ 172

2. Nazir Ahmad Vs King-Emperor; 1936 SEC OnLine PC 41

3. Chandra Kishore Jha Vs Mahavir Prasad & ors.; (1999) 8 SCC 266

4. Cherukuri Mani Vs Chief Secretary, Government of Andra Pradesh & ors.; (2015) 13 SCC 722

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

1. Heard Sri Amrendra Nath Tripathi, Advocate assisted by Sri Sant Singh Rayakwar, learned counsel for the petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counsel, Sri Vivek Shukla, Sri Pankaj Patel and Sri Tushar Verma, learned Additional Chief Standing Counsels for the State, Sri S.P. Singh, learned counsel for the opposite party no. 5 and Sri R.K. Singh Suryavanshi, learned counsel for the opposite party no. 4

2. Under challenge is the order dated 10th January 2024, whereby, the petitioner was forced to unlawfully retired on 30th April 2024, and further a writ of mandamus is sought, commanding and directing the respondent to allow the petitioner to continue on his post of Ad-hoc Principal till end of Academic Session, that is 31.03.2025, in terms of Regulation 21 of the Regulations framed under Chapter IIIrd of the UP Intermediate Education Act, 1921, with full salary and other benefits.

3. Factual matrix of the case is that the petitioner was appointed as a Lecturer (Agriculture), on 3rd March 1989, in Bakshi Ka Talab Inter College District Lucknow, thereafter, the service of the petitioner was regularised with effect from 7th August 1993, by the order of Deputy Director (Secondary Education), VIth Region, Lucknow, vide order dated 17th October 1994, and since then he was working to his best of efficiency and his work and conduct was always above board.

4. Later on, the petitioner was recommended for State Teachers Award 2019-2020, and he was awarded with the State Teachers Award on 3rd September 2020 and since, State Government had a policy for the State Teachers Awardees for extension of services till 65 years' of age, which came into effect vide Government Orders dated 30th December 2014 and 30th June 2015, and in view thereof, the petitioner was also accorded the extension of services up to 65 years' of age, vide order dated 29th March 2022, and thus, the petitioner was to be retired on attaining the age of 65 years, but the petitioner felt aggrieved by the issuance of the retirement notice dated 10th January 2024, wherein, the date of superannuation, is shown as 30th April 2024, on the premises that he is entitled for the benefit of Academic Session, that is up till 31th March 2025, in terms of the provisions invisaged under Regulation 21 of the Regulations made under the UP Intermediate Education Act, 1921 (hereinafter referred as Act, 1921).

5. Contention of the counsel for the petitioner is that the impugned order/retirement notice dated 10th January 2024 is arbitrary, illegal and violative of Article 14 of the Constitution of India as the same is passed in the most mechanical and arbitrary manner. He submits that the Regulation 21 of the Regulations framed under Chapter IIIrd of the Act, 1921, very specifically provides for automatic extension of service period, by way of session benefits to those who are retiring between second day of April and 30th March of Academic Session. Therefore, the retirement notice dated 10th January 2024, wherein, the date of superannuation is mentioned in between the aforesaid period but no session benefit is given, is perverse on its face and suffers arbitrariness.

6. Further contention of the counsel for the petitioner is that the petitioner is regularly teaching and taking classes, satisfactorly and he is fit, mentally and physically. He submits that if the petitioner gets retired in the mid academic session, the education of students will adversely suffer and affect and as the policy makers were aware about the instant hardship, therefore, a provision under Chapter III, Regulation 21 under the regulations, was framed. Next contention is that the provisions of Chapter III, Regulation 21, have it's perspective and constructive interpretation which is very clear that the interest of the students is a paramount goal of a welfare state and therefore, once a State awardee is completing his or her age, in between 2nd April to 30th March, should be given the benefit of academic session, otherwise, the interest of the students would hamper.

7. Adding his arguments he has drawn attention towards the order dated 29th March 2022 and submitted that the intent of the order is very clear that the same grants the benefit of the academic session and non-granting of the benefit of academic session by the impugned order dated 10th January 2024 is in contravention of the order dated 29th March 2022. Concluding his argument, he submits that the order dated 10th January 2024 is not only violative of the Government Order dated 29th March 2022, but that also goes against the provisions of Chapter IIIrd of the Regulations, made under the Act, 1921. Thus, the order impugned is unsustainable.

8. Contrary, the learned counsel appearing for the opposite parties have opposed the aforesaid contentions vehemently and submitted that the benefits of extension of age, till 64 years to the teachers working in the non-government aided institution has been provided with certain restrictions and conditions, enumerated in the Government Orders dated 6th May 1982, 4th December 1986, 23rd October 1991, 27th June 1994, 29th June 2004 and 30th September 2013. So far as the extension of tenure, till the academic session ending on 31th March 2025 is concerned, is opposed on the ground that extension in terms of Regulation 21 does not cover the further extension of academic session to the State Awardees. It is added that the Regulation 21 could be segregated in two distinct parts; the first part is that the age of superannuation for the post of Principal, Headmaster/Teachers to which, it attach the provisions of session benefit, allowing him to continue till the end of academic session, unless a written request is made to the contrary, two months prior to attaining the age of superannuation. Secondly, it contemplates extension in service in addition to the first part upon conditions that are prescribed by the State Government, that session benefits allowing the teachers to

continue till the end of academic session, allowing the end of academic session under Regulation 21 is restricted only to the first part and not to the second part and this would not apply automatically unlike the first part and therefore, it is well within the domain of State Government to provide extension only up till the end of calander month, in which the petitioner will attain the age of superannuation and once an employee has attained the age of superannuation, he has no right to any continuance in service or any extension of his services, unless provided under any law.

9. Further contention is that the order dated 29th March 2022 is very clear in its terms as it speaks specifically that the same shall be counted after completing the age of superannuation up till 31st March 2022 and specific, date that is 1st April 2022 is provided, meaning thereby, that those teachers who have completed their age of superannuation after completing the benefit of academic session, their age of 65 years will be counted from 1st April 2022, and therefore, the order dated 10th January 2024 is in consonance with the Government Order dated 29th March 2022, which can no way be controverted by the petitioner.

10. In support of their contentions, they have placed reliance on a judgement and order in case of **Dr. Murli Shyam Pathak Vs. State of U.P and Ors decided on 24.05.2019,** reported in **2019 7 ADJ 172**, wherein, it has been held that 'in the facts of the present case also the prtitioner was granted sessions benefit when he attained the age of superannuation, specified in Regulation 2021, in as much as, he would have retired on 1st April 2015, itself. His continuation beyond 1st April 2015 was on account of session benefit which continued up till 24th June 2015. Extension in age of up to 65 years, was allowed only till 24th June 2015 and a second session benefit would therefore, otherwise would not be available to him'.

11. Concluding their arguments, they submit that there is no force in the contention of the counsel for the petitioner, and thus, no interference is warranted.

12. Having heard the learned counsel for the parties, and after perusal of the material placed on record, it transpires that the petitioner has sought relief that he is entitled for the benefit of academic session as he is completing the age of 65 years in between second day of April and 30th March

13. The petitioner has assailed the notice dated 10th January 2024, issued by the Manager, Committee of Management, Bakshi ka Talab, whereby, he has been shown to be retired on 30th April 2024, while completing the age of 65 years. From perusal of the Government Order dated 30th December 2014, it is evident that such teachers who are the awardee of National/State Teachers Award would get the benefit of the retirement till 65 years of age and it was clarified that this benefit would also be accorded to those teachers, who have been granted two years service extension as per the Government Order dated 6th May 1982, vide order dated 29th March 2022. It is provided that the petitioner including the other teachers of the different colleges mentioned in the order would get extension of service up till 65 years of age.

14. The order dated 29th March 2022 is extracted as under:-

''उत्तर प्रदेश शासन

शिक्षा अनुभाग-8

संख्या-463/15-8-22-2006(1)/2021

लखनऊः दिनांक 29 मार्च, 2022

कार्यालय - ज्ञाप

प्रदेश के राज्य पुरस्कार प्राप्त अध्यापकों को शासनादेश संख्या-1772/15-(14)-30(67)/71, दिनांक 06.5.1982 यथासंशोधित शासनादेश दिनांक 04.12.1986, 23.10.1991, 27.06.1994, 30.09.2013, 30.12.2014 एवं दिनाक 30.06.2015 में निर्धारित व्यवस्था / प्राविधानों एवं शासनादेश दिनांक 30.12.2019 द्वारा निर्धारित प्रारूप पर शिक्षा निदेशक (मा०) उ०प्र० द्वारा उपलब्ध कराये गये प्रस्तावों का परीक्षण किया गया तथा शिक्षा निदेशक (मा०) उ०प्र० की सस्तुति एवं अभिलेखीय साक्ष्यों के आधार पर सेवा विस्तार समिति द्वारा की गयी संस्तुति के दृष्टिगत सम्यक विद्यारोपरान्त श्री राज्यपाल शासनादेश दिनांक 30.12.2014 के राज्य अध्यापक पुरस्कार प्राप्त अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत निम्नलिखित प्रधानाचार्यों/ शिक्षकों को दिनांक 31.03.2022 को सत्रांत लाभ सहित अधिवर्षता आयु पूर्ण करने के पश्चात दिनांक 01.04.2022 से 65 वर्ष की आयु तक के लिए सेवा विस्तार प्रदान किये जाने की सहर्ष स्वीकृति प्रदान करते हैं:-

नाम/पदनाम

विद्यालय का नाम

डॉ कंचन प्रभा शुक्ला, प्रधानाचार्य जैन इण्टर कालेज, नई मण्डी, मुजफ्फरनगर।

डॉ० भूदेश्वर पाण्डेय, प्रधानाचार्य जगत जीत इण्टर कालेज, इकौना, श्रावस्ती।

श्री कृष्ण कुमार शुक्ला, प्रवक्ता बक्शी का तालाब इण्टर कालेज, लखनऊ।

श्री उमा शकर यादव, प्रवक्ता / तदर्थ प्रधानाचार्य गन्ना विकास इण्टर कालेज मुण्डेरवा, बस्ती।

2- उपरोक्त प्रधानाचार्यों/शिक्षक, जिस विषय के शिक्षक हैं उन्हें संबंधित विषय में वादन करना अनिवार्य होगा तथा सेवाविस्तार की अवधि मे अपने पद पर ही तैनात रहेगे।

(जय शंकर दुबे)

विशेष सचिव।''

15. From bare reading of the above order, it is evident that the same is in consonance with the Government Order dated 30th December 2014, which does not provide the benefit of the academic session to those teachers who have been given the benefit of service extension till 65 years of age.

16. The government order dated 30th December 2014 is quoted hereinunder:-

''शिक्षा (8) अनुभाग :

लखनऊः दिनांक 30 दिसम्बर, 2014

बिषय :– प्रदेश के राष्ट्रीय/ राज्य अध्यापक पुरस्कार प्राप्त शिक्षकों को सेन्ट्रल बोर्ड आफ सेकेण्ड्री एजूकेशन के सर्कुलर संख्या–22 दिनांक 18.02.2014 में दी गई व्यवस्था के आधार पर सेवा विस्तार की अवधि में वृद्धि।

महोदय,

उपर्युक्त विषयक आपके पत्र संख्या–सा0(1)शि0/3924/2014–15, दिनांक 25.8.2014 का कृपया सन्दभ ग्रहण करें।

2– प्रदेश के राष्ट्रीय/ राज्य पुरस्कार पाप्त अध्यापकों को उनकी अधिवर्षता आयु के पश्चात दो वर्ष का सेवा विस्तार किये जाने की व्यवस्था शासनादेश संख्या –1772/15–(14)–30 (67)/17, दिनांक 6–5–1982 द्वारा प्रदान की गई है जिससे राजकीय विद्यालयों में कार्यरत शिक्षकों/प्रधानाचार्यो की सेवानिवृत्ति आयु 62 वर्ष एवं अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत शिक्षकों/प्रधानाचार्यो की सेवानिवृत्ति आयु 64 वर्ष होती है। इन दोनों श्रेणी के शिक्षकों को शासनादेश दिनांक 06 मई, 1982, 04 दिसम्बर 1986, 23 अक्टूबर,1991, 27 जून, 1994, 29 जून, 2004 तथा 30 सितम्बर, 2013 में वर्णित प्रतिबन्ध एवं शर्तो के साथ उक्त लाभ प्रदान किया गया है।

3– अतः इस संबंध में मुझे यह कहने का निर्देश हुआ है कि सम्यक विचारोपरान्त सेन्ट्रल बोर्ड आफ सेकेण्ड्री एजूकेशन के सर्कुलर संख्या–22 दिनांक 18–2–2014 में की गई व्यवस्था के क्रम में प्रदेश के राजकीय माध्यमिक विद्यालयों /अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के राष्ट्रीय /राज्य अध्यापक पुरस्कार प्राप्त शिक्षकों को उनकी उत्कृष्ट सेवा, उत्तम स्वास्थ्य एवं उत्तम कार्य आचरण के आधार पर संबंधित शिक्षकों की अधिवर्षता आयु पूर्ण होने के पश्चात 65 वर्ष की आयु होने तक के लिए सेवा विस्तार दिये जाने की स्वीकृति श्री राज्यपाल सहर्ष प्रदान करते है। उक्त व्यवस्था का लाभ ऐसे शिक्षकों को भी दिया जायेगा जिन्हें शासनादेश दिनांक 6–5–1982 कि प्राविधानों के अनुसार दो वर्ष का सेवा विस्तार प्रदान किया जा चुका है एवं वे सम्प्रति कार्यरत हैं। अधिवर्षता सेवा का लाभ उपरोक्त प्रस्तर–2 पर पात्रता विषयक शासनादेशों के प्रतिबन्धों के अन्तर्गत होगा।

4– यह आदेश वित्त विभाग के अशासकीय संख्या –ई–11/1499/दस–2014, दिनांक 26 दिसम्बर 2014 में प्राप्त उनकी सहमति से निर्गत किए जा रहे है।

भवदीय,
(जितेन्द्र कुमार)
प्रमुख सचिव''''

17. From perusal of the order 29th March 2022, there is no such provision of benefit of academic session to the petitioner and law is very clear on this point started from the judgement and order in case of **Nazir Ahmad Vs King-Emperor, 1936 SEC OnLine PC 41**, rendered by the Privy Council, wherein, it has been held that 'where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all' and the other methods of performance are necessarily forbidden.'

18. This court has also considered the judgement and order rendered in the case of **Chandra Kishore Jha Vs. Mahavir Prasad and Others,** reported in **(1999) 8 SCC 266,** wherein, the following principle is laid down:-

"17.....It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935-36) 63 lA 372 : AIR 1936 PC 253 (lI)] , Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] .) An election petition under the rules could only have been presented in the open court up to 16-5-1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done....."

19. Further, in case of **Cherukuri Mani Vs. Chief Secretary, Government of Andra Pradesh and Ors, (2015) 13 SCC 722**, it has been held by the Apex Court that 'where the law prescribed a thing to be done in a particular manner, following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure'.

20. In the order dated 29th March 2022, the futher benefit of the 'academic session' is not granted for the State Awardees Teachers, who are given the extension of service, up till age of 65 years, and therefore, in absence of any provision for grant of benefit of academic session, the same cannot be allowed to the petitioner.

21. In view of the abovesaid submissions and discussions, the writ petition lacks merit, hence is **dismissed.**

22. No order as to cost.

23. Consigned to record.

(2024) 5 ILRA 470
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 5280 of 2015

Ajay Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pushp Raj Singh, Gaurav Upadhyay, Manish Misra

Counsel for the Respondents:
C.S.C.

A. Service Law – Civil Service Regulations – Reg. 351 – Pension – During service period, the petitioner was sentenced for committing Murder, against which Criminal Appeal and SLP were also dismissed – No departmental enquiry was conducted – Effect – Held, St. Government reserves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct – The provision of Regulation 351 of the Civil Services Regulations cannot be ignored or make it inoperative or redundant only on the ground that no departmental enquiry was contemplated against the petitioner. (Para 16 and 19)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Special Appeal No. 40 of 2017; Shiv Gopal & ors.Vs St. of U.P. & ors. decided on 08-05-2019

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

1. Heard learned counsel for the petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counsel and Sri Vivek Shukla, learned Additional Chief Standing Counsel for the State and perused the material placed on records.

2. By means of instant writ petition, the petitioner has assailed the order dated 02-06-2015 passed by the Deputy Director of Education,Lucknow Region, Lucknow and the order dated 13-08-2015 passed by the opposite party no. 1.

3. Contention of learned counsel for the petitioner is that the petitioner was initially appointed on the post of Assistant Teacher C.T. Grade on 01-08-1972, and subsequently, he was treated as Assistant Teacher in 2 L.T. Grade in Narvadeshwar Inter College, Rambagh, Raebareli(hereinafter referred to as 'Institution'). The institution is recognized by the U.P. Intermediate Education Board and imparts education upto Intermediate Classes and the provisions of Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921'), U.P. Secondary Education Service Selection Board Act, 1982(U.P. Act No. 5 of 1982) as well as the U.P. High School and Intermediate College(Payment of Salaries to Teachers and other Employees) Act, 1971, are applicable on the teaching and non teaching staffs of the institution. Further submitted that the work and conduct of the petitioner was always above the board, but, unfortunately, in the year, 1977, he was falsely implicated in a murder case, wherein the petitioner was sentenced for life imprisonment vide Judgment and order dated 12-05- 1981, whereafter, an appeal was preferred by the petitioner and he was released on bail. Thereafter, the petitioner joined the institution and kept on working and was getting salary, regularly. He next submits that the petitioner was sent to jail at the time, when the first information report was lodged and later on, when he was punished and he communicated it to the institution,but, no departmental enquiry was contemplated against him, however, he was being paid salary, except apart the period he remained in jail.

4. Again submitted that the appeal preferred by the petitioner was decided and the punishment was reduced and he was punished under section 304(ii) of 3 I.P.C. and was sentenced for 7 years of imprisonment and sent to jail, whereafter, the petitioner preferred Special Leave

Petition before the Hon'ble Apex Court, which was also dismissed and subsequently, the review petition and curative petition were also dismissed. He further submits that after serving the punishment, the petitioner was released from jail on 03-01-2010, though in between, he had attained the age of superannuation on 30-06-2009, but, the fact remains that since 01-10-2004 uptil the date of his retirement, the petitioner was not paid his salary and therefore, after release from the jail, the petitioner moved an application for release of his post retiral benefits, which were due to be paid to him, but, once, after completing the pension papers, sent to the office of Deputy Director of Education, Lucknow Region, Lucknow, the Deputy Director of Education sought the instructions from the Finance Controller of the office of the Director Secondary Education, vide letters dated 05-05-2010 and 23-02-2011, but, the same remains unresponded and therefore, the petitioner preferred Writ Petition bearing no. 1507(S/S) of 2013, wherein an order was passed on 15-03-2013.

5. The relevant portion of the order is quoted hereinunder :-

"Heard learned counsel for the petitioner and learned counsel for the opposite parties. Learned counsel for the petitioner submits retiral dues of the petitioner has not been paid, though the petitioner retired on 30.6.2009. He further states that necessary papers have already been forwarded to the authority concerned, but the post retiral 4 dues of the petitioner has not been paid up till now. The petitioner has also made a representation in this regard. In the aforesaid circumstances, the writ petition is disposed of
with the direction that the authority concerned shall consider and dispose of the aforesaid representation of the petitioner dated 22.1.2013, as contained in Annexure no.5 to the writ
petition, in accordance with law within a period of three months from the date of receipt of a certified copy of this order."

6. He added that in compliance of the order dated 15- 03-2013, the order dated 02-06-2015 was passed, whereby the claim of the petitioner for payment of pension has been rejected and thereafter, the petitioner filed a representation/appeal before the opposite party no. 1, who without application of mind, passed the order on 13-08-2015 and upheld the order passed by the Deputy Director of Education.

7. Learned counsel for the petitioner argued that the petitioner has falsely been implicated in the criminal case and he was not involved in committing any offence. He next submits that as and when the petitioner was sent to jail, he informed the department, but, no departmental enquiry has ever been contemplated against him and in criminal appeal, the punishment is reduced upto 7 years and after serving the period of 7 years of imprisonment, the petitioner was released from jail and he has been paid all the post retiral dues. Therefore, submission is that the petitioner is also entitled for the pensionary benefits.

8. Further contention is that since there is no criminal case pending against the petitioner and therefore,under Regulation 351 of the Civil Services Regulations, the petitioner is entitled for payment of the pensionary benefits. Next submits that the Deputy Director of 5 Education and the State Government have passed the orders in an arbitrary manner and without adhering to the provisions of Civil Services Regulations as neither any departmental enquiry nor any

criminal case is pending against the petitioner. Thus, submission is that the orders dated 02-06-2015 and 13-08-2015 may be quashed.

9. On the other hand, learned counsel appearing for the State has vehemently opposed the contentions aforesaid and submitted that initially, when the first information report was lodged, the petitioner was sent to jail and thereafter, when he was convicted, he was again sent to jail and finally, the conviction is upheld by the Apex Court. He submits that so far as the provisions of Regulation 351 of the Civil Services Regulations are concerned, that speaks about the implied condition of future good conduct for ever grant of pension and since the petitioner is convicted and therefore, as per the abovesaid provisions, he is not entitled for pension.

10. Adding his arguments,he submits that in compliance of the order dated 15-03-2013 passed by this court, the claim of the petitioner with respect to payment of pension has thoroughly been considered and decided by the Deputy Director of Education and once the representation is preferred against the same, the State Government has also passed an order on 13-08-2015 and has rightly turned down the claim of the petitioner. Thus, submission is that the petitioner is not entitled for any relief. 6

11. Having heard learned counsels for the parties and after perusal of the material placed on record, it transpires that the petitioner was initially appointed on the post of Assistant Teacher,whereafter, the first information report was lodged against him, for committing murder and he was punished. Thereafter, the petitioner filed an appeal before this court, which was also dismissed on 06-07-2004 and the Special Leave Petition was preferred before the Hon'ble Apex Court and that too, was dismissed on 27-09-2004 and the petitioner after serving the 7 years of sentence, was released from jail and admittedly, he is a convicted person.

12. After the petitioner was released from jail, serving the sentence, raised claim for payment of pension and thereafter, filed a writ petition, wherein a direction is given for taking a decision on the representation of the petitioner and ultimately, the decision was taken by the Deputy Director of Education on 02-06-2015, rejecting the claim of the petitioner.

13. When this court examines the matter in facts and law, it emerges that so far as the claim of the petitioner is concerned, the same is covered with the provisions of Regulation 351 of the Civil Service Regulations, which provides implied condition for grant of pension.

14. Provision of Regulation 351 of the Civil Services Regulations is extracted as follows :-

"351. *Future good conduct is an implied condition of ever grant of a pension. The State Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct. The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under this regulation shall be final and conclusive."*

15. A bare reading of the abovesaid provision is evident that the same confers power upon the State Government for withholding or withdrawing pension or any

part of it, if a person claiming pension is convicted of 'serious crime' or guilty of 'grave misconduct', meaning thereby, that if a criminal case or disciplinary proceeding is pending, it would not be sufficient to withhold or withdraw the pension, unless such person is convicted or hold the guilty of grave misconduct. Infact, the expression 'serious crime' indicates towards the offences, which are having the dangerous possible. The 'serious offences' have been defined under section 2(54) of the Juvenile Justice Act, 2015, which is extracted as follows :-

"Serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years."

16. The aforesaid provision is very clear in it's term as the same provides that the State Government reserves the 'right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

17. This court is also aware of the law laid down in the case of **Shiv Gopal and Others Vs. State of U.P. and Others and other connected matters (Special Appeal No. 40 of 2017 decided on 08-05-2019.**Paragraph nos. 31,32 & 36 of the said Judgment are quoted hereinunder:-

"31. The decision of the above Division Bench as contained in the later part is based upon equitable principle and is not the law that has been laid down. The decision on equity is confined to the fact situation of that case. Moreover, equity has no place where the provisions of law are express.

32. The decision in the case of Bal Krishna Tiwari39 has been rendered simply following the equitable principle of Faini Singh (Supra) in context with the fact situation of the said case wherein the government servant had retired 10 yeas ago but was not getting his gratuity as a case was pending against him. The said decision also does not lay down any binding precedent.

36. The decision dated 5.10.2013 in Writ No. 12574 of 2013 (Narendra Singh Vs. State of U.P., and others) is also of no consequence as it again fails to take into consideration the specific provision of Regulation 919-A with regard to withholding of gratuity during the pendency of the judicial proceedings."

18. Undisputedly, the petitioner is a convicted person and therefore the Deputy Director of Education as well as the State Government have rightly passed the orders on 02-06-2015 and 13-08-2015, respectively while rejecting the claim/prayer of the petitioner for grant of pension.

19. Thus, the provision of Regulation 351 of the Civil Services Regulations cannot be ignored or make it inoperative or redundant only on the ground that no departmental enquiry was contemplated against the petitioner as the provision speaks and includes not only the past but, of future good conduct, as well and since, it is undisputed fact that the petitioner is a convicted person, therefore, the provision of Regulation 351 of the Civil Services Regulations, shall apply.

20. Resultantly, the petitioner is not entitled for pension.

21. Consequently, the writ petition lacks merits and hence, is **dismissed.**

22. No order as to costs.

(2024) 5 ILRA 475
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 6879 of 2012

Shailendra Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
G.C. Verma, Sharad Pathak

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh, P.C. Chauhan, Pradeep Kumar Singh Bisen

A. Service Law – UP Recognised Basic Schools (Junior High Schools) (Recruitment of Conditions of Service of Ministerial Staff and Group D Posts), Rules 1984 – Rule 14 – Selection – Post of Clerk – Constitution of three members Selection Committee – Third member i.e. Specialist was appointed by two other members of the Selection Committee, not by the Committee of Management – Effect – Held, appointment of third member, made by the remaining two members, but not by Committee, vitiates the constitution of the selection committee. (Para 30 and 31)

B. Service Law – UP Recognised Basic Schools (Junior High Schools) (Recruitment of Conditions of Service of Ministerial Staff and Group D Posts), Rules 1984 – Rule 15(5)(iii) – Appointment – Post of Clerk – Appointment was made without waiting one month period – Effect – Held, Rule 15(5)(iii) provides that if, the DBEO does not communicate his decision on the due intimation by the Committee of Management, within one month form the date of receipt of the papers under clause 4, he shall be deemed to have accorded approval to the recommendations made by the selection committee – High Court held the appointment made not in-consonance with Rules 15(5)(iii). (Para 30 and 31)

C. Service Law – Upgradation of the institution from Junior High School to High School/Intermediate College – Whether Intermediate Education Act, 1921 is applicable or Rules of 1984 – Held, the institution in question is covered with the provisions of the Act, 1921 – *Manju Awasthi's case* relied upon – Basic Siksha Adhikari cannot exercise any administrative control over the institution, except to the extent of payment of salary. (Para 32 and 33)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Dhirendra Pratap Singh Vs St. of UP & ors.; 2019 (7) ADJ 250 (LB)

2. Special Appeal No. 667 of 2014; St. of UP through Principal Secretary Vs Pravin Kumar Mishra & anr. decided on 07.03.2018

3. Ramesh Singh Vs St. of U.P.; (2020) 5 SCC 677

4. Manju Awasthi & ors. Vs St. of U.P. & ors.; Manu/UP/3739/2012

5.St. of U.P. & ors.Vs District Judge, Varanasi & ors.; 1981 SCC OnLine All 279

6. Dr. (Smt.) Sushila Gupta Vs The Joint Director of Education, Kanpur & ors.; (2005 SCC OnLine All 1183)

7. Standard Intermediate College Mau-Aima & ors. Vs St. of U.P. & ors. (MANU/UP/2108/2019)

8. Rakesh Chandra Sharma Vs St. of U.P. & ors.; 2001 (1) UPLBEC 131

9. Sharda Prasad Yadav & ors.Vs District Inspector of Schools, Deoria & ors.; 2002 (49) ALR 800

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

1. Heard Sri G. C. Verma, learned counsel for the petitioner, Sri Ran Vijay Singh, learned counsel for the respondent no.2, Sri Anurag Kumar Singh, learned counsel for the respondent no. 4, i.e., Committee of Management, Sri Shailendra Kumar Singh, Chief Standing Counsel, Sri Vivek Shukla, additional chief standing counsel and Sri Piyush Kumar, learned Standing Counsel for the State.

2. Vide the instant petition, a challenge is made to the order dated 13.9.2012 passed by the District Basic Education Officer, Pratapgarh.

3. Factual matrix of the case is that a post of clerk became vacant due to retirement of regular clerk, namely, Mohan Lal Sharma in the Uchchatar Madhyamik Vidyalaya, Para Hamidpur Pratapgarh (hereinafter referred to as 'the institution'), on 30.9.2011. Thereafter, the then Manager of the Committee of Management moved an application on 4.11.2011, to the District Basic Education Officer (hereinafter, referred to as 'DBEO') for granting permission for filling up the post of Clerk. On such application, the 'DBEO' granted permission and, thereafter, the post of Clerk (Class-III) was advertised in the newspaper as per the provisions of UP Recognised Basic Schools (Junior High Schools) (Recruitment of Conditions of Service of Ministerial Staff and Group D Posts), Rules 1984 (hereinafter referred to as 'the Rules 1984'). The qualification and other description as an eligibility criterion, was also mentioned in the advertisement and on 30.11.2011, the Manager i.e opposite party no.4 sent a letter to the 'DBEO' for providing Observer on 4.12.2011, i.e., the date fixed for interview but the same remained unheard. Again on 27.12.2011, a letter was sent for providing Observer/Nominee for 1st of January 2012 and in response, after the expiry of the aforesaid date, the DBEO informed to the opposite party no.5 that since, assembly election is notified, therefore, the appointment process would be conducted after the election is denotified. After the election was over again, the date of interview was fixed on 1st of April 2012 and it was intimated by the opposite party no.4, vide letter dated 3.3.2012 to the DBEO and, thereafter, on 29.3.2012, 28.6.2012, 11.7.2012 and 24.7.2012, the same request was repeated before the DBEO while fixing the dates for interview but, ultimately, when the Entire effort went unsuccessful, the interview was held on 29.7.2012 and the selection so made was placed before the Committee of Management, who sent the papers before the opposite party no.2 for approval, which was received in the office of opposite party no.2, on 14.8.2012, which is undisputed fact.

4. Thereafter, on 13.9.2012, after expiry of period of one month, the appointment letter was issued to the petitioner, while following the provisions of Rule 15 (5) (iii) of the Rules, 1984, which says about the deemed approval after expiry of period of one month. After the letter was issued on 14.9.2012, the petitioner submitted his joining on 20.9.2012 and he was allowed to join and was permitted to work since, 19.9.2012. On 13.9.2012, the impounded order was passed by the opposite party no. 2/DBEO and request for the approval of the appointment of the petitioner was rejected precisely, on the ground that the appointment of the petitioner is done by an unlawfully constituted selection committee.

5. Contention of the learned counsel for the petitioner is that there is no dispute that a substantive vacancy arose on the retirement of regular Clerk, Mohan Lal Sharma and, thereafter, the Manager, i.e., opposite party no.4, sent several letters, started from the month of November, 2011 till July 2012, wherein the repeated request was made for appointment of nominee. In response, only one letter is sent by opposite party no.3, i.e. dated 6.1.2012, whereby, he has directed that the nominee will be provided after finalization of the Assembly election and once the Assembly election was over, five letters were written to the opposite party no.2, with the request to provide a nominee, but no response was given.

6. He further argued that looking into the exigency of the services of the Clerk in the institution, under the compelling circumstances, the selection was held by a duly constituted selection committee, comprises of three members wherein, the then Manager, Head Master of the school and one other member was nominated by the Committee of Management, when no nominee was sent by opposite party no. 2, as per the provisions of Rule 14 of the Rules, 1984, and two members, i.e., the Manager and the Head Master, were present in selection committee and the Manager, who is one of the members, is of Scheduled Caste Category. Adding his arguments, he submits that time and again, in several verdicts, this Court has held that if out of three members, two were present in selection, the selection would be valid.

7. Further contention of counsel for the petitioner is that the Government Order dated 24.11.2001 provides that where, the aided Junior High School upgraded to High School/Intermediate (Un-aided), the administrative control of DBEO would remain continue for the Junior High School including the payment of salary and subsequently, the said Government order is also considered while another order dated 09.05.2022 is issued.

8. In support of his contention, He has placed reliance on a judgement reported in 2019 (7) ADJ 250 (LB), Dhirendra Pratap Singh Vs. State of UP and others, and has referred paras 10 to 12 of the above said judgement. Paras 10 to 12 are extracted as under:-

"10. Learned counsel for the petitioner has also submitted that in the instant case, one nominee was sought from the office of the District Basic Education Officer for making selection on the post in question, but said nominee was not sent and the selection exercise was completed in absence of the nominee of the District Basic Education Officer. Learned counsel for the petitioner has cited judgment of this Court rendered in a batch of writ petitions, leading Writ Petition No. 5118 (S/S) of 2016, Sanjay Kumar Singh v. State of U.P. and others, MANU/UP/5726/2018 : 2019 (5) ADJ 583 (LB). In para-24 of the aforesaid judgment, it has been observed as under:

"(24) On overall consideration of the respective arguments advanced by the learned counsel for the parties, it is crystal clear that the main issue in rejecting the approval is that the nominee of the District Basic Education Officer was not present in the Selection Committee and in his absence, the Selection Committee was permitted to conclude the selection proceeding. It is recorded that in case one Member of the Selection Committee is absent and the decision has been taken by majority of Members including the Chairman of the Selection Committee in making selection, the same does not vitiate the selection made

in absence of nominee of the District Basic Education Officer. Upon bare perusal of the judgment relied upon and after examination of the law laid down by the Division Bench of this Court in the case of District Basic Shiksha Adhikari, Ambedkar Nagar (supra) and Fateh Bahadur Singh (Supra), this Court holds that issue involved in the aforesaid judgments was in regard to the appointment on the post of Clerk, wherein in the selection proceedings nominee of the District Basic Education Officer did not participate. The learned Single Judge on the basis of material placed on record found that the District Basic Education Officer to send the nominee on the letter submitted by the Manager/Principal of the Institution, did not respond and in consequence thereto, the Selection Committee comprising of Manager and Headmaster met and made recommendation for the appointment and thereafter, the selection was made in absence of nominee of the District Basic Education Officer. Thus, in the present case, in case the same has been disapproved on the ground of non-appearance of nominee of the District Basic Education Officer, the impugned order appears to be not justifiable in law."

11. Therefore, in view of the above, the approval of the appointment of the petitioner may not be denied for the reason that there was no nominee on behalf of the District Basic Education Officer at the time of selection.

12. Considering the facts and circumstances of the issue in question and also considering the legal position, I am of the considered view that the District Basic Education Officer, Sitapur should accord formal approval of the appointment of the petitioner w.e.f. 7.1.2017 after expiry of one month from the date of receipt of papers for approval."

9. Referring the aforesaid, he submitted that identical controversy has been dealt with, while answering that once the request of appointment of the nominee is ignored by the District Basic Education Officer, two member selection committee fulfills the quorum and there is no unlawfulness in selection proceeding by such selection committee.

10. He further placed reliance on judgment dated 7.3.2018 passed in Special Appeal No. 667 of 2014 (State of UP through Principal, Secretary, District Basic Education Officer, Lucknow Vs. Pravin Kumar Mishra and another and has referred para 14 of the judgment which is quoted as under:-

"A perusal of the impugned order, it reveals that learned Single Judge, after appreciating the submissions of the parties and Rule 15 (5) (ii) of the Rules, 1984, has recorded a clear cut finding that it is not in dispute that receipt of the letter dated 26.9.2006 has not been denied anywhere in the counter affidavit. In the said letter, the Institution had indicated that three dates have been fixed for holding the interview on which dates the Observer was not sent by the District Basic Education Officer, Raibareli and finally the selection was fixed for 30.9.2006. On 30.9.2006, also no Observer was sent and as such, the Selection Committee met and finalized the process in which the writ petitioner was selected for Class-IV post. The entire papers relating to the selection were forwarded to the District basic Education Officer, Raebareli, on 15.10.2006 as is evident from the letter of the Institution dated 17.11.2006. In these backgrounds, learned Single Judge opined that the District Basic Education Officer despite requests having been made by the Institution for forwarding the name of an

Observer, did not do so and even after the selection papers were received in his office on 15.10.2006, he neither approved nor disapproved the same. In this situation, on the expiry of one month from the date of receipt of the papers, the selection would be deemed to have been approved by the District Basic Education Officer in view of the provisions of Rules 15(5) of the Rules, 1984. Accordingly, learned Single Judge rightly came to the conclusion that it is not open for the respondent now to take the stand that the selection suffers from the vice of illegality since no observer was present in the selection."

11. He submitted that the aforesaid judgment also determine the question regarding non-appointment of nominee and with respect to the validity of the selection committee, which is decided positively in favour of the respondent while dismissing the special appeal.

12. Next contention is that the Government order dated 24.11.2001, contemplates the teacher and staff of junior high school/high school, whose services are governed by the provision of U.P. recognized basic schools (Junior High Schools)(Recruitment and conditions of Service of Teacher) Rules, 1978 (hereinafter referred as 'Rules 1978' and the 'Act 1978'). He added that the provisions of the act, 1978 as well as Rules 1984 shall also apply to an institution, which is upgraded up to the level of High School or Intermediate college.

13. Continuing with argument, he submits that Hon'ble Single Judge, while noticing judgment rendered in Ramesh Singh vs State of U.P. [(2020) 5 SCC 677] has held that 'upgradation of an Aided Junior High School as Un-Aided High School/Intermediate College' does not take away the institution from the financial control of the Basic Siksha Adhikari and the State Government is well within the authority to issue the Government Order invoking the powers under section 9(4) of the Act, 1921 and in order to remove difficulties and smooth functioning of the powers, the State Government can always fill in the gaps.

14. Concluding his arguments, he submits that the impugned order is totally perverse as the same is passed on the premises that the selection committee is not duly constituted. He added that the specific pleading of para 14 has not been controverted by the opposite party no. 2, in his counter affidavit dated 30.3.2013, as is evident from the para 15 of the counter affidavit that there is no specific denial regarding the letters which were issued for appointment of Nominee. He submits that the present Manager of Committee of Management is having anonymity with the petitioner, though, he has failed to demonstrate that the letters to the District Basic Education Officer were not duly sent. Therefore, submission is that the order impugned dated 13.9.2012 passed by the opposite party no. 2, i.e., the District Basic Education Officer is erroneous and suffers from non-application of mind, thus, the same may be quashed and the opposite party no. 2 may be directed to make payment of salary to the petitioner treating approval of the appointment as deemed approval under the provisions of section 15 (2) of the Rules, 1984.

15. On the other hand, Sri Anurag Kumar Singh, counsel appearing for the private-respondent submits that the committee of management had never taken any decision for filling up the post in question which fell vacant on the

superannuation of Mohan Lal Sharma and the documents which have been relied upon by the petitioner, is not in the knowledge of committee of management, as the alleged resolution dated 17.09.2011 under the signature of the then Manager, was never passed and the thumb impression is also forged as Sri Babu Lal Verma the then president stated on an affidavit dated 05.10.2018 that no meeting took place on 17.09.2011 and no decision has ever been taken for appointment of Amar Bahadur Singh (Assistant Teacher) as third member of selection committee.

16. Adding his arguments, he submits that the records, which has been appended by the petitioner along with writ petition, is evident that once the nominee was not appointed by the DBEO, the members of the selection committee themselves, have appointed a third member, which is impermissible under the law and thus, the selection committee vitiates in the eyes of law.

17. Further contention is that if any proceedings have been carried out by the then Manager, namely, Sitaram Saroj regarding the appointment of the petitioner, without the resolution of committee of management, the same is against the law. He also added that the letter dated 14.08.2012 was received in the office of opposite party no. 2 on 19.08.2012, therefore, no appointment letter could have been issued to the petitioner before 19.09.2012.

18. Further contended that vide Government Order dated 15.03.2012, the ban was imposed on all appointments in the aided Junior High School and that was lifted on 15.09.2014. Further the committee of management did not appoint third member of the selection committee and no advertisement was ever published in any newspaper.

19. In support of his contention, he has placed reliance on the judgments rendered in case of Manju Awasthi and Ors. Vs. State of U.P. and Ors. (MANU/UP/3739/2012), State of U.P. and Others Vs. District Judge, Varanasi and Others reported in 1981 SCC OnLine All 279, Dr. (Smt.) Sushila Gupta Vs. The Joint Director of Education, Kanpur and Ors. (2005 SCC OnLine All 1183) and Standard Intermediate College Mau-Aima and Ors. Vs. State of U.P. and Ors. (MANU/UP/2108/2019).

20. Finally, he submits that the appointment of the petitioner is not only dehors the rules, but the same is done while preparing the forged and fabricated documents, thus, submission is that the petitioner is not entitled for any relief.

21. Counsels appearing for the State submitted that so far as the contention of counsel for the petitioner is with respect to the Government Order dated 24.11.2001 read with section 9(4) of the Act, 1921 is concerned, the same speaks about 'modified, re-signed and make any regulation' which does not cover any 'order'. It is submitted that submits that the Rules, 1984 is not applicable to the institution in question and the Government Order dated 24.11.2001 is only clarificatory in nature and do not constitute any provision.

22. In support of contention, reliance is placed on judgement reported in 2001 (1) UPLBEC 131, Rakesh Chandra Sharma Vs. State of U.P. and others, and has referred paras 6 and 7 of the abovesaid judgement. It has been held that once the institution is upgraded up to intermediate level, the Rules

1984 will not attract as the provision of Intermediate Education Act, 1921 read with the Regulations will come into force in such institutions.

23. Paragraphs 6 and 7 are extracted as under:-

"6. The first question which arises for consideration is whether after upgradation of the institution to High School if a vacancy of clerk occurs in the institution, it has to be filled under the provisions of the Act, 1921 and Regulations framed thereunder or under the provisions of the U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 (in brief Rules, 1984). It is not disputed that the institution was upgraded from Junior High School to High School on 24.8.1993. A clerk of the institution was dismissed from service after the institution was upgraded and this vacancy was sought to be filled by the management through an advertisement made on 2.4.1999. Section 2 (e) of Rules, 1984 defines a Junior High School to mean an institution other than High School or Intermediate College imparting education to boys and girls or both from class VI to VIII. Therefore, Rules, 1984 would apply to the institutions where education is imparted from class VI to VIII but it shall not apply to the institutions which impart education from classes IX and X. Since the institution was upgraded as High School in 1993, Rules, 1984 ceased to apply to the institution. And the only provision to fill the non-teaching post of clerk was Regulation 101 of Chapter III of the regulations. Under Regulation 101 prior approval of District Inspector of Schools had to be obtained before making appointment on a class-III post. It has been held by this Court In Civil Misc. Writ Petition No. 50266 of 2000, Amit Kumar v. District Inspector of Schools, Jaunpur and another decided on 21.11.2000, that provisions of Regulation 101 are mandatory. Therefore, appointment of the petitioner on the post of clerk could not be made by the management without obtaining prior approval of the District Inspector of Schools. BSA had no power to grant approval to the appointment of the petitioner. Thus, the approval granted to the petitioner's appointment on 20.4.1999 by BSA was void. It has rightly been cancelled by BSA.

7. The next question is what would be the effect of payment of salary, etc., to the teachers and staff from the grant-in-aid received from the Government as Junior High School under interim order passed by this Court and whether services of such teachers and staff would be governed by Basic Education Act and Rules or U. P. Intermediate Education Act, 1921 and Regulations framed thereunder. I have earlier held that after upgradation of the institution to High School, the provisions of Act, 1921 and Regulations would apply and the provisions of Rules, 1984 would not be applicable for recruitment on the non-teaching post. If teachers and non-teaching staff of the institution are receiving salary from grant-in-aid which was earlier payable to the institution prior to its upgradation as High School. Even then, fresh appointments in unaided recognised High School would be governed by the provisions of Act, 1921 and Regulations. A Division Bench of this Court (Lucknow Bench) in Shiksha Prasar Samiti, Babhnan, District Gonda v. State of U. P. and others 1986 UPLBEC 477, has held that the provisions of U. P. Intermediate Education Act, 1921, apply to a recognised institution. It is not necessary that the institution should be receiving grant-in-aid. Therefore, even though the institution is not

receiving grant-in-aid from the Government and has been granted recognition as unaided High School. The management could fill vacancy of clerk, only by following the provisions of recruitment as provided under the U. P. Intermediate Education Act, 1921 and Regulations framed thereunder. Since the management did not appoint the petitioner under Act, 1921 and Regulations, therefore, no relief could be granted to the petitioner."

24. Again reliance is placed in a case reported in 2002 (49) ALR 800, Sharda Prasad Yadav and others Vs. District Inspector of Schools, Deoria and others, and paras 16 to 19 are referred.

25. Paragraphs 16 to 19 are quoted hereinunder:-

16. The second contention of the petitioners that Annexure-C.A-1 is an exparte report as no point of time the petitioners were ever associated in the enquiry and as such the salary of the petitioners cannot be withheld, is also misconceived. It is admitted to the petitioners that either appointments were made by the Principal of the institution and according to them, he had forwarded the papers to the D.I.O.S., Deoria for grant of financial sanction for payment of their salary. The District Inspector of Schools, Deoria, respondent No. 1 has categorically denied that no such papers had ever been received in his office for granting financial sanction. On the contrary it has been stated that these appointments are FARZI and the State is not liable to pay salary to the petitioners. In so far as the enquiry is concerned, D.I.O.S. has rightly based his conclusion on the papers and submitted to the interrogatories submitted by the Principal. It has nothing to do with the petitioners, it cannot be said that the report of the D.I.O.S. is an exparte without hearing the necessary parties, and even otherwise also whatever the petitioners could have shown, they have stated in the rejoinder affidavit, which has been examined by this Court.

17. As regards the third contention of the petitioners, it is apparent from the records of this case as well as from the contention of the parties that the appointments of the petitioners were not as per Rules. There were only fourteen sanctioned posts of class-IV employee and the District Inspector of Schools, Deoria was not at all applied to grant financial sanction for four additional posts, which has been made against the rules. The contention of the petitioners that their appointments have been made on the posts in accordance with law by the Principal of the institution, is not correct.

18. Apart from the above, under Regulation 101 it is mandate upon the appointing authority not to pay the non-teaching staff except without prior approval of the District Inspector of Schools. The use of word shall in the Regulation 101 makes it obligatory upon the appointing authority to obtain prior approval from the D.I.O.S. before filling any vacancy of non-teaching post in the institution. Further use of word 'except' with prior approval of the D.I.O.S. do not give discretionary power to the appointing authority, Regulation 101 is as under:

"101. The appointing authority shall not fill any vacancy in the non-teaching staff of a recognized aided institution except with the prior approval of the inspector."

19. In Amit Kumar v. D.I.O.S., Jaunpur [2001 (42) ALR 153.] , it has been held by a Single Judge of this Court that the Regulation 101 cannot be treated to be

directory and this interpretation would result in giving power to the appointing authority for making appointment and thereafter obtain financial sanction. This Court held:

"If Regulation 101 is treated to be directory then the appointing authority could make appointment on non-teaching post even without prior approval of the DIOS. It would result in giving power to the appointing authority to make appointment first and thereafter obtain financial approval. This was not the intention of legislature or the Rule making authority. And it clearly intended that before makingany appointment the appointing authority must obtain prior approval of the DIOS. The legislative intent has to be given effect to while interpreting regulatory provisions of Regulation 101. Regulations 103 to 106 further make it clear that the Regulation 101 cannot be construed as permissive or directory. Further the procedural safeguard contained in Regulation 101, making it obligatory for the appointing authority in matter of making appointment on non-teaching post, not to fill the vacancy except with the prior approval of the DIOS, has an element of public interest."

26. He next submits that school is upgraded uptill high school in year, 1982 vide letter no. I.B.Recognitaion/96 dated 02.11.1982, which is an undisputed fact and thus, thereafter, the provisions of the Act, 1921 shall apply therefore, any appointment following the provisions of the Act 1978 or Rule 1984, would apparently be against the settled law, thus, submission is that the petitioner is not entitled for any relief.

27. Considering upon contentions of counsels for the parties and after perusal of material placed on record, it transpires that the institution was upgraded as high school on 02.11.1982 and once, one of the regular class III employee namely, Mohan Lal Sharma retired, several request were made by the Committee of Management for appointed on the post of Clerk, but when, no nominee was sent by the District Basic Education Officer, the other members of the selection committee, nominated the third member and held the selection, wherein, the petitioner was declared successful and got joined on the post of clerk, but once it was send for the financial concurrence, the same was denied by the District Basic Education Officer vide letter dated 13.09.2012 with the observations that 'appointment of the petitioner is done by unlawfully constituted a selection committee.'

28. Having perused the impugned order dated 13.09.2012, it emerges that the District Basic Education Officer has passed the order, on the premises that the selection committee is not constituted lawfully, meaning thereby, that the provision which is prescribed under Rule 15 of the Rules, 1984 meant for the appointment of Non-Teaching Staff in the Recognized Basic Schools (Junior High Schools).

29. For ready reference, the provisions of rules 14, 15 and 16 of Rules, 1984 are quoted hereinafter:-

"14. Selection Committee.- (1) Manager

(2) Headmaster of the recognised School in which the appointment is to be made:

(3) A specialist nominated by the District Basic Education Officer who will be from amongst minority in respect of a school established and administered by a minority or from amongst Scheduled Castes in respect of any other school.

15. Procedure for selection.-(1) The Selection Committee shall. after interviewing such candidates as appear before it on a date fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.

(2) The list prepared under Clause (1) shall also contain particulars regarding the date of birth, academic qualifications of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall as soon as possible forward such list, together with the minutes of the proceedings of the Committee to the Management.

(4) The Manager shall, within one week from date of receipt of the papers under Clause (3), send a copy of the list to the District Basic Education Officer.

(5) (i) The District Basic Education Officer is satisfied that-

(a) the candidates recommended by the Selection Committee possess the minimum qualification prescribed for the post:

(b) the procedure laid down in these rules for the selection of Ministerial staff and Group 'D' employees, as the case may be. has been followed, he shall aecord approval to the recommendations made by the Selection Committee and shall communicate his decision to the management within two weeks from the date or receipt of the papers under Clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid. he shall return the papers to the management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under Clause (4), he shall be deemed to have accorded approval to the recommendatioris made by the Selection Committee.

16. Appointment- Appointment by by the management.-111 On receipt of communication of approval or as the case may be, on the expiry of the period of one month under Clause (iii) of sub-rule (5) of Rule 15, the management shall first offer appointment to the candidate given the first preference by the Selection Committee and, on his failure to join the post, to the candidate next to him in the list prepared by the Selection Committee, and on the failure of such candidate also, to the last candidate mentioned in such list.

(2) (a) The appointment letter shall be sent under the signature of the Manager, by registered past to the selected candidate.

(b) The appointment letter shall clearly specify the name of post, the pay scale and the nature of appointment, whether permanent or temporary and shall also specify that if the candidate does not join within 15 days from the date of receipt of the appointment letter. his appointment shall be cancelled.

(c) A copy of the appointment letter shall also be sent to the District Basic Education Officer."

30. As per the rule 14, the selection committee consists of three members i.e. Manager, Headmaster and an Specialist nominated by the DBEO and at the same time, Rule 15(5)(iii) provides that if, the DBEO does not communicate his decision on the due intimation by the Committee of Management, within one month form the date of receipt of the papers under clause 4, he shall be deemed to have accorded approval to the recommendations made by the selection committee. One of the

exigencies has also been dealt with that in case, the DBEO did not sent his nominee, the committee of management shall appoint third member.

31. It is an undisputed fact that the third member has been appointed by two other members of the selection committee and not by the Committee of Management, which vitiates the constitution of the selection committee. Further the appointment of the petitioner is done without waiting for completion of a month and therefore, the same is not in-consonance with the provisions of Rules 15(5)(iii) of Rules, 1984.

32. Now the question crops up that whether, the institution in question is governed with the provisions of Rules, 1984 or the same is governed with the provision of the Act, 1921. The undisputed fact is that uptill 01.11.1982, the institution was running at the level of Junior High School and by virtue of an order dated 02.11.1982, this has been upgraded, however, there is no overt provision in the Rules, 1984 for appointment of Group D posts, in such institution, but time and again this issue was brought up before this Court and ultimately, this was decided in the case of Manju Awasthi and Ors. Vs. State of U.P. and Ors, reported in Manu/UP/3739/2012 wherein, in the paragraphs 77,78 and 82, the Division Bench has very categorically held that the 'Government Order dated 24.11.2001 can be supported only to the extent of payment of salary at the Junior High School level and the ancillary power thereunder, but the Basic Siksha Adhikari cannot exercise any administrative control over the institution, except to the extent of payment of salary.' Paragraphs 77, 78 and 82 of the abovesaid judgment are extracted as under:-

"We are of the view that the Government Order dated 24.11.2011 can be supported only to the extent of payment of salary of teachers at the Junior High School level and ancillary power thereunder. However, the Basic Shiksha Adhikari cannot exercise any administrative control over the institution except to the extent of payment of salary nor can make any appointment in view of the applicability of 1921 and 1982 Acts. The judgment of Hon'ble Single Judge in Committee of Management Beni Singh Vaidīc Vidyawati Inter College, Baluganj, Agra and others (supra) to that extent cannot be approved. It is relevant to note that against the judgment of Hon'ble Single Judge dated 7.9.2005 in Committee of Management Beni Singh Vaidic Vidyawati Inter College, Baluganj, Agra and others (supra) special appeal No. 1419 of 2005, Agam Prakash Deepak. State of U.P., was filed, which appeal was also dismissed on 29.11.2005.

78. The Special Appellate bench considered the submissions of the appellant only qua the qualifications of the Assistant Teacher and laid down that Assistant Teacher must possess the training course recognised by the State Government hence, the appellant could not have been appointed as Assistant Teacher hence, the appeal was dismissed. No other ratio was laid down in the said judgment.

82. The selections made by the Basic Shiksha Adhikari under the provisions of U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978, have rightly been quashed in the writ petitions by Hon'ble Single Judge on the ground that after up-gradation of a Junior High School, selection/appointment is to be made in accordance with 1921 Act and U.P. Act No. 5 of 1982. As noticed above, we have found that the State Government as well as the

educational authorities have not been properly construing the provisions of Section 7A and under the misconception, they have granted recognition to the institution under Section 7A, for the first time whereas recognition under Section 7A is to be granted to an existing recognised institution within the meaning of Section 2(b). We thus, feel that certain directions are necessary to be issued in this context. We have already observed that our observations and interpretation of Section 7A in no manner shall affect any recognition already granted to an institution under Section 7A and institution which has been granted recognition shall be treated to be duly recognised but necessary action which has not yet been taken with respect to the said institution is required to be taken by the educational authorities as per our observation. The appeals are disposed of with following directions:

1. The judgment of Hon'ble Single Judge Impugned in the appeal holding that after up-gradation of a Junior High School to High School, appointment and selection on the post of Head Master shall be made in accordance with 1921 Act and U.P. Act No. 5 of 1982 are upheld and prayer of the appellant to set aside the judgment of Hon'ble Single Judge is refused.

2. The recognition/permission under Section 7A shall be granted to an institution which is already recognised institution within meaning of Section 2(b) of 1921 Act.

3. Recognition to a junior high school as High School is to be granted in accordance with the provisions of Section 7(4) of 1921 Act.

4. The State is fully empowered to grant recognition under Section 7(4) or Section 7A without finance (Vitta vihin).

5. After an institution is granted recognition for the first time as a High School minimum necessary post of teachers and Head Master is contemplated to be created even though without finance (Vitta Vihin) so as to fill up those posts in accordance with 1921 Act and 1982 Act.

6. Against the recognition/permission granted under Section 7A, the appointment of a part time teacher or instructor as contemplated under Section 7A(a) shall be continued to be made by the management as per the Government Orders issued from time to time regulating their terms and conditions.

All the appeals are disposed of accordingly.

Parties shall bear their own costs."

33. While dealing with the aforesaid issue, the coordinate division bench of this Court at Allahabad has also sketched out the difference in the judgment and order passed in earlier Special Appeal, thereby holding that the same considered the qualification of Assistant Teacher and no other ratio was laid down in the said judgement and therefore, this was open to the coordinate bench to dealt with the issue, regarding the applicability of the other provisions. The law laid down in the case of Manju Awasthi and Ors. Vs. State of U.P. and Ors still holds filled and therefore, the institution in question is covered with the provisions of the Act, 1921.

34. It has been argued by the petitioner that the approval of the appointment of the petitioner is declined on the sole ground that the appointment is done by an unlawfully constituted selection committee, whereas, it is undisputed that the third member is nominated by the member of the selection committee itself which is impermissible under the law and thus, it is wrong to say that

the order impugned do not stand on its own legs.

35. Ultimately this Court is of considered opinion that, the appointment of the petitioner is done under the provision of the Rules, 1984 whereas, the provisions of the Act, 1921 would apply to the institution in question thus, in view of the settled proposition of law, the whole proceedings of the said appointment vitiates in the eyes of law.

36. Consequently, the writ petition lacks of merit, hence, the same is **dismissed.**

37. No order as to costs.

(2024) 5 ILRA 487
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 8437 of 2023

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

Counsel for the Petitioner:
Manoj Kumar Pandey, Pt. S. Chandra

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Secondary Education Service Selection Board Act, 1982 – Sections 33-C(2)(b) & 33-G – Teacher – Regularization – Rejection order was passed in cyclostyle manner and without following procedure – Legality challenged – Held, no procedure has been adopted/prescribed, as is provided u/s 33-C(2)(b) of the Act, 1982, for considering the regularisation of the petitioners. It fails the very purpose and Scheme of the Section 33-G of the Act, 1982 – Almost all the rejection orders have been passed in a cyclostyle manner – High Court quashed the impugned order declaring it unlawful and against the settled proposition of law. (Para 16, 17, 30 and 31)

B. Service law – Constitution of India – Principle of natural justice – Rule of *audi alteram partem* – Applicability to administrative proceeding – Opportunity of hearing – Significance – Held, under the Constitutional Scheme, one of the most important ingredients which is to be taken care of, is the rules of principle of natural justice – Even in administrative proceeding, the application of the rules of '*audi alteram partem*', is must – Opportunity of hearing is a substantive obligation, which is based on fundamental principle of natural justice – The petitioners have not been associated while considering their cases for regularisation, u/s 33-G of the Act, 1982, as, neither any notice is issued to the petitioner nor any record was called from the Committee of Management concerned, which, prima facie, is a violation of rules of principle of natural justice. (Para 19, 22 and 25)

Writ petition allowed. (E-1)

List of Cases cited:

1. Bharat Sanchar Nigam Limited & anr. Vs BPL Mobile Cellular Ltd. & ors.; (2008) 13 SCC 597

2. Rajjan Lal Vs St. & anr.; AIR 1961 All 139 (FB)

3. St. Bank of India & ors.Vs Rajesh Agarwal & ors.; (2023) 6 SCC 1

4. Mohindher Singh Gill & anr. Vs Chief Election Commissioner, New Delhi & ors.; (1978) 1 SCC 405

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

1. Heard learned counsels for the petitioners, Sri Shailendra Kumar Singh, learned Chief Standing Counsel, Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel for the State and perused the records.

2. Notices to the concerned respondents, other than the State, are hereby dispensed with.

3. The bunch of petitions have been preferred by the petitioners assailing their respective rejection orders, mainly on the ground that they were entitled to be considered and to be regularised, under the provision of Section 33-G of the UP Secondary Education Service Selection Board Act, 1982 (hereinafter referred to as 'Act, 1982') but the benefits under the aforesaid provisions have been declined to them.

4. The provision of Section 33–G of the Act 1982 is extracted as under:-

"33-G (1) Any teacher, other than the Principal or the Head Master, who-

(a) was appointed by promotion or by direct recruitment in the lecturer's grade or trained graduate grade on or after August 7, 1993 but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) order, 1981 as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy;

(b) was appointed by promotion or by direct recruitment on or after August 7, 1993, but not later than December 30, 2000 on adhoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(c) possesses the qualifications prescribed under, or is exempted from such qualification in accordance with, the provisions of the Intermediate Education Act, 1921;

(d) has been continuously serving the institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2016:

(e) has been found suitable for appointment in a substantive capacity by the Selection Committee referred to in clause (a) of sub-section (2) of Section 33-C in accordance with the procedure prescribed under clause (b) of the said sub-section;

Shall be given substantive appointments by the Management.

(2)(a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment;

(b) if two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(3) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

(4) A teacher who is not found suitable under sub- section (1) and a teacher who is not eligible to get a substantive appointment under the said sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(5) Nothing in this section shall be contrued to entitled any teacher to substantive appointment if on the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016 such vacancy

had already been filed or selection for such vacancy has already been made in accordance with this Act.

(6) The services of the adhoc teachers and the teachers who have been appointed against short term vacancies shall be regularised from the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016.

(7) Reservation Rules shall be followed in regularization of adhoc teachers and teachers who are appointed against short term vacancies.

(8) Adhoc teachers, who have not been appointed either in accordance with the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 or in accordance with Section 18 of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 and are otherwise getting salary only on the basis of interim/Final orders of the court shall not be entitled for regularization."

5. From bare reading of the provisions of Section 33–G(a) of the Act, 1982, it is conspicuous that any teacher other than Principal or Headmaster, who was appointed by promotion or by direct recruitment in the lecturer's grade or trained graduate grade on or after August 7, 1993 but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) order, 1981 as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy.

Similarly, Section 33-G(b) provides that:- any Teacher other than Principal or Headmaster, who was appointed by promotion or by direct recruitment, on or after 7th August 1993, but not later than 30th December 2000, on ad-hoc basis on substantive vacancy, in accordance with Section 18, in the Lecturer Grade or Trained Graduate Grade and possess the qualification prescribed under or is exempted from such qualification in accordance with the provisions of Intermediate Education Act, 1921 (hereinafter referred to as 'Act 1921') and has been continuously serving the institution from the date of such appointment up till the date of commencement of U.P. Service Selection Board Act, 2016 and has been found suitable for appointment in a substantive capacity by the Selection Committee referred to in Clause (a) of Sub-Section (2) of Section 33-C in accordance with the procedure prescribed in the Clause (b), shall be given substantive appointment.

6. Section 33-G(8) of the Act, 1982, laid down condition, that ad-hoc Teachers who have not been appointed either in accordance with UP Secondary Education Service Commission (Removal of Difficulties) Second Order, 1981 (hereinafter referred to as 'Order, 1981'), or in accordance with Section-18 of the Act, 1982 or otherwise getting salary only on the basis of interim/final order, shall not be entitled for regularization.

The direct recruitment falls in two categories as is envisaged under Section 33-G of the Act, 1982; firstly, the concerned Teacher has been appointed on or after 7th August 1993, but not later than 25th January 1999 against a short term vacancy, in accordance with paragraph 2 of the Removal of Difficulties Order 1981 as amended from time to time, and as such, the vacancy was converted into a substantive vacancy and secondly, the concerned Teacher has been

appointed on or after 7th August 1993, but not later than 30th December 2000, on ad-hoc basis against substantive vacancies, in accordance with the old Section 18 of the Act, 1982 in the Lecturers' Grade and Trained Graduate Grade.

7. The petitioners herein claims to be appointed either under the Removal of Difficulties Order, 1981 or under unamended Section 18 of the Act, 1982, and it was incumbent upon the Regional Level Committee to thoroughly examine the case of the petitioners while ensuring the records from the Committee of Management of the Institution as well as the District Inspector of Schools concerned, prior coming to any conclusion.

8. While going through the provision of Section 33-G(e) of the Act, 1982, this Court has noted two ingredients, which is to be taken care of, by the Regional Level Committee; one, that the Teacher is suitable for appointment in a substantive capacity by the Selection Committee referred to in Clause (a)(2) of Section 33-C, in accordance with the procedure proscribed; meaning thereby, that a procedure must be prescribed, so far as, to look into the suitability of appointment.

9. Section 33-C(2)(b) is extracted hereinunder:-

"(b) The procedure of selection for substantive appointment under sub-section (1) shall be such as may be prescribed."

10. The Legislature in its conscious wisdom, has provided the aforesaid procedure of selection for substantive appointment, which clearly indicates that some procedure is to be 'prescribed' for selection of substantive appointment. Time and again, the Apex Court has interpreted the word 'prescribed'.

11. In case of **Bharat Sanchar Nigam Limited and Another Vs. BPL Mobile Cellular Limited and Others** reported in **(2008) 13 SCC 597**, it is held that 'ordinarily, the word 'prescribed' would mean prescribed by rules, meaning thereby, that prescribed in accordance with law and not otherwise.

12. Paragraph 45 of the abovesaid judgement is referred hereinunder:-

"45. For invoking clauses 4.1 and 19.5 of the licence agreement, we may notice that the word `prescribed' is not defined. It has not been defined even in the Indian Telegraph Act. It has not been defined in the licence. The said provision unlike clause 18.14 does not use the words `from time to time'. A contract entered into by the parties, it will bear a repetition to state, must be certain. It must conform to the provisions of the Indian Contract Act. Ordinarily, the word `prescribed' would mean prescribed by Rules. Section 7(2)(ee) of the Indian Telegraph Act provides for the Rule making power for the purpose of laying down the tariff. We may not be understood to be laying down a law that in absence of any statutory rule framed under the Indian Telegraph Act, no contract can be entered into. In absence of any statutory Rule governing the field, the parties would be at liberty to enter into any contract containing such terms and conditions as regards the rate or the period stipulating such terms as the case may be. The matter might have been different if the parties had entered into an agreement with their eyes wide open that the circular letter shall form part of the contract. They might have also been held

bound if they accepted the new rates or the periods either expressly or sub silentio. When on the basis of terms of the contract, different rates can be prescribed, the same must be expressly stated. When the word `prescribed' is not defined, the same, in our opinion, would mean that prescribed in accordance with law and not otherwise."

13. A full Bench of Allahabad High Court, in case of **Rajjan Lal Vs. State and another, reported in AIR 1961 All 139 (FB)** has also categorically held that the word prescribed in a general sense has a meaning, 'prescribed by any law, whatsoever.'

14. Paragraph 33 of the abovenoted judgement is reproduced as under:-

"33. It will be seen that Section 48 prohibits execution after the expiry of 12 years from the date of the decree. It was contended by the decree-holders before the Full Bench that by virtue of the provisions of Section 15 of the Limitation Act, in computing the time within which they were entitled to execute the decree, the period during which the execution of the decree had been stayed should not be included. teo questions were posed 'before the Full Bench, One was whether Section 48 prescribed a period of limitation within the meaning of Section 15, Limitation Act, and the second was whether Section 15 was not confined in its operation to periods of limitation prescribed by the Act or Schedule thereof.

The Full Bench answered both the questions on the affirmative. We are not here concerned with the first question because it is not contended before us that Sub-section (4) of Section 417 does not prescribe a period of limitation. The second question which fell for consideration by the Full Bench in Durga Pal Singh's case, AIR 1939 All 403, is very similar to the one referred to this Bench for decision. Thom, C. J., who delivered the principal judgment in the case observed upon consideration of the terms of Section 48, C. P. C., and Sections 15 and 29, of the Limitation Act, that the general provisions of Section 15, Limitation Act are intended to apply to periods of limitation prescribed in the Civil Procedure Code and are not confined in their operation to periods prescribed by the Limitation Act or by Schedule 1 thereof, Iqbal Ahmad, J., who concurred in the opinion of the learned Chief Justice, after considering the relevant provisions of the Limitation Act and the Code of Civil Procedure and the course of legislation on the subject came to the conclusion that in the group of sections from 3 to 29 in Sections 3, 6 and 29, after the word "Prescribed" reference has expressly been made to the first Schedule. It was sheld that the omission of this qualification in the other sections was not without significance and that the word "prescribed" has been used in these sections to a general sense as meaning prescribed by any law whatsoever."

15. It culled out that if the word 'prescribed' is not given any meaning or interpretation in the particular provision, the meaning of the same would be, as provided by the law. While examining the instant matter, in view of the law laid down by the Apex Court, it emerges that undisputedly, no procedure was prescribed as it is provided under Section 33-C(2)(b) of the Act, 1982, though, the same is a mandate of Section 33-G(e) for consideration, thus, the whole proceeding of considering the cases of the petitioners vitiates in the eyes of law.

16. This Court has also taken note of the fact that since, no procedure has been adopted/prescribed, as is provided under

Section 33-C(2)(b) of the Act, 1982, for considering the regularisation of the petitioners, it fails the very purpose and Scheme of the Section 33-G of the Act, 1982.

17. From perusal of all the rejection orders, there seems to be no procedure followed, and the orders have been passed in a cyclostyle manner, in almost all the rejection orders. In this view of the matter, this Court is of considered opinion that the procedure prescribed under Section 33-C(2)(b), have not been adhered to, which demolished the scheme of regularisation, inserted vide Section 33-G of the Act, 1982.

18. Coming on the issue of opportunity of hearing to the Committee of Management as well as the persons aggrieved, i.e., the petitioners, it is apparent, that the Regional Level Committee while proceeding with the consideration of regularisation of the petitioners, did not procure the records, either from the Committee of Management or from the District Inspector of Schools concerned, whereas, fact remains that the District Inspector of Schools is one of the co-opted member of the Regional Level Committee. It emerges from the rejection orders that those are passed, in almost an identical manner, which indicates that the same have been passed, in a cursory and hasty manner and lacks application of mind.

19. Further, under the Constitutional Scheme, one of the most important ingredients which is to be taken care of, is the rules of principle of natural justice. The Apex Court, time and again has held that even in administrative proceeding, the application of the rules of 'audi alteram partem', is must.

20. The Apex Court while rendering the judgement and order in case of **State Bank of India and Others Vs. Rajesh Agarwal and others** reported in **(2023) 6 SCC 1**, has held that Principles of Natural Justice are not mere formalities, but it constitute substantive obligations that need to be followed by decision making and adjudicating authorities. It is further held that the 'principles of natural justice, has a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial and administrative authorities'.

21. Paragraph 36 of the above noted judgement is quoted hereinunder:-

"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) nemo judex in causa sua, which means that no person should be a judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi- judicial action must be heard before a decision is taken. The courts generally favor interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute

under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power." .

22. The Apex Court has, thus, held that the opportunity of hearing is a substantive obligation, which is based on fundamental principle of natural justice.

23. This Court has also taken note of the fact that the opportunity of personal hearing to the concerned petitioners/ affected teachers have also not been accorded so as to sub-serve the compliance of the rules of principles of natural justice. The matter, which is in hand to decide, is not on the premises that there is no regularisation rules prevailing but petitioners have been deprived of their valuable rights without ensuring the due opportunity of hearing and further prior coming to the conclusion, the records were not procured from the committee of management as well as the District Inspector of Schools concerned.

24. It is trite law that every order, administrative or judicial must stand on its own legs. The Constitutional Bench of Hon'ble Apex Court in the case of **Mohindher Singh Gill and another Vs. Chief Election Commissioner, New Delhi and ohters, (1978) 1 SCC 405,** has very categorically held as under:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji[2]:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

25. Undisputedly, the petitioners have not been associated while considering their cases for regularisation, under Section 33-G of the Act, 1982, as, neither any notice is issued to the petitioner nor any record was called from the Committee of Management concerned, which, prima facie, is a violation of rules of principle of natural justice. It is also a trite law that if any action is of civil consequence and that affects someone, the opportunity of hearing of the affected person is must.

26. The State counsel during the course of his argument has also failed to substantiate that with what manner the Regional Level Committee sought for the records from the committee of management and from the District Inspector of Schools, when, the District Inspector of Schools himself is the member of the Regional Level Committee.

27. So far as the present petitioners are concerned, their appointments were made under certain exigencies provided under Section 33-G of the Board Act, 1982 for imparting education, where the State

machinery was totally failed to make appointment of teachers, which is the paramount duty of a welfare State. The petitioners were appointed in the educational institutions, which are in the remote areas of the Province and those are fulfilling the aim and object of the constitutional scheme, thereby imparting education, which is the fundamental right.

28. In fact, the State, while looking into the aforesaid Act No.7 of 1982 while inserting provision 33-G, provided that those teachers other than principal or headmaster appointed under the condition laid down in the statute, shall be given substantive appointment, but the impugned orders clearly show that Regional Level Committee without the reports of the Committee of Management and District Inspector of Schools, has passed the orders, which in fact failed the very purpose of prescribing the scheme under section 33-G of the Act 1982. The orders passed by the Regional Level Committee are in a very cursory manner and without ensuring the records from the committee of management and the District Inspector of Schools concerned, which cannot be approved of.

29. Earlier also, the matter came up for consideration before this Court in Special Appeal (Defective) No. 103 of 2023 wherein the controversy is settled while providing that it is the duty and responsibility of the State authorities to consider and adjudge the suitability of the teachers for substantive appointment under Section 33-G of the Act 1982 and their continuation in the ad hoc capacity in the institution concerned is subject to only such consideration. Further, the order passed in the aforesaid special appeal has also been affirmed in Special Leave to Appeal (C) No.13023 of 2023, vide order dated 17.7.2023. Thus, there remains no dispute so far as the consideration of the petitioners/ teachers under section 33-G of the Act 1982, is concerned."

30. In view of the above said submissions and discussions, it is apparent that the orders impugned in all the writ petitions have been passed in a cyclostyle manner, without associating the petitioners in the proceeding and without ensuring the records from the Committee of Management/District Inspector of Schools concern and further without following with any procedure, as it is provided under Section 33-C(2)(b) of the Act, 1982. Thus, the impugned orders on its face, are unlawful and against the settled proposition of law.

31. Consequently, the orders of rejection, assailed in the present bunch of writ petitions are hereby **quashed.**

32. The writ petitions are **allowed,** accordingly.

33. All the matters are relegated back to the Regional Level Committees concerned to pass order afresh within a period of three months, after calling the records from the committee of management as well as the District Inspectors of Schools concern and by verifying the same. It is further directed that the petitioners shall also be provided the opportunity of hearing, if so required. The scheme provided under Section 33-G of the Act, 1982 shall strictly be adhered to, keeping in view of the requirement of procedure to be adopted by the Committee so constituted.

34. In addition, it is further provided that the petitioners of the present bunch of writ petitions are entitled to continue in service and shall be paid salary without any further break,

till the decision so taken by the committee concerned. The petitioners as well as the Manager of the Committee of Management shall ensure their presence and would co-operate with the Regional Level Committee, as and when required.

(2024) 5 ILRA 495
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

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

Writ A No. 10088 of 2020

Parasnath Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kunwar Bahadur Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Cooperative Societies Act, 1965 – Sections 92-A & 92-B – UP Co-operative Collection Fund and the Amins and Other Staff Service Rules, 2002 – Rule 29 – Post retiral benefit – Superannuation from the post of Junior Clerk in the office of Commissioner, Cooperative Society – Pension was claimed by clubbing service rendered as a Cooperative Collection Amin and Junior Clerk – Permissibility – Held, a Clerk engaged in connection with the Cooperative Collection Scheme is not entitled to pension, gratuity or other post retiral benefits – Rules of 2002 cannot be extended in their application, including Rule 29, to a Clerk serving in connection with the Cooperative Collection Scheme. (Para 1, 34 and 35)

B. Interpretation of statute – Literal interpretation – Application – Held, if the provisions of a statute are unequivocal and clear, the rule of literal interpretation ought be adopted and the statute understood for what it means, giving effect to every word of it. (Para 34)

C. Enforcement of statute – Prospective effect – Applicability of Rules of 2016 enforced on 26.08.2016 to the petitioner, who was retired on 31.10.2015 – Held, the Rules have not been given retrospective operation, either expressly or by necessary intendment. These Rules are substantive Rules and the well settled canon of construction is that all substantive law is deemed to be prospective, unless expressly made retrospective. (Para 36)

Writ petition dismissed. (E-1)

List of Cases cited:

1. St. of U.P. & ors. Vs Chandra Prakash Pandey & ors., (2001) 4 SCC 78

2. Writ Petition No. 3832 of 2012, UP Sahkari Sangrah Karmchari Union Vs St. of U.P. & ors.decided on 11.05.2015

3. St. of U.P. & ors.Vs Chandra Prakash Pandey & ors.; (1995) 3 UPLBEC 1491

4. Jagmal Singh Vs St. of U.P. & ors.; 2009 (3) AWC 2461

5. Ramsevak Vs St. of U.P. & ors., 2019 : AHC: 136501

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

1. his writ petition is directed against an order dated 30.06.2020 passed by the Additional Chief Secretary, Department of Cooperatives, Government of Uttar Pradesh, Lucknow and a circular dated 22.04.2019 issued by the Commissioner and Registrar, Cooperatives, Uttar Pradesh, Lucknow. By the order of 30th June, 2020, the petitioner's claim for grant of pension, clubbing his services as a Cooperative Collection *Amin*

and Junior Clerk (Collection) in the office of the Assistant Commissioner and Assistant Registrar, Cooperative Societies, Maharajganj, has been rejected.

2. he impugned circular issued by the Commissioner and Registrar, Cooperatives, Uttar Pradesh, Lucknow directs that other staff of the Cooperative Department, like Clerks and Drivers, would be entitled to the benefit of pension, reckoning their entire services, if they have superannuated after the enforcement of the Uttar Pradesh Co-operative Collection Other Staff Service Rules, 2016 (for short, 'the Rules of 2016'). The other staff, other than *Kurk Amin*s, like Clerks, Drivers etc., who retired before enforcement of the Rules of 2016, would not be eligible for pension.

3. The petitioner was appointed on 25.04.1979 as an *Amin* on commission basis under the provisions carried in the circular of the Registrar, Cooperative Societies, U.P., Lucknow, bearing No.C-28/Adhikashan/ Bakaya, dated 3rd January, 1983. The District Magistrate, Gorakhpur by an order dated 18.07.1983 appointed the petitioner a Tehsil Level Cooperative Collection *Amin* in the pay-scale of 354-10-424-EB-10-454-12-514-EB-12-550/-. Pursuant to the orders passed by the District Assistant Registrar, Cooperative Societies, Gorakhpur dated 19.07.1983, the petitioner was posted as a Tehsil Level Collection *Amin* at Tehsil Bansgaon, where the petitioner joined service on 22.07.1983. Later, in terms of an order No.3703-06/ Collection/ Establishment dated 11.08.1997, the petitioner was promoted to the post of a Junior Clerk (Collection) in the pay-scale of 950-20-1150-EB-25-1500/- in the office of the Deputy Registrar, Cooperative Societies, U.P., Gorakhpur.

4. The petitioner claims that he worked on the post of Junior Clerk for 18 years 3 months and 5 days. Detailing his total service period, the petitioner claims that he functioned as a Tehsil Level Cooperative Collection *Amin* on regular basis from 18.07.1983 to 11.08.1997 and from 12.08.1997 onwards as a Junior Clerk (Collection) in the office of the Assistant Commissioner and Assistant Registrar, Cooperative Societies, Maharajganj, till his superannuation on 31.10.2015. He says that upon retirement, apart from the due arrears of salary to the tune of Rs.1,44,632/-, he was paid leave encashment worth Rs.3,00,470/- and gratuity in the sum of Rs.2,70,423/-, making an aggregate post retiral benefits of Rs.7,15,525/-. The petitioner did not receive any pension for 7 months after retirement.

5. The petitioner represented his cause to the Commissioner and Registrar, Cooperative Societies, Lucknow through registered post on 20.05.2016, but to no avail. There were repeat representations in this regard, of which mention is not necessary. Since, there was no action, the petitioner moved Writ Petition No.19156 of 2019 before this Court, in substance, claiming relief for the sanction of his retirement pension and revision of arrears of his salary, leave encashment dues, gratuity and pension in terms of his total period of service, clubbing all of it. The said writ petition was disposed of by this Court vide an order dated 16.12.2019, directing the Principal Secretary, Cooperatives, U.P., Lucknow to decide the petitioner's claim for payment of pension, after ex*Amin*ing it, in accordance with the judgment dated 28.02.2018 passed in Writ Petition No.6349 (S/S) of 2018, within a period of three months from the date of presentation of a copy of the order made in that cause. The petitioner served a copy of the judgment along with a representation dated 31.12.2019 upon the Additional Chief Secretary, Cooperatives.

6. There was again a chase by the petitioner, representing his cause before the Additional Chief Secretary, who sat over the matter. In the end of it all, by an order dated 30.06.2020, the Additional Chief Secretary rejected the petitioner's claim for the payment of pension, clubbing of all his services together for the revision of his post retiral benefits as well. There is another circular, which the Commissioner and Registrar (Cooperatives) addressed to all Assistant Commissioners and Assistant Registrars, besides all Deputy Commissioners and Deputy Registrars/ Joint Commissioner/ Joint Registrar (Cooperatives), U.P., saying that pension would be payable to Clerks, Drivers and **Sahyogi**, in accordance with Rule 5 and Rule 26 of the Rules of 2016, reckoning their entire period of service, if they have retired after notification of the said Rules, to wit, on 26.08.2016.

7. Aggrieved by the order dated 30.06.2020 and the circular dated 22.04.2019, the petitioner has instituted this writ petition under Article 226 of the Constitution.

8. A notice of motion was issued to the respondents on 24.04.2020. A counter affidavit was filed on behalf of respondent Nos.2, 3 and 4 jointly by the Additional District Collection Officer, Maharajganj on 11.08.2021. On 18.12.2023, when the writ petition came up before this Court, it was admitted to hearing, which proceeded forthwith. Judgment was reserved.

9. Heard Mr. Kunwar Bahadur Srivastava, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing for the respondents.

10. It is submitted by the learned Counsel for the petitioner that the petitioner was appointed a Cooperative *Kurk Amin* in the regular pay-scale on 22.07.1983 and then continued to work on the substantive post of a Junior Clerk (Collection) since 12.08.1997 up to 31.10.2015, that is to say, for a total period of 18 years 2 months and 19 days in the regular pay-scale. He, thus, rendered a total uninterrupted service of 32 years 3 months and 9 days as a government servant on regular basis from the date of his initial appointment to his superannuation. The conditions of the petitioner's service, it is argued, are governed by the Uttar Pradesh Co-operative Collection Fund and the *Amin*s and Other Staff Service Rules, 2002 (for short, 'the Rules of 2002'). It is submitted that he is entitled to club his entire service together for the purpose of reckoning his post retiral dues, including pension.

11. It is urged that after the judgment of the Supreme Court in **State of U.P. and others v. Chandra Prakash Pandey and others, (2001) 4 SCC 78** (for any further reference, this case would be referred to **as 'Chandra Prakash-I')**, Sections 92-A and 92-B were inserted in the Uttar Pradesh Cooperative Societies Act, 1965 (for short, 'the Act of 1965') vide U.P. Act No.8 of 2003 w.e.f. 28.02.2002. The submission is that after the said amendment, the service conditions of *Amin* and other staff, including Clerks and Drivers were governed by the provisions of Sections 92-A and 92-B of the Act of 1965 and Rules framed thereunder, to wit, the Rules of 2002. These Rules, however, did not define properly the cadre of service, governed by the said Rules. Taking advantage of this lacuna, the rightful claim to pensionary benefits of Clerks was denied whereas they received regular salary, gratuity and leave

encashment from the same fund established under Section 92-B of the Act of 1965.

12. It is urged that despite several communications by the Registrar, Cooperative Societies to the State Government, when the Government failed to take a final decision in the matter of proposed amendment to the Rules of 2002, Civil Misc. Writ Petition No.20073 of 2010, Bhopal Singh v. State of U.P. and others, was instituted before this Court, seeking a writ of mandamus directing the State Government to take a final decision in the matter of effecting these amendments. This writ petition was disposed of in terms of an order dated 06.05.2010 with a direction to the Government to take decision within a period of three months of the date of production of a copy of the order. This was followed in the year 2012 by an action commenced by the Union of Employees of the Cooperative Collection Department. They instituted **Writ Petition No.3832 of 2012, Uttar Padesh Sahkari Sangrah Karmchari Union through its President v. State of U.P. through Principal Secretary, Cooperative Department and others**, which was disposed of by an order dated 11.05.2015, directing the Principal Secretary, Cooperative Department, Government of U.P., to take a decision in the matter expeditiously, preferably within a period of three months of the date of receipt of a certified copy of the order in consultation with other Departments that may be involved in the decision making process, to borrow the words of the learned Judge, who disposed of the said writ petition. This was not complied with by the respondents. Contempt Petition (Civil) No.1945 of 2015 was then instituted by the Karmchari Union, wherein after appearance of the respondents on various dates, the Rules of 2016 were framed and notified w.e.f. 26.08.2016.

13. In compliance with these various judgments of this Court and the Supreme Court, it is argued, the respondents have preferred not to amend the Rules of 2002, and, instead framed the new Rules or the Rules of 2016 for regulating the service of other staff recruited and appointed under the collection scheme of the Cooperative Department. It is, particularly, argued by Mr. Srivastava, learned Counsel for the petitioner that the impugned order is based on the reasoning that the petitioner having been appointed as a Cooperative *Kurk Amin* on salary basis w.e.f. 22.07.1983, a post he held upto 11.08.1997, when he was promoted to the post of a Junior Clerk (Collection), a position that he held until his retirement on 31.10.2015, his services were not governed by the Rules of 2002. He is not entitled to pension under the said Rules, which do not extend to him and are limited in their application to the *Kurk Amin*; not the other staff. It is pointed out further by the learned Counsel for the petitioner that the other ground to found the impugned order is a circular of the Commissioner and Registrar, Cooperative Societies, where it is opined that pensionary benefits are admissible to only those employees, who have retired after enforcement of the Rules of 2016 i.e. on or after 26.08.2016 and since the petitioner has retired on 31.10.2015, before enforcement of the Rules 2016, he is not entitled to pension.

14. It is submitted by Mr. Srivatava that indisputably pensions to various similarly situate incumbents, like Jagmal Singh, Brij Lal Shukla, Raj Kumar Shukla, have been sanctioned in accordance with the

Rules of 2016, whereas the petitioner has been denied the benefit, causing him much prejudice. It is submitted that denial of pension to the petitioner is discriminatory, arbitrary and *mala fide*. It violates Articles 14 and 16 of the Constitution. It is next submitted that like the Collection *Amin*, Collection Clerk is also the holder of a civil post under the State as both work under the same Collection Scheme. The State has power and right to select and appoint a Clerk and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the District Assistant Registrar, Cooperative Societies. He receives regular salary from the same fund, provided under Section 92-B of the Act of 1965. There exists a relationship of master and servant between the State and the Assistant Clerk, like the petitioner. He holds office in the Revenue Administration and performs duties in connection with affairs of the State. He renders service in the Collection Scheme as provided under Rule 2(o) of the Rules of 2002. The office, that a Junior Clerk holds, if falls vacant on the death of an incumbent, is filled up by offering compassionate appointment.

15. It is urged, on the basis of all these telltale features and bearing in mind the system of Junior Clerk's recruitment, employment and functions that he is a government servant and the holder of a civil post under the State. It is next submitted that admittedly after judgment of the Supreme Court in **Chandra Prakash Pandey-I**, the State Government brought amendments and Sections 92-A and 92-B were inserted to the Act of 1965. Apart from the specific provisions carried in Section 92-B, there were statutory Rules of 2002, occupying the field, which in substance were clarified by the Rules of 2016, wherein Chapter VIII was added relating to provision of pensions for other staff, other than the *Kurk Amin*.

16. It is urged that in pursuance of various decisions, as already pointed out, the Government had framed Rules of 2002, providing for the absorption of existing staff in service. The Rules of 2002 as well as the Rules of 2016, the *Amin* and the other staff are entitled to pension, gratuity and post retiral benefits, to be paid out of the *Sahkari Sangrah Nidhi*, governed by Sections 92-A and 92-B, inserted in the Act of 1965 by amendment. The petitioner was appointed as a Cooperative *Kurk Amin* in the regular pay-scale w.e.f. 22.07.1983 and continued on the said post till he was promoted a Junior Clerk on 12.08.1997, where he functioned up to 31.10.2015, a period of 18 years 2 months and 19 days. He has rendered a total service of 32 years 3 months and 9 days under the respondents as a government servant, throughout on regular basis as a member of the service. He is, therefore, entitled to be governed by the Rules of 2002 for the purpose of his retirement dues and pension. The impugned circular dated 22.04.2019 is based on ambiguous reasoning and a misreading of the statutory provisions of the Rules of 2002. It is arbitrary, discriminatory and irrational. It has the effect of prejudicing the petitioner and frustrating the scheme of Section 92-B of the Act of 1965 and the Rules framed thereunder. The impugned circular, therefore, issued by the Commissioner and Registrar, Cooperatives, is manifestly illegal and fit to be quashed as the learned Counsel for the petitioner says. In the last, it is submitted by the learned Counsel that in view of the provisions carried in Rules 5(d), 5(j), 5(k) of the Rules of 2016, the petitioner's claim to pension is fit to be granted, entitling him to pension with arrears with effect from the date of superannuation.

17. Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel, on the other hand, submits that the petitioner is not at all entitled to pension bearing in mind the date of his retirement. He submits that the Rules of 2002 made provision for pension for *Kurk Amin*s, but not for the other staff, engaged in connection with the Cooperative Collection Scheme. There was no provision for payment of pension to the Clerks and Drivers. He submits that it is no doubt correct that there were efforts by the Union of these employees to enforce their right to receive pension, like *Kurk Amin*s, which led to litigation and the ultimate fr*Amin*g of the Rules of 2016, which came into w.e.f. 26.08.2016. The said Rules provide for pension to Clerks, Drivers and **Sahyogi** (peon). The difficulty is that the petitioner retired on 31.10.2015 and according to Mr. Tripathi, the benefit of the Rules of 2016 cannot be retrospectively extended to an employee, who has demitted office prior to enforcement of the Rules of 2016.

18. This Court has carefully considered the submissions advanced by learned Counsel on both sides and perused the record.

19. At the centre-stage of the controversy, here is the issue, if the Rules of 2002 made provision for payment of pension to *Kurk Amin* alone or the 'other staff', engaged in connection with the Cooperative Collection Scheme as well. The other issue is, if the Rules of 2016, that did provide for pension to the 'other staff' engaged in the Cooperative Collection Scheme, would enure to the benefit of those employees, like the petitioner, who retired prior to enforcement of the last mentioned Rules. There is no doubt that the *Kurk Amin* and the other staff engaged in connection with the Cooperative Collection Scheme, appointed on commission basis, let alone those regularly appointed in a pay-scale, came to be regarded as civil servants in the employ of the Government in consequence of two judgments, where the issue was settled. The first was a Bench decision of this Court at Lucknow in **State of U.P. and others v. Chandra Prakash Pandey and others, (1995) 3 UPLBEC 1491** (for any further reference, this case would be referred to as **'Chandra Prakash-II')**. The other decision was the one rendered by the Supreme Court on appeal by special leave from **Chandra Prakash-II**. This decision was **Chandra Prakash-I**. These decisions need not detain us for the point here is different than what was decided in the aforesaid decisions.

20. The only significance of those very seminal decisions is that *Kurk Amin* on commission basis and others retained regularly in connection with the Cooperative Collection Scheme, came to be acknowledged as government servants. The establishment of their status and the others staff employed under the Scheme led to the next issue if they were entitled to receive pensions and post retiral benefits, like other government servants. It is the latter issue, or so to speak some subtler aspects of it that are the concern of this Court here. The immediate impact of the two decisions, to wit, **Chandra Prakash-II and Chandra Prakash-I,** was that the Act of 1965 came to be amended by U.P. Act No.8 of 2003. Sections 92-A and 92-B came to be inserted in the Act of 1965 w.e.f. 28.02.2002, which read:

"92-A. Appointment of *Amin*s and other staff.- (1) There shall be appointed such number of *Amin*s and other staff as may be determined by the State

Government from time to time, for collection of an amount due to a Co-operative Society or for execution of a process issued in the proceedings of execution of an award, order or certificate for recovery under clause (a) or clause (b) of section 92.

(2) The State Government may by rules regulate the recruitment and conditions of service of *Amin*s and other staff.

92-B. Co-operative Collection Fund.:— (1) There shall be established a fund, to be called the Cooperative Collection Fund to which the following amounts shall be credited, namely :—

(a) all costs of collection recovered on an amount due to a Cooperative Collection Society;

(b) all costs of execution recovered on an award, order or certificate for recovery under clause (a) or clause (b) of section 92;

(c) such other amounts as the State Government may direct.

(2) The fund established under sub-section (1) shall be utilized for meeting out all expenses relating to collection of dues in the manner as may be prescribed by rules to be framed by the State Government. The expenses relating to collection of dues shall also include payment of commission, salary, leave encashment at the time of retirement, if any, gratuity, other allowances, loans and advances, due interest on Provident Fund and pension to *Amin*s and other staff appointed under section 92-A."

21. Now, Sections 92-A and 92-B conferred power upon the State Government to make Rules regarding service conditions of *Kurk Amin* and the other staff, including Clerks and Drivers employed in connection with the Cooperative Collection Scheme. The Rules of 2002 came to be made by the Governor in exercise of powers under Section 130 read with Section 92-A and 92-B of the Act of 1965. As the short title of these Rules would suggest, these apply not only to the *Amin*, but the 'other staff' as well. The difficulty that arose was that under the Rules of 2002, both in Part VII and Part VIII, the employees, who were spoken of, were *Amin* and **Sahyogi**. There was no mention of others, like Clerks and Drivers. Part VII and Part VIII of the Rules of 2002 read:

"Part-VII

Pay, Allowances, Commission

20. Scales of Pay of *Amin* and Sahyogi.—(1) The scales of pay admissible to persons appointed shall be such as may be determined by the Government under these rules from time to time.

(2) Until any change under sub-rule (1) the scales of pay, payable from the Fund shall be as follows—

Sl. No.	Name of the post	Pay scale (in Rs)
1	*Amin*	3050-75-3950-80-4590
2	**Sahyogi**	2550-55-2660-60-3200

21. Allowances admissible to *Amin* and Sahyogi.—Dearness allowance. City compensatory allowance, H.R.A., Travelling allowances, and other allowances shall be at the rate admissible to the State Government employees and shall be paid from Fund.

22. Pay during probation.—(1) Notwithstanding any provision in Fundamental Rules to the contrary, a person on probation, if he is not already in permanent service, shall be allowed increment in the time scale after satisfactory completion of probation period.

(2) The pay during probation of a person who was already holding a post, shall be regulated by the relevant fundamental rules.

(3) The pay during probation of a person already permanent, shall be regulated by the relevant rules.

23. Target of Recovery.—Target of recovery for *Amin*s and *Amin*s on commission basis shall be fixed by Registrar from time to time.

24. Commission admissible to *Amin* on commission basis.—(1) The rate of commission to *Amin*s on commission basis shall be as follows—

(a) From April to July — 4%

(b) From August to March — 6%

(2) In case of recovery more than the target fixed under Rule 23 additional commission may be allowed by Registrar.

25. Records to be submitted.—For payment of salary, commission and additional commission to *Amin*s, they shall have to deposit the following records—

(a) The amount for which the citation/attachment or arrest warrant has been served by the *Amin* and duly certified by the Assistant Development Officer (Co-op.).

(b) The amount for which the receipt of the recovery has been issued by the *Amin*.

(c) The payment of the salary, commission/additional commission to the *Amin* shall be made only in that situation when the collection income received as described above in clause (a) and clause (b) is deposited in the Fund and the compliances of the provisions as laid down under rules have been made.

Part-VIII

Leave, Provident Fund, Gratuity

26. Leave.—The provisions of financial handbook, Vol. II, Part-2 to 4 shall mutatis mutandis apply in respect of leave admissible to the *Amin*s and **Sahyogi**.

27. Provident Fund.—*Amin*s and **Sahyogi**es shall be eligible for the Provident Fund as may be admissible to Group-C and Group-D Government employees and shall be maintained in the manner prescribed by Registrar.

28. Advance.—House building/ construction/repair, vehicle and other advances may be granted to *Amin*s and **Sahyogi**es as per rules applicable to Government employees and shall be payable from the Fund.

29. Retirement Benefit.—*Amin*s and **Sahyogi** shall be eligible for pension, gratuity and other retirement benefits as may be admissible from time to time to the Government employees of the respective category. These retiral benefits shall be paid only from the Fund."

(emphasis by Court)

22. In particular, Rule 29 of the Rules of 2002 unequivocally laid down that *Amin* and **Sahyogi** shall be eligible for pension, gratuity and other retirement benefits, as may be admissible to government servants of corresponding categories. There is no mention about Clerks and Drivers or what may be called the 'other staff' in Rule 29. The stand, therefore, taken by the State in answer to any claim for pension, gratuity etc. by a Clerk, part of the Cooperative Collection Scheme, was that under Rule 29, it was only the *Amin* and the **Sahyogi**, who were entitled; not others. This was particularly the case in matters like the present one, where an employee started serving the Cooperative Collection Scheme as a *Kurk Amin* and then moved on to become a Clerk. The Clerk's post was a higher post and, therefore, there was passage of staff from *Amin* to the higher position of a Clerk. Nevertheless, when these more accomplished and experienced hands retired from service and demanded pension or other post retiral benefits, the claims were resisted by the State falling back upon Rule 29 of the Rules of 2002.

23. One of the important decisions, where this issue arose and answered against the State was **Jagmal Singh v. State of U.P. and others, 2009 (3) AWC 2461**. **Jagmal Singh** had started his career as a Cooperative *Kurk Amin* on 28.07.1975 in the pay-scale of Rs.200-320/-. Later on, on 28.02.1984, he was appointed on the post of a Cooperative *Kurk Amin* at the Tehsil Level in the office of the Additional District Cooperative Officer, Sadar, Muzaffar Nagar. He was placed in the pay-scale of Rs.354-550/-. Still later, the Additional Registrar (Banking) Cooperative Societies, U.P., Lucknow by an order dated 29.11.1990 directed the Deputy Registrar (Cooperatives), Meerut to appoint the petitioner a Junior Clerk. The Deputy Registrar (Cooperatives), Meerut directed the District Assistant Registrar (Cooperatives), Haridwar to appoint the petitioner on the position of a Junior Clerk in the then newly created District of Haridwar in the pay-scale of Rs.950-1500/-. As the facts gathered from the report in **Jagmal Singh** (supra) would show he served as a *Kurk Amin* without any break for 16 years and 17 days and then moved on to become a Junior Clerk (Collections) at the Tehsil Level w.e.f. 21.08.1991. He superannuated on 31.10.2006, completing a total of 31 years and 87 days of service in the regular pay-scale. The petitioner was denied pension. He was recommended for pension by the District Assistant Registrar (Cooperative Societies), Muzaffar Nagar on ground that pension was granted to Cooperative *Kurk Amin*s under the Rules of 2002. Jagmal Singh's claim was resisted on the short case that being a Junior Clerk, his services are not regulated by the Rules of 2002, which applied to an *Amin* and a **Sahyogi**, described in the report in **Jagmal Singh** as an Associate *Amin*. It was, particularly, urged that under Rule 29 of the Rules of 2002, **Jagmal Singh** was not entitled to pension. Repelling the contention of the State in Jagmal Singh, Sunil Ambwani, J. (as the learned Chief Justice then was) held:

"9. In State of U. P. and others v. Chandra Prakash Pandey and others, (2001) 4 SCC 78 : 2001 (2) AWC 1399 (SC), arising out of the Division Bench judgment of this Court referred to above, the Supreme Court held that the *Kurk Amin*s appointed on commission basis for recovery of outstanding dues of the Co-operative Societies were members of service and Government servants on the ground that Co-operative *Kurk Amin*s were appointed by the Collectors and were being paid out of the cost recovered according to the provisions for the recovery of land revenue, and were also given the revised pay scale. They were performing the same duties and responsibilities as *Kurk Amin*s of other department on salary basis. They enjoy and exercise the power to arrest a person, who is a defaulter; can attach his property, which he can put to auction, like his counter part on regular basis. A *Kurk Amin* on commission basis and on regular basis similarly follows the provisions of U. P. Z*Amin*dari Abolition and Land Reforms Act, 1951 and U. P. Land Revenue Act, 1901 in so far as the recovery of land revenue is concerned. Once the District Magistrate issues a recovery citation, both the sets of *Kurk Amin*s in order to execute the recovery follow the same procedure and exercise the powers and they are under the control of one and same authority. Both work in the same capacity under control of the State Government and that their appointments and duties fully comply with the tests laid down by the Supreme Court in the decision of State of Gujarat v. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33, in which a Constitution

Bench held that the panchayat service constituted under Section 203 of the Gujarat Panchayats Act, 1962 was a civil service of the State and the members of the service were Government servants. It was found that the right of appointment; the right to terminate the employment; the right to take other disciplinary action; the right to prescribe conditions of service; the nature of duties performed by the employees; the right to control the employees; manner and method of work; for issuing directions and the right to determine the source from which wages or salary are paid and a host of such circumstances, have to be considered to determine the exigency of the relationship of master and servant.

10. The issue, as to whether a Cooperative *Kurk Amin* is a Government servant holding a civil post, is thus, no longer res-integra. This Court and Apex Court have held that the Cooperative *Kurk Amin*s are Government servants, the petitioner, appointed as Co-operative *Kurk Amin* of the Collectorate on the regular pay scale on 28.7.1975; working continuously thereafter in the capacities of the Sahkari *Kurk Amin*s, and Junior Clerk, continued to serve as a Government servant throughout on regular basis from the date of his initial appointment on 28.7.1975 to the date he attained superannuation and retired at the age of 60 years as a member of service of whose service conditions are, regulated by the Rules of 2002. He is thus entitled to club his entire services together for the purposes of retirement dues and pension."

24. **Jagmal Singh** was appealed. Their Lordships of the Division Bench, before whom Special Appeal No.436 of 2009 came up, admitted the appeal on 30.07.2009 by the following order:

"Admit.

Mr. M.C. Chaturvedi, appearing on behalf of the appellants submits that in view of Rule 19 of U.P. Co-operative Collection Fund Regulation, 1982, the post held by the respondent, who. happens to have superannuated from the post of junior clerk, is not a pensionable post. He points out that respondent at his own request was appointed as a junior clerk.

During the pendency of the appeal, operation of the impugned order shall remain stayed

Pendency of the appeal shall not stand in the way of the State Government in taking decision for grant of pension to the junior clerks."

25. The issue, that because of the provisions of Rule 29 of the Rules of 2002, the Clerks and Drivers cannot be treated at par with *Amin* and **Sahyogi**, was agitated in **U.P. Sahkari Sangrah Karmchari Union through its President** (supra), which was disposed of in terms of the following order:

"Heard Sri S.K. Kalia, learned Senior Counsel assisted by Sri Nirankar Singh for the petitioner and Sri Neeraj Chaurasia, learned Standing Counsel for the respondents.

The petitioner is a registered Union of Employees of Group-C & D Clerical Assistants and Driver Cadre of Cooperative Societies.

The petitioner is aggrieved by the act of the Government in not treating the Clerks, Drivers, **Sahyogi** (Class IV post) as Government Service as has been done in the case of *Amin*. Earlier a writ petition no. 6755 (S/S) of 2006, Uttar Pradesh Sahkari Sangrah Karmchari Union through President Vs. State of U.P. through Secretary Revenue and Others had been filed by the petitioner which was disposed of by this Court by order dated 21.09.2011 with

a direction to the Principal Secretary, Revenue Department, U.P. Lucknow. It is stated that in pursuance of the said direction the impugned order had been passed, copy of which has been filed at page 18, Annexure-1 to the writ petition.

Sri S.K. Kalia, learned Senior Counsel submitted that inspite of the order of this Court no decision has been taken by the respondents and in fact the matter is still engaging the attention of the Government in the Cooperative Department of the Government regarding requisite amendment in the Rules. The impugned order however mentions that the competent authority who is required to take a decision in this regard is the Administrative Department and the Cooperative Department. This does not appear to be a positive categorical decision as to whether the members of the petitioner-Union as mentioned above are eligible to be treated as Government Servant or not.

In the counter affidavit in paragraph 4 all that has been stated is that the matter for fr*Amin*g the Rules in respect of the petitioner is under departmental consideration and the same is the averment in the supplementary affidavit also.

It is submitted by the learned Senior Counsel that the members of the petitioner-Union as aforementioned are working along with the *Amin* and *Amin* **Sahyogi** in the matter of recovery of collection dues and that they are also holders of civil posts as held by the Division Bench in the Special Appeal no. 15 (S/B) of 1994, State of U.P. and Others Vs. Chandra Prakash Pandey and Others by judgment dated 05.05.1995 which was confirmed by the Supreme Court in the case reported in (2001) 4 SCC 78, Civil Appeal No.8467-68 of 1995, State of U.P. and Others Vs. Chandra Prakash Pandey and others. Learned Senior Counsel submitted that thereafter the respondents have framed the U.P. Cooperative Clerk Funds *Amin* and Other Staffs Service Rules, 2002.

The submission is that the petitioners are also the holders of civil posts working in the same Department and engaged in the same job of recovery of collection dues therefore the case of the petitioners must be considered at par with the *Amin* and *Amin* **Sahyogi**.

No useful purpose would be served by keeping this writ petition pending.

This writ petition is therefore disposed of with the consent of the learned counsel for the parties with a direction to the respondent no.1, Principal Secretary, Cooperative Department, Government of U.P., Civil Secretariat, Lucknow to take a decision in the matter expeditiously preferably within a period of three months from the date of receipt of a certified copy of this order in consultation of the other requisite Departments that may be involved in the decision making process."

26. When the order in **U.P. Sahkari Sangrah Karmchari Union through its President** remained uncomplied with, as already mentioned, contempt proceedings were launched, which ultimately led to the making and enforcement of the Rules of 2016 w.e.f. 26.08.2016. It would be noticed that the Rules of 2016 by their short title were about the 'other staff' employed in the Collection Scheme of the Cooperative Department. Rule 3 of the Rules of 2016 reads:

"3. Application of the Rules.– These Rules shall apply to the post of Clerk, Drivers and **Sahyogi**es appointed in Collection Scheme of the Co-operative Department."

27. 'Clerk' was defined under these Rules by Rule 5(d) whereas members of

service were defined under Rule 5(j) and the other staff under Rule 5(k). Rules 5(d), 5(j) and 5(k) read:

"5. Definition.–

(d) 'Clerk' means Collection Clerk who is working or appointed under these rules: Provided that the clerks appointed before the commencement of these rules shall be deemed to be appointed under these rules;

(j) 'Member of Service' means Clerk, Driver and **Sahyogi**es substantively appointed under these rules or deemed to have substantively appointed under orders in force prior to the commencement of these rules;

(k) Other Staff means the employees of the Uttar Pradesh Cooperative Collection other than *Amin*s;"

28. Chapter VIII, Part I of the Rules of 2016 are concerned with the miscellaneous provisions and these are leave, advance and retiral benefits. Rule 26 of the Rules of 2016 govern the subject of post retirement benefits. Rule 26 reads:

"26. Retirement Benefit.– Clerks, Drivers and Sahayogies shall be eligible for pension, gratuity and other retirement benefits as may be admissible from time to time to the State Government employees of the respective category. These retiral benefits shall be paid only from the Fund. Qualifying service shall be determined on the basis of Civil Service Regulations as applicable in State of Uttar Pradesh and amended by Government from time to time."

29. On the other hand, the appeal arising out of the decision in **Jagmal Singh** came up before the Division Bench and their Lordships dismissed the appeal by their order dated 29.01.2019, where the short remark to part with the appeal reads:

"4. Learned counsel for the appellant contended that it is only from the date when petitioner/respondent was allowed to change his cadre but could not show any provision that earlier service rendered by petitioner/ respondent as *Kurk Amin* would not count as qualifying service even though it has been held to be a civil post. Even Supreme Court **in Chandra Prakash Pendey and Others v. State of U.P. and Others, (2001)4 SCC 78** has held that said *Kurk Amin* is a civil post. He could not show why earlier services rendered by petitioner/respondent as *Kurk Amin* would not qualify for pension."

30. The issue, if on the terms of the Rules of 2002, Clerks were indeed entitled to receive pension, particularly under Rule 29 of those Rules was not at all ex*Amin*ed. With utmost respect to the learned Single Judge, who decided **Jagmal Singh**, his Lordship also did not go into the issue as to what would be the effect of Rule 29 of the Rules on the entitlement of a Clerk, employed in connection with the Cooperative Collection Scheme, to be paid pension.

31. In **Ramsevak v. State of U.P. and others, 2019 : AHC: 136501**, the issues that are involved here engaged the attention of the learned Single Judge. So far as the instant issue is concerned, the facts in **Ramsevak** (supra) have to be noticed from the report, which reads:

"2. Facts, that give rise to filing of the present petition are that the petitioner was initially appointed as Junior Clerk in the pay scale of Rs. 100-180 vide order dated 7.10.1970. He continued in service as such

and after working for 39 years and 8 months he superannuated on 30.6.2018. Till the time petitioner continued to work and attained the age of superannuation he was not holding any post in an pensionable establishment nor any pension was paid to him. After his retirement, petitioner approached this Court by filing Writ Petition No. 26601 of 2012 with a grievance that the amount of gratuity and leave encashment has not been paid to him. The writ petition was disposed of vide following orders passed on 28.5.2012:-

"The grievance of the petitioner in the matter of payment of Gratuity and Leave Encashment needs to be ex*Amin*ed by respondent no. 4 (District Registrar, Cooperative Societies, Mainpuri), at the first instance.

Accordingly, the present writ petition is disposed of with liberty to the petitioner to make a representation ventilating all his grievances before respondent no. 4, within two weeks from today, along with a certified copy of this order. On such a representation being made the respondent no. 4 shall call for the records and shall pass a reasoned speaking order preferably within eight weeks after affording opportunity of hearing to the bank concerned."

3. Consequential order was passed by the Registrar on 16.7.2012, which is not assailed. It appears that thereafter service rules have been framed under Section 92-A readwith section 130 of the U.P. Cooperative Societies Act,1965 on 26.8.2016, known as 'U.P. Cooperative Collection *Amin* and other Employees Rules, 2016' (hereinafter referred to as the 'Rules of 2016'). In this rule, clerk is defined in Clause-5(d) in following terms:-

"(घ) 'लिपिक' का तात्पर्य संग्रह लिपिक से है, जो इस नियमावली के अधीन कार्यरत अथवा नियुक्त हो:

प्रतिबंध यह है कि इस नियमावली के प्रारम्भ होने के पूर्व नियुक्त लिपिक इस नियमावली के अधीन नियुक्त समझे जायेगें:"

4. Relying upon the aforesaid provision the writ petitioner has prayed for a writ of mandamus of commanding the respondents to release pension to petitioner on the ground that the post of clerk from which the petitioner had retired is now made pensionable under the Rules of 2016. Learned counsel for the petitioner has placed reliance upon the judgment of this Court in **Jagmal Singh** Vs. State of U.P. and others, reported in 2009(4) ADJ 744 and also the order passed by this Court in Service Single No. 5844 of 2019."

32. In answering the issue if **Jagmal Singh** held that the petitioner, a Clerk, would be entitled to pension under the Rules of 2002, his Lordship in **Ramsevak** distinguished **Jagmal Singh** from the case under consideration, in terms of the following remarks:

"7. So far as the judgment in the case of **Jagmal Singh** (supra) is concerned, the issue there was entirely distinct. The issue that fell for consideration before this Court was as to whether a Cooperative *Kurk Amin* is a government servant holding a civil post or not? Issue has been answered in paragraphs no. 8 to 10 of the judgment which is extracted here in after:-

8. The Co-operative Kurk Amins are engaged for realization of Government dues. They discharge same functions and duties as regularly appointed collection Amins in the revenue department of the State.

9. In State of U. P. and Ors. v. Chandra Prakash Pandey and Ors. MANU/SC/0180/2001 : (2001) 4 SCC 78 : 2001 (2) AWC 1399 (SC), arising out of the Division Bench judgment of this Court referred to above, the Supreme Court held that the Kurk Amins appointed on commission basis for recovery of

outstanding dues of the Co-operative Societies were members of service and Government servants on the ground that Co-operative Kurk Amins were appointed by the Collectors and were being paid out of the cost recovered according to the provisions for the recovery of land revenue, and were also given the revised pay scale. They were performing the same duties and responsibilities as Kurk Amins of other department on salary basis. They enjoy and exercise the power to arrest a person, who is a defaulter; can attach his property, which he can put to auction, like his counter part on regular basis. A Kurk Amin on commission basis and on regular basis similarly follows the provisions of U. P. ZAmindari Abolition and Land Reforms Act, 1951 and U. P. Land Revenue Act, 1901 in so far as the recovery of land revenue is concerned. Once the District Magistrate issues a recovery citation, both the sets of Kurk Amins in order to execute the recovery follow the same procedure and exercise the powers and they are under the control of one and same authority. Both work in the same capacity under control of the State Government and that their appointments and duties fully comply with the tests laid down by the Supreme Court in the decision of State of Gujarat v. Raman Lal Keshav Lal Soni MANU/SC/0346/1983 : (1983) 2 SCC 33, in which a Constitution Bench held that the panchayat service constituted under Section 203 of the Gujarat Panchayats Act, 1962 was a civil service of the State and the members of the service were Government servants. It was found that the right of appointment; the right to terminate the employment; the right to take other disciplinary action ; the right to prescribe conditions of service ; the nature of duties performed by the employees ; the right to control the employees ; manner and method of work ; for issuing directions and the right to determine the source from which wages or salary are paid and a host of such circumstances, have to be considered to determine the exigency of the relationship of master and servant.

10. The issue, as to whether a Cooperative Kurk Amin is a Government servant holding a civil post, is thus, no longer res-integra. This Court and Apex Court have held that the Cooperative Kurk Amins are Government servants, the petitioner, appointed as Co-operative Kurk Amin of the Collectorate on the regular pay scale on 28.7.1975 ; working continuously thereafter in the capacities of the Sahkari Kurk Amins, and Junior Clerk, continued to serve as a Government servant throughout on regular basis from the date of his initial appointment on 28.7.1975 to the date he attained superannuation and retired at the age of 60 years as a member of service of whose service conditions are, regulated by the Rules of 2002. He is thus entitled to club his entire services together for the purposes of retirement dues and pension.

8. Once a finding has been returned by this Court in the case of ***Jagmal Singh*** *(supra) that a Cooperative Kurk Amin is a government servant and holds a civil post. The provisions applicable upon the government employees would get attracted. The petitioner, himself was appointed as a clerk and is claiming benefit under the Rules of 2016, which is a distinct claim altogether.*

9. As against this, the admitted facts in the present case is that the petitioner neither claims to hold any civil post nor has claimed status of a government servant. The post held by the petitioner was otherwise not a pensionary post. It is only after the rules of 2016 have been framed that the post itself has been treated as a civil post and the employee concerned is granted benefit admissible to a government servant. Since

the Rules of 2016 itself are not found to be applicable upon the petitioner no direction can be issued to the respondents to consider petitioner's claim for payment of pension."

33. Indeed, in **Jagmal Singh**, though a plea based on Rule 29 of the Rules of 2002 was raised and noticed by the Court, it was never decided, as already remarked. In Jagmal Singh, his Lordship went on to decide the issue about the petitioner being a government servant holding a civil post, on the foot of which, the petitioner was permitted to club his services earlier as a *Kurk Amin* and later as a Clerk together, entitling him to pension. There is no pronouncement in **Jagmal Singh** about the effect of Rule 29. To this extent, I am in respectful agreement with opinion expressed in **Ramsevak** that **Jagmal Singh** proceeds on a different issue than the one here. Rather, it is not at all an authority on the point if Rule 29 of the Rules of 2002 would entitle a Driver to pension and other retirement benefits.

34. Upon a plain reading of the provisions of Rule 29 of the Rules of 2002, it has to be held that a Clerk engaged in connection with the Cooperative Collection Scheme is not entitled to pension, gratuity or other post retiral benefits. It is well settled that if the provisions of a statute are unequivocal and clear, the rule of literal interpretation ought be adopted and the statute understood for what it means, giving effect to every word of it. This is how a Court ought read a statute unless it leads to some incongruous or absurd result, or presents some other difficulty in giving effect to the underlying intention or object of the legislation. This is not a case at all where the underlying intention may be required to be given effect to. This we say notwithstanding the fact that the short title of the Rules does hint that these apply to the 'other staff' as well, apart from the *Amin*. Nevertheless, the entire scheme of the Rules are conspicuously silent about the other staff, except **Sahyogi**, who find mention along with the *Amin*.

35. Therefore, in the considered opinion of this Court, the Rules of 2002 cannot be extended in their application, including Rule 29, to a Clerk serving in connection with the Cooperative Collection Scheme. The first question involved is decided accordingly.

36. The other question, which survives for consideration is if the petitioner is entitled to pension, gratuity and other retirement benefits under the Rules of 2016. Clearly, these Rules were enforced w.e.f. 26.08.2016. The petitioner retired from service on 31.10.2015. The Rules have not been given retrospective operation, either expressly or by necessary intendment. These Rules are substantive Rules and the well settled canon of construction is that all substantive law is deemed to be prospective, unless expressly made retrospective.

37. In the view that I take, I am fortified by the holding on the point in **Ramsevak,** where this was an issue that was examined. In **Ramsevak**, it was held:

"6. Having heard learned counsel for the parties, this Court finds that the 'Rules of 2016' have come into force only on 26.8.2016. Clause-1(iv)of the Rules of 2016 clearly makes this provision prospective in nature. No provision in the Rules of 2016 has been brought to the notice of the Court which may indicate that these Rules would have retrospective effect. Clause-5(d), read with its proviso, would only make the rule applicable upon the clerks who were

appointed prior to the framing of Rules of 2016 provided they are working on the date of enforcement of the Rules of 2016. These rules, therefore, would have no applicability upon the case of the petitioner who was appointed in the year 1970 and had retired in the year 2011 i.e. prior to the introduction of Rules of 2016."

38. A reading of the entire Scheme and Rules of 2016, including Rule 1(2), Rule 5 and Rule 5(d), lead to the inescapable conclusion, apart from what has been said above that these Rules have no retrospective operation. These would never apply or enure to the benefit of an employee, who has retired from service before the date of enforcement of the Rules of 2016. The other question, therefore, involved in this petition is also decided against the petitioner.

39. In this view of the matter, there is no force in this petition. It fails and is **dismissed.**

40. There shall be no order as to costs.

(2024) 5 ILRA 510
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ A No. 17100 of 2022

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

Counsel for the Petitioner:
Siddharth Khare

Counsel for the Respondents:
Archana Singh, C.S.C.

A. Service Law – Termination from Service – Post of Assistant Teacher – Complaint of mentioning 324 marks out of 600, though he has secured only 316 marks, was made – Petitioner added eight marks awarded to him as grace marks in Math – During selection, the petitioner was at Serial no. 1673 in merit list as he obtained 64.23% marks and even if eight grace marks are removed, the petitioner's percentage comes to 64.09 – Next selected person at Serial No. 1674 obtained 63.93 % marks – Effect – Held, the petitioner does not gain any advantage as well as in this matter, the candidate who is at Serial No. 1674 is not put to any disadvantage position because she has got 63.93 percentage – High Court quashed the impugned order and issued mandamus permitting the petitioner to discharge his services and paying him salary month to month forthwith. (Para 14, 15, 18 and 20)

Writ petition allowed. (E-1)

List of Cases cited:

1. Special Appeal No. 69 of 2022; Secy. Basic Edu. Board, Prayagraj & ors.(In Writ A No. 17495 of 2021) Vs Jubeda Bano decided on 08.03.2022

2. Writ Petition (Civil) No. 322 of 2021; Jyoti Yadav and Anr. Vs The St. of Uttar Pradesh & ors. decided on 08.04.2021

3. Special Appeal No. 153 of 2022; Secretary Basic Education Board & anr. Vs Pratibha Mishra & ors.

4. Special Appeal Defective No. 551 of 2021; The Basic Education Board U.P. Vs Manisha Singh and 2 Others decided on 09.08.2021

5. Sushil Kumar Vs St. of U.P. & ors.; 2021 (8) ADJ 210

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and Ms. Archana Singh, learned counsel for the respondents.

2. By means of this writ petition, the following prayer has been made:-

"(i) Issue a writ, order or direction in the nature of certiorari and quash the orders dated 14.09.2022 passed by District Basic Education Officer, District Badaun (Annexure No. 15) in interest of justice.

(ii) Issue a suitable order or direction in nature of mandamus and directing to respondents to allow to petitioner for work of the post of Assistant Teacher and pay salary month to month from due date without any interruption in interest of justice according to law.

(iii) ……."

3. Brief facts of the case are that the State Government invited application for filling up 69,000/- post of Assistant Teachers in Primary Schools by publishing advertisement. In pursuance thereof, the petitioner, having requisite qualification, applied for the same. In the said application, he has specifically mentioned the obtained number in academic and training alongwith High School Marks as 324/600. Thereafter, the petitioner appeared in the written examination held on 06.01.2019 and the petitioner has been declared successful by obtaining 64.23 per cent. Further, on 04.12.2020, the appointment letter was issued to the petitioner for the post of Assistant Teacher. In pursuance thereof, petitioner joined his services on 01.02.2021 in the institution allotted to him. Thereafter, some complaint was made against the petitioner and consequent thereof, notice was issued to the petitioner to which the petitioner submitted reply specifically stating therein that in the High School Marks, against the Mathematics, grace mark was given and since the petitioner was not aware as to grace marks that the same will not be added in total score. Thereafter, on 14.09.2022, the services of the petitioner has been terminated. Hence the present petition.

4. Learned counsel for the petitioner has submitted that the petitioner has mentioned the total marks in the application including the grace marks, which is in total 324/600 and if the grace marks i.e. 8 is subtracted, then it comes to 316 out of 600. He further submits that in the selection list, the petitioner has been shown at Serial No. 1673, where the percentage of obtained marks is mentioned as 64.23. He next submits that if the grace marks is reduced, then total percentage comes to 64.093. He further submits that since the person next to the petitioner, who is at Serial No 1674 and whose marks is 63.93 per cent, therefore, the merit list as a whole will not change.

5. In support of his submission, counsel for the petitioner has placed reliance upon two Government Orders dated 04.12.2020 & 05.03.2021. He refers Clauses 2 & 3 of Point No.2 of G.O. dated 04.12.2020 and submits that the intent of Government is very clear that if the aspirants have filled the higher marks than the obtained marks incorrectly, which does not affect the merit list, then the selection of such candidate will not be cancelled. He further refers *Clause Nos. 2 to 4* of the Government Order dated 05.03.2021 and submits that the intent of the Government is very clear where the merit list in either of the cases i.e. mentioning the lower numbers or the higher numbers, if the merit is not changed and if the same is changed, after obtaining affidavit, no future claim will be made by the candidate.

6. He next refers Clause 2 (1) of G.O. dated 05.03.2021, which also clarifies

the said decision specifically satisfy that where the candidate, if without any basis has mentioned higher marks than obtained marks, the selection of such candidate may be cancelled. He submits that in the case in hand, there is a reason for mentioning higher marks awarded to the petitioner, therefore, the total sum was mentioned as 324 (including eight grace marks) instead of 316. He further submits that this fact is also not clear to the District Basic Education Officer. He further submits that in the advertisement, it was not clear that with which regard, total sum is to be mentioned that is deducting the grace marks. In support of his contention, he refers letter dated 13.07.2021 issued by District Basic Education Officer to higher authority, a copy of which has been annexed as **Annexure No.7** , where the BSA has sought guidelines how to deal with the situation where the total sum has been mentioned including grace marks. Counsel for the petitioner further submits that the mistake is bona-fide as the grace marks was included in the total sum on the basis of material on record and not otherwise, which can be ignored in view of the Government Order dated 05.03.2021, therefore, the appointment of the petitioner should not be cancelled.

7. In support of his submission, he further placed reliance upon the judgment of Division Bench of this Court passed in the case of ***Secy. Basid Edu. Boar, Prayagraj and Others (In Writ-A No.17495 of 2021) Vs. Jubeda Bano (Special Appeal No. 69 of 2022),*** decided on 08.03.2022 in which the Government Orders dated 04.12.2020 and 05.03.2021 have specifically been considered holding that no grace marks shall be permitted in the OnLine application to avoid any alteration or change in the inter-se merit list of the candidates or to alter/change in the final merit list.

8. *Per contra*, learned counsel for the respondents submits that the Government order dated 05.03.2021 is absolutely clear, which empowers to the candidates, who has wrongly mentioned the marks OnLine, the appointment can be cancelled. She further submits that the said government order was not only considered by the Division Bench of this Court but also by the Hon'ble Apex Court. He placed reliance upon the recent judgment of the Hon'ble Apex Court passed in the case *of* ***Jyoti Yadav and Anr. Vs. The State of Uttar Pradesh & Ors., [Writ Petition (Civil) No. 322 of 2021]***, decided on 08.04.2021 in which the candidature of the petitioner has been rejected, considering the said G.O. dated 05.03.2021 by holding that the G.O. dated 05.03.2021was designed to achieve a purpose of securing fairness while maintaining the integrity of the entire process. She further placed reliance upon the judgment of Division Bench of this Court passed in ***Special Appeal No. 153 of 2022 (Secretary Basic Education Board and Another Vs. Pratibha Mishra & Ors.)*** by submitting that the candidate got one grace mark, which was mentioned by the appellant therein, has turned down the candidature of the appellant therein.

9. She further placed reliance upon the judgment of ***Special Appeal Defective No. 551 of 2021 (The Basic Education Board U.P. Vs. Manisha Singh and 2 Others)***, decided on 09.08.2021, where the appellant was not non-suited because of mentioning wrong marks. Similarly, she has relied upon the judgment of this Court passed in the case of ***Sushil Kumar Vs. State of U.P. and Ors., 2021 (8) ADJ 210***, where the Court has taken the view that the grace marks should not have included in the total marks, and therefore, turned down prayer made therein.

10. Counsel for the respondents summarises his submission while submitting that admittedly, the petitioner has secured only 316 marks and not 324 out of 600, therefore, by the impugned order, his appointment has rightly been cancelled.

11. Rebutting to the said submission of the counsel for the respondents, Shri Khare, submits that the judgments cited by the learned counsel for the respondents are not applicable to the facts of the case. He submits that even assuming without admitting the marks have wrongly been mentioned, but if the eight grace marks are reduced, the percentage comes to 64.093 and the candidate, who is just below the petitioner i.e. at Serial No. 1674 has obtained 63.93, therefore, the merit list of the selected candidate will not be changed, this fact has neither been argued in any of the cited judgments by counsel for the respondents nor considered. The petitioner has neither got advantages nor any other candidate was put to disadvantages position.

12. After hearing the parties, the Court has perused the records.

13. It is not in dispute that the petitioner secured 316 marks out of 600 marks and while filling the OnLine application, has mentioned 324 out of 600, by adding eight marks, which was awarded to the petitioner as grace marks in the Mathematics subject.

14. The merit list, which has been brought on record as ***Annexure No.2*** to the present writ petition, wherein the petitioner has been shows at Serial No. 1673 and obtained 64.23. Further, the next person has been shown at Serial No. 1674 who has obtained 63.93 per cent marks. Furthermore, even if eight grace marks are removed, the petitioner's percentage comes to 64.093 and admittedly, even if said percentage i.e. 64.093 is taken to be correct.

15. The petitioner does not gain any advantage as well as in this matter, the candidate who is at Serial No. 1674 is not put to any disadvantage position because she has got 63.93 percentage. In other words, the petitioner does not gain any advantage of mentioning the grace marks and putting the candidate next to him in disadvantage position.

16. The Hon'ble Apex Court as well as Division Bench of this Court has considered the government order dated 05.03.2021 in the above-quoted judgments, in which it has categorically been affirmed that the said government order has been issued so that the process of selection of appointment will not be disturbed. The circular further provides that by any reason, if the marks has wrongly been mentioned, the candidature would be cancelled, but in the case in hand, since eight grace marks have been mentioned by the petitioner though he secured only 316 marks out of 600, and even after deducting eight grace marks, the merit list does not affect as mentioned above as the selected candidate next to the petitioner secured much less percentage i.e. 63.93; whereas after deducting eight grace marks it comes to 64.093, therefore, it can happily be said that the petitioner has not put any candidate at disadvantage position by mentioning eight grace marks along with actual marks.

17. Further, in the judgments cited by the counsel for the respondents, nowhere, it has been considered the aspect of the fact, but by reducing the grace marks, the *inter-se* merit list was not disturbed. Therefore, the judgments cited by the counsel for the

respondents do not do any aid to her in a peculiar facts and circumstances mentioned here-in-above.

18. In view of the facts as stated above, the impugned order dated 14.09.2022 cannot sustain in the eye of law and the same is hereby quashed.

19. The writ petition is ***allowed***, accordingly.

20. A ***mandamus*** is issued to the authority concerned to permit the petitioner to discharge his services on the post of Assistant Teacher and salary shall be paid to him month to month forthwith. A mandamus is also issued to authority concerned to give all consequential benefits to the petitioner.

(2024) 5 ILRA 514
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

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

Writ A No. 17113 of 2023

Puran Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Sanjeev Singh, Advocate, Mr. Pramod Kumar Srivastava, Advocate

Counsel for the Respondents:
Mr. Mahesh Chandra Chaturvedi, Additional Advocate General with Mr. Suresh Singh, Additional Chief Standing Counsel for respondents Nos. 1 and 2 Mr. Suresh C. Dwivedi, Advocate for respondents Nos. 3 and 4

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 7 – Disciplinary proceeding – Punishment – Censure and withholding of two increment – Charges may likely to lead major punishment – No date, time and place was fixed for oral inquiry – Witnesses of establishment could not be cross-examined – Effect – Held, in any disciplinary matter involving the possible imposition of a major penalty, it is imperative for the Establishment to prove the charges by leading before the Inquiry Officer evidence, both documentary and oral – High Court set aside the impugned punishment order giving liberty to Disciplinary Authority to proceed with enquiry afresh, but with condition that he cannot impose higher punishment than that was awarded by the impugned order. (Para 18, 19 and 23)

B. Service Law – Disciplinary proceeding – Role of Inquiry Officer – The Inquiry Officer cannot identify himself with the Establishment and assume the charges to be proof of themselves – He must require the Establishment to come forth and produce evidence through a Presenting Officer, both documentary and oral, to prove the charges. It is also imperative that in cases of possible major penalty, witnesses ought to be examined. After the Presenting Officer leads evidence, introducing documents and proving them through appropriate witnesses, which, in certain cases, can be the Presenting Officer himself, the witnesses for the Establishment have to be offered for cross-examination to the chargesheeted employee. It is after the evidence of the Establishment is over that the charge-sheeted employee has to be given opportunity to lead his evidence, which, again, can be both documentary and oral. If the chargesheeted employee leads oral evidence, that is to say, produces witnesses, his witnesses can be cross-examined by the Establishment. (Para 20 and 21)

Writ petition allowed. (E-1)

List of Cases cited:

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

2. Roop Singh Negi Vs Punj. National Bank & ors.; (2009) 2 SCC 570

3. St. of Uttaranchal & ors.Vs Kharak Singh; (2008) 8 SCC 236

4. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

6. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB) (LB)

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

This writ petition is directed against the order dated 08.08.2023 passed by the Additional Chief Secretary, Department of Housing and Urban Planning, Government of U.P., Lucknow, punishing the petitioner with the withholding of two increments with cumulative effect and awarding a censure after disciplinary proceedings.

2. The facts giving rise to this writ petition are these :

The petitioner was appointed an Assistant Engineer by the respondents *vide* office order dated 25.08.1987 pursuant to the recommendations of a Selection Committee, along with thirteen others. He was regularised vide Office Order dated 20.11.2001, along with ten others. The State Government is the petitioner's appointing and disciplinary authority. The petitioner had worked as an Assistant Engineer in various development authorities and his services are governed by the Uttar Pradesh Development Authorities Centralised Service Rules, 19851. The eligibility for promotion from the post of Executive Engineer to Superintending Engineer is by way of 100% promotion. Thus, the cadre of Executive Engineers in the service governed by the Rules constitutes the feeding cadre for the cadre of the Superintending Engineers. The promotion to the post of a Superintending Engineer is based upon seniority subject to rejection of unfit with satisfactory service of a total period of 12 years, out of which, 5 years have to be put in on the post of an Executive Engineer. The petitioner was promoted from the post of an Assistant Engineer to that of an Executive Engineer vide Order No. 479 dated 12.05.2015 and posted as such since July, 2017 with the Agra Development Authority2. By an office order dated 16.01.2020, disciplinary proceedings were drawn against the petitioner under Rule 33 of the Rules of 1985 read with Rule 7 of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 19993, charging him *prima facie* of misconduct. By the aforesaid office order, the Commissioner, Agra Division, Agra was appointed the Inquiry Officer.

3. A charge-sheet dated 03.02.2020 was served by the Inquiry Officer, carrying four articles of charges and to prove the same, no witnesses were cited. Documents alone were relied upon. The petitioner submitted a reply to the charge-sheet. The reply was dated 26.12.2020. The petitioner denied the charges with details of his defence regarding all imputations carried in the charges. It was a detailed defence.

4. In his reply, the petitioner has segregated Charge No. 1 into Charges Nos. 1A to 1D for the sake of convenience and urged that he is not responsible, even remotely, for any dereliction and indifference towards his duty. It was

emphasized that he is the supervising authority and for the work allegedly not completed, the responsibility rests, in the first instance, with subordinates like the Assistant Engineer and the Junior Engineer, who had not even been called upon to explain. The petitioner also pleaded in denial of Charges Nos. 2 and 3, that were again segregated into Charges Nos. 2A to 2D to 3A to 3D for felicity of defence.

5. In paragraph No. 14 of the writ petition, it is averred that no date, time and place was fixed for holding the inquiry by the Commissioner and in between, several incumbents changed in the Office of the Commissioner. This led to an interruption of the inquiry. It is also averred that no witness on behalf of the respondents was examined in support of the charges, nor was the petitioner called upon to examine himself in defence. The inquiry concluded, as it is alleged, in violation of the Rules of 1999 and the Inquiry Report dated 12.04.2021 was submitted by the Inquiry Officer to the State Government, who, on its basis, issued a show-cause notice dated 07.10.2021, requiring the petitioner to submit his reply. The Inquiry Officer found Charges Nos. 1 and 4 not proved whereas Charge No. 2 was found proved. Charge No. 3 was found partly proved. The petitioner submitted his reply dated 03.11.2021 to the State Government, which consisted of, again, substantial comments, running into 12 pages, together with 32 annexures.

6. It is averred in paragraph No. 17 that in his reply to the show-cause or the second show-cause, as it is called, the petitioner raised a plea that no oral inquiry was held in the sense that no witness was examined by the Establishment whom the petitioner could cross-examine before the Inquiry Officer. The Additional Chief Secretary, Department of Housing and Urban Planning, Government of U.P., Lucknow, who acted for the State Government under the Rules of Business, taking cognizance of the petitioner's plea that no oral inquiry was held, issued a memo dated 31.12.2021 to the petitioner, asking him to appear in the Secretary's office on 06.01.2022 at 04:00 p.m. for personal/oral hearing.

7. It is averred in paragraph No. 19 that being satisfied that no personal hearing and oral inquiry was held by the Commissioner, and in its absence, the inquiry report dated 12.04.2021 was bad, the first respondent issued a letter to the Vice Chairman of the Development Authority, directing that the principles of natural justice ought to be followed and the petitioner allowed to cross-examine the Assistant Engineer as well as the Junior Engineer by getting their statements recorded, after which, the inquiry report be submitted by the Vice Chairman to the Secretary. The petitioner asserts that the Commissioner was not directed to undertake a fresh inquiry, who had held the inquiry earlier, but now, it was entrusted to the Vice Chancellor, pointing out the deficiency in the earlier proceedings.

8. It is the petitioner's case at this stage that there being a procedural lapse in the inquiry, the State Government ought not to have switched Inquiry Officers midway and entrusted it to the Vice Chairman for the Commissioner. In compliance with the order of the Secretary, the Vice Chairman held an inquiry into the matter again and after recording the statement of the two junior officers i.e. the Assistant Engineer and the Junior Engineer, submitted his report dated 18.02.2022, exonerating the petitioner of Charges nos. 2 and 3 as well, of which he

was earlier found guilty and partly guilty. The Charges Nos. 1 and 4, as it appears, of which he was exonerated, no finding was recorded, treating the earlier report to be subsisting and valid. After submission of the report by the Vice Chairman, no order upon the same was passed. Rather, on the basis of the findings in the inquiry report dated 18.02.2022, explanations were sought from the Assistant Engineer and the Junior Engineer vide memos dated 27.12.2022. The petitioner, apprehending foul play, as his promotion was due to the post of Superintending Engineer, where the DPC was to be held shortly, and there were only two sanctioned posts in the entire cadre of centralized services, raised a grievance in the matter, saying that he would be deprived of his consideration for the post of Superintending Engineer.

9. The Additional Chief Secretary, by the order dated 08.08.2023, proceeded to award the petitioner the major penalty of stoppage of his annual increments, besides the award of a censure. It is the petitioner's case that the impugned order takes note of the show-cause notice dated 07.10.2021 issued to the petitioner along with the inquiry report dated 12.04.2021, to which the petitioner had submitted a show-cause on 03.11.2021 as also the fact that he was afforded a personal hearing on 06.01.2022, but ignored the later development of the direction dated 09.02.2022 to hold a re-inquiry addressed to the Vice-Chairman of the Development Authority and a further inquiry report dated 18.02.2022, which exonerated the petitioner of all charges. No cognizance of this report has at all been taken. The petitioner pleads that the Additional Chief Secretary has erred in ignoring the relevant inquiry report, which was called by himself on the petitioner's plea that the earlier inquiry report's findings where he was found guilty of one charge and partly on the other, was one in violation of the principles of natural justice, which required a re-inquiry to be held. It is also pleaded that this is not a case where the Disciplinary Authority disagreed with the findings of the Inquiry Officer recorded in the later report dated 18.02.2022 submitted by the Chairman of the Development Authority. It is pleaded that if it were so, he would have caused a notice to be served framing issues of disagreement, and after hearing the petitioner, passed appropriate orders.

10. Aggrieved by the impugned order dated 08.08.2023, the instant writ petition has been instituted by the petitioner.

11. A notice of motion was issued on 11.10.2023. A counter affidavit was filed on behalf of respondent No. 1 on 29.11.2023, to which, the petitioner has filed a rejoinder. Another counter affidavit dated 17.10.2023 has been filed on behalf of respondentd Nos. 3 and 4 jointly, and still another, on behalf of respondent No. 2, the Divisional Commissioner. The parties having exchanged affidavits, when the matter came up on 14.12.2023, it was admitted to hearing, which proceeded forthwith to conclusion. Judgment was reserved.

12. Heard Mr. Sanjeev Singh and Mr. Pramod Kumar Srivastava, learned Counsel for the petitioner in support of this petition, Mr. Mahesh Chandra Chaturvedi, learned Additional Advocate General assisted by Mr. Suresh Singh, learned Additional Chief Standing Counsel appearing on behalf of respondents Nos. 1 and 2, and Mr. Suresh C. Dwivedi, learned

Counsel appearing on behalf of respondents Nos. 3 and 4, the Vice Chairman and the Secretary of the Development Authority.

13. We have carefully considered the submissions advanced by learned Counsel for the parties.

14. At the hearing, much was made of the issue by Mr. Sanjeev Singh, learned Counsel for the petitioner that the two inquiry reports, the one dated 12.04.2021 submitted by the Commissioner of the Division to the Additional Chief Secretary, and the other dated 18.02.2022 submitted by the Vice Chairman upon the direction of the State Government to record the statements of the Assistant Engineer and the Junior Engineer by the Vice Chairman of the Development Authority, when read together, exonerate the petitioner of all the four charges and, therefore, the Additional Chief Secretary, acting on behalf of the Government, could not punish the petitioner without recording reasons of disagreement with the two inquiry reports and putting the petitioner to notice. We do not think that this is a matter where both the inquiry reports ought to be acted upon. In fact, the Additional Chief Secretary has taken cognizance of the inquiry report dated 12.04.2021 submitted by the Commissioner of the Division, who was initially appointed the Inquiry Officer, and not the later one submitted by the Chairman of the Development Authority dated 18.02.2022, in compliance with the Secretary's direction dated 09.02.2022 to record the statement of the Assistant Engineer and the Executive Engineer.

15. We think that the direction of the Additional Chief Secretary carried in his memo dated 09.02.2022 addressed to the Vice Chairman of the Development Authority, upon the petitioner's answer to the show-cause notice issued to him along with a copy of the inquiry report submitted by the Inquiry Officer, the Commissioner of the Division is entirely ill-founded. It is ill-founded for two reasons. One, that if any further inquiry had to be directed, because of a fundamental flaw in procedure, the matter had to be sent back to the Commissioner, who was already the appointed Inquiry Officer and had submitted a report in the matter, on which the show-cause was issued; and the other is that the directions given to remove the anomaly by the Additional Chief Secretary to the Vice Chairman, even if these were given to the Commissioner, are entirely inappropriate. The material part of the order dated 09.02.2022 passed by the State Government, that is to say, the Additional Chief Secretary and notified on his behalf by the Deputy Secretary, reads in its material part as follows :

2- इस सम्बन्ध में श्री पूरन कुमार, अधिशासी अभियंता (वि०यॉ०), आगरा विकास प्राधिकरण, आगरा के पत्र दिनांक 06.01.2022 की छायाप्रति संलग्न कर प्रेषित करते हुए 2- मुझे यह कहने का निदेश हुआ है कि कृपया नैसर्गिक न्याय के दृष्टिगत निम्नवत सूचना शीर्ष प्राथमिकता के आधार पर शासन को उपलब्ध करान्याय व दृष्टिगत निम्नवत सूचना कष्ट करें :-

(1) प्रकरण अपचारी अभियन्ता जिन अवर अभियन्ता, सहायक अभियन्ता आदि का बयान दर्ज कराना चाहता है, उनका बयान उक्त पत्र दिनांक 06.01.2022 में किये गये अनुरोधानुसार दर्ज कराकर उपलब्ध करायें।

(2) प्रकरण में अवर अभियन्ता व सहायक अभियन्ता का उत्तरदायित्व निर्धारित, किये 2 बिना सीधे अधिशासी अभियन्ता (2) को आरोपित करने के संबंध में उक्त पत्र दिनांक 06.01.2022 में अपचारी अभियन्ता द्वारा की गयी आपत्ति के दृष्टिगत स्थिति स्पष्ट कर उपलब्ध करायें।

16. Clearly, as already observed, the inquiry in this case had been concluded by the Commissioner of the Division acting as the Inquiry Officer appointed by the State

Government. If the Additional Chief Secretary thought that statement of the Assistant Engineer or the Junior Engineer was required to be recorded during this inquiry, the jurisdiction would be that of the Inquiry Officer, who was the Divisional Commissioner, and not the Chairman of the Development Authority. The other direction in the order dated 09.02.2022 was that the Development Authority may clarify how in the absence of the Junior Engineer and the Assistant Engineer's responsibility being fixed, the Executive Engineer could be charged, as objected to by the Executive Engineer, the charge-sheeted employee, vide his memo dated 06.01.2022. Now, this was not a matter to be clarified, at the stage where proceedings stood, by the Chairman of the Development Authority. The Commissioner of the Division had already submitted his inquiry report and the State Government was the Disciplinary Authority. The Additional Chief Secretary was acting on behalf of the State Government to decide the disciplinary matter. If he thought, on the basis of the inquiry report submitted, that proceedings against the petitioner could not be taken without charging the Assistant Engineer and the Junior Engineer along with the Executive Engineer (the petitioner) or it was the Junior Engineer and the Assistant Engineer alone, who were to be charged, he could have issued appropriate orders, directing a fresh charge-sheet to be issued to the Assistant Engineer and the Junior Engineer as well, and the matter ordered to be determined afresh by the Inquiry Officer against the petitioner as well as the Assistant Engineer and the Junior Engineer, or else, the Additional Chief Secretary could have held that the petitioner was not liable to be proceeded with against, exonerated him and ordered the Junior Engineer and the Assistant Engineer to be suitably charge-sheeted and proceeded with.

17. The direction issued by the Additional Chief Secretary to the Chairman of the Development Authority to record the statements of the Assistant Engineer and the Junior Engineer was a course of action that is utterly illegal. The Chairman of the Development Authority was not the Inquiry Officer and he could not, in the circumstances, have just recorded the statements of the two officers and and sent in his own report to the State Government. It is for this reason perhaps that the Additional Chief Secretary has not looked into or taken cognizance of the Vice Chairman's report dated 18.02.2022, exonerating the petitioner of Charges Nos. 3 and 4. This does not do any credit to the Additional Chief Secretary, because it is he who is responsible for causing this anomalous report by the Vice Chairman to figure on the records.

18. So far as the validity of the impugned order passed by the State Government against the petitioner is concerned, we do not think that it can be sustained. The reason is that in answer to the assertion in paragraph No. 14 of the writ petition that no date, time and place was fixed for oral inquiry by the Commissioner and also that the petitioner could not cross-examine any witness of the Establishment, despite his request, apparently because none was produced by the Establishment, all that is said in paragraph No. 16 of the counter affidavit filed on behalf of the Commissioner is as follows :

16. That the averments contained in Paragraph No. 14 of the Writ Petition are misconceived and misleading. In reply thereto, it is submitted that personal/oral

hearing of the Petitioner was held on 06.01.2022 before the Chief Secretary, Avas Evam Vikas Shakhri Niyojan Department, Lucknow.

19. One is left to wonder what a personal hearing of the petitioner before the Additional Chief Secretary has to do with the obligation of the Establishment to produce witnesses and lead other evidence before the Inquiry Officer to prove the charges. It is too well settled for a salutary principle, which is also the mandate of Rule 7 of the Rules of 1999, that in any disciplinary matter involving the possible imposition of a major penalty, it is imperative for the Establishment to prove the charges by leading before the Inquiry Officer evidence, both documentary and oral. Hearing the petitioner personally, either by the Inquiry Officer or by the Disciplinary Authority, would not, at all, satisfy the fundamental requirements of a fair of procedure, where the Establishment have to prove charges, starting from scratch, before the Inquiry Officer, by leading evidence, both documentary and oral, that is to say, by examining witnesses.

20. A perusal of the inquiry report dated 12.04.2021 submitted by the Commissioner, Agra Division, Agra shows that the Officer has thrown the procedure to hold a major penalty to the winds, or he does not understand the elementaries about it. He has held the charges proved in a disciplinary matter involving the possible imposition of a major penalty by going through the charge-sheet and the petitioner's reply and papers annexed to the charge-sheet and reply to it. He has never convened himself as an Inquiry Tribunal, which must be done by virtue of Rule 7 of the Rules of 1999 and also by salutary principles to hold such an inquiry. The mandate of Rule 7 as well as the requirement of salutary procedure in all matters involving the possible imposition of a major penalty is that the Inquiry Officer must distance himself from the Establishment and sit as an impartial arbiter. He must assume the charges to be not at all proved to begin with, and just no more than a set of allegations. He must require the Establishment to come forth and produce evidence through a Presenting Officer, both documentary and oral, to prove the charges. It is also imperative that in cases of possible major penalty, witnesses ought to be examined. After the Presenting Officer leads evidence, introducing documents and proving them through appropriate witnesses, which, in certain cases, can be the Presenting Officer himself, the witnesses for the Establishment have to be offered for cross-examination to the charge-sheeted employee. It is after the evidence of the Establishment is over that the charge-sheeted employee has to be given opportunity to lead his evidence, which, again, can be both documentary and oral. If the charge-sheeted employee leads oral evidence, that is to say, produces witnesses, his witnesses can be cross-examined by the Establishment. These propositions are well settled by a catena of decisions by the Supreme Court and this Court, a reference to some of which may suffice. In this connection, reference may be made to the holding of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha4, Roop Singh** Negi v. Punjab National Bank and others5, State of Uttaranchal and others v. Kharak Singh6 and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another7, Smt. Karuna Jaiswal v. State of U.P.8 and State of U.P. v. Aditya Prasad Srivastava and another9.**

21. Now, the inquiry report, that has been submitted in this case by the Commissioner is based upon, as already remarked, the Inquiry Officer gleaning

through idle papers annexed to the charge-sheet and the petitioner's reply. The papers annexed to the charge-sheet and the petitioner's reply could not have been regarded as evidence. These would turn into evidence once they were properly introduced by a Presenting Officer before the Inquiry Officer and proved by witnesses or otherwise, indicating their relevance to each charge. The Inquiry Officer cannot identify himself with the Establishment and assume the charges to be proof of themselves. This is one trap that every Administrative Officer holding a departmental inquiry, at whatever position or rank he might be, invariably falls into.

22. We are constrained to say that after a string of decisions that we have noticed hereinabove, the repeat lapse by Administrative Officers serving as Inquiry Officers in major penalty matters, writing inquiry reports in breach of Rule 7 of the Rules of 1999, and otherwise also, the salutary principle regarding proof of the charges by the Establishment in a formal inquiry, producing both documentary evidence and witnesses, ought not to happen. The Additional Chief Secretary, in passing the order of punishment, has committed the same mistake as the Commissioner, apparently because both officers seem to think small of the law. Both the Commissioner and the Additional Chief Secretary must understand that once we have laid down the law, about how a particular matter is to be dealt with and the same also has imprimatur of the Supreme Court, it has to be followed and there cannot be any breach. If this breach is not remedied for the future by a suitable understanding and adherence to the law that we have declared, the immense wastage of public resource in consequence of the result of inquiries being nullified for a flawed procedure will have to be remedied by imposition of exemplary costs recoverable from the Inquiry Officers and Disciplinary Authorities; not the public exchequer.

23. In the result, this petition **succeeds** and stands **allowed**. The impugned order dated 08.08.2023 passed by the Additional Chief Secretary, Department of Housing and Urban Planning, Government of U.P., Lucknow is hereby **quashed.** The Disciplinary Authority will be at liberty to proceed with the inquiry afresh from the stage of the charge-sheet, if he so elects, bearing in mind the remarks of this Court and guidance in this judgment. In case, the Disciplinary Authority elects to pursue fresh proceedings, he will not impose a punishment higher than that awarded by the order impugned and since quashed by this judgment.

24. There shall be no order is to costs.

25. The Registrar (Compliance) is directed to communicate a copy of this order to the Additional Chief Secretary, Department of Housing and Urban Planning, Government of U.P., Lucknow. In addition, a copy of this order shall also be communicated to Nitin Ramesh Gokarn, the Additional Chief Secretary, Department of Housing and Urban Planning, Government of U.P., Lucknow, wherever he might be posted, if he is not holding charge in that department, and Amit Gupta, the then Commissioner, Agra Division, Agra, wherever he might be posted, by the Registrar (Compliance) through the Additional Chief Secretary (Personnel), Government of U.P., Lucknow and a report regarding service shall be submitted by the Additional Chief Secretary (Personnel), Government of U.P., Lucknow to the

learned Registrar General of this Court, which shall be placed on record.

(2024) 5 ILRA 522
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

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

Writ A No. 18084 of 2022

Dhirendra Kumar Chaudhary ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kapil Dev Singh Rathore, Vikram Dev Singh Rathore

Counsel for the Respondents:
Abhishek Srivastava, C.S.C., Devesh Vikram

A. Service Law – Dismissal from Service – Post of Peon – Disciplinary proceeding – Charges may likely to lead imposition of a major penalty – Burden of proof, on whom lie – Held, it is the burden of the Establishment to prove the charge/charges by leading evidence in the first instance, both documentary and oral, before an Inquiry formally convened through a Presenting Officer. (Para 28)

B. Service law – Disciplinary proceeding – Principle of natural justice – Applicability – Evidence considered by the inquiry officer were not put to the petitioner's notice – Effect – Held, all the technical evidence, that the Disciplinary Authority and the Inquiry Committee took into consideration, was not brought to the petitioner's notice with opportunity to him to rebut the same. In the absence of all this being done the findings of the Disciplinary Authority and the Appellate Authority are utterly vitiated for violation of principles of natural justice that have led to demonstrable prejudice to the petitioner. The result would be that all proceedings, beyond the chargesheet, stand vitiated. (Para 34 and 36)

Writ petition allowed. (E-1)

List of Cases cited:

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

2. Roop Singh Negi Vs Punj. National Bank & ors.; (2009) 2 SCC 570

3. St. of Uttaranchal & ors.Vs Kharak Singh; (2008) 8 SCC 236

4. St. of UP & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

6. St. of UP Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB) (LB).

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

1. This writ petition is directed against an order of the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow *(for short, 'the Corporation')* dated 23.07.2021, dismissing the petitioner from service, besides directing recovery, and the appellate order of the Corporation Board dated 18.02.2022, dismissing the petitioner's appeal arising out of the order passed by the Chairman aforesaid.

2. The petitioner was appointed a Peon with the erstwhile Uttar Pradesh State Electricity Board on 11.04.1997. Subsequently, upon establishment of the Uttar Pradesh Power Corporation Limited and its subsidiary Distribution Companies, including the Purvanchal Vidyut Vitran Nigam Limited, the Uttar Pradesh State Electricity Board was dissolved. The

petitioner and other employees of the Board were transferred to the Corporation. The petitioner was posted with Purvanchal Vidyut Vitran Nigam Limited, Varanasi (hereinafter, referred to as the Distribution Corporation). The Corporation, considering the petitioner's unblemished service record, granted him promotion to the post of an Office Attendant. He was serving on the said post until the date of the impugned order.

3. In the year 2017, a Human Rights Organization, called Teesri Ankh through its founder, one Shailendra Kumar Mishra, laid complaints to the Distribution Corporation regarding incorrect revision/correction of electricity bills of consumers. Upon receipt of the said complaint, the Director (P&A) of the Corporation, *vide* order dated 21.05.2017, constituted a three member Inquiry Committee to hold a preliminary inquiry into the veracity of the allegations. The three member Committee probed the matter and submitted reports dated 17.11.2017 and 01.06.2018 to the Director (P&A), last mentioned. Upon receipt of the reports, the Director (P&A), vide a letter dated 17.09.2018, transferred the matter to himself for the purpose of instituting disciplinary proceedings against the officer and employees, including the petitioner, as indicated in the letter. Subsequently, a charge-sheet dated 22.04.2019 was issued to the petitioner by a two member Inquiry Committee comprising the Chief Engineer and the Accountant of the Corporation.

4. A perusal of the charge-sheet shows that though it carries a solitary charge but, in fact, it relates to seventy different consumers about whom there were allegations regarding irregular proceedings to rectify their electricity bills and electricity disconnections, without following the guidelines of the Corporation as well as ignoring the provisions of the Electricity Supply Code, 2005 in order to give undue benefit to the consumers, causing wrongful loss to the Corporation and wrongful gain to himself. The evidence cited in support of the charge are sixteen complaints by Shailendra Kumar Mishra, founder General Secretary of *Teesri Ankh*, the Human Rights Organization, Gorakhpur and a letter of the Director of the Distribution Corporation dated 17.09.2018. In answer to the charge-sheet dated 22.04.2019, issued to the petitioner, he submitted a reply dated 19.06.2019.

5. It is the petitioner's case that no formal notice regarding fixation of a date for inquiry was given to the petitioner but the petitioner was informally informed by the Executive Engineer, Electricity Distribution Division of the Distribution Corporation about the date of hearing. The petitioner appeared before the Inquiry Committee which recorded the petitioner's statement. It is, particularly, pleaded in paragraph no. 18 of the writ petition that the Inquiry Committee did not inform the petitioner about any other proceedings nor the date was fixed by the Inquiry Committee, except the last mentioned date, where the statement of the petitioner alone was recorded.

6. It is averred in paragraph no. 19 that except recording the petitioner's statement, no evidence whatsoever was led before the Inquiry Committee by anybody. In paragraph no. 22 it was averred that the testimony of Shailendra Kumar Mishra, Naveen Kumar Srivastava and S.P. Varshney was never recorded by the Inquiry Committee during the inquiry. Further, the Inquiry Committee did not give opportunity to cross-examine witnesses. The Inquiry Committee submitted their report to the Corporation. It is averred by the petitioner in

paragraph no. 23 that the Corporation, by their order dated 27.07.2020, remitted the matter to the Inquiry Committee.

7. It is the petitioner's case in paragraph no. 24 that after the earlier report by the Inquiry Committee was remitted for consideration by the Corporation by their order of 27.07.2020, no further inquiry was held by the two member Committee. The Inquiry Committee submitted a fresh report dated 05.09.2020.

8. In the inquiry report, that was submitted, as already noticed, in the garb of a solitary charge, there are seventy distinct charges relating to seventy different consumers. The Inquiry Committee, therefore, in their conclusion gave a finding differently in relation to the different consumers mentioned at serial no. 1 to 70 of the charge. The findings of the Inquiry Committee read:

क०सं०	बिल संशोधन की स्थिति	आरोप संख्या-01
1.	बिल संशोधन निमानुसार है।	कम सं0-07, 08 09, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 25, 26, 27, 29, 32, 33, 34, 35, 37, 38, 42, 49, 51, 53, 54, 55, 58, 60, 61, 63, 67, 69 एवं 70
2.	बिल संशोधन त्रुटिपूर्ण है।	कम सं0-02 04 05, 06, 10, 22, 24, 28, 30, 31, 36, 39, 40, 41, 43, 44, 50, 52, 59 एवं 66
3.	बिल संशोधन में आंशिक त्रुटि दर्शित है।	कॅम सं0-17 एवं 68
4.	आरोपित सेवक से संबंधित नहीं है।	कम सं0-01, 03, 11, 45, 46, 47, 48, 56, 57, 62, 64 एवं 65

संदर्भित प्रकरण में कुल 70 बिल संशोधन / पी०डी० प्रकरणों की जाँच की गयी जिसमें से 12 नग प्रकरण (उपरोक्त तालिका में अंकित) आरोपित सेवक से संबंधित नहीं पाये गये, शेष 58 नग प्रकरणों में से 36 प्रकरणों में बिल संशोधन नियमतः पाया गया तथा कोई भी त्रुटि दर्शित नहीं है। शेष 22 बिल संशोधनों के प्रकरणों में त्रुटि/आंशिक त्रुटि दर्शित है। उक्त 22 प्रकरणों में से 3 नग प्रकरणों (कम सं० 5, 39 एवं 40) में कॉरपोरेशन को पहुँचाई गयी वित्तीय क्षति की धनराशि रू0 61,967.00 आगणित होती है तथा शेष 19 नग प्रकरणों में संदर्भित कम संख्या पर अंकित कारणों के दृष्टिगत वित्तीय क्षति की गणना किया जाना संभव नहीं है।

कॉरपोरेशन के आदेश स0-87-प्र०सु०-०1/पाकाली/2002-20-प्र०सं०/2000 दिनांक 25.02.2000 के अनुसार विद्युत बीजकों में संशोधन किये जाने हेतु संबधित बिल क्लर्क का प्राथमिक उत्तरदायित्व, सहायक अभियन्ता(रा०) एवं लेखाकार(रा०) का पर्यवेक्षणीय उत्तरदायित्व तथा अधिशासी अभियन्ता का प्रशासकीय उत्तरदायित्व निर्धारित है। अतः कॉरपोरेशन को पहुँचाई गयी उपरोक्त वित्तीय क्षति हेतु संबंधित बिल लिपिक, सहायक अभियन्ता(रा०), लेखाकार(रा०) तथा अधिशासी अभियन्ता (आरोपित सेवक) उत्तरदायी है।

साथ ही यह भी अवगत कराना है कि प्रश्नगत बिल संशोधन/स्थायी विच्छेदन के अधिकांश प्रकरणों को तत्कालीन सहायक अभियन्ता(रा०) द्वारा भी हस्ताक्षरित किया गया है। किन्तु संदर्भित सहायक अभियन्ता (राजस्व) के विरुद्ध अनुशासनिक कार्यवाही का प्रकरण जाँच समिति को संदर्भित नहीं किया गया है।

9. It is averred in paragraph no. 25 of the writ petition that, from 27.07.2020 to 04.09.2020, no inquiry whatsoever was conducted by the two member Committee nor the petitioner associated with the proceedings in any manner. The Inquiry Committee, without conducting any further inquiry, submitted their report dated 05.09.2020.

10. After receipt of the inquiry report dated 05.09.2020 on the 11th of December, 2020, the Director (P&A) of the Corporation issued directions to the Chief Engineer (Distribution) of the Distribution Corporation, Gorakhpur Region, Gorakhpur

to constitute a two member Committee to conduct an inquiry with regard to the revision of bills of twenty three consumers.

11. In compliance with the said order dated 11.12.2020, the Chief Engineer constituted a two member Inquiry Committee, comprising one A.K. Singh, Superintending Engineer, Electricity Works Division, Gorakhpur and Manoj Kumar Verma, Deputy Chief Accounts Officer, Gorakhpur to conduct an inquiry into revision of the specified bills of consumers. This two member Committee submitted a report, along with a letter dated 25.01.2021, issued by the Superintending Engineer. The aforesaid report was forwarded by the Chief Engineer (Distribution) of the Distribution Corporation to the Director (P&A) of the Corporation vide letter dated 27.01.2021.

12. Still later, the Director (P&A) sought a further report from the I.T. Cell of the Corporation and did receive a report from them. The Chairman of the Corporation, vide letter dated 31.03.2021, enclosing a copy of the inquiry report dated 05.09.2020, submitted by the two member Committee, and, also a copy of the incorrect/partially incorrect electricity bills together with a calculation sheet computing the financial loss, required the petitioner to show cause. This was the second show cause. In response to the second show cause, the petitioner submitted his objections of June, 2021.

13. On 23.07.2021, the Chairman of the Corporation passed the impugned order dismissing the petitioner from service and further imposing upon him the penalty of recovery of a sum of Rs. 3,88,584/-. The petitioner preferred an appeal dated 27.09.2021 to the Board of Directors through the Chairman of the Corporation. It is the petitioner's case that he submitted a voluminous 350 pages of documents in support of this appeal but that may not be very relevant to the point on which the decision of this matter turns. The Board of Directors, by their order dated 18.02.2022, rejected the petitioner's appeal and affirmed the punishment awarded by the Chairman of the Corporation.

14. Aggrieved by the order dated 23.07.2021, passed by the Chairman of the Corporation and the appellate order made by the Board of Directors dated 18.02.2022, this writ petition has been preferred by the petitioner under Article 226 of the Constitution.

15. A counter affidavit was filed on behalf of the Corporation. When the matter come up for admission on 08.12.2023, the parties having exchanged affidavits, it was admitted to hearing which proceeded forthwith. Judgment was reserved.

16. Heard Mr. Kapil Dev Singh Rathore, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel appearing for respondent nos. 2, 3 and 4, the contesting respondents and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing for respondent no. 1.

17. It is argued by the learned Counsel for the petitioner that on the strength of the averments in paragraph no. 43 of the writ petition that during the inquiry at no point of time, any evidence was led on behalf of the Establishment, documentary or oral, to establish the charges. No witness was examined by the Establishment to prove the charges or the documents sought to be relied upon.

18. A perusal of the charge-sheet shows that the documents relied upon are

sixteen complaints by Shailendra Kumar Mishra and a letter from the Director (P&A) dated 17.09.2018. Neither of these documents have been substantiated in evidence against the petitioner nor an effort made to prove these documents by examining the authors. It is urged that at least the complainant, who has submitted the sixteen complaints, ought to have been examined as a witness at the inquiry.

19. It is further submitted that, besides the sixteen complaints and the letter of the Director (P&A), no other document was relied upon by the respondents or produced during the inquiry. It is specifically pointed out by the learned Counsel for the petitioner, with reference to paragraph no. 46 of the writ petition, that neither Shailendra Kumar Mishra nor the three members of the Committee, doing the preliminary inquiry, were examined as witnesses before the Inquiry Committee.

20. It is emphasized that the inquiry report, submitted by the two member Committee, was initially submitted and discarded by the Disciplinary Authority vide order dated 27.07.2020 and the matter remitted for further inquiry. After the matter was remitted on 27.07.2020 the inquiry, that was conducted between 27.07.2020 and 31.08.2020, leading to the inquiry report dated 05.09.2020, did not at all associate the petitioner with it. It is argued that no inquiry, whatsoever, was held between 27.07.2020 and 04.09.2020 by the Inquiry Committee.

21. The learned Counsel for the petitioner submits that the Disciplinary Authority, if it thought fit to discard the inquiry report originally submitted, ought to have intimated the petitioner of the matter, and, more than that, the Inquiry Committee, upon resuming the inquiry, after the matter was remitted, should have intimated the petitioner about the further inquiry that was being undertaken where the petitioner should have been called and the Establishment required to prove the charges in his presence by leading evidence, both documentary and oral. This was not at all done.

22. A serious exception is also taken to the course of action where, after receipt of the inquiry report dated 05.09.2020, a fresh inquiry report was invited in regard to twenty three cases of objectionable billing, according to the respondents' case.

23. It is also urged that there was absolutely no reason after two inquiry reports had been received, to call for a report from the I.T. Cell of which there is no copy available to the petitioner. Whatever the I.T. Cell inquired, the petitioner was never associated with it.

24. It is emphasized further that the two member Committee subsequently asked to look into the twenty three cases and the I.T. Cell never associated the petitioner though both put in their reports to the Disciplinary Authority, on the foot of which the impugned order has been passed.

25. In the counter affidavit, there is an omnibus and a vague denial of the averments very specifically taken in the writ petition.

26. Mr. Abhishek Srivastava, learned Counsel for the Corporation, points out that the petitioner was given full opportunity of personal hearing before the Inquiry Committee on 12.09.2019. The petitioner had also taken ten days' time to file his supplementary reply. He never

showed interest to examine/cross-examine witnesses, leading to the inquiry proceedings being completed.

27. It is also urged by Mr. Srivastava that the petitioner did not dispute the documents supplied to him or their genuineness and cannot, therefore, say that no witness was examined to prove the same. The entire procedure, for holding a disciplinary inquiry, was punctiliously followed as the learned Counsel for the Corporation would submit.

28. This Court, upon consideration of the parties' case, is of opinion that the respondents' stand cannot be accepted for more than one reason. The foremost requirement of a valid inquiry in any disciplinary proceedings likely to lead to the imposition of a major penalty is the salutary principle that it is the burden of the Establishment to prove the charge/charges by leading evidence in the first instance, both documentary and oral, before an Inquiry formally convened through a Presenting Officer.

29. It is also imperative that as part of the evidence, witnesses on behalf of the Establishment be examined in all matters where a major penalty is likely to be imposed. Someone has to introduce and prove idle papers and turn them into speaking documents. This is not a case where the petitioner has admitted the documents by endorsement that the respondents have relied upon.

30. Another feature of the matter is that the documents relied upon by the Establishment are mere complaints of misconduct alleged against the petitioner. These are not documents that comprise evidence aliunde. If for the purpose of sustaining the charges, the respondents have looked into some other documents from their records, which have not been cited in the charge-sheet, it is a serious infraction of natural justice for that would amount to consideration of evidence behind the petitioner's back. To add to it is the feature that after the inquiry report dated 05.09.2020, a further inquiry report was called by the Disciplinary Authority, which was in regard to twenty three matters of objectionable revision of bills. This report was apparently submitted by another Inquiry Committee on 25.01.2021. To add to it, the Disciplinary Authority appears to have sought information and report from the I.T. Cell of the Corporation and also considered the material provided by the I.T. Cell. All this material was considered behind the petitioner's back without bringing it to his notice and providing him an opportunity to rebut it.

31. It is also not apparent from the reports of the Inquiry Committee, two in number, that they have convened themselves into a formal Inquiry tribunal distancing themselves from the Establishment and required the Establishment to prove the charges by leading evidence, both documentary and oral (witnesses). It is imperative in a matter involving the imposition of a major penalty that the Inquiry Committee should distance themselves from the Establishment, even if otherwise a part of it and act as impartial arbiters. They must require the Establishment to prove the charges by leading documentary as well as oral evidence in the first instance. The Inquiry Committee here appear to have sat with the presumption that the charges are proof of themselves, instead of requiring the Establishment, in the presence of the petitioner, to lead their evidence through a

Presenting Officer, both oral and documentary.

32. The only fair procedure for an inquiry, that would be countenanced by law, was that the Establishment ought to have been required to prove the charges against the petitioner in relation to each of the seventy and odd cases of irregular billing by producing both documentary and oral evidence through a Presenting Officer. The witnesses examined should have been offered for the petitioner's cross-examination. After this stage was over, the petitioner was to be given opportunity to likewise produce his evidence in defence, both documentary and oral. If he chose to lead oral evidence as well, the petitioner's witnesses in defence too would be cross-examined by the Establishment. If the petitioner did not lead any evidence it would not absolve the Establishment from leading evidence to prove the charges before the Inquiry Committee. We do not think that the Inquiry Committee ever distanced themselves from their loyalties to the Establishment and always understood the charges to be sponsored by themselves. They regarded the charges proved to begin with or at least *prima facie* and expected the petitioner to dispel them. This is not the procedure by which charges in a departmental inquiry, involving the imposition of a major penalty, can be proved much less sustained. In this connection, reference may be made in support of the the salutary principle mentioned to the decision of the Supreme Court **in State of Uttar Pradesh and others v. Saroj Kumar Sinha (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank and others (2009) 2 SCC 570, State of Uttaranchal and others v. Kharak Singh (2008) 8 SCC 236** and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another 2018 (9) ADJ 397 (DB) (LB), Smt. Karuna Jaiswal v. State of U.P. 2018 (9) ADJ 107 (DB) (LB) and State of U.P. v. Aditya Prasad Srivastava and another 2017 (2) ADJ 554 (DB) (LB).**

33. This case has more than just these issues about the failure of the Establishment to prove the charges in the manner they have to be in a case involving the imposition of a major penalty. The reason is, we think that here is a case, where the Disciplinary Authority has looked into more than one inquiry report and also a report from the I.T. Cell. The evidence, cited in support of the charge, is hardly any evidence. It is just a bunch of complaints by a man called Shailendra Kumar Mishra representing some self-styled Human Rights Organization called *'Teesri Ankh'*. The complaints can hardly be regarded as documents in proof of seventy different cases of incorrect or flawed revision of bills of consumers. These charges or irregularities can be substantiated on the basis of documents and oral evidence forthcoming from the Establishment of the Corporation. That kind of evidence, except for a letter written by the Director (P&A), is simply not mentioned in the charge-sheet.

34. The discussion on charges by the Inquiry Committee shows that they have considered evidence in intricate details about billing et cetera which apparently has never been put or brought to the petitioner's notice during the inquiry. It has been considered by the Inquiry Committee and by the Disciplinary Authority absolutely behind the petitioner's back. Also, the Disciplinary Authority has relied upon another inquiry report dated 31.03.2021 but the second show cause, that was given to the petitioner, carries with it only one report, that is to say, the first report of the Inquiry

Committee dated 05.09.2020, not the other report dated 31.03.2021.

35. It is also true that some information was also sought from the I.T. Cell of the Corporation. Unless a categorical case was taken in the counter affidavit that the report of the I.T. Cell was not at all taken into consideration or the fact mentioned in the impugned order explicitly, it has to be presumed that the later report by the other Inquiry Committee, dated 31.03.2021, and, also some reports by the I.T. Cell, were considered by the respondents in arriving at their conclusions. Logically as well, given the intricate and technical nature of the charges, it is most likely that all kinds of evidence of technical detail would have been considered by the Disciplinary Authority, a fact also reflected from the orders impugned. But, the issue is: if this evidence, before being taken into consideration, was put to the petitioner during the inquiry in which he participated, in whatever manner he was allowed.

36. We do not think that all the technical evidence, that the Disciplinary Authority and the Inquiry Committee took into consideration, was brought to the petitioner's notice with opportunity to him to rebut the same. In the absence of all this being done the findings of the Disciplinary Authority and the Appellate Authority are utterly vitiated for violation of principles of natural justice that have led to demonstrable prejudice to the petitioner. The result would be that all proceedings, beyond the charge-sheet, stand vitiated and it would remain open to the respondents to proceed against the petitioner *de novo* from the stage of the charge-sheet.

37. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 23.07.2021 passed by the Chairman of the Corporation and the appellate order dated 18.02.2022 passed by the Corporation Board are hereby **quashed.** The petitioner shall be reinstated in service forthwith and paid his current salary regularly. The respondents shall be free to pursue fresh proceedings against the petitioner from the stage of the charge-sheet, bearing in mind the guidance in this judgment. If the respondents elect to pursue fresh proceedings, arrears of emoluments for the period of time that the petitioner has remained out of employment shall not be payable immediately. These shall abide by the event in the disciplinary proceedings. If the respondents do not elect to pursue fresh proceedings against the petitioner, he will be entitled to 50% of his emoluments for the period of time that he has remained out of employment. It is further ordered that in case the respondents elect to pursue fresh proceedings, it would be open to the respondents to place the petitioner under suspension pending disciplinary proceedings, which shall then be expedited and concluded early, wherein the petitioner shall cooperate. It is further ordered that in the event, the petitioner is placed under suspension by the respondents, the respondents shall be obliged to ensure prompt and regular payment of subsistence allowance to the petitioner during the period of suspension, which they will pay without asking the petitioner to produce a non-alternative engagement certificate.

39. There shall be no order as to costs.

40. Let this judgment be communicated to the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow and the Managing Director, Uttar Pradesh Power Corporation Limited,

Lucknow through the Civil Judge (Senior Division), Lucknow by the Registrar (Compliance).

(2024) 5 ILRA 530
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ A No. 23843 of 2018

Sanjay Kumar Singh & Ors. ...Petitioner
Versus
District Basic Education Officer, Jaunpur & Ors. ...Respondents

Counsel for the Petitioner:
Adarsh Singh, Indra Raj Singh

Counsel for the Respondents:
Abhishek Srivastava, C.S.C., Mrigraj Singh

A. Service Law – Appointment – Post of Assistant Teacher – Selection was made after obtaining prior approval and appointment was also accorded approval – Salary was stopped – Validity challenged – Neither approval was ever recalled nor the petitioner was ever suspended or terminated – No material to proof collusion with St. authorities in any manipulation was produced – Effect – Held, the appointment of the petitioners cannot be said to be illegal as after due selection interviews were made in presence of the nominee of the District Basic Education Officer. Thereafter, approval was granted on 21.8.2003 after duly being satisfied by the District Basic Education Officer – The salary of the petitioners cannot be withheld or stopped unless petitioners are suspended or dismissed from service – High Court issued mandamus to pay arrears of salary and allow all the consequential benefits. (Para 19, 26, 31, 32 and 46)

Writ petition allowed. (E-1)

List of Cases cited:

1. Radhey Shyam Yadav Vs St. of U.P. & ors.; 2024 AIR (SC) 260

2. Civil Appeal No. 3904 of 2013; Nahar Singh & ors. Vs St. of U.P. & ors. decided on 14.07.2017

3. Special Leave Petition (Civil) Diary No. 7348 of 2024; Basic Shiksha Adhikari, District Basti & anr. Vs Uday Pratap Singh & ors. decided on 16.04.2024

4. Special Appeal (Defective) No. 870 of 2023; Basic Shiksha Adhikari, District Basti & anr. Vs Uday Pratap Singh & ors. decided on 19.01.2024

5. Civil Appeal Nos. 7634-7635 of 2022; Professor (Dr.) Srejith P.S. Vs Dr. Rajasree M.S. & ors. decided on 21.10.2022

6. St. of Odisha & ors. Vs Sulekh Chandra Pradhan etc.; 2022 LiveLaw (SC) 393

7. Misc. Application Diary No. 4303/2024; Devesh Sharma Vs U.O.I.decided on 08.04.2024

8. Special Appeal (Devective) No. 890 of 2023; St. of U.P. & ors. Vs Ram Avtar Singh & ors. decided on 09.01.2024

9. Civil Appeal No. .. of 2024 (Arising out of SLP (C) Nos. 22241-42 of 2016; Vinod Kumar & ors. Vs U.O.I.decided on 30.01.2024

10. Sandeep Kumar Vs G.B. Pant Institute of Engineering and Technology, Ghurdauri; 2024 0 Supreme (SC) 346

11. C/M Dadaur Inter College, Dadaur, Rae Bareilly Vs District Inspector of Schools, Rae Bareily & ors.; 1985 UPLBEC 1378

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Sri Adarsh Singh, learned counsel for he petitioners and Sri Abhishek Srivastava, learned Chief standing counsel for the State-respondents.

2. By means of the present writ petition, the petitioners have prayed to issue a writ, order or direction in the natue of mandamus commanding the respondent no.1- District Basic Education Officer, Jaunpur to grant salary to the petitioners on the posts of Assistant Teachers in the institution namely, Keshav Nath Senior Basic School, Horaiya, Ram Nagar Vidhmauwa, Jaunpur along with arrears, within stipulated time as may be fixed by Hon'ble Court as well as permit them to work.

3. Counsel for the petitioners submits that on 25.5.2003 Authorised Controller was appointed in the Institution in question. Thereafter permissioin was sought for apppointment of four Assistant Teachers by the Athorised Controller vide letter dated 28.7.2003. The approval was accorded by the District Basic Education Officer, Jaunpur on 29.7.2003. Thereafter advertisement with regard to appointment of Assistant Teachers was published in the newspaper in which interview was fixed for 14.8.2003.

4. The petitioners being duly qualified and eligible applied for the posts. The Selection Committee including the nominee of the District Basic Education Officer, Jaunpur conducted the interview. After conclusion of the interview, the petitioners were found most suitable candidates amongst all the candidates and their names were recommended by the Selecton Committee.

5. On 15.8.2003 the Authorised Controller of the Institution forwarded all the requisite papers pertaining to selection of the petitioners on the posts of Assistant Teacher to the District Basic Education Officer, Jaunpur for approval. On 21.8.2003 the District Basic Education Officer, Jaunpur after verifying the requisite documents and after duly satisfied accorded approval for selection of the petitioners on the post of Assistant Teachers. Thereafter the petitioners joined on the post of Assistant Teachers in the Institution in question and were discharging their duties diligently. Salary was paid to the petitioners by the Finance and Accounts Officer in the office of the District Basic Education Officer, Jaunpur.

6. He further submits that one Bachai Singh has filed Civil Misc. Writ Petition No. 4888 of 2007 before this Court and by order dated 31.1.2007 payment of salary to the petitioners was stayed. By order dated 11.4.2018 the said writ petition was dismissed and the interim order stood vacated.

7. He further submits that some enquiry was made behind the back of the petitioners but neither any disciplinary proceedings were initiated nor suspension order was passed nor services of the petitioners were terminated till date nor approval granted by the District Basic Education Officer, Jaunpur on 21.8.2003 was recalled.

8. He further submits that in pursucance of the ex parte report of the year 2008, first information reports had been lodged against the petitoners and charge sheet had been submitted to which application under section 482 Cr. P.C. had been filed in which interim order had been passed.

9. He further submits that for approval of appointment of the petitioners as Assistant Teachers papers were forwarded by the Authorised Controller and on his

application approval was granted by the District Basic Education Officer, Jaunpur, who happens to be State Authorities. He further submits that apart from bare allegation absolutely no material is on record to show how the petitioners had colluded for any manipulation, therefore, the petitioners should not be penalised for none of their fault.

10. In support of his submissions counsel for the petitones relied upon the judgments of the Apex Court in **A(i) Radhey Shyam Yadav vs. State of U.P. And others (2024 AIR (SC) 260; (ii) Civil Appeal No. 3904 of 2013 (Nahar Singh and othrs vs. State of U.P. And others) decided on 14.7.2017; (iii)Special Leave Petition (Civil) Diary No. 7348 of 2024 (Basic Shiksha Adhikari, District Basti and another vs. Uday Pratap Singh and others) decided on 16.4.2024; (B)**Division Bench judgment of this Court in Special Appeal (Defective) No. 870 of 2023 **(Basic Shiksha Adhikari, District Basti and another vs. Uday Pratap Singh and others)** decided on 19.1.2024.

11. Per contra, learned Chief Standing counsel submits that while making appointment of the petitioners, provisions of the Act and Rules have not been complied with. He specifically referes to Rules, 4,5, and 7 of the Uttar Pradesh recognized Basic Schools (Junior High Schools) (Recruitment and conditions of Service of Teachers) Rules, 1978. He further submits that in absence of compliance of specific provisions the appointment of the petitioners are illegal as well as bad in law, therefore, the salary of the petitioners have rightly been stopped.

12. He futher submits that in pursuance of the order dated 31.1.2007 of this Court an enquiry was conducted and enquiry report was prepared on 24.3.2008, a copy of which has been filed along with the counter affidavit. He futher submits that in the said enquiry various defects/deficiencies in the process of appointment of the petitoners were found. The advertisements were not made in two news papers as well as required details were also not mentioned in it. He further submits that the petitioners do not have the requisite qualifications to be appointed as Assistant Teachers, therefore, the appointment is void ab initio.

13. He further submits that in pursuance of the enquiry report dated 24.3.2008 first information report was lodged in which charge sheet has been submitted and congnizance has been taken by the officer concerned.

14. In support of his contention he has relied upon the judgments of the Apex Court in **(A) (i)** Civil Appeal Nos. 7634-7635 of 2022 **(Professor (Dr.) Srejith P.S. vs. Dr.Rajasree M.S. And others**) decided on 21.10.2022**,; (ii) State of Odisha and others vs. Sulekh Chandra Pradhan etc**. (2022 LiveLaw(SC) 393)**; (iii) Devesh Sharma vs. Union of India** (Misc. Application (Diary No. 4303/2024 decided on 8.4.2024**; (B)** Division Bench Judgment of this Court in Special Appeal (Devective) No. 890 of 2023 **(State of U.P. And others vs. Ram Avtar Singh and others)** decided on 9.1.2024.

15. Rebutting the submission of the learned Chief Standing Counsel, counsel for the petitoners submits that the appointments of the petitioners cannot be said to be illegal. He further submits assuming without admitting for the sake of argument that the appointment of the petitioners can be said to be irregular only. He further submits that in

pursuance of ex parte enquiry report dated 24.3.2008 only first informaton report has been lodged against the petitioners as they are beneficiary but no action against the erring officer has been brought on record. In support of his submission he has relied upon the judgment of the Apex Court in Civil Appeal No. .. of 2024 (Arising out of SLP (C) Nos. 22241-42 of 2016) **(Vinod Kumar and others vs. Union of India)** decided on 30.1.2024.

16. He further submits that it is not in dispute that neither the petitoners were suspended nor charge sheets were issued to them, nor the petitoners' services have been terminated. In support of his submission he has relied upon the recent judgment of the Apex Court in **Sandeep Kumar vs. G.B. Pant Institute of Engineering and Technology, Ghurdauri** (2024 0 Supreme (SC) 346. He further submits that the Apex Court has held that if the procedure prescribed under the Rules has not been complied with the services of the petitioners cannot be terminated. He prays that a writ of mandamus be issued to the respondents for payment of salary to the petitoners regularly.

17. After hearing the learned counsel for the parties, the Court has perused the record.

18. It is not in dispute that in the Institution in question the Authorised Controller was appointed by the District Basic Education Officer who sought permission for filling up the vacancies of the Assistant Teachers. After due approval on 29.7.2003 by the District Basic Education Officer the advertisement was issued. The selection was held in presence of the nominee of the District Basic Education Officer. After concluding the interview selected names of the candidates were forwarded by the authorised controller for approval by the District Basic Education Officer. It is also not in dispute that by order dated 21.8.2003 the District Basic Education Officer after verification of the requisite documents and after duly satisfied granted approval for selection of the petitioners on the post of Assistant Teachers. Thereafter the petitioners joined their duties and payment of salary was also made to them. But payment of salary was stopped in pursuance of order dated 31.1.2007 passed in Writ Petition No. 4888 of 2007. On 11.4.2018 the said writ petition was dismissed and stay order stook vacated.

19. It is a matter of record that an enquiry was instituted in pursuance of the order dated 31.1.2007 passed by this Court in public interest litigation in which a report was prepared on 24.3.2008. In pursuance thereof the only action was taken against the petitioners by way of stopping their salary and were restrained from discharging their duties but nothing has been brought on record that after the report was prepared in the year 2008 any notice was issued to the petitioners. It is also not in dispute that no material have been brought on record on behalf of the State to show that either the petitioners were suspended from services or charge sheets were issued to them or services of the petitioners were terminated. Further the respondents have not brought on record any material to show that the approval granted on 21.8.2003 by the District Basic Education Officer for appointment of the petitoners on the post of Assistant Teachers has been recalled.

20. Further it is not in dispute that after the report dated 24.3.2008 alleging that the petitioners were in collusion with the State Authorities but no departmental action has been taken agianst the erring officers of

the State. No material has been broght on record to show that any action has been taken against the erring officers except filing of first information report against the petitioners. The affidavits filed by the respondents, not a single word has been whispered about the same. Further in-turn the respondent authorities gave a safe passage to the erring officers to superannuate. Even after retirement no acton has been taken against the erring officers within the stipulated time povided in the Service Rules. The conduct of the respondent authorities shows that the petitioners are only made scape goat leaving aside the role of the erring officers.

21. On the aforementioned facts the Court proceeds to examine the arguments raised as well as judgments relied upon by the counsels.

22. The record of the case in hand shows that there is only bald allegation about colluding of the petitioners with the State Authorities but no material has been brought on record.

23. The Apex Court in the judgment of **Radhey Shyam Yadav** (supra) has held in the relevant pagraph nos. 5, 6, 8, 10, 14, 15, 33 and 34 as follows:

5. Thereafter, responding to the letter of the School, the District Basic Education Officer by his letter of 20.11.1998 accorded permission to issue advertisement for appointment of three posts of Assistant Teachers. On 25.11.1998, an advertisement was issued. The School, thereafter, on 08.12.1998, wrote a letter to the District Basic Education Officer to nominate a Member for the selection of the teachers.

In response, the District Basic Education Officer nominated the Assistant District Basic Education Officer, Bahorikpur as a Member of the Selection Committee. The Selection Committee duly met and considered the twelve applications received by it. Seven out of the twelve applicants, including the three appellants herein, participated in the interview.

By its letter of 27.12.1998, the Selection Committee informed the District Basic Education Officer that the appellants, on basis of their ability, have been selected and their case was being submitted for approval. The order in which the Selection Committee has sent subjectwise names were as follows:

i. Lal Chandra Kharwar - Science and Math

ii. Radhey Shyam Yadav - English

iii. Ravindra Nath Yadav - Agric & Gen.Topic

It is not disputed that by an order of 09.06.1999, the District Basic Education Officer granted approval for the appointment of the appellants. As stated earlier, they were appointed on 25.06.1999 and were working continuously.

6. The undisputed case is that from October, 2005, their salaries were stopped from being disbursed, forcing them to file Writ Petitions in the High Court, namely, Civil Misc. Writ Petition No. 10286 of 2007 and Civil Misc. Writ Petition No. 18641 of 2008. The three appellants, in all, filed two writ petitions. In the writ petitions, the prayer was for a writ of mandamus commanding the respondents to pay the arrears of salary from July, 1999 to January, 2002 and continue to pay salary from October, 2005. It was their case that

from the date of appointment till January 2002, their salary had not been released.

8. Apart from this bare allegation, absolutely no material was placed on record to show how the appellants had colluded or were blameworthy for any manipulation.

10. The Learned Single Judge, by order dated 10.09.2013, held that if based on the forged order, proceedings were initiated for the selection of Assistant Teacher, then the entire selection needs to be cancelled. It was also held that since forgery was committed by the persons involved in the selection of Assistant Teachers and since the selection process was not fair, being based on a forged letter, the candidates who were selected in the selection process are not entitled to be appointed and retained on the post of Assistant Teacher, and holding so, the writ petitions were dismissed. The appellants filed writ appeals. By the impugned order, the appeals were dismissed reiterating the findings of the learned Singe Judge.

14. We have given our thoughtful consideration to the matter and considered the submissions of the rival parties and perused the records. The correspondence between the School and the Directorate of Education culminated in the order of 26.12.1997. There is a dispute about the number of posts that were sanctioned. According to the State, two posts were, in fact, sanctioned and it was the School that manipulated it, to make it three. We will proceed on the basis that the version of the State is correct.

The nominee of the State participated in the selection process. Twelve candidates had applied and ultimately three appellants were empanelled for selection. Due approval was given for the appointment and admittedly they discharged their duties on their post from 25.06.1999 till September, 2005. Even according to the State, admittedly, till date there is no order terminating their services. What impelled the appellants to go to the High Court was the stoppage of their salary.

15. There is not an iota of material to demonstrate how the appellants, who were applicants from the open market, were guilty of colluding in the manipulation.

33. This judgment in Sachin Kumar (supra) is clearly distinguishable from the case at hand. First of all, Sachin Kumar (supra) involved the cancellation of the selection process before any appointments were made. No rights were crystallized to any of the candidates. The issue was about the validity of the cancellation of the selection process. Sachin Kumar (supra) falls in that genre of cases concerning validity of cancellation of the selection process due to largescale irregularities. The Case at hand is proximate to the facts and ratio in Suresh Raghunath Bhokare (supra) and cases of that ilk set out hereinabove.

34. We feel that the appellants were not at fault and the State could not have abruptly stopped their salaries. Accordingly, we set aside the judgments of the High Court dated 15.09.2021 in Special Appeal Nos. 1435/2013 and 1445/2013 and direct that the State shall pay the salaries of the appellants for the period from 25.06.1999 till January, 2002 in full. We also direct that insofar as the period from October 2005 till today is concerned, the State shall pay the appellants 50% of the backwages. Since the appointment order and the approval order are still in force, we declare that the appellants have always been and are deemed to be in service. Apart from 50% backwages, as ordered above, we direct that all consequential benefits, includig seniority, notional promotion, if

any, and fitment of salary and other service benefits due, be granted to the appellants. We direct the State to comply with these directons within four weeks from today. We also direct tht the appellants be allowed to commence work within the said period of four weeks." *(Emphasis supplied)*

24. The record further reveals that State Authorities took a conscious decsion after being satisfied, accorded approval for selection of petitioners vide order dated 21.8.2003 on the posts of Assistant Teacher.

25. The Apex Court in the case of **Md. Zamil Ahmad** (supra) has held in the relevant paragraph nos. 15, 19, 21 and 22as follows:

Firstly, the appellant and wife of the deceased at the time of seeking compassionate appointment did not conceal any fact and nor filed any false or incorrect document/declaration. On the other hand, both of them disclosed their true family relations and conditions prevailing in the deceased family on affidavit.

19) In the light of aforementioned reasons, which rightly persuaded the State to grant compassionate appointment to the appellant, we do not find any justification on the part of the State to dig out the appellant's case after 15 years of his appointment and terminate his services on the ground that as per the State policy, the appellant did not fall within the definition of the expression "dependent of deceased" to claim compassionate appointment.

21) In our considered view, the aforesaid facts would clearly show that it was a conscious decision taken by the State for giving an appointment to the appellant for the benefit of the family members of the deceased who were facing financial hardship due to sudden demise of their bread earner. The appellant being the only close relative of the deceased could be given the appointment in the circumstances prevailing in the family. In our view, it was a right decision taken by the State as a welfare state to help the family of the deceased at the time of need of the family.

22) In these circumstances, we are of the view that there was no justification on the part of the State to woke up after the lapse of 15 years and terminate the services of the appellant on such ground. ***In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services****. It was more so because the appellant was not responsible for making any false declaration and nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State.*

(Emphasis supplied)

26. The appointment of the petitoners cannot be said to be illegal as after due selection interviews were made in presence of the nominee of the District Basic Education Officer. Thereafter on 21.8.2003 approval was granted after duly being

satisfied by the District Basic Education Officer.

27. The Apex Court in the case of **Vinod Kumar** (supra) has held in the relevant paragraph nos. 7 and 8 as follows:

7. The judgement in the case Uma Devi (supra) also ***distinguished between "irregular" and "illegal" appointments underscoring the importance of considering certain appointments even if were not made strictly in accordance with the prescribed Rules and Procedure, cannot be said to have been made illegally if they had followed the procedures of regular appointments such as conduct of written examinations or interviews as in the present case.***

8. In light of the reasons recorded above, this Court finds merit in the appellants' arguments and holds that their service conditions, as evolved over time, warrant a reclassification from temporary to regular status. The failure to SLP(C) Nos.22241-42 OF 2016 Page 9 of 9 recognize the substantive nature of their roles and their continuous service akin to permanent employees runs counter to the principles of equity, fairness, and the intent behind employment regulations. (Emphasis supplied)

28. The appointment cannot be disturbed on the ground of lack of qualification as held by the Apex Court in **Nahar Singh** (supra) in relevant paragraph nos. 2 and 3 as follows:

Having regard to the fact that the petitioners have been in service for a long period we are of the view that their appointments ought not to be disturbed ***only on the ground of allged lack of qualification which is contested by the petitioners****. (Emphasis supplied)*

Accordingly, the special leave petitions are disposed of by directing that the services of the petitoners be not disturbed on the above grounds.

29. It is not the case of the respondents that any misrepresentation or fraud committed by the petitioners in getting their appointments as held by the Division Bench of this Court in the case of **Uday Pratap Singh** (supra) in relevant paragraph no. 10, which is quoted below:

10. Facts as have been noticed above are not in issue. It remains undisputed that respondent claimed compassionate appointment in the year 2000 and was offered such appointment in 2003. The father of the respondent had clearly given an affidavit wherein it was mentioned that he was employed in the Education Department of the State. From such material it can clearly be deduced that the factum of the father of the respondent being in Government Service was a fact clearly made known to the authorities and it can therefore not be asserted by the ***appellant that there was any fraud or misrepresentation made on part of the respondent.*** *(Emphasis supplied)*

30. Against the said order in **Uday Pratap Singh** (supra) the State went in appeal before the Apex Court, which has been dismissed on 16.4.2024.

31. In view of the judgments referred hereinabove, the respondents have failed to bring on record any material as to how the petitioners have been colluded with the State Authorites in any manipulation. Further the approval was granted by the State Authorities has not yet been withdrawn. It is

also not in dispute that the petitioners were interviewed in the presence of the nominee of the State Authorities and thereafter State Authorities approved their appointments as Assistant Teacher as well as the said approval dated 21.8.2003 has not been withdrawn.

32. The salary of the petitioners cannot be withheld or stopped unless petitioners are suspended or dismissed from service. The Division Bench of this Court in the case of **Committee of Management of Dadaur Inter College, Dadaur, Rae Bareilly vs. District Inspector of Schools, Rae Bareily and others (1985 UPLBEC 1378) has held in the relevant paragraph no. 6 as follows:**

6. We have examined the arguments of Mr. B. C. Saxena and we find no merit in his contention. Given the fact that opposite-parties 3 to 8 are abscond- ing from duty and are not attending the teaching job, it is open to the petitioners to initiate disciplinary proceedings against them. Regulation No. 36 of the Regulations framed under the Act lays down the procedure for initiating disciplinasy proceedings against the teachers. If opposite-parties Nos. 3 to 8 were absconding and were guilty of insubordination and they neglected the discharge of their duties, they could be suspended and proceeded with depart- mentally but unless opposite-parties 3 to 8 are dismissed or they are suspended, their salary cannot be withheld. Unless the said teachers are dismissed there would no vacancy to justify the making of fresh appointments. If the delinquent teacher is suspended, he will be entitled to subsistence allowance and will not be entitled to full salary. ***Unless the delinquent teachers are suspended or are dismissed from service, the payment of salary to them cannot be withheld. Mr. Saxena made an impassioned appeal that the teachers who were not co-operating with the working of the institution should not be allowed payment of salary as that would result in spoiling the discipline of the institution. In our opinion, this contention is not tenable. The difficulty in the way of the petitioner is that the teachers againt whom charges are levelled are still holding their appointment in the institution. No departmental proceedings have so far been taken against them. Their appointment has neither been terminated nor have they been suspended. In view of these facts it cannot be said that opposite-parties Nos. 3 to 8 are not entitled to salary payable to them. As long as they are teachers in the institution and their appointment subsists, they are entitled to their salary*** *. If the said teachers misbehave or do not discharge their duties properly, it is always open to the Management of the College to suspend such teachers or dismiss them from service after departmental inquiry. Unless this is done there is no basis on which payment of salary to the said teachers can be refused. We are, accordingly of the view that writ petition No. 1585 has no merit and deserves to be dismissed. (Emphasis supplied)*

33. The respondents have not brought on record any material to show as to whether in pursuance of the report dated 24.3.2008 any disciplinary inquiry was initiated against the petitoners or the petitioners were put to notice or were suspended or any termination order was passed against them. Even the respondents have not taken any action agianst the erring officers except filing of first information report against the petitioners. Record also shows that the respondents, till date, have not recalled the order granting approval by the District Basic Education Officer for the appointments of the petitioners.

34. The Apex Court in **Sandeep Kumar** (supra) has held in relevant paragraph no. 19, which reads as under:

*19. In this background**, we are of the firm view that the termination of the services of the appellant without holding disciplinary enquiry was totally unjustified and dehors the requirements of law and in gross violation of principles of natural justice. Hence, the learned Division Bench of the High Court fell in grave error in dismissing the writ petition filed by the appellant on the hypertechnical ground that the minutes of 26th meeting of the Board of Governors dated 16th June, 2018 had not been placed on record**. (Emphasis supplied)*

35. Learned Chief Standing Counsel has vehemently argues that while appointing the petitioners Rules 4,5, and 7 of the Rules 1978 have not been complied with. In support of his submissions he placed reliance to paragraph nos. 32 and 35 of the judgment of the Apex Court in **Sulekh Chandra Pradhan** (supra) which is quoted below:

32. It is not in dispute that the appointment of all the applicants/respondents/teachers have been made directly by the respective Management without following the procedure as prescribed under the Rules/Statute. It is a trite law that the appointments made in contravention of the statutory provisions are void ab initio. Reference in this respect could be made to the judgments of this Court in the cases of Ayurvidya Prasarak Mandal and another vs. Geeta Bhaskar Pendse (Mrs) and others1, J & K Public Service Commission and others vs. Dr. Narinder Mohan and others2, Official Liquidator vs. Dayanand and others3, and Union of India and another vs. Raghuwar Pal Singh.

35. The impugned order passed by the High Court depicts total nonapplication of mind. Whereas the cause title would itself show that a Writ Petition (Civil) No.6557 of 2018 is disposed of by the impugned judgment, the High Court observed that the order dated 18 th May, 2017, passed by the Tribunal in O.A. No.2266 of 2015, has not been challenged by the State. Whereas the teachers have hardly worked for four years and a substantial part thereof on account of interim orders passed by the High Court, the High Court goes on to 5 (1997) 2 SCC 635 observe that the teachers have worked for a period of more than 20 years. No reasons, leave aside sound reasons, are reflected in the impugned order while dismissing the writ petitions filed by the State.

36. In the case cited above by the State, the appointment was made by the Management Committee of the School in the year 1988 and after the Government Order was issued the services of the candidates were terminated. Thereafter they approached the High Court in which interim order was passed permitting them to continue in service as in interim protection but in the case in hand the approval was sought by the State Authority as Authority Controller, approval was granted by the State Authorites i.e. the District Basic Education Officer and after adopting due process of selection in the presence of the nominee of the District Basic Education Officer the selection has been undertaken. After completing the selection process the Authorised Controller (appointed by the State Authority) forwarded the names of the selected candidates to the District Basic Education Officer for its approval for appointment. By the order dated 21.8.2003

the approval was accorded, therefore, the the case referred to above is entirely different in the facts and circumstances of the present case and will not give any aid to the respondents.

37. Learned Chief Standing Cunsel has further referred to paragraph nos. 8 and 9 in **(Professor (Dr.) Srejith P.S (supra)** which reads as under:

38. *8.10 At this stage, it is required to be noted that even as per Section 13(4) of the University Act, 2015, the Committee shall recommend unanimously a panel of not less than three suitable persons from amongst the eminent persons in the field of engineering sciences, which shall be placed before the Visitor/Chancellor. In the present case, admittedly the only name of respondent No. 1 was recommended to the Chancellor. As per the UGC Regulations also, the Visitor/Chancellor shall appoint the Vice Chancellor out of the panel of names recommended by the Search Committee. Therefore, when only one name was recommended and the panel of names was not recommended, the Chancellor had no option to consider the names of the other candidates. Therefore, the appointment of the respondent No. 1 can be said to be dehors and/or contrary to the provisions of the UGC Regulations as well as even to the University Act, 2015. Therefore, the appointment of respondent No. 1 on the basis of the recommendations made by the Search committee, which was not a duly constituted Search Committee as per the UGC Regulations and when only one name was recommended in spite of panel of suitable candidates (3-5 suitable persons as required under Section 13(4) of the University Act, 2015), the appointment of respondent No. 1 can be said to be illegal and void ab initio, and, therefore, the writ of quo warranto was required to be issued.*

39. *In view of the above and for the reasons stated above, the present appeals succeed. The impugned judgment(s) and order(s) passed by the Division Bench of the High Court as well as that of the learned Single Judge dismissing the writ petition and refusing to issue the writ of quo warranto declaring the appointment of respondent No. 1 as Vice Chancellor of the APJ Abdul Kalam Technological University, Thiruvananthapuram as bad in law and/or illegal and void ab initio are hereby quashed and set aside. The writ petition is allowed. There shall be a writ of quo warranto declaring the appointment of the respondent No. 1 as Vice Chancellor of the APJ Abdul Kalam Technological University, Thiruvananthapuram as void ab initio and consequently, the appointment of respondent No. 1 as Vice Chancellor of the APJ Abdul Kalam Technological University, Thiruvananthapuram is quashed and set aside.*

40. In the case cited above the appointment of the Vice Chancellor was made diluting some provisions where the Apex Court has taken the view that the provisions of U.G.C. Regulations will be applicable and provisions cannot be diluted but the case in hand the responents have not approached the Court even after enquiry report dated 24.3.2008 for issuance of writ of quo warranto or appointments of petitioners were illegal or dehors the rules, therefore above cited judgments is of no aid to the respondents specially in view of latest judgment of Apex Court in the case of **Vinod Kumar** (supra) **and Sandeep Kumar** (supra).

41. Learned Chief Standing Counsel further argued that the petitoners do not possess the requisite qualifiaction therefore, the appointment is void ab initio. He referred to paragraph nos. 9 and 10 in the case of **Ram Avtar Singh** (supra) and **Devesh Sharma** (supra) are of no help as facts of the case stated hereinabove and in view of the latest judgment of the Apex Court in the cases of **Vinod Kumar** (supra) and **Sandeep Kumar** (supra) as well as of **Nahar Sigh** (supra).

42. In the case in hand the approval was sought by the State Authority as Authority Controller, approval was granted by the State Authorites i.e. the District Basic Education Officer and after adopting due process of selection in the presence of the nominee of the District Basic Education Officer the selection has been undertaken. After completing the selection process the Authorised Controller (appointed by the State Authority) forwarded the names of the selected candidates to the District Basic Education Officer for its approval for appointment. By the order dated 21.8.2003 the approval was accorded which is still intact. In others words the approval has not been recalled till date.

43. Further in the case of **Radhay Shyam Yadav** (supra) the Apex Court has recently held that since the approval is still enforce, the appellants therein were deemed to be in service and directed to pay arrears of salary with all consequential benefits, including seniority, notional promotion, if any, and fitment of salary and other service benefites due, be granted to the appellants therein.

44. The report was prepared on 24.3.2008. In pursuance thereof the only action was taken against the petitioners by way of stopping their salary and were restrained from discharging their duties but nothing has been brought on record on behalf of the State to show that either the petitioners were suspended from services or charge sheets were issued to them or services of the petitioners were terminated.

45. The report dated 24.3.2008 alleging that the petitioners were in collusion with the State Authorities but no departmental action has been taken agianst the erring officers of the State. In-turn the respondent authorities gave a safe passage to the erring officers to superannuate. Even after retirement no acton has been taken against the erring officers within the stipulated time povided in the Service Rules. The conduct of the respondent authorities shows that the petitioners are only made scape goat leaving aside the role of the erring officers.

46. In view of the factual matrix of the case as well as judgments of the Apex Court and Division Bench of this Court referred to hereinabove, a mandamus is issued to the respondent- State Authorities concerned to pay the arrears of salary to the petitioners from the date the order was passed stopping payment of salary as well as to work (whichever is earlier) till the date of this order. Since the appointment order and approval order are still in force the petitioners are deemed to be in service. The respondents are further directed to allow all consequential benefits, seniority, notional promotion, if any, and fitment of salary and other service benefits due, be granted to the petitioners. Further mandamus is issued to the respondents -State Authorities to comply above directions within four weeks from today. Further mandamus is issued to the respondents to allow the petitioners to

commence work within the aforesaid period of four weeks.

47. The writ petition is allowed in the above terms.

(2024) 5 ILRA 542
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters U/A 227 No. 2098 of 2024

M/s A2z Waste Management (Meerut) Pvt. Ltd. ...Petitioner
Versus
Construction & Design Services, U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Suyash Gupta

Counsel for the Respondents:
Sri Indu Prakash Singh, Sri Manish Kumar Srivastava, Sri Pankaj Srivastava, Sri Santosh Srivastava

Civil Law - Arbitration and Conciliation Act, 1996 – Sections 34 & 42 - Commercial Courts Act, 2015 – Section 16 r/w Article 6 of Schedule - Civil Procedure Code, 1908 - Order XV-A Rules 1, 2 and 3 - The Code of Criminal Procedure, 1973 – Sections 195(1)(b), 340 – Indian Penal Code, 1860 – Section 191 - Constitution of India - Article 215 – Oath's Act, 1969 – Section 8 - Petitioner filed arbitration claim against respondent Nos.1 to 3 in 2012/2013 - Arbitration award was passed on 29.05.2019, directing respondents to pay Rs. 66 Crores, alongwith 18 % interest p/a to petitioner - Arbitration proceedings and arbitration award was passed at Lucknow on 29.05.2019 and respondent Nos.1 and 2 filed application u/s 34 in Commercial Court at Lucknow on 11.09.2019, the respondent No. 3 filed application u/s 34 challenging award before District Judge, Meerut on 05.10.2019 - Apparently, after an application u/s 34 filed in Commercial Court, no subsequent application could be filed before any other court - After expiry of about 1 year and 9 months since filing of application at Meerut, on 24.06.2021 the respondent no. 3 filed Transfer Application at Allahabad for transfer of case from Meerut to Lucknow - By interim order dated 05.07.2021, proceedings of application filed at Meerut also Arbitration Case in Commercial Court was stayed – In view of facts and circumstances, prayer for expeditious disposal of proceedings was allowed – Perjury application against petitioner, rejected. (Para 22, 23, 24, 25, 28, 31, 54)

Petition allowed. (E-13)

List of Cases cited:

1. M/S Chopra Fabricators and Manufacturers Pvt. Ltd. Vs Bharat Pumps & Compressors Ltd. & anr.: (2023) 2 SCC 481

2. Dhananjay Sharma Vs St. of Har. & ors. (1995) 3 SCC 757

3. S. P. Chengal Varaya Naidu Vs Jagannath & ors. (1994) 1 SCC 1

4. Hamza Haji Vs St. of Kerala (2006) 7 SCC 416

5. K. D. Sharma Vs Steel Authority of India Ltd. & ors. (2008) 12 SCC 481

6. ABCD Vs U.O.I. & ors. (2020) 2 SCC 52

7. Dhananjay Sharma Vs St. of Har. (1995) 3 SCC 757

8. S. P. Chengalvaraya Naidu Vs Jagannath, (1994) 1 SCC 1

9. K.D. Sharma Vs SAIL, (2008) 12 SCC 481

10. P. S. Sathappan Vs Andhra Bank Ltd., (2004) 11 SCC 672

11. Amrendra Pratap Singh Vs Tej Bahadur Prajapati: (2004) 10 SCC 65

12. Sasikala Pushpa & ors. Vs St. of T. N. (2019) 6 SCC 477

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

1. Heard Sri Jaideep Narain Mathur Senior Advocate assisted by Sri Suyash Gupta Advocate, the learned Counsel for the petitioner and Shri Indu Prakash Singh, learned counsel for the respondent No.1 - Construction and Design Services, U.P. Jal Nigam and respondent no. 2 - U.P. Jal Nigam and Sri Pankaj Srivastava, the learned counsel for the respondent No.3 – Municipal Corporation, Meerut.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has sought a direction for expeditious disposal of Arbitration Case No.831 of 2019 pending in Commercial Court No. 2, Lucknow. The aforesaid case is an application under Section 34 of the Arbitration and Conciliation Act which was filed by the respondent no. 1 and 2 on 11.09.2019 challenging an Arbitration Award dated 29.05.2019 passed in favour of the petitioner.

3. A copy of the entire order sheet of the proceedings under Section 34 of the Arbitration and Conciliation Act has been annexed with the petition. A copy of an order dated 10.07.2023 passed by this Court sitting at Allahabad in Transfer Application No.278 of 2021 has also been annexed with the petition. The said Transfer Application was filed by Meerut Municipal Corporation (respondent No.3 in this petition) seeking transfer of Case No. Nil of 2019 in the Court of the District Judge, Meerut, which was an application under Section 34 of Arbitration and Conciliation Act filed by the respondent no. 3 on 05.10.2019 challenging the same arbitration award dated 29.05.2019. The Transfer Application was allowed by means of an order dated 10.07.2023 and the application under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the respondent no. 3 at Meerut was transferred to Lucknow and it was directed that that the same shall be heard along with Arbitration Case No.831 of 2019. After being transferred to Commercial Court – 2, Lucknow, the application under Section 34 filed by the respondent no. 3 has been registered as Arbitration Case No. 133 of 2023.

4. When the case was taken up as fresh on 27.04.2024, the learned counsel for the respondent Nos.1 and 2 had sought two days' time to seek instructions in the matter. On 01.05.2009, the learned counsel for the respondent No.3 filed an application under Section 340 Cr.P.C. and the learned counsel for respondent No.1 and 2 filed counter affidavit/objections against the petition under Article 227 of the Constitution of India. Subsequently, the respondent Nos.1 and 2 have also filed a counter affidavit.

5. It is relevant to note that Section 34 (6) of Arbitration and Conciliation Act contains a statutory mandate that an application under this Section shall be disposed of expeditiously and in any event, within a period of one year from the date on which notice referred to in Sub Section (5) is served upon the other party. This statutory mandate cannot be altogether ignored by the Commercial Court and by this Court.

6. The application under Section 34 is pending before a Commercial Court, which has been constituted under the Commercial Courts Act, 2015. The statement of objects and reasons of the Commercial Courts Act, 2015 states that: -

"The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and question of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system."

7. The object of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, was *inter alia*, to amend the Code of Civil Procedure, 1908, as applicable to the Commercial Courts and Commercial Divisions which shall prevail over the existing High Courts Rules and other provisions of the Code of Civil Procedure, 1908, so as to improve the efficiency and reduce delays in disposal of commercial cases and to accelerate economic growth, improve the international image of the Indian Justice delivery system, and the faith of the investor world in the legal culture of the nation.

8. The Statement of Objects and Reasons of Amendment Act 28 of 2018 states that *"The global economic environment has since become increasingly competitive and to attract business at international level,* ***India needs to further improve its ranking in the World Bank 'Doing Business Report' which, inter alia, considers the dispute resolution environment in the country as one of the parameters for doing business.*** *Further, the tremendous economic development has ushered in enormous commercial activities in the country including foreign direct investments, public private partnership, etc., which has prompted initiating legislative measures for speedy settlement of commercial disputes, widen the scope of the courts to deal with commercial disputes and facilitate ease of doing business.* ***Needless to say that early resolution of commercial disputes of even lesser value creates a positive image amongst the investors about the strong and responsive Indian legal system. It is, therefore, proposed to amend the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.***

9. The object of enactment of Commercial Court Act, 2015 shows that the legislature was concerned about the image of the Indian justice delivery system and the legal culture of the nation, which unfortunately is that the proceedings are not decided expeditiously in the courts in India.

10. Section 16 of the Commercial Courts Act, 2015 provides as follows: -

"16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.*—(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.*

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government

is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail."

11. By means of Entry 6 of the Schedule appended to the Commercial Courts Act 2015, which is referred to in Section 16 (1), Chapter XV-A has been inserted in C.P.C. applicable to the Commercial Courts, which contains provisions for holding a case management hearing. Rules 1, 2 and 3 of Order XV-A C.P.C. applicable to the Commecial Courts provide as follows: -

"ORDER XV-A

Case Management Hearing

1. First Case Management Hearing.—The court shall hold the first Case Management Hearing, not later than four weeks from the date of filing of affidavit of admission or denial of documents by all parties to the suit.

2. Orders to be passed in a Case Management Hearing.—In a Case Management Hearing, after hearing the parties, and once it finds that there are issues of fact and law which require to be tried, the court may pass an order—

(a) framing the issues between the parties in accordance with Order XIV of the Code of Civil Procedure, 1908 (5 of 1908) after examining pleadings, documents and documents produced before it, and on examination conducted by the court under Rule 2 of Order X, if required;

(b) listing witnesses to be examined by the parties;

(c) fixing the date by which affidavit of evidence to be filed by parties;

(d) fixing the date on which evidence of the witnesses of the parties to be recorded;

(e) fixing the date by which written arguments are to be filed before the court by the parties;

(f) fixing the date on which oral arguments are to be heard by the court; and

(g) setting time limits for parties and their advocates to address oral arguments.

3. Time limit for the completion of a trial.—In fixing dates or setting time limits for the purposes of Rule 2 of this order, ***the court shall ensure that the arguments are closed not later than six months from the date of the first Case Management Hearing."***

12. The Commercial Court as well as this Court cannot ignore the provision contained in Section 34 (6) of the Arbitration and Conciliation Act, 1996 and the object of enactment of Commercial Courts Act, 2015 and the provisions of Order XV-A C.P.C. applicable to the Commercial Courts.

13. The petitioner has approached this Court with a prayer for issuance of a direction for expeditious disposal of the application under Section 34 of the Arbitration and Conciliation Act in respect of an arbitration award passed way back on 29.05.2019. This Court cannot appreciate the opposition of the respondent No.3 against issuance of such a direction, when the arbitration award directs the respondents to pay a sum of Rs.Six Crores alongwith 18% interest, and the amount of interest is increasing with each passing day and it will be a burden on the public exchequer in case the outcome of the application under Section 34 of Arbitration and Conciliation Act is not favourable to the respondents.

14. T he learned counsel for the petitioner has placed Reliance on an order passed by the Hon'ble Supreme Court in the case of **M/S Chopra Fabricators and Manufacturers Pvt. Ltd. Vs. Bharat Pumps and Compressors Ltd. and another:** (2023) 2 SCC 481, where in the Hon'ble Supreme Court expressed its serious concern about the delays in disposal of execution cases filed in the state of Uttar Pradesh for execution of arbitration awards. The Hon'ble Supreme Court had called for a report, which was submitted and after perusing the report, the Supreme Court observed that: -

"The statement, so placed before this Court, shows a very sorry state of affairs insofar as the disputes under the 1940 Act and under the 1996 Act are concerned. From the statement it appears that, 30,154 execution petitions are pending with various District Courts/regular courts in the State of U.P. and the oldest one is of the year 1981. Similarly, in the Commercial Courts, in the State of Uttar Pradesh, 13,367 execution petitions/applications are reported to be pending and the oldest one seems to be of the year 2002."

15. The Hon'ble Supreme Court called for a response from the Chief Justice of this Court as to how this High Court proposes to deal with the pendency of the execution petitions / applications under Section 34 of the 1996 Act at the earliest and within some stipulated time period. The Chief Justice was requested to constitute a special arrears Committee of the judges of the High Court and invite suggestions and formulate a mechanism to tackle with the problem of arrears.

16. The issue was addressed by this Court and certain steps were taken. Thereafter, a comparative status of pendency of arbitration matters was placed before the Hon'ble Supreme Court, which was taken into consideration in an order dated 21.01.2024 passed in the aforesaid case, which indicated that pendency of arbitration cases had reduced significantly after this Court addressed the issue of delay in disposal of execution cases relating to arbitration award. The Hon'ble Supreme Court expressed satisfaction with the steps taken by this High Court and observed that "The steps taken by the High Court and the other courts may be continued in order to bring about a further reduction in the pendency of arbitration cases in Uttar Pradesh.

17. The aforesaid direction of the Hon'ble Supreme Court to continue efforts to bring about reduction in pendency of arbitration cases in Uttar Pradesh is to be honoured by this Court as also by the Commercial Court Lucknow.

18. Shri Indu Prakash Singh, learned counsel for the respondent Nos.1 and 2 submitted that the petitioner is seeking expeditious disposal of Case No. 831 of 2019, which is the application under Section 34 of the Arbitration and Conciliation Act filed by the respondent No.1 and 2 only whereas the other application - Arbitration Case No. 133 of 2023 filed by the respondent no. 3 is also pending in same Court and it has also to be decided along with Case No. 831 of 2019. Therefore, he requests that in case a direction is issued for expeditious disposal of Case No. 831 of 2019, the same should be issued in respect of Arbitration Case No. 133 of 2023 also.

19. Shri Pankaj Srivastava, learned counsel for the respondent No.3 Municipal Corporation Meerut, has seriously opposed

the petition under Article 227 of the Constitution of India. It is interesting to note that the case which is sought to be expedited by the petitioner and which is being opposed by the respondent no. 3, has been filed by the respondent nos. 1 and 2 for setting aside an arbitration award passed in favour of the petitioner and the respondent no. 3 is merely a proforma respondent in this case.

20. The learned Counsel for the respondent no. 3 has submitted that the petition has been filed concealing the fact that the proceedings of Case No. 831 of 2019 had been stayed by means of an order dated 05.07.2021 passed by this Court sitting at Allahabad in Transfer Application (Civil) No.278 of 2021. Therefore, the Commercial Court could not have proceeded with the application under Section 34 of the Arbitration and Conciliation Act till the Transfer Application was finally decided by means of the order dated 10.07.2023. He has submitted that the petition is liable to be dismissed as the petitioner has not approached this Court with clean hands.

21. The respondent no. 3 has filed an application under Section 340 Cr.P.C. read with Article 215 of the Constitution of India filed, which has been titled as 'Perjury Application'. The prayer made in the application is to prosecute and suitably punish the petitioner and Sri Yuvraj Sharma the deponent of the affidavit filed in support of the petitioner under Article 227 of the Constitution of India, for committing the offence of perjury by suppressing true and correct facts and swearing false affidavit before this Court.

22. A perusal of the Arbitration award, from which the proceedings under Section 34 of the Arbitration and Conciliation Act arises, indicates that the petitioner had filed an arbitration claim against the respondent Nos.1, 2 and 3 in the year 2012/2013. The arbitration award was passed on 29.05.2019 directing the respondents to pay amounts under various heads to the petitioner, aggregating to about Rs. 66 Crores, along with 18 % Simple Interest per annum. The liability of interest is increasing day by day and the delay in final disposal of the matter would not be in the interest of the respondent no. 3 also, yet the respondent no. 3 is strongly opposing the petition filed for seeking a direction of expeditious disposal of the matter.

23. Although the arbitration proceedings were held at Lucknow, the arbitration award was passed at Lucknow on 29.05.2019 and the respondent Nos.1 and 2 had filed an application under Section 34 of Arbitration and Conciliation Act bearing Arbitration Case No. 831 of 2019 in the Commercial Court No. 2, Lucknow on 11.09.2019, the respondent No. 3 filed an application under Section 34 of the Arbitration and Conciliation Act challenging the same award before the District Judge, Meerut on 05.10.2019.

24. Section 42 of Arbitration and Conciliation Act provides that where with respect to an arbitration agreement any application under Part-I of the Act has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court. Apparently, after an application under Section 34 of Arbitration and Conciliation Act having been filed in Commercial Court at Lucknow on 11.09.2019, no subsequent application could be filed before any other court. Yet,

the respondent No.3 filed the application under Section 34 of the Arbitration and Conciliation Act at Meerut on 05.10.2019.

25. After expiry of about 1 year and 9 months since filing of the application at Meerut, on 24.06.2021 the respondent no. 3 filed Transfer Application (Civil) No. 278 of 2021 before this Court at Allahabad for transfer of the case from Meerut to Lucknow. An interim order dated 05.07.2021 was passed in the Transfer Application staying the proceedings of application under Section 34 of Arbitration and Conciliation Act filed at Meerut as also the Arbitration Case No.831 of 2019 in the Commercial Court at Lucknow.

26. When there is an arbitration award operating against the respondent Nos.1 to 3, all of whom are State Authorities and there is an award for payment of interest at the rate of 18 % on the awarded amount, the action of the respondent No.3 in first filing an application under Section 34 at Meerut, whereas a previous application had already been filed at Lucknow and the court at Meerut had no jurisdiction in view of the provision contained in Section 42 of Arbitration and Conciliation Act, and thereafter filing an application for transfer of the case from Meerut to Lucknow after about 1 year and 9 months and then getting the proceedings under Section 34 pending at Lucknow also stayed for over two years, cannot be appreciated by the Court. This approach is against the interest of justice as also against the interests of the State, as any delay in disposal of the application under Section 34 of Arbitration and Conciliation Act is in no way beneficial to the State. For the same reason, the action of the respondent No.3 in raising a serious objection and opposing the petition under Article 227 of the Constitution of India seeking a direction for expeditious disposal of the proceedings under Section 34 of Arbitration and Conciliation Act, also cannot be appreciated.

27. While opposing the petition, the learned counsel for the respondent No.3 has submitted that numerous arbitration proceedings were initiated by the petitioner in respect of various contracts of similar nature. In two other matters, proceedings had been expedited by this Court and thereafter the District Judge / Commercial Court started fixing short dates in the matter even though record of the arbitrator had not been received and some orders were passed in these matters, which were detrimental to the interest of the respondents. He has further submitted that the arbitrator's record has been summoned by the Commercial Court, Lucknow, which has not been received till date. In response to a specific query, the learned Counsel for the respondent no. 3 answered that the respondent no. 3 is not a party to any such proceedings in which the alleged orders have been passed.

28. Merely because some other order passed in some other petition for expeditious disposal of this court has resulted in early dates being fixed in some other proceedings under Section 34 of the Arbitration and Conciliation Act, wherein record has not been received, cannot be a ground to decline the prayer for expeditious disposal of proceedings under Section 34 of Arbitration and Conciliation Act in accordance with the law.

29. Regarding the apprehension of the learned Counsel for the respondent no. 3 that in case the proceedings are expedited, the Commercial Court will conclude the same without receipt of the record of the arbitrator

and in violation of law, the Commercial Court will be bound to decide the case in accordance with the law only and this apprehension cannot be a ground to decline issuance of a direction for expeditious disposal of the application under Section 34 of Arbitration and Conciliation Act, more particularly when the direction would certainly include a direction to the court to proceed with the application "in accordance with the law".

30. Keeping in view the aforesaid facts and circumstances of the case, the petition under Article 227 of the Constitution of India is **allowed**. A direction is issued to the learned Commercial Court No. 2, Lucknow to proceed with Arbitration Case No. 831 of 2019 and Arbitration Case No. 133 of 2023 expeditiously without granting any unnecessary adjournments to any of the parties, in accordance with law, particularly keeping in view the provisions contained in Section 34 (6) of the Arbitration and Conciliation Act, the object of establishment of the Commercial Courts and the provisions contained in Section 16 read with Article 6 of the Schedule appended to the Commercial Courts Act, 2015.

Order on Application filed under 340 Cr.P.C. read with Article 215 of the Constitution of India: -

31. This is an application under Section 340 Cr.P.C. read with Article 215 of the Constitution of India filed by the respondent No.3-Municipal Corporation Meerut, which has been titled as 'Perjury Application'. The prayer made in the application is to prosecute and suitably punish the petitioner and Shri Yuvraj Sharma the deponent of the affidavit filed in support of the application, for committing offence of perjury by suppressing the fact that the proceedings of Arbitration case No. 831 of 2019 had remained pending since 05.07.2021 till 10.07.2023.

32. Before commencement of submissions of this application Sri Jaideep Narain Mathur Senior Advocate, stated that the petitioner has committed an error in not disclosing the fact of proceedings having been stayed by this Court sitting at Allahabad in the petition filed under Article 227 of the constitution of India and he tenders unconditional apology for this mistake. However, he stated that the petitioner has disclosed the fact that the respondent no. 3 had filed Transfer Application (Civil) No. 278 of 2021 and he has annexed a copy of the order dated 10.07.2023 passed in that case. He has submitted that the mistake committed by the petitioner, regarding which an unconditional apology has been submitted, does not make out a case for prosecution under Section 340 Cr.P.C. and in case the learned counsel for respondent No. 3 agrees not to press this application, precious time of this Court may be saved so that it can be utilized for some more fruitful purpose but the learned counsel for respondent No.3 insisted that he will establish that a case for prosecution of the petitioner is made out and he would press his application under Section 340 Cr.P.C. Therefore, the Court had to proceed to hear submissions in support of the application and against it also and to pass an order thereon.

33. The learned Counsel for the applicant submitted that Section 340 Cr.P.C. makes a reference to offences referred to in Clause B of sub-Section 1 of Section 195 Cr.P.C. Section 195 (1) (b) Cr.P.C. refers to the offences under Section 193 to 196, 199, 200, 205 to 211, 228, 463, 471, 475 and 476.

He submitted that although he does not defend the mistake of the petitioner in not disclosing the complete facts before this Court, the aforesaid omission does not in any manner make out any of the offences enumerated in Section 195 (1)(b) Cr.P.C.

34. The only ground on which the application under Section 340 Cr.P.C. has been filed is omission to disclose a stay order that was operating for a period 05.07.2021 to 10.07.2023. The learned Counsel for the respondent no. 3 has placed reliance on the provisions contained in Section 8 of the Oath's Act 1969, which provides that "Every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject."

35. Learned counsel for respondent No.3 has referred to Chapter4 Rule 17 of a Allahabad High Court Rules 1952 which provides as follows: -

"17. Oath or affirmation by deponent :- *The person administering an oath or affirmation to the person making an affidavit, shall follow the provisions of the Indian Oaths Act, 1873.*

The following forms are prescribed, namely--

Oath

I swear that this my declaration is true; that it conceals nothing; and that no part of it is false. So help me God.

Affirmation

I solemnly affirm that this my declaration is true; that it conceals nothing; and that no part of it is false."

36. However, the Oaths Act does not contain any provision which may make a person who omits to state the complete truth liable to be prosecuted under Section 340.

37. The Court put a specific question to the learned counsel for respondent No.2 as to which of the offences enumerated under Section 195 (1)(b) Cr.P.C. is made out from the omission of the petitioner to disclose the proceedings having remain stayed by means of an stay order passed by this Court at Allahabad, but the Learned counsel for respondent No.3 could not point out any single offence mentioned in Section 195 Cr.P.C. which attracted in the present case.

38. Section 191 I.P.C. provides as follows:-

"Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

39. Section 191 makes 'making any statement which is false'a punishable offence. The learned counsel for respondent No.3 had submitted that omitting to state complete truth also amount to making a false statement and, therefore, the omission of the petitioner in not stating about the stay order passed by this Court sitting at Allahabad, amounts to making a false statement.

40. It is a well settled principle of interpretation of statutes that while interpreting a statute, the Court should give plain and simple meaning to the words used by the legislature and the Courts can neither add any word nor subtract any word from the words used by the legislature.

41. The penal laws are required to be interpreted strictly. While interpreting a penal provision, the Court cannot enlarge the scope of the words used by the legislature. When the legislature did not make omission of stating any relevant fact to be an offence under Section 191, the petitioners cannot be punished for the omission to disclose the stay order, which omission would not affect the outcome of this petition in any manner.

42. The learned Counsel for the respondent no. 3 has relied upon the decisions in the case of **Dhananjay Sharma Vs. State of Haryana and Others (1995) 3 SCC 757, S. P. Chengal Varaya Naidu Vs. Jagannath and Others (1994) 1 SCC 1, Hamza Haji Vs. State of Kerala (2006) 7 SCC 416, K. D. Sharma Vs. Steel Authority of India Ltd. and Others (2008) 12 SCC 481 and ABCD Vs.Union of India and Others (2020) 2 SCC 52.**

43. In **Dhananjay Sharma v. State of Haryana**, (1995) 3 SCC 757 it was held that: -

"38. ... The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. The filing of false affidavits in judicial proceedings in any court of law exposes the intention of the party concerned in perverting the course of justice. The due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery of by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence, commits criminal contempt of the court and renders himself liable to be dealt with in accordance with the Act. Filing of false affidavits or making false statement on oath in courts aims at striking a blow at the rule of law and no court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law. The stream of justice has to be kept clear and pure and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the court and interfere with the due course of judicial proceedings or the administration of justice...."

44. In **S. P. Chengalvaraya Naidu v. Jagannath**, (1994) 1 SCC 1, the Hon'ble Supreme Court held that: -

"1.Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

* * *

5...The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that

more often than not, process of the court is being abused. Property-grabbers, tax evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

45. S. P. Chengalvaraya Naidu (Supra) was followed in Hamza Haji Vs. State of Kerala (Supra).

46. In **K.D. Sharma v. SAIL**, (2008) 12 SCC 481, it was reiterated that: -

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim."

47. **S. P. Chengalvaraya Naidu** (Supra) was followed in **Hamza Haji Vs. State of Kerala** (Supra). The Hon'ble Supreme Court did not discuss the provisions of Section 340 Cr.P.C. or Article 215 of the Constitution of India in any of the aforesaid cases.

48. In A**BCD v. Union of India**, (2020) 2 SCC 52, it was held that: -

"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said section."

49. In none of the cases cited by the learned Counsel for the respondent no. 3, an order for prosecution under Section 340 Cr.P.C. was passed. It is settled law that a judgment is an authority for what it actually decides and not for what can be deduced from it. In a Constitution Bench judgment in the case of **P. S. Sathappan v. Andhra Bank Ltd., (2004)** 11 SCC 672, it was held that:—

"118. ...It is well known that a judgment is an authority for what it decides and not what may even logically be deduced therefrom.

* * *

144. While analysing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.

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145. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made

therein should receive consideration in the light of the questions raised before it. [See Haryana Financial Corpn. v. Jagdamba Oil Mills (2002) 3 SCC 496, Union of India v. Dhanwanti Devi (1996) 6 SCC 44, Nalini Mahajan (Dr.) v. Director of Income Tax (Investigation) (2002) 257 ITR 123 (Del) State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139, A-One Granites v. State of U.P. (2001) 3 SCC 537, and Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111],

146. Although decisions are galore on this point, we may refer to a recent one in State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal (2004) 5 SCC 155, wherein this Court held:

"It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which it was used."

147. It is further well settled that a decision is not an authority for the proposition which did not fall for its consideration."

50. Again, in **Amrendra Pratap Singh versus Tej Bahadur Prajapati:** (2004) 10 SCC 65, the Hon'ble Supreme Court reiterated that:—

"A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the judges, and inferring from it a proposition of law which the judges have not specifically laid down in the pronouncement."

51. Learned Senior Advocate appearing for the petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court in case of **Sasikala Pushpa and Others Vs. State of Tamil Nadu** (2019) 6 SCC 477, wherein the Hon'ble Supreme Court held that:-

"10. It is fairly well settled that before lodging of the complaint, it is necessary that the court must be satisfied that it was expedient in the interest of justice to lodge the complaint. It is not necessary that the court must use the actual words of Section 340 CrPC; but the court should record a finding indicating its satisfaction that it is expedient in the interest of justice that an enquiry should be made. Observing that under Section 340 CrPC, the prosecution is to be launched only if it is expedient in the interest of justice and not on mere allegations or to vindicate personal vendetta. In Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370, this Court held as under:

"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words 'court is of opinion that it is expedient in the interests of justice'. This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). ***This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon***

administration of justice. *It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint."*

(Emphasis added)

52. The petition under Article 227 of the Constitution of India has been filed for issuance of a direction for expeditious disposal of the application under Section 34 of the arbitration Act, 1996, which in any case has to be decided expeditiously keeping in view the provisions contained in Section 34 (6) of the Arbitration and Conciliation Act, the object of establishment of the Commercial Courts and the provisions contained in Section 16 read with Article 6 of the Schedule appended to the Commercial Courts Act, 2015. The omission of the petitioner to state the fact of the stay order dated 05.07.2021 would not affect the decision of this petition and, therefore, this omission does not in any manner adversely affects the administration of justice.

53. Although this fact would otherwise not be relevant for decision of the application under Section 340 Cr.P.C. but when the learned counsel for respondent No.3 has vehemently opposed the issuance of a direction for expeditious disposal of proceeding under Section 34 of Arbitration and Conciliation Act, it becomes relevant to notice the conduct of the respondent No.3. The respondent Nos.1 and 2 have filed an application under Section 34 of the Arbitration and Conciliation Act challenging the arbitration award on 11.09.2019. After that respondent No.3 filed another application under Section 34 for setting aside the same arbitration award at Meerut on 05.10.2019 whereas as per Section 42 of the Arbitration Act, the application could be filed at Lucknow only. Even after getting knowledge about the proceeding under Section 34 of Arbitration and Conciliation Act pending at Lucknow, the respondent No.3 did not promptly take any steps for transfer of the application to appropriate Court and it filed Transfer Application No.278 of 2021 at Allahabad on 24.06.2021 and by means of an interim order passed in that transfer application filed by the respondent No.3 regarding the proceedings at Meerut, the proceedings of Arbitration Case No.831 of 2019 Lucknow were also stayed on 05.07.2021, which stay order continued till 10.7.2023 thereby causing a delay of more than 2 years in disposal of the application under Section 34 of Arbitration and Conciliation Act. This conduct of the State Authorities when the arbitration award includes a direction for payment of 18% interest on the awarded amount, is detrimental to the public Ex-chequer and in turn to the public at large. Therefore, it appears that the respondent no. 3 itself is interfering in administration of justice by creating unwarranted obstacles in expeditious dispensation of justice.

54. As neither there is averment in the application under Section 340 Cr.P.C. or in the affidavit filed in its support, nor the learned counsel for the petitioner could make it out in his submissions that the petitioner has committed any act which may amount to commission of an offence under

Section 191 I.P.C., the application under Section 340 Cr.P.C. is misconceived and the same is accordingly **dismissed.**

(2024) 5 ILRA 555
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters U/A 227 No. 2145 of 2024

Shivam Tandon & Anr. ...Petitioners
Versus
Hindustan Petroleum Corp. Ltd. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sudeep Kumar, Sri Avdhesh Kumar Pandey, Radhika Varma

Counsel for the Respondents:
Sri Shikhar Anand, Pushpila Bisht, Sri Shikhar Anand

Civil Law - Arbitration and Conciliation Act, 1996 – Sections 11, 27 & 29-A - Petitioners had filed arbitration application u/s 11 of Arbitration and Conciliation Act,1996 for appointment of Arbitrator - Application was allowed – Arbitrator framed the issues – During proceedings, petitioners filed application u/s 29A before Presiding officer for extension of time for conclusion of arbitration proceedings by a further duration of at least 12 months – Application rejected - Impugned order challenged - Held, the Court can extend the period of arbitration u/s 29-A (4) irrespective of fact whether the application seeking extension of time has been filed before expiry of period specified in sub-Section (1) of Section 29-A or after that - Delay in disposal of application u/s 29- A(4) can't be a reason for rejection of application and Commercial Court has rejected the application on considerations which are not relevant – Hence, impugned order is unsustainable in law, liable to be set aside, substitute arbitrator appointed for completing arbitration proceedings. (Para 3, 8, 38, 41, 45)

Petition allowed. (E-13)

List of Cases cited:

1. Wadia Techno-Engineering Services Ltd. Vs Director General of Married Accommodation Project, 2023 SCC OnLine Del 2990

2. Hiran Valiiyakkil Lal Vs Vineeth M.VS, 2023 SCC OnLine Ker 5151

3. Reliance Infrastructure Ltd. Vs Madhyanchal Vidyut Vitran Nigam Ltd., 2023 SCC OnLine Del 4894

4. Rohan Builders (India) Pvt. Ltd. Vs Berger Paints India Ltd., 2023 SCC OnLine Cal 2645

5. ATC Telecom Infrastructure (P) Ltd. Vs BSNL, 2023 SCC OnLine Del 7135

6. H. P. Singh Vs G. M. Northern Railways, 2023 SCC OnLine J&K 1255

7. ATS Infrastructure Ltd. & ors. Vs Rasbehari Traders, O.M.P. (T) (COMM.) 91/2023

8. Hiralal Rattanlal Vs St. of U.P., (1973) 1 SCC 216,

9. Gurudevdatta VKSSS Maryadit Vs St. of Mah., (2001) 4 SCC 534

10. B. Premanand Vs Mohan Koikal, (2011) 4 SCC 266

11. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

12. Vidarbha Industries Power Ltd. Vs Axis Bank Ltd., (2022) 8 SCC 352

13. VS Senthil Balaji Vs St., (2024) 3 SCC 51

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

1. Heard Sri Sudeep Kumar assisted by Ms. Radhika Varma, and Sri Shresth Srivastava, Advocates, the learned Counsel for the petitioners and Ms. Pushpila Bisht, Advocate, the learned counsel for the respondents.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioners have challenged validity of the order dated 11.03.2024 passed by the Presiding Officer, Commercial Court No.1, Lucknow in Misc. Case No.305 of 2019 under Section 29-A of the Arbitration and Conciliation Act, 1996.

3. Briefly stated, facts of the case are that the petitioners had filed Arbitration Application No.45 of 2017 in this Court under Section 11 of the Arbitration and Conciliation Act,1996. This Court allowed the application by means of an order dated 28.02.2018 and appointed Sri Seth Shailendra Nath Tandon H.J.S. (Retd.) as the Arbitrator to decide the disputes between the parties through process of arbitration.

4. The Arbitrator entered upon the reference on 05.04.2018, the petitioners filed his statement of claims on 13.06.2018, the respondents filed their written statement on 28.07.2018 and the petitioners filed their replication on 16.9.2018. The learned Arbitrator framed the issues on 13.10.2018. Thereafter, the matter was fixed for 16.11.2018 for evidence of the claimant and the claimant filed his evidence on the said date. The petitioners filed an application under Section 27 of the Arbitration and Conciliation Act for summoning some officers of the respondent Corporation for their examination.

5. On 25.11.2018, the respondents filed their evidence and objections against the petitioners' application under Section 27 of Arbitration and Conciliation Act. Thereafter, the matter was fixed for 22.02.2019, on which date, the respondents sought an adjournment on the ground of illness of their counsel. It was not opposed by the petitioners-claimant and the matter was adjourned and fixed for 02.03.2019. On 02.03.2019, an adjournment was sought on behalf of the respondents as their counsel was not available. This too was not opposed by the claimant and the matter was fixed for 09.03.2019. On 09.03.2019 also, an adjournment was sought on behalf of the respondents, which was opposed by the claimant. However, the Arbitrator granted the adjournment and fixed the matter for 18.03.2019. On 18.03.2019, learned counsel for both the parties were present but the matter was postponed without any effective orders having been passed and the Arbitrator merely directed the parties to deposit the secretarial expenses.

6. On 19.04.2019, the Arbitrator passed an order deciding three applications - C4, C5 and C-6 filed by the claimant for summoning some witnesses, some material evidences and for a direction to the respondents to produce the witnesses or to provide complete address of the witnesses for their examination. The Arbitrator held that the arbitral tribunal itself had got no power to summon any witness and if the claimant wants production of any witness before the arbitral tribunal, the claimant is permitted to move the appropriate Court for summoning of the witnesses or production of any material or goods.

7. On the next date fixed in the arbitration proceedings on 05.05.2019, the Arbitrator recorded in his order that he had been appointed by means of an order dated 05.04.2018 and had issued notice to the

parties on 16.04.2018. One year's time had expired and the proceedings could not be completed within the time provided under Section 29-A of the Arbitration and Conciliation Act. This Section provides that the time may be extended either by mutual consent of both the parties or the Court may extend the time. Neither the parties had extended time for adjudication of the dispute by the Arbitrator by mutual consent, nor was any order passed by the Court extending the time period of the Arbitrator available on record. The Arbitrator fixed 26.05.2019 for further orders. On 26.05.2019, the Arbitrator again posted the matter for 05.07.2019 for further orders. On 05.07.2019, the matter was posted for 25.07.2019, on which date the respondents declined to extend the time for completion of arbitration proceedings.

8. On 18.9.2019, the petitioners filed an application under Section 29A of the Arbitration and Conciliation Act, 1996 before the Presiding officer, Commercial Court No.1, Lucknow praying for extension of time for conclusion of the arbitration proceedings by a further duration of at least 12 months. The respondents filed objections against the application for extension of time on 12.2.2020. The application has been rejected by means of the impugned order dated 11.03.2024.

9. The Commercial Court has held that the period for conclusion of the arbitral proceedings expired on 06.04.2019 but the claimant did not make a request before the Arbitrator for extension of time. The application for extension of time was filed in the Court after 5 months and 12 days since expiry of the period of one year available to the Arbitrator under Section 29-A of the Arbitration and Conciliation Act and the petitioners did not give any explanation for this delay.

10. The Commercial Court further observed that a perusal of the record reveals that the petitioners have filed applications - C4, C5 and C6, and the Arbitrator had passed orders on those applications on 19.04.2019 i.e. 13 days after expiry of his mandate and this order is non-est in law. The petitioners have filed an application under Section 27 of the Arbitration and Conciliation Act before the Commercial Court on 30.05.2019 (which date is wrongly mentioned in the impugned order as 26.08.2019), which was filed after termination of mandate of the Arbitrator and the Court had passed an order dated 30.07.2019 on the said application, which too has been passed after termination of the mandate of the Arbitrator.

11. The Commercial Court held that the petitioners' contention that the proceedings could not be concluded within time due to non-corporation of the respondents is not believable in its entirety. It is correct that the respondents have sought adjournment on 02.03.2019, 09.03.2019 and 18.03.2019 but the petitioners have not objected against the requests for adjournments, which indicates that they also intended to cause delay in disposal of the matter.

12. The Commercial Court held that time for completion of arbitration proceedings can be extended under Section 29-A of the Act even after termination of mandate of the Arbitrator yet as the Commercial Court was of the view that the petitioners themselves have caused delay on several dates, the application under Section 29-A of the Arbitration and Conciliation Act was liable to be rejected.

13. While assailing the validity of the aforesaid order, the learned counsel for the

petitioners submitted that the observations made by the Commercial Court in the impugned order that the petitioners did not oppose the request for adjournment made on behalf of the respondents indicates that they intended to cause delay in disposal of the proceedings and, therefore, the application under Section 29-A of the Arbitration and Conciliation Act is liable to be rejected, is factually and legally incorrect. The request for adjournment on 3 dates was made due to personal difficulties of the learned counsel for the respondents and in case the learned counsel for the petitioners were courteous and did not object against adjournments sought due to personal difficulties of the learned counsel for the respondent, this is no ground to penalize the petitioners by foreclosing the forum for dispensation of justice through the process of arbitration.

14. The basic object of any judicial or quasi-judicial form is to ensure dispensation of justice and the rules of procedure are framed to aid the Courts and other judicial/quasi-judicial fora in ensuring expeditious disposal of justice. The rules of procedure should not be interpreted/implemented in such a manner as to cause a failure of justice. The endeavor of the Courts to ensure expeditious disposal of cases is appreciated but this endeavor to ensure expedition should not be allowed to override the basic object of the Courts, which is to ensure dispensation of justice to the parties.

15. In the present case, Section 29-A would be applicable as it existed prior to amendment by Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019), which read thus: -

"29-A. Time limit for arbitral award.— (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.

(6) While extending the period referred to in sub-section (4), it shall be open to the court to substitute one or all of

the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

16. Section 29-A, as amended by Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019) reads as follows: -

"29-A. Time limit for arbitral award.*—[(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:*

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.

(6) While extending the period referred to in sub-section (4), it shall be open to the court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record,

and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

17. The learned Counsel for the petitioner submitted that there is no authoritative pronouncement of this Court regarding interpretation of Section 29-A (4) and the High Courts of Delhi, Kerala and Jammu and Kashmir and Ladakh have held that sub-section (4) provides that the Court is empowered to extend the period for making the award either prior to or after the expiry of the said period, whereas Calcutta High Court has held that Section 29-A(4) uses the word "extension" for the period specified under section 29-A(1) or (3) of the arbitrator's mandate to make the award. There is a conscious omission of the word "renewal" or "revival". This would mean that the continuing mandate of the arbitrator must form the substratum for an application to be made for extension of that mandate.

18. As there is a divergence of opinions of various High Courts on this point, it would be appropriate to have a look at those decisions.

19. In **Wadia Techno-Engineering Services Ltd. v. Director General of Married Accommodation Project,** 2023 SCC OnLine Del 2990 decided on 16.05.2023, a Single Judge Bench of Delhi High Court held that: -

"23…. The provision clearly provides that the Court may extend the period even after its expiry. Indeed, the second proviso provides that the mandate of the tribunal would continue until the disposal of such a petition. I see no justification in the text of the statute, or on a purposive interpretation thereof, to hold that the power can only be exercised on an application filed prior to the expiry of the mandate."

20. In **Hiran Valiiyakkil Lal v. Vineeth M.V., 2023 SCC OnLine Ker 5151** decided on 13.07.2023, it was held that "the sub-section (4) provides that the Court is empowered to extend the period for making the award either prior to or after the expiry of the said period. Sub-section (5) provides that such extension of period may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. Subject to the above, the time limit specified for arbitral award can be extended by Court."

21. In **Reliance Infrastructure Ltd. v. Madhyanchal Vidyut Vitran Nigam Ltd.,** 2023 SCC OnLine Del 4894 decided on 14.08.2023, another Single Judge Bench of Delhi High Court held that *"in terms of Section 29A (4) and (5) of the Act, the mandate of the Arbitrator can be extended by the Court even after expiry of the time for making of the arbitral award on sufficient cause being shown by the party making the application."*

22 . However, in **Rohan Builders (India) Pvt. Ltd. versus Berger Paints**

India Ltd., 2023 SCC OnLine Cal 2645 decided on 06.09.2023, a Single Judge Bench of Calcutta High Court held that: -

*"43. The second proviso to section 29-A(4) hence envisages pendency of an application for extension of the arbitrator's mandate as opposed to filing of an application. Therefore, the mandate can only continue if the application is filed prior to expiry of the mandate and not thereafter. The words in section 29-A(4) "...**either prior to or after the expiry of the period so specified**..." is a deeming fiction which takes shape to ensure that the application is made during the continuation of the mandate.*

44. Section 29-A(4) uses the word "extension" for the period specified under section 29-A(1) or (3) of the arbitrator's mandate to make the award. There is a conscious omission of the word "renewal" or "revival". This would mean that the continuing mandate of the arbitrator must form the substratum for an application to be made for extension of that mandate. If the framers intended that the application for extension could be made at any time after expiry of the mandate, section 29-A(4) would not have used "terminate" but "revive" or "renew"."

23. The learned Counsel for the petitioners informed that a Special Leave Petition filed against the aforesaid order is pending before the Hon'ble Supreme Court.

24. In **ATC Telecom Infrastructure (P) Ltd. v. BSNL**, 2023 SCC OnLine Del 7135 decided on 06.11.2023, another Single Judge Bench of Delhi High Court followed the decision in the case of **Wadia Techno-Engineering Services Ltd.** (Supra) and held that: -

"25. Thus, under Section 29A(4) of the A&C Act, the termination of the mandate of the arbitrator(s) is subject to the decision of the Court which may be "either prior or after the expiry" of the specified period. The Court would take a suitable decision upon a petition under Section 29A(4) of the A&C Act being filed. Such a petition can be filed either before expiry of the period referred to under Section 29A(1) or Section 29A(3) of the A&C Act or even thereafter. When the Court has been specifically empowered to grant the requisite extension even after expiry of the specified period, it would not be apposite to read a proscription in the statutory provision to the effect that a petition under Section 29A(4) of the A&C Act [seeking extension of time] must be filed before expiry of the specified period and not thereafter. Such a proscription simply does not exist in the statute. On the contrary, as already noticed, the court has been empowered to grant an extension even after expiry of the specified period."

25. The **Delhi High Court further held in ATC Telecom Infrastructure (P) Ltd.** (Supra) that: -

"27. The facts of the present case also illustrate that the dictum laid down in Rohan Builders (supra) can potentially thwart, rather than subserve the legislative intent. In the present case, there is no controversy that the learned sole Arbitrator has conducted the arbitral proceedings with expedition and despatch, and that there is ample justification for extending the time period for completion of arbitral proceedings and making of the arbitral award. The order dated 18.09.2023 passed by the learned sole Arbitrator even records the consent of the parties in this regard. To deny extension of time in such a case, only

because the petition under Section 29A(4) of the A&C Act came to be filed a few days after expiry of the period set out in Section 29A(3) of the A&C Act besides being in the teeth of the language of Section 29A(4) of the A&C Act, seriously undermines the efficacy of the arbitral process and also impinges on party autonomy. Any interpretative exercise must therefore avoid this consequence.

28. For all the above reasons, I am in respectful disagreement with the judgment of Rohan Builders (supra). I am also bound by the view taken by a Co-ordinate bench of this Court in Wadia Techno-Engineering Services (supra)."

26. **ATC Telecom Infrastructure (P) Ltd.** (Supra) has been followed by Delhi High Court in **ATS Infrastructure Ltd. and Ors. Vs. Rasbehari Traders, O.M.P. (T) (COMM.)** 91/2023, decided on 17.11.2023. A Special Leave Petition has been filed against the order and the same is pending.

27. In **H. P. Singh v. G. M. Northern Railways,** 2023 SCC OnLine J&K 1255 decided on 07.12.2023, the High Court of Jammu and Kashmir and Ladakh held that "*I am unable to concur with the view taken by the Calcutta High Court in Rohan (supra), as I am also of the opinion that even after the mandate of the Arbitrator has been terminated on expiry of the term under sub-section (1) or (3) as the case may be, an application for extending the term/mandate will be maintainable under sub-section (4) of section 29A of the Act."*

28. The golden rule of interpretation of statutes is that the words used by the legislature have to be given their plain and simple meaning and no other rule of interpretation is to be applied if there is no ambiguity in the legislative provision.

29. In **Hiralal Rattanlal v. State of U.P.**, (1973) 1 SCC 216, the Hon'ble Supreme Court held that: -

"In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear."

30. In **Gurudevdatta VKSSS Maryadit v. State of Maharashtra,** (2001) 4 SCC 534,the Hon'ble supreme clarified that: -

"*26. ...it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of*

construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute."

31. In **B. Premanand v. Mohan Koikal**, (2011) 4 SCC 266, the Hon'ble Supreme Court reiterated that: -

"9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule.."

32. In **Rakesh Kumar Paul v. State of Assam,** (2017) 15 SCC 67, the Hon'ble Supreme Court explained the principles of interpretation in the following words: -

"67. While interpreting any statutory provision, it has always been accepted as a golden rule of interpretation that the words used by the legislature should be given their natural meaning. Normally, the courts should be hesitant to add words or subtract words from the statutory provision. An effort should always be made to read the legislative provision in such a way that there is no wastage of words and any construction which makes some words of the statute redundant should be avoided. No doubt, if the natural meaning of the words leads to an interpretation which is contrary to the objects of the Act or makes the provision unworkable or highly unreasonable and arbitrary, then the courts either add words or subtract words or read down the statute, but this should only be done when there is an ambiguity in the language used. In my view, there is no ambiguity in the wording of Section 167(2) of the Code and, therefore, the wise course would be to follow the principle laid down by Patanjali Shastry, C.J. in Aswini Kumar Ghose v. Arabinda Bose AIR 1952 SC 369, where he very eloquently held as follows:

"26. ... It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."

In Jugalkishore Saraf v. Raw Cotton Co. Ltd. AIR 1955 SC 376, S.R. Das, J., speaking for this Court, held as follows:

"6. ... The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning."

68. External aids of interpretation are to be used only when the language of the legislation is ambiguous and admits of two or more meanings. When the language is clear or the ambiguity can be resolved under the more common rules of statutory interpretation, the court would be reluctant to look at external aids of statutory interpretation.

69. Gajendragadkar, J., speaking for this Court in Kanai Lal Sur v. Paramnidhi Sadhukhan AIR 1957 SC 907, held :

"6. ... the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself."

70. These sound principles of statutory construction continue to hold the field. When the natural meaning of the words is clear and unambiguous, no external aids should be used."

33. Following the aforesaid judgments in the cases of **Hiralal Rattanlal and B. Premanand (Supra), in Vidarbha Industries Power Ltd. v. Axis Bank Ltd**., (2022) 8 SCC 352, the Hon'ble Supreme Court reiterated that "It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation".

34. In **V. Senthil Balaji v. State,** (2024) 3 SCC 51, the Hon'ble Supreme Court laid down that "When there is no need for a purposive interpretation and the statute clearly expresses its intendment, an act of judicial surgery is best avoided."

35. The unamended Section 29-A(4) provided that If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period. Even after amendment of the Section, this sub-section continues to remain the same.

36. Thus the words used by the legislature in Section 29-A (4) are clear that the Court may extend the period either prior to or after the expiry of the period specified in sub-section (1) of Section 29-A. Thus it is clear that the Court may extend the period for completion of arbitration proceedings beyond one year even after expiry of the period and there is no condition that the Court can extend the period only if an application in this regard has been made prior to expiry of the period.

37. When the legislature has not used any words to restrict the power of the Court under Section 29-A(4) to be exercised only in cases where an application under that provision is filed before expiry of the period mentioned in Section 29-A(1), it is impermissible in law to read these words by implication by applying any principles of interpretation of Statutes.

38. Therefore, the law is clear that the Court can extend the period of arbitration under Section 29-A (4) of the Arbitration and Conciliation Act, 1996 irrespective of the fact whether the application seeking extension of time has been filed before expiry of the period specified in sub-Section (1) of Section 29-A or after that.

39. In the present case, the Commercial Court has rightly held that time for completion of arbitration proceedings can be extended under Section 29-A of the Act even after termination of mandate of the Arbitrator, yet it denied extension of time under Section 29-A (4) for the sole reason that the claimant had not opposed the requests for adjournment made on the ground of personal difficulties of the learned Counsel for the respondent on three occasions. This approach of the Commercial Court cannot be appreciated by this Court, as it has resulted in denial of justice to the claimant / petitioner. This reason recorded by the Commercial Court is even factually incorrect, as the petitioner had not opposed the requests for adjournment only on two dates, i.e. 22.02.2019 and 02.03.2019. On the third date, i.e. 09.03.2019, the petitioner had opposed the respondent's request for adjournment but the arbitrator had granted the adjournment.

40. The Commercial Court has also supported his order by observing that a period of 4 ½ years was spent in disposal of the application under Section 29-A (4). It is relevant to note that Section 29-A(9) provides that "An application filed under sub-section (5) shall be disposed of by the court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party". It is the duty of the Court follow this legislative mandate and the responsibility for delay in disposal of the application cannot be entirely fastened on a party – more particularly when the order does not contain any factual particulars as to how the petitioner was responsible for delay in disposal of the application under Section 29-A(4).

41. In any case, the delay in disposal of the application under Section 29-A(4) cannot be a reason for rejection of the application and it appears that the Commercial Court has rejected the application on considerations which are not relevant.

42. In view of the foregoing discussion, I am of the considered view that the impugned order dated 11.03.2024 passed by the Presiding Officer, Commercial Court No.1, Lucknow in Misc. Case No.305 of 2019 rejecting the petitioner's application for extension of time for completion of arbitration proceedings under Section 29-A of the Arbitration and Conciliation Act, 1996, is unsustainable in law.

43. The learned counsel for the respondents has opposed the petition but she has not seriously disputed the power of the Court to grant extension of time for conclusion of arbitral proceedings in the interest of justice even after expiry of the mandate of the arbitrator, particularly when the proceedings had reached an advanced stage. However, she has submitted that as the respondents had declined to extend the mandate of Arbitrator, the respondents would be apprehensive in getting a fair hearing before the Arbitrator, whose mandate they had declined to extend. Therefore, she requests that in case the period for conclusion of arbitration proceedings is extended under Section 29-A of the Arbitration and Conciliation Act, this court may substitute the Arbitrator. The learned counsel for the petitioners has no objection to the aforesaid submissions of the learned counsel for the respondents.

44. In view of the aforesaid submissions, without going into the reasonableness of the respondent's apprehension, in view of the consensus between the learned Counsel for the parties, it appears to be just to pass an order substituting the Arbitrator. Both the learned Counsel agree for appointment of Sri. Deepak Kumar, H.J.S. (Retd.), resident of 3/310, Vinamra Khand, Gomti Nagar, Lucknow, as the substitute arbitrator for completion of the arbitration proceedings.

45. Accordingly, this petition deserves to be **allowed**. The impugned order dated 11.03.2024 passed by the Presiding Officer, Commercial Court No.1, Lucknow in Misc. Case No.305 of 2019 rejecting the petitioner's application for extension of time for completion of arbitration proceedings under Section 29-A of the Arbitration and Conciliation Act, 1996 is liable to be set aside and the application under Section 29-A filed by the petitioner before the Commercial Court deserves to be allowed. The substitute arbitrator to be appointed by

this Court will complete the arbitration proceedings between the parties within a period of one year from the date of first appearance of the parties before him.

46. The office is directed to obtain consent of Sri. Deepak Kumar, H.J.S. (Retd.), resident of 3/310, Vinamra Khand, Gomti Nagar, Lucknow, for acting as the Arbitrator for deciding the dispute between the parties in terms of Schedule VI of the Arbitration and Conciliation Act, 1996.

47. List on 24.05.2024 for further orders.

(2024) 5 ILRA 566
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2024

BEFORE

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

Matters Under Article 227 No. 3254 of 2024

Kailash & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Phool Singh

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 307, 506, 34 – The Code of Criminal Procedure, 1973 - Sections 200, 202, 204 – As per complaint – Petitioner no. 1 has been assigned the role of firing with pistol, while Petitioner no. 2 has been assigned the role of exhortation - Allegations have been supported by St.ments u/s 200, 202 Cr.P.C. - Medical report is indicative of firearm injuries - Submission that at the stage of summoning, the Magistrate is only required to record a prima facie opinion, based on material on record, and is not expected to hold a mini trial or to examine defence of accused – Scope of procedure followed by Magistrate - Held, allegations in complaint have been found to be supported in the St.ment made by complainant during the course of examination and also by St.ments of witnesses recorded during the course of inquiry made by Magistrate – Summoning order has been passed by trial court after taking due consideration of material available on record – Hence, the order passed by court below doesn't suffer from any infirmity and also the revisional court order affirming the summoning order of Magistrate can't be faulted, for the same reason. (Para 2, 4, 5, 13)

Petition dismissed. (E-13)

List of Cases cited:

1. S.W. Palanitkar & ors. Vs St. of Bihar & anr., (2002) 1 SCC 241

2. Nirmaljit Singh Hoon Vs St. of West Bengal & anr., (1973) 3 SCC 753

3. Chandra Deo Singh Vs Prokash Chandra Bose, (1964) 1 SCR 639

4. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors., (1976) 3 SCC 736

5. Nupur Talwar Vs Central Bureau of Investigation & anr., (2012) 11 SCC 465

6. Sanjay Singh & anr. Vs St. of U.P. & anr., 2021 (117) ACC 479

7. Pinkal Singh @ Raghvendra Singh & ors. Vs St. of U.P. & anr., 2021 (3) ACR 2461

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

1. Heard Sri Phool Singh, learned counsel for the petitioners and Sri Prem Prakash Tiwari, learned AGA-I appearing for the State-respondent.

2. The present petition has been filed seeking to assail the summoning order dated 05.05.2023 passed in Complaint Case No. 5683 of 2019 (Anar Singh Vs. Kailash and others), under Sections 307, 506, 34 IPC, and the subsequent order dated 22.12.2023 passed in Criminal Revision No. 75 of 2023 (Kailash Vs. Anar Singh and others), in terms of which the earlier order has been affirmed.

3. Counsel for the petitioners has sought to assail the orders by referring to the factual aspects of the case, and the defence which is to be set up on behalf of the petitioners.

4. Learned AGA-I submits that, as per the complaint version, the petitioner no. 1 has been assigned the role of firing with a pistol, and the petitioner No. 2 has been assigned the role of exhortation, as per the statement of the injured, and the complaint allegations have been supported by the statements under Section 200 and 202 Cr.P.C., and also that the medical report is indicative of the firearm injuries.

5. It is submitted that at the stage of summoning, the Magistrate is only required to record a prima facie opinion, based on the material on record, and is not expected to hold a mini trial or to examine the defence of the accused.

6. The procedure to be followed by the Magistrate upon taking cognizance, on a complaint, as per Sections 200, 202 and 204 of the Code and the degree of satisfaction to be recorded at this stage would be required to be referred to for the purpose of the controversy involved in the present case.

7. Section 200 provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and that the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The object of such examination is with a view to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person.

8. The object of section 202 is to enable the Magistrate to form an opinion as to whether the process is to be issued or not. The purpose of the investigation to be directed under this section is to help the Magistrate in arriving at a decision as to the issuance of process. The broad based inquiry by the Magistrate, as contemplated under this section, is with a view to enable him to arrive at a decision as to whether he should dismiss the complaint or whether he should proceed to issue process upon the complaint.

9. The provisions contained under sections 200, 202 and 204 of the Code and the degree of satisfaction required to be recorded at this stage by the Magistrate was subject matter of consideration in **S.W. Palanitkar and Others v. State of Bihar and Another** and it was held that test which was required to be applied was whether there is "sufficient ground for proceeding" and not whether there is "sufficient ground for conviction". Referring to the earlier decisions in the case of **Nirmaljit Singh Hoon v. State of West Bengal and**

Another, Chandra Deo Singh v. Prokash Chandra Bose, and **Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others,** it was stated that the scope of inquiry under section 202 is limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (i) on the material placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

10. The sufficiency of the material and the test to be applied at the stage of issue of process again came up for consideration in the case of **Nupur Talwar v. Central Bureau of Investigation and Another** and it was reiterated that the limited purpose of consideration of material at the stage of issuing process being tentative as distinguished from the actual evidence produced during trial, the test to be applied at the stage was whether the material placed before the Magistrate was "sufficient for proceeding against the accused" and not "sufficient to prove and establish the guilt".

11. The object of the inquiry under Section 202 is not akin to a trial, which can only take place after issuance of process. The inquiry made by the Magistrate, at this stage, is only with a view to ascertain the truth or falsehood of the complaint, with reference to the intrinsic quality of the statements made before him at the inquiry, which would mean the complaint, the statement on oath made by the complainant and the statements made by persons examined at the instance of the complainant. At the stage of issue of process under Section 204, the Magistrate is only to decide whether there exists sufficient ground or not for proceeding in the matter.

12. The aforementioned legal position has been considered in a recent decision of this Court in **Sanjay Singh and Another Vs. State of U.P. and Another** and followed in another decision in **Pinkal Singh @ Raghvendra Singh and Others vs. State of U.P. and Another.**

13. In the case at hand, the allegations in the complaint have been found to be supported in the statement made on oath by the complainant during the course of examination under section 200 and also by the statements of the witnesses recorded during the course of inquiry made by the Magistrate under section 202. The order summoning the accused petitioners passed by the trial court indicates that the same has been passed taking due consideration of the material available on record. Reference has been made to the statements under Sections 200 and 202 and also the fact that the statements recorded support the complaint allegations. The order passed by the court below issuing process thus does not suffer from any infirmity so as to warrant interference by this Court. The order passed by the revisional court affirming the summoning order of the Magistrate, also cannot be faulted, for the same reason.

14. Counsel for the petitioners has not been able to dispute the aforesaid factual and legal position.

15. Having regard to the aforesaid, this Court is not inclined to entertain this petition in exercise of its supervisory power under Article 227 of the Constitution of India.

16. The petition stands **dismissed** accordingly.

(2024) 5 ILRA 569
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2024

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Matters U/A 227 No. 8348 of 2023 (CIVIL)

Maharaj Kumari Vishnupriya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rithvik Upadhyay, Sri V.K. Upadhyay (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Sanjay Singh, Sri Saurabh Raj Srivastava, Sri Anil Kumar (Sr. Adv.)

Criminal Law - Protection of Women from Domestic Violence Act, 2005 - Sections 3, 12, 23, 18 &22 – The Code of Criminal Procedure, 1973 - Section 340 - Applicability of DV Act is due to domestic violence inflicted on petitioner who is in a domestic relationship with respondent no.2, related by consanguinity - The protection order u/s 18 is being sought in application u/s 23 in respect of immovable property - Till the issue of title with regard to properties is finally decided by competent court, the petitioner claiming to be an 'aggrieved person' in a 'domestic relationship', is subjected to 'domestic violence', entitled to claim benefits and protection - Civil Court have jurisdiction to determine rights of parties and make appropriate decrees - Where in application u/s 12, permissible amendment in view of subsequent developments is made, additional permissible relief is sought, a fresh application u/s 23 would be maintainable - Protection order to be passed by Magistrate on being satisfied that domestic violence had taken place or was likely to take place – Direction to petitioner to move application before civil court, where civil suit is pending, pertaining to properties for temporary injunction or protection order – Directions accordingly. (Para 26, 27, 29, 30)

Petition disposed. (E-13)

List of Cases cited:

1. Satish Chander Ahuja Vs Sneha Ahuja, (2021) 1 SCC 414

2. Himani Alloys Ltd. Vs Tata Steel Ltd, (2011) 15 SCC 273

3. Kunapareddy Vs Kunapareddy Swarna Kumari &oOrs., (2016) 11 SCC 774

4. Vaishali Abhimanyu Joshi Vs Nanasaheb Gopal Joshi, (2017) 14 SCC 373

5. Deoki Panjhiyara Vs Shashi Bhushan Narayan Azad & anr, (2013) 2 SCC 137

(Delivered by Hon'ble Jayant Banerji, J.)

1. Heard Shri V.K. Upadhyay, learned Senior Advocate assisted by Shri Ritvik Upadhya, learned counsel for the petitioner and Shri Anil Kumar Srivastava, learned Senior Advocate assisted by Shri Saurabh Raj Srivastava, learned counsel appearing for the respondents.

2. This petition has been filed seeking to set aside the order dated 2.6.2023 passed by the Additional District Judge, Court No. 14, Varanasi in Criminal Appeal No. 70 of 2022 (Maharaj Kumari Vishnupriya vs. State of U.P. and others) with a further relief to prohibit and restrain the respondents from committing any act of economic abuse against the petitioner by alienating or creating in any manner whatsoever third party interest over any part of the properties

as mentioned in the schedule to the application dated 30.10.2021 of the petitioner (Annexure No. 7) and also not to interfere in the peaceful possession of the petitioner.

3. It appears from the record of this petition that the petitioner is the daughter of late Vibhuti Narain Singh, who was the erstwhile ruler of the State of Banaras and has been continuously living in the fort of Ramnagar since childhood. The respondent No. 2 is the youngest sibling of the petitioner and son of late Vibhuti Narain Singh who also continues to stay along with the petitioner as a family member in the Ramnagar Fort even after the demise of his father on 25.12.2000.

4. After the death of their father, it is alleged that the petitioner and another family member were subjected to misbehaviour, manhandling and torture, which were engineered to dispossess her from her residence in Ramnagar Fort and other properties to which she is entitled. The reasons for staying in her matrimonial home has been explained by the petitioner in paragraph nos. 7, 8 and 9 of the petition. It has been stated that after the death of Vibhuti Narain Singh, domestic violence was committed by the Respondent No. 2 and he took into his custody various documents including the recorded family settlement of 8.12.1969 which was reduced in writing on 16.7.1970 and other documents of title, etc. and he created a situation in the residence which became non-conducive to the peaceful residence of the petitioner. This led to the institution of a case by means of an application under Section 12 read with Section 23 of the Protection of Women from Domestic Violence Act, 2005 in October 2011. The court of the Additional Chief Judicial Magistrate, Court No. 10, Varanasi, by an order dated 21.10.2011, prohibited the petitioner no. 2 from interfering in the shared household in the possession of the petitioner over properties reflected in Annexure Nos. C1 and C2 of the application and not to evict her, not to create any hindrance and not to harass her during pendency of the aforesaid case under the DV Act. The order dated 21.10.2011 was affirmed by the Supreme Court.

Thereafter an application under Section 23 of the DV Act was filed on 30.10.2021 seeking a direction under Section 18 of the DV Act for restraining the petitioner No. 2 from transferring the properties specified in the schedule to that application. The schedule to the application specified several plots of land with their respective areas in Mauza Kodopur, Pargana Ramnagar, Tehsil and District Varanasi. Objections were filed by the respondent No. 2 on 7.1.2021. By an order dated 12.4.2022, the trial court observed that it is the civil court which would be competent to grant the relief sought in the application dated 30.10.2021. Challenging the aforesaid order dated 12.4.2022, an appeal bearing Criminal Appeal No. 70 of 2022 was filed in the court of the District and Sessions Judge, Varanasi seeking setting aside of the order dated 12.4.2022. By the impugned judgment and order dated 2.6.2022, the appeal was dismissed.

5. The contention of the learned counsel for the petitioner is that the property in dispute includes both that are mentioned in the schedule to the application made by the petitioner in the year 2011 under Section 12 read with Section 23 of the DV Act, as well as the properties mentioned in the schedule enclosed with the application dated 30.10.2021. It is stated that given the definition of the terms “aggrieved person”,

"domestic relationship", "domestic violence", "shared household" appearing in section 3 of the DV Act, as well as the term "economic abuse" appearing in Explanation 1 to Section 3 of the DV Act, the properties in dispute are well within the jurisdiction of the courts under the DV Act. It is stated that the Magistrate is empowered to grant protection orders for prohibiting the respondents from committing any act of domestic violence as well as for prohibiting the respondents from alienating any assets of the aggrieved person that may be held jointly by the aggrieved person and the respondent or singly by the petitioner, including her 'stridhan' or any other property held either jointly by the parties or separately by them. It is further contended that given the provisions of Section 26 of the DV Act, any relief available under Sections 18, 19, 20, 21, and 22 may also be sought in any legal proceeding, before civil court, family court, or a criminal court, affecting the aggrieved person and the respondent, whether such proceeding was initiated before or after the commencement of the DV Act, and any relief referred in that provision could be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. However, the only condition that is imposed on the aggrieved person is that in case any relief has been obtained by her in any proceedings other than the proceeding under the DV Act, she shall be bound to inform the magistrate for the grant of such relief. The contention is that given the fact that the family settlement of 8.12.1969 that was reduced in writing on 16.7.1970 which has been admitted by the respondent no. 2 time and again in various proceedings including in the proceedings under the D.V. Act, the courts exercising jurisdiction under the DV Act had jurisdiction to grant an appropriate order under Section 23 of the DV Act, and it is a case of failure to exercise jurisdiction by the courts concerned against which the petitioner is aggrieved. The learned counsel has referred to a judgment of the Supreme Court in the case of **Satish Chander Ahuja v. Sneha Ahuja** to contend that the court while exercising jurisdiction under Section 18 of the DV Act would exercise civil jurisdiction. The learned counsel has referred to Annexure No. 1 in the rejoinder affidavit to contend that the appellate court had noticed that the Protection Officer in its letter dated 28.4.2018 had no right to travel beyond the scope of the inquiry that she was required to conduct. The learned counsel for the petitioner has further sought to contend that the delay attributed to the petitioner in filing the subsequent application dated 30.10.2021 was not as a result of any deliberate act on her part but was actually attributable to the circumstances emerging out of transfer of properties by the respondent No. 2 in the year 2021.

Learned counsel for the petitioner has also pressed an application No.3 of 2023 filed under Chapter XXII Rule 1 of the Allahabad High Court Rules read with Section 340 Cr.P.C. for initiation of criminal prosecution against the respondent no.2 and one Shatrughan Singh for deliberately making the false and misleading statement in the counter affidavit dated 6.11.2023.

6. On the other hand, Shri Anil Kumar Srivastava, learned Senior Advocate has referred to the judgment of the High Court dated 4.1.2019 and the order of the Supreme Court dated 2.9.2019 to contend that the subsequent application dated 30.10.2021 was deliberately filed by the petitioner to delay and defeat the outcome of the case instituted under the DV Act which were directed by this Court as well as by the

Supreme Court for being decided expeditiously. The learned counsel has referred to orders passed by the trial and appellate courts. It is stated that mutation with regard to the disputed properties has already taken place in favour of the respondent no. 2 and as such, no stay or injunction can be granted by the criminal court under the provisions of the DV Act inasmuch as it is the civil court which is competent to adjudicate that matter relating to immovable properties. The learned counsel for the respondent No. 2 has referred to a communication made by the Protection Officer, Varanasi dated 28.4.2018, that has been enclosed as an Annexure No. 1 to the counter affidavit, to contend that a categorical observation was made in that letter that there is no evidence of domestic violence because both the plaintiff and the respondent are residing in their separate portions of the premises. Learned counsel has also referred to the Original Suit No. 165 of 2022, a copy of the plaint, which has been enclosed as Annexure No. 3 to the counter affidavit to demonstrate that a civil suit with regard to the property in dispute is pending. It is therefore urged that rejection of the application dated 30.10.2021 was justified.

7. On perusal of the record, it appears that the aforesaid application under Section 12 read with Section 23 of the DV Act, bearing No.829 of 2011, was filed by the petitioner against the respondent no.2 claiming to be an aggrieved person who is living in a shared household in a domestic relationship and is being subjected to domestic violence. The petitioner stated that she was residing in her paternal home and soon after the death of her father, the respondent no.2 asked her to leave the house and subjected her to domestic violence. Allegation of damage to the rooms, kitchens and storerooms that are in her possession by the respondent no.2 was made, the details of which properties were mentioned in Annexures C-1 and C-2 enclosed alongwith the application. A relief, inter alia, was sought against the respondent no.2 for restraining him and his agents from dispossessing the petitioner from the shared household or making any alteration or demolition in the said portions which are in the exclusive possession of the petitioner. By an order of 21.10.2011, the Magistrate passed the restraint order in respect of that part of the shared household reflected in Annexures C-1 and C-2 to the aforesaid application.

8. The order dated 21.10.2011 was challenged in an appeal before the Additional Sessions Judge who, by his judgment and order dated 7.3.2013, dismissed the appeal and affirmed the order dated 21.10.2011 passed by the Magistrate. Against the aforesaid orders dated 21.10.2011 and 7.3.2013, Criminal Revision No.1499 of 2013 was preferred by the respondent no.2 before this Court, in which the Court held that there was no error in the orders dated 21.10.2011 and 7.3.2013. However, the applications pending before the trial court as well as the Case No.829 of 2011 itself were directed to be decided expeditiously. The judgment of this Court in the aforesaid criminal revision was challenged before the Supreme Court by means of a Special Leave Petition (Criminal), which was dismissed by an order dated 2.9.2013 while directing the trial court to expeditiously dispose of the case within a period of six months.

9. Thereafter, certain plots of agricultural land situated in Mauza Kodopur, Pargana Ramnagar, Tehsil & District Varanasi, that are stated to be part of

an oral family settlement, which later came to be recorded in a memorandum, were being alienated by the respondent no.2 despite the fact that, as stated, the petitioner alone was the owner under the family settlement. Therefore, the aforesaid fresh application dated 30.10.2021 was filed by the petitioner under Section 23 of the DV Act seeking protection order under Section 18 in respect of those immovable properties.

10. Objections were filed by the respondent no.2 and in paragraph 7 whereof, apparently, an admission was made with regard to the family settlement. The claim of the petitioner made in the application dated 30.10.2021 was refuted. By an order dated 12.4.2022, the Magistrate rejected the application dated 30.10.2021 filed by the petitioner. The Magistrate observed that a civil suit is pending between the parties and in the revenue records, the name of the respondent no.2 was recorded; that till the time the civil court does not decide the suit, it cannot be said with certainty that the petitioner is the owner of the property; that as only on that basis the respondent no.2 is alienating the property, he cannot be restrained under the DV Act. The Magistrate noted that on 21.10.2011, with regard to the shared household of the petitioner, an interim relief was granted till the final disposal of the application under the DV Act; that in Annexures C-1 and C-2, there is no record of any arazi number, whereas the application dated 30.10.2021 reflects several arazi numbers along with areas seeking relief with respect to those properties. It was held that the petitioner had not been able to prove how the order dated 20.10.2011 was being violated; that orders could be passed only with regard to the shared household under the DV Act, and that no order could be made for restraining the transfer of properties as sought in the application. It was, accordingly, held that the jurisdiction with regard to the restraining transfer of the properties mentioned in the application dated 30.10.2021 was with the civil court and as far as the right of the petitioner with regard to the shared household is concerned, an order dated 20.10.2011 had already been passed. The application dated 30.10.2021 filed by the petitioner was, accordingly, rejected.

11. Against the aforesaid order of the Magistrate, an appeal being Criminal Appeal No.70 of 2022, was filed by the petitioner in which objections were filed by the respondent no.2. The respondent no.2 stated that he is the recorded owner of the properties mentioned in the application dated 30.10.2021. The petitioner had no right over the personal properties of the erstwhile ruler of Banaras; his name is recorded in the khatauni as per rules and if there is any objection to the same, it may be raised before the revenue courts; there is no jurisdiction of the Magisterial court nor can any interference be made therein; there is no collusion between the respondent no.2 and the vendees mentioned in the two sale-deeds; the vendees are not parties to the proceedings and in this connection it is only the civil court which has jurisdiction to try the matter regarding the two sale-deeds; in case there is any non-compliance of the order of the court, then it has to be clearly mentioned in the application; the petitioner has sought a new relief in that application, and accordingly, the application deserves to be dismissed.

12. The appellate court framed a point for determination that whether another application under Section 23 of the DV Act

can be filed during the validity of the order dated 2.10.2011 (sic 21.10.2011) passed in the previous application under Section 23 of the DV Act.

13. The appellate court noted that the previous order dated 21.10.2011 mentioned in the application dated 30.10.2021 reflects that an order under Section 23 of the DV Act was passed and on the part of the properties in possession reflected in Annexures C-1 and C-2, the respondent no. 2 was restrained from evicting the petitioner, creating any obstruction to persons meeting her and creating any obstruction with regard to the repairs being carried out by the petitioner in her portion of the properties; the complaint under Section 23 is pending trial. The appellate court observed that the issue whether the respondent No. 2 had right to execute the sale-deeds dated 20.7.2021 and 24.8.2021, can be decided by a civil court in a civil suit. Under the DV Act, a summary proceeding is prescribed in which the criminal procedure is used and under the circumstances, at the stage of the appeal or the trial, the issue cannot be looked into.

It was observed that as regards the entries made in the revenue records, the name of respondent no.2 is recorded and the petitioner had stated that she is the owner of the same immovable properties under a family settlement. It was observed that while adopting summary proceedings prescribed under the DV Act, the issue (regarding immovable properties) cannot be decided by the court; that in case any property is charged against the maintenance amount, then in respect of those properties, orders can be passed by the concerned court that that property would remain encumbered with the charge. It was held that since no charge was created with regard to any interim maintenance, therefore, such an order also could not be passed. It was observed that if the name of the respondent had been wrongly recorded, for setting it aside, the responsibility rested with the petitioner as the entries made in the revenue records are presumed to be correct. However, the appellate court did observe that the entries in the revenue records are not proof of title but pertain to recovery of land revenue only. It was observed that the proceedings under the DV Act are 'quasi-civil' which have to be decided on preponderance of probability and since, on the basis of possession, a prima facie presumption can be drawn regarding ownership; under such circumstances, only by the procedure prescribed by law, the matter can be set aside by the revenue court. The appellate court held that the petitioner is admittedly enforcing her right relating to immovable properties which cannot be done under the DV Act; the order of the trial court dated 12.4.2022 was passed after including (sic) the order dated 21.10.2011 and no fact had been stated that the order has been disobeyed; in the original complaint no such prayer had been sought by the petitioner as in the application dated 30.10.2021. During the effectiveness of the order dated 20.10.2011 (sic 21.10.2011), further interim order was being sought and that too in respect of a subject matter for which no relief can be granted under the DV Act. The appeal was, accordingly, dismissed.

14. As noted above, initially the application/complaint dated 11.10.2011 under section 12 read with section 23 of the DV Act was filed seeking relief in respect of the shared household that was mentioned in Annexures C-1 and C-2 to that application. The interim order passed by the Magistrate dated 21.10.2011 is effective till the disposal of the complaint case.

15. Sections 12 to 29 of the DV Act fall under Chapter IV of the DV Act, which

relates to procedures for obtaining orders seeking reliefs. Under Section 12 of the DV Act, an aggrieved person or a Protection Officer or any other person on behalf of an aggrieved person may present an application to the Magistrate seeking one or more reliefs under the DV Act. The reliefs sought for may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such persons to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent. Every application is required to be in the prescribed format or as nearly as possible thereto. The Magistrate is enjoined to endeavour to dispose of every such application within a period of 60 days from the date of its first hearing. Section 13 provides for service of notice on the respondent concerned and on any other person, through the Protection Officer. Section 14 gives power to the Magistrate to direct the respondent or aggrieved person to undergo counselling with any member of the service provider possessing such qualifications and experience in counselling as may be prescribed. Section 15 deals with assistance of welfare experts to the Magistrate. Section 16 gives a discretion to the Magistrate to conduct the proceedings under the DV Act in camera. Section 17 deals with the right of every woman in a domestic relationship to reside in the shared household whether or not she has right, title or any beneficial interest in the same. The aggrieved person cannot be evicted or excluded from the shared household or any part of it by the respondent except in accordance with the procedure established by law. Section 18 deals with protection order that may be passed by the Magistrate on being satisfied that domestic violence has taken place. Section 19 deals with residence orders that may be passed by the Magistrate on being prima facie satisfied that domestic violence has taken place, where the matter concerns the residence of the aggrieved person in a shared household. Section 20 provides for direction regarding monetary relief which may be made by the Magistrate while disposing of the application under sub-section (1) of section 12. Section 21 deals with custody orders that may be passed by the Magistrate at any stage of hearing of the application for protection order in respect of temporary custody of any child or children to the aggrieved person or the person making an application on her behalf. Section 22 deals with compensation orders that the Magistrate may pass in addition to other reliefs as may be granted under the DV Act. Section 23 invests power in the Magistrate to pass an interim ex-parte order as he deems just and proper, on the basis of an affidavit of the aggrieved person under Sections 18, 19, 20, 21 or, as the case may be, Section 22, against the respondent. Section 25 provides for the duration and alteration of protection orders made under Section 18. Section 26 reads as follows:-

"26. Relief in other suits and legal proceedings.

1) Any relief available under sections 18, 19,20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any

proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

Section 27 provides for the jurisdiction of the court of Judicial Magistrate or the Metropolitan Magistrate and that the order made in the DV Act shall be enforceable throughout India. Section 28 reads as follows:-

"28. Procedure.

(1) Save as otherwise provided in this Act, all proceedings under sections 12,18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23."

Section 29 provides for an appeal to the Court of Session from the order of the Magistrate.

16. Certain terms that have been defined in Section 2 of the DV Act merit consideration:-

"(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

….....

(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

(g) "domestic violence" has the same meaning as assigned to it in section 3;

….....

(o) "protection order" means an order made in terms of section 18;

(p) "residence order" means an order granted in terms of sub-section (1) of section 19;

….....

(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

....."

The definition of "domestic violence" is provided under Chapter II of the DV Act as under:-

"3. Definitions of domestic violence.

For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it--

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view

to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.--For the purposes of this section,--

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes--

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested;

(iv) "economic abuse" includes--

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, house hold necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared house hold and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.--For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

(emphasis supplied)

17. Initially, the application filed by the petitioner in the year 2011 under Section 12 read with Section 23 of the DV Act was in respect of the properties mentioned in its Annexures C-1 and C-2 and was specifically in respect of the shared household. As noted above, a protection order can be passed by the Magistrate prohibiting the respondent from committing any act of domestic violence, and, accordingly, an interim order was passed by the Magistrate on 21.10.2011, every challenge to which has been put to rest. However, the application dated 30.10.2021 deals with other immovable

properties which are mentioned in the Schedule to that application. The definition of "domestic violence" given in Section 3 of the DV Act is very wide. Under Explanation I of Section 3, sub-clause (b) of clause (iv), which pertains to 'economic abuse', the definition uses the word "includes", and entails disposal of household effects, a**ny alienation of assets whether movable or immovable,** valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person. It is noted that in sub-clauses (a) and (c) of clause (iv) of Explanation I, reference has been made to "shared household", whereas in sub-clause (b) thereof, there is no reference to the term "shared household".

Explanation II, which is also very illustrative, reads that for the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

18. As noted above, in his objections, the respondent no.2 has, prima facie, admitted the existence of the family settlement, which family settlement is part of the record of this petition, reflecting that the properties mentioned in this Schedule to the application of the petitioner dated 30.10.2021 fall in her share. However, this 'admission', as held by the Supreme Court in **Himani Alloys Ltd. vs. Tata Steel Ltd.,** unless is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable rights of a defendant to contest the claim.

19. In view of the aforesaid provisions of the DV Act, the observation of the appellate court in the impugned order that the properties mentioned in the application dated 30.10.2021 cannot be looked into by the court in proceedings under the DV Act, is incorrect. Given Explanation I to Section 3, which uses the word 'includes' while defining the term "economic abuse", and, the 'overall facts and circumstances of the case' that are required to be taken into consideration in view of Explanation II, it would bring into the ambit of the definition of "domestic violence" the properties mentioned in the Schedule to the application dated 30.10.2021 filed by the petitioner.

20. An application to the Magistrate under Section 12 can seek one or more reliefs under the DV Act, including a relief for issuance of an order for payment of compensation or damages. An amendment in the application filed under Section 12, in view of subsequent developments, can be sought by an aggrieved person, but for consideration of such amendment application, the court has to see whether certain circumstances exist. The under-noted judgment of the Supreme Court would point to that aspect. Therefore, subject to such amendment being effected in the application under Section 12, it cannot be said that the relief sought for in the application dated 30.10.2021 filed by the petitioner under Section 23 seeking an interim order under Section 18, would not be maintainable under the DV Act. In effect, the petitioner is seeking a protection order under Section 18 of the DV Act, which only requires a prima facie satisfaction of the Magistrate that domestic violence has taken place or is likely to take place. As reflected in Section 26 as quoted above, the very reliefs available to the petitioner under Sections 18, 19, 20, 21 and 22 may also be

sought in any legal proceeding before a civil court, family court or a criminal court, and the relief sought under the DV Act may be along with any other relief that the aggrieved person may seek in any such suit or legal proceeding before a civil court or criminal court.

21. It is important to note that though a protection order passed by the Magistrate under Section 18 of the DV Act is to be made on his prima facie satisfaction that domestic violence has taken place or is likely to take place, however, no adjudication of title with regard to immovable property of the aggrieved person, in this case the petitioner, can be made under the DV Act. As such, the protection order sought in the application dated 30.10.2021 is essentially in the nature of an interim relief, which may be granted by the court subject to due amendment in the application under Section 12 of the DV Act.

22. Apparently, the petitioner has filed a suit being Original Suit No.165 of 2024 in the court of Civil Judge (Senior Division), Varanasi, seeking declaration, partition and prohibitory injunction with respect to various properties. As such, the title of the petitioner with regard to the properties mentioned in the Schedule to the application dated 30.10.2021 can well be decided therein. Suffice to state that even in the said suit, the reliefs sought under Section 12 of the DV Act can be sought, given the provisions of Section 26, which aspect has also been indicated by the Supreme Court in a judgment cited below.

Further, for setting aside the revenue entries on properties that the petitioner claims to her own, it is for her to move appropriate legal proceedings before the revenue court.

23. The purpose for enacting the DV Act was considered by the Supreme Court in **Kunapareddy vs. Kunapareddy Swarna Kumari & Ors.** in which it observed as follows:-

12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality.

……

……..”

After considering the procedure for obtaining reliefs as stipulated in Chapter IV of the DV Act, which comprises Sections 12 to 29, the Supreme Court went on to observe as follows:-

“14. In the aforesaid scenario, merely because Section 28 of the DV Act provides for that (,) the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature. We may take some aid and assistance from the nature of the proceedings filed under Section 125 of the Code. Under the said provision as well, a woman and children can

claim maintenance. At the same time these proceedings are treated essentially as of civil nature."

It is also pertinent to mention here that in the case of **Kunapareddy** (supra), the Supreme Court was considering whether an amendment application can be filed under the DV Act for amending the application filed under the DV Act. The Supreme Court further observed that it cannot be said that the Court dealing with the application under the DV Act has no power and/or jurisdiction to allow the amendment of the application. The observations of the Supreme Court are as follows:-

"16. We understood in this backdrop, it cannot be said that the court dealing with the application under the DV Act has no power and/or jurisdiction to allow the amendment of the said application. **If the amendment becomes necessary in view of subsequent events (escalation of prices in the instant case) or to avoid multiplicity of litigation, court will have the power to permit such an amendment.** It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that Respondent 1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment. If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate application. It is not that there is a complete ban/bar of amendment in the complaints in criminal courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances. The pronouncement on this is contained in the recent judgment of this Court in *S.R. Sukumar v. S. Sunaad Raghuram [S.R. Sukumar v. S. Sunaad Raghuram, (2015) 9 SCC 609 : (2015) 4 SCC (Cri) 44]* in the following paragraphs: (SCC pp. 620-21, paras 18-20)

"18. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In *U.P. Pollution Control Board v. Modi Distillery [U.P. Pollution Control Board v.Modi Distillery, (1987) 3 SCC 684 : 1987 SCC (Cri) 632],* wherein the name of the company was wrongly mentioned in the complaint, that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows: (SCC pp. 689-90, para 6)

'6. ..... The learned Single Judge has focussed his attention only on the technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in Para 2 of the complaint so as to make the controlling company of the industrial unit figure as the accused concerned in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Ltd., the company owning the industrial unit, in place of Modi Distillery.

... Furthermore, the legal infirmity is of such a nature which could be easily cured.'

19. What is discernible from *U.P. Pollution Control Board case [U.P. Pollution Control Board v. Modi Distillery, (1987) 3 SCC 684 : 1987 SCC (Cri) 632]* is that an easily curable legal infirmity could be cured by means of a formal application for amendment. **If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the court shall not allow such amendment in the complaint.**

20. In the instant case, the amendment application was filed on 24-5-2007 to carry out the amendment by adding Paras 11(a) and 11(b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. **Firstly, the Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly, the publication of poem Khalnayakaru being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore, to avoid multiplicity of proceedings, the trial court allowed the amendment application.** Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined *[S.R. Sukumar v. S. Sunaad Raghuram, 2012 SCC OnLine Kar 1619]* to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India."

17. What we are emphasising is that even in criminal cases governed by the Code, the court is not powerless and may allow amendment in appropriate cases. **One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings.** The argument of the learned counsel for the appellant, therefore, that there is no power of amendment has to be negated.

18. In this context, provisions of sub-section (2) of Section 28 of the DV Act gain significance. Whereas proceedings under certain sections of the DV Act as specified in sub-section (1) of Section 28 are to be governed by the Code, the legislature at the same time incorporated the provisions like sub-section (2) as well which empowers the court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the DV Act. This provision has been incorporated by the legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act.

Section 23 deals with the power of the Magistrate to grant interim and ex parte orders and sub-section (2) of Section 23 is a special provision carved out in this behalf which is as follows:

"23.(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent."

19. The reliefs that can be granted by the final order or by an interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application, etc. is not read into the aforesaid provision, the very purpose which the Act attempts to subserve itself may be defeated in many cases."

(emphasis supplied)

24. In the case of **Vaishali Abhimanyu Joshi v. Nanasaheb Gopal Joshi,** the Supreme Court was considering a question that whether a counter-claim filed by a lady seeking right under Section 19 of the DV Act can be entertained in a suit filed against her under Section 26 of the Provincial Small Cause Courts Act, 1887, as amended in the State of Maharashthra, seeking a mandatory injunction directing her to stop using the suit flat and to remove her belongings therefrom. The Supreme Court observed as under:-

"40. Section 26 of the 2005 Act has to be interpreted in a manner to effectuate the very purpose and object of the Act. Unless the determination of claim by an aggrieved person seeking any order as contemplated by the 2005 Act is expressly barred from consideration by a civil court, this Court shall be loath to read in bar in consideration of any such claim in any legal proceeding before the civil court. When the proceeding initiated by the plaintiff in the Judge, Small Cause Court alleged termination of gratuitous licence of the appellant and prays for restraining the appellant from using the suit flat and permit the plaintiff to enter and use the flat, the right of residence as claimed by the appellant is interconnected with such determination and refusal of consideration of claim of the appellant as raised in her counterclaim shall be nothing but denying consideration of claim as contemplated by Section 26 of the 2005 Act which shall lead to multiplicity of proceedings, which cannot be the object and purpose of the 2005 Act.

41. We, thus, are of the considered opinion that the counterclaim filed by the appellant before Judge, Small Cause Court in Civil Suit No. 77 of 2013 was fully entertainable and the courts below committed error in refusing to consider such claim."

It is pertinent to note that in the aforesaid case of **Vaishali Abhimanyu Joshi,** the Supreme Court categorically held that denial of consideration of claim, as contemplated by Section 26 of the DV Act in a counter-claim filed in proceedings under the Provincial Small Cause Courts Act, 1887, would lead to multiplicity of proceedings which cannot be the object and purpose of the DV Act.

25. In the case of **Deoki Panjhiyara vs. Shashi Bhushan Narayan Azad & Anr.,** the Supreme Court was considering a matter where an application under Section

12 of the DV Act seeking certain reliefs including damages and maintenance was filed and on an application for interim maintenance filed therein, by an order dated 13.2.2008, the trial court granted an interim maintenance. The order of the trial court was affirmed by the Session Judge and against the aforesaid order, the husband filed a writ petition before the High Court. During pendency of the writ petition, the husband sought a recall of the order dated 13.2.2008 (granting maintenance) on the ground that he subsequently came to know that his marriage with the lady was void on the ground that at the time of the said marriage the lady was already married to another person. The husband had placed reliance upon a certificate of marriage dated 18.4.2003 between the lady and another person issued by the competent authority under Section 13 of the Special Marriage Act, 1954. The application was rejected by the trial court. The revision filed against this order of the trial court before the High Court was heard along with the writ petition filed earlier and by a common order it was held that the marriage certificate issued under Section 13 of the Special Marriage Act was conclusive proof of first marriage of the lady with another person which had the effect of rendering the marriage between the lady and her husband null and void. The Supreme Court observed as follows:-

"17. While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in *Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav [(1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644]* (SCC p. 534, para 3) has taken the view that a marriage covered by Section 11 is void ipso jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage. It must, however, be noticed that in Yamunabai [(1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644] there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

18. A similar view has been expressed by this Court in a later decision in *M.M. Malhotra v. Union of India [(2005) 8 SCC 351 : 2005 SCC (L&S) 1139]* wherein the view expressed in *Yamunabai [(1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644]* was also noticed and reiterated. However, the facts in which the decision in *M.M. Malhotra [(2005) 8 SCC 351 : 2005 SCC (L&S) 1139]* was rendered would require to be noticed in some detail.

19. The appellant M.M. Malhotra was, inter alia, charged in a departmental proceeding for contracting a plural marriage. In reply to the charge-sheet issued it was pointed out that the allegation of plural marriage was not at all tenable inasmuch as in a suit filed by the appellant (M.M. Malhotra) for a declaration that the respondent (wife) was not his wife on account of her previous marriage to one D.J. Basu the said fact i.e. previous marriage was admitted by the wife leading to a declaration of the invalidity of the marriage between the parties. The opinion of this Court in *M.M. Malhotra [(2005) 8 SCC 351 : 2005 SCC (L&S) 1139]* was, therefore, once again rendered in the situation where there was no dispute with regard to the factum of the earlier marriage of one of the spouses.

20. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that

she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18-4-2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in *Yamunabai [(1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644] and M.M. Malhotra [(2005) 8 SCC 351 : 2005 SCC (L&S) 1139].*

….....

22. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.

23. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005."

It is to be noted that in the aforesaid judgment of the Supreme Court, the applicability of the DV Act was considered given the fact that the marriage was not declared a nullity by a competent court.

26. In the present case, the applicability of the DV Act is due to alleged domestic violence inflicted on the petitioner who is in a domestic relationship with the respondent no.2 and related by consanguinity. The protection order under Section 18 is being sought in the application dated 30.10.2021 under Section 23 of the DV Act in respect of immovable property specified in the Schedule to that application. Till the issue of title with regard to those properties is finally decided in the suit by the competent court, the petitioner claiming to be an 'aggrieved person' in a 'domestic relationship' who is subjected to 'domestic

violence' would continue to be entitled to claim all benefits and protection available under the DV Act. There does not appear to be any bar on seeking additional reliefs, to the extent they can be granted and the cause for which has arisen subsequently, in a subsequent application under Section 23, provided such relief and pleadings are incorporated by permissible amendments in the initial application under Section 12 of the DV Act.

27. In the backdrop of the aforesaid judgments of the Supreme Court, given the facts of the instant case, what emerges is that given the dispute being raised regarding the immovable properties mentioned in the Schedule to the application dated 30.10.2021, it is certainly the civil court that will have the jurisdiction to conclusively determine the rights of the parties and make appropriate decree/s. That is, however, not to say that proceeding under Section 23, which deals with the power to grant interim and ex-parte orders by the Magistrate, would not be maintainable. Where in the application under Section 12, permissible amendment in view of subsequent developments or otherwise is made and additional permissible relief is sought, a fresh application under Section 23 would be maintainable. It is iterated that the protection order to be passed by the Magistrate under Section 18 of the DV Act is on his being prima facie satisfied that the domestic violence had taken place or was likely to take place.

28. In view of the aforesaid, the position can thus be summarized as follows:-

(i) The purpose of enacting the DV Act was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality.

(ii) There is no complete ban/bar of amendment in the complaints in criminal courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances.

(iii) If the amendment sought in the application under the DV Act relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the court shall not allow such amendment in the complaint.

(iv) Where amendment sought is of a substantial nature the same may be allowed after carefully considering the facts, circumstances and the stage of the case, provided that the amendment would not change the original nature of the complaint, and, provided further that the amendment is necessitated in view of subsequent event which creates a new cause of action in favour of the aggrieved person and would avoid multiplicity of proceedings.

(v) On such amendment being effected, a fresh application filed under Section 23 of the DV Act can be maintained for seeking a protection order under Section 18.

(vi) The alienation of assets whether moveable or immoveable in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her 'stridhan' or any of the other properties jointly or separately held by the aggrieved person, may constitute 'economic abuse' bringing it within the definition of "domestic violence" under Section 3 of the DV Act.

(vii) Adjudication of title of an aggrieved person with regard to moveable or immoveable properties sought to be alienated cannot be made under the DV Act but can only be made by a competent civil court. However, in respect of such properties a protection order can be passed by the Magistrate under Section 18 of the DV Act on his prima facie satisfaction that domestic violence has taken place or is likely to take place.

(viii) The relief/s available under Sections 18, 19, 20, 21 and 22 in an application filed under Section 12 of the DV Act may also be sought before the civil court before which the suit filed by the petitioner against the respondent no.2 is pending, in terms of Section 26 of the DV Act.

29. In the present case, the protection order sought in the application dated 30.10.2021 is essentially in the nature of an interim relief. As noted above, a civil suit pertaining to the properties in dispute is pending, in which suit, the reliefs available to the petitioner under the DV Act can be well addressed in view of the provisions of Section 26 of the DV Act. Relegating the matter to the appellate court would unnecessarily prolong the case under the DV Act.

30. Therefore, under the facts and circumstances of the present case, this petition is **disposed of** leaving it open to the petitioner to move appropriate application before the civil court in which the aforesaid suit is pending seeking appropriate temporary injunction or protection order, as she may be advised. If such an application is filed, the concerned court is requested to decide the same in accordance with law, preferably within a period of four months from the date of filing of that application.

In the interest of justice it is provided that for a period of five months from today, none of the parties to the petition will create any third party interest over any part of the properties as mentioned in the Schedule to the application dated 30.10.2021 filed by the petitioner in Case No.829 of 2011 under the DV Act.

31. As far as the aforesaid application under Section 340 Cr.P.C. is concerned, the same is required to be registered and numbered as a Criminal Miscellaneous case and, thereafter, placed before the appropriate Court for its consideration. The office is directed to do the needful in this regard. All other pending applications stand disposed of.

(2024) 5 ILRA 586
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 1700 of 2024

Ashok Kumar Pal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Manish Kumar Tripathi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 482-Food Safety and Standards Act, 2006-Sections 51 & 59(i)-Quashing of summoning order-complaint was filed against the applicant after collecting sample of milk from his shop under the provision of Prevention of Food Adulteration Act, 1954-in the present case the sample was collected in the year 2010 and the proceeding was initiated under the act, 1954 despite repealing the same-more than three years has expired from the date of commission of offence, therefore, cognizance cannot be taken by the concerned court, even on the fresh complaint in view of the section 77 of the Act, 2006-The order is set aside.(Para 1 to 19)

The application is allowed. (E-6)

List of Cases cited:

Hindustan Unilever Ltd. Vs St. of M.P. (2020) 10 SCC 751.

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

1. Heard learned counsel for the applicant and Sri Anish Kumar Upadhyay, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of Complaint Case No.1340 of 2011 (State Vs. Ashok Kumar Pal), under Sections-51, 59(i) of the Food Safety and Standards Act, 2006 (hereinafter referred to as 'the Act, 2006'), Police Station-George Town, District-Allahabad (now Prayagraj), pending in the court of Additional Chief Judicial Magistrate, Court No.2, Allahabad as well as summoning order dated 12.09.2023.

3. Facts giving rise to the present case are that after collecting the sample of milk from his shop on 02.11.2010, the complaint was lodged against the applicant on 24.05.2011 under the provision of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act, 1954'), on which the Magistrate, after taking cognizance, had issued a summon on 12.09.2023 to applicant. This cognizance and summoning order was challenged by the applicant before this court in Application under Section 482 No. - 38175 of 2022 on the ground that on the date of filing the complaint, the provisions of the Act, 1954 were already repealed on 29.07.2010 and a new act namely the Act, 2006 had come into force. This application was allowed by the Court vide order dated 03.07.2023 and cognizance as well as summoning order dated 12.09.2023 was set aside, with the liberty to proceed against the applicant as per the provisions of the Act, 2006. Thereafter, learned court below again passed an order dated 12.09.2023 on the basis of same complaint filed against the applicant and summoned the applicant under Sections 51, 59(i) of the Act, 2006, which is under challenge in the present application.

4. Contention of learned counsel for the applicant is that once the earlier summoning order dated 12.09.2023 was set aside by this Court on the ground that that summoning order was passed under the Act, 1954, which was already repealed by the Act, 2006, therefore, fresh complaint should have been filed as per the Act, 2006, but, in the present case, the complaint filed under the Act, 1954 was taken into consideration and summoning order was passed on that complaint as well as material available with the complaint. Second contention of learned counsel for the applicant is that as per Section-77 of the Act, 2006, the prosecution

on the basis of fresh complaint under the Act, 2006 is itself barred beyond three years because the sample was collected on 02.11.2010 and if a fresh complaint is filed under the Act, 2006, then the concerned court cannot take cognizance over the same in view of Section-77 of the Act, 2006, because more than three years has already expired from the date of commission of offence i.e. on the date of collection of sample of milk.

5. Per contra, learned AGA has submitted incorrect mentioning of sections in the complaint cannot make the complaint illegal because of adulterated food (milk), found in the shop of applicant, the complaint was filed against him and on the basis of the same complaint and material, learned Magistrate has passed the order as per the new Act, 2006. Therefore, there is no illegality in the impugned summoning order.

6. After hearing the submission of learned counsel for the parties and on perusal of record, it appears that earlier complaint dated 24.05.2011 was filed as per the procedure of Section 20 of the Act, 1954 after taking sanction from the District Magistrate. Section 20 of the Act, 1954 is being quoted as under:

"20. Cognizance and trial of offences.-(*1) [No prosecution for an offence under this Act not being an offence under section 14 or section 14A] shall be instituted except by, or with the written consent of, [the Central Government or the State Government or a person authorised in this behalf, by general or special order, by the Central Government or the State Government:*

Provided that a prosecution for an offence under this Act may be instituted by a purchaser [or recognised consumer association] referred to in section 12, [if he or it produces] in court a copy of the report of the public analyst along with the complaint.

[(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under sub-section (1AA) of section 16 shall be cognizable and non-bailable).]"

7. Under the new Act, 2006, the procedure for launching the prosecution has been mentioned in Section 42 of the Act, 2006. As per Section 42 of the Act, 2006 the prosecution can be initiated only after the designated authority's recommendation and thereafter sanction of Commissioner of Food Safety. Section 42 of the Act, 2006 is being quoted as under:

"42. Procedure for launching prosecution.-(*1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis.*

(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety.

(3) The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to

the Commissioner of Food Safety for sanctioning prosecution.

(4) The Commissioner of Food Safety shall, if he so deems fit decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to,?

(a) a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or

(b) a Special Court in case of offences punishable with imprisonment for a term exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a Court of ordinary jurisdiction.

(5) The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken under section 40."

8. From the perusal of Section 20 of the Act, 1954 as well as Section 42 of the Act, 2006, it is clear that for launching the prosecution on the basis of complaint, procedure is different in both the Acts. In the Act, 1954 only the District Magistrate can grant sanction for the prosecution, but in the Act, 2006, it is the Commissioner of Food Safety, who, after getting recommendation of Designated Officer can grant sanction for prosecution. Therefore, any complaint filed under the Act, 1954 after the repeal of the same, will not be a valid complaint for the Act, 2006 unless same is filed as per procedure of the Act, 2006.

9. Even the complaint filed under the Act, 1954 after its repeal is not saved by Section 97 of the Act, 2006 except in certain circumstances. For ready reference Section 97 of the Act, 2006 is being quoted as under:

"97. Repeal and savings.-(*1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:*

Provided that such repeal shall not affect:?

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or Orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and Orders, the licences issued under any such enactment or Order, which are in force on the date of

commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act."

10. From the perusal of Section 97 of the Act, 2006, it is explicit that only those proceedings that commence or duly done under the Act, 1954 are saved, but proceeding done under the Act, 1954 after its repeal cannot be said to be duly done under the Act, 1954.

11. It is also clear from Section 97(ii) of the Act, 2006, if sample of adulterated food (including milk) is collected from a food business operator during the existence of the Act, 1954 then his liable acquired under the Act, 1954 will not be affected by the new Act, 2006, and despite repealing the Act, 1954, legal proceeding may be continued under the Act of 1954.

12. Section 6 of the General Clauses Act, 1897 also does not save the proceeding under the repeal Act if no cause of action arises before the repeal of the Act. Section-6 of General Clauses Act, 1897 is being quoted as under:

"6. Effect of repeal.-*Where this Act, or any 33[Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not"*

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or any thing duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.?

13. Apex Court in the case of **Hindustan Unilever Limited. Vs. State of Madhya Pradesh** reported in **(2020) 10 SCC 751** also discussed the effect of the repeal Act in the light of Section-6 of General Clauses Act, 1897. Paragraph no.16 of the **Hindustan Unilever (supra)** is being quoted as under:

"16. In terms of Section 6 of the General Clauses Act, 1897, unless different intention appears, the repeal of a statute does not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act or Regulation had not been passed. But in the 2006 Act, the repeal and saving clause contained in Sections 97(1)(iii) and (iv) specifically provides that repeal of the Act shall not affect any investigation or remedy in respect of any such penalty, forfeiture or punishment and the punishment may be imposed, ?as if the 2006 Act had not been passed?. The question as to whether penalty or prosecution can continue or be initiated under the repealed provisions has been examined by this Court in State of Punjab v. Mohar Singh [State of Punjab v. Mohar Singh, AIR 1955 SC 84 : 1955 Cri LJ 254] , wherein this Court examined Section 6 of the General Clauses Act which is on lines of Section 38(2) of the Interpretation Act of England. It was held as under : (AIR pp. 87-89, paras 6 & 9)

"6. Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law [Vide Craies on Statute Law, 5th Edn., p. 323.] . A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the repealing Act and not already prosecuted to a final judgment so as to create a vested right [Vide Crawford on Statutory Construction, pp. 599-600w.] . To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment.

Later on, to dispense with the necessity of having to insert a saving clause on each occasion, Section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known, is on the same lines as Section 38(2) of the Interpretation Act of England.

9. The offence committed by the respondent consisted in filing a false claim. The claim was filed in accordance with the provision of Section 4 of the Ordinance and under Section 7 of the Ordinance, any false information in regard to a claim was a punishable offence. The High Court is certainly right in holding that Section 11 of the Act does not make the claim filed under the Ordinance a claim under the Act so as to attract the operation of Section 7.

Section 11 of the Act is in the following terms:

"11. Repeal."The East Punjab Refugees (Registration of Land Claims) Ordinance 7 of 1948 is hereby repealed and any rules made, notifications issued, anything done, any action taken in exercise of the powers conferred by or under the said Ordinance shall be deemed to have been made, issued, done or taken in exercise of the powers conferred by, or under this Act as if this Act had come into force on 3rd day of March, 1948.""

" The truth or falsity of the claim has to be investigated in the usual way and if it is found that the information given by the claimant is false, he can certainly be punished in the manner laid down in Sections 7 and 8 of the Act.

If we are to hold that the penal provisions contained in the Act cannot be attracted in case of a claim filed under the Ordinance, the results will be anomalous and even if on the strength of a false claim a refugee has succeeded in getting an allotment in his favour, such allotment could not be cancelled under Section 8 of the Act. We think that the provisions of Sections 4, 7 and 8 make it apparent that it was not the intention of the legislature that the rights and liabilities in respect of claims filed under the Ordinance shall be extinguished on the passing of the Act, and this is sufficient for holding that the present case would attract the operation of Section 6 of the General Clauses Act.

It may be pointed out that Section 11 of the Act is somewhat clumsily worded and it does not make use of expressions which are generally used in saving clauses appended to repealing statutes; but as has been said above the point for our consideration is whether the Act evinces an intention which is inconsistent with the continuance of rights and liabilities accrued or incurred under the Ordinance and in our opinion this question has to be answered in the negative."

14. So far as the second contention of learned counsel for the applicant is that now the prosecution is barred by Section-77 of the Act, 2006 is concerned, for that, it is clear from the perusal of Section-77 of the Act, 2006 that even after the approval of Commissioner of Food Safety, cognizance of an offence by the court can be taken up to three years. For ready reference, Section-77 of the Act, 2006 is being quoted as under:

"77. Time limit for prosecutions.- *Notwithstanding anything contained in this Act, no court shall take cognizance of an offence under this Act after the expiry of the period of one year from the date of commission of an offence:*

Provided that the Commissioner of Food Safety may, for reasons to be recorded in writing, approve prosecution within an extended period of up to three years."

15. From the perusal of Section-77 of the Act, 2006, it is explicit that the court can take cognizance up to three years from the date of commission of the offence. A commission of an offence under the Act, 2006 can be considered on the date when the sample was collected. In the present case, the sample was collected on 02.11.2010 and the proceeding was initiated under the Act, 1954, despite repealing the same. Therefore, that proceeding was not saved u/s 97 of the Act, 2006. Therefore, even if the fresh complaint is filed under the Act, 2006 then the concerned court cannot take cognizance in view of the bar of Section-77 of the Act, 2006. Therefore, the contention of learned counsel for the applicant is correct that now the prosecution is barred u/s 77 of the Act, 2006 as the sample of the milk was collected on 02.11.2010, therefore, cognizance cannot be taken in a fresh complaint filed under the Act, 2006.

16. In the present case, this court by the order dated 03.07.2023 had set aside the earlier summoning order dated 12.09.2023 on the ground that on the date of filing the complaint under the Act, 1954, the Act, 2006 already repealed it and liberty was also granted to proceed in accordance with the Act, 2006 but the opposite party no.2 has not initiated any proceeding as per the Act, 2006, even then, the learned Magistrate has erroneously passed a fresh summoning order dated 12.09.2023 on the basis of the same, a complaint, which was filed as per the procedure of the Act, 1954, even a sample of

milk was collected on 02.11.2010, which itself was after the repeal of the Act, 1954. Therefore, not only the summoning order dated 12.09.2023 is erroneous, but also the entire proceeding of the Complaint Case No.1340 of 2011 (State Vs. Ashok Kumar Pal) is itself illegal as the same was initiated on the basis of the complaint filed under the Act, 1954 (Repealed Act), not as per the procedure of the Act, 2006 which was prevalent at the time of filing the complaint.

17. Therefore, the proceeding of Complaint Case No.1340 of 2011 (State Vs. Ashok Kumar Pal), under Sections-51, 59(i) of the Act, 2006, Police Station-George Town, District-Allahabad (now Prayagraj), pending in the court of Additional Chief Judicial Magistrate, Court No.2, Allahabad as well as summoning order dated 12.09.2023 is hereby set aside.

18. As already observed hereinabove that more than three years has expired from the date of commission of offence, therefore, cognizance cannot be taken by the concerned court, even on the fresh complaint in view of Section-77 of the Act, 2006. Therefore, Food Safety Officer, cannot be permitted to file a fresh complaint under the Act, 2006 because the court cannot take cognizance on that complaint in view of Section-77 of the Act, 2006.

19. With the aforesaid observations, the present application is **allowed**.

(2024) 5 ILRA 593
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 4095 of 2023
&
Other Connected Cases

Madhu Tiwari ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Nadeem Murtaza, Aditya Vikram Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 482-Indian Penal Code, 1860-Sections 307, 323, 504, 506 & ¾ D.P. Act-quashing of criminal proceedings-mutual settlement in matrimonial dispute-multiple applications filed by both the parties, later they reached a settlement-Held, in cases where the dispute is private and resolved amicably, quashing of criminal proceedings is justified to secure the ends of justice-the court directed the family court to expedite the proceedings and waived the statutory cooling off period, following the Supreme Court judgment in Amardeep singh Vs Harveen Kaur.(Para 1 to 17)

B. In the exercise of the power u/s 482 and while dealing with the plea that the dispute has been settled, the high court must have due regard to the nature and gravity of the offence. The High court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice. (Para 11)

The application is allowed. (E-6)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur (2017) AIR SC 4417

2. Shalini Massey Vs Neeraj Samuel Dass, FAPLD No. 392 of 2019

3. B.S Joshi Vs St. of Har. & ors. (2003) 4 ACC 675

4. Gian Singh Vs St. of Punj. (2012) 10 SCC 303

5. Dimpey Gujral & ors. Vs U.T. Thru Admin. (2013) 11 SCC 697

6. Narendra Singh & ors. Vs St. of Punj. & ors. (2014) 6 SCC 466

7. Yogendra Yodav & ors. Vs St. of Jhar. (2014) 9 SCC 653

8. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr.(2017) 9 SCC 641

9. R.P. Kapoor Vs St. of Punj. (1990) AIR SC 866

10. St. of Haryana Vs Bhajanlal (1992) SCC (Crl.) 426

11. St. of Bih. Vs P.P. Sharma (1992) SCC (Crl.) 192

12. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.(2005) SCC (Crl.) 283 para 10

13. S.W. Palankattkar & ors. Vs St. of Bih. (2002) 44 ACC 168

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

1. Heard Sri Alok Saran as well as Sri Himanshu Suryavanshi, learned counsel for the Mitali Tiwari and Sri Nadeem Murtaza, learned counsel for the Himanshu Tiwari and Madhu Tiwari.

2. Since all the three cases are counter blast cases filed by the parties against each other, therefore, all the cases are being decided with the common judgment and Application under Section 4095 of 2023 is being treated as leading case.

(I) Application under Section 4095 of 2023:- This application has been filed with a prayer to quash the impugned order dated 27.03.2023 in Criminal Revision Case No.209/2022 (Madhu Tiwari Vs. State of U.P. and 7 Others) passed by learned Sessions judge-I. Lucknow, which had affirmed the order dated 28.02.2022 passed by learned Judicial Magistrate-III, Lucknow, whereby partially opposite parties are summoned for minor offences under Sections 323, 504, 506 I.P.C. and all the opposite parties were summoned for committing additional major offences under Sections 307, 384, 385, 388, 389 I.P.C. read with Section 34 I.P.C. in Criminal Complaint Case No.1882 of 2020 pending before the learned Judicial Magistrate-III, Lucknow.

(II) Application under Section 5104 of 2021:- This application has been filed with a prayer to quash the order dated 17.11.2021 in Criminal Revision No.152 of 2021, under Section 397 Cr.P.C. read with Section 399 Cr.P.C. passed by learned Additional District and Sessions Judge-7, Lucknow as well as to quash the order dated 27.07.2021 in Misc. Criminal Case No.3803 of 2020, under Sections 190 Cr.P.C. read with Section 200 Cr.P.C. passed by learned Special Chief Judicial Magistrate Custom, Lucknow.

(III) Application under Section 3121 of 2023:- This application has been filed with a prayer to quash the order of summoning dated 28.02.2022 passed by the Judicial Magistrate-III, Lucknow in Criminal Complaint No.1882 of 2020, under Sections 323, 504, 506 I.P.C., Police Station Mandiaon, District Lucknow as well as to quash the entire criminal proceedings in pursuance thereof.

3. On 03.04.2024, this Court has passed the following order:-

"Heard Mr. Anand Kumar Srivastava, learned Counsel for the applicants, Mr. Nadeem Murtaza, learned Counsel for the private opposite parties, Mr. Ashok Kumar Singh, learned A.G.A. for the State-opposite party.

The present application under Section 482 Cr.P.C. has been moved by the applicant seeking quashing of the impugned order dated 27.03.2023 in Criminal Revision Case No.209/2022 (Madhu Tiwari vs. State & 7 Others) passed by court of learned Sessions Judge I, Lucknow which had affirmed order dated 28..02.2022 passed by learned Court of Judicial Magistrate III, Lucknow which has only partially summoned the opposite parties for committing minor offences under Sections 323/504/506 I.P.C. and thereby summoning all the opposite parties for committing additional major offences under Section 307, 384, 385, 388, 389 r/w 34 I.P.C. in Criminal Complaint Case No.1882/2020 (Madhu Tiwari vs. Mitali Tiwari & 6 Others) pending before learned Court of Judicial Magistrate III, Lucknow.

In compliance of the order dated 12.03.2024 passed by the Coordinate Bench of this Court, both the parties are present in person, who have been identified by their respective counsels.

On query made by this Court, Ms. Mitali Tiwari, submits that she is ready to settle the dispute if she is paid Rs.10,00,000/- (Rupees Ten Lacs Only) as one time alimony for her and her daughter, namely-Sambhavi Tiwari.

Mr. Himanshu Tiwari, husband of Ms. Mitali Tiwari submits that he is also ready to settle the dispute by paying a sum of Rs.10,00,000/- (Rupees Ten Lacs Only) as one time alimony to his wife and his daughter. In this regard he is ready to bring the draft of Rs.5,00,000/- (Rupees Five Lacs Only) on the next date of listing of this case, in the name of Ms. Mitali Tiwari i.e. half of the alimony amount. The remaining amount of Rs.5,00,000/- will be paid to Ms. Mitali Tiwari within 20 days' from the date of filing a decree of divorce under Section 13(B) of Hindu Marriage Act.

Further, it was also assured by both the parties that the decree of divorce under Section 13(B) of Hindu Marriage Act will be filed within 20 days' from the date of this order before the Principal Judge, Family Court, Lucknow and it was also requested by learned Counsel for the parties that a suitable direction may be given by this Court to the family court to decide the decree of divorce, if filed, by the parties by diluting the period of motions in view of the judgment of Hon'ble Supreme Court in the case of ***Amardeep Singh vs. Harveen Kaur, 2017 (8) SCC 746*** *and Division Bench of this Court in the case of* ***Shalini Massey vs. Neeraj Samuel Dass passed in First Appeal Defective No.392 of 2019.***

The requests and proposals made by both the parties appear to be genuine and justified and it is better that the parties may be separated as early as possible for their better life ahead.

In view of the above, the Principal Judge, Family Court, Lucknow is directed to decide the decree of divorce, if filed, by the parties within the stipulated time in light of the law laid down by the Hon'ble Supreme Court in the case of ***Amardeep Singh (supra)*** *and Division Bench of this Court in the case of* ***Shalini Massey (supra)*** *positively by diluting the period of motions/cooling period.*

Accordingly, list/put up this case on 10quashing.04.2024 for further orders before this Court.

It is made clear that if the draft of Rs.5,00,000/- (Rupees Five Lacs Only) is not

brought by Mr. Himanshu Tiwari, on the next date fixed, this Court will proceed and will pass final order in this case.

On the next date fixed, both the parties shall again appear in person."

4. Thereafter, this case was listed on 10.04.2024 before this Court and following order was passed:-

"In compliance of the order dated 03.04.2024, Sri Himanshu Tiwari as well as Ms. Madhu Tiwari are present in person before this Court. They have been identified by their counsel Sri Nadeem Murtaza. However, Ms. Mitali Tiwari is not present owing to some illness, however, her counsel Sri Anand Kumar Srivastava is present.

Sri Himanshu Tiwari has brought a demand draft of Rs.5,00,000/- drawn at the ICICI Bank, Lucknow dated 09.04.2024 in favour of Mitali Tiwari. Photocopy of the same has been seen and signed by Sri Anand Kumar Srivastava, learned counsel for the Mitali Tiwari, which is taken on record.

Sri Anand Kumar Srivastava, Advocate seeks some further time so that original draft may be handed over to Mitali Tiwari.

Sri Nadeem Murtaza, Advocate has no objection to the prayer made by Sri Anand Kumar Srivastava, Advocate.

Accordingly, put up this case on 18.04.2024 alongwith connected matter before this Court for further orders.

On the next date of listing, Ms. Mitali Tiwari, Ms. Madhu Tiwari and Sri Himanshu Tiwari shall again appear in person before this Court. Sri Himanshu Tiwari shall again bring the aforesaid bank draft on that day so that the same may be handed over to Mitali Tiwari."

Again this case was listed on 18.04.2024 before this Court and following order was passed:-

"The present applications are filed by the respective parties against each other and both these applications are arising out of counter cases filed by the respective parties, thus, the Coordinate Bench of this Court clubbed these two application with the consent of both the parties vide order dated 12.03.2024. This Court is treating Application U/S 482 No.4095 of 2023 as leading case and is proceeding accordingly.

Vakalatnama filed today in the Court by Mr. Himanshu Suryavanshi, Advocate on behalf of applicant-Ms. Mitali Tiwari and others in Application U/S 482 No.3121 of 2022 is taken on record.

Heard Mr. Nadeem Murtaza, learned Counsel for the applicant, namely-Madhu Tiwari, Mr. Alok Saran, Advocate alongwith Ms. Swati Singh, Advocate holding brief of Mr. Himanshu Suryavanshi, learned Counsel for the opposite party No.2, Mr. Ashok Kumar Singh, learned A.G.A-I for the State-opposite party.

In compliance of the orders dated 03.04.2024 and 10.04.2024 passed by this Court, the applicant, namely-Ms. Madhu Tiwari alongwith her son, namely-Mr. Himanshu Tiwari and the opposite party No.2, namley-Ms. Mitali Tiwari (wife of Mr. Himanshu Tiwari) are present before this Court, who have been identified by their respective counsel and Mr. Himanshu Tiwari has brought an original demand draft of Rs.5,00,000/- (Rupees Five Lacs Only), which was seen and verified by learned Counsel for the opposite party No.2 and the same was handed over to the opposite party No.2, namely-Mitali Tiwari in the open court. The opposite party No.2 gave a receiving of the same on the photostat copy, which is taken on record.

The applicant and her son, namely-Mr. Himanshu Tiwari have shown their bonafide by handing over the demand

draft of Rs.5,00,000/- (Rupees Five Lacs Only) to the opposite party No.2 as directed by this Court. Now, only Rs.5.00,000/- (Rupees Five Lacs Only) is to be paid to the opposite party No.2, namely-Ms. Mitali Tiwari.

Both the parties and their counsel submit before this Court that they have decided to file a petition under Section 13(B) of the Hindu Marriage Act for separation of both the parties for their better life ahead. They further submit that the said petition will be filed before the concerned Family Court within 15 days' from today.

Before concluding their arguments, learned Counsel for the parties further submit that some suitable order may be passed regarding the visitation rights to the father of the minor child, namely-Shambhavi Tiwari, D/o of Ms. Mitali Tiwari and Mr. Himanshu Tiwari.

Learned A.G.A-I for the State-opposite party No.1 has no objection to the proposals made by learned Counsel for the parties.

In view of the above, as agreed between the parties present in person before this Court, they are permitted to file a petition under Section 13(B) of the Hindu Marriage Act within 15 days' from today and if any such petition is filed before the concerned Family Court, the Family Court will decide the said petition in compliance of the order dated 03.04.2024 passed by this Court in this case. It is further directed that after filing of the said petition, learned Counsel for the applicant will file a supplementary affidavit annexing therein the photostat copy of the said petition so filed by the parties before the concerned Family Court on the next date of listing.

It is further observed here that remaining amount of Rs.5,00,000/- (Rupees Five Lacs Only), which was promised by Mr. Himanshu Tiwari to be paid to the opposite party No.2 will be paid to her within ten days' from the date of passing of decree of divorce.

So far as the visitation right is concerned, Mr. Himanshu Tiwari, husband of Ms. Mitali Tiwari shall have visitation rights to meet his daughter once every month on the Fourth Sunday between 11:00 A.M. to 1:30 P.M. at Saharaganj Mall, Lucknow starting from the Month of April, 2024 by giving one day prior intimation to the opposite party No.2, Ms. Mitali Tiwari, who is the mother of the minor child. Further, Mr. Himanshu Tiwari, shall also have right to talk to his daughter on every 1st and 4th Saturday of the every Month between 7:30 P.M. to 8:00 P.M. on whatsapp/phone call on mobile of Ms. Mitali Tiwari.

Accordingly, list/put up this case on 25.04.2024 before this Court for further orders."

5. Again this case was listed before this Court on 25.04.2024 and this Court has passed the following order:-

"In compliance of the orders dated 03.04.2024 and 18.04.2024 passed by this Court, learned counsel for the opposite party No.2 Sri Nadeem Murtaza has filed supplementary affidavit today in Court, in which he has given the details, in paragraph Nos. 9 and 10, of the cases filed by each of the parties either to be quashed by this Court or the cases should be withdrawn by the parties before the competent court, where the case is pending and he has also filed the settlement agreement as well as the certified copy of the petition filed under Section 13 B of the Hindu Marriage Act filed before the court of Principal Judge, Family Court, Lucknow, which is annexed as Annexure No.3 to the supplementary affidavit.

Learned counsel for the applicant submits that the parties have already settled the dispute, thus a positive direction be given to the Principal Judge, Family Court, Lucknow to decide the petition filed by the parties under Section 13 B of the Hindu Marriage Act expeditiously in view of the judgment rendered by Hon'ble Supreme Court in the case of ***Amardeep Singh Vs. Harveen Kaur: AIR 2017SC 4417*** *and further order passed by the Division Bench of this Court in* ***First Appeal Defection No. 392 of 2019: Shalini Massey Vs. Neeraj Samuel Dass decided on 07.01.2020.***

Sri Alok Saran as well as Sri Himanshu Suryavanshi, learned counsel for the opposite party No.2 made a agreement with the request and proposal made by learned counsel for the applicant.

The request and proposal made by the both the counsels as well as the parties appears to be genuine and the final order in this regard will be passed on the next date fixed.

List this case on 30.04.2024 for further orders along with record of Application under Section 482 Cr.P.C. No. 5104 of 2021 and Application under Section 482 Cr.P.C. No. 3121 of 2022."

6. Sri Nadeem Murtaza, learned counsel for Himanshu Tiwari submits that both the parties have arrived at a settlement, copy of the settlement agreement dated 20.04.2024 is annexed as Annexure No.SA-2 to the supplementary affidavit. He further submits that in pursuance of this Court's order dated 03.04.2024, the parties have mutually filed a divorce petition under Section 13(B) of Hindu Marriage Act before the learned Principal Judge, Lucknow on 20.04.2024, copy of the petition is Annexed as Annexure No.SA-3 to the supplementary affidavit. He further submits that Rs.5,00,000/- has already been paid to the wife and as per agreement the remaining amount of Rs.5,00,000/- will also be paid by the husband Himanshu Tiwari to the wife Mitali Tiwari within ten days after the passing of divorce decree. Thus, he submits that entire proceeding of the cases pending between both the parties which are mentioned at paragraph No.10 of the supplementary affidavit from serial no. I to X may be quashed and the learned Principal Judge, Family Court, Lucknow be directed to decide the divorce petition of the parties filed under Section 13(B) of the Hindu Marriage Act in light of the judgment rendered by Hon'ble Supreme Court in the case of **Amardeep Singh Vs. Harveen Kaur: AIR 2017 SC 4417** and further order passed by the Division Bench of this Court in **First Appeal Defective No. 392 of 2019: Shalini Massey Vs. Neeraj Samuel Dass decided on 07.01.2020**. He further submits that Civil Contempt CAPL No.510 of 2022 "Himanshu Tiwari & Anr. Vs. Mitali Tiwari" filed by Himanshu Tiwari had already been dismissed as withdrawn by a co-ordinate Bench of this Court vide order dated 29.04.2024. Paragraph Nos. 19 and 20 of **Amardeep Singh (Supra)** are reproduced hereinunder:-

"19. Applying the above to the present situation, we are of the view that where the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section

23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned.

20. Since we are of the view that the period mentioned in Section 13-B(2) is not mandatory but directory, it will be open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

Further, this Court has been pleased to observe paragraph No.12 in the case of **Shalini Massey (Supra)** which is reproduced hereinunder:-

"12. The provisions contained in Section 10A of the Divorce Act, 1869, are, in substance, a verbatim reproduction of the provisions contained in Section 13B of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954. The only substantial difference is that, instead of the period of one year mentioned in Section 13B(1) of the Hindu Marriage Act, 1955 and Section 28(1) of the Special Marriage Act, 1954, a period of two years of separate residence is provided under Section 10A(1) of the Divorce Act, 1869. The beneficiaries under the abovementioned provisions of different statutes are persons who want divorce by mutual consent and who file joint petition for that relief. There can be no discrimination among them on the ground of religion. Divorce by mutual consent is a secular concept. When the Apex Court has declared the law that the "cooling off period" of six months provided under Section 13B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and such period can be allowed to be waived by the court on satisfaction of certain conditions, denying that benefit to persons who are governed by the Divorce Act, 1869 would amount to unjust discrimination. Therefore, we are of the considered opinion that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed under Section 10A of the Divorce Act, 1869 and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated under Section 10A(2) of that Act.

In view of the foregoing discussion, we find that but for the difference in period provided for making the second motion, the provisions of Section 13B (1) of Act of 1955 and 28 (1) of the Act of 1954 and 10A (1) of the Act, the aforesaid provisions are verbatim reproduction of each other. Since the Hon'ble Apex Court while considering the question whether the minimum period of six months stipulated u/s 13B (2) of Act of 1955 in the case of Amardeep Singh v. Harveen Kaur reported in AIR 2017 SC 4417, for a motion for passing decree of divorce on the basis of mutual consent is mandatory or directory and whether such period can be relaxed in exceptional situations or circumstances, held that the period mentioned in Section 13B (2) of Act of 1955 is not mandatory but directory and it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is

no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

We have no hesitation in holding that the view taken by the Kerala High Court in the case of TOMY JOSEPH (supra) that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed u/s 10A of the Act and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated u/s 10A (2) of the Act."

7. Sri Alok Saran and Sri Himanshu Suryavanshi, learned counsel for the Mitali Tiwari and Sri Ashok Kumar Singh, learned A.G.A.-I for the State have submitted that since the parties have already arrived at a settlement and there is no dispute that the parties have filed a petition under Section 13(B) of the Hindu Marriage Act for mutual divorce and the husband, namely, Himanshu Tiwari has also given Rs.5,00,000/- to the wife, namely, Mitali Tiwari and remaining amount will be given to the wife within ten days after the decree of divorce is passed. They have also confirmed this fact that Civil Contempt CAPL No.510 of 2022 “Himanshu Tiwari & Anr. Vs. Mitali Tiwari” filed by Himanshu Tiwari had already been dismissed as withdrawn by a co-ordinate Bench of this Court vide order dated 29.04.2024. Thus, they submit that no useful purpose would be served if the proceedings of the cases pending against each other go on further before the trial court and the same may also be quashed by this Hon’ble Court.

8. Learned counsel for the parties have drawn the attention of this Court and placed reliance on the judgment of the Hon'ble Apex Court in support of their case.

(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.

(ii) Gian Ssingh Vs. State of Punjab 2012 (10) SCC 303.

(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.

(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.

(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.

9. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of

Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

10. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases**:-(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.**

11. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is

to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued. **In S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

12. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences and a petition under Section 13(B) of the Hindu Marriage Act has already been filed for mutual divorce. It is deem proper and meet to the ends of justice. The proceeding of the cases filed between the parties be quashed by this Court.

13. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the parties and the observation made above, the entire proceedings of following cases are hereby **quashed** so far as it relates to the instant parties.

I. Criminal Complaint Case No.1882 of 2020, under Sections 323, 504, 506 I.P.C. "Madhu Tiwari Vs. Mitali Tiwari and 6 Ors." filed by Madhu Tiwari pending before learned court of Judicial Magistrate-III, Lucknow.

II. Criminal Misc. Case No.179 of 2016, under Section 12 of Domestic Violence Act "Madhu Tiwari Vs. Munish Chandra Pandey & Ors." filed by Madhu Tiwari pending before learned court of Additional Chief Judicial Magistrate-II, Lucknow.

III. Case No.22281/2017 alongwith entire State proceedings arising out of Crime No.101/2015, under Sections 498-A, 323, 406, 504, 506 I.P.C. and Section ¾ of Dowry Prohinition Act lodged at Police Station Mahila Thana, District Lucknow "State Vs. Himanshu Tiwari & Ors." pending before the learned court of Civil Judge, F.T.C. (CAW), Lucknow.

IV. Criminal Misc. Case No.789/2016 registered as 158/2016, under Section 12 of Domestic Violence Act "Mitali Tiwari Vs. Himanshu Tiwari & Ors", filed by Mitali Tiwari alongwith minor daughter Shambhavi Tiwari pending before learned court of Additional Chief Judicial Magistrate-II, Lucknow.

V. Application under Section 482 Cr.P.C. No.3121/2021 "Mitali Tiwari & Ors. Vs. State of U.P. and Anr." filed by Mitali Tiwari alongwith her family members pending before this Court.

VI. Criminal Misc. Case No.1478/2015, under Section 125 Cr.P.C. "Mitali Tiwari & Anr. Vs. Himanshu Tiwari" filed by Mitali Tiwari alongwith daughter Shambhavi Tiwari pending before court of learned Additional Principal Judge-I, Lucknow.

VII. Criminal Complaint Case No.80963 of 2023, Police Station Madiayon, District Lucknow filed by Himanshu Tiwari pending before learned Court of Additional Chief Judicial Magistrate-II, Lucknow.

VIII. Criminal Revision No.687 of 2019 filed by Himanshu Tiwari pending before the learned Court of Additional Sessions Judge-I, Lucknow.

IX. Criminal Appeal No.115 of 2023, under Section 341 Cr.P.C. "Himanshu Tiwari Vs. State & Anr. Filed by Sri Himanshu Tiwari pending before learned court of Additional Sessions Judge-XV, Lucknow.

X. Civil Misc. Case No.210/2019, under Section 25 of Guardians and Wards Act, 1890 r/w Section 6(a) of The Hindu Adoptions and Maintenance Act, 1956 pending before learned court of Additional Principal Judge-I, Lucknow.

14. Learned Principal Judge, Family Court, Lucknow is also directed to decide the decree of divorce filed by the parties bearing Case No.1220 of 2024, under Section 13(B) of the Hindu Marriage Act within two months from the date of filing of certified copy of this judgment before it by diluting the period of motions in view of the judgment of Hon'ble Supreme Court in the case of **Amardeep Singh** (Supra) and Division Bench of this Court in the case of **Shalini Massey** (Supra).

15. Learned Additional Principal Judge-I, Family Court, Lucknow is also directed to handover Rs.62,000/- to the wife, namely, Mitali Tiwari within 20 days from the date of pronouncement of this judgment, which has been deposited by Himanshu Tiwari on 29.04.2024 in Case No.1478/2015, under Section 125 Cr.P.C.

16. The husband, namely, Himanshu Tiwari is also directed to give Rs.5,00,000/- to the wife, namely, Mitali Tiwari within ten days after the decree of divorce under Section 13(B) of the Hindu Marriage Act is passed.

17. With the aforesaid directions, the instant applications under Section 482 Cr.P.C. stands **allowed** and the proceedings of the cases challenged in these applications as well as the reference of the cases given in paragraph No.13 of this judgment are hereby **quashed**.

(2024) 5 ILRA 603
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Application U/S 482. No. 4282 of 2024

Akhilesh Kumar Sachan & Ors.
...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sanjay Kumar Srivastava, Akshat Kumar

Counsel for the Opposite Parties:
G.A.

Criminal Law-Criminal Procedure Code,1973-Section 482-Indian Penal Code,1860-Section 447 - Prevention of Damage of Public Property Act, 1984-section 2/3-challenge to –summoning order-demarcation of land-the petitioners claimed ownership of Gata No. 437, which they purchased through registered sale deeds, while the State alleged that they had encroached on the adjacent public land i.e. Gata no. 436-Held, the court determined that the issue was fundamentally a civil land dispute not a criminal matter-the demarcation of land, ordered by the court, could not be completed due to the lack of fixed boundary points-The prosecution failed to prove any intent to commit criminal offence, a requirement for a conviction u/s 447 IPC. (Para 1 to 22) (E-6)

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Heard learned counsel for the applicant as well as learned AGA for the State.

2. Instant petition under Section 482 Cr.P.C. has been preferred for quashing of the F.I.R. and consequential criminal proceedings with the following prayer:-

"Wherefore, it is most respectfully prayed that for the reasons mentioned in the accompanying petition this Hon'ble Court may very kindly be pleased to set-aside the impugned order dated 23.06.2022 passed by learned Additional Chief Judicial Magistrate-V, Lucknow, in case No. 82783 of 2022 in First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, 1984 at the police station-Ashiyana, District-Lucknow.

It is further prayed that this Hon'ble Court may kindly be pleased to quash the chargesheet No.1 dated 29.06.2020 in First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, 1984 at the police station-Ashiyana, District-Lucknow.

It is further prayed that this Hon'ble Court may kindly be pleased to quash the entire proceedings of Case No. 82783 of 2022 State Vs. Shrawan Sachan and Ors. arises out from First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, 1984, at the police station-Ashiyana, District-Lucknow pending in the court of learned Additional Chief Judicial Magistrate-V, Lucknow"

3. It is submitted by learned counsel for the petitioner that impugned order dated 23.06.2022 passed by the learned Additional Chief Judicial Magistrate-V, Lucknow in case No. 82783 of 2022 in First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, 1984 at the police station-Ashiyana, District-Lucknow is a non speaking, unreasoned and cryptic order. The Court has taken cognizance of charge-sheet and summoned the accused on the basis of charge-sheet submitted by Investigating Officer on 19.06.2020 under Section 447 I.P.C. and 2/3 of Prevention of Damage of Public Property Act, 1984 with respect to Gata No. 436 measuring area 0.635 hectare situated in village Aurangabad Jagir, Tehsil Sarojni Nagar, Police Station-Ashiyana, District-Lucknow. Investigating Officer without investigating the matter at all submitted charge-sheet arbitrarily under Section 447 I.P.C. Gata No. 437-Sa of village Aurangabad Jageer, Sarojini Nagar, Lucknow consist of total area of 20 Biswa. Out of total 20 Biswa of Gata No. 437-Sa, the petitioner No. 2 purchased 10 Biswa through registered sale deed dated 02.06.2003 and reamining 10 Biswa land of Gata No. 437-Sa was purchased by the petitioner No. 3 through registered sale-deed dated 23.05.2006 and the name of petitioner No. 2 and 3 were also mutated in the revenue records. It is further submitted that petitioners have never raised any construction over any part of Gata No. 436 situated in Village Aurangabad and they are in peaceful possession of Khasra No. 437-Sa and constructed four rooms, one Kitchen, Two Latrines and Bathrooms and one Gate and also started living with effect from the year 2009. Tehsildar, Lucknow Nagar Nigam issued a notice dated 02.07.2007 regarding the encroachment over land of Khasra No. 436. Immediately after the service of notice, petitioner No. 2 submitted the reply on 16.07.2007. After the lapse of

about 8 years, when the petitioners were on their work and were not present over the aforesaid property, opposite party No. 4 demolished the part of the construction of the petitioners with the help of officials. Petitioner, thereafter, approached the Hon'ble High Court by filing Writ Petition No. 7423 (M/B)/2015 Akhilesh Kumar Sachan and Ors. Vs. State of U.P. After hearing the matter at length, Hon'ble Court directed ?petitioners are permitted to apply for demarcation and directed that if the said application is made, the demarcation shall be carried out in accordance with law expeditiously preferably within period of one month from the date of receipt of certified copy of this order?. It is next contended that petitioners along with certified copy of the order dated 18.08.2015 applied for demarcation in the office of Commissioner on 18.08.2015, thereafter, the Additional Commissioner, Lucknow Nagar Nigam issued a letter dated 04.09.2015 to apply for demarcation of land in question in the Court of Deputy Collector Sarojini Nagar, Lucknow. When the petitioners moved an application dated 15.09.2015 before the Commissioner, it was replied that the land in question comes within the territorial limit of Municipal Authorities, therefore demarcation was also done by Nagar Nigam, Lucknow. Thereafter, the petitioner filed contempt petition dated 2271(C) of 2015 but demarcation could not take place because of non-availaibility of fixed point the demarcation of plot is not possible. The Tehsildar, Shri Rajesh Kumar Srivastava appeared before the Hon'ble Court in contempt proceedings and stated that because of non-availability of fixed point, demarcation of land is not possible by traditional method of demarcation. Finally the contempt petition was disposed of with a note that petitioner are directed to apply for demarcation in terms of order issued by Writ Court dated 18.08.2018 within a period of three months. Opposite parties instead of demarcating the lands lodged F.I.R. against the petitioner. It is also submitted that the informant was itself part of committee who was assigned the work of demarcation and he was well aware of the fact that demarcation of the land is not possible. It is also submitted that it is civil dispute which has been given the colour of criminality. It is further contended by learned counsel for the applicant that he has purchased Khasra No. 437 and he is very well in possession of Khasra No. 437 and he has nothing to do with Khasra No. 436. When the petitioners came to know about the said F.I.R. they provided all the documents of Court proceedings to Investigating Officer including copy of the judgments but Investigating Officer without taking into account the said orders, arbitrarily filed charge-sheet against petitioners. Learned trial court had taken cognizance on 23.06.2022 without application of mind and without looking into the fact whether any material is available against the petitioners for cognizance. Hence, it is prayed to quash the impugned order dated 23.06.2022.

4. Learned AGA for the State submitted that petitioners encroached Gata No. 436 in the garb of Gata No. 437 and the Gata No. 436 is public land, therefore, charge-sheet is filed with due care and Court has taken cognizance well on the basis of evidence collected during the investigation.

5. I have heard the rival submissions advanced on behalf of the parties and perused the entire material brought on record. The questions arises as to whether the land in dispute belonged to applicants or they had illegally encroached upon the land vested in Gram Sabha. It can be adjudicated

by Revenue Court itself, if it is found that petitioners have encroached public land then the proper proceedings for eviction of the unauthorized occupants can be undertaken under Section 67 of the Revenue Code 2006. The short cut procedure should not be adopted to dis-possess the petitioner without applying due procedure of law.

6. The Sub-Divisional Officer is empowered to take action on the information received from Bhumi Prabandhak Samiti or other authority or Lekhpal concerned about such illegal occupation or damage or mis-appropriation of Gram Sabha land. In any case, any person is found in illegal possession of such land in contravention of provisions of Revenue Code, The Sub-Divisional Officer has to issue notice to the person concerned to show cause as to :- (I) why compensation for damage, misappropriation or wrongful occupation specified in the notice be not recovered from him? (ii) why he should not be evicted from such land?

7. The person to whom such a notice is issued under sub-Section (2) of Section 67 of the Code, can submit his reply disclosing his right or entitlement or nature of occupation over the land in question, thereafter the Sub-Divisional Officer should pass a reasoned order. The amount of compensation for damage or misappropriation of the property or for wrongful occupation, as the case may be, recovered from such person as arrears of land revenue. Under sub-Section (4) of Section 67, the Officer is empowered to discharge the notice if he forms an opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation of the property in question. Any person aggrieved by the order of Sub-Divisional Officer may prefer an appeal to the Collector within thirty days from the date of such order. The procedure for undertaking the procedure under Section 67 of the Revenue Code, thus, is complete in itself and does not leave any scope for any further computation of damage for wrongful occupation, damage caused or misappropriation of Gram Sabha land.

8. Section 210 of Revenue Code confers supervisory power on Board or Commissioner to call for the record of any proceedings decided by Sub-Divisional Officer in which no appeal lies for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit. The nature of eviction proceedings under Section 67 of Revenue Code, 2006 is however, summary in nature. The rights of parties claimed, if gives rise to a dispute requiring adjudication on the question of fact, a suit for declaration has to be instituted against such person. Gram Sabha may institute a suit under Section 145 of the U.P. Revenue Code, 2006 for declaration of its right or to seek any further relief.

9. As far as criminal proceeding for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of parties over the land in dispute as the said determination can be done only by the revenue Court. As far as the P.D.P.P. Act, 1984 is concerned, the same has been enacted with the specific purpose. The statement of objects and reasons of the said Act shows that it was enacted with a view to curb acts of vandalism and damages to public property including destruction and damage caused during riots and public commotion. A need was felt to strengthen the law to enable the authorities to deal with

cases of damage to public property. The ?Public Property? as defined under Section 2(b) of P.D.P.P. Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or under possession or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central Provincial or State Act or its undertaking.

10. Section 3 of the P.D.P.P. Act, 1984 provided that anyone who commits mischief by doing any act in respect of any ?public property? including the nature referred in sub-Section(2) in the said Section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-Section (1) and sub-Section (2) of Section 3 of the P.D.P.P. Act, 1984. Section 4 provides punishment for an act of ?Mischief? causing damage to public property by fire or explosive substance.

11. The provisions oblige a person found guilty of commission of offence to pay the damage or loss caused to the public property. This Act, thus, covers the specific area of damage or loss or destruction to the public properties and recovery of such damages from a person who is found guilty of such damage.

12. In Re. Destruction of Public and Private Properties, In Re vs. State of Andhra Pradesh and others1. Taking a serious note of various instances where there was a large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings had been initiated by the Apex Court and two committees were appointed to give suggestions on strengthening of the legal provisions of P.D.P.P. Act to effectively deal with such instances. The recommendations of two committees were considered and it was observed that the suggestions were extremely important and they constitute sufficient guidelines which need to be adopted. It was left open to the appropriate authorities to take effective steps for their implementation.

13. In a recent decision in Kodungallur Film Society and another vs. Union of India and others2, relief was sought to issue a mandamus to the appropriate authorities to strictly follow and implement the guidelines formulated by the Apex Court "Destruction of Public & Private Properties In re:", with regard to measures to be taken to prevent destruction of public and private properties in mass protests and demonstrations and also regarding the modalities of fixing liability and recovering compensation for damages caused to public and private properties during such demonstration and protests.

14. It was acknowledged in Kodungallur Film Society2 that the recommendations of the Committee noted in the said judgment travesed the length and breadth of the issue at hand and, if implemented in their entirety, would go a long way in removing the bane of violence caused against persons and property.

15. As far as implementation of the said recommendations, the Union had advised the States to follow the same in its letter and spirit. Issuing directions to implement recommendations made by the Apex Court in both the above decisions. Direction was issued in Kodungallur Film Society2 to both the Central and the State Government to do the same at the earliest.

16. In compliance thereof, the State of U.P. notified the "Uttar Pradesh Recovery of

Damages to Public and Private Property Rules, 2020", framed with a view to provide for recovery of damages to public and private property during hartal, bundh, riots, public commotion, protests etc. in respect of the property and imposition of fine. The said 'Rules' provide for constitution of the claims tribunal to investigate the damages caused and to award compensation related thereto.

17. The area which is covered by the P.D.P.P. Act, 1984 is, thus, confined to the destruction or damage to the 'public property' within the meaning of Section 2(b) of the Act during the course of riots or public demonstrations (commotion). The said provisions, in the considered opinion of the Court, cannot be invoked for lodging the criminal complaint or the first information report on the allegations of damage or loss caused to the Gram Sabha land by illegal encroachment against a person permanently residing in the village or a tenure holder of any land in the village in question.

18. In the said set of circumstances, the inherent dispute is whether the construction were raised by petitioner in Gata no. 437-Sa or Gata No. 436 which can be decided very well by demarcation proceedings. Demarcation of the land was directed by this Court itself, and the Committee of seven members reported that the land in dispute is now thickly populated and no fixed point can be ascertained, therefore, at this stage, it is not possible to conduct demarcation proceedings. It is the duty of State to demarcate and show that the disputed land on which construction is raised belongs to State before lodging the F.I.R. against a person stating that he had encroached public land. First of all, State should show that it is public land. There is no dispute over the fact that land of Gata No. 436 belongs to State, however, Gata no. 437 containing 20 Biswa of land was purchased by petitioner No. 2 and 3. The construction, as per the petitioner, is raised only on gata No. 437. If State wants to proceed to lodge F.I.R. on the ground that construction was raised on Gata No. 436, prima facie, there must be demarcation

19. So far as allegation of criminal offence under Section 447 I.P.C. is concerned, prosecution has to prove and the Court has to return a finding on the fact that trespassing was committed with one of the intent enumerated in Section 441 I.P.C. Prosecution has not only to allege but also to prove that entry of unlawful occupation must be with the intention to commit an offence or to intimidate, insult or annoy any person in possession of property. Every trespass by itself is not criminal. In the absence of such finding conviction under Section 447 cannot be sustained.

20. Offence under Section 447 I.P.C. is compoundable by Magistrate it is to be tried summarily. Even if there is there is no trespass, an accused may lay a bonafide claim and right in the land in question, then too, offence under Section 447 I.P.C. cannot be charged against accused. If the petitioners are bonafide purchasers of the land in dispute and in possession State has right to dispossess him by proving that it is the part of Gata No. 436 but State cannot take action against the citizen. Mere trespassing without intention to intimidate, insult or annoy is not sufficient to constitute offence under Section 447 of the I.P.C.

21. Here in the case at hand, petitioners specifically established their right that they are bona fide purchaser, hence, the lodging of F.I.R. for demolishing the construction of petitioner is unfair. Information lodged F.I.R. without disclosing the fact that

demarcation proceedings were directed by this Court and the Committee of seven members failed to demarcate, even charge-sheet does not disclose the appreciation of any particular material on record against the petitioners. The order of taking cognizance passed by the Magistrate is also passed in a cursory manner, even without mentioning the contents of case diary, hence, the criminal action proposed against the accused is a result of inadvertent taking of cognizance. In view of the discussions as above, F.I.R., charge-sheet and the criminal proceedings initiated against the applicants vide order dated 23.06.2022 in case crime No. 82783 of 2022 in First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 of Prevention of Damage to Public Property Act, 1984, Police Station-Ashiyana, District-Lucknow pending the Court of learned Additional Chief Judicial Magistrate-V, Lucknow deserves to be set-aside.

22. In view of the discussions as above, impugned order dated 23.06.2022 passed by the learned Additional Chief Judicial Magistrate-V, Lucknow, in case No. 82783 of 2022 in First Information Report No. 0631 of 2018 under Section 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, 1984, Police Station-Ashiyana, District-Lucknow is hereby **set-aside** and instant petition is hereby **allowed**.

(2024) 5 ILRA 609
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 4327 of 2024

Anuj Pandey ...Applicant

Versus

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

Counsel for the Applicant:
Devarshi Mishra, Ayush Tandon, Rajiv Misra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Sections 498-A, 323, 504 & 506 - ¾ D.P. Act,1984 -quashing of-summoning order-parties entered into an amicable settlement and they already filed a divorce petition by mutual consent- Held, keeping in view the nature and gravity of the offence which are private dispute, it deems proper to quash the proceeding of the instant case.(Para 1 to 17)

B. In the exercise of the power u/s 482 and while dealing with the plea that the dispute has been settled, the high court must have due regard to the nature and gravity of the offence. The High court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice. (Para 11)

The application is allowed. (E-6)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur (2017) AIR SC 4417

2. Shalini Massey Vs Neeraj Samuel Dass, FAPLD No. 392 of 2019

3. B.S Joshi Vs St. of Har. & ors. (2003) 4 ACC 675

4. Gian Singh Vs St. of Punj. (2012) 10 SCC 303

5. Dimpey Gujral & ors. Vs U.T. Thru Admin. (2013) 11 SCC 697

6. Narendra Singh & ors. Vs St. of Punj. & ors. (2014) 6 SCC 466

7. Yogendra Yodav & ors. Vs St. of Jhar. (2014) 9 SCC 653

8. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr.(2017) 9 SCC 641

9. R.P. Kapoor Vs St. of Punj. (1990) AIR SC 866

10. St. of Har. Vs Bhajanlal (1992) SCC (Crl.) 426

11. St. of Bih. Vs P.P. Sharma (1992) SCC (Crl.) 192

12. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.(2005) SCC (Crl.) 283 para 10

13. S.W. Palankattkar & ors. Vs St. of Bih. (2002) 44 ACC 168

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

1. Sri Vijay Prakash Tiwari, Advocate has put in appearance on behalf of the opposite party no.2 by filing vakalatnama, which is taken on record.

2. Heard Sri Devarshi Mishra, learned counsel for the applicant, Sri Vijay Prakash Tiwari, learned counsel for the opposite party no.2 and Ms. Ankita Tripathi, learned A.G.A. for the State.

3. The instant application under Section 482 Cr.P.C. has been filed by the applicant with a prayer to quash the charge sheet dated 30.12.2020, cognizance and summoning order dated 27.07.2021 passed by learned Chief Judicial Magistrate, Lucknow in Case No.26775 of 2021 (State of U.P. Vs. Anuj Pandey), arising out of Complaint dated 08.06.2020 filed by Respondent No.2, under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Gomti Nagar, District Lucknow pending in the court of learned Chief Judicial Magistrate, Lucknow.

4. Today, the applicant, namely, Anuj Pandey and the opposite party no.2, namely, Ms. Saumya Dwivedi are present before this Court and they have been identified by their respective counsel.

5. Learned counsel for the parties submit that the applicant as well as the opposite party no.2 have entered into an amicable settlement and they are ready to take divorce by mutual consent. The parties have already filed a petition under Section 13-B of the Hindu Marriage Act, which is pending before the learned Principal Judge, Family Court, Lucknow. Copy of the petition has been annexed as annexure no.5 of the affidavit filed alongwith the instant Application under Section 482 Cr.P.C. The terms and conditions have also been laid down in the aforesaid petition. In para 7 of the aforesaid petition, a condition regarding one time alimony has been mentioned. Para 7 of the petition filed under Section 13-B of the Hindu Marriage Act is being quoted hereunder:-

"7. यह कि याची सं0–01 द्वारा माननीय न्यायालय में रू0 70,00,000/– (सत्तर लाख रूपया) जरिये तीन डिमाण्ड ड्राफ्ट नामित प्रिंसिपल जज फैमिली कोर्ट, लखनऊ डिमाण्ड ड्राफ्ट सं0–708388 दिनांक 16.12.23 बैंक आई0डी0एफ0सी0 बैंक शाखा–मुंशी पुलिया डिमाण्ड ड्राफ्ट सं0–444624 दिनांक–16.12.23 बैंक यूनियन बैंक शाखा विभूति खण्ड, गोमती नगर डिमाण्ड ड्राफ्ट सं0–708309 दिनांक 16.12.23 बैंक–आई0डी0एफ0सी0 बैंक शाखा–मुंशी पुलिया माननीय न्यायालय श्रीमान प्रधान न्यायाधीश जी के कोष में टेन्डर द्वारा जमा किया जा रहा है। उक्त धनराशि याची सं0–2 के भरण–पोषण व जीवनयापन हेतु याची सं0–1 द्वारा जमा की जा रही है जिसे याची सं0–2 याचिका के निस्तारण के बाद याचिका के निर्णय की सत्यापित प्रति देकर न्यायालय श्रीमान प्रधान न्यायाधीश जी के कार्यालय से जरिये चेक प्राप्त कर लेगी। उपरोक्त तीनो डिमाण्ड ड्राफ्ट

की छायाप्रति व टेन्डर की कॉपी उपरोक्त याचिका के साथ संलग्नक है।"

6. Further, in para 8 of the aforesaid petition, it has been clearly stated that apart from the above amount, now nothing remains to be paid to the opposite party no.2 and the opposite party no.2 will not demand any further Stree Dhan from the applicant. Para 8 of the petition filed under Section 13-B of the Hindu Marriage Act is being quoted hereunder:-

"8. यह कि याची सं0–1 व याची सं0–2 के मध्य किसी भी प्रकार कोई भी लेन–देन शेष नही रह गया है और याची सं0–2 भविष्य में याची सं0–1 से किसी भी प्रकार के स्त्रीधन की मांग नही करेगी और न ही याची सं0–1 की सम्पत्ति पर किसी भी प्रकार के अधिकार की मांग करेगी।"

7. Learned counsel for the parties further submit that as the parties have already settled their dispute and they do not want to linger on any further, thus, the entire proceeding of the case may be quashed and the learned Principal Judge, Family Court, Lucknow be directed to decide the divorce petition of the parties filed under Section 13(B) of the Hindu Marriage Act in light of the judgment rendered by Hon'ble Supreme Court in the case of **Amardeep Singh Vs. Harveen Kaur: AIR 2017 SC 4417** and further order passed by the Division Bench of this Court in **First Appeal Defective No. 392 of 2019: Shalini Massey Vs. Neeraj Samuel Dass decided on 07.01.2020.** Paragraph Nos. 19 and 20 of Amardeep Singh (Supra) are reproduced hereinunder:-

"19. Applying the above to the present situation, we are of the view that where the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned.

20. Since we are of the view that the period mentioned in Section 13-B(2) is not mandatory but directory, it will be open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

8. Further, this Court has been pleased to observe in paragraph No.12 in the case of **Shalini Massey (Supra)** which is reproduced hereinunder:-

"12. The provisions contained in Section 10A of the Divorce Act, 1869, are, in substance, a verbatim reproduction of the

provisions contained in Section 13B of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954. The only substantial difference is that, instead of the period of one year mentioned in Section 13B(1) of the Hindu Marriage Act, 1955 and Section 28(1) of the Special Marriage Act, 1954, a period of two years of separate residence is provided under Section 10A(1) of the Divorce Act, 1869. The beneficiaries under the abovementioned provisions of different statutes are persons who want divorce by mutual consent and who file joint petition for that relief. There can be no discrimination among them on the ground of religion. Divorce by mutual consent is a secular concept. When the Apex Court has declared the law that the "cooling off period" of six months provided under Section 13B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and such period can be allowed to be waived by the court on satisfaction of certain conditions, denying that benefit to persons who are governed by the Divorce Act, 1869 would amount to unjust discrimination. Therefore, we are of the considered opinion that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed under Section 10A of the Divorce Act, 1869 and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated under Section 10A(2) of that Act.

In view of the foregoing discussion, we find that but for the difference in period provided for making the second motion, the provisions of Section 13B (1) of Act of 1955 and 28 (1) of the Act of 1954 and 10A (1) of the Act, the aforesaid provisions are verbatim reproduction of each other. Since the Hon'ble Apex Court while considering the question whether the minimum period of six months stipulated u/s 13B (2) of Act of 1955 in the case of Amardeep Singh v. Harveen Kaur reported in AIR 2017 SC 4417, for a motion for passing decree of divorce on the basis of mutual consent is mandatory or directory and whether such period can be relaxed in exceptional situations or circumstances, held that the period mentioned in Section 13B (2) of Act of 1955 is not mandatory but directory and it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

We have no hesitation in holding that the view taken by the Kerala High Court in the case of TOMY JOSEPH (supra) that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed u/s 10A of the Act and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated u/s 10A (2) of the Act."

9. Learned A.G.A. for the State has also made an agreement with the proposal made by learned counsel for the respective parties and she further submits that no useful purpose would be served if the proceedings of the instant case go on further before the learned trial court, therefore, the same may be quashed by this Hon'ble Court.

10. Learned counsel for the parties have drawn the attention of this Court and placed reliance on the judgment of the Hon'ble Apex Court in support of their case.

(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.

(ii) Gian Ssingh Vs. State of Punjab 2012 (10) SCC 303.

(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.

(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.

(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.

11. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour

may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases**:-(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283**.

13. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

14. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences and a petition under Section 13(B) of the Hindu Marriage Act has already been filed for mutual divorce, it deems proper and meet to the ends of justice, the proceeding of the instant case be quashed by this Court.

15. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the parties and the observation made above, the entire proceedings of charge sheet dated 30.12.2020, cognizance and summoning order dated 27.07.2021 passed by learned Chief Judicial Magistrate, Lucknow in Case No.26775 of 2021 (State of U.P. Vs. Anuj Pandey), arising out of Complaint dated 08.06.2020 filed by Respondent No.2, under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Gomti Nagar, District Lucknow pending in the court of learned Chief Judicial Magistrate, Lucknow are

hereby **quashed** so far as it relates to the instant applicant.

16. Learned Principal Judge, Family Court, Lucknow is also directed to decide the decree of divorce filed by the parties under Section 13(B) of the Hindu Marriage Act within two months from the date of filing of certified copy of this judgment before it by diluting the period of motions in view of the judgment of Hon'ble Supreme Court in the case of **Amardeep Singh (Supra)** and Division Bench of this Court in the case of **Shalini Massey (Supra).**

17. With the aforesaid directions, the instant application under Section 482 Cr.P.C. stands **allowed**.

(2024) 5 ILRA 615
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 7662 of 2023

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

Counsel for the Applicant:
Neeranjan, Pratyush Mishra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 482, 239-Prevention of Damage of Public Property Act, 1984-section 2/3-challenge to –summoning order-encroachment of land- The present case originated from an FIR alleging that the applicant (minor) and others had placed straw on public property (a chak marg in village Gata no. 625) with the intent to encroach upon it-the applicant claimed that the straw was placed temporarily and without any intent to illegally occupy the land-The trial court had rejected the discharge application without properly considering the evidence-The act emphasized that the Act applies in situations of actual damage to public property, in this case, no actual damage occurred-The court allowed the application and quashed the entire proceedings.(Para 1 to 25)

The application is allowed. (E-6)

List of Cases cited:

1. In Re Vs St. of A.P. & ors. (2009) 5 SCC 212

2. Kodungallur Film Socy. & Anr. Vs U.O.I. & Ors (2018) 10 SCC 713

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

1. The instant application has been moved on behalf of the applicant with a prayer to quash the order dated 16.05.2023 passed by Learned Additional Civil Judge (C.D.) Fast/ACJM. Ambedkar Nagar in Criminal Misc. Case No. 1223/2023 vide Crime No. 12/2020, U/s 2/3 of Prevention of Damage to Public Property Act, Police Station Maharuwa, District- Ambedkar Nagar, on the application of applicant under Section 239 Cr.P.C and further be pleased to discharge the applicant.

2. Heard Sri Neeranjan Singh, learned counsel for the applicant and Sri Ashok Kumar Singh, learned A.G.A.-1 for the State.

3. Learned counsel for the applicant submitted that the complainant-Lekhpal of the village concerned had lodged an F.I.R. dated 02.02.2020 bearing No. 12/2020 U/s 3/4 of Prevention of Damage to Public

Property Act, Police Station Maharuwa against the applicant and 6 other persons stating therein that the alleged accused persons with the intention of grasping the public property kept the "puaal" straw on Gata No. 625 which is recorded as "chak marg" in Revenue record.

4. Learned counsel for the applicants further submitted that the applicant was minor at the time of lodging of F.I.R. and the alleged allegation leveled against the applicant by the Complainant is false and fabricated. The true fact is that the applicant did not intend to grasp any public utility land but had kept the straw (Puaal) over the said Gata on temporary basis as the other co-accused has also put the same and all the (Puaal) Straw has been removed and the said Gata was being used by the villagers and other people since long year back.

5. Learned counsel for the applicant further submitted that the Investigating Officer conducted the investigation in a very mechanical and arbitrary manner and filed the charge-sheet on 04.10.2020 against the applicant under Section 2/3 of Prevention of Damage to Public Property Act and strucked off the Section 3/4 of Prevention of Damage to Public Property Act.

6. Learned counsel for the applicant further submitted that the applicant had earlier filed an application under Section 482 Cr.P.C. in which this Hon'ble Court and vide order dated 23.02.2023 the applicant to move discharge application through counsel.

7. Learned counsel for the applicant further submitted that the thereafter the applicant moved discharge application before the court of learned Additional Civil judge (C.D) Fast/ACJM. Ambedkar Nagar and the concerned court vide order dated 16.05.2023 rejected the discharge application without considering the material evidence on record.

8. Learned counsel for the applicant further submitted that the applicant was selected in the Indian Army under Agniveer scheme vide selection list year 2023 but he was not allowed to join due to very fact of FIR being lodged against him without any case of criminal nature made out against him.

9. Learned A.G.A. for the State controverts the submissions of learned counsel for applicant on the ground that this is not a stage where minute and meticulous exercise with regard to the appreciation of evidence may be done and truthfulness of the allegations could only be tested in a criminal trial and, therefore, the application is misconceived and liable to be dismissed.

10. After considering the argument advance by learned counsel for the parties, this Court is of the view that the relevant provision of the Act be dealt with, which are quoted here as under:

Prevention of Damage to Public Property Act, 1984

Section 2. Definitions.--In this Act, unless the context otherwise requires,--

(a) "mischief" shall have the same meaning as in section 425 of the Indian Penal Code (45 of 1860);

(b) "public property" means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of--

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or

(iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

Section 3. Mischief causing damage to public property

S 3. Mischief causing damage to public property.—(1) Whoever commits mischief by doing any act in respect of any public property, other than public property of the nature referred to in sub-section (2), shall be punished with imprisonment for a term which may extend to five years and with fine.

(2) Whoever commits mischief by doing any act in respect of any public property being—

(a) any building, installation or other property used in connection with the production, distribution or supply of water, light, power or energy;

(b) any oil installations;

(c) any sewage works;

(d) any mine or factory;

(e) any means of public transportation or of tele-communications, or any building, installation or other property used in connection therewith, shall be punished with rigorous imprisonment for a term which shall not be less than six months, but which may extend to five years and with fine:

Provided that the court may, for reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than six months.

The "Prevention of Damage to Public Property Act, 1984" is legislation aimed at preventing vandalism and damage to public property in India. It defines key terms like "mischief" and "public property" and outlines penalties for those who commit acts of mischief causing damage to such property.

The "Prevention of Damage to Public Property Act, 1984" is legislation aimed at preventing vandalism and damage to public property in India. It defines key terms like "mischief" and "public property" and outlines penalties for those who commit acts of mischief causing damage to such property.

According to the Act, "mischief" is defined in alignment with Section 425 of the Indian Penal Code (IPC), which generally refers to intentionally causing damage to property. "Public property" encompasses various forms of property owned or controlled by governmental bodies, corporations, or specified institutions, and includes both immovable and movable assets.

Section 3 of the Act specifies the offense related to mischief causing damage to public property. It delineates two categories of public property: general public property and specific types of property critical to infrastructure such as water, power, telecommunications, and transportation systems. The punishment for these offenses varies based on the type of property damaged, with more severe penalties for damage to critical infrastructure."

11. Object and idea of enacting the Prevention of Damages to Public Property Act, 1984 is to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion. A need was felt to strengthen the law to enable the authorities to deal with cases of damage to public property. The “public property” as defined under Section 2(b) of the P.D.P.P. Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or in possession of or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central, Provincial or State Act or its undertaking. Section 3 of the P.D.P.P. Act, 1984 provides that anyone who commits mischief by doing any act in respect of any ‘public property’ including the nature referred in subsection (2) in the said section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-section (1) and sub-section (2) of Section 3 of the P.D.P.P. Act, 1984. The P.D.P.P. Act, 1984 .

12. The Act was enacted to empower authorities to effectively address cases of damage to public property, especially during riots or public disturbances. Its aim is to deter acts of vandalism and protect public assets essential for the functioning of society.

The court is explaining that the Prevention of Damage to Public Property (PDPP) Act, 1984, only applies to situations where public property is damaged or destroyed during riots or public demonstrations. This means if there's damage to things like government buildings or infrastructure during these events, the PDPP Act can be used to address it.

So, if there's no actual damage or loss related to Gram Sabha land or any other village land due to illegal encroachment by someone living in the village or holding land there temporarily and remove encroachment after the notice, without causing damage or decreasing the land's value of the property, then the PDPP Act wouldn't be applicable.
In essence, if someone occupies land unlawfully temporary but doesn't cause any harm or decrease in value to the land, the PDPP Act doesn't come into play. This means that the Act is primarily concerned with instances where there is actual damage to public property or where the value of the property is diminished due to unlawful Occupation.

13. In Re. Destruction of Public and Private Properties, **In Re vs. State of Andhra Pradesh and others, 2009 (5) SCC 212.** Taking a serious note of various instances where there was a large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings had been initiated by the Apex Court and two committees were appointed to give suggestions on strengthening of the legal provisions of P.D.P.P. Act to effectively deal with such instances. The recommendation of two committees were considered and it was observed that the suggestions were extremely important and they constitute sufficient guidelines which need to be adopted. It was left open to the appropriate authorities to take effective steps for their implementation.

14. In a recent decision in **Kodungallur Film Society and another vs. Union of India and others, 2018 (10) SCC 713**, the relief was sought to issue a mandamus to the appropriate authorities to strictly follow and implement the guidelines

formulated by the Apex Court "Destruction of Public & Private Properties In re:", with regard to measures to be taken to prevent destruction of public and private properties in mass protests and demonstrations and also regarding the modalities of fixing liability and recovering compensation for damages caused to public and private properties during such demonstration and protests.

15. It was acknowledged in **Kodungallur Film Society (supra)** that the recommendations of the Committee noted in the said judgment traversed the length and breadth of the issue at hand and, if implemented in their entirely, would go a long way in removing the bane of violence caused against persons and property. As far as implementation of the said recommendations, the Union had advised the States to follow the same in its letter and spirit. Issuing directions to implement recommendations made by the Apex Court in both the above decisions. Direction was issued in Kodungallur Film Society to both the Central and the State Government to do the same at the earliest.

16. From the aforesaid it is clear that the underline purpose and idea of enacting the Prevention of Damages to Public Property Act, 1984 is to provide benefits to those persons or to take a suitable remedial action to prevent the destruction of public and private properties in mass protest, demonstration, hartal, agitation and in this damage to the public and private properties, pursuant to the ratio laid down by Hon'ble Apex Court in the case of **Kodungallur Film Society (supra)** the State Governments were granted liberty to form a committee to carry out and implement the recommendations made by the Hon'ble Apex Court in the above decision. Accordingly, the State of Uttar Pradesh too has notified "Uttar Pradesh Recovery of Damages to Public and Private Property Rules, 2020" with a view to provide for recovery of damages to public and private property during hartal, bundh, riots, public commotion, protests etc. in regard to property and imposition of fine. The said Rules provides for constitution f the claims tribunal to investigate the damages caused and to award compensation related thereto.

17. The judgment in the case of **Munshi Lal and Another (supra),** relied upon after noticing the provisions of the PDPP Act, has taken the view that as far as criminal proceedings for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of the parties over the land in dispute as the said determination can be done only by the revenue court. In so far as the observation made in the decision that the Act covers the specific area relating to any act of vandalism including the destruction or damage during any riots or public demonstration in the name of agitations, bandhs, hartals and the like, is concerned, reference may be had to a recent decision by a Division Bench of this Court in **Devnath Yadav vs. State of U.P. and three Others**, which was a case where an FIR under Section 2/3/5 of the PDPP Act, in respect of encroachment over the Gaon Sabha land, had been sought to be challenged. The Division Bench upon considering the legal position held that the judgment in the case of **Munshi Lal and Another** was distinguishable and made the following observations :-

*"in the case of **Munshi Lal (supra),** we find that, proceeded on the premise that Prevention of Damage to*

Public Property Act, 1984 was enacted to curb vandalism and damage to pubic property.

Statement of Objects and Reasons reads as follows-

"With a view to curb acts of vandalism and damage to public property, including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property."

18. Now coming to yet another aspect of the issue, learned counsel for the applicants in order to buttress their contention have drawn attention of the Court to the provisions of Section 67 of the U.P. Revenue Code which speaks about the power to prevent damages, misappropriation and wrongful occupation of Gram Panchayat property:-

(i) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(ii) Where from the information received under sub-section (i) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (i) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(iii) If the person to whom a notice has been issued under sub-section (ii) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue.

(iv) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (ii), he shall discharge the notice.

(v) Any person aggrieved by an order of the Assistant Collector under Sub-section (iii) or Sub-Section (iv), may within thirty days from the date of such order, prefer an appeal to the Collector.

(vi) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(vii) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation.- For the purposes of this section, the word "land" shall include the trees and building standing thereon."

19. Further, under Rule 67(1) of U.P. Revenue Code, 2016, it is incumbent upon the Assistant Collector to make an inquiry as he deems proper and obtain further information regarding the following issues :

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages."

20. Thus, from the above it is clear that as per the U.P. Revenue Code, it is the Assistant Collector of the area who is the authority concerned to act a pivotal role in demarcation and holding and declaring the land in dispute is encroached by the applicants. The Investigating Officer of criminal cases is not even remotedly connected to conduct this exercise. The entire procedure has been laid down in Section 67(2) that only after getting a reply from the alleged encroacher, the Assistant Commissioner/Sub Divisional Officer has to pass an order giving reasons for not exceeding the explanation, if so offered by the person concerned. The eviction from the land in dispute can only be recorded after disposal of the explanation offered by the person concerned keeping in line with the cardinal principle of natural justice by passing a well reasoned and speaking order while disposing of the said explanation. The Act is itself contained the amount of compensation of damage or misappropriation of the property or for wrongful occupation, as the case may be and may be recovered from such person as arrears of land revenue. Section 210 of the Revenue Code, 2006 confers supervisory power on the Board or the Commissioner to call for the record of any proceeding decided by the subordinate revenue court in which no appeal lies for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding.

21. A careful reading of the provisions of the Revenue Code, 2006, thus, makes it clear that the proceeding for causing damage to the public property can be undertaken against any person who is in wrongful occupation of the same or causes damage or misappropriations to the said property. The nature of eviction proceeding under Section 67 of the Revenue Code, 2006, is, however, summary in nature. The rights of the parties claimed, if gives rise to a dispute requiring adjudication on the questions of fact, a suit for declaration has to be instituted against such person. The Gram Sabha may institute a suit under Section 145 of the U.P. Revenue Code, 2006 for declaration of its right or to seek any further relief. In case of institution of such a suit, a temporary injunction may be granted by the Court concerned to prevent wastage, damage or alienation of the suit property. The Revenue Code, 2006 is a Special enactment providing for the law relating to the 'land' defined under Section 4(14) of the Code.

22. Thus, this Court comes to the conclusion that if a person is using public property for a temporary period without causing damage or altering its nature or

structure or and remove after the notice serve, the temporary nature of the occupation may suggest that there was no intention to unlawfully grab public property related to the prevention of damage to public property Act. Such laws typically aim to prevent intentional or negligent harm to public assets or resources. As long as the use is temporary, non-destructive, and does not pose any risk to the property or public safety, its may not to be considered a violation of law related to the prevention of damage to public property.

23. The court is explaining that the Prevention of Damage to Public Property (PDPP) Act, 1984, only applies to situations where public property is damaged or destroyed during riots or public demonstrations. This means if there's damage to things like government buildings or infrastructure during these events, the PDPP Act can be used to address it. So, if there's no actual damage or loss related to Gram Sabha land or any other village land due to illegal encroachment by someone living in the village or holding land there temporarily, without causing damage or decreasing the land's value, then the PDPP Act wouldn't be applicable. In essence, if someone occupies land unlawfully but doesn't cause any harm or decrease in value to the land, the PDPP Act doesn't come into play. This means that the Act is primarily concerned with instances where there is actual damage to public property or where the value of the property is diminished due to unlawful activities.

24. Thus, prima facie it appears that the learned trial court has failed to appreciate the materials available on record and has committed manifest illegality while passing the impugned order while rejecting the discharge application and the same is passed without considering the evidence produced by the applicants, which is unsustainable in the eyes of law. Thus, this Court allow this application under Section 482 Cr.P.C. and quash the order dated 16.05.2023 passed by Learned Additional Civil Judge (C.D.) Fast/ACJM. Ambedkar Nagar in Criminal Mise. Case No. 1223/2023 vide Crime No. 12/2020, U/s 2/3 of Prevention of Damage to Public Property Act, Police Station Maharuwa, District- Ambedkar Nagar as well as further proceeding is also quashed.

25. Accordingly, this application under Section 482 Cr.P.C. is **allowed** and the impugned order dated 16.05.2023 passed by Learned Additional Civil Judge (C.D.) Fast/ACJM. Ambedkar Nagar in Criminal Mise. Case No. 1223/2023 vide Crime No. 12/2020, U/s 2/3 of Prevention of Damage to Public Property Act, Police Station Maharuwa, District- Ambedkar Nagar as well as entire criminal proceedings of Criminal Mise. Case No. 1223/2023 vide Crime No. 12/2020, U/s 2/3 of Prevention of Damage to Public Property Act, Police Station Maharuwa, District- Ambedkar Nagar, pending before the court of Additional Civil Judge (C.D.) Fast/ACJM. Ambedkar Nagar are hereby **quashed**.

26. Let a copy of this judgment and order be sent to the trial court for necessary compliance.

(2024) 5 ILRA 622
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 14197 of 2024

Rakesh Upadhyay ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dilip Kumar Dubey, Sri Prabhat Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Negotiable Instruments Act, 1881-Section 138-Challenge to-summoning order-the applicant had issued two cheque which were dishonored due to insufficient funds-a demand notice was sent to the applicant, which went unanswered, leading to the initiation of legal action under NI Act-The summoning order issued by the Magistrate did not adequately consider the necessary legal conditions u/s 138 and 142 of the Act, such as timely presentation of the cheque, issuance of demand notice, and filing of the complaint within the prescribed period-Thus, the failure to reflect these conditions in the summoning order was deemed a significant procedural lapse-The High court set aside the impugned summoning order.(Para 1 to 18)

B. For a court to take cognizance of an offense u/s 138 of the Act it must strictly adhere to the procedural requirements outlined in sections 138 and 142 of the act. (i) the cheque must be presented to the bank within its period of validity. (ii) the payee or holder must issue a written demand notice to the drawer within 30 days of receiving information about the cheques dishonor. (iii) if the drawer of the cheque fails to make payment within 15 days of receiving the demand notice, the complaint must be filed within one month from the expiration of this 15 day period. Failure to reflect these conditions in the summoning order renders it procedurally defective. (Para 11)

The application is allowed. (E-6)

List of Cases cited:

1. In Re Vs St. of A.P. & ors. (2009) 5 SCC 212

2. Kodungallur Film Scty. & anr. Vs U.O.I. & ors. (2018) 10 SCC 713

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

1. Heard learned counsel for the applicant and Sri Arbind Kumar, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed for quashing of entire proceeding as well as summoning order dated 22.11.2023 passed by learned Additional Chief Judicial Magistrate, Second, Jaunpur in Complaint Case No.13185 of 2023 (Jay Prakash Upadhyay Vs. Rakesh Upadhyay), under Section 138 of N.I. Act, Police Station Sujanganj, District Jaunpur, pending in the Court of Additional Chief Judicial Magistrate, Second, Jaunpur.

3. Facts giving rise to the present case are that the opposite party no.2 had filed a complaint under Section 138 N.I. Act against the applicant with the allegation that the complainant and the present applicant were good friends and the applicant was involved in property dealing. He assured the complainant to provide him with land. For that purpose, Rs.20,00,000/- (Rupees Twenty Lac) was taken by the opposite party no.2 as advance, but subsequently, the applicant did not execute the sale deed of the land despite repeated requests of the complainant. The applicant issued two cheques for each Rs.10,00,000/- (Ten Lac) on 02.03.2023. When the complainant presented those cheques in his account maintaining in Baroda U.P. Gramin Bank, the same was returned because of insufficiency of fund in the applicant's account. After that, despite repeated request applicant has not paid the cheque amount.

After that, the complainant sent demand notice through registered post on 29.03.2023 to the present applicant, but despite receiving the same cheque, the amount was not paid by the applicant. In support of his complaint, opposite party no.2 had also filed a receipt of registered post dated 29.03.2023 as well as the account ledger report issued by Baroda U.P. Gramin Bank regarding the account of opposite party no.2 showing the bouncing of cheque on 02.03.2023. Learned Magistrate, after that, had issued a summons to the applicant by order dated 22.11.2023, which is impugned in the present application.

4. Contention of learned counsel for the applicant is that the impugned summoning order is bad in the eyes of the law because the cognizance for the offence under Section 138 of N.I. Act can be taken only after satisfying the condition mentioned under Section 142 N.I. Act, which requires a complaint should be made within one month from the date of arising of the cause of action, and 15 days' notice of demand should also be made within 30 days after receiving information from the bank regarding dishonour of cheque, but in the present case learned Magistrate had not discussed anything.

5. Per contra, learned A.G.A. has submitted that the issue raised by learned counsel for the applicant is his defence and disputed question of fact that can be decided during trial.

6. Considering the submission above of learned counsel for the parties and from the perusal of the record, the sole legal question arises: which condition authorizes the concerned Court to take cognizance of the offence under Section 138 N.I. Act. Section 138 N.I. Act prescribed when the offence under Section 138 N.I. Act deemed to be committed. For reference, under Section 138 N.I. Act is being quoted as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless —

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder, in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque [within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be,

to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—

For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

7. From the perusal of Section 138 N.I. Act, it is clear that for the maintainability of a complaint under Section 138 N.I. Act after dishonour of cheque following conditions must be satisfied:-

(I) The cheque has been presented within a period of its validity.

(II) After receiving the information from the bank regarding the return of the cheque, the payee or holder, in due course of the cheque, makes a demand of the cheque amount in writing within a period of 30 days.

(III) The cheque Drawer failed to pay the cheque amount to the cheque drawee within 15 days from the date of receiving the above notice.

8. Similarly, Section 142 N.I. Act prescribes the condition which authorizes a Court to take cognizance under Section 138 N.I. Act. For reference, Section 142 of N.I. Act is quoted as under:-

"Section 142 Cognizance of offences.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated;

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated."

9. From the perusal of Section 142 N.I. Act, it is clear that certain conditions must be fulfilled despite anything contained in Cr.P.C.. Only then can the Court take cognizance of the offence under Section 138 N.I. Act. These conditions are as follows:-

(I) A complaint must be filed in writing by a payee or holder in due course of the cheque.

(II) Such complaint must be made within one month from the expiry of 15 days after receiving the notice for demand by the drawer of the cheque, and only the Judicial Magistrate of Ist Class to try the offence under Section 138 N.I. Act.

(III) Only that Court will have jurisdiction to entertain a complaint where the payee or holder in due course maintains his account when the cheque in question was delivered for collection through his account.

10. It is also clear from Section 142 N.I. Act that the procedure under this section will prevail over the procedure in the

criminal procedure code. In the ordinary course, when any complaint is filed under Section 200 Cr.P.C., the Magistrate, after perusal of the complaint and statement recorded under Section 200 and 202 Cr.P.C., makes his opinion that prima facie case regarding a particular offence is made out, but in the case of an offence under Section 138 N.I. Act summons cannot be issued by taking cognizance unless certain conditions are fulfilled, as mentioned in Section 142 N.I. Act as well as in the proviso of Section 138 N.I. Act.

11. From the above analysis, it is clear that while taking cognizance under Section 142 N.I. Act regarding offence under Section 138 N.I. Act, Courts must satisfy the fulfillment of primary conditions before issuing summons and fulfillment of these conditions must be mentioned in the summoning order itself. These necessary conditions are being summarised as follows:-

(I) Cheque must be presented to the bank during its validity.

(II) The payee or holder, in due course, must give a written notice within 30 days to the cheque drawer after receiving information from the bank regarding the return of the cheque.

(III) The drawer of the cheque fails to make payment of the cheque amount despite the expiration of 15 days from the date of receiving the written notice sent by the payee or holder in due course.

(IV) The complaint must be filed within one month after the expiry of 15 days from receiving the written notice from the payee or holder in due course of cheque.

(V) If the complaint is filed beyond one month from the date of cause of action (the expiry of 15 days from receiving the notice by the cheque drawer) and the Court condones the delay. This order must be reflected in the summoning order itself.

(VI) If no date of service of demand notice is mentioned in the complaint, the Court can presume service as per the law laid down by this Court in the case of Rajendra vs. State of U.P. and another in Application U/S 482 No.45953 of 2023.

(VII) Apart from the above conditions, the cheque number and date, date of sending the notice and mode of sending the notice must also be mentioned in the summoning order.

12. The above-mentioned guidelines are being issued, considering the facts that taking advantage of technical lacuna in the summoning orders, dishonest drawers of cheques get interim order from High Court and thereafter proceedings under the N.I. Act remain kept pending for number of years though the Hon'ble Apex Court specifically directed in the case of *In Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 in Suo Motu Writ Petition (Crl.) No.2 of 2020*, that trial under Section 138 N.I. Act should be concluded expeditiously.

13. Hon'ble Apex Court, in the case of ***Kusum Ingots and Alloys Ltd. Vs. Pennar Peterson Securities Ltd. and others, reported in 2000 (2) SCC 745*** had also observed that before taking cognizance under Section 138 N.I. Act, conditions mentioned in paragraph No. 10 must be satisfied. Paragraph no.10 of the above judgment is being quoted as under:-

"10. On a reading of the provisions of Section 138 of the NI Act, it is

clear that the ingredients which are to be satisfied for making out a case under the provision are :

1. a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

2. that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

3. that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

4. the payee or the holder, in due course of the cheque, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

5. the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;"

14. It would be appropriate to mention here that this Court, in the case of ***Rajendra Vs. State of U.P. and another in Application U/S 482 No.45953 of 2023*** by judgment dated 25.01.2024 has already held that written notice mentioned under Section 138 N.I. Act includes notice through e-mail or Whatsapp. Paragraph Nos.10 & 18 of judgment mentioned above is quoted as under:-

"10. The above judgement of the Hon'ble Supreme Court was delivered in the year 2008 considering the efficiency of service of the post office at that time. Even Hon'ble Apex Court has not presumed that 30 days will always be counted for service of notice if the same is sent through registered post and is not returned. Now, almost 15 years have passed, much water has flown under the bridge and delivery of letters through the postal department has become so fast that presuming 30 days for service delivery for the registered post does not appear correct. Even the Order 5 Rule 9(5) of C.P.C. provides presumption for delivery of service of summons through registered post, if not received back within 30 days from the date of issuance of summons cannot be equated with the present service of notice under N.I. Act because giving of notice cannot be equated with the service of notice under N.I. Act, and if such pleas are allowed, then dishonest drawer of the cheque may get an unnecessary advantage, especially when drawer of the cheque did not denied the receiving of statutory notice.

18. In the present time of digitalization and computerisation, delivery of post has become so fast that the Court can presume that a correctly addressed registered post has been served upon the addressee within a maximum period of 10 days if the date of service is not mentioned in the complaint. After the initiation of the online post tracking system, it is too easy to know the date of delivery of the registered post. In the ordinary course of business, the registered letter is delivered within 3 to 10 days if correctly addressed. ***Therefore, this Court holds that if no date of service has been mentioned in the complaint, then the Court can presume under Section 114 of the Evidence Act and Section 27 of the General Clause Act that notice would have***

been served within ten days from the date of its dispatch. *Though it is always open to the drawer of the cheque to take the plea during trial, the notice was never served upon him."*

15. In the present case, from the perusal of the summoning order dated 22.11.2023, it is explicit that the conditions mentioned above were not discussed as the cheque number, date of the notice, mode of service of notice, and fulfilment of the necessary conditions were not mentioned.

16. Impugned order ex-facie suffers from infirmity and, therefore, deserves to be set aside.

17. In view of the above, the order dated 22.11.2023 passed by learned Additional Chief Judicial Magistrate-II, Jaunpur, is hereby set aside. The learned Magistrate is directed to pass a fresh order in light of the observation made above within one month from the date of receiving a copy of this order.

18. With the observation mentioned above, the present application is **allowed**.

19. Registrar (Compliance) is directed to circulate a copy of this order to all District Judges of the State of Uttar Pradesh; they will further apprise their subordinate Judicial Officers that the essential ingredients that must be reflected in the summoning order passed for the offence under Section 138 N.I. Act.

(2024) 5 ILRA 628
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Application U/S 482. No. 42855 of 2023

Shishupal Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Raghuvansh Misra

Counsel for the Opposite Parties:
G.A., Sri Prashant Kumar Singh

A. Criminal Law-Criminal Procedure Code, 1973-Section 482 –Indian Penal Code, 1860-Sections 147, 308, 323, 504 & 506-Challenge to-summoning order-FIR registered based on complaint, followed by a police investigation that led to a Closure Report-the closure report was challenged by a protest petition, which the magistrate treated as a complaint, leading to the summoning of the applicants for trial-The court observed that there were discrepancies and lack of sufficient evidence to support the complaint-The court set aside the lower court's order and the case back for fresh decision.(Para 1 to 15)

B. Issuing a summoning order in a criminal case is a serious judicial function and cannot be done mechanically. The order must reflect a thorough evaluation of the material on record. When a protest petition is filed against a police closure report, the magistrate must ensure that the petition satisfies the requirements of a complaint u/s 2(d) CrPC. The magistrate must carefully consider whether the allegations in the protest petition , supported by evidence, are sufficient to take cognizance of offence u/s 190(1)(a) CrPC. Simply treating a protest petition as a complaint without scrutiny violates procedural law.(Para 10, 12, 13)

The application is allowed. (E-6)

List of Cases cited:

1. Pepsi Foods Ltd. & anr. Vs Spl. J.M. & ors. (1998) 5 SCC 749

2. Mukhtar Zaidi Vs St. of U.P. & anr.(2024) SCC Online SC 553

3. Mahmood UI Rehmand Vs Khazir Mohd. Tund (2016 (Cri) 124,

(Delivered by Hon'ble Ms.Nand Prabha Shukla, J.)

1. Heard Sri Raghuvansh Misra, learned counsel for the applicants, learned A.G.A. for the State of U.P. and Sri Prashant Kumar Singh, learned counsel for the opposite party no. 2.

2. Perused the record.

3. The present application under Section 482 Cr.P.C. has been filed to quash the order dated 25.01.2023 as well as the summoning order dated 26.05.2023 passed by the Chief Judicial Magistrate, Kanpur Dehat in Complaint Case No.803 of 2023 (Manju Shukla vs. Shishupal Singh Katiyar) under Sections 147, 308, 323, 504, 506 IPC, (Case Crime No.58 of 2022), Police Station Gajner, District Kanpur Dehat as well as the entire proceedings of the aforesaid complaint case pending in the Court of Chief Judicial Magistrate, Kanpur Dehat against the applicants.

4. Learned counsel for the applicants submitted that the opposite party no.2 Smt. Manju Shukla moved an application dated 25.03.2022 under Section 156 (3) Cr.P.C. on the basis of which a First Information Report dated 02.04.2022 was registered as Case Crime No. 58 of 2022, under Sections 147, 308, 323, 504 IPC, Police Station Gajner, District Kanpur Dehat alleging that on 15.03.2022 her two sons Gopal Shukla and Ram Shukla were going to their fields on a motorcycle and were ambushed by the applicants near the house of village Pradhan Rekha Singh (wife of applicant no.1 Shishupal Singh). Shishupal Singh hit an axe on the head of Gopal Shukla and Ram Shukla was assaulted with sticks. Upon hearing about the incident, her other two sons Govind Shukla and Chhotu Shukla went to rescue the injured and found them lying unconscious. At the place of occurrence, a Milk Dairy was situated owned by Bhanu Pratap Singh, whose employee, namely, Shubham Shukla fired with a country made pistol of 315 bore causing injury to Akanshu.

5. On 15.03.2022, Gopal Shukla was medically examined at District Hospital, Kanpur Dehat. A lacerated wound of 6x5 cm was found on the head with irregular margins and complaint of pain in right thumb. All the injuries were found to be simple in nature. A CT Scan of the head of Gopal Shukla was conducted on 15.03.2022 and soft tissue scalp injury was noted with no intra-cranial abnormality. The injured was discharged in a satisfactory condition on 17.03.2022.

6. After the registration of the FIR, the investigation was conducted and the Closure Report/Final Report dated 26.04.2022 under Section 173(2) Cr.P.C. was prepared and submitted before the concerned Court. Against the said Closure Report/Final Report the opposite party no. 2 moved a protest petition which was treated as a complaint case vide order dated 25.01.2023 passed by Judicial Magistrate, Court No. 2, Kanpur Dehat and after examining upon oath the complainant and the witnesses under Sections 200 and 202 Cr.P.C., the Chief Judicial Magistrate, Kanpur Dehat vide order dated 26.05.2023 summoned the accused/applicants to face trial.

7. Learned counsel for the applicants have assailed the aforesaid order dated 25.01.2023 passed by the Judicial Magistrate, Court No. 2, Kanpur Dehat and order dated 26.05.2023 passed by the Chief Judicial Magistrate, Kanpur Dehat on following grounds :-

(i) The impugned orders have been passed without application of mind.

(ii) The learned Trial Court committed a manifest error in treating the protest petition as a complaint case and rejected the Closure Report/Final Report without adverting to the material collected during investigation and followed the procedure of complaint case mechanically.

(iii) The opposite party No. 2 Smt. Manju Shukla, in order to settle the score and to mount pressure for compromise against the cross case, i.e. FIR bearing Case Crime No. 47 of 2022, under Sections 34/307, 323, 504 IPC at Police Station Gajner, District Kanpur Dehat, lodged the impugned criminal proceedings against the applicants.

(iv) Injured Ram Shukla was though alleged to have been assaulted but no medical report was produced.

(v) The independent eye-witness Jaipal Singh, in his statement under Section 161 Cr.P.C. stated that while Gopal Shukla was fleeing from the spot, his legs went inside the drain and his head hit at the wall which resulted in head injury.

(vi) That no offence as alleged took place and the injuries were not to be grievous to attract punishment under Section 308 IPC.

8. It was thus submitted that as no such incident took place as alleged, therefore after conclusion of investigation, a Final Report/Closure Report dated 26.04.2022 was submitted. But the learned Trial Court without application of mind had rejected the Final Report/Closure Report. The Protest Petition moved by the opposite party no.2 was treated as a complaint case and the accused/applicants have been summoned to face trial without any reasoned and speaking order and, therefore, it is liable to be set-side. The learned Trial Court recorded a wrong finding which was not based on the material recorded under Sections 200 and 202 Cr.P.C., therefore, the findings recorded by the Trial Court was perverse and was liable to be set-aside.

9. Learned counsel for the applicants in support of his submissions has relied upon the judgment rendered by the Hon'ble Supreme Court in ***Pepsi Foods Ltd. And Another vs. Special Judicial Magistrate and others, (1998) 5 Supreme Court Cases 749,*** wherein it has been observed that:

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

allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

(Emphasis supplied)

10. Per contra, learned A.G.A. as well as learned counsel for the opposite party no.2 vehemently opposed the above submissions of the learned counsel for the applicants and submitted that there is no illegality or perversity in the order impugned. The learned Trial Court on the basis of the material under Sections 200 and 202 Cr.P.C. has rightly summoned the applicants to face trial.

11. Having heard learned counsel for the parties and upon perusal of the record it transpires that the learned Trial Court has not applied its judicial mind while passing the impugned summoning order. The impugned order contains the substance of the examination of the complainant Smt. Manju Shukla on oath recorded under section 200 Cr.P.C., who is not an eye witness of the incident. There is no whisper of statement on oath of Gopal Shukla and Ramji Shukla two injured examined on oath who were the material witnesses. There is no description about the nature of injuries inflicted to the injured Gopal though from the perusal of the records, it transpires that it was simple in nature caused by hard and blunt object. The alleged injured witness Ramji Shukla was not even medically examined. There are certain other noticeable discrepancies. It appears that as an afterthought, the application under Section 156 (3) Cr.P.C. has been moved after a delay of about 10 days on the basis of false and fabricated injury report to mount pressure and to settle the score in the cross case, i.e., Case Crime No. 47 of 2022, under Sections 34, 307, 323, 504 IPC, P.S. Gajner, District Kanpur Dehat, which was registered prior in point of time. The said injuries can be fabricated. After the investigation, the Police adverted to the filing of Closure Report/Final Report. However, the learned Trial Court without application of mind rejected the said Final Report and on the basis of the protest petition of opposite party No. 2 summoned the applicants to face trial in a cursory manner by taking cognizance obviously under section 190(1)(a) of the Cr.P.C. and proceeded against the applicants by issuing process under Sections 147, 308, 323, 504 and 506 IPC. Therefore, the summoning order is bad in the eyes of law.

12. At this juncture, it is imperative to quote paragraph-9 of the judgment rendered by Hon'ble the Supreme Court in ***Mukhtar Zaidi vs. State of Uttar Pradesh and another, 2024 SCC Online SC 553,*** which reads as under:

"44. We may also notice that in Veerappa v. Bhimareddappa [Veerappa v. Bhimareddappa, 2001 SCC OnLine Kar 447 : 2002 Cri LJ 2150] , the High Court of Karnataka observed as follows: (SCC OnLine Kar para 9)

"9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 CrPC, but, has approached the police only and where the police after investigation have filed the 'B' report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under Section 190(1)(a) CrPC on a complaint. If it were to be so, the Protest Petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) CrPC, and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a)

CrPC. Instead, if it is to be simply styled as a Protest Petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 CrPC."

13. In the same sequel, it is necessary to cite the observations of Hon'ble the Apex Court in ***Mahmood UI Rehmand vs. Khazir Mohd. Tund (2016) 1 SCC (Cri) 124***, which reads as under:

" That the cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered alongwith the statement recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course to set in motion the process of criminal law against a person in a serious matter."

14. This Court is of the considered opinion that the mandate of provisions of Sections 200 and 202 Cr.P.C. has been clearly violated. Learned Trial Court should have carefully scrutinized the complete material to find out the truthfulness of allegations and the basis of prima facie satisfaction before summoning the applicants at the time of recording of preliminary evidence. Thus, the orders impugned dated 25.01.2023 and 26.05.2023 are not tenable.

15. Consequently, the present Application U/S 482 Cr.P.C. is **allowed**.

16. The order dated 25.01.2023 passed by Judicial Magistrate, Court No. 2, Kanpur Dehat and the summoning order dated 26.05.2023 passed by the Chief Judicial Magistrate, Kanpur Dehat in Complaint Case No.803 of 2023 (Manju Shukla vs. Shishupal Singh Katiyar) under Sections 147, 308, 323, 504, 506 IPC, (Case Crime No.58 of 2022), Police Station Gajner, District Kanpur Dehat, are hereby set-aside.

17. The matter is hereby remitted back to the Court concerned to pass a fresh order within a period of two months from the date of production of a certified copy of this order in the light of the observations made herein above.

(2024) 5 ILRA 632
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1135 of 2024

Krishna ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Intekhab Alam Khan, Sri Vaibhav Shandilya, Sri Vivek Shandilya (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Ajay Sengar, Sri R.K. Srivastava

A. Criminal Law-Criminal Procedure Code, 1973-Section 438-Indian Penal Code, 1860- - ¾ POCSO Act, 2012 - Sections 363 & 376(3) - FIR lodged regarding the incident in which final report was submitted at earlier point of time-Later a

complaint was filed by the informant-statement of the victim was recorded u/s 161 and 164 Crpc in which she has not stated about rape but later after nine months she changed her statement u/s 202 crpc-no credible evidence against applicant-no criminal history-hence, the applicant is liable to be enlarged on bail.(Para 1 to 21)

The application is allowed. (E-6)

List of cases cited:

1. Hoechst Pharma. Ltd Vs St. of Bih. (1983) 4 SCC 45

2. C.S. Gopalakrishnan Etc Vs St. of T.N. & ors. (2023) LiveLaw SC 413

3. M. Karunanidhi Vs U.O.I. (1979) AIR SC 898

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

5. Sushila Aggarwal Vs St. (NCT of Delhi) & anr.(2020) AIR SC 831

6. Bhadresh Bipinbhai Sheth Vs St. of Guj. (2015)AIR SC 3090

7. Hema Mishra Vs St. of U.P. & ors.(2014) 4 SCC 453

8. Sushila Aggarwal Vs St. (NCT of Delhi) (2020) 5 SCC 1

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Sri Vivek Shandilya, learned Senior counsel assisted by Mr Vaibhav Shandilya, learned counsel for the applicant, Mr Ajay Sengar, learned counsel for the informant, Mr R. K. Srivastava, learned counsel appearing for the State and perused the record.

2. The applicant seeks anticipatory bail in Complaint Case No. 03 of 2023,under Sections 363, 376(3) IPC and Section of POCSO Act, 2012, P.S. Kuthaundh, District Jalaun, during the pendency of trial.

3. At the outset, learned AGA for the State raised preliminary objection that sub-section (4) of Section 438 of Cr.P.C, explicitly excludes the application of the provision relating to pre-arrest bail in relation to any case involving the arrest of any person on accusation of having committed an offence under subsection (3) of Section 376 IPC as such the application for pre-arrest bail is not maintainable.

4. Section 438 of the Cr.P.C. provides for issuing directions for granting bail to a person apprehending arrest. The amendment [Code of Criminal Procedure Amendment Act, 2018] introduced to Section 438 (4)] reads as follows:

"438(4). Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code."

5. In reply to the said argument, learned counsel for the applicant has submitted that the new section (438 Cr.P.C.) inserted in the State of Uttar Prdesh vide Uttar Pradesh Act No. 4 of 2019, (assented by the President on June 1, 2019), does not exclude the person seeking pre-arrest bail for an offence committed under Section 376 (3) IPC. Section 438(6) reads as follows:-

438 (6) Provision of this section shall not be applicable-

(a) to the offences arising out of,--

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Prdesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

6. Learned counsel for the applicant has further drawn attention of the court towards Article 254(2) of the Constitution of India to contend that in case of repugnancy, if any, between the State Act and Central Legislation on a subject in the concurrent list, would stand cured if the State Act receives the assent of the President under Article 245(2) of the Constitution of India and such repugnancy cannot therefore be a ground to invalidate the State Act. It is further submitted that the whole purpose of the Article 254(2) is to protect the State enactment when it ran contrary to the central legislation. In support of his argument, learned counsel for the applicant has relied upon the cases of **Hoechst Pharmaceauticals Ltd Vs State of Bihar, 1983 4 SCC 45; and C.S. Gopalakrishnan Etc Vs The State of Tamil Nadu and others, 2023 LiveLaw (SC) 413.**

7. Article 254 of the Constitution of India provides for the method of resolving conflicts between a law made by Parliament and a law made by the Legislature of a State with respect to a matter falling in the Concurrent List and it reads:

"254 (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

8. In the case of **M. Karunanidhi VS Union of India, AIr 1979 SC 898,** the Supreme Court has laid down certain guidelines with respect to matters in the concurrent list:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become

void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List an entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

9. In the case of **Hoechst Pharmaceauticals Ltd (supra),** wherein under paragraph no. 66, it has been held has under:-

" Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to cl. (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together."

10. Learned counsel for the applicant has, however, further contended that there is no absolute bar for the grant of bail, if a prima facie case of commission of the

offences mentioned therein is not made out against the applicant. Reliance was placed on the three-Judge Bench decision of the Apex Court in **Prathvi Raj Chauhan v. Union of India and Others [(2020) 4 SCC 727.**

11. Learned AGA has further drawn the attention of the Court to the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2022, which aims to include offences under Protection of Children from Sexual Offences Act (POCSO) and offences relating to rape enumerated in Sections 376, 376-A, 376-AB, 376-B, 376-C,376-D, 376-DA, 376-DB, 376-E of the IPC in the exceptions to the provision of anticipatory bail. To the contrary, learned counsel for the applicant has submitted that the said bill is still pending for assent of the President and as such has no legal sanctity as yet.

12. In the light of the above quoted provisions and after having considered the arguments of the respective parties, the argument of the learned counsel for the applicant that the state amendment would prevail over the Central Act find force as there is no bar to exclude the application of the provision relating to pre-arrest bail in relation to any case involving the arrest of any person on accusation of having committed an offence under subsection (3) of Section 376 IPC in view of the amendment in the State of UP under Section 438 Cr.P.C. as amended vide UP Act No. 04 of 2019, as such the application for pre-arrest bail would be equally maintainable.

13. Moreover, it is no doubt true that the provision of pre-arrest bail enshrined in Section 438 of Cr.P.C. is conceptualised under Article 21 of the Constitution of India, which relates to personal liberty. The law presumes an accused to be innocent till his guilt is proven. As a presumably innocent person, he is entitled to all the fundamental rights, including the right to liberty guaranteed under Article 21 of the Constitution of India. In **Sushila Aggarwal v. State (NCT of Delhi) and Another (AIR 2020 SC 831),** the Apex Court held that the provision for pe-arrest bail was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognised as a widespread malaise on the part of the police and inasmuch as the denial of bail would amount to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438 Cr.P.C.. In **Bhadresh Bipinbhai Sheth v. State of Gujarat (AIR 2015 SC 3090),** the Apex Court held that the provision of pre-arrest bail enshrined in Section 438 of Cr.P.C calls for liberal interpretation in the light of Article 21 of the Constitution of India. In **Hema Mishra v. State of Uttar Pradesh and Others [(2014) 4 SCC 453],** the Apex Court emphasised the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. It was held that a writ court is even empowered to grant pre-arrest bail despite a statutory bar imposed against the grant of such relief.

14. Now the merits of the case.

15. As per case of prosecution, on 14.10.2022, while minor daughter of the informant, who is said to be a student of high school, had gone to school at 8 in the morning, the applicant is said to have reached the college and seduced her daughter and took her to Som Plaza Guest house and kept her locked in a room for two hours and did wrong things by molesting the

delicate parts of her body. It is also alleged that even prior to this, the applicant also molested her daughter many times and on complaint to applicant's family but of no avail.

16. Learned counsel for the applicant has contended that the applicant is innocent of the offences alleged against him and he has been falsely implicated in the case. The counsel further submitted that no materials are on record to connect the applicant with the alleged crime; hence, he is entitled to get pre-arrest bail. It is further submitted that in the present case, the FIR was filed by the informant in relation to the incident that happened with his minor daughter, in which the final report was presented in the court by the Investigating Officer at earlier point of time. It is further submitted that thereafter a protest petition was filed by the informant on which the order to register it as a complaint was passed on 20.06.2023. After this, the statement of the informant was recorded under Section 200 Cr.P.C. and his witnesses under Section 202 Cr.P.C. and on the basis of evidence, the applicant was summoned by the court in the said crime on 03.11.2023. It is further stated that thereafter the applicant approached this Court by filing application u/s 482 No. 43276 of 2023 to quash the said summoning order, which came to be disposed of vide order dated 16.12.2023 with a direction to the applicant to appear and apply for bail before the court below within three weeks.

17. It is further contended by learned counsel for the applicant that relying on the statement of the victim said to have been recorded under Sections 161 & 164 Cr.P.C. as well as the medical report, the incident was found to be untrue by the Investigating Officer and hence no offence under Section 376(3) IPC is made against the applicant. It is further submitted that the victim in her statement under Section 164 Cr.P.C. has not stated about rape but later on after nine months of the incident she has given her statement under Section 202 Cr.P.C. and changed her statement that she was raped by the applicant. The victim in her statement under Section 164 Cr.P.C. has herself admitted that she is 16 years of age and the applicant is aged about 17 years nine months. The applicant has no criminal history. It is further submitted that the entire allegation against the applicant is false and concocted. There is no credible evidence against him. The applicant undertakes to co-operate during proceedings before the Court below and trial and he would appear as and when required by the Court. It has been stated that in case, the applicant is granted anticipatory bail, he shall not misuse the liberty of bail and will co-operate during proceedings before the Court below and would obey all conditions of bail.

18. Learned counsel for the informant as well as learned AGA has opposed the prayer for bail and submitted that the evidence on record reveals that the accusation made against the applicant therein is very serious in nature.

19. On due consideration to the arguments advanced by learned counsel for the applicant as well as learned A.G.A. and considering the nature of accusations and antecedents of the applicant, the applicant is liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of **Sushila Aggarwal Vs. State (NCT of Delhi), (2020) 5 SCC 1.** The future contingencies regarding the anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

20. In view of the above, the anticipatory bail application of the applicants is allowed.

21. Let the accused-applicant-**Krishna** be released forthwith in the aforesaid complaint case on anticipatory bail till the conclusion of trial on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

1. The applicant shall not leave India during the currency of trial without prior permission from the concerned trial Court.

2. The applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court.

3. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to any police officer;

4. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law to ensure presence of the applicants.

5. In case, the applicant misuses the liberty of bail, the trial Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of Sushila Aggarwal and others Vs State (NCT of Delhi) and another, (2020) 5 SCC 1.

6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against them in accordance with law.

7. The trial court would make every endeavor to conclude the trial of the case within a period of six months in accordance with law.

22. With the aforesaid directions, this application stands disposed of finally.

(2024) 5 ILRA 638
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-A No. 8517 of 2023
With
Other Connected Cases

Tirthraj ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Harsha Yadav

Counsel for the Respondents:
C.S.C.

(A) Service Law – Regularisation of teachers - Uttar Pradesh Secondary Education (Service Selection Boards) Act, 1982 - unamended Section 18 - new Section 33-G - Regularisation of certain more appointments against short term vacancies - The UP Intermediate Education Act, 1921 - An employee should not be deprived of any benefit or the provisions of law only because of the fact that some error has been committed by the employer including the State and if it is so, the same must be rectified - every order either

administrative or judicial must stand on its own legs - State is a welfare State and action of State must transpire that decision taken by the State be fair, reasonable, transparent and justifiable - Orders are not like old wine becoming better as they grow older.(Para - 8,14,19)

Adhoc teachers appointed under the Second Removal of Difficulties or unamended Section 18 of Act, 1982 - Order were rejected by Regional Level Committee - without considering their records or providing them with an opportunity of hearing - state government introduced Section 33-G to regularize their services. (Para - 4,5)

HELD: - Orders passed in writ petitions in a cyclostyle manner without ensuring records from the committee of management and the District Inspector of Schools, resulting in infirmity and erroneousness. Impugned order quashed. Matters relegated back to the Regional Level Committees to pass orders afresh within three months, after verifying records from the committee of management and District Inspectors of Schools. Scheme under Section 33-G of the Act, 1982 must be strictly followed. Petitioners are entitled to continue in service and receive salary without further breaks. (Para – 20 to 24)

Writ Petitions Allowed. (E-7)

List of Cases cited:

Mohindhr Singh Gill & anr. Vs Chief Election Commissioner, New Delhi & ors., (1978) 1 SCC 405

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

1. Heard learned counsels for the petitioners and Sri Shailendra Kumar Singh, learned Chief Standing Counsel and Sri Vivek Shukla, learned Additional Chief Standing Counsel for the State.

2. Notices to the concerned respondents other than the State are hereby dispensed with.

3. Core legal issues are common in all bunch of the writ petitions, hence, the members of Bar were invited to address and all these writ petitions are decided by common Judgment and order.

4. Chronic cases are brought before this Court by way of the bunch of the writ petitions wherein the petitioners have assailed their respective orders of rejection of regularisation, which were passed by the Committee headed by the Joint Director of Education of respective regions.

5. The crux of the issue is that the petitioners were appointed either under the Second Removal of Difficulties Order framed under the Act No.5 of 1982 or under unamended Section 18 of Uttar Pradesh Secondary Education (Service Selection Boards) Act, 1982 (hereinafter referred to as 'the Act 1982'. Subsequently, vide the UP Act No.7 of 2016, a new Section 33-G is inserted with effect from 22.3.2016, thus, it was incumbent upon the Regional Level Committee to thoroughly examine the case of the petitioners but it's contended that the Regional Level Committees, ignoring the provisions of law and without ensuring the records of each and every petitioners from the committee of management concerned, passed the orders.

6. Section 33-G is extracted as under:-

"33-G (1) Any teacher, other than the Principal or the Head Master, who-

(a) was appointed by promotion or by direct recruitment in the lecturer's grade or trained graduate grade on or after August 7, 1993 but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) order,

1981 as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy;

(b) was appointed by promotion or by direct recruitment on or after August 7, 1993, but not later than December 30, 2000 on adhoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(c) possesses the qualifications prescribed under, or is exempted from such qualification in accordance with, the provisions of the Intermediate Education Act, 1921;

(d) has been continuously serving the institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2016:

(e) has been found suitable for appointment in a substantive capacity by the Selection Committee referred to in clause (a) of sub-section (2) of Section 33-C in accordance with the procedure prescribed under clause (b) of the said sub-section;

Shall be given substantive appointments by the Management.

(2)(a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment;

(b) if two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(3) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

(4) A teacher who is not found suitable under sub- section (1) and a teacher who is not eligible to get a substantive appointment under the said sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(5) Nothing in this section shall be contrued to entitled any teacher to substantive appointment if on the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016 such vacancy had already been filed or selection for such vacancy has already been made in accordance with this Act.

(6) The services of the adhoc teachers and the teachers who have been appointed against short term vacancies shall be regularised from the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016.

(7) Reservation Rules shall be followed in regularization of adhoc teachers and teachers who are appointed against short term vacancies.

(8) Adhoc teachers, who have not been appointed either in accordance with the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 or in accordance with Section 18 of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 and are otherwise getting salary only on the basis of interim/Final orders of the court shall not be entitled for regularization."

7. While promulgating the aforesaid provisions, two important conditions were provided for regularisation; firstly that any teacher, other than the principal or headmaster appointed by promotion or by direct recruitment in the lecturers grade or trained graduate grade, on or after 7.8.1993, but not later than 25.1.1999, and secondly, appointed on a short term Vacancy in accordance with paragraph 2 of Uttar

Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, which was subsequently converted into a substantive vacancy. The various committees of management all over the Uttar Pradesh, looking into the shortage of teachers for imparting education, appointed teachers in their institutes and once the financial concurrence was not granted by the District Inspector of Schools concerned, time and again, such appointed teachers approached the Hon'ble High Court, wherein, interim orders were passed while directing the District Inspector of Schools to pay salary and as a result, they were getting the salary since almost last more than two decades.

8. It is worth to notice that the provisions contained under section 33-G of the Act 1982, is a beneficiary scheme launched by the State Government looking into the plight of the teachers who were serving for more than two decades and their service conditions were not regulated as there was no statutory provisions. It has long been held that in our constitutional scheme, the State is a welfare State and action of State must transpire that decision taken by the State be fair, reasonable, transparent and justifiable. So far as the present case is concerned, it is the pious duty of the respondent authorities to examine that the teachers, who are serving for a long period of time, whether falls under the mandate of section 33-G of the Act 1982, and for such consideration, two sources have pivotal role to get it decided as those are having factual information; firstly, the committee of management of the institution concerned and secondly, the District Inspector of Schools.

9. When this Court examines the impugned orders in the bunch of writ petitions, it is apparent that it has been noted by the Regional Level Committee in all the impugned orders that *'उपरोक्त वर्णित विन्दुओं से सम्बन्धित वांछित पत्रजात न तो जिला विद्यालय निरीक्षक, प्रतापगढ़ द्वारा दिया गया और न ही प्रबन्धतंत्र द्वारा ही प्रस्तुत किया गया।'*

10. From perusal of the aforesaid observations, it is crystal clear that the records with respect to the appointment of the petitioners were not placed before the Regional Level Committee. This Court does not enter into the reasons that who is responsible for not furnishing the documents but the fact remains that the Regional Level Committee has taken decision without the records. Further the Regional Level Committee has also not given any reason that as to when and how the District Inspector of Schools and the committee of management concerned were directed to produce the record in the connected writ petitions whereas the aforesaid observations has been made in a cyclostyle manner, in all the connected writ petitions, which in fact indicates that the Regional Level Committee was ignorant to the importance ofthe records which could only be availed from the authority abovesaid.

11. This Court has also taken note of the fact that the opportunity of personal hearing to the concerned petitioners/ affected teachers have also not been accorded so as to sub-serve the compliance of the rules of principles of natural justice. The matter, which is in hand to decide, is not on the premises that there is no regularisation rules prevailing but petitioners have been deprived of their valuable rights without ensuring the due

opportunity of hearing and further prior coming to the conclusion, the records were not procured from the committee of management as well as the District Inspector of Schools concerned.

12. The State counsel during the course of his argument has also failed to substantiate that with what manner the Regional Level Committee sought for the records from the committee of management and from the District Inspector of Schools, however, the District Inspector of Schools himself is the member of the Regional Level Committee.

13. From perusal of the orders of Regional Level Committee, it is evident that the District Inspector of Schools concerned is one of the members and further there is provision under the UP Intermediate Education Act, 1921 (hereinafter referred to as 'Act 1921') that if a committee of management is violating any instruction or direction of the educational authority, the same can be forced by invoking the provisions prescribed under the Act, 1921, but it is nowhere mentioned in the orders that either the District Inspector of Schools or the committee of management concerned have ever called upon or forced to submit the relevant documents with respect to the appointments or whatsoever the records were required for the purpose of considering the regularisation of such teachers/petitioners.

14. This Court is also of the considered opinion that an employee should not be deprived of any benefit or the provisions of law only because of the fact that some error has been committed by the employer including the State and if it is so, the same must be rectified. So far as the present petitioners are concerned, their appointments were made under certain exigencies and the grave requirements for imparting education, wherein the State machinery was totally failed to make appointment of teachers, which is the paramount duty of a welfare State. The petitioners were appointed in the educational institutions, which are in the remote areas of the Province and those are fulfilling the aim and object of the constitutional scheme, thereby imparting education, which is the fundamental right.

15. In fact, the State, while looking into the aforesaid Act No.7 of 1982 while inserting provision 33-G, provided that those teachers other than principal or headmaster, appointed by promotion or direct recruitment, after 7.8.1993, but not later than 30.12.2000, shall be given substantive appointment, but the impugned orders clearly show that Regional Level Committee without the reports of the Committee of Management and District Inspector of Schools, has passed the orders, which in fact failed the very purpose of prescribing the scheme under section 33-G of the Act 1982. The orders passed by the Regional Level Committee are in a very cursory manner and without ensuring the records from the committee of management and the District Inspector of Schools concerned, which cannot be approved of.

16. Earlier also, the matter came up for consideration before this Court in Special Appeal (Defective) No. 103 of 2023 wherein the controversy is settled while providing that it is the duty and responsibility of the State authorities to consider and adjudge the suitability of the teachers for substantive appointment under Section 33-G of the Act 1982 and their continuation in the ad hoc capacity in the institution concerned is subject to only such consideration. Further,

the order passed in the aforesaid special appeal has also been affirmed in Special Leave to Appeal (C) No.13023 of 2023, vide order dated 17.7.2023. Thus, there remains no dispute so far as the consideration of the petitioners/ teachers under section 33-G of the Act 1982, is concerned.

17. So for as the issue with respect to ignoring the opportunity to the committee of management and calling for the record are concerned, this Court is not unmindful to the rules of principles of natural justice which is not a mere legal formality but the same constitutes substantive obligation which should reflect in the decision making process of an adjudicating authority. This rule is guaranteed against arbitrary action in all the proceedings, namely, judicial, quasi-judicial and administrative. The fundamental principle enshrined in the Indian jurisprudence; audi alteram partem, which means a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken and, thus, in this view of the matter, the issue involved in all these petitions, have become more relevant and needs to be rectified in the light of the abovesaid principle.

18. I have also gone through the master counter affidavit filed in leading writ petition from which it is evident that there is no specific reason assigned regarding non-availability of the record which was incumbent upon the committee of management to furnish before the Regional Level Committee, however, the same could have been ensured by the Regional Level Committee.

19. It's so long settled that every order either administrative or judicial must stand on its own legs. The constitutional Bench of Hon'ble Apex Court in the case of Mohindhr Singh Gill and another Vs. Chief Election Commissioner, New Delhi and ohters, (1978) 1 SCC 405, has very categorically held as under.

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji[2]:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

20. In view of the above submissions and discussions, it emerges that the orders impugned in all the writ petitions have been passed in a cyclostyle manner and without ensuring the records from the committee of management and the District Inspector of Schools and, therefore, those assail infirmity and erroneousness.

21. Thus, all the writ petitions succeeds and are **allowed**.

22. Resultantly, the impugned orders passed by the Regional Level Committee headed by the Chairman, namely, Regional Joint Director of Education concerned, in all the respective writ petitions are hereby quashed.

23. All the matters are relegated back to the Regional Level Committees concerned to pass order afresh within a period of three months, after calling the records from the committee of management as well as the District Inspectors of Schools concerned and subsequently verifying those records and consulting with the committee of management, and while affording opportunity of hearing to the teachers concerned, if so required. The scheme provided under Section 33-G of the Act, 1982 shall strictly be adhered to.

24. In addition, it is further provided that the petitioners of all the writ petitions are entitled to continue in service and shall be paid salary without any further break. It is further directed that the petitioner as well as the manager of the committee of management shall ensure their presence and would co-operate with the Regional Level Committee, as and when required.

(2024) 5 ILRA 644
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2024
BEFORE

THE HON'BLE YOGENDRA KUMAR SRIVASTAVA, J.

Matters U/A 227 No. 339 of 2024

Saleem Ahmad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Verma

Counsel for the Respondents:
G.A., Sri Kuldeep Singh Parmar

Civil Law – Protection of Women from Domestic Violence Act,2005 – Sections 2(a),2(q),12,18, 19, 20, 22 & 28 - Application u/s 12 of D.VS Act was moved by respondent no. 3 seeking an amendment in relief clause of an earlier application – St.d that due to inadvertent typographical error, maintenance had been sought for 'the minor son', whereas applicant didn't have any minor son - Petitioner (father of the husband of the respondent no. 3) raised objections that no such amendment was permissible in criminal proceeding - Learned Magistrate allowed the application, observed that said application be read along with main application - Against the order, the petitioner preferred a revision – Rejected, the revisional court held that proceedings under D.VS Act are quasi civil in nature, and amendments to pleadings were permissible – Impugned orders – Held, proceedings before a magistrate, which commence with filing of application u/s 12, seeking various kinds of reliefs, under Chapter IV, are of a civil nature, and upon breach of a protection order, the said proceedings get transformed into criminal proceedings - Power to amend the complaint/application would have to be read in relevant statutory provisions – No illegality in impugned order, dismissed. (Para 3, 4, 5, 6, 20, 42)

Petition dismissed. (E-13)

List of Cases cited:

1. Kunapareddy @ Nookala Shanka Balaji Vs Kunapareddy Swarna Kumari & anr., (2016) 11 SCC 774

2. St. of U.P. Vs Mukhtar Singh, AIR 1957 All 505

3. SAL Narayan Row Vs Ishwarlal Bhagwandas, AIR 1965 SC 1818

4. Ram Kishan Fauji Vs St. of Har. & ors., (2017) 5 SCC 533

5. Kamatchi Vs Lakshmi Narayanan, (2022) 15 SCC 50

6. S.R. Sukumar Vs S. Sunaad Raghuram, (2015) 9 SCC 609

7. U.P. Pollution Control Board Vs Modi Distillery, (1987) 3 SCC 684

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

1. Heard Sri Sanjay Kumar Verma, learned counsel for the petitioner, Sri Pankaj Saxena, learned AGA-I for the State respondents and Sri Kuldeep Singh Parmar, learned counsel for respondent no. 2.

2. The present petition has been filed seeking to assail the order dated 18.08.2022 passed by Judicial Magistrate, Ghatampur, Kanpur Dehat in Case No. 474 of 2019 (Mashroof Raza alias Sonu Khatoon Vs. Waseem Ahmad and others), under Section 12 of Protection of Women from Domestic Violence Act, 20051, and the subsequent order dated 03.10.2023 passed by the Additional Sessions Judge, Court No. 1, Kanpur Dehat in Criminal Revision No. 76 of 2022 (Saleem Ahmad vs. State of U.P. and another), whereby the earlier order has been affirmed.

3. The facts of the case as reflected from the pleadings in the petition indicate that an application dated 21.12.2019 was moved by the respondent no. 3 seeking an amendment in the relief clause of an earlier application dated 03.08.2019 which had been filed under Section 12 of the D.V. Act. The application seeking amendment sought deletion of a part of the relief clause, stating that due to an inadvertent typographical error, maintenance had been sought for 'the minor son', whereas the applicant did not have any minor son.

4. The petitioner herein, who is the father of the husband of the respondent no. 3 (applicant in D.V. Case), raised objections to the amendment application by contending that no such amendment was permissible in a criminal proceeding.

5. Learned Magistrate passed an order dated 18.08.2022 allowing the application dated 21.02.2019 seeking amendment, and observing that the said application be read along with the main application, fixed a date for passing of further order.

6. Aggrieved against the aforesaid order, the petitioner preferred a revision, which has been rejected by an order dated 03.10.2023, wherein the revisional court has held that proceedings under the D.V. Act are quasi civil in nature, and accordingly, amendments to pleadings were permissible.

7. The order passed by the learned Magistrate on the amendment application and the subsequent revisional order, are sought to be assailed by means of the present petition.

8. Learned counsel for the petitioner has sought to challenge the orders passed by the learned Magistrate and the revisional court by referring to the factual aspects of the case and the defence which is to be set up on behalf of the petitioner to contest the proceedings.

9. Learned AGA-I appearing for the State respondents and also the counsel appearing for the respondent no. 3 have supported the orders passed by the learned Magistrate and also the revisional court by submitting that proceedings under D.V. Act

are essentially of a civil nature and in a situation where amendment is necessary, the Court concerned would have power to allow such amendments.

10. It is submitted that the amendment sought in the present case was to correct an inadvertent typographical error, and the objections which were sought to be raised by the petitioner herein were solely with a view to delay the proceedings, and the said objections have been rightly turned down by the learned Magistrate.

11. The question which, thus, falls for consideration in the present case is with regard to the extent of the powers of amendment of pleadings exerciseable in proceedings under the D.V. Act.

12. The proceedings under the D.V. Act, in the instant case, were initiated pursuant to an application filed under Section 12 wherein the reliefs sought are referable to the provisions under Sections 18, 19, 20 and 22 of the said Act.

13. The genesis of the D.V. Act is traceable to the General Recommendation No. XII (1989) made by the United Nations Committee on Convention of Elimination of all Forms of Discrimination against Women (CEDAW), in terms of which it was recommended that the State parties, should act to protect women against violence of any kind especially, that occurring within the family. The Vienna Accord of 1994 and the Beijing Declaration and Platform for Action (1995), acknowledged that domestic violence was a human rights issue and a serious deterrent to development.

14. The Protection from Domestic Violence Bill, 2002 upon being tabled in the Lok Sabha was referred to a Standing Committee of the Ministry of Human Resource Development in the Rajya Sabha. The Committee submitted its 124th Report on the Bill (2002), wherein it was stated that the proposed legislation was aimed at "providing a remedy under the civil law which is intended to preserve the family and at the same time provide protection to victims of domestic violence."

15. The object of the Act was to bridge the gap between the existing procedures in civil and criminal law by providing a civil remedy for a complaint of domestic violence without disrupting the harmony in the family. This is also clear from the following extract from the Report of the Standing Committee:

" ...the existing civil, personal or criminal laws leave certain gaps in addressing the issue of Domestic Violence. Under criminal law, if a husband perpetrates violence on his wife, she may file a complaint under Section-498 A of IPC. Similarly, under the civil law, if there is disharmony in a family and the husband and wife cannot live together, any one of them may file a suit for separation followed by divorce. However, the present Bill addresses such situation where there is some disharmony in the family but the situation has not yet reached a stage where either separation or divorce proceeding has become inevitable and the aggrieved woman also for some reasons does not want to initiate criminal proceedings against her perpetrator. Therefore, the Bill seeks to give the aggrieved woman an alternative avenue whereby she can insulate herself from violence without being deprived of the basic necessities of life and without disintegrating her family."

16. The D.V. Act was enacted as a law (Act 43 of 2006) with the purpose of providing a remedy in civil law for the

protection of women from being victims of domestic violence and to protect the occurrence of domestic violence in society. The enactment of law was made keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution and to provide for a remedy in the civil law which is intended to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. The scheme of the Act envisages that the order to be passed by the Magistrate, and a complaint by the aggrieved person, would be of a civil nature, and if the said order is violated, it would assume the character of criminality. The legislative intent of the enactment, is reflected in the statement of objects and reasons of the Act, which reads as follows:

"STATEMENT OF OBJECTS AND REASONS"

Domestic violence is undoubtedly a human Right issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation NO. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially the occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14,15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. The Bill, inter alia, seeks to provide for the following:-

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household,

whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting the communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v) It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc."

17. An 'aggrieved person' is defined under Section 2(a) of the D.V. Act to mean any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any Act of domestic violence by the respondent. It is noticeable that the grievance of the 'aggrieved person' under the D.V. Act, is to be considered against a 'respondent' as defined under Section 2(q) of the Act. The grievances which may be raised and the reliefs that may be sought under the D.V. Act, are not to be in the nature of a formal accusation as in a criminal case, and the person against whom the relief is sought, is therefore not referred to as an accused.

18. The procedure for obtaining orders of reliefs are provided under Chapter IX of the D.V. Act, and in terms thereof the various reliefs that can be granted are as follows: (i) protection orders under Section 18; (ii) residence order under Section 19; (iii) monetary reliefs under Section 20; (iv) custody orders under Section 21; and (v) compensation orders under Section 22.

19. Amongst the various reliefs that may be claimed under the D.V. Act, it is only the breach of a protection order, or of an interim protection order by the respondent, that is held to be an offence in terms of Section 31 with a penalty specified, and in terms of Section 32, the said offence is cognizable and non-bailable.

20. The proceedings before a magistrate, which are to commence with filing of an application under Section 12, seeking various kinds of reliefs, provided for, under Chapter IX, are essentially of a civil nature, and it is only upon breach of a protection order, or of an interim protection order, that the said proceedings get transformed into criminal proceedings.

21. The breach of protection order or of an interim protection order, is held to be an offence under Section 31(1), and Section 31(2) uses the expression 'accused' only when an offence i.e., a breach of a protection order or of an interim protection order is alleged to have been committed.

22. It would be seen that criminality under Section 31 is attached only to breach of a protection order under Section 18, or of an interim protection order under Section 23 order, or under Section 33 for failure of a Protection Officer to discharge his duties without sufficient cause.

23. The question as to whether the reliefs envisaged under Chapter IX of the D.V. Act are of a civil nature, was examined in **Kunapareddy Alias Nookala Shanka**

Balaji Vs. Kunapareddy Swarna Kumari and Another, wherein after considering the purpose of the enactment and its scheme, it was held that the order that is to be passed by the Magistrate on a complaint by the aggrieved person, would be of a civil nature, and it is only when the said order is violated that it assumes the character of criminality. The observations made in the judgment, in this regard, are as follows:

"12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality.....

.....

13. Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person. The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorises the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides, etc. Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act includes giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any. Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex parte orders. It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence."

24. The procedure to be followed by the court in 'proceedings' under the D.V. Act, is prescribed under Section 28 of the Act. Sub-section (1) of Section 28, while drawing a distinction between 'proceedings' under Sections 12, 18, 19, 20, 21, 22 and 23, and 'offences' under Section 31, states that that they would be governed by the provisions of the Cr.P.C. For ease of

reference, Section 28 of the D.V. Act is being extracted below:

*"**Procedure**.--(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. (2 of 1974).*

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23."

25. It is noticeable that Section 28(1) commences with the expression "save as otherwise provided by this Act", the effect of which would be to exclude the application of the Code in areas where the procedure has been expressly provided under the D.V. Act or under the Protection of Women from the Domestic Violence Rules, 20063.

26. It is further noticeable that Section 28(2) begins with a *non obstante* clause which empowers the court to lay down its own procedure for disposal of an application under Section 12 or under Section 23(2).

27. The aforesaid may be seen as exceptions to the general rule with regard to the applicability of the provisions of the Cr.P.C. to proceedings under the D.V. Act.

28. The 'Statement of Objects and Reasons' of the enactment is clearly indicative that the legislature was conscious that in a situation where a woman is subjected to cruelty by her husband or her relatives, it would be an offence under Section 498 A of I.P.C.; however, the civil law does not address the phenomena in its entirety. The legislation, was, accordingly, brought in place, keeping in view the rights guaranteed under Articles 14, 15 and 16 of the Constitution and to provide for a remedy under the civil law intended to protect a woman from being victim of domestic violence and to prevent the occurrence of domestic violence in society.

29. The procedure set out under the D.V. Act and the D.V. Rules, is sufficiently indicative of a conscious deviation from the manner in which a criminal court proceeds to take cognizance, issue process and try the accused under the provisions of the Cr.P.C. It is only in case of a breach of a protection order or of an interim protection order, passed under the provisions of the D.V. Act, that an element of criminality is sought to be attached. At the stage of the proceedings related to an application under Section 12, the applicability of the Cr.P.C., would be seen to be circumscribed by the provisions under Section 28 of the D.V. Act.

30. The question as to whether a proceeding is civil or not, was examined in **State of Uttar Pradesh Vs. Mukhtar Singh** and it was stated thus:

"Whether a proceeding is civil or not depends, in my opinion, on the nature of the subject-matter of the proceeding and its object, and not on the mode adopted or the forum provided for the enforcement of the right. The expression "civil rights" in a broad sense comprises the entire bundle of private rights that a human being or any person recognises by law as a juristic entity might, as such, possess under law and for the recognition, declaration or enforcement of which law makes a provision."

31. The test to be applied for examining the character of a proceeding before a Court or authority, and the

distinction between a 'civil proceeding' and a 'criminal proceeding', was formulated by a Constitution Bench of the Supreme Court in **SAL Narayan Row Vs. Ishwarlal Bhagwandas,** and it was held as follows:

"8. .....The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed.

".....The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is therefore one in which a person seeks to enforce by appropriate, relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."

32. The distinction between a 'civil proceeding' and a 'criminal proceeding', and the test to be applied for the purpose was reiterated in **Ram Kishan Fauji Vs. State of Haryana and Others.** It was observed as follows:

31. "..... As far as criminal proceeding is concerned, it clearly stipulates that a criminal proceeding is ordinarily one which, if carried to its conclusion, may result in imposition of (i) sentence, and (ii) it can take within its ambit the larger interest of the State, orders to prevent apprehended breach of peace and orders to bind down persons who are a danger to the maintenance of peace and order. The Court has ruled that the character of the proceeding does not depend upon the nature of the tribunal which is invested with the authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed."

33. The question as to whether the nature of proceedings under the various provisions of the D.V. Act, would be of a civil or criminal nature, was clarified in **Kunapareddy Alias Nookala Shanka Balaji Vs. Kunapareddy Swarna Kumari and Another,** wherein referring to Section 28, it was observed that in respect of a petition filed under Sections 18 and 20, though proceedings are to be governed by the Cr.P.C., such proceedings, undisputedly; would be predominantly of a civil nature. It was also observed that all the reliefs stipulated under Chapter IV of the D.V. Act, which comprises Sections 12 to 29 and can be granted by a Magistrate, are of a civil nature. The observations made in the judgment, are as follows:

"12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women

against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality....."

13. Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person. The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorises the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides, etc. Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act includes giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any. Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex parte orders. It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence.

14. In the aforesaid scenario, merely because Section 28 of the DV Act provides for that the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature.....

34. The nature of proceedings instituted upon an application under Section 12 of the D.V. Act, and whether the filing of such application can be equated to lodging of a complaint or initiation of prosecution, was examined in a recent decision in **Kamatchi Vs. Lakshmi Narayanan** and clarifying the law on the subject it was held that the Magistrate after hearing the parties and considering the material on record, may pass an appropriate order under Section 12, and only thereafter, the breach of such order would constitute an offence as provided under Section 31; at the time when the application under Section 12 is preferred, no offence is committed as per the terms of the provisions of the D.V. Act.

35. There is a marked distinction between a 'complaint' contemplated under the D.V. Act and the D.V. Rules, and a 'complaint' under the Cr.P.C.. A complaint

under Rule 2(b) of the D.V. Rules, has been defined as an allegation made orally or in writing by any person to a Protection Officer, whereas a complaint under Section 2(d) Cr.P.C. is any allegation made orally or in writing to a Magistrate with a view to taking action under Cr.P.C. that some person whether known or known has committed an offence. The Magistrate dealing with an application under Section 12 is not called upon to take action for the commission of an offence; hence what is contemplated is not a complaint but an application to a Magistrate as set out in Rule 6(1) of the D.V. Rules. The filing of an application under Section 12 of the D.V. Act, can, therefore, not be equated to the lodging of complaint or initiation of prosecution as contemplated under the provisions of the Cr.P.C.

36. The question as to whether an amendment would be permissible in a criminal complaint or a petition filed under the provisions of Cr.P.C., was examined in **S.R. Sukumar Vs. S. Sunaad Raghuram,** and laying down principles for the purpose it was held that although there was no specific provision in the Cr.P.C. to permit amendment of a complaint or a petition, if the amendment sought to be made related to a simple infirmity, which was curable by means of a formal amendment and by allowing such amendment no prejudice would be caused to other side, the court may permit such amendment to be made. Referring to and earlier decision in **U.P. Pollution Control Board v. Modi Distillery** it was observed as follows:

"18. Insofar as merits of the contention regarding allowing of amendment application is concerned, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board v. Modi Distillery wherein the name of the company was wrongly mentioned in the complaint, that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:

"6. ...The learned Single Judge has focussed his attention only on the technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in Para 2 of the complaint so as to make the controlling company of the industrial unit figure as the accused concerned in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery. ... Furthermore, the legal infirmity is of such a nature which could be easily cured."

19. What is discernible from U.P. Pollution Control Board case is that an easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for

entertaining such amendment, the court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the court shall not allow such amendment in the complaint.

20. In the instant case, the amendment application was filed on 24-5-2007 to carry out the amendment by adding Paras 11(a) and 11(b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. Firstly, the Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly, the publication of poem Khalnayakaru being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore, to avoid multiplicity of proceedings, the trial court allowed the amendment application. Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution."

37. The aforesaid authorities lead to the conclusion that even in criminal cases governed by the Cr.P.C., the court is not powerless and may allow amendment in appropriate cases, which may be in situations where an amendment seeks to introduce facts based on subsequent events, or to avoid multiplicity of the proceedings. An amendment may also be permissible if it relates to a simple infirmity which is curable by means of a formal amendment and in allowing such amendment no prejudice is likely to be caused to the other side.

38. There would, thus, be no complete or absolute bar in seeking amendment even in complaints before criminal courts which are governed by Cr.P.C., although the power to allow such amendment would have to be exercised with due caution and sparingly, in appropriate circumstances.

39. The question as to whether a court dealing with an application filed under the D.V. Act has the power to allow amendments to the application originally filed, was also examined in the **Kunapareddy (supra)** case and after considering the provision contained under sub-section (2) of Section 28, which empowers the court to lay down its procedure for disposal of an application filed under Section 12 or under Section 23, it was held that the court is not powerless in this regard and may allow amendments in appropriate cases. This would be in situations where the amendment becomes necessary, in view of the subsequent events or to avoid multiplicity of litigation. It was observed as follows:

"16. ....It cannot be said that the court dealing with the application under the DV Act has no power and/or jurisdiction to allow the amendment of the said

application. If the amendment becomes necessary in view of subsequent events (escalation of prices in the instant case) or to avoid multiplicity of litigation, court will have the power to permit such an amendment. It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that Respondent 1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment. If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate application.....

17. What we are emphasising is that even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings. The argument of the learned counsel for the appellant, therefore, that there is no power of amendment has to be negated.

18. In this context, provisions of Sub-Section(2) of Section 28 of the DV Act gain significance. Whereas proceedings under certain sections of the DV Act as specified in sub-Section (1) of Section 28 are to be governed by the Code, the Legislature at the same time incorporated the provisions like sub-Section(2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the DV Act. This provision has been incorporated by the Legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act. Section 23 deals with the power of the Magistrate to grant interim and ex-parte orders and sub-Section (2) of Section 23 is a special provision carved out in this behalf which is as follows:

"23. (2).If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19. section 20, section 21 or, as the case may be, section 22 against the respondent."

19. The reliefs that can be granted by the final order or by an interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application, etc. is not read into the aforesaid provision, the very purpose which the Act attempts to subserve itself may be defeated in many cases."

40. The proceedings before the Magistrate relating to reliefs claimed under Chapter IV of the D.V. Act, having been held essentially to be of a civil nature, the power to amend the complaint/application would have to be read in relevant statutory provisions, as a necessary concomitant.

41. Having regard to the aforesaid, the contention sought to be raised on behalf of the petitioner that the Magistrate before whom the application under Section 12 of the D.V. Act, was pending, did not have the jurisdiction or the power to allow the application seeking amendment in the relief clause of the original application, cannot be legally sustained.

42. The order passed by the learned Magistrate allowing the amendment application, and the subsequent order of affirmation by the revisional court, cannot be said to suffer from any illegality, which may warrant interference by this Court, in exercise of its supervisory power, under Article 227 of the Constitution.

43. The petition thus fails and is accordingly **dismissed**.

(2024) 5 ILRA 656
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 3802 of 2019

Sagar Jotwani ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ankit Srivastava

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Section 370(5) - Juvenile Justice Care and Protection of Children Act, 2015-Section 79-Quashing of charge sheet and summoning order-Applicant was charged with employing minors in his factory through labour contractor, without verifying their age or identities- a raid conducted in the factory revealed the employment of minors-In this case, the prosecution failed to provide sufficient evidence to establish the applicant's direct involvement in employing minors or exploiting child labour-The court emphasized that the issuance of process should not be a mechanical act but must be based on a clear application of judicial mind and proper assessment of evidence-The order is set aside.(Para 1 to 23)

The application is allowed. (E-6)

List of Cases cited:

1.Inder Mohan Goswami Vs St. of U.K. (2007) 12 SCC 1

2. Lalankumar Singh & ors. Vs St. of Mah. (2022) SCC Online SC 1383

3. Pepsi Foods Ltd. Vs J.M. (1998) 5 SCC 749.

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

5. St. of Har. Vs Bhajan Lal (1992) Supp (1) SCC 335

6. R.P. Kapoor Vs St. of Punj. (1990) AIR SC 866

7. St. of Har. Vs Bhajanlal (1992) SCC (Crl.) 426

8. St. of Bih. Vs P.P. Sharma (1992) SCC (Crl.) 192

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.(2005) SCC (Crl.) 283 para 10

10. S.W. Palankattkar & ors. Vs St. of Bih. (2002) 44 ACC 168

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

1. Heard Shri Ankit Srivastava, learned Counsel for the applicant, Shri Rajeev Kumar Verma, learned A.G.A. for the State-opposite party and perused the entire material placed on record.

2. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicant,namely-Sagar Jotwani seeking quashing of the charge sheet dated 24.12.2017 submitted in Case Crime No.487/2017 before the Court of Chief

Judicial Magistrate, Lucknow under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 and summoning order dated 13.09.2018 passed by Court of Chief Judicial Magistrate, Lucknow in Criminal Case No.54326/2018 whereby cognizance has been taken and the applicant has been summoned under Section 370(5) I.P.C. and Section 79 of Juvenile Justice Care and Protection of Children Act, 2015 and bailable warrant dated 15.03.2019 passed in the aforesaid case against the applicant.

3. Learned Counsel for the applicant submits that the applicant is Sole Proprietor of the proprietorship known as 'Kumar Dalmoth Factory.' having its registered address at Annaura Gaon, Amausi Road, Lucknow. He further submits that being the proprietor of the aforesaid proprietorship, the applicant had no direct role to play in the appointment/ selection of the non-managerial staff.

4. Learned Counsel for the applicant further submits that the officials of the factory in order to engage the workers contacted one Yashpal Singh alias Papu, the said Yashpal Singh who happens to be a labour thekedar thereafter sent some 10-15 boys in the factory of the applicant.

5. Learned Counsel for the applicant further submits that when the officials of the factory asked about the particulars & the ids of the labours in order to ascertain the whereabouts of the labours & also about their age, the said Yashpal Singh informed that he is having the ids of the labours & gave an affidavit to the effect that he shall provide the same whenever it is needed. Meanwhile on 04.8.2017 an inspection was carried out & it was alleged that 16 boys were found in the aforesaid factory that were employed as labour & were not adults.

6. Learned Counsel for the applicant further submits that an FIR was also lodged at Police Station Sarojini Nagar District Lucknow under Section 370(5) IPC & Section & under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015. He further submits that subsequently an investigation was conducted however without there being any independent or cogent evidence the investigation agency submitted the Charge Sheet dated 05.8.2017 in Case Crime No. 487/2017 before the Court of Chief Judicial Magistrate Lucknow under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015.

7. Learned Counsel for the applicant further submits that there is absolutely no evidence against the applicant so as to say that he has committed any offence under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015. Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 is reproduced hereinunder:

"S.79 Exploitation of a child employee.

Notwithstanding anything contained

in any law for the time being in force, whoever ostensibly engages a child and keeps him in bondage for the purpose of employment or withholds his earnings or uses such earning for his own purposes shall be punishable with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine of one lakh rupees.

Explanation.-For the purposes of this section, the term "employment" shall

also include selling goods and services, and entertainment in public places for economic gain."

8. Learned Counsel for the applicant further submits that there is no evidence so as to say that the applicant has engaged a child and kept him in bondage for the purpose of employment or has withheld his earnings or used such earning for his own purposes. However learned Trail Court without appreciating the material evidences on record & without appreciating the scope of Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 took cognizance of the offences under Section 370(5) IPC & under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 and summoned the applicant vide order dated 13.8.2019.

9. Learned Counsel for the applicant further submits that the learned trial court has summoned the applicant under Section 370(5) IPC & under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 whereas the charge sheet was submitted only under Section 79 of the Juvenile Justice Care And Protection Of Children Act, 2015 but while passing the order dated 13.9.2018 no reason has been recorded by the learned Court of Chief Judicial Magistrate Lucknow.

10. Learned Counsel for the applicant further submits that moreover the aforesaid impugned order dated 13.09.2018 is neither speaking one nor has any reason been assigned by the learned trial court. Admittedly it is a fairly settled principle of law that the reason is the life of law. It is that filament that injects soul to the order, absence of analysis not only evinces non application of mind but mummifies the core spirit of the order. However the perusal of the aforesaid order would reveal to the Hon'ble Court that the impugned order is a non speaking one and is also un-reasoned one.

11. Per contra, learned A.G.A. for the State-opposite party has vehemently opposed the contentions made by learned Counsel for the applicant and submits that there was ample evidence against the applicant, who was present at the railway crossing at the time of incident and the police party in a very cautious manner nabbed him red handed, while he was creating nuisance in a public place and was passing obscene comments on the girls and ladies. Thereafter, the police has thoroughly conducted the inquiry against the applicant and has filed a charge sheet against him considering the material on record, thus, he submits that the trial court has correctly took the cognizance of the charge sheet and has rightly summoned the applicant to face trial in the aforesaid case. He further submits that no interference by this Court is required in the matter and the present application being devoid of merit and substance is liable to rejected.

12. I have heard learned Counsel for the parties.

13. On careful perusal of averments made in this application under Section 482 Cr.P.C. as well as after hearing the learned Counsel for the parties, the factual matrix discloses that the opposite party No.2 alongwith his other associates lodged an F.I.R. against the applicant alleging therein that the applicant was running a factory in which sixteen minor boys were working as laborers but it has been alleged by learned Counsel for the applicant that the applicant has nothing to do with the employment of non managerial staff, thus, he has no

concern with the minor boys who were allegedly deployed in his factory. Further, there also appears force in the argument of learned Counsel for the applicant that the officials of the factory in order to engage the workers contacted one Yashpal Singh alias Papu, the said Yashpal Singh who happens to be a labour thekedar sent 10-15 boys in the factory of the applicant and when the officials of the factory asked about the particulars & the ids of the labours in order to ascertain the whereabouts of the labours & also about their age, the said Yashpal Singh informed that he is having the ids of the labours & gave an affidavit to the effect that he shall provide the same whenever it is needed. Meanwhile on 04.8.2017 an inspection was carried out & it was alleged that 16 boys were found in the aforesaid factory that were employed as labour & were not adults, there also appears force in the argument of learned Counsel for the applicant that there is absolutely no evidence against the applicant so as to say that he has committed any offence under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015. Further, the trial court has failed to appreciate the fact that while filing the charge sheet, the Investigating officer has failed to comply with the mandatory provisions of criminal law and has passed the impugned summoning order 13.09.2018, which is nothing but an abuse of process of law.

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

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

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

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

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

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

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

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

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

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

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

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

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

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking

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

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

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

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

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

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

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

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

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

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

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

21. Thus, in view of the law laid down by the Hon'ble Apex Court and in light of the observations and discussions made above and keeping view the facts and circumstances of the case, and from the perusal of the record, the impugned charge sheet dated 24.12.2017 submitted in Case Crime No.487/2017 before the Court of Chief Judicial Magistrate, Lucknow under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 and summoning order dated 13.09.2018 passed by Court of Chief Judicial Magistrate, Lucknow in Criminal Case No.54326/2018 whereby cognizance has been taken and the applicant has been summoned under Section 370(5) I.P.C. and Section 79 of Juvenile Justice Care and Protection of Children Act, 2015 and bailable warrant dated 15.03.2019 passed in the aforesaid case against the applicant.

22. Accordingly, the impugned charge sheet dated 24.12.2017 submitted in Case Crime No.487/2017 before the Court of Chief Judicial Magistrate, Lucknow under Section 79 of the Juvenile Justice Care and Protection of Children Act, 2015 and summoning order dated 13.09.2018 passed by Court of Chief Judicial Magistrate, Lucknow in Criminal Case No.54326/2018 whereby cognizance has been taken and the applicant has been summoned under Section 370(5) I.P.C. and Section 79 of Juvenile Justice Care and Protection of Children Act, 2015 and bailable warrant dated 15.03.2019 passed in the aforesaid case against the applicant are hereby ***set aside*** and ***reversed***.

23. For the reasons discussed above, the instant application under Section 482 Cr.P.C. is allowed in respect of the instant applicant, namely-Sagar Jotwani.

(2024) 5 ILRA 662
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Application U/S 482. No. 7411 of 2018

Pintu Singh @ Rana Pratap Singh & Ors. ...Applicants

Versus

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

Counsel for the Applicants:
Sri Manoj Kumar Singh, Sri Virendra Pratap Pal

Counsel for the Opposite Parties:
G.A., Sri Nanhe Lal Tripathi, Sri Rakesh Singh Yadava

A. Criminal Law-Criminal Procedure Code,1973-Section 482-Indian Penal Code, 1860-Sections 147, 452, 323, 504, 506 & 3(1)(r) - SC/ST Act,. 1989-challenge to-chargsheet-accused person entered into the house of informant and made caste based remark and assaulted-in the present case the offence is not committed in public view nor the offence has been committed at public place-the statement of the

informant discloses that any member of the public was present and the incident occurred-Thus, the provision of section 3(1)(r) of the SC/ST Act would not be attracted-proceedings in respect of offence under SC/ST Act is quashed and other offences proceedings may go on (Para 1 to 11)

The application is partly allowed. (E-6)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. List has been revised.

2. Heard learned counsel for the applicants and learned AGA for the State. No one is present on behalf of the opposite party no. 2.

3. This application under Section 482 Cr.P.C. has been filed by applicants for quashing the S.St. No. 36 of 2018 (State Versus Arun Singh and others) Case Crime No. 447 of 2017, under sections 147, 452, 323, 504, 506 I.P.C. and 3(1)(r) SC/ST Act, Police Station Nagara, District Ballia, pending in the court of Additional Sessions Judge, Court No. 2, Ballia as well as charge sheet dated 03.01.2018 arising out of Case Crime No. 447 of 2017, under sections 147, 452, 323, 504, 506 I.P.C. and 3(1)(r) SC/ST Act, Police Station Nagara, District Ballia.

4. At the very outset, learned counsel for the applicants submits that the applicants are pressing 482 application in respect of the offence under section SC/ST Act. In respect of the other offences the applicants are not putting any challenge to the charge sheet at this stage.

5. It is submitted by learned counsel for the applicants that initially an F.I.R. was lodged on 15.11.2017 under sections 147, 452, 323, 504, 506 I.P.C. and 3(1)(r) of SC/ST Act at Police Station Nagara, District Ballia with the allegations that the nominated accused persons who are seven in number including the applicants have entered into the house of the informant and have stated caste based remark and have also assaulted the informant and his family members. Learned counsel for the applicants submits that as per F.I.R. it is alleged that the accused persons have entered into the house of the informant and thereafter have made caste based remark. On the aforesaid basis, the applicants are proceeded under section 3(1)(r) of the SC/ST Act for an offence intentionally insulting or intimidating with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view.

6. Learned counsel for the applicants submits that the offence was committed in the house of the informant which is not the public place nor the same was in the public view. In this respect, learned counsel for the applicants has drawn the attention of this Court to the site plan annexed alongwith the supplementary affidavit as well as the statement of the informant recorded under section 161 Cr.P.C. He submits that once the words uttered was not in public view nor it was in public place then provisions of section 3(1) (r) of SC/ST Act would not be attracted.

7. Learned A.G.A. has opposed the 482 application, however, he could not dispute the fact that the incident is alleged to have occurred in the house of the informant. He could not further dispute the fact that the incident has not occurred in public view.

8. It is to be seen that in the present case as per prosecution case it is alleged that

the accused persons including the applicants have entered into the house of the informant and have stated caste based remark and have assaulted. The present 482 application is only confined to the allegations under section 3(1)(r) of the SC/ST Act. The site plan filed by the learned counsel for the applicants would indicate that the place of incident is the house of the informant which is not a public place or public view. A perusal of the statement of the informant under section 161 Cr.P.C. as well as the F.I.R. would further demonstrate that there was no member of the public in the house where the alleged incident is said to have been taken place. As per the provision of Section 3(1)(r) of SC/ST Act is quoted herein below:

"Section 3(1)(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."

9. One of the essential ingredients for an offence under section 3(1)(r) of SC/ST Act is that the offence ought to have been committed in public view.

10. In the present case, the offence is not committed in public view nor the offence has been committed at public place. In the statement of the informant it has not been stated that any member of the public was present and the incident has occurred. Once the offence has not taken place in public view the provisions of section 3(1)(r) of the SC/ST Act would not be attracted and as such the same cannot be proceeded with.

11. In view of the facts and circumstances, the present 482 application is **partly allowed.** The Criminal proceedings against the applicants in Case Crime No. 447 of 2017 in respect of offence under sections 3(1)(r) SC/ST Act is hereby quashed. However, in respect of other offences the proceedings may go on and be brought to its logical conclusion, in accordance with law.

(2024) 5 ILRA 664
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 10290 of 2019

Rajkumar ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri R.V. Pandey

Counsel for the Opposite Parties:
G.A., Sri Ashutosh Gupta, Sri Ashutosh Sharma, Sri Gyan Prakash Verma

A. Criminal Law-Criminal Procedure Code, 1973-Sections 482 & 125-application for maintenance filed by wife and daughter which was dismissed for want of prosecution-recall was filed which was allowed by the court below-The applicant challenged the impugned order stating that the same cannot be recalled or modified in view of the section 362 CrPc-The apex court considered in the case of Sanjeev kapoor that the proceeding of section 125 crpc is quasi criminal in nature and observed that bar of section 362 Crpc does not apply-Order passed u/s 125 CrPc may be final or interim, can be recalled or altered u/s 127 CrPC-a bar of section 362 CrPC is not applicable in such cases.(Para 1 to 17)

The application is rejected. (E-6)

List of Cases cited:

1. St. Rep. by D.S.P., S.B.C.I.D., Chennai Vs K.V Rajendran & ors. CRLA No. 1389 of 2008

2. Sanjeev Kapoor Vs Chandana Kapoor & ors. (2020) AIR SC 1064

3. Badshah Vs Sou. Urmila Badshah Godse & anr. (2014) 1 SCC 188.

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

1. Rejoinder affidavit filed today is taken on record.

2. Heard learned counsel for the applicant, learned counsel for opposite party no.2 and Sri Sunil Kumar Kushwaha, learned AGA for the State.

3. The present application has been filed for the following relief:

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present application and quashed the order and judgment dated 25.01.2019 in recall/restoration application no.164 of 2017 whereby has recall/restore ex-parte order dated 23.11.2017 passed by the learned trial court in Case No.336 of 2016 (Smt. Bindu Devi & Others Vs. Rajkumar), u/s 125 Cr.P.C., pending in the court of the Chief Judge, Family Court, Azamgarh."

4. Facts giving rise to the present case are that opposite parties, nos.2 and 3, are the wife and daughter of the applicant, respectively. The application for maintenance u/s 125 Cr.P.C. filed by opposite parties, nos.2 and 3, was dismissed for want of prosecution on 23.11.2017. Against that order, opposite parties, nos.2 and 3 filed a recall application, which was allowed by the court below by the impugned order dated 25.01.2019. This impugned order is under challenge in the present case.

5. Contention of learned counsel for the applicant is that the impugned order is erroneous as once an order has been passed in criminal proceeding dismissing the application u/s 125 Cr.P.C. for want of prosecution, then same cannot be recalled or modified in view of the bar of Section 362 Cr.P.C. In support of his contention, the counsel of the applicant relied upon the judgment of the Apex Court in the case of **State Rep. by D.S.P., S.B.C.I.D., Chennai Vs. K.V. Rajendran and Ors in Criminal Appeal No.1389 of 2008.** In this judgment, the Apex Court observed that the bar of section 362 Cr. P.C. also applies to the inherent power under section 482 Cr.P.C.

6. *Per contra*, learned counsel for opposite parties, nos.2 and 3 as well as learned AGA have submitted that Section-362 Cr.P.C. provides that save as otherwise provided by the Cr.P.C. or any other law, no court shall alter or review its judgement or final order disposing of the case. Therefore, it is clear that an exception has been provided in Section-362 Cr.P.C., itself and that exception has been mentioned in Section-127 Cr.P.C. which permits the court to alter or change any order passed u/s 125 Cr.P.C. Therefore, the court below is correct in recalling the order dated 23.11.2017 and restoring the case at its original number. In support of his contention, learned counsel for opposite party no.2 has relied upon the judgement of the Apex Court in the case of ***Sanjeev Kapoor Vs. Chandana Kapoor & Others*** reported in ***AIR 2020 SC 1064***. In that judgement, the Apex Court observed that even after passing the order u/s 125 Cr.P.C., Magistrate or the court concerned

will not become functus officio and it has jurisdiction to cancel or modify the order passed u/s 125 Cr.P.C.

7. After hearing the rival contention of learned counsel for the parties, and on the perusal of record, it appears that the application filed by the opposite parties, nos.2 and 3 against the applicant seeking maintenance u/s 125 Cr.P.C. was dismissed for want of prosecution on 23.11.2017 and on the recall application filed by the opposite parties, nos.2 and 3, the order dated 23.11.2017 was recalled and matter was restored to its original place by the impugned order dated 25.01.2019. In the impugned order, the court below has observed that in the proceeding of 125 Cr.P.C., if the case was dismissed for want of prosecution, the same can be recalled under Section-126(3) Cr.P.C. where the court has all power to make such order as the circumstances require.

8. So far as the bar u/s 362 Cr.P.C. is concerned, the bar has been imposed to recall or modify the final order by Section-362 Cr.P.C. after signing the same. It is clear from Section-362 Cr.P.C. that unless otherwise provided by the code or any other law, final judgement or order cannot be recalled or reviewed after signing the same. For ready reference, Section-362 Cr.P.C. is being quoted as under:

"362. Court not to alter judgment *- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."*

9. From perusal of the above section, it is clear that if any provision is provided under Cr.P.C., which permits the recall or alter the judgement or final order, then the bar u/s 362 Cr.P.C. will not apply. It is provided u/s 126(3) Cr.P.C. that the court dealing with Section-125 Cr.P.C. shall have power to make such order as may be just and proper. After that, Section-127 Cr.P.C. provides that the court which has passed an order for maintenance u/s 125 Cr.P.C. including the order of interim maintenance has jurisdiction to make such alteration as required. Sections-125, 126 and 127 Cr.P.C. are being quoted as under:

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

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

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

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

(d) his father or mother, unable to maintain himself or herself,

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

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband

of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

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

Explanation.-For the purposes of this Chapter,?

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

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

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

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

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

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

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

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

***126. Procedure**.-(1) Proceedings under Section 125 may be taken against any person in any district?*

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance.-(*1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.*

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that?

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,?

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [maintenance or interim maintenance, as the case may be,] after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under Section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person [as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order."

10. From perusal of Sections-125 Cr.P.C., 126 Cr.P.C. and 127 Cr.P.C., it is

clear that Section-125 Cr.P.C. is social justice legislation which orders for the maintenance of wives, children and parents and the legislature has provided in Sections-125(5) Cr.P.C., 126 Cr.P.C. as well as Section-127 Cr.P.C., certain conditions on fulfilling of which, order passed u/s 125 Cr.P.C. can be recalled or modified.

11. In Section-125 Cr.P.C. using of expression "as the Magistrate from time to time direct", the use of expression from time to time has purpose and meaning. It clearly contemplates that the order passed u/s 125(1) Cr.P.C., the Magistrate may have to exercise jurisdiction from time to time. The above legislative scheme indicates that Magistrate does not become functus officio after passing of the order u/s 125 Cr.P.C.

12. The Apex Court in the case of **Badshah Vs. Sou. Urmila Badshah Godse and another reported in (2014) 1 SCC 188** has considered the interpretation of Section-125 Cr.P.C. In paragraph nos.13.3 to 18 of the judgement of **Badshah (supra),** following guidelines have been laid down:

"13.3.Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125 Cr.P.C. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate.

There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

"It is, therefore, respectfully submitted that 'social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice.

Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

15. The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to

social context adjudication is the need of the hour.

16. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

17. Cardozo acknowledges in his classic "- no system of jus scriptum has been able to escape the need of it." and he elaborates:

"It is true that codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. ? There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a Judge's troubles in ascribing meaning to a statute. ? Says Gray in his lectures:

"The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the Judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.""

18. The court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision ? libre recherch scientifique i.e. "free scientific research". We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 Cr.P.C., to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard.

Journey from Shah Bano to Shabana Bano guaranteeing maintenance rights to Muslim women is a classical example.

13. Considering the legislative purposes behind Section- 125 Cr.P.C., which is quasi-criminal in nature, the Apex Court considered in the case of **Sanjeev Kapoor (supra)** the issue of applicability of Section-362 Cr.P.C. in the proceeding of Section-125 Cr.P.C. and observed that bar of Section-362 Cr.P.C. does not apply to the order passed u/s 125 Cr.P.C. Paragraphs nos.25, 26 and 27 of the judgement mentioned above are being quoted as under:

"25. The above legislative scheme indicates that the Magistrate does not become functus officio after passing an order under Section 125 Cr.P.C., as and when the occasion arises the Magistrate exercises the jurisdiction from time to time. By Section 125(5) Cr.P.C., the Magistrate is expressly empowered to cancel an order passed under Section 125(1) Cr.P.C. on fulfilment of certain conditions.

26.Section 127 Cr.P.C. also discloses the legislative intendment where the Magistrate is empowered to alter an order passed under Section 125 Cr.P.C. Sub-section (2) of Section 127 Cr.P.C. also empowers the Magistrate to cancel or vary an order under Section 125 Cr.P.C. The legislative scheme as delineated by Sections 125 and 127 Cr.P.C. as noted above clearly enumerated the circumstances and incidents provided in the Code of Criminal Procedure where the court passing a judgment or final order disposing of the case can alter or review the same. The embargo as contained in Section 362 is, thus, clearly relaxed in the proceedings under Section 125 Cr.P.C. as indicated above.

27.The submissions which have been pressed by the learned counsel for the appellant were founded only on embargo of Section 362 and when embargo of Section 362 is expressly relaxed in the proceedings under Section 125 Cr.P.C., we are not persuaded to accept the submission of the counsel for the appellant that the Family Court was not entitled to set aside and cancel its order dated 6-5-2017 in the facts and circumstances of the present case."

14. From the above legal position, it is clear that the order passed u/s 125 Cr.P.C. may be final or interim, can be recalled or altered u/s 127 Cr.P.C. Therefore, it falls in the category of exceptional cases mentioned in Section-362 Cr.P.C. Hence, a bar of Section 362 Cr.P.C. is not applicable in such cases.

15. The Judgment relied upon by the applicant's counsel does not apply in the present case.

16. In view of the above, this Court does not find any illegality in the impugned order passed by the Principal Judge, Family Court, Azamgarh.

17. Accordingly, the present application is **rejected**.

18. Considering the fact that application u/s 125 Cr.P.C. has been pending since 2016, therefore, Principal Judge, Family Court, Azamgarh, is directed to conclude the proceeding u/s 125 Cr.P.C., expeditiously, preferably within a period of one year, without giving any unnecessary adjournment to any of the parties.

(2024) 5 ILRA 671
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Application U/S 482. No. 10569 of 2024

Kapil Tomar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ankur Singh Kushwaha, Sri Santosh Kumar Upadhyay, Sri Vinod Kumar Upadhyay

Counsel for the Opposite Parties:
G.A., Sri Shekhar Gangal

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Sections 304-B, 306,498-A, 323, 504 & 506 - ¾ D.P. Act 1961-quashing of summoning order-dowry death-deceased wife committed suicide due to harassment within one year of her marriage-The applicant claimed that wife was having affair with another person and placed some documents in his defence-Once the informant has given specific statement that there was demand of dowry, there was no occasion for the Investigating Officer to have not relied upon the statement of informant-The court held whether the wife has died on account of behavior of applicant or solely on her own will, it is to be seen at the time of evidence-At this stage such issues cannot be considered.(Para 1 to 10)

The application is rejected. (E-6)

List of Cases cited:

Babubhai & ors. Vs St. of Guj. & ors. (2010) 0 Supreme (SC) 782

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the applicant, Sri Shekhar Gangal, learned counsel for opposite party no.2 and learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed by applicant for quashing the entire proceedings of Case No.7114 of 2024 (State Vs. Kapil Tomar), under Sections 304-B, 323, 498-A IPC and Section 3/4 D.P. Act, 1961, P.S. Chandaus, District Aligarh arising out of Case Crime No.0079 of 2023, under Sections 306, 323, 498-A IPC and Section 3/4 D.P. Act, 1961, P.S. Chandaus, District Aligarh including charge sheet dated 12.8.2023 bearing no.175 of 2023 as well as cognizance and summoning order dated 29.1.2024 passed by learned Chief Judicial Magistrate, District Aligarh.

3. It is submitted by learned counsel for the applicant that applicant is husband and charge sheet has been filed against applicant under Sections 304-B, 323, 498-A IPC and Section 3/4 D.P. Act, 1961. The marriage of the applicant took place with the deceased on 4.12.2022. As per prosecution case, at the time of marriage dowry was given to the applicant and family members and, thereafter, harassment was extended to the deceased for further dowry and in this respect, on 5.1.2023 when the informant along with family members went to the house of applicant, demand of dowry was reiterated and car was being demanded. Subsequently, as per allegation, the wife was thrown out of the house and thereafter, the demand was also made and as a result of same on 6.4.2023 deceased wife has committed suicide.

3-A. It is submitted by learned counsel for the applicant that present criminal proceedings are abuse of process of law as the conduct of wife was not proper as a result of same, the father of informant on 30.12.2022 has written a letter admitting mistake of the deceased and assuring the applicant of non repetition of the same in future. It is further submitted by learned counsel for the applicant that conduct of deceased wife being not fair an agreement was entered into between husband and wife, which is at page 115 of the paper book.

3-B. It is submitted by learned counsel for the applicant that independent witness have also given statement that there was dispute between husband and wife on account of the fact that wife was interested in some another person and as a result of same, there was friction in the marriage and

marriage was not consummated. It is submitted that although statement of independent witnesses, who were resident of same locality, have been recorded in case diary, however, while submitting charge sheet the aforesaid statement has not been considered. It is submitted that Investigating Officer is required to conduct fair investigation independently and cannot be partisan to the investigation. In this respect, learned counsel for the applicant has relied upon the judgement of Supreme Court in ***Babubhai and others Vs. State of Gujarat and others; 2010 0 Supreme (SC) 782.*** It is submitted by learned counsel for the applicant that as per Regulation 107 of Police Regulation, it is the duty of the Investigating Officer to conduct investigation fairly and to consider the defence raised by the applicant at the time of investigation. In this respect, it is submitted that complaint was also made to the Senior Superintendent of Police, which is at page 147 of the paper book , which is part of case diary according to learned counsel for the applicant.

3-C. It is also submitted by learned counsel for the applicant that the charge sheet has been submitted by considering the statement of informant. On the aforesaid basis, learned counsel for the applicant submits that the present criminal proceedings are not tenable under law. It is also submitted by learned counsel for the applicant that the wife has committed suicide at her parental home and she has not committed suicide at the place of applicant and as such, criminal proceedings are liable to be quashed. It is further submitted by learned counsel for the applicant that wife has not committed suicide on account of harassment for demand of dowry, as has been claimed by the prosecution.

4. Learned counsel for opposite party no.2 has opposed the application and submits that the wife has died within seven years of marriage and the death is unnatural. It is submitted that the defence raised by applicant cannot be considered at this stage. It is further submitted by learned counsel for opposite party no.2 that there was no agreement entered into between the parties and the letter which is at page 112 of the paper book is not admitted. It is submitted by learned counsel for opposite party no.2 that on account of harassment by applicant for demand of dowry, the daughter of informant has committed suicide and applicant is liable to be proceeded in accordance with law. It is also submitted that once the statement of witnesses of informant has been recorded, who have supported the prosecution case, then there was no other option for the Investigation Officer except to proceed to submit charge sheet and court concerned had not committed any error in taking cognizance in pursuance of charge sheet submitted by Investigating Officer.

5. It is to be seen that in the present case, applicant, who is husband was married to the deceased on 4.12.2022. The wife has committed suicide on 6.4.2023. The applicant claimed that wife was having an affair with another person and as such, she was not interested in marriage and marriage was not consummated. In this respect, learned counsel for the applicant has placed before this Court the letter dated 30.12.2022, which is at page 112 of the paper book to submit that informant had admitted the mistake of deceased. It is to be seen that learned counsel for the applicant has relied upon the agreement entered into between husband and wife, which is at page 115 of the paper book. The agreement is dated 30.12.2022. On the strength of aforesaid, it

has been stated before this Court that once parties have agreed upon mistake of deceased then subsequently lodging of criminal proceeding is not tenable.

6. It is to be seen that documents placed before this Court being letter dated 30.12.2022 and agreement dated 30.12.2022, learned counsel for opposite party no.2 has not admitted the aforesaid documents. The aforesaid documents are, therefore, at present a disputed documents, which are required to be proved by the applicant at the stage of trial. At this stage, the aforesaid documents are mere defence raised by the applicant, which is to be considered at proper stage by the court concerned. The jurisdiction of Section 482 Cr.P.C. cannot be exercised to hold mini trial at this stage.

7. So far as argument of learned counsel for the applicant that independent witnesses whose statements were recorded have not been considered while submitting charge sheet is concerned, the same is to be seen by court concerned. A perusal of statement of informant would demonstrate that there is allegation with regard to demand of dowry against applicant and even specific statement has been recorded in statement under Section 161 Cr.P.C. The independent witnesses relied upon by the applicant are the resident of the same area, who have stated that there was a dispute between husband and wife, however, with regard to transaction of demand of dowry, it is not the case that they were the witnesses to any such transaction. Once the informant has given specific statement that there was demand of dowry, there was no occasion for the Investigating Officer to have not relied upon the statement of informant.

8. The third submission of learned counsel for the applicant is that the wife has committed suicide in her parental home. No site plan has been filed along with application.

9. The effect whether the wife has died on account of behaviour of applicant or solely on her own will, it is to be seen at the time of evidence. At this stage such issue cannot be considered. It can be a case where wife goes back to her parental home being harassed, she commits suicide at her parental home although the possibility may be remote, however, in application under Section 482 Cr.P.C., such issue cannot be looked into. The present application under Section 482 Cr.P.C. is devoid of merits and is liable to be rejected.

10. Accordingly, the present application under Section 482 Cr.P.C. is ***rejected***.

(2024) 5 ILRA 674
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/S 37 of Arbitration & Conciliation Act 1996 No. 257 of 2024

Sh. Dharmveer Tyagi & Ors.
...Defendants/Appellants
Versus
Competent Authority Dfcc Special Land Acquisition Joint Officer Organization & Ors. ...Plaintiffs/Respondents

Counsel for the Appellants:
Sri Shivam Shukla, Sri Sushil Kumar Shukla

Counsel for the Respondents:

A. Arbitration and Conciliation Act, 1996- Section 37 - the appeal was filed beyond 120 days-the discretionary power is only to be exercised when sufficient cause is made out and compelling reasons are provided for condonation of delay-the appellants have had a lackadaisical and nonchalant approach to the entire issue and even after giving benefit of section 14 of the Limitation Act, section 34 application would have remained time barred-the issue with regard to filing an appeal u/s 37 of the Act is no longer res integra as the same has been settled by the Supreme Court in various judgment.(Para 1 to 12)

B. The usage of the phrase "but not thereafter" in section 34(3) the Act is of immense significance. This seemingly innocuous phrase underscores the legislature's intent to impose a strict and non-negotiable deadline for challenging arbitral awards, precluding the courts from exercising any discretion in granting additional time beyond what is specified in section 34(3) of the Act. (Para 7,8)

The application is dismissed. (E-6)

List of Cases cited:

1. U.O.I. Vs Popular Cons. Co. (2001) 8 SCC 470

2. Bhimashakar Sahakari Sakkare Karkhane Niyamita Vs Walchandnagar Indus. Ltd. (WIL) (2023) 8 SCC 453

3. Esha Agarwal & ors. Vs Ram Niranjan Ruia MANU/ WB/0021/2023

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

1. Heard Sri Sushil Kumar Shukla, learned counsel for the appellants.

2. This is an appeal filed against an order dated March 22, 2024 passed by the Additional District Judge, Court No.1, Saharanpur in an application filed under Section 34 of the Arbitration and Conciliation Application Act, 1996 (hereinafter referred to as the "Act") whereby the said application was dismissed as time barred.

3. Acquisition of the land of the appellants was carried out in the year 2015 and thereafter an arbitration award was passed by the learned Arbitrator/Commissioner, Saharanpur on March 15, 2018. Subsequently, on November 21, 2019, the appellants filed a writ petition before this Court bearing Writ-C No.4985 of 2020. This writ petition was disposed of by this Court on February 20, 2020 with the following direction:

"Upon perusal of the averments made in the writ petition and the documents appended thereto, it transpires that the petitioners are challenging the validity of the award made under Section 20F(6) of The Railways Act, 1989.

In our opinion, the remedy if any, available to the petitioners against the impugned award is to file an objection under Section 34 of the Indian Arbitration & Conciliation Act, 1996.

Subject to aforesaid observations, writ petition stands disposed of."

4. Upon being reverted by this Court, the appellants filed an application under Section 34 of the Act before the court of Additional District Judge on July 13, 2020. Learned Additional District Judge, after granting hearing to the appellants, passed a detailed order taking into consideration the submissions made by the appellants and dismissed the said application on the ground that the application was beyond 120 days and, Section 5 of the Limitation Act, 1963 (hereinafter referred to as the 'Limitation Act') would not apply. Accordingly, the learned Additional District Judge dismissed

the application under Section 34 of the Act as time barred. Relevant portion of the judgment is extracted herein:

"15. That in this case, the impugned order was passed by Ld. Arbitrator/Commissioner, Saharanpur on 15.03.2018 and it is the case of the applicants that they went to the Hon'ble High Court against that order and filed writ petition, but it is not mentioned on what date that writ petition was filed before the Hon'ble High Court. The Court can condone the time spent before the Hon'ble High Court while pursuing writ petition as per Section 14 of the Limitation Act. However, in this case, as the applicants have not mentioned when they have filed the writ petition before the Hon'ble High Court and therefore, it is not possible to calculate the time spent by the applicants before the Hon'ble High Court. Even though, the writ petition was disposed off on 20.02.2020 and the present application filed by the applicants before this Court on 13.07.2020 i.e. after five months from the date of order of the Hon'ble Allahabad High Court, when the writ petition of the applicants were disposed off. Though, the applicants have mentioned that certain times were taken for getting certified copy of the order, but the applicants were already aware about the impugned order and also went to the Hon'ble High Court against that order. Thus, the applicants cannot take the advantage of its own mistake. Admittedly, in this case the objection was filed beyond 120 days and therefore, the present application under Section 5 of the Limitation Act is not maintainable and the same is liable to be dismissed.

The present application of the applicants under Section 5 read with Section 34(3) of the Arbitration and Conciliation Act, 1996 is hereby dismissed.

The file be consigned to the record room."

5. Upon a perusal of the order passed by the learned Additional District Judge, it appears that the appellants did not inform the Court of the date of the filing of the writ petition before the High Court. This factual matrix has, however, been addressed before this Court and it appears that the writ petition was filed on November 21, 2019. As the order was passed by the learned Arbitrator/Commissioner on March 15, 2018, it is clear that the writ petition was filed after a period of eighteen months. Subsequently, after dismissal of the writ petition on February 20, 2020, the arbitration application was filed once again after the delay of five months, that is, on July 17, 2020.

6. Section 34 of the Act delineates the procedural contours governing recourse against the arbitral awards. Central to this section is the stipulation regarding the timeline within which an application for setting aside an arbitral award must be made. Section 34(3) of the Act unequivocally mandates that such an application cannot be made after three months from the date on which the party received the arbitral award or, if a request under Section 33 of the Act was made, from the date on which such request was disposed of by the arbitral tribunal. Section 34(3) of the Act also provides that the courts may allow an application filed under Section 34 of the Act within a further period of thirty days, but not thereafter. This temporal constrain is not merely a procedural formality but embodies crucial legal principles essential for maintaining the integrity, efficiency, and finality of the arbitral process. The imposition of a strict timeline serves to promote legal certainty,

preserve the integrity of the arbitral process, and safeguard against dilatory tactics employed by parties dissatisfied with arbitral outcomes. By setting a clear deadline for challenging arbitral awards, parties are compelled to act promptly, ensuring that awards are either upheld or set aside within a reasonable time frame.

7. The usage of the phrase "but not thereafter" in Section 34(3) of the Act is of immense significance. This seemingly innocuous phrase underscores the legislature's intent to impose a strict and non-negotiable deadline for challenging arbitral awards, precluding the courts from exercising any discretion in granting additional time beyond what is specified in Section 34(3) of the Act.

8. The language of Section 34(3) of the Act is clear and unambiguous, leaving no room for discretionary interpretation. This language reflects a deliberate policy decision to impose a rigid temporal constraint, emphasizing the importance of adherence to statutory timelines in the arbitration regime. Allowing indefinite delays in challenging awards would undermine the efficiency and credibility of arbitration, eroding trust in the process and detracting from its efficacy as a viable alternative to traditional litigation.

9. In **Union of India -v- Popular Construction Co.** reported in **(2001) 8 SCC 470,** the Hon'ble Supreme Court propounded that Section 5 of the Limitation Act would not apply to applications made under Section 34 of the Act and the time period prescribed by Section 34(3) of the Act is absolute and unextendible. Relevant paragraphs are extracted herein:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:

"[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation." [(1974) 2 SCC 133] (SCC p. 146, para 17)

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" [Para 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996] . This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

"5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

15. The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act.

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that "where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court". This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

10. Referring to it's judgment in **Popular Construction Co. (supra),** the Hon'ble Supreme Court in **Bhimashankar Sahakari Sakkare Karkhane Niyamita -v- Walchandnagar Industries Limited (WIL)** reported in **(2023) 8 SCC 453** held that Limitation Act will apply to the Act except where it has been specifically excluded:

"54. Now, so far as the submission on behalf of the appellant that the Limitation Act shall not be applicable to the proceedings under the Arbitration Act is concerned, the aforesaid has no substance. Section 43(1) of the Arbitration Act specifically provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceeding in Court. However, as observed and held by this Court in Assam Urban [Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831] , the Limitation Act, 1963 shall be applicable to the matters of arbitration covered by the 1996 Act save and except to the extent its applicability has been excluded by virtue of express provision contained in Section 34(3) of the Arbitration Act.

55. In Popular Construction Co. [Union of India v. Popular Construction Co., (2001) 8 SCC 470] , when Section 5 of the Limitation Act was pressed into service to proceedings under Section 34 of the Arbitration Act for setting aside the arbitral award, this Court has observed that the

Arbitration Act being a special law and provides a period of limitation different from that prescribed under the Limitation Act, the period of limitation prescribed under the Arbitration Act shall prevail and shall be applicable and to that extent the Limitation Act shall be excluded. That, thereafter, it is observed and held that application challenging an award filed beyond period mentioned in Section 34(3) of the Arbitration Act would not be an application "in accordance with" sub-section (3) as required under Section 34(1) of the Arbitration Act."

11. In **Esha Agarwal and Ors. -v- Ram Niranjan Ruia** reported in **MANU/WB/0021/2023,** I had dealt with the question of limitation under Section 34(3) of the Act as follows:

"6. The question of limitation takes centre stage in the present application and needs to be adjudicated upon first and foremost. With respect to limitation for filing a challenge to an arbitral award, Section 34(3) of the Arbitration and Conciliation Act, 1996 provides that an application under the section cannot be made after 'three months have elapsed from the date on which the party making that application had received the arbitral award'. The courts can condone the delay within a further period of thirty days, provided sufficient cause is present, but not 'thereafter'. I believe the term 'thereafter' used in the section does not need any further interpretation. A plain reading of the said section and the proviso makes it as clear as the sky on a summer morning that courts cannot condone a delay beyond the extendable period of thirty days provided in the section.

7. It is necessary at this point to make reference to the recent decision of the apex court in Mahindra and Mahindra Financial Services Limited v. Maheshbhai Tinabhai Rathod And Others reported in MANU/SC/1338/2021 : (2022) 4 SCC 162 wherein the restricted scope of the courts' power to condone the delay in case of an application under Section 34 was reiterated by the Supreme Court. Relevant portions have been extracted below-

9. The scope available for condonation of delay being self-contained in the proviso to Section 34(3) and Section 5 of the Limitation Act not being applicable has been taken note by this Court in its earlier decisions, which we may note. In Union of India v. Popular Construction Co. [Union of India v. Popular Construction Co., MANU/SC/0613/2001 : (2001) 8 SCC 470] it has been held as hereunder:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

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14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" [Para 4(v) of the Statement of Objects and Reasons of the

Arbitration and Conciliation Act, 1996.]. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

'5. Extent of judicial intervention.-- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'

***

16. This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.'

8. While I express my sympathy towards the petitioner, my judicial hands are curtailed by the law, as mentioned above. There is no runway of merit for the present application to land on. The present application has been filed forty-two days after the prescribed period of limitation under the Act, and given that the court has the power to condone a delay of only up to thirty days, the present application fails and is bound to be sacrificed at the altar of limitation."

12. From the above factual matrix, it is clear that the appellants have had a lackadaisical and nonchalant approach to the entire affair and even after giving the benefit of Section 14 of the Limitation Act, Section 34 application would have remained time barred.

13. Before I part with this judgement, it is essential to underscore the importance of adhering to statutory timelines especially within the context of arbitration. Unlike traditional litigation, where cases may languish in the court system for years, arbitration offers parties a streamlined and expeditious mechanism for resolving disputes. Central to the efficacy of arbitration is the timely administration of proceedings, which necessitates adherence to prescribed timelines at every stage of the arbitral process. Delay in challenging arbitral awards can prejudice the rights for the parties involved, particularly the party seeking to enforce the award. When disputes are resolved expeditiously, parties can obtain closure and move forward with their lives, rather than being mired in prolonged legal battles. Moreover, timely resolution reduces the burden on the court system, allowing courts to focus their resources on cases that require judicial intervention.

14. In light of the aforesaid, I find no reason to interfere with the order passed by the learned Additional District Judge under Section 34 of the Act dismissing the application as time barred.

15. Accordingly, the instant appeal is dismissed.

(2024) 5 ILRA 680
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/S 37 of Arbitration & Conciliation Act 1996 Defective No. 593 of 2023

Nirankar Dutt Tyagi & Anr.
...Defendants/Appellants
Versus
N.H.I. Unit Dehradun & Anr.

...Plaintiffs/Respondents

Counsel for the Appellants:
Sri Pankaj Dubey, Sri Santosh Kumar Srivastava

Counsel for the Respondents:
Sri Pranjal Mehrotra

A. Arbitration and Conciliation Act, 1996-Section 37-the appeal was filed with a delay of 393 days-the discretionary power is only to be exercised when sufficient cause is made out and compelling reasons are provided for condonation of delay-counsel for the appellants was suffering from serious illness, the appeal could not be filed within time, this explanation is not sufficient-the issue with regard to filing an appeal u/s 37 of the Act is no longer res integra as the same has been settled by the Supreme Court in various judgment.(Para 1 to 12)

B. The expression "sufficient cause" under section 5 of the Limitation Act is not elastic enough to cover long delays and merely because sufficient cause has been made out, there is no right to have such delay condoned. The Apex court held that only short delays, can be condoned only by way of an exception and not by the way of rule, and that too only when the party acted in a bonafide manner and not negligently.(Para 7)

The application is rejected. (E-6)

List of Cases cited:

1. M/s N.V. International Vs St. of Asam & ors. (2020) 2 SCC 109

2. Govt. of Mah. (Water Res. Deptt) Rtd by Ex. Eng. Vs M/s Borse Brothers Engs. & Cons. Pvt. Ltd (2021) 6 SCC 460

3. NHAI Vs Smt. Sampata Devi & ors. (2023) 12 ADJ 787

4. Pathapati Subba Reddy (Died) By LRs & ors. Vs The Special Dy. Collr. S.L.P. (Civil) No. 31248 of 2018

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

Civil Misc. Delay Condonation Application No.1 of 2024

1. Heard counsel appearing on behalf of the applicants/appellants and Mr. Pranjal Mehrotra with Mr. Ashish Kumar Gupta, counsel appearing on behalf of the respondent.

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

3. There is an inordinate delay of 393 days in filing this appeal under Section 37 of the Act.

4. In **M/s N.V. International v. State of Asam and others** reported in **2020 (2) SCC 109** [Coram:- Rohinton Fali Nariman and S. Ravindra Bhat, JJ.] and **Government of Maharashtra (Water Resources Department) Represented by Executive Engineer v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.** reported in **(2021) 6 SCC 460** [Coram :- Rohinton Fali Nariman, B.R. Gavai and Hrishikesh Roy, JJ.], the Supreme Court has stated that such a delay in filing an appeal under Section 37 of the Act cannot be allowed.

5. The issue with regard to filing an appeal under Section 37 of the Act is no longer res integra as the same has been settled by the Supreme Court. One may rely on the judgement in **M/s N.V. International**

(Supra), the relevant paragraph thereof is delineated below :-

"4. We may only add that what we have done in the aforesaid judgment is to add to the period of 90 days, which is provided by statute for filing of appeals under Section 37 of the Arbitration Act, a grace period of 30 days under Section 5 of the Limitation Act by following Lachmeshwar Prasad Shukul and Others (supra), as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned."

6. Furthermore, paragraph 61 of the judgement in **Government of Maharashtra (Water Resources Department) Represented by Executive Engineer (Supra)** is required to be looked into. The said paragraph is delineated below:-

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

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

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

(45) Further, Section 5 of the Limitation Act will apply to the appeals filed under Section 37 of the Act, 1996 and in holding the said applicability, the Apex Court noted with affirmative that Section 13(1A) of the Commercial Courts Act does not contain any provision akin to section 34(3) of the Arbitration Act, 1996 and merely provides for a limitation period of 60 days from the date of the judgment or order appealed against, without going into whether delay beyond this period can or cannot be condoned.

(46) Further, the expression 'sufficient cause' under Section 5 of the Limitation Act is not elastic enough to cover long delays and merely because sufficient cause has been made out, there is no right to have such delay condoned. The Apex Court

further held that only short delays, can be condoned only by way of an exception and not by the way of rule, and that too only when the party acted in a bona fide manner and not negligently.

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

8. The Supreme Court very recently in Special Leave Petition (Civil) No.31248 of 2018 titled as **Pathapati Subba Reddy (Died) By L.Rs. and others v. The Special Deputy Collector (LA)** [Coram:- Bela M. Trivedi and Pankaj Mithal, JJ.] decided on April 8, 2024, has dealt extensively with the law of limitation and after considering various judgements of the Supreme Court, has laid down certain principles to be followed while applying the law of limitation. The relevant paragraph is delineated below:-

"26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

9. In fact, the Supreme Court while upholding the judgement of the High Court went on to say that just because other persons have been granted relief in other matters that by itself would not be a ground for condoning the delay. The Supreme Court has deprecated the practice of taking lenient view and stated that just because the Courts, on earlier occasions, had taken lenient view would not entitle the appellants as a matter of right to be entitled to condonation of delay where no proper explanation was

provided by the them. The relevant paragraphs are delineated below:-

"30. The aforesaid decisions would not cut any ice as imposition of conditions are not warranted when sufficient cause has not been shown for condoning the delay. Secondly, delay is not liable to be condoned merely because some persons have been granted relief on the facts of their own case. Condonation of delay in such circumstances is in violation of the legislative intent or the express provision of the statute. Condoning of the delay merely for the reason that the claimants have been deprived of the interest for the delay without holding that they had made out a case for condoning the delay is not a correct approach, particularly when both the above decisions have been rendered in ignorance of the earlier pronouncement in the case of Basawaraj (supra).

31. Learned counsel for the petitioners next submitted on the basis of additional documents that in connection with the land acquisition in some other Special Leave Petitions, delay was condoned taking a lenient view and the compensation was enhanced with the rider that the claimants shall not be entitled for statutory benefits for the period of delay in approaching this Court or the High Court. The said orders do not clearly spell out the facts and the reasons explaining the delay in filing the appeal(s) but the fact remains that the delay was condoned by taking too liberal an approach and putting conditions which have not been approved of by this Court itself. In the absence of the facts for getting the delay condoned in the referred cases, vis-a-vis, the facts of this case, it cannot be said that the facts or the reasons of getting the delay condoned are identical or similar. Therefore, we are unable to exercise our discretionary power of condoning the delay in filing the appeal on parity with the above order(s)."

10. Upon a perusal of the above judgements, it is clear that the Arbitration Act being a legislation for speedy redressal, the delay in filing the appeal can only be allowed if the appellants make out a very strong case and explains the reasons for delay. In the present case, the reasons provided for condonation of delay are without assigning any specific reasons for the delay. No documents have been provided for the reasons given in the said affidavit. Furthermore, the only ground that has been taken for condonation of delay is that as the counsel for the appellants was suffering from serious illness, the appeal could not be filed within time. This explanation does not cut any ice whatsoever as the law of limitation as explained in the judgments above and elaborated in the judgment in **Pathapati Subba Reddy (Died) By L.Rs. and others (supra)** penned by Hon'ble Pankaj Mithal, J. is that the discretionary power is only to be exercised when sufficient cause is made out and compelling reasons are provided for condonation of delay. In the present case, one does not find any such reason provided which would enable this Court to condone the delay. In fact, it is crystal clear that the appellants have acted in a lackadaisical manner. It is clear that this appeal has been filed with a delay of 393 days. The filing of this appeal is a mere attempt to cloak the laissez faire attitude taken by the appellants.

11. In the light of the above, the delay condonation application is rejected.

Appeal

12. Since the delay condonation application has been rejected, consequently,

the appeal is dismissed as barred by limitation.

(2024) 5 ILRA 685
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Misc. Writ Petition No. 5637 of 2006

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

Counsel for the Petitioner:
Sri Rajiv Lochan Shukla, Sri Anil Kumar Shukla, Sri Devesh Vikram, Sri Shailendra K. Singh, Sri Shivakant

Counsel for the Respondents:
G.A., Sri Abhishek Kumar Chaubey, Sri Pradeep Pandey, Sri S.N. Verma, Sri S.S. Pandey

A. Criminal Lawr-Constitution of India, 1950-Article 226-Criminal Procedure Code, 1973-Section 145-The grandfather of the petitioner instituted a proceeding u/s 145 Crpc against his own real son before SDM Chunar whereby a preliminary order attaching property was passed-the dispute which may cause breach of peach continued but the SDM dropped the proceeding-the property was handed over to a Supurdgar and he died before the first round of litigation –it was the duty of the SDM to appoint any other person in place of deceased supurdgar but that step was never taken, instead, the heirs of supurdgar kept taking care of the property and this is too glaring and gross negligence on the part of the SDM concerned-The rights and duties of supurdgar cannot devolve upon the heirs of a supurdgar-Hence, impugned orders are set aside and the court concerned is directed to open the proceeding u/s 145 CrPC and direct for substitution of legal representative.(Para 1 to 15)

B. Where a piquant situation arises, in matters where a party has died during the pendency of proceeding u/s 145 Crpc and a serious dispute arises as to who is the legal heir, the Magistrate concerned cannot refuse to exercise its jurisdiction, just because he has no power to decide as to who is the 'heir' of the deceased or just because the matter of inheritance is fiercely fought in a civil court. The purpose of the proceedings which may be pending between the parties in a civil court or a revenue court. Definitely, the SDM is not empowered to decide the question of inheritance however, he can always be implead a legal representative to continue the proceedings with a larger interest of the parties and the society in mind.(Para 11)

The petition is disposed of. (E-6)

List of Cases cited:

1. Ram Sumer Puri Mahant Vs St. of U.P.

2. Amresh Tiwari Vs Lata Prasad Dubey

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

1. Heard Sri Ram Lakhan Deobanshi and Sri Shailendra Kumar Singh, learned counsels for the petitioner, Sri Anil Kumar Mishra, learned counsel for private respondent no.4 and Sri R.K. Gupta, learned A.G.A. for the State.

2. Written submissions/arguments filed on behalf of the petitioner and the private respondent no.4, are taken on record.

3. This criminal miscellaneous writ petition has been filed by petitioner Rajeshwar Singh against respondent no.4

Tez Bali and three others with a prayer as below:

"Issue a writ, order or direction in the nature of certiorari calling for the records of the case and quashing the impugned orders dated 3.1.2006 and 6.3.2006 passed by the respondent nos. 3 and 2 respectively (Annexure nos. 7 and 9 to the writ petition)"

4. The facts relevant for the controversy are:

• The grandfather (late Parmananda) of the petitioner Rajeshwar Singh instituted a proceeding under section 145 Cr.P.C. against his own real son before the S.D.M Chunar, whereby a preliminary order, attaching the property was passed on 04.03.1972.

• A criminal reference no. 13 of 1973 was made to the civil court, under section 146 Cr.P.C. and the civil court passed an order dated 03.05.1974, holding that grandfather of the petitioner, late Parmanand has been in possession over the plots in question, on the date of passing of preliminary order. Challenging the aforesaid order of 03.05.1974, the respondent no.4 Tejbali s/o Parmanand preferred a writ petition before this Court.

• During the pendency of aforesaid writ petition Parmanand died therefore, the writ petition no. 2690 of 1974 was dismissed on 20.11.1996 and interim order was discharged.

• In aforesaid order, the High Court made it clear that it will be open to the petitioner to raise a question about the desirability of continuing the proceeding under section 145 Cr.P.C., before the Magistrate concerned.

• Respondent no.4- Tejbali filed an application before the S.D.M., with a prayer that the disputed property may be released in his favour till the mutation proceeding pending before the Commissioner, Varanasi gets decided.

• The instant petitioner Rajeshwar Singh objected to aforesaid application filed by Tejbali, submitting that at the time when proceeding under section 145 Cr.P.C. was initiated, his father Dayaram and grandfather Parmanand were in possession and therefore after their death, the property had come into his possession.

• The court of S.D.M. Marihan, Mirzapur, by its order dated 11.04.2001, de-attached the disputed property and released the same in favour of Tejbali and the petitioner s/o Lt. Dayaram, subject to final decision by Addl. Commissioner, Varanasi Zone and dropped the proceeding under section 145 Cr.P.C.

• The instant petitioner as well as the instant respondent no.4 challenged the aforesaid order (dated 11.04.2001) by filing two separate criminal revisions i.e. criminal revision no. 142 of 2001 by the petitioner and criminal revision no. 98 of 2001 by the respondent no.4.

• Both the revisions were decided by a common order dated 16.07.2004, observing that only civil court could have decided the fact as to who were the heirs of the deceased, therefore, the order of the Magistrate deciding shares of the parties and releasing the disputed property in their favour, is an order passed beyond jurisdiction. The order was set aside and matter was remanded for decision afresh.

• The S.D.M. passed a fresh order on 03.01.2006, whereby he set aside the attachment, dropped the proceeding under section 145 Cr.P.C. and released the property in favour of respondent no.4-Tejbali.

• Challenging the aforesaid order passed by the S.D.M., the petitioner filed a

criminal revision no. 15 of 2006, which was rejected by Addl. Sessions Judge, Mirzapur vide its order dated 06.03.2006. Now, the petitioner is before this Court invoking writ jurisdiction, challenging the two orders dated 03.01.2006 and 06.03.2006.

5. The grounds taken by the petitioner in nutshell are; that it was wrong on the part of the court concerned to have given a finding that the petitioner could not have challenged the order as he was not a party in the proceedings and therefore, the revision was not maintainable and secondly, it was a misconceived and misplaced finding that the matter of heirship of late Dayaram could only be decided by a civil court. It is submitted on behalf of the petitioner that respondent no.4 filed a civil suit surreptitiously in his name and in the name of father of the petitioner, with the pleading that they were in joint possession of the property Arazi no. 232 and prayed for decree of permanent injunction. That civil suit no. 446 of 1981 abated on the basis of an application moved by defendant, submitting that Dayaram had died and his heirs have not been substituted. In a civil appeal he was allowed to prosecute the suit further. The argument of the petitioner is that Lt. Parmanand has been in possession of the property and the property had been wrongly handed over to a receiver, though, the petitioner has been in possession. The petitioner has been cultivating the same after death of the supurdgar and therefore, the orders passed by the courts below are illegal and arbitrary. They could not have delivered the property to respondent no.4, solely on the ground that after death of Parmanand, his son i.e. respondent no.4 was the only surviving party to the proceeding. The contention is that the learned court ignored the express provisions of law under section 145(7) Cr.P.C., in which it is clearly provided that if any party to the proceeding under section 145 Cr.P.C., dies, all the persons claiming to be his heirs, shall be substituted. The impugned orders dated 03.01.2006 and 06.03.2006 suffer from manifest error of law. The courts below were wrong in holding that because the respondent no.4 was sole surviving party and the claim of heirship/inheritance was pending adjudication before the revenue court, hence property could have only be released in favour of respondent no.4.

Furthermore by means of supplementary affidavit, it has been contended by the petitioner, that the courts below gave away possession of entire property belonging to Parmanand, to respondent no.4, however, being the only son of late Dayaram, petitioner's name stood entered in revenue record. He obviously inherited the property belonging to his father Dayaram, therefore, he is entitled to succeed to the property of Parmanand, in addition to Tejbali.

6. The main objections raised by the respondent are:- first that petitioner is neither a recorded owner nor was ever in possession of the property, since the very beginning. Neither he nor his father were party to proceeding under section 145 CrP.C. and that he had no concern with the instant dispute. The mutation proceedings are still pending. The proceedings before the civil court as well as the revenue court are also pending hence, in view of judgment of Apex Court in ***Ram Sumer Puri Mahant Vs. State of U.P. and Amresh Tiwari Vs. Lata Prasad Dubey***, the proceedings under section 145 Cr.P.C. are not maintainable. The petitioner is a stranger to proceedings under section 145 Cr.P.C., hence, there is no justification in reopening the proceeding under section 145 Cr.P.C. He has no locus

standi to question the legality of the impugned orders. Secondly that the issue regarding death of father of the petitioner is pending adjudication hence, the controversy cannot be decided, before that issue is decided by a competent court. This court has no power to go into the questions of facts under article 226 of the Constitution of India, therefore, the petition may be dismissed with cost.

7. Before I take up the arguments as advanced by the rival side, some of the facts on which there is no controversy may be reiterated. The litigation under section 145 Cr.P.C. began between Parmanand and his real son Tejbali in the year 1972. The S.D.M. Chunar passed a preliminary order under section 145 Cr.P.C. and also directed attachment of the property in dispute. The attached property was given in possession of one Kripa Singh s/o Raghunath in the capacity of a Supurdgar. Admittedly, at that time all the disputed property in question was recorded in the name of Parmanand. As a question of de facto possession arose between father and son, the S.D.M, referred the matter to the civil court. The civil court gave its decision on 03.05.1974, holding that Parmanand has been in possession since two months before the dispute arose. On the basis of the judgment given by the civil court in the reference by the S.D.M., the land was directed to be released in his favour of Parmanand, however, Tajbali s/o of Parmanand preferred a writ petition and the order of S.D.M. dated 03.05.1974 (releasing the land in favour of Parmanand), was stayed meanwhile. During the pendency of the writ proceeding before the High Court, Parmanand (the respondent no.3) died therefore, the interim order was vacated and the writ dismissed as having become infructuous, in view of death of only contesting party Parmanand (the respondent therein). It may importantly be noted that Parmanand had died in 1978 and the writ was dismissed by an order passed on 20.11.1996 and further it may also be noted that the High Court made an observation that Tajbali may raise the question of desirability of continuing the proceeding before the Magistrate concerned. There is no controversy as regard the fact that Tejbali and Dayaram both are sons of Parmanand. There has been a dispute whether Dayaram has died or has gone on pilgrimage. The instant petitioner is son of aforesaid Dayaram. The litigation which began between Parmanand and his real son Tejbali, now passed on to between Tejbali and the instant petitioner Rajeshwar Singh s/o Dayaram, on death of Parmanand. There is no plea from any of the sides that the sons of deceased Parmanand were ever divested of their rights, which might have devolved on them on the death of their father. In the year 1997 and probably in the light of observation made by the High Court as regard desirability of the continuance of proceedings under section 145 Cr.P.C., Tejbali admittedly applied before the S.D.M. for release of property in his favour, saying that the property has been mutated in his name and his brother Dayaram's name in revenue paper and as Dayaram is on pilgrimage, therefore, taking advantage of this fact, his son Rajeshwar has wrongly got his name mutated in place of his father on false pretext of death of his father. Further it was submitted in the application given by Tejbali that the question of mutation and revenue entry in the name of Rajeshwar, in place of his father on the basis of inheritance, is subjudice before the court of Commissioner.

8. These contentions were vehemently opposed on behalf of Rajeshwar, saying that Tejbali (his uncle), on the basis of false,

manipulated and twisted facts and especially concealing the fact that Dayaram has actually died, without impleading him i.e. Rajeshwar, his son as party, is trying to obtain order of release of property in his favour. The matter went before the S.D.M. again in the light of above submissions of both the sides and the S.D.M. passed an order on 11.04.2001 whereby he directed that the disputed property be released in favour of Tejbali and Dayaram both, mainly on the basis that there is no dispute that initially the property was in ownership and possession of Parmanand, now deceased and therefore Tejbali and Dayaram, both being his legal heirs and Rajeshwar who is undisputedly son of Dayaram, is entitled to have possession, It may be noted at this very juncture that the S.D.M. took a view that share in the property belonging to Dayaram, shall obviously go to his son and not to his brother Tejbali. It may also be noted that this kind of reasoning, observation and finding did not find favour with the court of revision. The court of revision passed an order on 16.07.2004 and remanded the matter for fresh hearing. Importantly, the order of remand was passed mainly on the premise that Rajeshwar was never a party in the litigation, therefore, the question of releasing it in his favour did not arise. And further that only Parmanand was found in possession of the property therefore, it could have been released in his favour only, had he been alive And as he has actually died and further the question of inheritance is sub judice before a competent court, hence till that issue is decided, the S.D.M. could not have released the property in favour of Rajeshwar.

9. In nutshell, following undisputed facts emerge that Parmanand, who is grandfather of the present petitioner Rajeshwar and father of respondent no.4, died in 1978, during the pendency of proceedings under section 145 Cr.P.C. (which was initiated at his behest against his real son Tejbali only) At that time, his other son Dayaram was not in picture, for the reason that he had either died or was not traceable. The writ proceeding before the High Court in which Parmanand and one of his sons Tejbali was party, was dismissed as having become infructuous because of his death. It may be noted that the fact that his other son being missing or having gone on pilgrimage and not traceable for any reason or had died was never brought before the courts concerned in any manner. The main contention of the petitioner is that these facts were deliberately not brought before the courts as respondent no.4-Tejbali his uncle wanted that all the property should be released in his possession only.

10. The provisions of section 145(7) Cr.P.C. which appear relevant in the circumstances of this case, are being reproduced as below:

"7. When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto."

The provision says that the proceeding under section 145 may continue by the legal representatives of the deceased party and further that where any question arises as to who is the legal representatives of the deceased party, all persons claiming to be his representatives shall be impleaded. There is no denial of the fact that Rajeshwar

Singh is the real son of Dayaram. The question of inheritance went before the other forum just because a question was raised by Tejbali that till Dayaram is alive his son Rajeshwar cannot claim property. On the other hand, Rajeshwar always claimed that his father has actually died therefore, his share of property naturally devolved on him and that therefore, he should have been impleaded in the proceeding under section 145 Cr.P.C. and that he is entitled for release of at least his share in the property in his favour.

In view of above factual position, the impugned orders dated 03.01.2006, and 06.03.2006 cannot stand as whole of the property has been released in possession of his uncle Tejbali. He has been illegally deprived of his property. In the light of above arguments further contention of the petitioner is that in revenue records, the entry in his name exists. The order of mutation, though was challenged by Tejbali is still in force. And meanwhile, civil death of Dayaram has also been declared by the civil court.

11. The forceful contention of the petitioner is that it was wrong for assuming that property in question could only be delivered to Tejbali just because the only other party had died. The provisions of section 145 (7) Cr.P.C. were not followed. Respondent no.4 never brought this fact into knowledge of the SDM or any other court, (in which the other litigations proceeded) that he had a real brother Dayaram, who inherited half of the share, on death of Parmanand. It is argued that irrespective of the fact that Dayaram had died or was missing or was on pilgrimage, at least his real brother had no right over Dayaram's share. I find force in this argument. Another very important fact is that the purpose of proceeding under section 145 Cr.P.C. or attachment under section 146 Cr.P.C. is nothing but to prevent and avoid breach of peace and to maintain law and order for the purpose of keeping peace in the society at large. The provisions of section 145 and 146 Cr.P.C. are preventive in nature. The purpose is to prevent any ugly occurrence because of disputes over land and water. The executive has been entrusted with responsibility to take measures where a dispute between two private parties may give rise to an incident which may disrupt the peace to which society at large is entitled. Provisions of section 145(7) have been introduced for the purpose that in case, threat of breach of peace continues, even when a party has died, the proceeding may be continued by impleading the legal representatives of the warring parties. Definitely and undisputedly when legal representatives are to be impleaded for continuance of proceeding under section 145 Cr.P.C., the Magistrate is not to decide who is actually the legal heir of the deceased. The only thing is to be decided is who are to be substituted as his legal representative. **I find it very important to point out that there is a difference between the legal heirs and legal representatives. The word "legal representative" has not been defined in Cr.P.C. In my opinion when a question arises as who is the legal representative of a party, same meaning should be attached as has been defined in Civil Procedure Code. The word 'legal heir' and 'legal representative' are not interchangeable and are not exactly the same, as is very clear from the definition itself. In my opinion, where a piquant situation arises, in matters where a party has died during the pendency of proceeding under section 145 Cr.P.C. and a serious dispute arises as to who is the legal heir, the Magistrate concerned cannot refuse to exercise its**

jurisdiction, just because he has no power to decide as to who is the 'heir' of the deceased or just because the matter of inheritance is fiercely fought in a civil court. The purpose of the proceeding under section 145 Cr.P.C. is significantly different from the proceedings which may be pending between the parties in a civil court or a revenue court. Definitely, the S.D.M. is not empowered to decide the question of inheritance however, he can always implead a legal representative to continue the proceedings with a larger interest of the parties and the society in mind.

12. It is very interesting to note that probably the dispute, which may cause breach of peace continued but the S.D.M. dropped the proceeding. Another thing which has **escaped** attention at almost all the stages of litigation is that the property was handed over to a Supurdgar and admittedly he died before the very first round of litigation under section 145 Cr.P.C., came to be finally concluded. In my opinion, it was duty of the S.D.M. to appoint any other person in place of deceased supurdgar but that step was never taken, instead, the heirs of supurdgar kept taking care of the property and this is too glaring and gross negligence on the part of the S.D.M. concerned. **The rights and duties of supurdgar cannot devolve upon the heirs of a supurdgar.**

13. In view of the above facts and circumstances, I find that this matter needs indulgence of this Court in exercise of powers under article 226 of Constitution of India. Hence, the impugned orders dated 03.01.2006 and 06.03.2006 are hereby set aside and the court concerned is directed to open the proceeding under section 145 Cr.P.C., and direct for substitution of legal representative. Further he/she shall decide the question of desirability of its continuance, in the light of the purpose of the initiation of the proceedings under section 145 Cr.P.C. which is to prevent breach of peace. And in case the court is of opinion that there is no need to continue the same as no longer apprehension of breach of peace existed, it shall decide the matter of delivery of possession in accordance with law.

14. The impugned orders dated **03.01.2006** and **06.03.2006** are hereby set aside. The matter is remanded to the court concerned for decision afresh in the light of observations made in the body of this order.

15. Accordingly, this petition is **disposed of.**

(2024) 5 ILRA 691
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Special Appeal Defective No. 380 of 2024

State of U.P. & Ors. ...Appellants
Versus
Geeta Rani ...Respondent

Counsel for the Appellants:
C.S.C., Kunal Ravi Singh, S.C.

Counsel for the Respondent:
Atipriya Gautam, Devesh Mishra

A. Service Law – UP Recruitment of Dependents of Government Servants Dying in Harness. Rules, 1974 – GO dated 18.09.2015 – Clause 2(5) – Compassionate Appointment – Petitioner failed in physical

efficiency test for the post of Sub-Inspector – Second chance for the test sought for – Permissibility – Held, the petitioner was not liable to be offered the post of Sub Inspector. Moreover, once having failed the physical efficiency test, no second chance for qualifying the same could have been offered to a candidate claiming compassionate appointment. (Para 27)

B. Jurisprudence – Constitution of India – Article 141 – Rule of *stare decisis* defined – Held, Article 141 provides that the decisions of the Supreme Court are binding on all courts within the territory of India. Although there is no express provision, but by convention the decisions of a High Court are binding on all lower courts within the territorial jurisdiction of that High Court. Similarly, a decision of a higher Bench, is binding on the lower Bench. (Para 24)

C. Jurisprudence – Doctrine of Precedent – Binding precedent, Persuasive precedent, Original precedent and Declaratory precedent explained – Binding precedents are also known as authoritative precedents. These precedents are bound to be followed by a lower court or other equivalent courts once a judgment is made whether they approve it or not – Persuasive precedents include decisions taken by an inferior court that a higher court or any other court is not obliged to follow. It depends on the court to decide whether to consider it or not – An original precedent are those judgements where the court has never taken a decision in a case and it has to use its own discretion to reach to a conclusion – A declaratory precedent is application of existing precedent in a particular case. A declaratory precedent involves declaring an existing law and putting into practice, hence it does not help in creating new law. (Para 25)

Special Appeal disposed of. (E-1)

List of Cases cited:

1. The St. of Uttar Pradesh & ors. Vs Premlata; AIR 2021 SC 4984

2. Suneel Kumar Vs St. of U.P. & ors.; AIR 2022 SC 5416

3. Special Appeal No. 363 of 2019; St. of U.P. & ors. Vs Ashif Ali decided on 04.03.2022

4. Service Single No. 14796 of 2020; Dharmendra Singh Vs St. of U.P. & ors. decided on 22.10.2020

5. Special Appeal Defective No. 84 of 2021; St. of U.P. & ors. Vs Dharmendra Singh decided on 11.02.2021

6. Special Leave to Appeal (C) No(s). 7554 of 2021; St. of U.P. & ors. Vs Dharmendra Singh

7. Writ A No. 19265 of 2023; Anil Kumar & ors. Vs St. of U.P. & ors. decided on 21.11.2023

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

(In Re:- Civil Misc. Delay Condonation Application)

1. Heard learned counsel for the parties.

2. Cause shown in the affidavit filed in support of the instant application is to the satisfaction of the Court.

3. Accordingly, the delay in filing the instant appeal stands condoned and delay condonation application is allowed.

(Order on Memo of Appeal)

4. The instant intra-court Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred to as the "Rules, 1952") is being preferred by the appellant-respondent challenging the legality and validity of the judgment and order dated

21.12.2023 passed by the writ Court in **WRIT - A No. - 21105 of 2023** ***(Geeta Rani Vs. The State of U.P. and 5 Others),*** wherein, learned Single Judge while accepting the ratio has essentially premised its judgment on the basis of the mandate given by a Coordinate Bench of this Court vide its judgment and order dated 22.10.2020 passed in **SERVICE SINGLE No.- 14796 of 2020** ***(Dharmendra Singh Vs. State of U.P. Thru. Prin. Secy. Home, Lko. & Ors.)*** and accorded a last opportunity to the respondent-petitioner to clear the physical efficiency test within a period of 30 days and even if she fails, suitable appointment on compassionate basis shall be accorded to her.

5. Before hearing the rival submissions of the parties, it would be in the fitness of things to reproduce the order dated 21.12.2023 passed by learned Single Judge:-

"Petitioner applied for compassionate appointment on account of her husband late Man Singh dying in harness while working as Head Constable with Civil Police on 02.02.2021 however, while his application was entertained for the post of Sub-Inspector and was directed for the physical efficiency test, he could complete running in excess of 3 seconds to the scheduled time which was prescribed as 16 minutes for 2.4 kms.

Learned counsel for the petitioner submits that in respect of 3 seconds of delay there should be taken a sympathetic consideration because in many of service rules that provide for compassionate appointment relaxations are offered. He submits that in matters of compassionate appointment, the authorities ought to have taken pragmatic view as these rules are exception to the general rules of recruitment to show compassion towards the bereaved family as sole earning member has met premature death leaving liability behind. However, he submits that given an opportunity, may be as a last one, she would be again participating in the physical efficiency test and if this time she fails, she will not be setting up any further claim for the post and then can be offered any suitable appointment on compassionate basis.

Learned counsel for the petitioner has also relied upon an order of a coordinate Bench of this Court at Lucknow Bench in Service Single No.- 14796 of 2020 decided on 22nd October, 2020.

Learned Standing Counsel submits that the police force requires certain level of physical efficiency and any compromise to the same would not be in the interest in the police force which is involved in policing like civil administration as and when requires qua security of the people. However, he does not dispute that one direction has been issued in a case but submits, that cannot be taken as a binding precedent. He though submits that second opportunity as such could be offered in the discretion of this Court only as he does not dispute that the rules of compassionate appointment are exceptional to the general rules, however, reiterates the principle that there is no vested right to get a post of choice by way of compassionate appointment.

Having heard learned counsel for the respective parties and their arguments raised across the bar, considering the fact that the petitioner has been seeking a compassionate appointment and for which he was directed for physical efficiency test and has just exceeded three seconds to the scheduled time prescribed for running of a candidate as per the rules, the Court takes pragmatic view and directs that one last opportunity may be given to the petitioner to participate in the physical efficiency test.

It is, however, made clear that this will be a last opportunity and no further opportunity will be offered to the petitioner and in the event petitioner fails, she may be offered suitable appointment on compassionate basis.

The above exercise of physical efficiency test will be done within a period of 30 days from the the date of production of certified copy of this order.

With the aforesaid observations and directions, this petition stands disposed of."

FACTS

6. From the perusal of the record, it transpires that husband of the petitioner namely, Man Singh died in harness while working as Head Constable in Civil Police on 02.02.2021. Thereafter, on account of unfortunate demise of her husband, the petitioner applied for compassionate appointment and her application was entertained by the police department for the post of Sub-Inspector and she was asked to undergo the physical efficiency test. However, the petitioner could not complete the running within the stipulated time as fixed by the Police department. Consequently, she has approached to this Court to consider her claim qua the compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness. Rules, 1974 (hereinafter referred to as the "the Rules, 1974") for the post of Sub-Inspector as per her qualification by filing Writ A No.2105 of 2023, wherein, the learned Single Judge taking sympathetic view accorded a last opportunity to the respondent-petitioner to clear the physical efficiency test and entitled her for a suitable appointment on compassionate basis in case she fails to qualify in the physical efficiency test.

ARGUMENTS ON BEHALF OF APPELLANT-STATE

7. Mr. Fuzail Ahmad Ansari, learned Standing Counsel for the appellant-State vehemently submitted that the order passed by the learned Single Judge cannot sustain on the ground that claim of the respondent-petitioner was to be considered under the Rules, 1974 and as per the procedure prescribed in the disciplined force, the respondent-petitioner must undergo Physical Efficiency Test, Medical Test etc. In continuance to the same, he submitted that the respondent-petitioner could not be appointed as Sub-Inspector under the Rules, 1974 as she could not fulfill the minimum eligibility criteria, which is prescribed as such, for the Physical Efficiency Test. He submitted that there is no provision under the Rules, 1974 and the Government Order for according further opportunity or chance for completion of physical efficiency test. It has been argued that the respondent-petitioner has appeared in the physical examination out of her own freewill and without any objection and qua the same he has also placed reliance upon the declaration form dated 31.12.2022 filled up by the respondent-petitioner for the physical test. The relevant conditions contained in the aforesaid declaration form is reproduced hereinunder:-

" परीक्षा तिथि व समय एव परीक्षा केन्द्र में परिवर्तन सम्बन्धी कोई अनुरोध स्वीकार नहीं किया जायेगा।

दक्षता परीक्षा में विहित पत्रक प्राप्त न कर सकने के कारण असफल हो जाने वाले अभ्यर्थी को दूसरा मौका नहीं दिया जायेगा और

*स्वास्थ्य के कारण या किसी …… परीक्षा के लिए अपील स्वीकार नहीं की जायेगी, समय एवं दिनांक. …… **में सम्मिलित होने में असफल हो जाने वाले अभ्यर्थी को दूसरा मौका नहीं दिया जायेगा और स्वास्थ्य के कारण या किसी अन्य आधार पर …….. अपील स्वीकार नहीं की जायेगी।***

अपरिहार्य कारों (वर्षा अथवा तकनीकी कठिनाई) से उस तिथि की परीक्षा पूर्णतः अथवा बाधित होने की दशा में बोर्ड द्वारा किसी अन्य तिथि पर परीक्षा आयोजित नहीं की जायेगी।

द्वारा यथासम्भव उपयुक्त चिकित्सक विशेषकर हृदय रोग विशेषज्ञा से अपने हृदय तथा रक्तचाप की जांच कराकर चिकित्सक की राय के अनुसार अपने स्वास्थ्य का …… व परीक्षा में अथवा पूर्ण जिम्मेदारी पर ही भाग लें। यदि किसी अभ्यर्थी की शारीरिक दक्षता परीक्षा के दौरान स्वास्थ्य सम्बन्धी आकस्मिक समस्या आती है…… नहीं होगी।

<u>घोषणा</u>

*मैं (अभ्यर्थी का नाम) गीता रानी पुत्र/पुत्री मानसिक सेवायोजन प्रस्तावक जनपद इकाई गाजियाबाद प्रमाणित करता हूँ कि मृतक आश्रित के उप निरीक्षक नागरिक पुलिस के पद पर भर्ती हेतु आयोजित इस शारीरिक दक्षता परीक्षा, जिसमें पुरुष अभ्यर्थियों को 4.8 कि०मी० के. में तथा **महिला अभ्यर्थियों को 2.4 कि०मी० की दौड़ 16 मिनट में पूरी करनी है, में भाग लेने हेतु मैं पूर्ण रूप से स्वस्थ हूँ और इसमें स्वेच्छा से नाम …….. की शारीरिक क्षति / स्वास्थ्य सम्बन्धी अप्रिय घटना घटित होने पर उसके लिये मैं स्वयं जिम्मेदारी होऊंगा / होऊंगी। यह भी कि **मेरी पहचान …… करने आदि के लिए पुलिस भर्ती बोर्ड को मेरे आधार डाटा का उपयोग करने के लिए प्राधिकृत करता/करती हूँ।***

31.12.22

गीता रानी

अभ्यर्थी के हस्ताक्षर

प्रति हस्ताक्षरित

ह0/अस्पष्ट

कार्यालयाध्यक्ष के हस्ताक्षर

नाम/पदनाम के मुहर व दिनांक

मोहर/अस्पष्ट

// सत्य प्रतिलिपि //"

(emphasis supplied)

8. In this backdrop, learned Standing Counsel for the appellant-State submitted that once the respondent-petitioner participated in the physical examination without any objection and that too, out of her own freewill and failed therein, then she could not turn around and ask for second chance.

9. Learned Standing Counsel has further placed reliance upon the Clause 2 (5) of the Government Order dated 18.09.2015, which clearly provides that only one chance will be offered to the applicants, who are inclined to be appointed under the compassionate appointment. The aforesaid G.O. dated 18.09.2015 was not under challenge before the learned Single Judge. Hence, learned Single Judge erred in law in according the second chance to the

petitioner, which is, in fact, not available to the candidates claiming compassionate appointment.

10. Learned Standing Counsel for the appellant-State in support of his submission has further placed reliance upon the judgment and order dated 05.10.2021 passed by Hon'ble the Apex Court in ***Civil Appeal No.6003 of 2021 (The State of Uttar Pradesh & Ors. Vs. Premlata) reported in AIR 2021 SC 4984*** and submitted that, in fact, the petitioner was not liable to be offered the post of Sub-Inspector, which is higher post than the post of Head Constable on which her husband was admittedly discharging his duties and hence, she could have been offered the post of Constable or any other post lower than that. In this regard, he has also relied upon the interpretation given by the Hon'ble Apex Court to the term "suitable post" under Rule 5 of the Rules, 1974. The relevant portion of the aforesaid order is reproduced hereinunder:-

"10.1 Applying the law laid down by this court in the aforesaid decisions and considering the observations made hereinabove and the object and purpose for which the appointment on compassionate ground is provided, the submissions on behalf of the respondent and the interpretation by the Division Bench of the High Court on Rule 5 of Rules 1974, is required to be considered.

10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee. ***The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. 'Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment.*** *In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of Class II or Class I post and the deceased employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner.* ***As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.***

11. ***In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the 'suitable post' under Rule***

5 of the Dying In Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground."

(emphasis supplied)

11. To elaborate his submissions he has placed reliance upon the judgment and order dated 02.08.2022 passed by Hon'ble the Apex Court in ***Civil Appeal No.-5038 of 2022 (Suneel Kumar Vs. State of U.P. & Ors.) reported in AIR 2022 SC 5416.*** The relevant portion of the aforesaid order is reproduced hereinunder:-

"10. At the same time, as far as the question relating to the entitlement as it were of the appellant to be considered to the post of Gram Panchayat Officer is concerned, it is without doubt a post borne in Class-III. The father of the appellant was working as a Sweeper borne in Class-IV post. We have noticed the view taken by this Court in Premlata (supra). In other words, the law as declared is to the effect that the words "suitable employment" in Rule 5 must be understood with reference to the post held by the deceased employee. The superior qualification held by a dependent cannot determine the scope of the words "suitable employment".

11. It is clear that the Annexure P-1 does not represent statutory Rules. We do not think we should be persuaded to take a different view as things stand. We cannot eclipse the dimension that the whole purport of the scheme of compassionate appointment is to reach immediate relief to the bereaved family. In such circumstances, the meaning placed on the words "suitable employment" bearing in mind the post held by the deceased employee cannot be said to be an unreasonable or incorrect view."

12. Learned Standing Counsel has also placed reliance upon the judgment and order dated 04.03.2022 passed by a Division Bench of this Court in ***SPECIAL APPEAL No.- 363 of 2019 (State of U.P. and 2 Others Vs. Ashif Ali)*** which also dealt with a similar issue of providing second chance to a candidate claiming compassionate appointment. The relevant portion of the aforesaid order is reproduced hereinunder:-

"15. Consequently, we find that the learned Single Judge was not justified in directing the appellants to conduct a fresh physical efficiency test of the writ petitioner and consider his claim for compassionate appointment afresh particularly in view of the fact that the Rules and Government Orders governing the issue do not permit any second attempt to a candidate who has failed the physical test in the first attempt. The appeal is allowed. The judgment and order dated 30.8.2018 passed by the learned Single Judge allowing the writ petition with cost is set aside. The writ petition stands dismissed."

13. Referring to the order passed by the learned Single Judge, he submitted that the learned Single Judge while considering the matter has heavily relied upon the ratio laid down by another Single Bench in an order dated 22.10.2020 passed in ***Service Single No. - 14796 of 2020 (Dharmendra Singh Vs. State of U.P. Thru. Prin. Secy. Home, Lko. & Ors.)*** which itself contained that it will not be treated as "a precedent". The same is extracted hereinunder:-

"On 06.10.2020 the following order was passed by this court. Today Shri

Ranvijay Singh Additional Chief Counsel has informed the court on the basis of instructions that in the physical endurance test a distance of 4.8 k.m. was to be run by the petitioner in 30 minutes but he completed same in 30.01 minutes i.e. he overshot the time limit only by one second. This is precisely the case of the petitioner that he should be given one more opportunity considering the fact that he is being considered for appointment on compassionate basis.

Considering the fact of the case as the petitioner exceeded the time limit only by one second, ends of justice require that he be given one more opportunity by the opposite parties to undergo the physical endurance test. It should be conducted within two weeks of receipt of this order, based on which the candidature of the petitioner for compassionate appointment shall be considered. ***This order shall not be treated as a precedent as it has been passed in peculiar of facts of the present case.***

Petition is disposed of in the aforesaid terms."

(emphasis supplied)

14. He further submitted that the aforesaid order dated 22.10.2020 passed by the learned Single Judge was assailed by the State in the intra-court appeal i.e. ***SPECIAL APPEAL DEFECTIVE No. -84 of 2021 (State of U.P. Thru. Prin. Secy. Home Lko. & Ors. Vs. Dharmendra Singh),*** wherein the Division Bench of this Court has proceeded to observe that the order passed by learned Single Judge was based upon equity and not to be treated as a precedent, even though, the order passed by learned Single Judge was affirmed and the Special Appeal was dismissed vide judgment and order dated 11.2.2021. Thereafter, against the appellate order, the State Government has preferred a Special Leave to Appeal before the Hon'ble Apex Court being ***Special Leave to Appeal (C) No(s). 7554/2021 (State of U.P. & Ors. Vs. Dharmendra Singh),*** wherein, Hon'ble Apex Court was pleased to dismiss the same making an observation to the effect that issue of law shall remain open and the judgment of the Division Bench shall not be operated as a precedent. The order passed by the Hon'ble Apex Court is reproduced hereinunder:-

"Having regard to the facts and circumstances of this case, we do not deem it necessary to interfere with the impugned judgment and order in exercise of the power under Article 136 of the Constitution of India.

The special leave petition, is accordingly, dismissed.

We, however, make it absolutely clear that the issue of law shall remain open and the judgment of the Division Bench shall not operate as a precedent."

(emphasis supplied)

15. Learned Standing Counsel has also drawn our attention to the order dated 21.11.2023 passed by learned Single Judge in ***WRIT - A No.19265 of 2023 (Anil Kumar and 2 Others Vs. State of U.P. and 3 Others),*** wherein, learned Single Judge has disposed of the writ petition extending the benefit to the petitioners, therein, under Clause 2(5) of the Government Order dated 18.09.2015. The aforesaid order is reproduced hereinunder:-

"1. Heard Sri Vijay Kumar Pandey, learned counsel for the petitioner as well as learned Standing Counsel.

2.Petitioner sought appointment on compassionate ground as Constable as he is intermediate qualified. However, in the

he could not qualify in the Physical Efficiency Test.

3. Learned counsel for the petitioner submits that he is entitled to the benefit as given by this Court in the case of Jitendra Singh and another vs. State of U.P. and 3 others, Writ A No. 16436 of 2022.

4. Learned Standing Counsel submits that in the above regard he has obtained instructions and in view of the provisions as contained under the Government Order dated 18.09.2015 petitioner can be adjusted against any other post, if he applies afresh within three months. The provision as contained in para 5 of the instructions is reproduced hereunder:

"5. यह कि प्रश्नगत भर्ती शासनादेश दिनांकितः 18.09.2015 के प्रावधानों के अन्तर्गत संपन्न की गयी थी, जिसके प्रस्तर-2(5) में निम्नवत हैः-

"किसी भी पद पर मृत पुलिस कर्मी के आश्रित के रूप में भर्ती हेतु किसी भी अभ्यर्थी को नियमानुसार एक ही अवसर प्रदान किया जायेगा, अगर वह इस हेतु प्रदान किये गये अवसर में किसी भी कारण से उस पद के लिए निर्धारित प्रक्रियानुसार सेवायोजन पाने में असफल रहता है, तो उसे किसी निम्न पद पर सेवायोजन हेतु ऑफर दिया जायेगा और वह यदि 03 माह के अन्दर अन्य किसी पद पर सेवायोजन हेतु आवेदन नहीं करता है, तो यह समझा जायेगा कि वह पुलिस विभाग में किसी भी पद पर सेवायोजन पाने का इच्छुक नहीं है।"

5. In view of the above, it is hereby provided that since the petitioner has failed in physical efficiency test for the post of Constable, it will remain open for the petitioners to apply afresh for any other post in the police department which may be offered to him as per their eligibility.

6. It is accordingly provided that in the event petitioners make an application within four weeks from today, the same shall be considered and disposed of in the light of provisions as contained under the Government Order dated 18.09.2015 and quoted herein above. Petitioners, if held entitled for any other post, the same shall be offered within 30 days from the date of decision to be taken by the authority.

7. With the aforesaid observations and directions, this petition stands disposed of."

ARGUMENTS ON BEHALF OF RESPONDENT-PETITIONER

16. Learned counsel for the respondent-petitioner vehemently opposed the instant appeal and submitted that learned Single Judge has rightly passed the order on equity and essentially in respect of only 3 seconds of delay, the authorities must take sympathetic consideration, especially in the backdrop that the matter relates to compassionate employment and as such, the appeal is liable to be dismissed.

17. The learned counsel for the respondent-petitioner has drawn our attention to the judgement of **Dharmendra Singh (supra)** and submitted that the learned Single Judge has exercised his equity jurisdiction under Article 226 of the Constitution of India and as such, relying upon the same ratio the learned Single Judge has committed no error in exercising equity in favour of the respondent-petitioner and granting another opportunity to her in the present case.

ANALYSIS

18. We have heard the learned counsel for the parties and perused the material on

record and have carefully considered the judgements cited by the learned Advocates.

19. The present matter relates to compassionate appointment in a disciplined force i.e. police force and under the relevant provisions of the Rules, no relaxation in physical examination is accorded even to the direct recruitees and if they do not complete the race in the specific time, they are not selected hence no relaxation is available or to be extended qua the candidate seeking compassionate appointment, who even have a subsequent chance to claim the next lower post within the three months. In the present matter, admittedly, the admit card was issued by the State-appellant for physical test, which took place on 04.01.2024 and she had participated in the physical examination without any objection, compulsion or duress and with her own consent and freewill, which is crystal clear from the declaration form dated 31.12.2022 filled by her. In such admitted situation, in case, she failed in physical efficiency test then under the compassionate employment, she could not ask for a second chance to undergo the physical efficiency test again.

20. Surprisingly, in the present matter, the husband of the petitioner was working as Head Constable and she was allowed to participate for an appointment under the compassionate employment on the higher post to which her husband was holding i.e. on the post of Sub Inspector. The said offer could not be accorded to the petitioner-respondent in view of the law laid down by the Apex Court in the case of **Premlata (supra)** and **Suneel Kumar (supra).** Even on this score she was not eligible to be appointed as Sub-Inspector. Moreover, she failed in the physical efficiency test.

21. No such provision could be placed by the counsel for the respondent-petitioner before us, which contemplates for providing another chance to clear the physical efficiency test. Whereas, in another matter, the learned Single Judge, on the similar facts, has already disposed of the matter in the light of the Clause 2(5) of the the Government Order dated 18.09.2015. For ready reference, the aforesaid Clause 2(5) of the G.O. dated 18.09.2015 is reproduced hereinunder:-

"किसी भी पद पर मृत पुलिस कर्मी के आश्रित के रूप में भर्ती हेतु किसी भी अभ्यर्थी को नियमानुसार एक ही अवसर प्रदान किया जायेगा, अगर वह इस हेतु प्रदान किये गये अवसर में किसी भी कारण से, उस पद के लिए निर्धारित प्रक्रियानुसार सेवायोजन पाने में असफल रहता है, तो उसे किसी निम्न पद पर सेवायोजन हेतु ऑफर दिया जायेगा और वह यदि 03 माह के अन्दर अन्य किसी पद पर सेवायोजन हेतु आवेदन नहीं करता है, तो यह समझा जायेगा कि वह पुलिस विभाग में किसी भी पद पर सेवायोजन पाने का इच्छुक नहीं है।"

22. It is not in dispute that the judgement relied upon by the learned counsel for the respondent-petitioner in the case of **Dharmendra Kumar (supra)** itself contained that it shall not be treated as a precedent. Although the Special Appeal and the Special Leave Petition filed by the State were dismissed but while dismissing the SLP the Apex Court also made it absolutely clear that the issue of law shall remain open and the judgement of the Division Bench shall not operate as a precedent.

23. In the opinion of the Court, the orders passed by the writ court, appellate

court and the Apex Court in the case of **Dharmendra Kumar (supra)** is not binding precedent. It would be apt to have a glance of definition of "precedent":-

"As per Black's law dictionary, 'precedent' means an adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."

Salmond: -Precedent is, ?in a loose sense, it includes merely reported case law which may be cited & followed by courts.? In a strict sense, that case law which not only has a great binding authority but must also be followed.

Keeton: - Judicial precedent is a judicial decision to which authority has in some measure been attached.

24. The origin of the term 'precedent' is from a Latin term called 'stare decisis' which became the doctrine of legal precedent. The term 'stare decisis' refer to courts looking at similar or historical case as a guide to take a judgement in future, it means to stand by the decided cases. This doctrine is mentioned in the Article 141 of the Constitution. It is used in all courts and in all legal issues. The doctrine of precedent is expressly incorporated in India by Article 141 of the Constitution of India, 1950. Article 141 provides that the decisions of the Supreme Court are binding on all courts within the territory of India. Although there is no express provision, but by convention the decisions of a High Court are binding on all lower courts within the territorial jurisdiction of that High Court. Similarly, a decision of a higher Bench, is binding on the lower Bench.

25. With the evolution of law, the concept of precedent gained new dimensions and it came to be classified as 'binding precedents', 'persuasive precedent', 'original precedent' and 'declaratory precedent'. Binding precedents are also known as authoritative precedents. These precedents are bound to be followed by a lower court or other equivalent courts once a judgment is made whether they approve it or not. Persuasive precedents include decisions taken by an inferior court that a higher court or any other court is not obliged to follow. It depends on the court to decide whether to consider it or not. An original precedent are those judgements where the court has never taken a decision in a case and it has to use its own discretion to reach to a conclusion. A declaratory precedent is application of existing precedent in a particular case. A declaratory precedent involves declaring an existing law and putting into practice, hence it does not help in creating new law.

CONCLUSION

26. In the aforesaid facts and circumstances, we are of the opinion that the learned Single Judge committed an error in law in following the ratio of an order, passed by another Bench of same strength which itself contained that the order shall not be treated as 'precedent'.

27. In view of the ratio laid down by Hon'ble the Apex Court in **Premlata (supra)** and **Suneel Kumar (supra),** the petitioner was not liable to be offered the post of Sub Inspector. Moreover, once having failed the physical efficiency test, no second chance for qualifying the same could have been offered to a candidate claiming compassionate appointment. As such, the order impugned cannot be sustained and accordingly, the same is set aside.

OBSERVATIONS OF THE COURT

28. Before parting, this Court deems it fit to observe that the appointment under the compassionate scheme is not meant to be an alternate source of recruitment. It is essentially to reach immediate succor to a bereaved family. In other words, the sudden passing away of a government servant creates a financial vacuum and it is to lend a helping hand to the genuinely needed members of the bereaved family that an appointment is provided. It is never meant to be a source of conferring any status or an alternate mode of recruitment.

ORDER BY THE COURT

29. In view of the above, it is provided that as the respondent-petitioner has failed to qualify in the physical examination for the post of Sub-Inspector, it will remain open for her to apply afresh seeking compassionate appointment on any other suitable post in the Department, which may be offered to her as per her eligibility and suitability. It is also provided that in the event the respondent-petitioner makes any such application within four weeks from today, the same shall be considered and disposed of in view of the observations made hereinabove as well as taking into account the Government Order dated 18.09.2015 within next three weeks. If the petitioner is considered entitled for any other post by the department, the same shall be offered to her within a period of 30 days' from the date of decision to be taken by the authority.

30. With the aforesaid observations, the instant special appeal stands ***disposed of.***

31. There shall be no order as to costs.

(2024) 5 ILRA 702
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2024

BEFORE

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

Writ-A No. 2175 of 2023

Om Veer & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sr. Advocate, Sri Uma Nath Pandey

Counsel for the Respondents:
Anjali Upadhya, C.S.C.

A. Service Law – Constitution of India – Article 14 – Discrimination – Termination from service – Petitioners were engaged with NOIDA through Service provider as Assistant Manager over a long period of time – Though 187 old employees, who were engaged through another Service providers have been retained, services of the petitioners have been dispensed with – Permissibility – Held, the Greater NOIDA, being an establishment of the St., ought not to pick and choose, throwing out able and experienced hands and replacing them by fresh hands for no ostensible and reason individuate to each case – The petitioners had been on the Greater NOIDA's roll directly, may be as contractual employees, over periods of time, spreading from 10-23 years – Held further, dispensation of the petitioners' services in the fashion, that has been done through the order impugned, appears to be unreasonable, arbitrary and discriminatory – High Court issued Mandamus for re-engagement of the petitioners, if regularly selected have not already joined. (Para 18, 19 and 25)

Writ petition allowed in part. (E-1)

List of Cases cited:

1. Ashok Kumar & ors.Vs St. of U.P. & ors.; 2019 SCC OnLine All 7333

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

1. This writ petition is directed against an order dated 30.01.2023 passed by the Special Executive Officer (Personnel), Greater NOIDA, District Gautam Budh Nagar, directing the petitioners to be sent back to the Service Provider with immediate effect.

2. According to the petitioners, they are holders of Diploma in Civil Engineering and engaged on different dates on posts of Technical Supervisors by the Greater New Okhla Industrial Development Authority (for short, 'the Greater NOIDA'). The details of the petitioners' engagement with the Greater NOIDA as Technical Supervisors, now called Assistant Managers, are detailed by the petitioners in the following terms:

Sl. No.	Name	Designation	Father's Name	Qualification	Working Period	Total Year
1	Om Veer	Assistant Manager	Bachchu Singh	Diploma Civil Engineering	2007-2023	17
2	Dharmendra Verma	Assistant Manager	Prem Kumar	Diploma Civil Engineering	2004-2023	19
3	Naveen Kumar	Assistant Manager	Shamsher Singh	Diploma Civil Engineering	1999-2023	23
4	Mohit Chaudhary	Assistant Manager	Tej Pal Singh	Diploma Civil Engineering	2013-2023	10
5	Indra Dev Chhokar	Assistant Manager	Chandra Pal	Diploma Civil Engineering	2002-2023	20

3. The aforesaid tabular depiction of facts relating to the five petitioners is pleaded in paragraph No.11 of the writ petition. A Government Order, bearing No. 717/36-5-2020-8(26)/2020 dated 18.08.2020 has been issued saying that in accordance with another Government Order dated 18.12.2019 issued by the Department of Personnel in various Departments of the Government of Uttar Pradesh and its subordinate Establishments, there would be hiring of manpower through outsourcing, and for the purpose, a website developed by the Government of India, called Government e-Marketplace or GeM Portal would have to be utilized. The Greater NOIDA adopted the Government Order dated 18.08.2020 in their 120th Board Meeting held on 09.09.2020. In a subsequent meeting of the Greater NOIDA Board, that is to say, 122nd Meeting held on 22.06.2021, it was resolved that manpower would be procured through the GeM Portal against vacant posts, regarding which requisition had already been sent to the Subordinate Service Public Services Commission and the Public Service Commission. The procurement would, thus,

be done by means of outsourcing through Placement Agencies.

4. It was also resolved that Assistant Managers, whose services had been hired through Placement Agencies or Service Providers, would be given the right to write measurement books only, if the concerned Assistant Manager holds necessary qualifications in engineering, as prescribed by the State Government and have further rendered satisfactory service for a period of five years with the Greater NOIDA regularly. In order to implement the resolution of the Greater NOIDA Board dated 22.06.2021 for engagement of Assistant Managers through outsourcing from the GeM Portal, an administrative decision was taken to fill up these posts through Service Providers. A detailed proposal was drawn up, for which the necessary administrative and financial approval was given by the Chief Executive Officer, Greater NOIDA on 18.07.2021. Before that was done, on 14.07.2021, the Greater NOIDA sent a report to the State Government, carrying details of vacancy in different Departments and permission was sought to fill up these vacancies through Manpower Supply Agencies or Service Providers.

5. Once all these decisions were taken by the Greater NOIDA, a tender notice dated 31.07.2021 was published inviting bids from Manpower Supply Agencies/ Service Providers. Different Agencies submitted their tenders and it is the petitioners' case that the tender of one M/s. Madhav Associates, G-36, Sector-5, Daurala, NOIDA, District Gautam Budh Nagar was accepted on 13.09.2021. The bid was accepted for provision 117 employees by M/s. Madhav Associates. For the 117 posts to be filled up through a Service Provider, the want was shown on the Sewa Niyojan Portal of the Employment Office. Against the 117 vacancies, 339 candidates applied on the Sewa Niyojan Portal. The aforesaid list was forwarded by the Service Provider M/s. Madhav Associates to the Establishment Department, where after scrutiny, the Personnel Department consented to intimate candidates, calling them for interview. M/s. Madhav Associates sent information to candidates to participate in the interview conducted by officers of different Departments of the Greater NOIDA. These intimations were sent on the petitioners' mail on 03.12.2021. On receipt of intimation from Outsourcing Agency/ Service Provider M/s. Madhav Associates, the petitioners and the other candidates participated in the interview conducted by the Greater NOIDA. The attendance record of the candidates was maintained.

6. On 28.02.2022, the Senior Manager (Technical) called a report about Technical Supervisors, who have been working for them for more than five years. The Senior Manager (Project) submitted reports dated 26.04.2022 and 01.04.2022 to the Senior Manager (Technical), Greater NOIDA, indicating the qualifications, designation and the period of work of different personnel, who had worked as Technical Supervisors with the Greater NOIDA. The said reports included the names of all the petitioners. On the basis of the aforesaid reports, the Additional Chief Executive Officer, Greater NOIDA finalized the names of Junior Engineers (Civil) to be recruited, but showing them deployed through the Placement Agency/ Service Provider M/s. Madhav Associates vide order dated 04.05.2022. On 20.06.2022, the Additional Chief Executive Officer issued an office order, directing placement of the petitioners as Junior Engineers/ Assistant Managers

(Civil). On 06.01.2023, a complaint was laid against the Placement Agency/ Service Provider M/s. Madhav Associates and another Service Provide M/s. Radha Krishna. An inquiry was conducted into the matter by a Two-Member Committee, comprising of Greater NOIDA officials. The report, that was submitted, pointed out that M/s. Madhav Associates provided 36 employees against the 117 posts and in that hiring, the prescribed procedure was not adopted. It is further pointed out that out of the 36 employees provided by M/s. Madhav Associates, 30 were newly engaged hands whereas 6 were experienced hands, working with the Greater NOIDA, amongst whom the five petitioners are included. The other Placement Agency, M/s. Radha Krishna Service Provider had provided 200 employees, out of whom 187 were old hands and 13 new recruits.

7. Now, by the order impugned dated 30.01.2023 passed by the Special Executive Officer (Personnel), Greater NOIDA, 36 hands engaged through M/s. Madhav Associates have been directed to be returned to the Service Provider, which in effect terminates their services with the Greater NOIDA. This includes the 6 existing contractual employees now hired through M/s. Madhav Associates. It includes the petitioners.

8. It is pointed out that one Arvind Kumar, whose services were discontinued on the basis of the inquiry report dated 06.01.2023, submitted an application to the Additional Chief Executive Officer, Greater NOIDA, requesting that he may be permitted to continue in service. By an order dated 03.02.2023, the Additional Chief Executive Officer accepted Arvind Kumar's application and he was permitted to continue in service. Arvind Kumar's application and the note-sheet accepting the petitioners' applications by the Additional Chief Executive Officer, Greater NOIDA dated 01.02.2023 and 03.02.2023, respectively, are both annexed as Annexure Nos. SA-1 to the second supplementary affidavit filed on the petitioners' behalf.

9. The petitioners' further case is that Greater NOIDA invited bids through the GeM Portal for engagement of employees on various posts, including those of the petitioners. In this regard, a copy of the tender notice dated 27.01.2023 is annexed as Annexure No. SA-5 to the second supplementary affidavit. It is also the petitioners' case that the Greater NOIDA has engaged 10 retired employees on different posts, which show existing vacancy and availability of work. The petitioners plead a case of discrimination and arbitrariness on the Greater NOIDA's part in disengaging them, inasmuch as services of persons, junior to them, have been retained and other freshmen have been hired. They have also questioned the policy of keeping sanctioned posts vacant and taking work for years through outsourced employees. They have pleaded a case that outsourcing is a camouflage to pursue a policy of pick and choose. They have attempted to substantiate it by pleadings and materials, including their supplementaries.

10. A counter affidavit has been filed on behalf of the Greater NOIDA. The stand taken in the counter affidavit is that the post of a Junior Engineer, on which the petitioners were earlier not working and had now been engaged through a Service Provider, is a post that is under the purview of the Uttar Pradesh Industrial Development Authority Centralized Services governed by the Uttar Pradesh Industrial Development Authorities Centralized Service Rules,

2018. The said posts have already been advertised for regular selection by the Subordinate Selection Board. In the circumstances, for a period of six months or till duly selected Junior Engineers join, the Greater NOIDA Board by its Resolution No.122/10 dated 22.06.2021 had taken a decision to engage through outsourcing. Thus, this engagement is by way of a stop gap arrangement for a period of six months and not beyond. The sanctioned fund is also for a period of six months to pay for these engagements. It is also pleaded that the petitioners were earlier working on the post of Technical Supervisors and not Junior Engineers. They have applied afresh through outsourcing and were engaged as Junior Engineers, and have never worked as Junior Engineers prior to their recruitment through the Service Provider.

11. It is further pleaded on behalf of the respondents that there is no provision for engagement of Junior Engineers beyond six months, and, therefore, it is not correct to say that the Board have granted permission for appointment vide resolution dated 22.06.2021 for a period of six months or till regularly selected candidates join. The number of posts of Executive Engineers, Assistant Engineers (Civil), Assistant Engineers (Electrical), Junior Engineers (Civil), Junior Engineers (Electrical), have been requisitioned to the Subordinate Service Commission, where selections are pending. In the meantime, to meet the exigencies of work, the Board by their resolution dated 22.06.2021 provided for engagement of hands through outsourcing of manpower by bidding on the GeM Portal.

12. It is pointed out that in the present case, an interim order was passed on 14.03.2023, directing the respondents to continue taking work from the petitioners, as they were doing earlier. However, on the respondents' appeal, the Division, has vacated the order dated 14.03.2023 vide an order dated 06.04.2023, directing the present writ petition to be heard on merits.

13. It is pleaded that there is no relationship of master and servant between the petitioners and the Greater NOIDA, and their services have been hired on contract through a Service Provider. The applicability of the Government Order dated 18.08.2020 has also been pleaded to in paragraph No.17 of the counter affidavit to say that it does not extend any protection of employment to the workforce that is engaged. About the complaints, it is said that the complaints related to favouritism, pick and choose in the engagement of the workforce through Service Providers, where a detailed inquiry was conducted and the complaint found substantiated. It is particularly pleaded that when the term of six months has already expired, for which which the petitioners' services were hired in a stop gap arrangement, they have been returned to the Placement Agency.

14. Heard Mr. Uma Nath Pandey, learned Counsel for the petitioners, Ms. Anjali Upadhya, learned Counsel on behalf of respondent Nos. 2 and 3 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the State.

15. Upon hearing learned Counsel for the parties, this Court finds that it is true that the petitioners were engaged over a long period of time in the capacity of Work Supervisors, as the Greater NOIDA says, or Assistant Managers, as the petitioners say, directly by the Greater NOIDA. They have worked for varying period of time for 17-23 years. The shortest period for which the

fourth petitioner, Mohit Chaudhary has worked with the Greater NOIDA is 10 years. Naveen Kumar was engaged in the year 1999 and Om Veer in the year 2007. There were no Service Provider back then. Therefore, the arrangement now brought about to show that the petitioners have been hired through an Outsourcing Agency or a Service Provider, does somewhat appear to be a camouflage. The explanation that has been given by the Greater NOIDA that the service of a Junior Engineer is now part of a centralized service, already notified to the Subordinate Service Board, is plausible to the extent that a Junior Engineer can no longer be recruited or even if permitted to work on an ad hoc arrangement, cannot be regularized on that post. It may also be true that the decision taken by the Board to hire through Service Providers, may have been a pro tem arrangement so far as posts of Junior Engineers were concerned, till regularly selected candidates were available, but the fact cannot be denied that the petitioners were working as Work Supervisors for long periods of time with the Greater NOIDA. To show them to have been recruited through a Service Provider, does not appear to be forthright action, particularly so, as the mechanism of hiring hands through Service Providers, has clearly followed a policy of retaining old hands for felicity of work, which the petitioners, and many others like them, as old hands, are proficient in.

16. The remarks of the Division Bench, while vacating the interim order, upon which much emphasis has been placed by the learned Counsel for the respondents, are not very relevant, because those are confined to the interim matter. All that their Lordships of the Division Bench held was that the interim order, that was earlier passed by this Court, amounted to grant of final relief. It has no bearing on the merits of the parties' case at the hearing. This position of the law has been clarified by the Division Bench in the concluding part of the order dated 06.04.2023. No further allusion, therefore, need be made to it.

17. The position appear to be undisputed that 187 old employees, who were engaged through the other Service Provider M/s. Radha Krishna, have been retained, whereas services of the petitioners have been dispensed with. There is no pleading to indicate if the employees, whose services have been retained are of the same class or cadre as the petitioners' or different from them. They are apparently junior to the petitioners, but to what cadre they belong, is not shown. So far as one of the employee Arvind Kumar, whose services have been extended later on by the Additional Chief Executive Officer, Greater NOIDA on his application, is concerned, it is apparent that he is a news writer, the holder of a completely different post. Very different consideration may apply in his case. Also, the petitioners were holding positions, other than Junior Engineers, as the Greater NOIDA themselves say. They were Work Supervisors earlier. It is not the Greater NOIDA's case that this post has become part of a centralized service. Junior Engineers too, it is not shown, have already been recruited on a regular basis and the work that they have to do, would have to be undertaken through someone. Given the nature of a Junior Engineer's job, unless regularly selected staff of the Centralized Service are available, their work cannot be left unattended by the Greater NOIDA. It would apparently have to be handed over to someone, who would be a freshman. This would involve hiring of fresh hands replacing the petitioners for no ostensible reason.

18. The mention of inquiry, that was held into the recruitment, would be relevant

only to the extent that the Service Providers hired fresh hands. There cannot be any case about favouritism in relation to the petitioners, who have track records for 10-23 years with the Greater NOIDA. This Court does not mean to say that we intend to thrust upon the Greater NOIDA the petitioners to be hired as employees, but at the same time, the Greater NOIDA, being an establishment of the State, ought not to pick and choose, throwing out able and experienced hands and replacing them by fresh hands for no ostensible and reason individuate to each case. It is precisely this what they have done here. By one stroke of pen, they have thrown out all the five petitioners and another old hand along with a new staffer under the garb of returning them to the Service Provider. The truth of the matter is their services were never secured through a Service Provider. Rather, they were placed in the Service Provider's lap to effect a change of label and dub them as workers, whose services have come through a Service Provider. The petitioners had been on the Greater NOIDA's roll directly, may be as contractual employees, over periods of time, spreading from 10-23 years.

19. In these circumstances, dispensation of the petitioners' services in the fashion, that has been done through the order impugned, appears to be unreasonable, arbitrary and discriminatory.

20. Quite apart from this fact is another feature of the matter that cannot be ignored. The issue, that is involved here, fell for consideration before a Division Bench of this Court, on appeal from a learned Single Judge's order, in **Ashok Kumar and others v. State of U.P. and others, 2019 SCC OnLine All 7333.** The facts in **Ashok Kumar (supra)** may best be recapitulated in the words of their Lordships, as these figure in the report, which reads:

"3. Briefly, the petitioners-appellants (who are 27 in number), claim they had been engaged by GNOIDA through various placement agencies to work on different posts, inter alia Draughtsman Grade-II, Architectural Assistant, Assistant Grade-II, Supervisor, Water Tester/Supervisor, Programmer Grade-II, Accountant Grade-II, Personal Assistant, Manager II/Management Training, Manager-I(Planning). The date of engagement of different petitioners ranges from November, 1993 to February, 2011. However, all petitioners-appellants claim to be continuously engaged from the date of their first joining though, the placement agency through whom they were engaged by GNOIDA have changed over the years. As to the nature of work performed by them, it was further claimed to be permanent in nature. In such facts, the present petitioners-appellants had earlier filed Writ A No. 61127 of 2012 (Ashok Kumar v. State of U.P.). It was disposed of vide order dated 26.11.2012 directing the Chief Executive Officer of GNOIDA to take a proper decision on the representation made by the petitioners-appellants to claim regularization in service of GNOIDA. By order dated 08.07.2013 passed by the Chief Executive Officer of GNOIDA, the aforesaid representation was rejected. It was reasoned, GNOIDA had not engaged any of the petitioners-appellants as contractual workmen but that the said authority had awarded works contract to different contractors against payment. For execution of the work thus awarded, the contractors had engaged the petitioners-appellants and, therefore, there was no master-servant relationship between any of the petitioners-appellants and GNOIDA. Payment was also

claimed to have been made by the GNOIDA to the individual contractors and by those contractors to the petitioners-appellants. In absence of letters of appointment, the designation given to the petitioners-appellants by the GNOIDA was explained on grounds of convenience. The case of the petitioners-appellants was also distinguished from 27 other persons to whom relief of regularization had been granted upon their dispute being finally decided by the Supreme Court. The same was described as one time measure adopted by GNOIDA. Further, it was reasoned that the petitioners-appellants could have gained employment only by applying against sanctioned posts as and when the same had been advertised, if they fulfilled the eligibility conditions for the same."

21. The petitioners in the writ petition, that was in appeal before the Division Bench, had claimed quashing of a similar order and a further direction to regularize the petitioners in service. Here, the petitioners have sought a direction to restrain the respondents from interfering in their work as Assistant Managers (Civil) and to pay them salary every month. The learned Single Judge had dismissed the petition. The Division Bench, at the time of admission of the appeal, formulated three questions, which read:

"(1) Whether appellant-petitioners are deemed to be contractual employees of the Greater Noida Industrial Development Authority in view of the fact that they are in employment of it from the period more than a decade irrespective of the fact that their Service Provider was changed?

(2) Whether continuance of the appellants-workmen on daily rate basis/contractual basis through Service Providers, with their change time-to-time amount to an unfair labour practices as per Clause (x) of the Schedule V of the Industrial Disputes Act, 1947?

(3) Whether under U.P. Industrial Development Authority Centralized Service Rules, 2018, the Chief Executive Officer of the respondent authority is empowered to make regularization of the services of the appellant-petitioners?"

22. After considering all issues raised, including that, that it was essentially a matter of contract and a writ petition did not lie, their Lordships of the Division Bench held that the defence about the petitioners serving on contract through Service Providers, appears to be hollow, and in a case like this, to cure patent injustice by State Authorities, a writ under Article 226 of the Constitution would issue. The matter was remitted to the Greater NOIDA, as the petitioners had claimed regularization on the basis of Government Orders, antedating the centralization of services. Here, that question may not be involved and the rights of the petitioners are limited to continue in service as Junior Engineers (Civil) till regularly selected candidates join, or to continue in service on posts that they occupied earlier, which may not be part of the centralized service. Be that as it may, the three questions formulated were answered by the Division Bench in the following manner in **Ashok Kumar**:

"22. .... Also, in view of the fact that the order of admission formulated three questions, it is considered appropriate to answer the same. Thus, Question No. 1 is answered partly in the affirmative, i.e. the petitioners-appellants are deemed contractual employees of GNOIDA. As to the length of their service, the matter is being remitted to respondent No 1 for

passing appropriate orders within a period of three months from today. Question No. 2 is answered thus: the GNOIDA has apparently set up a false plea of having engaged the petitioners-appellants through works contractors. In view of the discussion made above, that arrangement is held to be a device to escape the liability of law. On Question No. 3, we are of the opinion that though the right of the petitioners-appellants to be regularized arose under the Government Order dated dated 24.02.2016, how ever, in view of the subsequent centralization of the services, the appropriate decision is to be made by respondent No. 1 on behalf of the State."

23. The answer to the second question is relevant to the issue here, inasmuch as the plea of engagement through Service Providers here too appears to be without basis as we have already held. We have not reasoned to reach that conclusion on lines that their Lordships of the Division Bench did by looking into the absence of service contracts with the Service Providers. We have drawn that inference from the fact that it is not disputed that the petitioners worked as Technical Supervisors, sometimes called Assistant Managers, for long periods of time before the Government Order dated 18.08.2020 was introduced and a mechanism for engagement of hiring hands through Service Providers became available to the Greater NOIDA.

24. It is noticed that though for the posts of Junior Engineers (Civil), which the petitioners held, it is the Greater NOIDA's case that these are now part of the centralized service and requisition has been sent to the Subordinate Staff Selection Board, but there is no indication, if for the present, all the posts of Junior Engineers, or even some have been filled up through recruitment done by the Staff Selection Commission, and, secondly, it is not shown if the petitioners holding as they were, positions of Work Supervisors earlier, still have the said work to do in the respondents Establishment. If that work is available, it is also not shown why the petitioners have been shunted out, as we have already observed, in an unceremonious manner, after being retained for long periods of time, without any case being pleaded against one or the other petitioners, that may have suddenly rendered all, some or one of them, unfit to be retained in service. This appears to be an impulsive and arbitrary decision, that cannot be termed reasonable at least on the existing material placed before the Court.

25. In the circumstances, this petition succeeds and is **allowed in part.** The impugned order dated 30.01.2023 passed by the Special Executive Officer (Personnel), Greater NOIDA, District Gautam Budh Nagar, is hereby **quashed**. A *mandamus* is issued to the Chief Executive Officer and the Special Executive Officer (Personnel), Greater NOIDA, to re-consider the petitioners' case for a re-engagement on the posts of Civil Engineer (Civil), if regularly selected candidates by the Commission have already not joined or on the post of a Work Supervisor, or other suitable posts, on which they have served in past, in accordance with law, bearing in mind the remarks in this judgment. The aforesaid order shall be passed within four weeks of the date of receipt of a copy of this order by the Chief Executive Officer, Greater NOIDA and the Special Executive Officer (Personnel), Greater NOIDA.

26. Let a copy of this order be communicated each to Chief Executive Officer, Greater NOIDA and the Special

Executive Officer (Personnel), Greater NOIDA by the Registrar (Compliance).

27. There shall be no order as to costs.

(2024) 5 ILRA 711
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2024

BEFORE

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

Writ-A No. 8107 of 2014

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

Counsel for the Petitioner:
Sri Kamlendra Singh Jadaun, Sri Radha Kant Ojha, Sri Satyendra Chandra Tripathi

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Yadav, Sri Shashi Dhar Pandey, Sri Upendra Upadhyay

A. Service Law – Constitution of India – Article 23 – Begar – Recovery of salary paid for service discharged during extra period – Permissibility – Date of birth of the petitioner, the Assistant Teacher, was found forged – Board's record reveal DoB 21.01.1955, however, High School Certificate with DoB 21.01.1950 was issued – On the complaint, the authority found forgery and therefore superannuated the petitioner from service withholding the post retiral benefits – Validity challenged – Held, salary received by the petitioner for the extra years he served, cannot be recovered from his eSt. in the hands of his, not even from the petitioner – Prohibition from recovering the entire salary, amongst others, was founded on the principle of prohibiting *begar* enshrined in Article 23 of the Constitution – The petitioner would be entitled to sanction of a final family pension worked out on that basis and so also gratuity and other post retiral benefits, to which she is entitled as the deceased's widow for the services rendered by him. (Para 15 and 19)

Writ petition allowed in part. (E-1)

List of Cases cited:

1. Sushil Kumar Pandey Vs St. of U.P. & ors.; 2010 (7) ADJ 617 (DB)

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

1. This writ petition is directed against an order passed by the Basic Shiksha Adhikari, Firozabad dated 16.12.2013, directing inter alia that the petitioner, the Headmaster of Junior High School, Bhitari, Block Narkhi, District Firozabad, be relieved of his duties forthwith having superannuated, a First Information Report lodged against him and the payment of his retiral dues stopped until salary paid to him in excess beyond the age of his superannuation is recovered.

2. On 10.02.2014, when this petition came up for admission, this Court, while issuing a notice of motion to the other side, passed an interim order in the following terms:

"It is directed that the recovery sought to be made against the petitioner in pursuance of the impugned order dated 16.12.2013 shall remain stayed till the next date of listing.

Sri Radha Kant Ojha very fairly requests that for the time being subject to the outcome of this writ petition the petitioner may at least be allowed provisional pension taking his date of retirement to be 30.6.2012 for his livelihood. Respondents do not have any objection to this proposal. It is further directed that treating the date of retirement

of the petitioner to be 30.6.2012, as determined by the respondents themselves in the impugned order, the petitioner will be entitled to provisional pension treating 30.6.2012 to be his date of retirement, which will however be subject to final outcome of the writ petition."

3. A counter affidavit dated 06.05.2014 was filed on behalf of respondent No.4, to which the petitioner filed a rejoinder on 05.05.2016.

4. Pending the writ petition, the sole petitioner, Vidya Sagar passed away on 28.08.2023. An application for substitution was made on behalf of his widow, Smt. Bitto Devi. It was allowed vide order 23.11.2023 and she was brought on record as petitioner No.1/1. This petition was admitted to hearing on 23.11.2023 as well, which proceeded forthwith. During hearing on 23.11.2023, this Court thought it fit to direct the Secretary, Board of High School and Intermediate Education, U.P., Prayagraj to file an affidavit, certifying the date of birth of Vidya Sagar son of Ram Sahay, the original petitioner, the year and the college that he had appeared from in the Board Examination and the roll number assigned to him, which were mentioned in the order, directing the Secretary. The Secretary was also cautioned about the fact that the original records may be required to be produced in Court and the affidavit, therefore, that he would file, must indicate the particulars of the records that he has relied upon. The matter was, accordingly, adjourned for further hearing to 30.11.2023. On 30.11.2023, an affidavit along with an application to accept it on record was filed on behalf of the Secretary, Board of High School and Intermediate Education, U.P., Prayagraj. The tabulation chart in original was produced on behalf of the Uttar Pradesh Board of High School and Intermediate Education (for short, 'the Board') by Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel, relating to the High School Examination of the year 1968 conducted by the Board. This Court went through the tabulation chart and recorded in our order of 30.11.2023 that at Sr. No. R/367/12, the roll number mentioned is 104055 and the name of the candidate is Vidya Sagar. His date of birth entered there is 21.01.1950 and his father's name is Ram Sahay. It is further recorded in our order of 30.11.2023 that upon a comparison with the petitioner's records, it is evident that the original tabulation chart produced by the Board relates to the petitioner and the particulars are referable to him. The affidavit too carries a copy of the tabulation chart, which was accepted on record. The hearing concluded on 30.11.2023 and judgment was reserved.

5. Heard Mr. Sujeet Kumar Rai, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the State.

6. The facts giving rise to this writ petition are these:

The petitioner appeared in the High School Examination conducted by the Board in the year 1968, appearing therein from the M.G.M. Intermediate College, Jalesar, Etah. He passed the said examination in the 2nd division. The petitioner then sat his Intermediate Examination from the same Board in the year 1970 and passed it. He earned his degree of Bachelor of Arts in the year 1972.

The petitioner earned his certificate in Teachers Basic Training Course in the year 1975, issued by the Department of Education, Government of U.P.

7. The petitioner was appointed as an Assistant Teacher, Primary School vide order dated 20.03.1985. He joined service as an Assistant Teacher. It is the petitioner's case that in the High School certificate issued to the petitioner, his date of birth mentioned is 21.01.1955. When the petitioner was appointed as aforesaid, he produced his original testimonials, including his High School certificate, on the basis of which he was permitted to join. The petitioner's work and conduct was without blemish and he never earned an adverse remark or entry in his career. He was promoted as Assistant Teacher, Junior High School in the year 2003 and then as Headmaster in the year 2011. According to the petitioner, his date of birth entered in his service-book is 21.01.1955, and, therefore, he had to retire in the year 2016. The petitioner's elder brother, Ramesh Chand son of Ram Sahay, who is older by 8 years, was assisting the petitioner's father in all matters relating to the petitioner's education etc. The petitioner's father was a farmer, unaware of many such matters. He had entrusted them to his elder son, Ramesh Chand. It was Ramesh Chand, who got the petitioner admitted to the institution, M.G.M. Inter College, Jalesar, Etah and disclosed his date of birth, that later on came to be entered in his High School certificate. The petitioner says that he had full faith in the bona fides of his brother and whatever was entered, he accepted it to be true. In all subsequent educational record, the entry remained consistent and also in his service-book.

8. The petitioner's brother was well aware of his date of birth furnished at the time of his admission. He moved a complaint on the Tehsil Diwas to the Sub-Divisional Magistrate, Sadar, Firozabad on 01.10.2013, saying that the petitioner's date of birth is 21.01.1950 and yet he was continuing in service beyond the age of 62 years, reckoned on the basis of a date other than his actual date of birth. It was alleged that this continuance in service was on the basis of a forged document. Appropriate action in the matter was requested.

9. The aforesaid complaint was made by Ramesh Chand on the basis of a report dated 29.07.2013 given by the Principal of the M.G.M. College, Jalesar, Etah. It was a date of birth certificate, which said that, according to the school records, the date of birth of the petitioner, who was a scholar in the College and appeared in the Board Examination of 1968 under Roll No.104055, was 21.01.1950. The certificate mentions that the said date of birth was verified on the basis of the list of marks maintained with the College. Some inspection of records were done in the office of the Board, where it was found that the petitioner's date of birth recorded there was indeed 21.01.1950.

10. The petitioner was then served with the impugned order, holding that, according to the records of the Board, his date of birth was 21.01.1950, on the foot of which the petitioner would superannuate on 30.06.2012. He had forged his certificates and continued in service. The said order, which is impugned herein, directed the petitioner's immediate retirement from service, the lodging of an FIR and withholding of his post retiral benefits, until such time that salary paid to him beyond the date of his superannuation was recovered.

11. Aggrieved, this writ petition has been instituted.

12. The stand taken in the counter affidavit filed on behalf of the Basic Shiksha Adhikari, Firozabad is that the petitioner committed forgery in his High School certificate and secured service playing fraud on the respondents.

13. In the rejoinder affidavit, the said stand is denied and the petitioner says that he has got appointment on the basis of a genuine High School certificate and has not committed any forgery. He has a right to continue according to the date of birth mentioned on his High School certificate, which is 21.01.1955, and not 21.01.1950.

14. Upon hearing learned Counsel for the parties, this Court finds that it is difficult to accept the petitioner's case. The petitioner's date of birth is indeed 21.01.1950, and not 19.01.1955. We have perused the original record, that is to say, the tabulation chart mentioned in the earlier part of the judgment. It clear evidences that the petitioner's date of birth entered in the records of the Board is 21.01.1950; not 21.01.1955. How then his date of birth on his High School certificate issued by the same Board, came to be mentioned as 21.01.1955, is a matter for the petitioner to explain. There could be some shadow of doubt that the date of birth mentioned on the High School certificate was the product of a mistake, for the correction of which there is a provision in the regulations of the Board, but that possibility appears to be remote, considering the elaborate process through which certificates of matriculation issued by the Board passed, even in the day when the petitioner's certificate was issued. There would be a number of cross-checks before the entries were finalized. This need not detain us if the mistaken entry on the document, upon which the petitioner places reliance is the result of a mistake or forgery, given the fact that the petitioner has not only been removed from office by the order impugned, but is also no more in the mortal world. What is important now is how his rights, if any, would enure to the benefit of his widow.

15. Taking matters for the worst that the petitioner indeed relied on a High School certificate that is genuine, but got an entry there about his date of birth that was manipulated or forged, and on that basis served some extra years, the question is: Can the salary received by the petitioner for the extra years he served, be recovered from his estate in the hands of his widow? We think that it could not have been recovered even from the petitioner. In **Sushil Kumar Pandey v. State of U.P. and others, 2010 (7) ADJ 617 (DB),** the writ petitioner had secured a compassionate appointment on the basis of a case that his father was a permanent employee in the Irrigation Department, holding the post of a Seenchpal. He disappeared on 01.08.1981 and was never seen or heard of by anyone, who would have naturally heard of him, if alive. A case of presumption of civil death was pleaded and the petitioner succeeded in securing compassionate appointment under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974. Later on, it was revealed that the petitioner's father was a temporary employee, who could not be presumed dead for the purpose of conferring benefits upon his dependents. He was in fact terminated from service after due notice on 07.06.1983. It was also found that the petitioner's father had written a letter to the Department on 10.06.1983, where he had expressed his inability to work any further on account of his domestic problems and health etc. The Court held that the petitioner's appointment was rightfully

terminated as it was the result of a fraud. There was no basis to the claim and, therefore, no right. The learned Single Judge, who had upheld the order determining the petitioner's services by the respondents, was affirmed. The Court found it to be a case of fraud and did not permit the writ petitioner-appellant to retain its benefit. However, so far as recovery of the entire salary for the period that the disentitled employee had worked, the Court prohibited it and limited the recovery to all emoluments paid to him, except the minimum pay scale admissible for the post held by the writ petitioner-appellant in that case. The prohibition from recovering the entire salary, amongst others, was founded on the principle of prohibiting begar enshrined in Article 23 of the Constitution. In **Sushil Kumar Pandey (supra),** it was observed by the Division Bench:

"23. ..... Considering the facts and circumstances of the case, it is undeniably true that fraud has been played in obtaining the appointment by the appellant and it is also true that the said fraud would have remained undetected if the mother of the appellant had not applied for family pension. During this period more than 10 years had elapsed and the authorities continued to take work from the appellant and for the services rendered he was remunerated by salary. Now after 10 years of service as the appellant has been dismissed, in such a case, the recovery of entire salary from the person would be too severe for the acts and omission on his part but also the omission and negligence on the part of the authorities in granting appointment to the appellant, which in the facts of the case cannot be ruled out. Even otherwise Article 23 of the Constitution of India prohibits taking of 'Begar'. The State-respondents having taken work from the appellant (Sushil Kumar Pandey) for more then 10 years before the fraud was detected, cannot be permitted to ask for refund of the entire salary paid to him as it would amount to taking of 'Begar' which the Constitution of India strictly prohibits.

24. Be that as it may, we can also not shut our eyes to the fact that the salary and other service benefits extended to the appellant was result of a fraud committed by him as held by the learned Single Judge. Therefore, being in respectful agreement with the judgment of the Hon'ble Judge, but keeping in view the provisions of Article 23 of the Constitution of India, we are of the view that it would meet the ends of justice if the order of the learned Single Judge is modified to the extent that instead of recovering entire salary paid to the appellant, it is directed that the authorities concerned will be entitled to recover all the amount paid to the appellant from the public exchequer during the period that he was in service except the minimum of the pay scale admissible to the post held by the appellant. It is further directed that the authorities are also at liberty to proceed against the appellant or any other person or employee found to have been involved in the commission of the aforesaid fraud in any manner as may be permissible in law."

16. Here, the case is not one of proven fraud. If the petitioner had been alive, may be an inquiry further into the matter, would have unravelled the truth. He is no longer there to answer. It is quite possible that notwithstanding the faith in the accuracy of certificates generally issued by the Board, the entry there might indeed have been the result of a mistake. Nothing much can be said about it either way except to hold it in the realm of doubt, if it was indeed fraud or a mistake after all, committed by the Board's office. What is sure is that the deceased

Vidya Sagar's date of birth was in fact 21.01.1950 and not 21.01.1955. Therefore, the deceased did work beyond his entitlement to serve as he would have attained the age of superannuation going by the age of 62 years in the year 2012. Here, he worked up to the date of the impugned order dated 16.12.2013. We are also of opinion that even if he had to retire in the year 2012, there would be some extended service for him on account of the rule of session benefit etc.

17. Be that as it may, the fact is that the deceased Vidya Sagar rendered service up to 16.12.2013 and received his monthly salary. His entitlement to salary would only be up to the date of his superannuation in accordance with the rule applicable, but to recover the salary paid from him or his estate, would indeed be taking begar, under the circumstances that we have noticed.

18. Added to it is the fact that the recovery, if any, now directed, would have to be made from his estate in hands of his widow. It would be highly inequitable to direct that and the extension of this equity is not contrary to the law also.

19. Therefore, this Court holds that no recovery shall be made from the petitioner, the deceased Vidya Sagar's widow or his estate in her hands, including the deceased's post retiral benefits. Of course, the deceased's post retiral benefits shall be finalized according to his date of superannuation worked out on the basis of his date of birth being 21.01.1950. The petitioner would be entitled to sanction of a final family pension worked out on that basis and so also gratuity and other post retiral benefits, to which she is entitled as the deceased's widow for the services rendered by him. All these benefits and a finally determined family pension, shall be paid to the petitioner within a period of six weeks of the date of receipt of a copy of this order by respondent Nos.3 and 4. The impugned order dated 16.12.2013 passed by the Basic Shiksha Adhikari, Firozabad is **quashed** to the extent it directs recovery alone. This writ petition succeeds and **allowed in part** in terms of the orders above made.

20. There shall be no order as to costs.

21. Let a copy of this order be communicated to the Additional Director of Education (Basic), Agra Region, Agra and the Basic Shiksha Adhikari, Firozabad by the Registrar (Compliance).

(2024) 5 ILRA 716
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

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

Writ-A No. 12902 of 2023

Dhananjay Mishra & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Awadh Behari Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Retirement – Merger of District Rural Development Agency (DRDA) with Government Department – Earlier the petitioners were appointed on the post of Clerk under the Gandak Project, who were absorbed in DRDA in pursuance of GO dated 18.07.2016 – Authority denied pensionary benefit – Validity challenged – Petitioner claimed the pensionary benefits

under GO dated 26.04.1991 as well as the parity with those employees, who were directly absorbed in Govt. Department – Entitlement – Held, GO dated 18.07.2016 does not introduce an arrangement of compulsion. It gives employees of the DRDA the election to accept absorption into government service in the Department of Rural Development, subject to conditions mentioned in the Government Order. One of the conditions is that the employees absorbed into the DRDA, who elect to join the Department of Rural Development, would be treated upon absorption as a dying cadre and governed by the New Pension Scheme, 2005 – The petitioners acquiesced to their absorption in the DRDA despite the fact that similarly situate persons were quickly moved away and absorbed in Government Departments. Now, being treated, whether rightly or mistakenly, as directly appointed employees of the DRDA, when absorbed in government service much later in the day in terms of the Government Order dated 18.07.2016, which again the petitioners, as already said, accepted with open eyes, they cannot be allowed to turn around and fall back upon their original rights as retrenched employees of the Gandak Project, entitled to absorption in a Government Department directly; not as directly appointed employees of the DRDA. (Para 19 and 22)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Pepsu Road Transport Corporation, Patiala & anr. Vs S.K. Sharma & ors., (2016) 9 SCC 206

2. Zila Gram Vikas Abhikaran Seva Nivrat Karamchari Kalyan Samiti & anr. Vs St. of U.P. & ors.; 2023:AHC-LKO:35044

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

1. This writ petition is directed against an order dated 28.02.2020 passed by the Commissioner, Rural Development, Uttar Pradesh, Lucknow, rejecting the petitioners' claim for the provision of pension contribution and leave encashment contribution in order to enable the said petitioners to claim retirement pension and leave encashment.

2. Heard Mr. K.D. Singh, learned Counsel for the petitioners and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the State.

3. The first petitioner, Dhananjay Mishra and the second petitioner, Ramesh Chandra Rai, are the two petitioners, who have instituted this writ petition. The facts of their cases are different and this Court would, therefore, venture to set them out separately, at least so far as these are different.

Facts relating the first petitioner Dhananjay Mishra's case

4. Dhananjay Mishra, petitioner No.1, was initially appointed a Junior Clerk on 12.02.1980 with a Soil Conservation Project in District Gorakhpur, called the Gandak Project. He was transferred and posted to District Deoria under the same project. By an order dated 31.10.1988 passed by the Deputy Director, Gandak Project, Padrauna, District Deoria, the first petitioner was confirmed as a Senior Clerk w.e.f. 01.12.1982. It is the first petitioner's case that while confirming him in service, there was a mention in the letter of confirmation to the effect that from the date of confirmation, the employee will be entitled to pension in accordance with Civil Service Regulations, and service rendered prior to confirmation, would be included for the purpose of reckoning the qualifying service.

5. The Gandak Project in the State was abolished and employees thereof, who were

surplus, were required to be absorbed in Government Departments, putting certain conditions to it. These conditions inter alia were that the benefit of absorption would be available to employees appointed prior to 01.10.1986, and further, about the applicability of rules relating to government servants with regard to general provident fund, leave encashment, pension etc., with effect from the date of appointment of an employee absorbed, in a particular Government Department. This arrangement was made vide Government dated 26.04.1991. The Government Order dated 26.04.1991 made provision for the absorption of surplus employees of the abolished Gandak Project, in various Departments of the Government. However, according to the first petitioner, for reasons best known to the respondents, he was absorbed not in any Government Department, but in the District Rural Development Agency (for short, 'DRDA') by the Chief Development Officer/ Executive Director, DRDA, Mau vide order dated 05.05.1990. About the DRDA, it is said by Mishra that they were a registered society, registered under the Societies Registration Act, 1860. It was an Establishment of the Government. The Chief Development Officer of the District was its Executive Director at the District Headquarters. This Establishment was set up to implement the Rural Development Programme of the Government. The DRDA was a society, as already said, but completely under the control of the State Government. There were no rules framed governing service conditions of employees of the DRDA. Therefore, a circular dated 17.03.1994 was issued by the Government, mentioning therein that the service conditions of employees, not provided in the circular, would be governed by such rules, regulations and orders, as apply ordinarily to serving government servants.

6. It is the first petitioner's case that though a surplus employee of the Gandak Project, he was not absorbed in a Government Department, but in the DRDA. Deduction towards GPF and Group Insurance was not being made from his salary and that of other employees as well. Therefore, the first petitioner and similarly circumstanced employees, raised their grievance before the Joint Development Commissioner, Gorakhpur, who forwarded their claim with regard to deposit of contribution/ deduction from their salary towards G.P.F. and Group Insurance vide his memo dated 11.01.1991 to the Additional District Magistrate (Projects), Siddharth Nagar. The first petitioner admittedly retired from service on 28.02.2017 upon attaining the age of superannuation. His notice of retirement dated 25.01.2017 shows that he retired as an employee of the DRDA. He was never absorbed in service of any Department of the Government.

7. The first petitioner earlier moved this Court vide Writ-A No.20234 of 2019, seeking grant of pension and leave encashment, referring to orders in this behalf passed by the respondents. In the counter affidavit filed to the aforesaid writ petition, the Commissioner, Rural Development, Lucknow filed a copy of the order dated 28.02.2020, by which the first petitioner's claim for pension and leave encashment was rejected by the Commissioner, Rural Development. He then moved an application in the aforesaid writ petition for withdrawal with liberty to file a fresh petition. The first petitioner, after withdrawing the said writ petition vide order dated 31.07.2023 with

liberty, instituted the present writ petition along with the second petitioner.

Facts relating to the second petitioner, Ramesh Chandra Rai

8. The second petitioner, Ramesh Chandra Rai, was initially appointed as a Junior Clerk under the Gandak Project in the office of the Assistant Soil Conservation Officer, Gorakhpur in the pay scale of Rs.200-5-250. Upon completion of satisfactory service, Rai was confirmed/ regularized on the said post by the Assistant Soil Conservation Officer, Gandak Project, Gorakhpur on 30.09.1982. With ten years' satisfactory service complete, Rai was extended the benefit of selection grade by the Soil Conservation Officer, Gandak Project, Sishwa Bazar, Maharajganj on 20.03.1990. When the Gandak Project was abolished and the employees declared surplus, a list was drawn up for absorption in other Departments of the Government in terms of the Government Order dated 06.02.1990. The Joint Development Commissioner, Gorakhpur issued subsequent orders in compliance with the order dated 06.02.1990 on 02.04.1990, asking the District Magistrate of the district concerned to absorb surplus employees of Gandak Project on equivalent posts in the Districts of Mau, Maharajganj and Siddharth Nagar. Some of the surplus employees of the Gandak Project were absorbed in the office of the District Development Officer, Maharajganj, the DRDA, Maharajganj, the District Development Officer, Mau, the DRDA, Mau and the District Development Officer, Siddharth Nagar, where as per orders issued by the Government, the absorption had to be made in a Government Department.

9. It is pointed out that some of the surplus employees of the abolished project, like Gomtilal Srivastava, Ram Adhar and Ram Awadh Verma, who were absorbed in the DRDA, Maharajganj, were again absorbed in a Government Department, to wit, the District Development Office, Maharajganj, whereas the second petitioner, who was absorbed in the DRDA, Mau and posted as a Junior Accounts Clerk on a vacant post in the National Rural Employment Programme, sanctioned by the Government, is still continuing with the DRDA, Mau, instead of being absorbed in a Government Department, for which he is entitled under the law after merger of the DRDA with the Department of the Rural Development, Government of Uttar Pradesh.

10. It is the second petitioner's case that under the Government Order dated 26.04.1991, employees of the Gandak Project, after absorption, would be entitled to benefits of GPF, leave encashment, pension etc., as admissible to government servants from the date of absorption. The Commissioner, Rural Development, Lucknow, however, issued an order dated 01.02.2002 with regard to the payment of leave encashment to employees of the DRDA, though it was said that they were not entitled to pension and gratuity, like other government servants.

11. The second petitioner after joining the DRDA, Mau on 01.06.1990 was posted as the Junior Accounts Clerk in the National Rural Employment Programme of the Government, where he held the post of an Accounts Clerk. It is asserted that there he was a government servant as clarified on 08.11.1993, by whom the second petitioner himself has not clarified. Subsequently, he was sent back to the DRDA, Mau. After merger of the DRDA with the Department of Rural Development, on a representation made by the second petitioner, as also the

first petitioner, to treat them as government servant with effect from the date of absorption from 05.05.1990, it was forwarded by the Project Director to the Commissioner, Rural Development, Lucknow on 24.09.2016. Acting on the said recommendation, the Commissioner, Rural Development called for a detailed report with regard to the services of both the petitioners on 11.11.2016. Accordingly, the Chief Development Officer submitted a detailed report to the Commissioner, Rural Development on 18.11.2016, giving the details about the relevant Government Orders with regard to continuity of service as a government servant. After the report submitted to the Commissioner, Rural Development, a clarification was sought about the deduction of GPF and Group Insurance from the Joint Development Commissioner, Gorakhpur. The Joint Development Commissioner, Gorakhpur submitted a detailed report dated 31.05.2017 along with relevant Government Orders on the second petitioner's claim with regard to consideration of his services as that of a government servant from the date of joining. After necessary instructions, the Commissioner, Rural Development forwarded the claim of the second petitioner to the Government on 10.08.2017 to the effect that in view of the relevant Government Orders, surplus employees of the Gandak Project were required to be absorbed in a Government Department with all benefits available to government servants. The Government, in response to the recommendations made by the Commissioner, Rural Development, issued a direction to the Commissioner, Rural Development to the effect that the claim relates to a Class-III employee, for which the Commissioner, Rural Development is competent to decide. He ought to decide the second petitioner's claim and in case of necessity, advice from the Government may be sought. The said communication from the Government is one dated 26.09.2017, addressed to the Commissioner, Rural Development, to determine the second petitioner's claim with regard to continuity and benefit of government service from the date of absorption i.e. 05.05.1990.

12. The second petitioner's case is that after merger, the Commissioner, Rural Development, again sent a letter to the Joint Secretary, Rural Development, giving details about absorption of employees and relevant Government Orders along with letters for absorption issued with regard to other employees, who were absorbed by a common order, along with petitioner No.2 in the DRDA, Maharajganj. He sought directions from the Government in the matter.

13. It is the second petitioner's further case that ignoring recommendations made to the Commissioner, Rural Development by the Chief Development Officer, DRDA, Mau, as also the report of the Joint Development Commissioner, Gorakhpur dated 31.05.2017, the Secretary, Rural Development illegally declined the second petitioner's claim by an order dated 16.06.2020. The second petitioner challenged the order dated 16.06.2020 by means of Writ-A No.733 of 2021 before this Court. Pending the aforesaid writ petition, the second petitioner too retired on 31.01.2022. He says that the pensionary benefits claimed by the petitioners have been declined by the order impugned dated 28.02.2020 on irrelevant considerations, ignoring the orders issued by the Government with regard to absorption in a Government Department for employees of the petitioners' class and the recommendations made in this regard.

Facts common to the petitioners

14. The State Government took a decision to merge the DRDA with the Department of Rural Development, and, accordingly, issued a Government Order dated 18.07.2016. After merger, the new pension scheme was made applicable to employees of the Department, including those, who were absorbed in service of the DRDA, ignoring their past services. It is the petitioners' case that the order of merger provides that the new pension scheme would be applicable to employees directly appointed to the DRDA. Therefore, the Government Order dated 18.07.2016 would not cover the petitioners' case in terms of the conditions mentioned there. The petitioners say that the Government Order dated 26.04.1991 has not been superseded or modified, and, therefore, in terms of the Government Order dated 26.04.1991 read with the Government Order for merger dated 18.07.2016, the benefit of GPF, leave encashment, pension etc., available to a government servant would have to be extended to every surplus employee of the Gandak Project. According to the petitioners, the order to merge the DRDA into the Department of Rural Development would entitle them to the benefit admissible to a government servant, once merged in the Department. The petitioners have to be treated to be employees of the Government in view of the law laid down by the Supreme Court in **Pepsu Road Transport Corporation, Patiala and another v. S.K. Sharma and others, (2016) 9 SCC 206.**

15. It is the petitioners' case that, according to the Government Order dated 06.02.1990, surplus employees of the Gandak Project were required to be absorbed in Government Departments by the order dated 02.04.1990, including the petitioners, Ram Awadh Verma and Gomtilal Srivastava, besides Udai Prakash Srivastava and others, all of whom were also entitled to be absorbed in a Government Department. Ram Awadh Verma and Gomtilal Srivastava who were absorbed in the DRDA, were subsequently posted in the District Development Office, Maharajganj, a Government Department, and are being paid all benefits due to a government servant. At the same time, the petitioners' claim is not being considered, though they hold parity with these men, without any distinguishing features. It is also the petitioners' case that the fact being brought to the notice of the Commissioner, Rural Development, he sought information in regard to the other similarly circumstanced persons from the Chief Development Officer, Maharajganj on 02.11.2017. His inquiry was about the status of Ram Awadh Verma and Gomtilal Srivastava, who were subsequently posted in a Government Department. The Chief Development Officer, Maharajganj submitted a report on 09.11.2017 providing a copy of the order dated 22.01.1994, by which the two men last mentioned were absorbed in government service, that is to say, the Department of Rural Development. Therefore, it is the petitioners' case that in the face of this report, being available to the Commissioner, Rural Development with regard to absorption of similarly situate employees as the petitioners in the DRDA and their re-settlement by a fresh order and absorption in a Government Department, he chose to ignore the same and rejected the petitioner's case by the impugned order.

16. The petitioners' case is that apart from all others like them, who were entitled to absorption in a Government Department vide order dated 22.01.1994, but absorbed with the DRDA, were soon absorbed in a

Government Department, rectifying the mistake committed by the respondents. The petitioners have, therefore, been discriminated against. It is also the petitioners' case that they have been paid GPF and Group Insurance, which is not admissible to employees of the DRDA, as employees of the said Agency are paid CPF etc. The benefit of GPF and Group Insurance is admissible to government servants alone, as the petitioners say. The petitioners blame it on the respondents about first absorbing them in the DRDA and then taking them to have become part of the Department of Rural Development, upon merger of the DRDA, not entitled to post retiral benefits, owing to length of their service, whereas similarly circumstanced employees, upon being retrenched from the Gandak Project, were quickly rectified about the mistake of posting them with the DRDA and were instead absorbed in a Government Department. The petitioners claim hostile discrimination on this ground.

17. This petition was heard on the basis of a personal affidavit filed by the Secretary to the Rural Development, to which a rejoinder has been filed.

18. Upon hearing learned Counsel for the parties, where both the petitioners have retired from service, the first petitioner much before this petition was filed, what we find is that the petitioners have been absorbed in service of the Government in the Department of Rural Development, pursuant to the Government Order dated 18.07.2016. The Government Order dated 18.07.2016 reads:

"संख्या डी 383/38-2-2016-2 (17) जी/206

प्रेषक

दीपक त्रिवेदी
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,
आयुक्त (ग्राम्य विकास)
उत्तर प्रदेश लखनऊ।

ग्राम्य विकास अनुभाग-2 लखनऊ दिनांक 18 जुलाई 2016

विषय- जिला ग्राम्य विकास अभिकरण में सीधी भर्ती से नियुक्त अधिकारियों कर्मचारियों को ग्राम्य विकास विभाग में संविलियन किये जाने के संबंध में।

महोदय,

उपर्युक्त विषयक के संबंध में मुझे यह कहने का निदेश हुआ है कि शासन द्वारा सम्यक विद्यारोपरान्त जिला ग्राम्य विकास अभिकरणों में सीधी भर्ती से नियुक्त अधिकारियों/ कर्मचारियों को ग्राम्य विकास विभाग में तात्कालिक प्रभाव से इस शर्त के साथ संविलियित किये जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते है कि जिला ग्राम्य विकास अभिकरण के कार्मिकों को ग्राम्य विकास विभाग में संविलियन किये जाने के उपरान्त प्रतिनियुक्ति पर माना जायेगा। इन कार्मिकों के संवर्ग को "डाईग कैडर" घोषित करते हुए नयी पेंशन योजना वर्ष 2005 से आच्छादित करने एवं संविलियन के फलस्वरूप कोई भी लाभ पूर्वगामी तिथि

से न दिये जाने के संबंध में सम्बन्धित कार्मिक से विकल्प प्राप्त कर अग्रेत्तर कार्यवाही की जायेगी। यदि किसी कर्मी को यह विकल्प स्वीकार नहीं है तो उसे पूर्व की भाँति सोसाईटी का कर्मी बने रहने का विकल्प रहेगा। उक्त शर्तों के अधीन जिला ग्राम्य विकास अभिकरणों के सीधी भर्ती के नियुक्त अधिकारियों/ कर्मचारियों जिनकी संख्या लगभग-995 है, को ग्राम्य विकास विभाग में संविलियन किया जाता है।

2. यह आदेश वित्त विभाग के अशासकीय पत्र संख्या-ई-2/622/दस-2016 दिनांक 11 जुलाई 2016 में प्राप्त उनकी सहमति से निर्गत किया जा रहा है।

भवदीय

ह०/अ०

दीपक त्रिवेदी

प्रमुख सचिव

संख्या 383 (1)/38-2-2016 तद्दिनांक

प्रतिलिपि-

1. महालेखाकार प्रथम / द्वितीय उ०प्र० इलाहाबाद।

2. सचिव (डीआरडीए प्रशासन) ग्रामीण विकास मंत्रालय भारत सरकार नई दिल्ली।

3. समस्त मण्डलायुक्त उत्तर प्रदेश।

4. समस्त जिलाधिकारी उत्तर प्रदेश।

5. समस्त मुख्य विकास अधिकारी उ०प्र०।

6. समस्त जिला विकास अधिकारी उ०प्र०।

7. समस्त परियोजना निदेशक डी०आर०डी०ए० उ०प्र०।

8. कार्मिक अनुभाग-1/ वित्त (व्यय नियंत्रण) अनु०-2/ वित्त (वेतन आयोग) अनु-2।

9. गार्ड बुक।

आज्ञा से

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प्रभात कुमार श्रीवास्तव

संयुक्त सचिव।"

19. A perusal of the said Government Order shows, no doubt, that it applies to direct recruits to the DRDA, allowed absorption in government service in the Department of Rural Development, subject to the conditions mentioned in the said Government Order. It does appear to be a case where the petitioners would not be governed by the terms of the said order, because they are not direct recruits to the DRDA. They are employees, who were absorbed in the DRDA upon abolition of the Gandak Project, as retrenched employees. Strictly speaking, therefore, it is not just that the Government Order dated 18.07.2016 would not govern the petitioners, but they would not be eligible under it to be absorbed in government service. Nevertheless, for whatever reason they were absorbed under the said order in the Department of Rural Development, the Government Order dated 18.07.2016 does not introduce an arrangement of compulsion. It gives employees of the DRDA the election to accept absorption into government service in the Department of Rural Development, subject to conditions mentioned in the

Government Order. One of the conditions is that the employees absorbed into the DRDA, who elect to join the Department of Rural Development, would be treated upon absorption as a dying cadre and governed by the New Pension Scheme, 2005. They would not be entitled to any benefit from retrospective date before their absorption, which implies the benefit of terms of service earlier rendered by them under the DRDA, including the benefit of GPF, Pension etc.

20. It is clearly stipulated in the Government Order under reference that if it is not acceptable to any employee of the DRDA to join on the terms mentioned in the Government Order of 18.07.2016, it is open to him to continue with the society, that is to say, the DRDA. It is true that in terms of the Government Order, the petitioners were not eligible to be absorbed in the Department of Rural Development, as already said, but when offered, they elected to accept it. They joined government service and whatever was the remainder of their tenure, they served and retired. The first petitioner retired very shortly into service in the Department of the Rural Development and the second petitioner continued up to the year 2022. Once the petitioners accepted absorption subject to terms carried in the Government Order dated 18.07.2016 with open eyes and rendered service in the Department of Rural Development, drawing salary and then retired, it is now not open to them to say that the terms of the Government Order dated 18.07.2016, particularly the condition about being governed by the New Pension Scheme would not apply to them.

21. It is true that the petitioners had rights quite independent of the of the Government Order dated 18.07.2016 and they have raised a plea of discrimination in the petition, where similarly situate employees of the Gandak Project were mistakenly placed with the DRDA and then quickly absorbed into government service. If the petitioners had to enforce their right to be absorbed in government service, upon dissolution of the Gandak Project, directly and not being placed with the DRDA, a Government run Society, they had to raise that claim early in the year 1990 in terms of the Government Order dated 02.04.1990, or for that matter, the order dated 26.04.1991.

22. The petitioners acquiesced to their absorption in the DRDA despite the fact that similarly situate persons were quickly moved away and absorbed in Government Departments. Now, being treated, whether rightly or mistakenly, as directly appointed employees of the DRDA, when absorbed in government service much later in the day in terms of the Government Order dated 18.07.2016, which again the petitioners, as already said, accepted with open eyes, they cannot be allowed to turn around and fall back upon their original rights as retrenched employees of the Gandak Project, entitled to absorption in a Government Department directly; not as directly appointed employees of the DRDA. By doing that, the petitioners cannot be permitted to approbate and reprobate.

23. The Court is in respectful agreement with the views expressed in **Zila Gram Vikas Abhikaran Seva Nivrat Karamchari Kalyan Samiti through its Secretary and another v. State of U.P. and others, 2023:AHC-LKO:35044.**

24. In the circumstances, this Court is not inclined to interfere with the impugned order.

25. This petition fails and is **dismissed**.

26. There shall be no order as to costs.

(2024) 5 ILRA 725
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

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

Writ-A No. 15103 of 2023

Lal Bahadur ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sr. Advocate

Counsel for the Respondents:
A.S.G.I., Sri Anadi Krishna Narayana, Anupama Parashar

A. Service Law – Pension – Defined Contributory Retirement Benefit Scheme – Petitioner worked as temporary peon from 1989 till the date of termination in 1994 – After Labour Court's order of reinSt.ment dated 14.06.2005 in favour of petitioner and during pendency of writ petition arising out of reinSt.ment, the tripartite settlement was implemented and after when writ petition was not pressed, the petitioner was absorbed in service on 09.10.2012 under the tripartite settlement and confirmed on 13.04.2013 – Appointment letter dated 09.10.2012 provide the term of post retiral benefit – Effect – Pension under Old Pension Scheme claimed – Entitlement – Held, the petitioner accepted his post retiral benefits in terms these were offered, particularly funds under the Defined Contributory Retirement Benefit Scheme is beyond cavil – High Court declined to interfere holding that the acceptance of the terms of the appointment letter by the petitioner placed him under the regime of the Defined Contributory Retirement Benefit Scheme. (Para 19, 25 and 26)

B. Constitutional Law – Fundamental right – Right of pension – Waiver of right – Not taking steps for enforcement of right within reasonable time – Effect – Held, while fundamental rights, it is true, cannot be waived, it is not the law that the principle of laches do not operate to defeat at least some of them. A plea of discrimination or arbitrariness has to be raised and enforced within a reasonable time. An unreasonable delay would certainly bring in laches. (Para 19)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Bageshwari Prasad Srivastava & ors.Vs St. of U.P. & ors.; 2022:AHC:167978

2. St. of U.P. & ors. Vs Late Bageshwari Prasad Srivastava & ors.; 2023:AHC:69329-DB

3. Nirupama Malviya Vs St. of U.P. & ors.; 2023 (11) ADJ 524

4. Mahesh Narayan & ors. Vs St. of U.P. & ors.; 2020 (4) ADJ 172

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

1. This writ petition has been instituted by the petitioner, a retired Peon of the Bank of Baroda, praying that a *mandamus* be issued, ordering the respondents to consider the petitioner covered by the Old Pension Scheme and sanction him pension forthwith w.e.f. 01.08.2023. A further direction is sought to the effect that the respondents pay the petitioner regular monthly pension as also arrears worked out with effect from 01.08.2023, along with interest at such rate as this Court may determine, until realization. The petitioner prays that a further direction be issued, ordering the respondents not to treat the petitioner covered by the newly defined Contributory Pension Scheme, which is applicable to the persons appointed subsequent to 01.04.2010.

2. The petitioner's case is that he was a temporary Peon employed with the Govindganj Branch of the Bank of Baroda in District Shahjahanpur, falling under the Bank's Shahjahanpur Region. This was the petitioner's status with the Bank in the month of November, 1989. He continued to function in the capacity of a temporary Peon till 19.11.1994, when his services were terminated. He raised an industrial dispute, when conciliation proceedings failed. The Central Government, by an order dated 07.01.1997, referred the dispute between the petitioner and his employer to the Central Industrial Tribunal-cum-Labour Court-II, Delhi. The reference was in terms if the action of the Management in terminating the petitioner's services w.e.f. 19.11.1994 was just and legal, and if not, what relief the petitioner was entitled to. The reference was registered on the file of the Central Industrial Tribunal-cum-Labour Court-II, New Delhi as Case No.08 of 1997. The Presiding Officer, Central Government Industrial Tribunal-cum- Labour Court-II, New Delhi made an award dated 14.06.2005, answering the reference in the petitioner's favour and holding termination of his services illegal. A direction was issued to reinstate the petitioner in service with 50% back wages w.e.f. 19.11.1994.

3. The validity of the award dated 14.06.2005 was challenged by the respondent, Bank of Baroda by instituting Writ-C No. 73449 of 2005 before this Court. In the aforesaid writ petition, an interim stay order was granted on 01.12.2005 in terms that the award was stayed subject to the condition that the Bank would reinstate the petitioner within one month and ensure payment of wages at par with his counterparts. In compliance with the aforesaid interim order, the petitioner was reinstated in service subject to the outcome of Writ-C No. 73449 of 2005. The petitioner continued to function in terms of the said interim order. As the petitioner says, a Memorandum of Settlement was arrived at between the Management of the Bank of Baroda and its Workmen on 18.03.2008 before the Deputy Chief Labour Commissioner (Central), Mumbai with regard to absorption of Causal/ Temporary Peons/ Sweepers. The settlement that was arrived at was circulated by the General Manager (Human Resource & Marketing), along with a circular letter dated 24.03.2008. The Memorandum of Settlement under the tripartite settlement dated 18.03.2008 conferred right to absorption upon Casual/ Temporary Peon/ Sweepers in accordance with the stipulation carried in the settlement. The absorption that was agreed upon under the tripartite settlement was to be implemented in a phased manner.

4. The first phase comprised such Causal/ Temporary Peons/ Sweepers, who had worked between 01.01.1982 and 31.12.1989 or between 01.01.1990 and 31.12.1990 for 90 days or more and were still working. Absorption for this category of workmen was to be completed on or before 30.06.2008. The second phase of the absorption, that was contemplated, related to Causal/Temporary Peons/ Sweepers, who had worked for 240 days or more over a period of 12 months consecutively between 01.01.1991 and 29.02.1996 and were still working. These absorptions were to be implemented during the financial year 2008-09. The third category of employees, who were to be absorbed in terms of the settlement, comprised Causal/ Temporary Peons/ Sweepers, who had worked for 240 days or more over a period of 12 months consecutively between 01.03.1996 and 28.07.2007 and were still working. This

class of employees were to be absorbed during the financial year 2009-10.

5. It is the petitioner's case that in terms of a Memorandum of Settlement, the entire exercise for absorption had to be completed on or before 31.03.2010; not later. It is also the petitioner's case that even though the petitioner was covered by the said settlement, no order of absorption was passed immediately with regard to the petitioner on account of pendency of the writ petition before this Court. The writ petition that the Bank had filed against the Industrial Tribunal-cum-Labour Court's award continued to remain pending and dismissed as not pressed on 17.08.2012.

6. What the petitioner says is that after the writ petition was not pressed, an order dated 09.10.2012 was issued by the respondent Bank, absorbing the petitioner in service as a Peon. He was placed initially on probation for a period of six months. The petitioner has said that the order dated 09.10.2012 refers to an undertaking dated 21.12.2011, “obtained” in pursuance to the communication of the respondent Bank dated 24.10.2011, but a copy of the undertaking was not immediately available with the petitioner. By a subsequent order dated 13.04.2013, the petitioner was confirmed in service. The petitioner discharged his duties with the respondent Bank until attaining the age of superannuation. He retired from service on 31.07.2023. It is the petitioner's case that despite retirement, he was not sanctioned any pension, though he is entitled to it under the Bank of Baroda (Employees) Pension Regulations, 1995. Under the bipartite Settlement dated 27.04.2010 entered into between the Banking Association and the Employees' Organization, the newly defined Contributory Pension Scheme was introduced in the Banks with regard to employees joining service of the Bank on or before 01.04.2010. The newly defined Contributory Pension Scheme was identical to the Contributory Pension Scheme, introduced by the Central Government, with regard to their employees, effective from 01.01.2004.

7. The petitioner says that according to the respondent Bank and their officials, the petitioner is not governed by the Old Pension Scheme, his date of absorption being subsequent to 01.04.2010; he is governed by the newly defined Contributory Pension Scheme. It is on this account that the petitioner has not been sanctioned pension. The petitioner says that this action is discriminatory and violative of Article 14 of the Constitution. He is not a new appointee and the entitlement of the petitioner for absorption in regular service has come into effect much prior to 01.04.2010, specifically on 16.03.2008, the date on which the settlement for absorption stood notified. The delay that the respondents did in implementing the settlement, cannot place the petitioner on the wrong side of the cut-off date.

8. A notice of motion was issued on 12.09.2023, after which parties exchanged affidavits. This petition was admitted to hearing on 09.11.2023, which proceeded forthwith. It was adjourned for further hearing to 24.11.2023. On 24.11.2023, hearing concluded and judgment reserved.

9. Heard Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Mohd. Yaseen, learned Counsel for the petitioner and Mr. Ashok Kumar Lal, learned Counsel appearing for respondent Nos. 2 to 6. No one appears on behalf of respondent No.1, the Union of India.

10. In the counter affidavit put in on behalf of the Bank, represented by respondent Nos.2 to 6, the facts regarding the industrial dispute are admitted as also the Bank approaching this Court against the Industrial Tribunal-cum-Labour Court's award. The petitioner's reinstatement also is not denied and those facts are not very relevant either. What is relevant is the respondents' case that a settlement was arrived at between the Bank of Baroda and its workmen on 18.03.2008, the tripartite settlement. In terms of this settlement, the petitioner's case was not considered for regularization, but left over because the writ petition was pending. Therefore, the petitioner approached the Bank that his case may be considered in terms of the settlement instead of the award impugned by the Bank. The Deputy General Manager (HRM & ADMN) vide letter dated 24.10.2011, addressed to the General Manager, Bank of Baroda, U.P. and Uttarakhand Zone, Lucknow issued guidance with regard to the petitioner's absorption. It is carried in a letter dated 24.10.2011, a copy of which is annexed as Annexure No. CA-1. The letter aforesaid, in its material part, carries the following directions relating to the petitioner:

"In respect of Mr. Lal Bahadur following action may be taken:

1. workman will agree and undertake in writing not to claim any back wages or other past benefits;

2. his absorption shall be with prospective date after completion of the prescribed formalities;

3. he shall not raise any dispute/ claim/ litigation against the Bank pertaining to this matter in future;

4. Thereafter, a joint consent application shall be filed before the High Court of Allahabad, not to pursue the case further."

11. Acting on the said letter, an affidavit dared 21.12.2011 was filed by the petitioner before the Deputy General Manager, Bank of Baroda, Regional Office Haldwani. The affidavit dated 21.12.2011, that was filed, reads:

"शपथ-पत्र

समक्षः- श्रीमान उपमहाप्रबंधक महोदय,

बैंक आफ बड़ौदा क्षेत्रीय कार्यालय, हल्द्वानी

शपथ पत्र ओर से लाल बहादुर उम्र करीब वर्ष पुत्र स्व0 श्री सूबेदार निवासी फैक्ट्री स्टेट क्वार्टर नम्बर 284/ 4 एचटाइप थाना सदर बाजार तहसील सदर जिला शाहजहांपुर का हूँ। मै ईश्वर को साक्षी मानकर शपथ पूर्वक निम्न ब्यान करता हूँ-

1. यह कि शपथकर्ता उपरोक्त पते का स्थाई निवासी है।

2. यह कि शपथकर्ता ने सी०जी०आई०टी० द्वितीय नई दिल्ली में आई०डी० न० 8 / 97 से लाल बहादुर बनाम क्षेत्रीय प्रबंधक बैंक आफ बड़ौदा के खिलाफ केस दायर किया था जिसका इल्म जाती है।

3. यह कि शपथकर्ता को बैंक आफ बड़ौदा क्षेत्रीय कार्यालय हल्द्वानी द्वारा बैंक सेवा में स्थायी नियुक्ति करने हेतु निर्णय लिया गया है, जिसका इल्म जाती है।

4. यह कि शपथकर्ता सी०जी०आई०टी० द्वितीय नई दिल्ली में

जी०आई०डी० नम्बर 8/97 में एवार्ड पारित हुआ है इस आदेश के विरुद्ध शपथी की नियुक्ति होने के उपरान्त शपथी बैंक के पूरे सेवाकाल में ताउम्र कभी भी उपरोक्त एवार्ड के सम्बंध में किसी भी न्यायालय में कोई भी वाद नहीं लायेगा, इल्म जाती है।

5. यह कि शपथकर्ता को बैंक आफ बड़ौदा द्वारा स्थायी नियुक्त करने का जो शपथकर्ता को आफर दिया गया है, इसके संदर्भ में शपथी भविष्य में सी०जी०आई०टी० द्वितीय नई दिल्ली के एवार्ड का किसी भी न्यायालय में क्लेम नहीं करेगा, इल्म जाती है।

6. यह कि शपथी की नियुक्ति होने के उपरांत शपथी बैंक के सदैव नियम व कानूनों का पूर्णतया बैंक हित में पालन करेगा, जिसका इल्म जाती है।

7. यह कि शपथकर्ता अपने किसी भी पुराने देय का वेतन व अन्य लाभ भरपाई हेतु बैंक से अपेक्षा नहीं करेगा तथा कानून सम्मत कार्यवाही भी नहीं करेगा।

8. यह कि शपथकर्ता सदैव बैंक के प्रति बफादार रहेगा तथा बैंक के निर्देशों के अनुरूप ही कार्य करेगा तथा अपनी सेवा बैंक के हित / लाभ के लिये ही देगा।

ह0 लाल बहादुर

उपरोक्त शपथ-पत्र के चरण 1 लगायत 8 तक मेरी निजी जानकारी व विश्वास में सत्य व सही है। कुछ भी छिपाया नहीं गया है। ईश्वर मेरी मदद करे।

स्थान:- पूरनपुर

दिनांक:- 21.12.2011"

12. It is also pleaded that the petitioner accepted the Contributory Provident Fund Scheme, as he has opted for all his retirement benefits in terms, details of which are mentioned in paragraph No.20 of the counter affidavit. It is also pleaded that the appointment order issued to the petitioner on 09.10.2012 specifically stipulates, amongst terms and conditions, that these, if acceptable, the petitioner may signify his acceptance in writing. The petitioner accepted the stipulation in the appointment order, which shows that in accordance with Clause 3 of the tripartite settlement dated 18.03.2008, the Bank was appointing him as a Peon in the Subordinate Staff Cadre on the stage of basic pay of Rs.5850/- per month, besides dearness allowance. It is pleaded that this appointment was accepted without demur by the petitioner, who served until his superannuation. The letter of appointment carries a stipulation that the petitioner would be eligible for Defined Contributory Retirement Benefit Scheme, as pleaded in paragraph No.26 of the counter affidavit. It is also averred that the petitioner accepted all terms and conditions, after which the Bank withdrew the pending writ petition relating to the old industrial dispute in terms of a joint application moved by both parties.

13. In the rejoinder affidavit, it has been emphasized that what cannot be lost sight of is the fact that the petitioner and every employee, who was to be regularized in terms of the tripartite settlement in all its three phases, had to be done on or before 31.03.2010. The petitioner, therefore, had a right to be regularized before the said date and not discriminated against. It is also submitted that by accepting the letter of appointment, the petitioner cannot be deemed to have waived his right to receive

pension under the Old Pension Scheme, to which he is otherwise entitled. It is pleaded that the right to receive pension is a fundamental right and there can be no waiver of a fundamental right.

14. Upon hearing learned Counsel for the parties and going through the records, though it does appear that the petitioner might have been overwhelmed into accepting the terms and conditions dictated by the Bank, but the fact remains that he has elected voluntarily to accept the position evidenced by a series of transactions. He was serving the Bank as a Peon, retained dehors the rules, in terms of the award passed by the Industrial Tribunal-cum-Labour Court, New Delhi and the interim orders of this Court made in the writ petition. No doubt, he was entitled to enforce the terms of the tripartite settlement and claim regularization with reference to a date that could not have gone beyond 31.03.2010. But, he never did enforce his claim to that effect. We also think that there was no justification for the respondents not to consider the petitioner's claim for regularization under the tripartite settlement on ground that arising out of an award of the Industrial Tribunal-cum-Labour Court, relating to termination of his temporary service, a writ petition was pending before this Court.

15. The pendency of a writ petition arising out of a different set of facts and cause of action between parties would, in no way, permit the Bank to act in a step-motherly fashion and discriminate against the petitioner in the matter of regularization, in terms of the tripartite settlement. If the respondents did not do that, it was the petitioner's obligation to seek enforcement of his rights in some manner. He had to seek enforcement of his rights under the tripartite settlement, and not sit back in lethargy or inaction until past 31.03.2010. Thereafter too, what the petitioner seems to have done is that he accepted an illegal fiat from the Deputy General Manager (HRM & ADMN) of the Bank of Baroda, who dictated conditions, on the basis of which he could be regularized, in his memo dated 24.10.2011 addressed to the General Manager, Bank of Baroda, U.P. and Uttarakhand Zone.

16. We have no hesitation in observing that the Deputy General Manager was highhanded in his approach in dictating terms to the petitioner carried in his letter dated 24.10.2011. In fact, he had no business to impose any terms at all. He had simply to carry out what was agreed between parties in terms of the tripartite settlement and within the scheduled time. The reference in the letter dated 24.10.2011, issued by the Deputy General Manager (HRM & ADMN), Bank of Baroda, imposing conditions upon the petitioner for his regularization in terms of the tripartite settlement on ground of pendency of a writ petition before this Court, is a very undesirable conduct. The culture of looking down and frowning upon litigation, amongst establishments of the State or Private Corporates, is something which does not augur well for the society. After all, litigation is constitutional and legal means for an employee to seek redressal of his grievances against his employer. An employer, who frowns upon an employee litigating, may, in fact, be committing criminal contempt.

17. All this apart, however, the petitioner's inaction in promptly enforcing his rights, that we have noticed, cannot be ignored. Much contrary to it, it was followed by the positive act of furnishing an affidavit to the Bank dated 21.12.2011, acceding to

all terms that they imposed. A careful perusal of the terms indicated in the letter dated 24.10.2011 issued by the Deputy General Manager (HRM & ADMN) and the affidavit would show that the terms there are not very faithfully incorporated in the affidavit. But, that does not matter. What matters is the appointment letter dated 09.10.2012, which the petitioner accepted without demur. The letter of appointment dated 09.10.2012 grants the petitioner fresh appointment as a Peon in the Subordinate Staff Cadre on the basic pay, placing him on probation for a period of six months. It carries in bold letters the terms of post retiral benefits, to which the petitioner would be entitled upon retirement. These read:

"Apart from the gratuity, provident fund permissible as per the rules of the Bank as may be amended from time to time, you will be eligible for Defined Contributory Retirement Benefit Scheme."

18. The petitioner accepted these conditions with open eyes and joined service in terms of the letter of appointment dated 09.10.2012. He completed his probation and all his service with the Bank from 09.10.2012, in terms of the said letter of appointment, until 31.07.2023. Till the petitioner superannuated, no grievance was ever raised by him during all this period of time about the unfair treatment given to him by the Bank, in not regularizing his services in terms of the tripartite settlement before 31.03.2010. The petitioner also did not protest, as already said, the terms of his post retiral benefits stipulated in the letter of appointment. In the counter affidavit, the respondents have taken a stand in paragraph No.20, which shows how the petitioner accepted his post retiral benefits immediately upon his retirement on 31.07.2023. Paragraph No.20 of the counter affidavit reads:

"20. That, the contents of paragraph No. 26 of the writ petition are not correct as stated hence denied. It is respectfully submitted that petitioner was retired on 31.07.2023 and was paid his gratuity amount of Rs. 3,29,945/- and was also paid his leave encashment amount amounting to Rs. 2,45,319/- on 01.08.2023 and further on his request 60% of the NPS amount was credited to his account no. 22370100012912 amounting to Rs.4,70,177.39 on 14.08.2023. It is respectfully submitted petitioner has opted Pension Fund Manager-SBI Life Insurance Company Ltd., for the annuity of his rest 40% Corpus amount for which the documentation process his (sic) carried out by the PFM and the same will be released shortly."

19. The fact that the petitioner accepted his post retiral benefits in terms these were offered, particularly funds under the Defined Contributory Retirement Benefit Scheme is beyond cavil. Decisions consistent with that Contributory Pension Scheme were taken by accepting 60% of the funds on 14.08.2023 and for the balance 40%, investment in the Pension Fund Manager-SBI Life Insurance Company Ltd. for an annuity was accepted. These actions show active acceptance on the petitioner's part of the Defined Contributory Retirement Benefit Scheme. After having retired and done all this, the petitioner presented this writ petition, claiming to agitate his rights under the tripartite settlement, entitling him to regularization from an earlier point of time, which if done, would entitle the petitioner to the Old Pension Scheme. The Old Pension Scheme is one mode of post retiral benefits, may be more advantageous

to the employee, and the other is the Defined Contributory Retirement Benefit Scheme, that has been enforced in the Bank w.e.f. 01.04.2010. The Defined Contributory Retirement Benefit Scheme has its own kind of model, which does not wipe out retirement funds altogether. Therefore, if an employee, under whatever circumstances, has acted in the manner the petitioner has done, it cannot be said that he has waived his fundamental right to receive pension. It is only that, that he has elected one of the alternative courses. At the same time, while fundamental rights, it is true, cannot be waived, it is not the law that the principle of laches do not operate to defeat at least some of them. A plea of discrimination or arbitrariness has to be raised and enforced within a reasonable time. An unreasonable delay would certainly bring in laches. That is also the case here. The time for the petitioner to have enforced his rights, we have already spoken of elaborately. It was all open to the petitioner after the tripartite settlement was notified, but he never acted in time. Instead, he has chosen to bring this petition, highly belated, after his retirement.

20. The very ingenious submission advanced on behalf of the petitioner that he came to know about what were the terms of his post retiral benefits when he actually retired, cannot be accepted, considering the bold terms and conditions about it mentioned in his letter of appointment. The assertion in paragraph No.23 of the writ petition that the undertaking dated 21.12.2011, referred to in the appointment letter dated 09.10.2012 pursuant to the communication of the respondent Bank dated 24.10.2011, is not immediately available with the petitioner, is really a camouflage for truth, which the petitioner knew all along. He knew what undertaking he had furnished to the Bank in order to secure the letter of appointment dated 09.10.2012. Reliance has been placed on behalf of the petitioner upon the decision of this Court in **Bageshwari Prasad Srivastava and others v. State of U.P. and others, 2022:AHC:167978,** which too was a case of denial of benefit under the Old Pension Scheme, because the appointment was made after the cut-off date, which was 01.04.2005 in that case. In **Bageshwari Prasad Srivastava (supra),** it was held:

"The above ground cited by the State is nothing but a pretense, in the facts of the present case. While there can be no dispute to the reason, if on true appraisal of facts it were to be concluded that the petitioners were born in the cadre on or after 01.4.2005. Here, upon direction issued by the writ Court on 29.4.1999 in Writ Petition No. 17195 of 1995 a right accrued to the petitioners to be absorbed on Class-III and Class-IV posts. Though, challenge was raised to that order by first filing Special Appeal and then by carrying the matter to the Supreme Court in Special Leave Petition, it is not the case of the State respondents that any stay order was passed in their favour at any stage, in any proceeding. Even then it cannot be denied that the Special Leave Petition came to be dismissed on 18.3.2002 well before the cut off date i.e. 31.3.2005. The State respondents did not act in accordance with law and did not comply with the direction to absorb the petitioners. They allowed almost three years to pass before the appointment letters came to be issued under threat of contempt proceedings. It is also not the case of the State respondent that there was any defect in the claim made by the petitioners or there were some delay caused by the conduct of the petitioners as may deprive them to any relief, now claimed.

Once the State respondents are found to have delayed the proceedings, in entirety, they cannot be permitted to wriggle out of the consequence of delay. In fact, sufficient discretion has already been exercised in favour of the State respondents inasmuch as upon showing compliance by issuance of appointment letters to the petitioners, the contempt proceedings appear to have been dropped, at that stage.

In view of the above, in the peculiar facts of the present case, it is found the right to be absorbed arose to the petitioners not on 09.4.2005 when the appointment letters came to be issued but on 29.4.1999 when the writ Court issued a positive direction in that regard. In any case, that right got vested on 18.3.2002 when the Special Leave Petition filed by the State against the decision of the Intra Court Appeal No. 540 of 1999 (dated 19.11.2001) came to be dismissed. Three years was much more than the time actually required to give effect to the order of the Supreme Court. Accordingly, the petitioners must be treated to have been absorbed, notionally on 18.3.2002. Hence, they are entitled to pension under Old Pension Scheme."

21. On appeal, the decision in **Bageshwari Prasad Srivastava** was upheld by the Division Bench in **State of U.P. and others v. Late Bageshwari Prasad Srivastava and others, 2023:AHC:69329-DB** in terms of the following remarks:

"No doubt, the appointment letter of the petitioners is dated 9.04.2005 and they joined in pursuance thereof on or before 20.04.2005, but it is an admitted fact on record that the direction of the Writ Court for absorption of the respondents against Class III and IV posts was issued on 29.04.1999. The special appeal filed by the State Government was dismissed on 29.11.2001 followed by dismissal of the SLP on 18.03.2002. The State Government had no justifiable reason with it to withhold the absorption and issuance of appointment letters to the respondents. The respondents were compelled to initiate contempt proceedings against the State and whereafter, appointment letters were issued to them on 9.04.2005. In the aforesaid background, the learned Single Judge has rightly held that the stand taken by the State for denying the benefit of old pension scheme to the respondents did not merit acceptance as valuable right to being appointed accrued in their favour atleast after dismissal of the SLP. The learned Single Judge has rightly directed the State to treat the respondents to have been absorbed in service notionally on 18.03.2002, the date on which the issue relating to their absorption in Government Service was finally settled by the Supreme Court."

22. So far as the principle in **Bageshwari Prasad Srivastava** is concerned, it is evidently very different. That was a case where pursuant to the *mandamus* issued by a learned Judge of this Court on 29.04.1999, the right to be absorbed in favour of the petitioners on Class-III and IV posts stood crystallized on 29.04.1999. It was the respondents themselves, who, by invoking appellate procedures and without the benefit of a stay order had postponed compliance with the mandamus issued by the learned Judge in the writ petition earlier filed by the petitioners relating to their right to be absorbed in service. They implemented the *mandamus* after losing up to the Supreme Court and upon facing contempt action. By that time, they pushed matters beyond the cut-off date, when the Old Pension Scheme went out of currency. It was on those facts that the Court held that the rights of the

petitioners to pension could not be judged with reference to the right when they were actually appointed. They had to be traced back to an earlier point of time when the Old Pension Scheme was still in force.

23. The learned Counsel for the petitioner has relied upon a decision of mine in **Nirupama Malviya v. State of U.P. and others, 2023 (11) ADJ 524**. That again was a case where the petitioner had been selected by the Uttar Pradesh Secondary Education Services Selection Board for a Lecturer's post in Economics and put in the panel of selected candidates, that was published and notified on 01.12.2004 by the Secretary to the Selection Board. She was allotted a college at Meerut, where she was not allowed to join. The petitioner made efforts with the District Inspector of Schools, Meerut, but was not successful. She was turned away. She sent an application again to the Secretary of the Selection Board on 27.01.2005, requesting that she may be allotted some institution in District Allahabad or Lucknow. It was at this stage that the State Government introduced the Contributory Pension Scheme on 28.03.2005 instead of Pension-cum-General Provident Fund Scheme. The Contributory Pension Scheme was introduced for new recruitments made after 01.04.2005, in terms of the Government Order dated 28.03.2005. The petitioner was then allotted the Janta Girls Inter College, Lucknow. She was not allowed to join there too. The reason assigned by the college at Lucknow was that there was a stay order passed by the Lucknow Bench of this Court in favour of the teacher, who was functioning on the post.

24. The District Inspector of Schools, Lucknow addressed a memo dated 20.10.2005 to the Secretary of the Selection Board, apprising him of the inability shown by the Janta Inter College, Lucknow to appoint the petitioner. The petitioner moved this Court by way of Civil Misc. Writ Petition No. 74936 of 2005 for an appropriate direction to the Selection Board and the Authorities to ensure her placement. It was dismissed on account of lack of territorial jurisdiction. She then instituted a writ petition before the Lucknow Bench for enforcement of her rights. The Lucknow Bench, vide order 21.04.2006 passed in Writ Petition No.3371 (S/S) of 2006, directed the Secretary of the Selection Board to ensure an appointment for the petitioner in any other institution, within a month. It was in compliance with the said direction that the petitioner was issued an appointment letter dated 01.08.2006, appointing her with the Zila Panchayat Balika Inter College, Gyanpur, Bhadohi. She joined the college on 02.08.2006. It was in the background of all these facts that I held in **Nirupama Malviya (supra):**

"14. It is not the subject-matter of the controversy here, if the District Inspector of Schools was in error or the Board in carrying out the Board's allocation in favour of the petitioner, first made on 1.12.2004. The crux of the matter is that the petitioner's right stands crystallized, when the college was allocated by the Selection Board, and she reported to the concerned college, where it is presumed that the District Inspector of Schools would have issued necessary directions to the concerned college. The District Inspector of Schools did report back to the Board, which shows that he issued the necessary direction to appoint. If he did not, that too would be inaction on the part of the District Inspector of Schools.

15. Now, it would be a great travesty of justice if the petitioner is made to

suffer either on account of the inaction or lethargy of the Selection Board, or the District Inspector of Schools or their callousness in selecting the appropriate institution to place the petitioner while allocating. If the institution, where the petitioner was first allocated, had not resisted her appointment or the District Inspector of Schools had enforced it, she would have joined well before the cut-off date under the Government Order dated 28th March, 2005, introducing a new pension scheme. The petitioner's rights cannot turn upon mere fortune dependent upon a chance of her date of joining being placed on the right side of the cut-off date. A crystallized right under the statute must move on surer ground about time when it comes into effect. It cannot be made dependent upon inaction or lethargy of Authorities about enforcement, or on the correctness of their choice to realize that right for the petitioner.

16. This Court is, therefore, of opinion that the petitioner would be entitled to trace her rights, as already said, either to the date when the allocation order was issued on 1.12.2004 or at any time before 25.1.2005, when the District Inspector of Schools, Meerut referred the matter to the Secretary of the Selection Board to allocate another college in same district or another district for the petitioner. The petitioner's right would, therefore, be traceable to a point of time, well before the cut-off date; not after it, when, in fact, she succeeded in securing an appointment letter from the allocated college after failing on two occasions, resisted by managements."

25. The learned Counsel for the petitioner also pressed in aid the decision of this Court in **Mahesh Narayan and others v. State of U.P. and others, 2020 (4) ADJ 172,** which I have relied upon in **Nirupama Malviya**, but that too was a case of inaction by the respondents that delayed the petitioner in securing appointment before the cut-off date came for enforcement of the Contributory Pension Scheme. It was not at all a case, like the present one, where there has not only been utter inaction on the petitioner's part to enforce his rights, but also positive acts of election, accepting the terms of the appointment letter, that placed the petitioner under the regime of the Defined Contributory Retirement Benefit Scheme.

26. In the considered opinion of this Court, no case for interference, therefore, is made out.

27. This writ petition fails and is **dismissed**.

28. There shall be no order as to costs.

(2024) 5 ILRA 735
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ-A No. 18438 of 2022

Ravi Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atipriya Gautam, Sri Devesh Mishra, Sr. Advocate

Counsel for the Respondents:
C.S.C.

A. Service Law – U.P. Police Officers of the Subordinate Ranks (Discipline and Appeal) Rules, 1991 – Rules 20, 21, 23 & 24 – Appeal against punishment – Scope – Jurisdiction of appellate authority – Re-appreciation of evidence – Permissibility – Whether *Pradeep Kumar Asthana's case* hold good law – Held, the appellate authority has been given complete jurisdiction to re-appeciate the entire evidence available in the file of the disciplinary proceedings and thereafter to nullify, reduce, affirm and enhance the punishment imposed by the disciplinary authority – Once the appellate authority has power to re-appreciate the entire evidence and entire evidence is available before it, it would not be in the fitness of things to remit the matter to disciplinary authority but it would be appropriate for the appellate authority to re-appreciate evidence available on record and after recording reasons to sustain the order passed by the disciplinary authority – Division Bench held the ratio laid down in *Pradeep Kumar Asthana's case* erroneous. (Para 18, 21 and 26)

B. Service Law – Disciplinary proceeding – Civil Procedure Code, 1908, extent of applicability – Held, the provisions made in the Code of Civil Procedure, 1908 are not *stricto sensu* applicable in the disciplinary matters of the police officers as they are governed by the provisions made in the Rules of 1991, but the texture of appellate jurisdiction and the scope of the appellate authority can easily be understood if the provisions made in the Rules of 1991 are seen in the light of the aforesaid provisions made in the Code of Civil Procedure – The scope of the appellate authority under the Rules of of 1991 is almost identical to that of the scope available with the appellate court in terms of Section 107 of the Code of Civil Procedure – The provisions made in the Rules of 1991 itself provide that the powers of the appellate authority and the powers of the disciplinary authority are co-extensive. (Para 25)

Division bench decided the issue framed by Single Judge and remitted the matter. (E-1)

List of Cases cited:

1. Writ A No. 18299 of 2021; Pradeep Kumar Asthana Vs St. of U.P. & ors.decided on 03.01.2022

2. U.O.I.& ors.Vs Mohan Lal Kapoor; AIR 1974 SC 87

3. Raj Kishore Jha Vs St. of Bihar & ors.; (2003) 11 SCC 519

4. Assistant Commissioner, Commercial Tax Department Works Contract and Lease, Kota Vs Shukla and brothers; (2010) 4 SCC 785

5. B.C. Chaturvedi Vs U.O.I.& ors.; (1995) 6 SCC 749

6. St. Bank of Bikaner and Jaipur Vs Nemi Chand Nalwaya; (2011) 4 SCC 584

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Ishir Shripat, Advocate holding brief of Ms. Atipriya Gautam, learned counsel appearing for the petitioner along with Sri Laxmikant Trigunait and Sri Irfan Ahmad Malik, learned counsels appearing on behalf of the petitioner in the connected writ petitions, Sri Sushil Kumar Pal, learned Additional Chief Standing Counsel, Sri Pramod Kumar Srivastava, learned Additional Chief Standing Counsel, Sri Ram Swaroop Umrao, learned Standing Counsel and Sri Girish Chand Tiwari, learned Standing Counsel appearing for the State.

2. Petitioner through this writ petition has assailed the order dated 02.04.2022 passed by the Senior Superintendent of Police, Aligarh whereby punishment of 'censure' has been imposed against him. Petitioner through this writ petition has also challenged the order dated 07.07.2022 whereby appeal filed against punishment order dated 2.04.2022 has been rejected and

further order dated 13.09.2022 whereby revision filed by the petitioner has been dismissed.

3. This writ petition was earlier heard by a learned Single Judge of this Court and the order dated 1.12.2022 has been passed whereby learned Single Judge expressed his respectful disagreement with the ratio of a judgement and order dated 03.01.2022 rendered by another learned Single Judge of this Court in ***Writ-A No. 18299 of 2021 (Pradeep Kumar Asthana Vs. State of U.P. and others)*** and thereby had framed the issue and requested Hon'ble The Chief Justice of this Court to constitute a larger Bench for deciding the said issue.

4. Learned Single Judge vide his order dated 1.12.2022 passed in Writ-A No. 18438 of 2022 had framed the following issue to be decided by the larger Bench:-

"Whether the power of the appellate authority under the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 are confined to the powers of the judicial review or the appellate authority can exercise the original powers and take a decision which are in the domain of the disciplinary authority while exercising the appellate powers?"

5. Pursuant to the aforesaid order dated 1.12.2022 passed by the learned Single Judge, Hon'ble the Chief Justice of this Court has constituted this Division Bench for deciding the aforesaid issue framed by the learned Single Judge.

6. Brief facts culled out from the writ petition are that the petitioner while posted as Constable in the Traffic Police at District Aligarh in the year 2021 was prima facie found to have committed misconduct therefore, preliminary inquiry was conducted in the matter and thereafter disciplinary authority i.e. the Senior Superintendent of Police, Aligarh issued a show-cause notice under Rule 14(2) of the U.P. Police Officers of the Subordinate Ranks (Discipline and Appeal) Rules, 1991 (hereinafter referred to as 'Rules of 1991') whereby petitioner was required to submit his reply explaining therein as to why minor punishment of 'censure' as provided under Rule 4 of the Rules of 1991 may not be imposed against him. Petitioner submitted his reply to the show-cause notice on 04.03.2022 wherein he took various grounds to prove his innocence. Ultimately disciplinary authority i.e. the Senior Superintendent of Police, Aligarh passed the order on 02.04.2022 wherein it has been recorded that the explanation given by the petitioner is not satisfactory and he could not give any such fact in his reply which is worth consideration and thereby minor punishment of 'censure' has been imposed against the petitioner.

7. Petitioner challenged the punishment order dated 02.04.2022 by filing appeal under Rule 20 of the Rules of 1991 and he took the ground in appeal that the Disciplinary Authority has not considered his reply to the show-cause notice and the punishment order is absolutely unreasoned and non-speaking. The appellate authority, in exercise of its jurisdiction under Rule 20 of the Rules of 1991 considered the entire evidence and also considered the reply submitted by the petitioner to the show-cause notice dated 16.02.2022 and thereby, has passed speaking and reasoned order on 07.07.2022 whereby he has affirmed the punishment order dated 02.04.2022 passed by the disciplinary authority and has rejected the appeal. Thereafter petitioner

challenged the punishment order dated 02.04.2022 and appellate order dated 07.07.2022 by filing revision under Rule 23 of the Rules of 1991 and the said revision has also been dismissed.

8. Petitioner in this writ petition has challenged the punishment order dated 02.04.2022 primarily on the ground that his reply to the show-cause notice dated 16.02.2022 had not been considered at all while imposing the minor punishment of 'censure' against him and once reply submitted by the petitioner has not been considered and reasons to prove the misconduct were not recorded, the punishment order cannot sustain in the eyes of law. Petitioner has challenged the appellate order dated 07.07.2022 primarily on the ground that the appellate authority in exercise of its appellate jurisdiction cannot rectify the errors of the punishment order and thus, the appellate authority while considering the reply submitted by the petitioner to the show-cause notice dated 16.02.2022 and appreciating the evidence on record, had committed a manifest error and therefore the appellate order dated 07.07.2022 is unsustainable in the eyes of law.

9. Petitioner in support of his case relied on the judgement and order dated 03.01.2022 rendered by the learned Single Judge of this Court in ***Writ-A No. 18299 of 2021 (Pradeep Kumar Asthana Vs. State of U.P. and Others)*** wherein it has been held that if in the punishment order, reasons for imposing punishment have not been recorded, then the appellate authority cannot record the reasons on its own and thereby affirm the punishment order passed by the disciplinary authority.

10. Learned Single Judge while hearing this writ petition considered the provisions of Rule 20, 21, 23 and 24 of the Rules of 1991 and thereby came to the conclusion that the appellate authority can adjudicate on the issues which are in the domain of the original disciplinary authority as while considering the appeal, the appellate authority has to examine the entire record available in the file of the disciplinary proceedings and has to consider the case on the basis of material available on record. Thus learned Single Judge has expressed his respectful disagreement with the ratio of the decision rendered in the case of ***Pradeep Kumar Asthana (Supra)*** and by framing the issue for adjudication has referred the matter to be decided by a larger Bench.

11. Learned counsel appearing for the petitioner has submitted that the disciplinary authority is under an obligation to consider the reply submitted by the delinquent employee to the show-cause notice and thereafter reasons, in support of the mis-conduct, are required to be recorded and only thereafter punishment can be imposed whereas in the matter of petitioner, punishment order dated 02.04.2022 is absolutely silent vis-a-vis the explanation submitted by the petitioner and also it does not contain any reason to prove the misconduct therefore, the punishment order cannot sustain in the eyes of law.

12. Learned counsel appearing for the petitioner has argued that once the disciplinary authority has not considered the explanation given by the delinquent employee to the show-cause notice and has not given any reason in the punishment order for imposing punishment then the appellate authority in exercise of its appellate jurisdiction cannot consider the reply given by the delinquent employee to the show-cause notice and cannot provide reasons in support of punishment and

thereby to affirm the punishment order passed by the disciplinary authority. It has further been argued that the appellate authority has to test the punishment order on its own merits and cannot rectify the mistakes committed by the disciplinary authority while passing the punishment order whereas in the present case punishment order on its face is an unreasoned order and has been passed without considering the reply submitted by the petitioner therefore, the same cannot be cured and affirmed by the appellate authority in exercise of its appellate jurisdiction, accordingly the appellate order dated 07.07.2022 cannot sustain in the eyes of law.

13. Learned counsel appearing for the petitioner in support of his case has relied on the judgements rendered by the Hon'ble Supreme Court in the cases of ***Union of India and Others Vs. Mohan Lal Kapoor AIR 1974 SC 87, Raj Kishore Jha Vs. State of Bihar and Others (2003) 11 SCC 519, Assistant Commissioner, Commercial Tax Department Works Contract and Lease, Kota Vs. Shukla and brothers (2010) 4 SCC 785*** and has argued that the disciplinary authority can pass punishment order only after recording reasons as only from reasons assigned in the order, it can be inferred that the disciplinary authority has applied its mind to reach the conclusion in the form of punishment and once disciplinary authority has failed to record reasons in the punishment order, that defect cannot be cured by the appellate authority while deciding the appeal against the punishment order.

14. Per contra, learned Additional Chief Standing Counsel appearing for the State respondents has contended that from bare perusal of the provisions made in the Rules of 1991, it is patently manifest that the scope of the appeal is the same as of the original proceedings giving rise to the punishment order and therefore appellate authority can appreciate the entire evidence available in the file of the disciplinary proceedings and thereby can provide reasons to support the punishment imposed by the disciplinary authority. It has further been contended that in the cases where disciplinary authority has not considered the explanation submitted by the delinquent employee to the show cause notice in detail, the appellate authority while hearing the appeal can consider the said explanation and record reasons to support the punishment imposed by the disciplinary authority and thereby can affirm the original punishment order.

15. Learned Additional Chief Standing Counsel has argued that from a bare perusal of the provisions made in the Rules of 1991, it is patently manifest that powers of the appellate authority are not confined only to the powers of judicial review rather the appellate authority can exercise the original powers and can take a decision which is in the domain of the disciplinary authority and in the present case, the appellate authority had considered the reply submitted by the petitioner to the show-cause notice and had also given reasons to support the punishment imposed against the petitioner and thereby had affirmed the punishment order dated 02.04.2022 which is well within the powers of appellate authority.

16. We have given our thoughtful consideration to the rival arguments advanced by the learned counsels appearing for the parties. Before proceeding to consider the issue framed by learned Single Judge, it is apt to have a brief look over the provisions made in Rule 20, 21, 23 and 24

of the Rules of 1991, therefore, they are extracted as under:

"Rule 20. Appeals- *(1) Every Police Officer, against whom an order of punishment mentioned in sub-clauses (i) to (iii) of Clause (a) and sub-clauses (i) to (iv) of Clause (b) of Rule 4 shall be entitled to prefer an appeal against the order of such punishment to the authority mentioned below:*

(a) to the Police Officer who is the immediate jurisdictional superior authority to the Police Officer who passed the order of punishment;

(b) to the Director-General of Police who may either decide the appeal himself or nominate any Additional-Director General for deciding it;

(c) to the State Government against the order passed under Clause (b).

(2) No appeal shall lie against an order inflicting any of the petty punishments enumerated in sub-rules (2) and (3) of Rule 4.

(3) Every officer desiring to prefer an appeal shall do so separately.

(4) Every appeal, preferred under these rules shall contain all materials, statements, arguments relied on by the Police Officers preferring the appeal, and shall be complete in itself, but shall not contain disrespectful or improper language. Every appeal shall be accompanied by a copy of final order which is the subject of appeal.

(5) Every appeal, whether the appellant is still in service of Government or not, shall be submitted through the Superintendent of Police of the district or in the case of Police Officers not employed in district work through the head of the office to which the appellant belongs or belonged.

(6) An appeal will not be entertained unless it is preferred within three months from the date on which the Police Officer concerned was informed of the order of punishment.

Provided that appellate authority may, at his discretion, for good cause shown extended the said period up to six months.

(7) It the appeal preferred does not comply with the provisions of sub-rule (4) the appellate authority may require the appellant to comply with the provisions of the said sub-rule within one month of the notice of such order to him and if the appellant fails to make the above compliance, the appellate authority may dispose of the appeal in the manner as it deems fit.

(8) The Director-General or an Inspector-General may, for reasons to be recorded in writing, either on his own motion or on request from an appellate authority before whom the appeal is pending transfer the same to any other officer of corresponding rank.

21. Submission of documents with appeal. *(1) When the appellate authority admits the appeal and sends for the records all the papers should be submitted which were considered by the officer against whose order the appeal is made including the character roll and service roll of the officer punished.*

(2) Copies of orders passed in appeal which are furnished to the Superintendent of Police by the appellate authority shall invariably be accompanied with the departmental punishment file and shall be submitted therewith when the record is called for.

Rule 23-Revision- (1) *An officer whose appeal has been rejected by an authority subordinate to the Government is entitled to submit an application for revision to the superior authority next to the authority which has rejected his appeal*

within three months from the date of rejection of appeal as mentioned below:

(a) to the Police Officer who is the immediate jurisdictional superior authority to the Police Officer who passed the appellate order.;

(b) to the Director-General of Police who may either decide the revision himself or nominate any Additional Director General for deciding it.

(c) to the State Government against the order passed under Clause (b).

On such an application, the powers of revision may be exercised only when, consequent of flagrant irregularity, there appears to have been material injustice or miscarriage of justice.

Provided that the revising authority may on its own motion call for the examine the records of any order passed in appeal against which no revision has been preferred under this rule for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such procedure and pass such order with respect thereto as it may think fit;

Provided further that no order under the first proviso shall be made except after giving the person effected a reasonable opportunity of being heard in the matter.

(2) The procedure prescribed for appeal applies also to application for revision. An application for revision of an order rejecting an appeal shall be accompanied by a copy of the original order as well as the order of appellate authority.

***24. Enhancement of punishment** - A punishment may be enhanced by -*

(a) an appellate authority on appeal; or

(b) any authority superior to the authority to whom an application will lie, in exercise of revisionary powers:

Provided that before enhancing the punishment such authority shall call upon the officer punished, to show cause why his punishment should not be so enhanced, and that an order by such authority so enhancing a punishment shall be deemed to be an original order of punishment."

17. We find that Rule 20(4) of the Rules of 1991 provides that every appeal must contain all materials, statements and arguments relied on by the police office preferring the appeal. Rule 21 of the Rules of 1991 further provides that when the appellate authority admits the appeal and sends for records, all the papers should be submitted which were considered by the officer against whose order appeal is made including character roll and service roll of the officer punished. Thus it is patently manifest that the rule provides that the entire material available in the file of the disciplinary proceedings against the delinquent employee must be placed before the appellate authority for its consideration. We further find that Rule 24 (a) categorically provides that appellate authority has power to enhance the punishment imposed by the disciplinary authority therefore, it is manifest that the appellate authority can appreciate the entire evidence and if ultimately reaches to the conclusion that lesser punishment has been awarded by the disciplinary authority, it can enhance the punishment after issuing a show-cause notice and after considering the reply of the delinquent employee. Proviso appended to Rule 24 further provides that the order passed by the appellate authority so enhancing the punishment shall be deemed to be an original order of punishment.

18. Thus from a conjoint reading of the Rule 20, 21 and 24 of the Rules of 1991, we find that the appellate authority has been

given complete jurisdiction to re-appeciate the entire evidence available in the file of the disciplinary proceedings and thereafter to nullify, reduce, affirm and enhance the punishment imposed by the disciplinary authority, This conclusion drawn by us finds support from the provisions made by the legislature in Rule 23(1) which provides remedy of revision and puts restriction that the revisional power may be exercised where in consequence of flagrant irregularity, there appears to have been material injustice or miscarriage of justice.

19. We find that legislature in its wisdom has put conditions/restrictions for the exercise of revisional jurisdiction under Rule 23 of the Rules of 1991 whereas there are no such restrictions in respect of the exercise of appellate jurisdiction as contemplated under Rule 20, 21 and 24 of the Rules of 1991. Even otherwise, we find that all along it has been settled proposition of law that in the disciplinary matters once the delinquent employee files an appeal then the appellate authority can re-appreciate the entire evidence available on record and after recording its satisfaction, can nullify, reduce, affirm or enhance the punishment awarded by the disciplinary authority.

20. Now we proceed to consider as to whether reasons are required to be recorded while taking decision by the quasi judicial authorities. We find that the Hon'ble Supreme Court in catena of judgements including the judgements, relied on by the learned counsel appearing for the petitioner, has categorically held that quasi judicial authorities are required to record reasons to reach out the conclusion in the order but in the matters of disciplinary proceedings against an employee, the appellate authority has the same scope to re-appreciate the evidence on record as the disciplinary authority had, therefore, if the reasons for imposing punishment have not been recorded by the disciplinary authority and ultimately appellate authority while considering the appeal against the punishment order finds that there is sufficient evidence on record to sustain the punishment imposed by the disciplinary authority then the appellate authority would have two options i.e. either to remit the matter to the disciplinary authority for passing a fresh order or to pass order imposing the same punishment after considering the reply submitted by the delinquent employee to the show-cause notice and after recording reasons to support the punishment.

21. We also find that it is also a well settled proposition of law through catena of judgements of the Hon'ble Supreme Court that once the appellate authority has power to re-appreciate the entire evidence and entire evidence is available before it, it would not be in the fitness of things to remit the matter to disciplinary authority but it would be appropriate for the appellate authority to re-appreciate evidence available on record and after recording reasons to sustain the order passed by the disciplinary authority.

22. The Hon'ble Supreme Court in its judgment rendered in the case of **B.C. Chaturvedi Vs. Union of India and others, (1995) 6 SCC 749** has categorically held that in the disciplinary matters, the disciplinary authority is the sole judge of the facts and where appeal is presented against the punishment order, the appellate authority has co-extensive power to re-appreciate the evidence and the nature of punishment i.e. appellate authority can re-appreciate the evidence available on record and thereafter on the basis of its own reasons

can nullify, reduce, affirm or enhance the punishment imposed against the delinquent employee. The relevant paragraphs of the judgment rendered by the Hon'ble Supreme Court in the case of **B.C. Chaturvedi** (supra) are extracted as under:

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. ***The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.***

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before Court//Tribunal. *In Union of India v. H.C. Goel, this Court held at p-728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."*

23. The Hon'ble Supreme Court vide its judgment rendered in the case of **State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya, (2011) 4 SCC 584** has again considered the difference in the power of judicial review with the courts and the scope of appellate authority in the disciplinary matters and has held that the scope of the judicial review with the courts in the disciplinary matters is very limited whereas the appellate authority while deciding the appeal can re-appreciate the entire evidence available in the file of the disciplinary proceedings and thereafter by recording reasons can nullify, reduce, affirm or enhance the punishment imposed by the disciplinary authority. The relevant paragraph of the judgment rendered by the Hon'ble Supreme Court in the case of ***State Bank of Bikaner and Jaipur*** (supra) is extracted as under:

"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B. C. Chaturvedi vs. Union of India, Union of India vs. G. Gunayuthan, Bank of India vs. Degala Suryanarayana and High Court of Judicature at Bombay vs. Shahsi Kant S Patil.)"

24. Now we proceed to consider the provisions made in the Code of Civil Procedure, 1908 in respect of the scope of the appellate jurisdiction. For ready reference, Sections 96 and 107 of the Code of Civil Procedure, 1908 are extracted as under:

"96. Appeal from original decree .- *(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court*

(2) An appeal may lie from an original decree passed ex parte.

(3)No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees.]

x x x x x x x x x x x

107. Powers of appellate Court .- *(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-*

(a) to determine a case finally;

(b)to remand a case;

(c)to frame issues and refer them for trial;

(d)to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

25. We find that Section 107(2) of the Code of Civil Procedure, 1908 provides that subject to sub-clause (i), the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein. We are conscious of

the fact that provisions made in the Code of Civil Procedure, 1908 are not stricto sensu applicable in the disciplinary matters of the police officers as they are governed by the provisions made in the Rules of 1991 but the texture of appellate jurisdiction and the scope of the appellate authority can easily be understood if the provisions made in the Rules of 1991 are seen in the light of the aforesaid provisions made in the Code of Civil Procedure. We are of the view that the scope of the appellate authority under the Rules of of 1991 is almost identical to that of the scope available with the appellate court in terms of Section 107 of the Code of Civil Procedure. The provisions made in the Rules of 1991 itself provide that the powers of the appellate authority and the powers of the disciplinary authority are co-extensive and the appellate authority possesses jurisdiction to re-appreciate the entire evidence available on record and thereafter by recording reasons can nullify, reduce, affirm or enhance the punishment imposed by the disciplinary authority.

26. We are also of the view that by now, it is well settled proposition of law that powers of the appellate authority in the matters of disciplinary proceedings are much wider than the powers of judicial review as the appellate authority is empowered to appreciate entire evidence available on record and thereafter to nullify, reduce, affirm and enhance the punishment imposed by the disciplinary authority. We find that learned Single Judge while rendering the judgement and order dated 03.01.2022 in ***Writ-A No. 18299 of 2022, Pradeep Kumar Asthana Vs. State of U.P. and others*** has not considered the scope of the appellate jurisdiction as provided under the Rules of 1991 and thereby has erroneously held that in the context of penalty awarded, it may never be open to the disciplinary authority to award penalty and leave it open to the appellate and higher authority to consider if there exists any reason to award such penalty.

27. Since the appellate authority enjoys the same power to appreciate the entire evidence available on record and thereafter to record findings in support of the punishment as is available to the disciplinary authority therefore, if the appellate authority finds that reasons are missing in the punishment order but there is enough evidence on record to support the awarded punishment, then definitely the appellate authority after considering the reply submitted by the delinquent employee to the show-cause notice can record reasons and thereby can affirm the punishment imposed by the disciplinary authority.

28. In view of the aforesaid reasons, our answer to the issue framed by learned Single Judge is as under:

"The powers of the appellate authority under the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 are not confined only to the powers of judicial review rather the appellate authority in exercise of appellate powers can re-appreciate the entire evidence available on record and take decision akin to the powers available in the domain of the disciplinary authority.

29. Let this writ petition be placed before the learned Single Judge for deciding the matter.

(2024) 5 ILRA 746
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Civil Revision No. 22 of 2022

Mrs. Ameena Jung & Anr. ...Revisionists
Versus
Faridi Waqf & Ors. ...Opp. Parties

Counsel for the Revisionists:
Subhash Vidyarthi, Dhruv Mathur, Saud Rais

Counsel for the Opp. Parties:
Syed Qamar Hasan Rizvi, Farhan Habib, Pranav Agarwal, Pritish Kumar, Shantanu Gupta, Syed Aftab Ahmad

Civil Law - Code of Civil Procedure, 1908) - Order 1 Rule 10 – *Proper and Necessary Parties* – The Waqf in question was a *Waqf-Al-Aulad* (private Waqf for the settlor's descendants). The then Mutawalli, Abdul Jalil Faridi, who was also a beneficiary, knew his two sisters, among others, were direct beneficiaries. However, he moved application to delist properties from the Waqf Board's register without impleading the beneficiaries in the proceedings. Held : The revisionists, being direct beneficiaries and known to the Mutawalli, were necessary parties.. Revisionists presence before the Waqf Tribunal was both necessary and imperative as it affected the character and composition of waqf property which was the corpus of the waqf and was for the benefit of the beneficiaries. (Para 45)

Allowed. (E-5)

List of Cases cited:

1. Mst. Peeran Vs Hafiz Mohammad Ishaq, AIR 1966 All 201

2. Abhishek Shukla Vs High Court of Judicature, AIR 2018 All 32

3. Ramesh Hirachand Kundanmal Vs Municipal Corporation of Greater Bombay, (1992) 2 SCC 524

4. Mumbai International Airport (P) Ltd Vs Regency Convention Centre & Hotels (P) Ltd., (2010) 7 SCC 417

5. Baluram Vs P. Chellathangam, (2015) 13 SCC 579

6. S.P. Chengalvaraya Naidu Vs Jagannath, 1994 1 SCC 1

7. Indian Bank Vs Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550

8. United India Insurance Co. Ltd. Vs Rajendra Singh, (2000) 3 SCC 581

9. K.D. Sharma Vs SAIL, (2008) 12 SCC 481

10. A.V. Papayya Sastry Vs Government of A.P., (2007) 4 SCC 221

11. Ram Chandra Singh Vs Savitri Devi, (2003) 8 SCC 319

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The instant revision has been preferred under Section 83 (9) of the Waqf Act, 1995 being aggrieved by the order dated 04.07.2018 passed by the Uttar Pradesh Waqf Tribunal in Waqf Case no. 37 of 2018, as a consequence, several properties belonging to Waqf No. 42-A, Lucknow have been de-listed from the register of Waqf.

2. In order to appreciate the controversy involved in the instant revision, certain facts giving rise to the instant revision are being noted hereinafter:-

3. Dr. Mohd. Abdul Jalil Faridi and his brother Lt. Mohd. Rafey Faridi both sons

of Late Khan Bahadur Maulvi Mohammad Abdul Haq Saheb created a Walf-Alal-Nafs and Alal-Aulad to be (known as Waqf Faridi) by a Waqf deed dated 09.11.1945 and two properties were dedicated to the Waqf Faridi; (i) House No. 91, Dr. Moti Lal Bose Road, Machli Mohal, P.S. Hazratgarnj, Lucknow (ii) Faridi Building situated on Nazool Plot No. 14 near Maqbara Amzad Ali Shah, Hazratganj, Lucknow.

4. Dr. Mohd. Abdul Jalil Faridi was the first mutawalli of the Waqf and the waqf deed provided that the income of the waqf would be shared amongst the wakifs from generation to generation in equal amounts. The Waqf deed further stipulated that the income from any of the properties if was less than the amount required for its upkeep and other necessary expenses then the same could be sold to purchase a better property subject to the condition that on the purchase of the new property, the same would also be dedicated to the Waqf.

5. At this stage, it will be relevant to reproduce certain recitals of the Waqf deed:-

Section (1): The present Waqf shall be called 'Waqf Fareedi' and this Waqf is created for purposes of residence and sustenance of the persons endowing the Waqf mentioned in Section (4) on the following conditions. In the event of discontinuance of the progeny of the persons endowing the Waqf mentioned in the aforementioned Section, the income of the Waqf property, in accordance with the conditions mentioned in the present document, will be spent, on relatives and orphans and poors' education for those not having means and other beneficial causes, respectively.

Section 3: (a): It will be incumbent upon every Mutawalli to keep a regular nccounts of the present Waqf and give details of account to cach of the beneficiaries of the Waqf. It will be incumbent upon any Mutawalli that according to the desire of beneficiaries of the Waqf, satisfy them by showing them the accounts of the Waqf.

(b): If at any time the Mutawalli does not keep accounts, or without any strong and reasonable cause does not pay the income from Wagf property at any appropriate time, to the beneficiaries of the Waqf and necessity of filing of a suit arises, or commits such an omission in the management of the property. or he knowingly commits any act or acts on account of which there is a decrease in the profits of the property or commits express or implied dishonesty or misappropriates then the beneficiaries of the Waqf may jointly or severally will have a right to present a petition before the Authorised Officer get the Mutawalli removed and in his place any other person may be a Mutawalli according to the procedure and intention of the present document to discharge the duties of Mutawalliship.

Section 4 (a): The income of the Waqf property detailed below shall be spent on the repairs of the dilapidated and fallen buildings and payment of every kind of tax and other expenditures which are necessary for conservation of the Waqf property. The amount left after deduction of necessary disbursement and expenditure above mentioned will remain at the disposal of us executants, generations after generations, womb to womb and the said amount shall be distributed equally between we executants. This equal distribution shall remain operative with the progenies of we executants, that is to say half the income will be given to the progeny of me, the first

executant and the other half to me the second executant.

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(j): The beneficiaries of the Waqf will not have the right to transfer, directly or indirectly in any form, the profit which has been given to him in accordance with the conditions of the present document to any person who is not in the progeny of we executants or the sons of the brothers of deceased aforementioned, with or without any consideration. But, the progeny of we executants and the sons of the brothers of the deceased aforementioned can transfer amongst themselves the rights to profits with or without consideration. And if, Allah forbid, any person transfers the profit in violation of the conditions in the present documents, then that transfer with respect to the Waqf property shall be deemed to be illegal and void, and it will be incumbent on the Mutawalli of the Waqf to refuse to implement the same, and if the Mutawalli of the Waqf in disregard to the conditions of the present Section acts on such a transfer then he would be personally responsible for returning of that amount which he had spent in disregard to the conditions in the present Section and the other parties to the profit will have a right to recover that amount from the said Mutawalli and give to the person entitled amongst themselves.

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Section (6): If the income of a property out of the Waqf properties mentioned below becomes less than the necessary expenses above mentioned or by selling it, more profit is possible by buying another property then the Mutawalli at that time will have a right to sell that property aforesaid in accordance with the prevalent law and to buy another property but in this situation the property purchased shall be deemed to be a Waqf property and the conditions of the present document shall be promulgated and enforced on the same.

Section (7): In case the Waqf property is extinguished fully or partly on account of promulgation of a law in force at that time, it would be necessary to abide by Section (6) mentioned above.

6. Dr. Mohd. Abdul Jalil Faridi taking recourse to Clause 6 of the Waqf deed sought permission from the District Judge on 30th April, 1960 and sold part of the waqf property situate at 91, Moti Lal Bose Road by means of a deed dated 04.05.1960 in favour of Sunni Central Board of Waqf for a sale consideration of Rs. 61,307/-

7. Since in terms of Clause 6 upon sale of the waqf property, the proceeds were to be applied for the benefit of the waqf, accordingly, Dr. Mohd. Abdul Jalil Faridi, the mutawalli, purchased plot No. 3 at 23/B Ashok Marg (erstwhile known as 3-B Outram Road) through a sale deed dated 04.08.1961. Another property bearing Plot No. 3/1 Mohalla- Karbala, Alamgir, Ram Teerth Marg (Erstwhile known as New Berry Road), Narahi, Lucknow was purchased from the Sunni Central Board of Waqf by means of sale deed dated 31.10.1961 as such now the waqf had four properties namely (i) part of house no. 91, Dr. Moti Lal Bose Road (ii) Faridi Building, Hazratganj (iii) Plot No. 3, 23-B Outram Road (iv) lease hold plot measuring 15811 square feet at 3/1 New Berry Road, Lucknow.

8. The first mutawalli Dr. Mohd. Abdul Jalil Faridi died on 19.05.1974 and his son who also shared the same name as his father Mohd. Abdul Jalil Faridi, he became the mutawalli (for the sake of clarity, the first mutawalli has been referred to as Dr. Mohd. Abdul Jalil Faridi whereas

upon his death his son has been referred to as Mohd. Abdul Jalil Faridi).

9. Abdul Jalil Faridi filed an affidavit before the Waqf Board for inclusion of the two properties purchased by the Waqf namely Plot No. 3, 23-B Outram road and the lease hold rights in plot no. 3/1 New berry road, Lucknow as the said two properties were acquired from the funds generated by selling part of the waqf property by Dr. Mohd. Abdul Jalil Faridi, upon which clause 6 of the Waqf deed was applicable.

10. It is also relevant to note that Mohd. Abdul Jalil Faridi after having taken over as the mutawalli of the waqf got a new lease executed in his own name in respect of the property situate at New Berry Road, Lucknow. Later Mohd. Abdul Jalil Faridi entered into an agreement to sell in respect of the plot bearing No. 3/1 New Berry road, Lucknow, through one Sri Mustafa Khan, to sell the property in favour of Sri Keshav Gurnani and in order to take the proceedings to its logical conclusion also received sale consideration in installments.

11. He also made an application dated 08.05.2017 before the Waqf Board seeking the permission of the Board to de-list/remove the plot No. 3/1 New Berry Road, Lucknow and the property bearing No. 23-B, Outram Road (now known as Ashok Marg, Lucknow) from the register of waqf properties.

12. This application was rejected by the Waqf Board by means of order dated 27.02.2018. Mohd. Abdul Jalil Faridi assailed the said order by filing case No. 37 of 2018 before the Waqf Tribunal. The Waqf Tribunal after hearing Mohd. Abdul Jalil Faridi and the Waqf Board who were the only two parties before the Waqf Tribunal allowed the said petition noticing that the two properties for which Mr. Abdul Jalil Faridi had sought de-listing/removal from the register of Waqf were lease hold properties and since there was no permanent dedication, hence, the same could not be treated to be Waqf property and the Waqf Tribunal relying upon a decision of this Court directed that the two properties could not be waqf properties. Once, the said order was passed by the Waqf Tribunal dated 04.07.2018, Mohd. Abdul Jalil Faridi got the lease hold rights converted into free hold. Mohd. Abdul Jalil Faridi also executed his will dated 09.04.2018 and upon his death on 18.10.2018, in terms of his will the two properties i.e. bearing No. 23-B Ashok Marg and Plot No. 3/1 Ram Teerath Marg were bequeathed to his three daughters and the will also provided that Ms. Anush Khan would be the mutawalli of the Faridi Waqf.

13. Soon after the death of Mohd. Abdul Jalil Faridi, his three daughters transferred plot no. 3/1 New Berry Road to M/s Syks Infratech Pvt. Ltd. It is thereafter the present revisionist have filed the instant revision assailing the order dated 04.07.2018 passed by the Waqf Tribunal by filing this revision.

14. Sri Dhruv Mathur, learned counsel for the revisionist has assailed the order impugned passed by the Waqf Tribunal primarily on the ground that the proceedings before the Waqf Tribunal were collusive in nature. It is urged that the revisionist nos. 1 and 2 are the sisters of late Mohd. Abdul Jalil Faridi and daughters of Dr. Mohd. Abdul Jalil Faridi (the first mutawalli) and as such they were the beneficiaries of the waqf and without impleading them in proceedings before the Waqf Tribunal, such an order could not have been passed which

has the effect of removing the properties from the register of Waqf and ultimately permit the mutawalli to dissipate the property of waqf to his personal benefit.

15. It is further urged that Mohd. Abdul Jalil Faridi (the brother of the revisionist) throughout his lifetime had treated the said properties as waqf and belonging to Waqf Faridi. However, his actions of scheming to sell the waqf properties for his personal benefit were contradictory to his status of a mutawalli, whose primary role was to ensure that the property dedicated to the waqf was perpetuated and protected.

16. It is further submitted that Mohd. Abdul Jalil Faridi knowing fully well that the properties at Ashok Marg road and Ram Teerath Marg road were both Waqf properties and in a surreptitious manner, he got a lease executed in his personal name, which was legally not permissible, as he was trying to create a title in himself, adverse to the interest of the Waqf while he was discharging his obligations as a Mutawalli. Hence, in a fraudulent manner, he devised a methodology to transfer the property for which he used the judicial forum of the Waqf Tribunal to seek a seal of judicial acceptability and for it he only impleaded the Waqf Board and deliberately ignored to implead the necessary parties i.e. the beneficiaries and procured the order impugned behind the back of the revisionists.

17. The revisionist being the beneficiaries have a direct interest in the well being of the Waqf as well as in the upkeep of the Waqf properties and they have ample right and interest to maintain the revision.

18. Sri Mathur, learned counsel further urges that from the bare perusal of the waqf deed of 1945, it was clear that if any of the waqf properties were sold then the funds generated therefrom would be utilized for the benefit of the waqf and as such the property procured from such funds would also be treated as a waqf property and could not be transferred.

19. It is submitted that once Dr. Mohd. Abdul Jalil Faridi after seeking permission from the District Judge on 13th April, 1960 sold part of the waqf property situate at 91, Dr. Moti Lal Bose Road, the funds generated from the said sale was utilized by Dr. Mohd. Abdul Jalil Faridi in procuring the property at 23-B Ashok Marg and Ram Teerath Marg, hence, by virtue of Clause 6 of the Waqf deed and the said properties too were waqf properties.

20. Once, the said properties were waqf property and the brother of the revisionist i.e. Mohd. Abdul Jalil Faridi also treated the same as Waqf property, thus, he could not have acted adverse to the interest of the waqf by moving an application seeking to de-list the property from the register of the waqf.

21. It is further pointed out that the Waqf Board before whom, at the first instance, an application was moved, though, did not pass any order de-listing the properties from the register of waqf. However, it paved the way for Mohd. Abdul Jalil Faridi to approach the Waqf Tribunal wherein by merely impleading the Waqf Board who did not oppose the claim rather gave in to the prayer made by Abdul Jalil Faridi and facilitated the passing of the order impugned dated 04.07.2018.

22. It is also urged that the Waqf Board was duly aware of the fact that the part of the property of the Waqf Faridi which was sold by Dr. Mohd. Abdul Jalil Faridi to the Waqf Board itself and from the said sale proceeds received, two properties were created which was in the notice of the Waqf Board including as per the stipulations contained in Clause 6 of the Waqf deed of 1945, hence, in such circumstances, it was apparent that the proceedings before the Waqf Tribunal was nothing but a process to scrub and cleanse the illegal act of Abdul Jalil Faridi.

23. It is also submitted that the provisions of the Uttar Pradesh Muslim Waqf Act, 1960 defines a waqf and the waqf property. The provisions contained in the Waqf Act, 1995 are a little different especially the definition of the word 'waqf'. It is also submitted that the reliance placed by the Waqf Tribunal on the decision of this Court in ***Mst. Peeran Vs. Hafiz Mohammad Ishaq: AIR 1966 Alld. 201*** which has been followed in a subsequent decision of this Court in ***Abhishek Shukla Vs. High Court of Judicature; AIR 2018; Alld 32*** do not help the case and the dictum therein has been incorrectly applied by the Waqf Tribunal, accordingly, the premise upon which the order has been passed by the Waqf Tribunal is erroneous.

24. It has further been submitted by Sri Mathur that since the property of the waqf was Nazool, hence, its disposition would not be in terms of the Transfer of Property Act, 1882 rather it being a grant and was governed by the Government Grants Act, 1895. It is also urged that Section 2 of the Government Grants Act, 1895 clearly indicates that the Transfer of Property Act, 1882 will not apply to Government Grants, thus, the manner in which the Waqf property has been transferred is clearly fraudulent.

25. Lastly, it has been urged that various documents filed in the instant revision would indicate the fraudulent activities of Mohd. Abdul Jalil Faridi and the course he adopted to transfer the Waqf property fraudulently in itself renders all acts as a nullity including the deed which the daughters of Mohd. Abdul Jalil Faridi have executed in favour of M/s SYKS Infratech Pvt. Ltd. Any order which is effectuated by fraud, misrepresentation and concealment of fact is necessarily rendered void and if the order dated 04.07.2018 is held as such then all consequential acts including execution of the deed in favour of M/s Syks Infratech Pvt. Ltd. also falls and the property which has been illegally sold needs to be reverted back and be declared as property and part of Waqf Faridi.

26. Sri Sudeep Seth, learned Senior Counsel assisted by Sri Syed Aftab Ahmad, learned counsel appearing for respondent no. 3 has questioned the submissions made by learned counsel for the revisionist primarily on the ground that the instant revision has been preferred under Section 83 (9) of the Wakf Act of 1995. It is submitted that the scope of a revision in terms of the aforesaid section is very narrow. The thrust of the submission is that the present revisionists were not a party before the Waqf Tribunal. The revisionist allege themselves to be the beneficiaries of the Waqf but since the time of its creation in the year 1945 till the initiation of proceedings of this revision, the revisionists did not claim any right as a beneficiary and as such they were neither the necessary nor proper parties before the Waqf Tribunal, hence, they have no right to maintain the above revision.

27. It is also urged by the learned Senior Counsel that the order dated 27.02.2018 passed by the Waqf Board has

not been challenged by the revisionists. In absence of any challenge to the order dated 27.02.2018 passed by the Waqf Board, the order passed by the Waqf Tribunal dated 04.07.2018 could not be challenged since the genesis is the order dated 27.02.2018. In the said circumstances, the revisionists ought to have filed an appropriate application before the Waqf Tribunal itself rather than rushing to this Court. Even otherwise, the revisionists have filed large number of documents with the revision and the revisionists have raised controversial questions which are pure questions of fact which require evidence and it cannot be seen or adjudicated by this Court in exercise of its revisional jurisdiction.

28. It is further submitted by Sri Seth that admittedly the two properties, the subject matter of controversy i.e. one at Ashok Marg and the other at New Berry Road, were both Nazool properties and it is the State which has absolute title to such properties. Upon the expiry of the period of lease, the said two properties came into the hands of the State. It is further urged that the lease of Ashok Marg property expired on 31.03.1991 whereas the lease relating to the New Berry Road property expired on 27.03.1999. Even assuming if the said properties were of the Waqf, even then at best the Waqf had only a limited interest therein. As soon as the term of the respective lease came to an end, they ceased to be Waqf properties.

29. It is also urged that in any case, as per the definition of the word 'waqf' as contained in the Wakf Act, 1995, it is necessary that the property is dedicated to the waqf permanently. In case if the settlor did not have exclusive right to dedicate the property to the Waqf permanently, in such a situation, a Waqf cannot be created as it lacks the necessary ingredient of permanent dedication. It is further urged that this is the issue which has been considered by this Court in ***Mst. Peeran (supra)*** and reiterated in ***Abhishek Shukla (supra)***. The case of Abhishek Shukla (supra) has been affirmed by the Apex Court in SLP No. 3085 of 2018 (Waqf Maszid Vs. High Court) by means of order dated 13.03.2023, hence, it cannot be said that the order passed by the Waqf Tribunal was bad.

30. It has also been pointed out that actually there is a fallout between the revisionists and the private respondents nos. 2 to 4. The revisionists also sought to transfer some part of the property and at that point of time, there was no protest raised by the revisionist. It is only at a later stage when there appears to be some disagreement regarding the sharing of the funds that the aforesaid dispute has been raised and for all the aforesaid reasons, the revision is not maintainable and deserves to be dismissed.

31. Sri Seth, learned Senior counsel has relied upon the following decisions in support of his submissions.

(i) ***Vidya Varuthi Thirtha Vs. Balusami Ayyar and Others; 1921 SCC Online PC 58***

(ii) ***Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta; (1969) 2 SCC 471***

32. Sri Pritish Kumar, learned counsel has opposed the aforesaid revision on behalf of M/s Syks Infratech Pvt. Ltd, the respondent no. 5 and it is urged by that the respondent no. 5 is a bonafide purchaser for valuable consideration. It is submitted that the respondent no. 5 had purchased the property for a valuable sale consideration which was paid to the private respondent

nos. 2 to 4. On the date of the execution of the said deed dated 24.12.2018, admittedly, the said property was not a waqf property. Any dispute between the revisionists on one hand and the private respondent nos. 2 to 4 is primarily between the beneficiaries of the Waqf inter se, however, the same cannot affect the right, title and interest of the respondent no. 5, inasmuch as, the deed executed in favour of respondent no. 5 has not been challenged before any court of law and still continues to subsist.

33. It is further submitted that in so far as the contention made by Sri Seth, learned Senior Counsel for the respondent no. 3 regarding the status of a lease hold property and whether such property could have been dedicated to a Waqf stands answered by a Division Bench of this Court in the case of Abhishek Shukla (supra) and in such circumstances, the property could not be treated to be a waqf property, hence, transferring the same by the respondent nos. 2 to 4 in favour of the respondent no. 5 cannot be said to be effectuated by any misrepresentation or fraud and to that extent the rights of the respondent no. 5 continues to be good and for the aforesaid reasons, the revision deserves to be dismissed.

34. Sri Farhan Habib, learned counsel who has appeared on behalf of the Waqf Board has merely adopted the submissions of the learned Senior Counsel Sri Sudeep Seth and did not make any independent submissions.

35. The Court has heard the learned counsel for the parties and also perused the material on record.

36. The question that arises for adjudication before this Court is; (i) whether the instant revision is maintainable at the behest of the revisionists who were not parties before the Waqf Tribunal; (ii) Whether the lease hold property could be Waqfed or in the given facts and circumstances, upon the expiry of the lease period, the Waqf was extinguished and as such the Waqf Tribunal was justified in passing the impugned order dated 04.07.2018.

37. This Court proposes to take up the issue no. (i) first since in case if it is held that the revisionists were necessary and proper parties then they are to be given an opportunity to contest and considering the fact that the documents which have been filed by the revisionists before this Court, apparently, were not before the Waqf Tribunal and in such circumstances the said documents would have to be considered in context with the defence of the revisionists. Hence, in case if the answer to question no. (i) is in the affirmative then necessarily the matter will have to be remanded for a decision afresh and in case if the answer to question no. (i) is in the negative then the Court shall proceed to consider the issue no. (ii) as noticed above irrespective of the documents filed by the revisionists.

38. In order to answer the first question, it will be relevant to notice certain facts which are not in dispute. A Waqf was created in the year 1945 by Dr. Mohd. Abdul Jalil Faridi and his brother Lt. Mohd. Rafey Faridi. The Waqf deed has been brought on record and the relevant clauses have already been reproduced hereinabove first:-

39. Clause 6 of the said Waqf deed clearly indicates that in case if with the prior permission any part of the waqf property is sold, then the proceeds generated therefrom shall be utilized for the Waqf and the same would also be treated to be a Waqf property.

40. The record would further indicate that the revisionists have filed a letter which has been written by Mohd. Abdul Jalil Faridi addressed to the Waqf Board dated 08th August, 1975 requesting the Waqf Board to incorporate the property situate at Ram Teerath Marg to be incorporated as part of Waqf Faridi. Another letter dated 31.07.1975 written by Mohd. Abdul Jalil Faridi and addressed to the Waqf Board seeking permission of the Board for raising a loan from the LIC and for the said purpose permission to mortgage the said property as collateral was sought. Another letter dated 27th May, 1991 followed by a letter dated 27th July, 1991, 20th September, 1991 indicating that Mohd. Abdul Jalil Faridi always treated the said property as Waqf property. The very fact that the Waqf was a dedication for the beneficiaries of the creator of the Waqf (settlor) which includes the present revisionists who are the daughters of Dr. Mohd. Abdul Jalil Faridi and after his death his son Mohd. Abdul Jalil Faridi became the mutawalli and the present revisionists being his sisters were the beneficiaries.

41. The concept of proper and necessary parties has been enshrined in Order 1 Rule 10 C.P.C. and with the aid of the decisions of the Apex Court, the said provision has been explained as under:-

42. In ***Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524***, the Apex Court has held as under:-

5. It was argued that the Court cannot direct addition of parties against the wishes of the plaintiff who cannot be compelled to proceed against a person against whom he does not claim any relief. Plaintiff is no doubt dominus litis and is not bound to sue every possible adverse claimant in the same suit. He may choose to implead only those persons as defendants against whom he wishes to proceed though under Order 1 Rule 3, to avoid multiplicity of suit and needless expenses all persons against whom the right to relief is alleged to exist may be joined as defendants. However, the Court may at any stage of the suit direct addition of parties. A party can be joined as defendant even though the plaintiff does not think that he has any cause of action against him. Rule 10 specifically provides that it is open to the Court to add at any stage of the suit a necessary party or a person whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

6. Sub-rule (2) of Rule 10 gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.

8. The case really turns on the true construction of the rule in particular the meaning of the words "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all

the questions involved in the suit". The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose. If the inter-vener has a cause of action against the plaintiff relating to the subject matter of the existing action, the Court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions.

43. In ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd., (2010) 7 SCC 417***, the Apex Court has observed as under:-

"13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."

44. In ***Baluram V. P.Chellathangam; (2015) 13 SCC 579***, the issue before the Apex Court was regarding the right of

impleadment of a beneficiary viz a viz a Trust and this is similar to the issue involved in the instant case. The Apex Court has held as under:-

"12. After due consideration of the rival submissions, we are of the view that the High Court erred in interfering with the order of the trial court impleading the appellant as a party defendant. Admittedly, the appellant is a beneficiary of the Trust and under the provisions of the Trusts Act, the trustee has to act reasonably in exercise of his right of alienation under the terms of the trust deed. The appellant cannot thus be treated as a stranger. No doubt, it may be permissible for the appellant to file a separate suit, as suggested by Respondent 1, but the beneficiary could certainly be held to be a proper party. There is no valid reason to decline his prayer to be impleaded as a party to avoid multiplicity of proceedings. Order 1 Rule 10(2) CPC enables the court to add a necessary or proper party so as to "effectually and completely adjudicate upon and settle all the questions involved in the suit".

In Mumbai International Airport [(2010) 7 SCC 417 : (2010) 3 SCC (Civ) 87] this Court observed: (SCC pp. 422-25, paras 13-15, 19 & 22)

"13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ('the Code', for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

10. (2)Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.'

14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary

party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

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19. Referring to suits for specific performance, this Court in Kasturi [Kasturi v. Iyyamperumal, (2005) 6 SCC 733 : AIR 2005 SC 2813] , held that the following persons are to be considered as necessary parties: (i) the parties to the contract which is sought to be enforced or their legal representatives; (ii) a transferee of the property which is the subject-matter of the contract. This Court also explained that a person who has a direct interest in the subject-matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party on his application under Order 1 Rule 10 CPC. This Court concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant vendor will not be a necessary party.

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22. Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice."

45. Applying the principles as culled out from the aforesaid decisions, it would be clear that in so far as the present dispute is concerned, where a mutawalli was seeking the permission to de-list certain properties from the register of Waqf then in such a case, at least those parties who, in the knowledge of the mutawalli, were the direct beneficiaries and would be affected ought to have been impleaded in the proceedings before the Tribunal. The Waqf Board, though, was a necessary and a proper party to the said proceedings but it could not exclude the revisionists who were the beneficiaries and their identity was very well known to the then mutawalli, moreso where it was a Waqf-Al-Aulad, (a private Waqf for the benefit of the descendants of the settlor) and the then mutawalli himself was its beneficiary and he had full knowledge of the fact that his two sisters, amongst others, were in the category of direct beneficiaries. The least he could do was to have impleaded them as a party as in this sort of dispute which was before the Waqf Tribunal, their presence was both necessary and imperative as it affected the character and composition of waqf property which was the corpus of the waqf and was for the benefit of the beneficiaries.

46. The factual matrix which unfolds indicates that the Mutawalli Abdul Jalil

Faridi had moved an application before the Waqf Tribunal seeking de-listing the properties from the Waqf Board from the register of Waqfs maintained by the Waqf Board. The documents which have been filed before the Waqf Tribunal were selective in the sense that Mohd. Abdul Jalil Faridi did not bring on record all those letters which have been mentioned hereinabove by which Mohd. Abdul Jalil Faridi himself had sought the permission from the Waqf Board to mortgage the property to incorporate the property in the Waqf Register as well as seeking permission to raise residential flats over the Waqf property.

47. There are certain documents which have been filed by the revisionists to submit that Mohd. Abdul Jalil Faridi was in a habit of maintaining a diary/a journal wherein he had recorded sequence of events and facts which indicates the mindset that the Waqf property was being transferred for which unscrupulous means were being adopted.

48. Though, the said documents are not admitted to the respondents nor they were before the Waqf Tribunal but without commenting on the said documents on merits regarding their admissibility and relevancy, suffice to state that they do appear to have some bearing on the controversy.

49. Moreover, the said documents do require proof but the very fact that the documents which have been brought on record by the revisionists along with their affidavit in support of the application for interim relief filed along with the revision and with the rejoinder affidavit relate to the controversy in question and could have thrown light over the controversy raging between the parties.

50. Before proceeding further, it will be worthwhile to notice certain decisions of the Apex Court as to the effect of not bringing on record the complete documents or selective disclosure or concealment of facts which are relevant to the controversy and known to the party. The Apex Court in ***S.P. Chengalvaraya Naidu Vs. Jagannath; 1994 1 SCC 1*** has held as under:-

"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

53. Again in ***Indian Bank V. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550***,

the Apex Court in para 20, 22 and 23 has held as under:-

"20. By filing letter No. 2775 of 26-8-1991 along with the review petition and contending that the other letter, namely, letter No. 2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16-11-1993, which was based on letter No. 2776, was obtained by the respondent by practising fraud not only on the appellant but on the Commission too as letter No. 2776 dated 26-8-1991 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the authorities, be they constitutional, statutory or administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together (Fraus et jus nunquam cohabitant). It has been repeatedly said that fraud and deceit defend or excuse no man (Fraus et dolus nemini patrocinari debent).

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22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See:Benoy Krishna Mukerjeev.Mohanlal Goenka[AIR 1950 Cal 287] ;Gajanand Sha v. Dayanand Thakur [AIR 1943 Pat 127 : ILR 21 Pat 838] ; Krishnakumar v. Jawand Singh [AIR 1947 Nag 236 : ILR 1947 Nag 190] ;Devendra Nath Sarkar v. Ram Rachpal Singh [ILR (1926) 1 Luck 341 : AIR 1926 Oudh 315] ;Saiyed Mohd. Raza v.Ram Saroop [ILR (1929) 4 Luck 562 : AIR 1929 Oudh 385 (FB)] ; Bankey Behari Lal v. Abdul Rahman [ILR (1932) 7 Luck 350 : AIR 1932 Oudh 63] ; Lekshmi Amma Chacki Amm v. Mammen Mammen [1955 Ker LT 459] .) The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (Ishwar Mahton v. Sitaram Kumar [AIR 1954 Pat 450]) or to set aside the order recording compromise obtained by fraud. (Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh [AIR 1958 Pat 618 : 1958 BLJR 651] ; Tara Bai v.V.S. Krishnaswamy Rao [AIR 1985 Kant 270 : ILR 1985 Kant 2930] .)"

51. Similarly, the Apex Court in ***United India Insurance Co. Ltd. Vs. Rajendra Singh; (2000) 3 SCC 581*** in paras 15 and 16 has held as under:-

"15. It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

52. Again in **K.D. Sharma v. Steel Authority of India Limited; ((2008) 12 SCC 481**, the Hon'ble Apex Court has held as under:

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

35. The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of R.V. Kensington Income Tax Commissioners, [1917] 1 K.B. 486 : 86 LJ KB 257 : 116 LT 136 in the following words:

"...it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts-it says facts, not law. He must not misstate the law if he can help it; the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement".(emphasis supplied)

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger

public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

37. In Kensington Income Tax Commissioner, Viscount Reading, C.J. observed:

"…Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit". (emphasis supplied)

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts"."

53. In ***A.V. Papayya Sastry v. Government of A.P., (2007) 4 SCC 221*** the Apex Court has observed as under:

"21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed; "Fraud avoids all judicial acts, ecclesiastical or temporal".

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : [1956] 1 Q.B. 702 : [1956] 2 WLR 502, Lord Denning observed:

"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

24. In Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it

might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

27. In S.P. Chengalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs., (1994) 1 SCC 1 : JT (1994) 6 SC 331, this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there was no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', Kuldip Singh, J. stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation". (emphasis supplied)

29. The Court proceeded to state:

"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would he guilty of playing fraud on the court as well as on the opposite party".

30. The Court concluded:

"The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants".

54. In ***Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319*** the Apex Court has held as under:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In Derry v. Peek, [L.R.] 14 App. Cas. 337, it was held:

In an 'action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit."

20. In Kerr on Fraud and Mistake, at page 23, it is stated:

"The true and only sound principle to be derived from the cases represented by Slim v. Croucher is this : that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with Derry v. Peek. A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief", said Lord Herschell, "is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so."

21. In Bigelow on Fraudulent Conveyances at page 1, it is stated:

"If on the facts the average man would have intended wrong, that is enough."

It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be

committed only against a being capable of rights, and 'fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question."

22. Recently this Court by an order dated 3rd September, 2003 in Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education reported in (2003) 8 SCC 311 : JT 2003 Supp (1) SC 25 held:

"Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry v. Peek, [L.R.] 14 App. Cas. 337) In Lazarus Estate v. Berly, [1971] 2 WLR 1149 the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment "no Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything". The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

In S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1 this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

24. In Arlidge & Parry on Fraud, it is stated at page 21:

"Indeed, the word sometime appears to be virtually synonymous wit "deception", as in the offence (now repealed) of obtaining credit by fraud. It is true that in this context "fraud" included certain kind of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit "under false pretences, or by means of any other fraud". In Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit by fraud but not of obtaining the meal by false pretences : his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a "false front" has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act, 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both Jones and the "false front" could now be treated as cases of obtaining property by deception."

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application f any equitable doctrine including resjudicata.

26. In Shrisht Dhawan v. Shaw Brothers, (1992) 1 SCC 534 : AIR 1992 SC 1555], it has been held that:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized

system of jurisprudence. It is a concept descriptive of human conduct."

27. In S.P. Chengalvaraya v. Jagannath [(1994) 1 SCC 1] this Court in no uncertain terms observed:

"…The principles of "finality of litigation" cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation…. A fraud is an act of deliberate deception with the design of security something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage… A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In Indian Bank v. Satyam Fibers (India) Pvt. Ltd. [(1996) 5 SCC 550], this Court after referring to Lazarus Estates (supra) cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order".

It was further held:

"The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business."

29. In Chittaranjan Das v. Durgapore Project Limited, 99 CWN 897, it has been held:

"Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby."

55. Apparently, had the revisionist been impleaded and were granted an opportunity to contest and the aforesaid

documents would have been placed on record of the Tribunal then at least its impact could have been noticed and assessed by the Tribunal after hearing the concerned parties while giving its verdict, however, this Court finds that in absence of the revisionist who were not impleaded and they could not raise their defence nor could produce the relevant documents before the Waqf Tribunal, hence, they have been deprived of an opportunity to contest as they were both necessary and proper parties.

56. It is no doubt true that the scope of revision is not as wide as rights exercised by an Appellate Authority but the fact remains that even while exercising the powers of revision in terms of Section 83 (9) of the Waqf Act, 1995, the Court has the power to see the legality and proprietary of the order impugned and in order to ascertain the same, this Court in the aforesaid facts and circumstances finds that there are number of issues which require consideration; (i) Whether in terms of Clause 6, the subsequently purchased properties were waqf property or not; (ii) whether a lease hold property could be made the subject matter of a waqf (iii) whether the mutawalli who by his conduct has been treating a particular property as a waqf and later takes recourse to certain acts which is adverse to his status of a mutawalli viz.a.viz. the Waqf and its effect; (iv) whether the free hold deed got executed by the mutawalli in his personal name and thereafter the said property was sold to the respondent no. 5, what rights would accrue to the respondent no. 5 is also an issue to be considered; (v) whether the respondent no. 5 was a bonafide purchaser for valuable consideration and whether his rights are protected in terms of Section 44 of the Transfer of Property Act; (vi) whether the provisions of the Transfer of Property Act viz.a.viz, the provisions contained in the Government Grants Act, 1885 are applicable; (vii) whether Mohd. Abdul Jalil Faridi could have bequeathed the waqf properties by way of a will and could have made his daughter a mutawalli by a testamentary disposition to the exclusion of his sisters as per their personal law is also an issue which requires consideration; (viii) whether the decisions of this Court in Mst. Peeran and Abhishek Shukla (supra) would have an impact in the given facts and circumstances of this case.

57. The issues as noticed above could have been adjudicated had the persons having right and interest in the waqf would have been impleaded. Unfortunately, the revisionists were not impleaded as a party and even the Waqf Board while filing its response before the Waqf Tribunal did not raise a relevant defence but a formal written statement filed which was nothing but an eye-wash and in such circumstances, this Court is of the clear opinion that the presence of the revisionists before the Waqf Tribunal was necessary and imperative.

58. Having arrived at the aforesaid conclusion that the presence of the present revisionists before the Waqf Tribunal was imperative and it was further necessary to have given an opportunity of hearing to the revisionists as the matter involved deeper questions as noticed above which required adjudication. Hence, in the aforesaid circumstances, the impugned order dated 04.07.2018 is set aside. The petition no. 37 of 2018 before the Waqf Tribunal shall stand restored. The parties shall appear before the Tribunal on ***01st July, 2024*** and the revisionist shall be entitled to move an formal application for impleadment along with their written statements and documents in case if such an application is moved, the same shall be allowed. The parties shall be

permitted to lead evidence on the issue emerging from their pleadings including the issues noticed by this Court and after affording full opportunity of hearing to the parties, but without granting an unnecessary adjournments, the Waqf Tribunal shall hear the matter afresh and pass appropriate orders in accordance with law by a reasoned and a speaking order.

59. It is made clear that this Court has only allowed the revision on question no. (i) i.e. the revisionists were necessary and proper parties and they have been deprived of an opportunity to contest and the question no. (ii) is left open to be decided on merits after due contest, hence, any observation made by this Court may not be taken as an expression of opinion on merits of the matter. The parties shall be at liberty of raising all pleas open to them in law including on the issue of admissibility and relevancy of documents filed by the respective parties which shall be decided by the Tribunal in accordance with law.

60. Accordingly, the revision is ***allowed*** in the aforesaid terms. Costs are made easy.

(2024) 5 ILRA 767
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 66 of 1992

Smt. Saroj Jaiswal ...Appellant
Versus
L.I.C. Of India Branch Sitapur ...Respondent

Counsel for the Appellant:
Avadhesh Kumar

Counsel for the Respondent:
P.K. Khare, Raj Kumar Singh

Insurance - Insurance Claim and Double Accident Benefit - Accidental Death - Drowning In the instant case, deceased had a life insurance policy with a double accident benefit. After his death, his legal heir (the appellant) received ₹21,103.40 as a full and final settlement of the policy amount without protest. Subsequently, the appellant filed a Regular Suit seeking additional double accident benefit, claiming the death was due to accidental drowning. Doctor stated in his evidence that he had not examined the body of the deceased to determine the cause of death. *Held* :- Court held that death on account of drowning cannot be determined merely by observation and the external condition of the body; it can only be ascertained by an internal examination of the body. It could not be proved that the deceased died on account of drowning as an accidental death. Therefore, the plaintiff-appellant was not entitled for double amount of policy in terms of insurance policy. (Para 16)

Dismissed. (E-5)

List of Cases cited:

Kodali Purnachandra Rao & anr. Vs The Public Prosecutor, Andhra Pradesh; (1975) 2 SCC 570

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

1. Heard Shri Avadhesh Kumar, learned counsel for the appellant. None appeared on behalf of the respondent even in the revised list.

2. This second appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.09.1991 passed by the District Judge, Sitapur in Civil Appeal No.57 of 1991; Life

Insurance Corporation of India Vs. Smt. Saroj Jaiswal by means of which the appeal has been allowed and the judgment and decree appealed against has been set-aside and the suit of the plaintiff-appellant has been dismissed with cost through out.

3. The facts, giving rise to this appeal, are that the plaintiff-appellant filed a suit for the recovery of Rs.20,000/- with interest at the rate of eighteen per cent per annum towards the amount of policy and Rs.548.60 paise towards the excess premium paid and Rs.2500/- towards the accidental interest on the ground that late Vijay Singh had taken a policy on 28.12.1977 from the defendant-respondent, which was a policy for double accident benefit. The plaintiff-appellant was nominee in the said policy. Late Vijay Singh accidentally died by drowning in the river at Gopal Ghat on 14.05.1984, therefore the plaintiff-appellant put a claim and she was paid Rs.21,103.40 paise i.e. the amount of policy but the double accident benefit has not been given, whereas since the policy was for double accident benefit, therefore the appellant is liable to be paid a further sum of Rs.20,000/-, which has not been paid despite demands alongwith other claims.

4. The defendant-respondent contested the suit. It was not denied that the policy was not taken by the deceased Late Vijay Singh on 28.12.1977 for Rs.20,000/-, which was a double accident benefit policy i.e. in case of death by accident, the double amount was to be paid. However it was pleaded that late Vijay Singh had not died on account of an accident. The defendant-respondent had demanded the documents in proof of death by accident, which were not furnished, therefore the amount of policy was paid which was accepted by the plaintiff-appellant towards full and final payment of the final claim under the policy and for this reason also the plaintiff-appellant is not entitled to any further amount.

5. Learned trial court, after exchange of pleadings, framing of necessary issues and evidence adduced by the parties, allowed the suit holding the plaintiff-appellant entitled the double the amount according to the policy. It was also held that the amount of Rs.21,103.40 paise has not been received towards full and final settlement. Accordingly, the suit was decreed by means of judgment and decree dated 19.07.1991 for Rs.20,000/- with interest at the rate of six per cent per annum. However, the suit was dismissed for Rs.548.60 for the excess premium paid and Rs.2500/- as interest. Aggrieved by the part of the decree, the defendant-respondent preferred Civil Appeal No.57 of 1991, which was allowed by the District Judge, Sitapur by means of the judgment and order dated 28.09.1991 setting aside the judgment and decree appealed against and dismissed the suit of the plaintiff-appellant. Hence this second appeal has been filed.

6. The following substantial questions of law have been formulated in this appeal:-

"1. Whether on the basis of medical attendant certificate issued by the doctor and the evidence adduced before the tribunal, the deceased can be held to be died on account of drowning as an accidental death and the appellants are entitled for double amount of policy in terms of insurance policy ?

2. Whether acceptance of the original amount of policy with full and final satisfaction will amount to relinquishment of the double amount of policy.?"

7. Learned counsel for the appellant submitted that late Vijay Singh had taken a

policy for double accident benefit. He had died accidentally on account of drowning, a certificate in regard to which was given by the family doctor of the plaintiff-appellant, who was also a panel doctor of the defendant-respond i.e. Life Insurance Corporation of India, therefore the plaintiff-appellant is entitled for the amount of Rs.20,000/- towards the double benefit and other claims as claimed by him in the suit filed by him. However the same has wrongly and illegally been denied to him. He further submitted that the trial court, after considering the pleadings of the parties and evidence adduced before it, had rightly and in accordance with law decreed the suit and directed to make the payment of Rs.20,000/- alongwith interest at the rate of six per cent per annum. However the appellate court wrongly and illegally, without considering that a panel doctor of the defendant-respondent corporation has given a certificate of accidental death of late Vijay Singh by drowning, which was also proved by him by oral evidence, allowed the appeal and dismissed the suit, which could not have been done.

8. He further submitted that merely because the plaintiff-appellant had accepted Rs.21,103.40 paise in full and final satisfaction of claim, it could not be said that the claim for double amount on the basis of double accident policy is not maintainable because the said amount was accepted as the plaintiff-appellant was entitled for the same and it can not be said that the appellant is not entitled for the double amount on the basis of double accident policy.

9. I have considered the submissions of learned counsel for the appellant and perused the records.

10. Late Vijay Singh had taken a policy of Rs.20,000/- on 28.12.1977, which was a policy for double accident benefit. He had died on 14.05.1984, therefore the claim was put forth by the plaintiff-appellant and she was paid the amount of policy i.e. Rs.21,103.40 paise, which was accepted by plaintiff-appellant towards full and final payment without any protest. Thereafter the appellant claimed the benefit of the double accident policy and filed a Regular Suit No.258 of 1987 claiming the same. After exchange of pleadings, four issues were framed by the trial court; (1) As to whether the plaintiff is entitled to receive the amount in dispute, (2) As to whether the plaintiff-appellant is entitled for any interest, if so, on what rate, (3) As to whether the plaintiff would be stopped from receiving the claim of double accident benefit, since she has received towards the full and final settlement as mentioned in paragraph- 18 of the written statement and (4) The plaintiff is entitled for which relief.

11. The trial court partly allowed the suit and decreed for double accident benefit of Rs.20,000/- but dismissed for rest of the relief. Being aggrieved, the respondent filed civil appeal, which has been allowed and the judgment and decree passed by the trial court has been set-aside and the suit of the appellant has been dismissed. Hence the instant second appeal has been filed, in which the aforesaid substantial questions of law have been formulated.

12. In view of above and the first substantial question law formulated by this Court, this Court has to consider as to whether the appellant is entitled to double amount of the accident benefit of the policy, treating the death of late Vijay Singh as a result of the accident. The plaintiff-appellant preferred the claim alleging that the death was caused due to drowning and it was accidental death. On her application the defendant-respondent demanded the inquest

report and postmortem report to prove the accident, which was not submitted, therefore the claim of the plaintiff-appellant for double accident benefit was not accepted. The plaintiff-appellant has claimed that the death was result of drowning and therefore she is entitled to double of the amount of the policy, therefore she had to prove that the insured late Vijay Singh had died by accident of drowning. The plaintiff-appellant to prove her claim got herself examined as PW-1 and Dr. Laxmi Narain Agarwal as PW-2, who after examining the deceased had issued the medical attendant certificate, which was filed before the trial court to prove that the death was due to drowning.

13. PW-2 had issued the medical attendant certificate, which was placed on record as paper no.15 Ga-1/7. He admitted in his cross-examination that he is family doctor of the plaintiff-appellant, therefore he was called to examine the deceased after he was taken out of water and he found him dead. However no certificate was given by him on that day i.e. 14.05.1984 and it was given by him subsequently on 25.07.1984. In the certificate he has not mentioned any symptom or condition to show that the death was on account of drowning. He also stated in his cross-examination that certificate was issued by him regarding the death and not for the reason of the death. He also stated that he did not examine the dead body with a view to find the cause of death, therefore admittedly he had not examined the cause of death, therefore it can not be disputed that he had mentioned the cause of death on the information given by the appellant.

14. The medical attendant certificate (paper no.15 Ga-1/7) is on a proforma of the Life Insurance Corporation of India. Clause-5-(a) of the certificate is 'what was the exact cause of death? (Besides defining the deceased or other cause or death in such terms as you consider appropriate, kindly add the distinotive technical name)'. Sub clause (b) is 'was it ascertained by examination after death or inferred from symptom and appearance during life.' Sub clause (g) is 'Did you attend him during the whole of it's course? If not, state during what period?' Against the sub clause (a), the PW-2 has given the primary cause "Drowning" and secondary cause 'nil', whereas as per sub-clause (a) of clause-5 the distinotive technical name was also to be added but the same has not been given. It is obvious because PW-2 had not examined the body of deceased to know the reason of death, therefore he has rightly not given. Against the sub-clause (b), PW-2 mentioned 'accidental drowning case' but it has not been disclosed in terms of sub-clause (b) as to whether it was ascertained by the examination after death or inferred from symptoms and appearance and what was symptoms and appearance. Against sub-clause (g), PW-2 mentioned 'yes, just after taking out of water, I was consulted', therefore admittedly PW-2 was consulted after the body was out of water. Therefore, admittedly PW-2 was consulted and had seen the dead body after taking out of the water. When the evidence of PW-2 as disclosed above is considered in the light of the observations made in the medical attendant certificate, this Court finds that the PW-2 could not prove that the death of insured person was as a result of the drowning.

15. The first appellate court, after considering the evidence of PW-2, has recorded a finding that his statement does not prove that the death of the insured person was as a result of the drowning. The appellate court has further recorded that the

respondent i.e. the plaintiff-appellant has not produced any evidence to prove this fact, no postmortem report was produced, no person who might have seen the insured person drowning has been examined and from the circumstances it is not established that the death was the result of drowning.

16. The death on account of drowning can not be determined merely by observance and the external condition of the body. The doctor has also stated in his evidence that he has not examined the body of the deceased to know the reason of death. The reason of death has also not been given by the doctor, which could also not have been given without internal examination of the body which could reveal symptoms which may indicate with certainty as to whether the death was from drowning or from unlawful violence or any other reason before the body was immersed in water. If the body was immersed in water after some violence with the body or any other reason for the death it can not be said that the death was accidental on account of drowning.

17. The Hon'ble Supreme Court, in the case of **Kodali Purnachandra Rao and Another Vs. The Public Prosecutor, Andhra Pradesh; (1975) 2 SCC 570**, has held that medical jurists have warned that in the case of a dead body found floating in water, the medical man from a mere observance of the external condition of the body should not jump to the conclusion that the death was from drowning and it can be ascertained only by internal examination of the body. The relevant paragraph- 42 is extracted here-in-below:-

"42. Medical jurists have warned that in the case of a deadbody found floating in water, the medical man from a mere observance of the external condition of the body should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to whether the death was from drowning or from. unlawful violence before the body was immersed in water. That is what Taylor the renowned medical jurist, has said on the point:

When a deadbody is thrown into the water. and has remained there sometimes water. fine particles of sand, mud. weeds etc. may pass through the windpipe into the large air-tubes. In these circumstances, however, water rarely penetrates into the smaller bronchi and alveoli as it may by aspiration, and even the amount which passes through the glottis is small. If immersed after death the water is found only in the larger air-tubes and is unaccompanied by mucous froth. Water with suspended matters can penetrate even to the distant air-tubes in the very smallest quantity even when not actively inhaled by respiratory efforts during life The quality, or nature of the suspended matter may be of critical importance.

When decomposition is advanced the lungs may be so putrefied as to preclude any opinion as to drowning but the demonstration of diatoms in distant parts of the body inaccessible except to circulatory blood, provides strong evidence of immersion in life-if not of death from drowning." (emphasis supplied)

17. This Court does not find any illegality or error in the findings recorded by the appellate court and as discussed above it could not be proved that the deceased died on account of drowning as an accidental death, therefore the plaintiff-appellant is not entitled for double amount of policy in terms of insurance policy.

18. The plaintiff-appellant received Rs.21,103.40 paise and issued a receipt

towards the full and final payment and discharged the claim and demands under the above mentioned policy of the insured. It has not been alleged that the receipt has been signed without knowing the contents. The plaintiff-appellant has signed the receipt in English and it appears that she had signed after fully knowing it. The plaintiff-appellant has also received the amount without reserving any right towards full and final satisfaction of the claim under the policy. The first appellate court, after examining the pleadings, evidence and receipt given by the plaintiff-appellant, has recorded a finding that the respondent i.e. the plaintiff-appellant has signed the receipt in English and it appears that the respondent new English and signed the receipt knowing as to what is written in it. The appellate court, considering the case laws relied by the plaintiff-appellant also, has recorded a finding that the respondent i.e. the plaintiff-appellant without reserving any right has accepted Rs.21,103.40 in full and final satisfaction of the claim under the policy therefore the claim for double of the amount is not maintainable. This Court does not find any illegality or error in the findings recorded by the appellate court. Accordingly, this Court is of the view that the acceptance of the amount of policy with full and final satisfaction will amount to relinquishment of the double amount of policy.

19. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that on the basis of medical attendant certificate issued by the doctor and the evidence adduced before the trial court, it could not be proved that the death of the deceased was as a result of drowning as an accidental death, therefore the plaintiff-appellant is not entitled for double amount of policy in terms of insurance policy. The plaintiff-appellant has also accepted the original amount of policy i.e. Rs.21,103.40 paise towards full and final satisfaction without reserving any right, which will amount to relinquishment of double amount of policy. The aforesaid substantial questions of law formulated in this appeal are answered accordingly. Thus, this second appeal is misconceived and devoid of any merit, which is liable to be dismissed.

20. The second appeal is, accordingly, **dismissed**. No order as to costs.

(2024) 5 ILRA 772
APPELATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 352 of 2003

Hriday Ram & Ors. ...Appellants
Versus
Paras Nath & Anr. ...Respondents

Counsel for the Appellants:
Bajrang Bahadur Singh

Counsel for the Respondents:
Ved Prakash Yadav

U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 9 - Private wells, trees in abadi, and buildings are to be settled with the existing owners or occupiers thereof - Sahan - Sahan refers to land appurtenant to a house that is beneficial to it. If such land has been used by the owners prior to the abolition of Zamindari, it would be deemed to be settled with them under Section 9 of the said Act - Suit for Permanent Injunction - Appellants filed suit for permanent injunction claiming that the land in dispute is their Sahan and

appurtenant land to their house, which has been settled with them. Held - Admittedly, the land in dispute faces the respondents' house and is on its northeastern side, not the appellants', as indicated by the Commissioner in his report. Appellants have their Sahan in front of their houses on the northern side. Therefore, the land in dispute cannot be said to be appurtenant land of the appellants' houses and is not settled with them under Section 9 of the Act of 1950 (Para 16).

Civil Procedure Code, S. 96 - First Appeal - First appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice. (Para 20)

Dismissed. (E-5)

List of Cases cited:

1. Maharaj Singh Vs St. of U.P. & ors.; (1976) 1 SCC 155

2. Santosh Hazari Vs Purushottam Tiwari; (2001) 3 SCC 179

3. G.Amalorpavam & ors. Vs R.C.Diocese of Madurai & ors.; (2006) 3 SCC 224

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

1. Heard Shri Bajrang Bahadur Singh, learned counsel for the appellants and Shri Ved Prakash Yadav, learned counsel for the respondents.

2. This Second Appeal under Section 100 of the Civil Procedure Code 1908 has been filed for setting aside the judgment and decree dated 30.09.2003, passed by the Additional District Judge/Special Judge, E.C.Act, Court Room No.8, Sultanpur in Civil Appeal No.5 of 1998; Hriday Ram and others Versus Ram Kuber and others and the judgment and decree dated 11.11.1997 passed by the Civil Judge,(Jr.Div.), North, Sultanpur in Regular Suit No.949 of 1993; Hriday Ram and others Versus Ram Kuber and others.

3. This appeal was admitted to decide the following substantial questions of law:-

"1. Whether, the report of the Commissioner indicating that disputed abadi falls facing the house of the defendant, will it deprive the plaintiff appellant to use the abadi land as it was used by the common members of the family?

2. Whether, the claim based on the joint property and there is admission of the defendant that three Bhitoor and Ghhor are in existence, the courts below could reject such admission of the defendant without arising (which should be assigning) any cogent reason whatsoever?

3. Whether, the judgment of the learned appellate court is justifiable as he has said that there is no need to re-examine the evidence although the trial court has misread the evidence of D.W.2 who has given evidence with regard to jointness of the property?

4. Learned counsel for the appellants submitted that the land in dispute was being used commonly by the plaintiffs-appellants (here-in-after referred as appellants) and the defendants/respondents (here-in-after referred as the respondents) since the time of their ancestors. It is coming from the common ancestors of the parties Bakhtawar. The partition had taken place between the two sons of Bakhtawar i.e. the predecessor-in-interest of the parties Buddhu and Shiv Raj except the land in dispute. The respondents tried to make construction on the land in dispute, therefore the appellants had to file the suit for

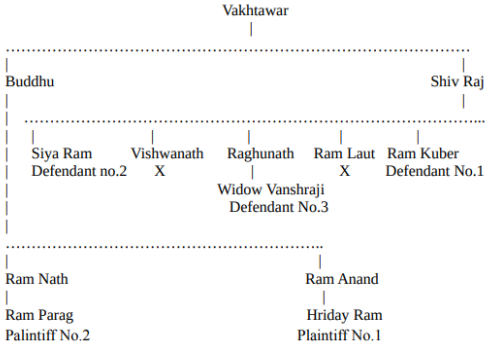
permanent injunction for restraining the respondents from making any construction on the land in dispute or removing the Ghhor, Condore and Kharhi etc. of the appellants or cut the trees and Banskot etc. without partition. He further submitted that the joint ness of the property was not disputed by D.W.2, but the learned Trial court has misread the same and learned Appellate court without considering the same dismissed the appeal. The courts below have also failed to consider that there is admission of the respondents that three Bhithoor and Ghhor exists on the land in dispute. He further submitted that merely because the land in dispute is facing the house of the defendants does not deprive the appellants from using as his abadi because it was being used by their common members of family. On the basis of above learned counsel for the appellants submitted that the trial court as well as the appellate court have committed grave miscarriage of justice by recording erroneous and perverse findings without considering the evidence on record correctly and dismissed the suit as well as the appeal, therefore the same are liable to be set aside.

5. Per contra, learned counsel for the respondents does not dispute regarding their ancestors Buddhu and Shiv Raj. However he submitted that they are in possession on their properties since the time of their ancestors and the question of partition does not arise. The land in dispute was a pond situated on the north-eastern side of the house of the respondents which was filled in by the respondents and they are in possession of the said land since prior to abolition of Zamindari. Thus they have got the right and entitlement over that land in dipsute under Section 7-AA of the U.P. Zamindari Abolition and Land Reforms Act 1950 (here-in-after referred as the Act of 1950) and it is settled with them on abolition of Zamindari under Section 9 of the said Act. On the basis of above learned counsel for the respondents submitted that the trial court as well as the appellate court have rightly and in accordance with law considered the evidence and material on record and dismissed the suit as well as the appeal filed by the appellants. There is no illegality or error in the impugned judgments and decrees passed by the courts below, which may call for any interference by this court. The appeal is misconceived and lacks merit, which is liable to be dismissed with cost.

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

7. The Suit for permanent injunction was filed by the appellants claiming joint-ness of the land in dispute between the appellants and the respondents. The appellants claim that the land in dispute was a common Abadi of both the parties. They use to utilize it as their Sahan for Ghoor, Kandore, Kharahi etc. Their grainery (Khalihan) also used to be on the said land. However for the last 12 years their grainery (Khalihans) used to be on separate lands. Both the parties have Banskot, trees of Mango, Jamun, Goolar, Seesam, Babul etc. on the land in dispute. The Plaintiff No.1 and 2 have 1/4th share each and defendants No.1, 2 and 3 have 1/6th share each in the land in dispute. There is no partition in regard to the land in dispute between the parties. However it has been admitted that the properties of the parties were coming from the common ancestor Bakhtawar and the partition had taken place between the sons of Bakhtawar i.e. Buddhu and Shiv Raj and thereafter the parties are in possession

on their portions. The following pedigree has been given:-



8. The respondents have filed written statement denying all the averments made in the plaint. They have also stated that the site plan given in the plaint is without any scale and against the position on spot. It was also stated that the position of house has also wrongly been shown. It has also been stated that the defendants had a door on the northern side of their house since the beginning and their Sahan is on the northern side and in the said appurtenant land there is Khalihan and Sariya. Their houses are separate since the time of their ancestors Buddhu and Shiv Raj. There is passage between both the houses. It has also been denied that there was any common residence of their family or fooding of their fathers Buddhu and Shiv Raj, therefore the question of partition does not arise. Their Abadi is separate since the beginning. It has also been stated that the respondents have filled the pond on the north-eastern side of their house and they are using it for keeping their animals and various purposes of agriculture and keeping Kolhu Gulaur, Ghoor and Khalihan since prior to abolition of Zamindari, thus the same is settled with them under Section 9 of the Act of 1950. The land in dispute is their Sahan and appurtenant land to their house, which is settled with them.

9. After exchange of pleadings seven issues were framed by the trial court. Considering the pleadings of the parties and the evidence on record the trial court dismissed the suit holding that the plaintiffs have failed to prove from their evidence that the land in dispute is in the joint ownership and possession of the plaintiffs and defendants, rather it has been found that the defendants are the exclusive owner and in possession of the land in dispute. The land in dispute as per site plan given by the appellants in their plaint and the Commissioner Report is on the north-eastern side of the house of respondents. The house of the appellants is on the western side of the house of the respondents and there is a passage between their houses.

10. The P.W.1, in his statement on oath, has admitted that the partition had taken place between Buddhu and Shiv Raj during their life time and their houses, agricultural fields and fooding had separated. The trial court has recorded a finding that it is apparent from the Khasra Abadi Ext.1 that since 1935 or prior to that their houses were partitioned. The respondents have also given the evidence that they are in possession and are owner of the land in dispute and the appellants are on their part since the time of Buddhu and Shiv Raj as they had separate properties. They have denied the joint-ness of property. In any case it is not in dispute that the parties are in possession and owner of their properties since the time of Buddhu and Shiv Raj.

11. In view of above, even if the contention of appellants is taken to be

correct that the parties had joint properties and the partition had taken place between Buddhu and Shiv Raj in their life time then the question arises as to when all the properties were divided, as to why the land in dispute was not divided between them. Learned counsel for the appellants also failed to give any explanation to this despite repeated queries made by the court. Therefore the contention of the appellants that the land in dispute was also a joint property of the parties is misconceived and not tenable.

12. Now the question arises as to whether the land in dispute, which falls on the north-eastern side of the house of the respondents can be said to be appurtenant land of the appellants, which may have settled with them under Section 9 of the Act of 1950. It is settled law that the land appurtenant to the house which is beneficial for house is called the appurtenant land i.e. Sahan and if the same is being used by them since prior to abolition of Zamindari, it would be deemed to be settled with them under Section 9 of the said Act.

13. The appurtenant land is a land which may be used for the purpose of use of the building. The Hon'ble Supreme Court considered the 'appurtenance' in the case of **Maharaj Singh Versus State of U.P. and others; (1976) 1 SCC 155** and has held that the 'appurtenance' is dependence of the building on what appertains to it for its use as a building. The relevant paragraphs 27 and 28 are extracted here-in-below:-

"27. "Appurtenance', in relation to a dwelling, or to a school, college .... includes all land occupied therewith and used for the purpose thereof (Words and Phrases Legally Defined---Butterworths, 2nd edn).

"The word 'appurtenances' has a distinct and definite meaning ....Prima facie it imports nothing more than what is strictly appertaining to the subject-matter of the devise or grant, and which would, in truth, pass without being specially mentioned:Ordinarily, what is necessary for the enjoyment and has been used for the purpose of the building, such as easements, alone will be appurtenant. Therefore, what is necessary for the enjoy- ment of the building is alone covered by the expression 'appurtenance'. If some other purpose was being fulfilled by the building and the lands, it is not possible to contend that those lands are covered by the expression 'appurte- nances'. Indeed 'it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word 'appurtenances' includes all the incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common ...but it does not include lands in addition to that granted'. (Words and Phrase, supra).

28. In short, the touchstone of 'appurtenance' is dependence of the building on what appertains to it for its use as a building. Obviously, the hat, bazar or mela is not an appurtenance to the building. The law thus leads to the clear conclusion that even if the buildings were used and enjoyed in the past with the whole stretch of vacant space for a hat or mela, the land is not appurtenant to the prin- cipal subject granted by s. 9, viz., buildings. This conclustion is inevitable, although the contrary argument may be ingenious. What the High Court has grant- ed, viz., 5 yards of surrounding space, is sound in law although based on guess- work in fact. The appeal fails and is dismissed but, in the circumstances, without costs. "

14. As per own case of the appellants and the site plan appended to the plaint, the Sahan of the appellants is in the northern side of their house. The land in dispute is on the north-eastern side of the house of the respondents. The trial court has recorded a finding on the basis of evidence of P.W.1 at page 5 that the location of the land in dispute is the same as has been given by the Commissioner in the site plan prepared by him, according to which the land in dispute is situated on the north-eastern side of the house of the appellants and respondents and in view of the evidence adduced by the appellants that they filled the pond in front of their house and using the same as Sahan land, Buddhu i.e. predecessor-in-interest of the appellants would have filled the land in front of his house in place of the north-eastern side of the respondents. The trial court has also recorded a finding that P.W.1 has stated in his evidence that their Khalihan is still in the land in dispute, whereas in the plaint they have stated that it is not for the last 12 years. As per evidence of the P.W.1, the land in dispute is adjacent to the house of Baijnath and P.W.2 has admitted in his evidence that it is at a distance of 1-2 Latha of the house of Baijnath. Therefore evidence of P.W.1 cannot be believed in absence of any evidence in regard to joint ownership of property- in-dispute and the evidence of P.W.1 is not supported by the documentary evidence. The evidence of P.W.2 has not been found to be believable in regard to filling of the land in dispute by Buddhu and Shiv Raj jointly because as per his age he would have been 5-7 years of age in 1952 and as per their claim the land in dispute must have been filled prior to that.

15. So far as the admission of defendants in regard of Bithoor and Ghoor on the land in dispute is concerned, merely because the D.W1 and D.W.2 have admitted the existence of three Bithore and Ghoor etc. on the land in dispute it cannot be said to be admission on their part in regard to joint-ness of property because it has been admitted by the parties that the partition has taken place among the defendants themselves, who were five brothers and it may be on account of partition among themselves. A plea was also taken by the appellants that they have no other land except the land in dispute for their Sahan land, whereas P.W.1 has admitted that their father had taken the house etc. of Kanhaiya after giving premium to the Zamindar and Kanhaiya had left the village. It has also been admitted by him in his evidence on oath by P.W.1 that the house and land of Kanhaiya was on the east of his house, therefore the contention in this regard is also misconceived and not tenable.

16. The trial court has recorded the findings on the basis of pleadings, evidence and material on record and the land in dispute, which is situated on the north-eastern side of the house of the parties is not appurtenant to the house of the appellants. Admittedly the land in dispute is facing the house of the respondents and is in it's north-eastern side and not the house of the appellants, which has also been indicated by the Commissioner in his report. The appellants have their Sahan in front of their houses on the northern side. Therefore the land in dispute cannot be said to be appurtenant land of the houses of the appellants, and settled with them under Section 9 of Act of 1950.

17. The appellate court has recorded the findings on the basis of arguments, pleadings and evidence on record and after recording that the P.W. 1 has admitted that the partition had taken place during life time of Buddhu and Shiv Raj, therefore it is very

astonishing as to why the partition of the land-in-dispute had not taken place and the same continued for such a long period as a joint property. The appellate court has further recorded a finding that the Khasra of the Abadi was prepared in 1935 in which all the properties of Buddhu and Shiv Raj have been shown separately in their names and if the land in dispute would have been a joint property then the same would have been recorded as such, whereas no properties are recorded as their joint property. The claim of the appellants that prior to consolidation they had no land in front of their house except the land in dispute, is also not sustainable in view of admission of P.W.1 that they had taken property of one Kanhaiya after paying the premium. The Appellate court has also recorded a finding that the land-in- dispute is not in front of the house of the appellants, rather it is in front of the house of the respondents, therefore it is not believable and also not obvious that the plaintiffs would have filled the pond in front of the house of the respondents in place of in front of their house. The appellate court has also recorded a finding on the basis of Khasra that the predecessor-in-interest of the appellants Buddhu had other properties also in addition to the house and the appellants have admitted that they are residing in the house of Buddhu and their Khalihan is not on the land in dispute for the last 12 years, therefore after recording a finding that in this way the contention of the appellants does not seem to be true, held that the trial court has minutely analyzed all the evidences in accordance with law and the appellate court is in agreement with the same, therefore the same is not required to be rebutted.

18. This court is of the view that after recording the relevant findings, if the appellate court has recorded it's agreement with the findings recorded by the trial court and reasons given for recording such findings, there is no illegality or error in it. Learned counsel for the appellant has also failed to show any illegality or perversity in the findings recorded by the trial court.

19. The Hon'ble Supreme Court, in the case of **Girja Nandini Devi Versus Bijendra Narain Choudhury; AIR 1967 SC 1124,** has held that Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice.

20. The aforesaid view was reiterated by the Hon'ble Supreme Court in **Santosh Hazari Versus Purushottam Tiwari; (2001) 3 SCC 179** holding that the appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice.

21. The aforesaid judgments have been followed by the Hon'ble Supreme Court, in the case of **G.Amalorpavam and others Versus R.C.Diocese of Madurai and others; (2006) 3 SCC 224**. The relevant paragraphs 10 to 12 are extracted here-in-below:-

"10. At this juncture it would be relevant to note what this Court said in *Girja Nandini Devi v. Bijendra Narain Choudhury* [(1967) 1 SCR 93 : AIR 1967 SC 1124] . In AIR para 12 it was noted as follows : (SCR p. 101 F-G)

"It is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the

reasons given by the trial court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice."

11. The view was reiterated in *Santosh Hazari v. Purushottam Tiwari*;[(2001) 3 SCC 179] . In para 15 it was held with reference to *Girja Nandini Devi case* [(1967) 1 SCR 93 : AIR 1967 SC 1124] as follows : (SCC pp. 188-89)

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (see *Girja Nandini Devi v. Bijendra Narain Choudhury* [(1967) 1 SCR 93 : AIR 1967 SC 1124]). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai* [(1983) 1 SCC 35 : AIR 1983 SC 114] .) The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad v. Jwaleshwari Pratap Narain Singh* [1950 SCC 714 : 1950 SCR 781 : AIR 1951 SC 120] .) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in

the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

12. It has been categorically recorded by the High Court that the first appellate court had considered the evidence led on behalf of the parties and has given findings to come to the conclusions arrived at. It noted that the lower appellate court had independently considered the evidence and had given different findings on the issues framed by the trial court and on the basis of the arguments which were advanced before it. It was further noted that there was detailed discussion giving reasons for affirming the order of the trial court. Learned counsel for the appellants had urged that the suit filed by the plaintiff was not maintainable as the plaintiff was the diocese represented by its procurator. It was submitted that the plaintiff is not entitled to any relief as was prayed for in the suit. This point was not urged before the High Court and, therefore, it would not consider necessary to go into that aspect. Judged in the background of legal principles set out above, the judgment of the High Court does not suffer from any infirmity."

22. In view of above and considering the overall facts and circumstances of the case this court is of the view that the trial court has rightly and in accordance with law considered and recorded findings on the basis of pleadings and evidence adduced before it including the evidence of D.W.2. The impugned judgment and decrees passed by the trial court as well as the appellate court have rightly been passed in accordance with law, which does not suffer from any illegality or error. Thus the substantial questions of law framed in this appeal are answered accordingly. The appeal has been filed on misconceived and baseless grounds and it is liable to be dismissed.

23. The Second Appeal is, accordingly, **dismissed**. No order as to cost.

(2024) 5 ILRA 780
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

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

Writ - A No. 19066 of 2023

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

Counsel for the Petitioner:
Sri Subhash Chandra Srivastava, Sri Rampyare Lal Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – Assured Career Progression (ACP) – GO dated 05.11.2014 – Petitioner was retired from service on 31.10.2019, a day before, when he was entitled to his third ACP on 01.11.2019 – Third ACP sought for – Entitlement – Parity with increment claimed – Held, an increment is part of a government servant's pay. It is an accretion to the pay that is earned during the course of employment over the period of one year, subject to good behaviour of the government servant concerned – By contrast, to what an increment is, ACP is very different. It is not something provided in the routine, though it does come as an accretion to the emoluments payable at specified intervals. ACP is a device that has

been invented by the Government, as the policy maker, to deal with the problem of stagnation of government employees – If a government servant, who has already retired from service and becomes entitled to his ACP, a day after his retirement, he too has no right to it – The principle, governing the grant of notional increment in a case where increment falls due, a day after retirement, would not apply to the case of grant of ACP. (Para 9, 10 and 11)

Writ petition dismissed. (E-1)

List of Cases cited:

1. The Director (Admn. and HR) KPTCL & ors.Vs C.P. Mundinamani & ors.; 2023 SCC OnLine SC 401

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

1. This writ petition prays that a *mandamus* be issued to the Chief Engineer, Minor Irrigation, Department of Irrigation, Government of U.P., Lucknow and the Executive Engineer, Minor Irrigation Wing, Hapur to sanction for the petitioner his third assured career progression.

2. The petitioner was appointed as an Assistant Boring Technician on 16.02.1986 in the office of the Chief Development Officer, Meerut *vide* letter dated 12.02.1986. He superannuated on 31.10.2019 from the post of a Junior Engineer, Minor Irrigation, posted at Hapur. The first Assured Career Progression (for short, 'ACP') was granted to the petitioner on completion of 14 years' satisfactory service and the first financial up-gradation was fixed on 01.11.2001. The second ACP was sanctioned and granted on 01.11.2009 upon completion of 16 years' satisfactory service. The second financial up-gradation was determined in the pay band of Rs.9300-34800/- with a grade pay of Rs.4600/-. The Chief Engineer, Minor Irrigation, Department of Irrigation issued an office order No. G-183/Estt.-03 (appointment post) 2018-19 dated 29.06.2018, promoting the petitioner from the post of a Boring Technician to that of a Junior Engineer. According to the petitioner, in terms of the rules applicable, he was entitled to a third ACP on 05.11.2014 upon completion of 26 years of satisfactory service, which he did complete on 31.10.2019. The third financial up-gradation would place him in the pay band of Rs.9300-34800/-, with a grade pay of Rs.4800/-. The petitioner acknowledges that he was promoted by the Chief Engineer on 29.06.2018 from the post of a Boring Technician to a Junior Engineer, carrying Pay Band-II, Level-VI, analogous to the pay-scale of Rs.9300-34800/-, grade pay of Rs.4200/-. The revised pay-matrix for Level-VI carries the pay scale of Rs.35400-112400/- with a probation period of two years. The petitioner says that he has been deprived of his third ACP, ignoring his satisfactory service, which employees junior to the petitioner have been extended by office order dated 26.04.2023. The petitioner has completed 26 years' satisfactory service, entitling him to the third ACP, that has fallen due on 31.10.2019, as already said. There being inaction in the matter of award of the third ACP, the petitioner represented the matter both to the Chief Engineer, Minor Irrigation, Department of Irrigation, Government of U.P., Lucknow and the Executive Engineer, Minor Irrigation Wing, Hapur, but to no avail. The petitioner buttresses his claim to the third ACP at the end of the 26 years of satisfactory service, relying upon a Government Order dated 05.11.2014. There is a mention of this order in paragraph No.10 of the writ petition, but no copy thereof has been annexed.

3. This Court on 16.11.2023 issued notice of motion to the Chief Engineer, Minor Irrigation, Department of Irrigation, Government of U.P., Lucknow and the

Executive Engineer, Minor Irrigation Wing, Hapur, requiring them to show cause by their separate affidavits within a week why the petitioner's third ACP had not been granted. In compliance, the Chief Engineer and the Executive Engineer, respondent Nos.2 and 3, respectively, filed their affidavits, both dated 22.11.2023. These affidavits have been treated as counter affidavits. The petitioner has not filed a rejoinder. On the 24th of November, 2023, parties having exchanged pleadings, this petition was admitted to hearing, which proceeded forthwith. Judgment was reserved.

4. Heard Mr. Rampyare Lal Srivastava, learned Counsel for the petitioner and Mr. Pramod Kumar Srivastava, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

5. In the affidavit filed on behalf of the Chief Engineer, Minor Irrigation, Department of Irrigation, Government of U.P., Lucknow, the relevant facts brought out are that the petitioner was appointed an Assistant Boring Technician on 17.02.1986 by the Chief Development Officer, Meerut *vide* his order dated 12.02.1986. The Executive Engineer, Minor Irrigation Division, Meerut, by his order dated 30.06.1995, granted a notional promotion to the petitioner on the post of a Boring Technician w.e.f. 01.11.1993. The Executive Engineer, Minor Irrigation Division, Meerut, by an order of 8th May, 2002, granted an additional increment to the petitioner upon completion of 8 years of regular satisfactory service on the post of a Boring Technician. This benefit was extended w.e.f. 01.11.2001. According to the Chief Engineer, in accordance with the Government Order dated 01.10.2009, the petitioner was extended the pay scale of Rs.5000-150-8000/- w.e.f. 01.11.2007 *vide* order dated 27.12.2007 passed by the the Executive Engineer, Minor Irrigation Division, Meerut on completing 14 years' regular satisfactory service. It was *vide* order dated 10.09.2012, the Executive Engineer, Minor Irrigation Division, Meerut granted the second ACP to the petitioner, relating to the post of a Boring Technician in the grade pay of Rs.4600/-. This was granted to the petitioner w.e.f. 01.11.2009 on completing 16 years of regular service.

6. It is pointed out that the petitioner has come up with a grievance that certain records show that five Junior Engineers, whose details are given in the writ petition, have been granted the benefit of the third ACP on 01.11.2019. It is the respondents' case that out of the five Junior Engineers, three, that is to say, Om Prakash Singh, Brajpal Singh and Vinod Kumar Sharma, retired on 31.10.2020, 31.07.2021 and 31.03.2023, respectively. The two others, to wit, Mehak Singh and Tejpal Singh, are scheduled to retire on 30.11.2025 and 31.12.2025, respectively. They are still in service. Thus, the benefit of the third ACP, to each of the above mentioned five Junior Engineers, has been granted on account of each of them being in service on the date when the benefit was given. It is next averred on behalf of the respondents that the benefit of the third ACP was due to the petitioner on 01.11.2019, but he retired from service on 31.10.2019. It is for the said reason that benefit of the third ACP could not be extended to him.

7. The learned Counsel for the petitioner, however, argues that the principle applicable in case of increment, that is earned during the entire year and becomes payable on the following day after

retirement, is granted notionally to the retiring employee for the purpose of determining his post retiral benefits, should also be extended to the case of award of the ACP. He submits that it is not disputed that the petitioner would have been entitled to his third ACP on 01.11.2019, but he retired from service on 31.10.2019. Learned Counsel for the petitioner has relied upon the authority of the Supreme Court in **The Director (Admn. and HR) KPTCL and others v. C.P. Mundinamani and others, 2023 SCC OnLine SC 401** in support of his contention.

8. The learned Counsel for the respondents has, however, argued that the grant of an ACP is entirely different from earning of increments and the principle in **C.P. Mundinamani** *(supra)* would not apply to the case of award of ACP at all. The principle in **C.P. Mundinamani** regarding payment of annual increment to an employee, who had earned it throughout the year, but retires from service on the succeeding day, when it becomes payable, holding him entitled to it notionally, has been laid down by the Supreme Court thus:

"20. Similar view has also been expressed by different High Courts, namely, the Gujarat High Court, the Madhya Pradesh High Court, the Orissa High Court and the Madras High Court. As observed hereinabove, to interpret Regulation 40(1) of the Regulations in the manner in which the appellants have understood and/or interpretated would lead to arbitrariness and denying a government servant the benefit of annual increment which he has already earned while rendering specified period of service with good conduct and efficiently in the last preceding year. It would be punishing a person for no fault of him. As observed hereinabove, the increment can be withheld only by way of punishment or he has not performed the duty efficiently. Any interpretation which would lead to arbitrariness and/or unreasonableness should be avoided. If the interpretation as suggested on behalf of the appellants and the view taken by the Full Bench of the Andhra Pradesh High Court is accepted, in that case it would tantamount to denying a government servant the annual increment which he has earned for the services he has rendered over a year subject to his good behaviour. The entitlement to receive increment therefore crystallises when the government servant completes requisite length of service with good conduct and becomes payable on the succeeding day. In the present case the word "accrue" should be understood liberally and would mean payable on the succeeding day. Any contrary view would lead to arbitrariness and unreasonableness and denying a government servant legitimate one annual increment though he is entitled to for rendering the services over a year with good behaviour and efficiently and therefore, such a narrow interpretation should be avoided. We are in complete agreement with the view taken by the Madras High Court in the case of *P. Ayyamperumal* (supra); the Delhi High Court in the case of *Gopal Singh* (supra); the Allahabad High Court in the case of *Nand Vijay Singh* (supra); the Madhya Pradesh High Court in the case of *Yogendra Singh Bhadauria* (supra); the Orissa High Court in the case of *AFR Arun Kumar Biswal* (supra); and the Gujarat High Court in the case of *Takhatsinh Udesinh Songara* (supra). We do not approve the contrary view taken by the Full Bench of the Andhra Pradesh High Court in the case of *Principal Accountant-General, Andhra Pradesh* (supra) and the decisions of the Kerala High Court in the case of *Union of India v. Pavithran* (O.P.(CAT) No.

111/2020 decided on 22.11.2022) and the Himachal Pradesh High Court in the case of *Hari Prakash v. State of Himachal Pradesh* (CWP No. 2503/2016 decided on 06.11.2020)."

9. An increment by its nature is generically different from ACP. An increment is part of a government servant's pay. It is an accretion to the pay that is earned during the course of employment over the period of one year, subject to good behaviour of the government servant concerned. An increment is a routine accretion, that accrues on regular interval, of which a government servant may be deprived in certain contingencies, such as the imposition of a minor punishment. Therefore, if a government servant works throughout the year, completing the period of time entitling him to increment but retires on the day it would actually be added to his salary, the principle of notionally granting that increment has been evolved by Courts, so as to eschew arbitrariness. If merely for the reason that a government servant retires on the day, when the increment would have been added to his salary, if he were in service, but is deprived of it due to retirement though he has already earned it over the period of time of one year, until the day preceding his retirement, he has been held entitled to it notionally by preponderant authority in the High Courts, and, of course, the final approval of this view by the Supreme Court.

10. By contrast, to what an increment is, ACP is very different. It is not something provided in the routine, though it does come as an accretion to the emoluments payable at specified intervals. ACP is a device that has been invented by the Government, as the policy maker, to deal with the problem of stagnation of government employees. There are many cadres and posts in government service, where there are no promotional avenues. It is to remove stagnation that the benefit of ACP is given at specified intervals in three instances. It is a substitute for promotion, or so to speak, a kind of promotion itself. The essence of ACP, therefore, is stagnation of a government employee on a particular post with no avenues of promotion that entitles him to it at the end of a particular period of time. In the nature of things, therefore, a government servant, who retires from service, even a day before he becomes entitled to his next ACP, would not be entitled to it. We think that the test about entitlement to an ACP lies in the fact if on the date a government servant demands it, would he be entitled to a consideration for promotion. Therefore, a government servant, who has already become entitled to promotion, say a few weeks or days before his retirement from service and is wrongfully denied consideration, may enforce his right to be notionally considered for promotion. Such a government servant may also enforce his right to receive his ACP, if it is a case of stagnation and he is entitled to it under the rules.

11. Let us take the case of a government servant, who says that under the rules he would be entitled to promotion on the date following his retirement. Would he be entitled to enforce his right in a Court against the employers to consider his case for promotion, albeit notionally. This Court is of opinion that the answer is an obvious no. If a government servant, who has already retired from service and becomes entitled to his ACP, a day after his retirement, he too has no right to it. The right to be considered for promotion under the rules has to be judged for a government servant, who is still in harness when the right accrues. Else, there

is no such right. No authorities, apart from those relating to the grant of notional increments in the matter of annual increments, were brought to this Court's notice during the course of arguments and we do not think that the principle, governing the grant of notional increment in a case where increment falls due, a day after retirement, would apply to the case of grant of ACP.

12. In this view of the matter, there is no force in this petition. It fails and is **dismissed**.

13. There shall be no order as to costs.

(2024) 5 ILRA 785
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Second Appeal No. 340 of 2024

Kammo Since Deceased & Ors.
...Appellants
Versus
Shahmim Ahmad & Anr. ...Respondents

Counsel for the Appellants:
Ajay Kumar Sharma

Counsel for the Respondents:
Utpal Chatterji

A. Civil Law - Code of Civil Procedure, 1908 - ORDER VIII, Rule 4, 5 - Evasive denial in Written statement - Order 8 Rule 4 of C.P.C. mandates that defendants must make specific denials. Order 8 Rule 5 of C.P.C. mandates that every allegation of fact in the plaint should be denied specifically or by necessary implication, and if it is not done, the said allegation shall be treated as admitted. In the instant case, the Defendant challenged the impugned judgment on the ground that, as per the waqf deed, the male descendant shall be appointed as Mutawalli, and as Usman was elder to plaintiff no. 2, therefore, Usman could only be appointed as Mutawalli. Court found that it was stated in paragraph no. 1 of the plaint that plaintiff no. 2 was the Mutawalli of plaintiff no. 1. In reply to the aforesaid assertion in the plaint, defendants in paragraph no. 1 of the written statement have made a bald denial. Court was of the view that such denial does not come within the periphery of denial as contemplated under Order 8 Rule 4 of C.P.C. Court was of the view that the denial about the appointment of plaintiff no. 2 as Mutawalli was only an evasive denial, inasmuch as if the defendants were disputing the appointment and competence of plaintiff no. 2 to act as Mutawalli of plaintiff no. 1, the defendants should have specifically pleaded the grounds on which they alleged that plaintiff no. 2 could not be appointed as Mutawalli. (Para 32, 33, 34)

B. Waqf Act, 1995, S. 83 - Jurisdiction - Appellant argued that an amendment in Section 83 of the Waqf Act, 1995 was incorporated by Act No. 27 of 2013, and sub-section 1 of Section 83 was substituted, and after the amendment, the civil appeal preferred by the plaintiff stood abated, and the remedy of the plaintiff was to file a fresh suit before the Waqf Tribunal. The question of jurisdiction was not raised by the defendants before the court below. However, since the question of jurisdiction raised by the appellant was a pure question of law, therefore, the Court proceeded to consider the same. The amendment was incorporated w.e.f. 01.11.2003. Civil court decided the lis between the parties on 06.08.2011 by dismissing the suit and an appeal was filed by the plaintiff/ respondents. Parties participated in the suit voluntarily, and the suit was decided by the competent court. Appeal is a continuation of the suit, but the appeal should always lie to a higher forum. Since the amending act is silent about the forum of appeal in cases where the suit had been

decided by the competent civil court before the incorporation of the amendment in the Waqf Act, therefore, the First Appellate Court was the competent court to decide the appeal, and the objection of jurisdiction raised in the appeal was held to be devoid of merit. (44, 45)

Dismissed. (E-5)

List of Cases cited:

1. Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs Chandran & ors. (2017) 3 SCC 702

2. Kashi Nath (Dead) Through LRS. Vs Jaganath (2003) 8 SCC 740

3. Bhagwati Prasad Vs Chandramaul 1966 AIR (SC) 735

4. Ram Sarup Gupta (Dead) by L.Rs. Vs Bishun Narain Inter College & ors. 1987 (2) SCC 555.

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

1. Heard Sri Ajay Kumar Sharma, learned counsel for the appellants and Sri Utpal Chatterji, learned counsel for the respondents.

2. The present appeal has been preferred by the defendants/appellants challenging the judgement and decree dated 03.02.2024 passed by the First Appellate Court i.e. Additional District Judge, Court No.20 Meerut in Civil Appeal No.163 of 2011 whereby he has allowed the civil appeal preferred by the plaintiffs/respondents.

3. The brief facts of the case are that plaintiff no.1 is the waqf in the name of Waqful Aulad Kayam Karda of which plaintiff no.2-Shamim Ahmad is the Mutawalli. As per the plaint case, defendants/appellants (hereinafter referred to as "defendants") are the tenants of a land of about 100 yards described at the foot of the plaint. The rent of the land was Rs.5 per month and the registered rent deed dated 18.05.1972 was executed between the plaintiff and defendant no.1 through Mutawalli Suleman (as he then was), who was the elder brother of plaintiff no.2.

4. It is further pleaded that defendant no.1 stopped paying the rent Since July 2002, and he sublet the suit property to Naseem (defendant no.4), Saleem (defendant no.3) and Anees (defendant no.2) without the consent of plaintiff, and subletting of the suit property by defendant no.1 to defendant nos.2 to 4 violated terms and conditions of the rent deed dated 18.05.1972.

5. The plaintiff gave a registered notice dated 25.08.2008 under Section 106 of the Transfer of Property Act to the defendants through the registered post which was served upon them. Another notice dated 25.08.2008 was separately given to defendant nos.2 to 4 asking them to vacate the suit property. The aforesaid notice was replied to by the defendants by stating false and incorrect facts in their reply.

6. In the aforesaid backdrop, the plaintiff prayed for the following relief:-

"14- यह कि वादीगण अदालत मजाज से दर्ज जैल दादरसी पाने के अधिकारी है:-

अ- यह कि बसदूरे डिग्री अदालत हाजा दखल वाकई वव कामिल बाद बेदखली प्रतिवादीगण 1 ता 4 आराजी जेरे मलवा हाल नं०-46 व साबिका नम्बर 89 वाके मौहल्ला चोक बजरया, मकबरा अब्बू धोसीयान, मेरठ जिसका हदूदर्बा वाद पत्र के अन्त में दे रखा है महदूदा जैल का कब्जा बजरिये अमीन अदालत वादीगण को दिलाया जावे।

ब- यह कि मुबलिग 178/-रूपये बावत किराया वादीगण की प्रतिवादी नं०-1 से दिलाया जावे।

स- यह कि वासलात मुबलिग 1140/-रूपये दिनांक 26-9-08 से 2-11-08 तक तीस रूपया योमिया प्रतिवादीगण से दिलाया जावे।

द- यह कि वाद का कुल खर्चा वादीगण को प्रतिवादी नं०-1 से दिलाया जावे।

ध- यह कि अदालत की राय में जो भी अन्य प्रतिकार बेहतर हो वह वादीगण को विरुद्ध प्रतिवादीगण दिलाये जावे।"

7. The suit was contested by the defendants denying the averments of the plaint contending *inter-alia* that they have attempted to pay rent by sending the rent to plaintiff, but the plaintiff refused to accept it. It is also pleaded that there is no breach of the terms and conditions of the rent deed. Accordingly, the defendants pleaded that the suit was based on incorrect facts and deserved to be dismissed.

8. The Trial Court framed as many as eight issues. Issue no.1 on which the finding has been assailed by the appellant is relevant and is reproduced below:

"1. क्या विवादित मालवा नंबर 46 हाल व साबिका नंबर 89 घोसीयान मकबरा अब्बू चौक मेरठ वादी सं०1 की संपत्ति है तथा वादी सं० 2 वादी सं०1 का मुतवल्ली, मुन्तजिम एवं मुनाफाखोर है?"

9. The Trial Court considered the waqf deed and after analysing the stipulations in the waqf deed, it concluded that according to the waqf deed, the male lenient descendant shall be appointed as Mutawalli. It found that the waqf was created by Dr. Gulam Haidar and after the death of Dr. Gulam Haidar, his eldest son Suleman, the next male lenient descendant was appointed as Mutawalli. The Trial Court further recorded a finding that plaintiff no. 2-Shamim Ahmad was the youngest brother among the three sons of Dr Gulam Haidar namely, Suleman, Usman and Shamim Ahmad, and Usman was next in line being younger to Suleman and elder to plaintiff no.2-Shamim Ahmad after the death of Suleman should have been appointed as Mutawalli, therefore, plaintiff no.2 could not have been appointed as Mutawalli. Thus, plaintiff no.2 as Mutawalli of plaintiff no.1 was not competent to institute the suit for eviction. Consequently, the Trial Court dismissed the suit.

10. The plaintiff/respondent being aggrieved by the order of the Trial Court preferred civil appeal before the First Appellate Court which was allowed by the First Appellate Court and the suit of the plaintiff was decreed.

11. The First Appellate Court held that the finding of the Trial Court that plaintiff no.2 could not have been appointed as Mutawalli as after the death of Suleman, Usman being younger to Suleman and elder to plaintiff no.2 should have been appointed as Mutawalli is erroneous and illegal.

12. In recording the aforesaid finding, the First Appellate Court noticed that Usman was present during the recording of the testimony of plaintiff no.2-Shamim Ahmad, and he did not raise any objection to the appointment of plaintiff no.2 as Mutawalli.

13. The First Appellate Court after considering and appreciating in detail the testimony of plaintiff no.2 and considering the fact that Usman was present at the time of recording the testimony of plaintiff no.2 and he did not raise any objection about the appointment of plaintiff no.2 as Mutawalli of the waqf held that the Trial Court erred in law and committed manifest illegality in holding that plaintiff no.2 could not have been appointed as Mutawalli, and he was not

competent to institute the suit. The First Appellate Court also considered the other issue and found substance in the submission of the plaintiff and consequently, it allowed the appeal and decreed the suit.

14. Challenging the judgement and decree passed by the First Appellate Court, learned counsel for the appellant has raised twofold submissions; he submits that finding of the First Appellate Court that plaintiff no.2 was Mutawalli of the waqf and he was competent to institute the suit is perverse and illegal inasmuch as the First Appellate Court has misinterpreted the waqf deed in concluding that plaintiff no.2 could be appointed as Mutawalli. He submits that as per the waqf deed, the male lenient descendant shall be appointed as Mutawalli and it is admitted on record that Usman was next in line after Suleman inasmuch as Usman was younger to Suleman and elder to plaintiff no.2, therefore, Usman could only be appointed as Mutawalli, and appointment of plaintiff no.2 as Mutawalli was illegal and in violation of the waqf deed.

15. He further contends that it is evident from the resolution of the Waqf Board dated 27.04.2010 appointing plaintiff no.2 as Mutawalli, that plaintiff no.2 was not the Mutawalli on the date of institution of suit, and therefore, he was not competent to institute the suit. Accordingly, it is contended that the finding of the First Appellate Court in this regard is erroneous, and the question of law which arises for consideration in the present case is "whether the First Appellate Court has committed manifest illegality in reversing the finding of the Trial Court with regard to the fact that plaintiff no.2 could not be appointed as Mutawalli and was not competent to institute the suit."

16. He further submits that an amendment in Section 83 of the Waqf Act, 1995 has been incorporated by Act No.27 of 2013 and sub-section 1 of Section 83 has been substituted by the said Act, and after this amendment, the civil appeal preferred by the plaintiff stood abated, and the remedy of the plaintiff was to file a fresh suit before the Waqf Tribunal.

17. In rebuttal to the aforesaid submission, Sri Utpal Chatterji, learned counsel for the respondents has contended that there is no pleading in the written statement about the fact that the appointment of plaintiff no.2 as Mutawalli was in contravention of the waqf deed. It is submitted that the appointment of plaintiff no.2 as Mutawalli has not been assailed by the defendants in the written statement, and no specific plea has been set up in this regard, therefore, in the absence of any pleading challenging the appointment of plaintiff no.2 as Mutawalli, the Trial Court could not have gone into the question of the validity of appointment of plaintiff no.2 as Mutawalli nor any evidence could have been led on the said point in absence of any pleading challenging the appointment of plaintiff no.2 as Mutawalli in the written statement, therefore, the Trial Court has committed manifest illegality in holding that plaintiff no.2 could not have been appointed as Mutawalli. He submits that the law is settled that in the absence of any pleading, the evidence cannot be read and in this respect, he has relied upon the two judgments of Apex Court in the cases of ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs. Chandran and Others (2017) 3 SCC 702*** & ***Kashi Nath (Dead) Through LRS. Vs. Jaganath (2003) 8 SCC 740.***

18. He further submits that the First Appellate Court has recorded a categorical finding that Usman was present during the recording of the testimony of plaintiff no.2, and he did not raise any objection nor appeared as a witness disputing the appointment of plaintiff no.2 as Mutawalli. He submits that the said finding has not been assailed by the defendants in the present appeal and in such view of the fact, no substantial question of law arises in the appeal calling upon the Court to invoke the power under Section 100 of C.P.C.

19. It is also submitted by Sri Utpal Chatterji, learned counsel for the respondents that the plaintiff/respondent has not disputed the validity of the appointment of plaintiff no.2 as Mutawalli even in their reply to the notice of the plaintiff.

20. So far as the question whether the First Appellate Court has jurisdiction to hear the appeal after amendment in Section 83(1) of the Waqf Act, he submits that the said issue was not raised by the plaintiff before the Trial Court as well as First Appellate Court and no issue was framed on this point, and therefore, the same cannot be raised the for the first time in the second appeal.

21. In the alternative, he submits that amendment in Section 83(1) of the Waqf Act was incorporated by Act No.27 of 2013 w.e.f. 01.11.2013 whereas the suit was decided by the Trial Court on 06.08.2011, therefore, lis between the parties has been decided by the competent civil court before the amendment was incorporated in Section 83(1) of the Waqf Act, and the appeal shall lie to a higher forum against the judgement and decree of the Trial Court, therefore, the submission of learned counsel for the appellant in respect of the competence of First Appellate Court in deciding the appeal is devoid of merit. He submits that the First Appeal before the First Appellate Court was maintainable being the higher court and the Waqf Act is silent in respect of the cases which have already been decided by the competent civil court before amendment in Section 83(1), and in such view of the fact, the First Appellate Court was competent to hear the appeal.

22. He has placed reliance upon the Preamble of the amending act which states that the Waqf (Amendment) Act, 2013 shall come into force on the date it was notified by the Central Government, and the amending act does not specify that it shall come into operation retrospectively, therefore, the act would operate prospectively, and proceeding pending before the competent Civil Court before amendment shall continue with the Civil Court and thus, for this reason also, the submission of learned counsel for the appellant with regard to jurisdiction of First Appellate Court is misconceived.

23. In rebuttal to the contention of learned counsel for the respondents that no specific plea has been raised by the defendants in the written statement disputing the appointment of plaintiff no.2 as Mutawalli, learned counsel for the appellant has placed reliance upon paragraph no.1 of the written statement of the defendants to contend that the appointment of plaintiff no.2 as Mutawalli has been denied by the defendants specifically, and the Trial Court framed the issue on this point, and no objection was raised by the plaintiff in respect to framing of such issue by the Trial Court and thus, the plaintiff was aware of the issue involved in the suit and object of the pleading is to communicate the other side to know the case

of the party so that he or she may be in a position to reply the same, therefore, the submission of learned counsel for the respondents that no specific plea has been raised by the defendants disputing the appointment of plaintiff no.2 as Mutawalli is without substance. In this respect, he has placed reliance upon two judgments of the Apex Court in the cases of ***Bhagwati Prasad Vs. Chandramaul 1966 AIR (SC) 735*** & ***Ram Sarup Gupta (Dead) by L.Rs. Vs, Bishun Narain Inter College and Others 1987 (2) SCC 555.***

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

25. The specific case of the plaintiff was that plaintiff no.1 is the waqf and plaintiff no.2 is the Mutawalli. It is not disputed that the defendants are the tenants. The only issue which is being raised and contented by the learned counsel for the appellant is that the suit was not instituted by a competent person inasmuch as plaintiff no.2 was not appointed Mutawalli as per the waqf deed inasmuch as the male lenient descendent shall be appointed as Mutawalli as per the waqf deed. Thus, after the death of Suleman (the then Mutawalli), his next brother Usman could have been appointed as Mutawalli and not the youngest brother plaintiff no.2.

26. The reading of the waqf deed discloses that it provides that only male lenient descendent shall be appointed as Mutawalli, and there is no stipulation in the waqf deed which expressly or impliedly stipulates that the next male lenient descendant in line shall be appointed as Mutawalli. The waqf deed is silent in this regard, and learned counsel for the appellant could not place any stipulation in the waqf deed which expressly or impliedly discloses the intention of the creator of the waqf that after the death of Mutawalli, the next male lenient descendant in line shall be appointed as Mutawalli.

27. In the present case, the First Appellate Court has recorded a categorical finding that Usman, who was the next male lenient descendant after Suleman, was present in the court at the time of recording of the testimony of plaintiff no.2 and he did not raise any objection with regard to the appointment of plaintiff no.2 as Mutawalli. The relevant finding of the First Appellate Court is reproduced herein below:-

''सुलेमान और शमीम अहमद के बीच का भाई उस्मन है। इस जिरह से यह भी स्पष्ट हो जाता है कि उस्मान ने प्रत्यर्थी कम्मू से किराये की मांग नहीं किया। यहां तक उस्मान भी जिरह के समय न्यायालय में उपस्थित था। सुलेमान का देहान्त 2003 में हो गया है। पत्रावली पर उपलब्ध साक्ष्य से यह स्पष्ट नहीं हो पा रहा है कि खलीलउर्रहमान का सुलेमान से क्या संबंध है। वक्फनामा के अनुसार ज्येष्ठ की मृत्यु के बाद उससे छोटा मुतवल्ली होगा, इस प्रकार सुलेमान की मृत्यु के बाद वक्फ की संपत्ति का मुतवल्ली उस्मान को होना चाहिए। उस्मान ने वादी संख्या 2 के मुतवल्ली होने के दावे को प्रश्नगत किया हो ऐसा कोई साक्ष्य नहीं आया है। इस वाद में प्रतिपरीक्षा के समय उस्मान की उपस्थिति और शमीम के मुतवल्ली होने के कथन को आक्षेपित न करना, उस्मान की ओर से शमीम अहमद की मुतवल्ली होने के बावत मौनानुकूलता दर्शित करता है।''

28. So far as the contention of learned counsel for the appellant that plaintiff no.2 was not competent to institute the suit as he was appointed Mutawalli by the Board of plaintiff no.1 in the year 2010 is concerned, the resolution dated 27.04.2010 of Waqf Board of the plaintiff no.1 establishes the fact that plaintiff-waqf had no objection to the appointment of plaintiff no.2 as Mutawalli, and the said letter implies that the Board of plaintiff no.1 has ratified the action of the plaintiff no.2 in instituting the suit.

29. At this stage, it is also relevant to consider the submission of learned counsel for the respondents that no specific denial has been made by the defendants in the written statement disputing the validity of the appointment of plaintiff no.2 as Mutawalli.

30. The learned counsel for the appellant has placed reliance upon paragraph no.1 of the written statement to contend that in paragraph no.1 of the written statement, defendants have denied the contents of paragraph no.1 of the plaint. To appreciate the said argument, it would be useful to have a glance at paragraph no.1 of the plaint and paragraph no.1 of the written statement of defendant nos.1 to 4 which are reproduced herein below:-

Paragraph no.1 of the plaint:-

"1-यह कि आराजी मुतादावीया जिसकी तफसील अर्जी दावे के आखिर में दी है वादी नं०-1 की सम्पत्ति है और वादी नं०-2 वादी नं०-1 का मुत्तावल्ली, मुनतजिम व मुनाफा खोर है। वादी नं०-2 वादी नं०-1 की जायदाद की देखभाल व इन्तजाम करता है और वादी नं०-2 को कानूनी तोर पर और वक्फ नामे में दी गई शराईत की रोशनी में वादी नं०-1 की जानिब से दावा दायर करने का पूरा हक है।

Paragraph no.1 of the written statement of defendant nos.1 to 4:-

1- यह की बात पत्र की धारा 1 का कथन ज्ञान न होने के कारण स्वीकार नहीं है। वादी अपने कथन को कठोर साक्ष्य से प्रमाणति करे।"

31. It is stated in paragraph no.1 of the plaint that plaintiff no.2 is Mutawalli of plaintiff no.1.

32. In reply to the aforesaid assertion in the plaint, defendants in paragraph no.1 of the written statement have made a bald denial. There is no specific denial in the written statement with regard to the fact that plaintiff no.2 has not been appointed as Mutawalli as per the waqf deed and his appointment was *dehors* the waqf deed.

33. This Court is of the view that such denial does not come within the periphery of denial as contemplated under Order 8 Rule 4 of C.P.C. which mandates that defendants must make specific denial. Order 8 Rule 5 of C.P.C. mandates that every allegation of the fact in the plaint should be denied specifically or by necessary implication, and if it is not done so, the said allegation shall be treated to be admitted.

34. If paragraph no.1 of the written statement, reproduced above, is read in the light of the mandate of Order 8 Rule 4 and Order 8 Rule 5 of C.P.C., the Court is of the view that denial about the appointment of plaintiff no.2 as Mutawalli is only an evasive denial inasmuch as if the defendants were disputing the appointment and competence of plaintiff no.2 to act as Mutawalli of plaintiff no.1, the defendants should have specifically pleaded the grounds on which they alleged that the plaintiff no.2 could not be appointed as Mutawalli.

35. Though it is true that in the present case, the Trial Court has framed the issue in respect to appointment of plaintiff no.2 as Mutawalli, but in the absence of any specific denial in the written statement, the Trial Court did not need to frame an issue regarding the validity of the appointment of plaintiff no.2 as Mutawalli. The Trial Court also could not consider the evidence of the plaintiff in respect of the appointment of plaintiff no.2 as Mutawalli in the absence of any specific pleading by the defendants in the written statement denying the fact that the appointment of plaintiff no.2 as Mutawalli is in contravention to the waqf

deed. On the aforesaid proposition of law, it would be useful to have a glance at the judgements of Apex Court namely, ***Executive Officer (supra) & Kashi Nath (supra)*** relied upon by the learned counsel for the respondents.

36. In the case of ***Executive Officer (supra)***, the Apex Court affirmed the finding of the Trial Court where the Trial Court discarded the sale deed dated 29.07.1974 in respect of the title of one Padmanabhan in the absence of any pleading claiming title based on sale deed dated 29.07.1974. The Apex Court held "The evidence, with regard to which there is no pleading, has rightly been discarded by the trial court. Unless there is a pleading, especially with regard to the source of title, the defendant of a suit has no opportunity to rebut such pleading. Thus, evidence with regard to which there is no pleading cannot be relied upon by the plaintiff for setting up his title in a suit."

37. The Apex Court in the case of ***Kashi Nath (supra)*** in paragraph no.17 has held as under:-

"17. From the judgments of the trial court, first appellate court and the High Court it is clear that there was no consistency so far as the claim regarding the adoption is concerned, particularly as to who and at what point of time it was made. The High Court has taken great pains to extract the relevant variations to indicate as to how it cut at the very root of plaintiff's claim. As noted by the Privy Council in Siddik Mohd. Shah v. Saran AIR 1930 PC 57 (1) and Trojan and Co. v. Rm. N.N. Nagappa Chetiar AIR 1953 SC 235 when the evidence is not in line with the pleadings and is at variance with it and as in this case, in virtual self-contradiction, adverse inference has to be drawn and the evidence cannot be looked into or relied upon. Additionally, as rightly submitted, the conclusion whether there was adoption is essentially one of fact merely depending upon pure appreciation of the evidence on record. This position has been stated in several decisions of this Court; e.g., Rajendra Kumar v. Kalyan (2000) 8 SCC 99 and Raushan Devi v. Ramji Sah (2002 10 SCC 205. Consequently, no exception could be taken to the well-merited findings concurrently recorded by the courts below, with which the High Court also rightly declined to interfere on the facts and circumstances of this case."

38. So far as the judgements relied upon by the learned counsel for the appellant are concerned, though, it is no doubt true that the law is settled that the object of the pleading is to communicate the other party the case set up by a party and the Court should be liberal in interpreting the pleadings, and considerations of form cannot override the considerations of substance while ascertaining whether the pleadings though may not be happily worded but are sufficient and communicates the case of parties to other party. To ascertain the said issue, the Court has to apply a test whether, in the facts, the parties did not know what matter was in issue at the trial and had no opportunity to lead evidence in respect of it.

39. If the Court applies the aforesaid principles in the present case in finding out whether paragraph no.1 of the written statement communicates the case of the defendants about the challenge of appointment of plaintiff no.2 as Mutawalli, this Court is of the view that the answer is 'No' for the reasons given below.

40. The challenge has been laid by the defendants to the appointment of plaintiff

no.2 on the ground that under the waqf deed, only the next in line male lenient descendant shall be appointed as Mutawalli. The written statement is bereft of the basic and essential pleadings of the fact as to which clause of the waqf deed was violated in appointing plaintiff no.2 as Mutawalli, and the most essential fact which ought to have been pleaded by the defendants that it is only Usman being next male lenient descendant in line after Suleman (the then Mutawalli) could have been appointed as Mutawalli and not the plaintiff no.2 who is younger to Usman.

41. In such view of the fact, this Court is of the view that judgements relied upon by the learned counsel for the appellant are not applicable in the facts of the present case inasmuch as if the principles laid down in those judgements are applied in the facts of the present case, it cannot be said by any stretch of imagination that the pleading in the written statement in paragraph no.1 are sufficient and communicate the grounds on which the appointment of plaintiff no.2 as Mutawalli has been assailed.

42. During the argument, learned counsel for the respondents has produced a copy of notice paper no.13Ka/1, and perusal of the same reveals that the defendant has not challenged the appointment of plaintiff no.2 as Mutawalli in reply to the notice of the plaintiff. The defendant has admitted the fact that the suit property was taken on rent by a registered rent note dated 18.05.1972. It is stated that construction was raised by defendants from their sources and the lease in favour of the defendant was perpetual. The reply of the defendant to the notice of the plaintiff reflects that the defendant did not raise any objection to the appointment of plaintiff no.2 as Mutawalli and the competence of plaintiff no.2 to serve such notice upon the defendant.

43. Now coming to the question of jurisdiction in the present case. It is not in dispute that the question of jurisdiction was not raised by the defendants before the court below. However, since the question of jurisdiction raised by the appellant is a pure question of law, therefore, this Court proceeds to consider the same.

44. In the present case, the amendment has been incorporated by Act No.27 of 2013 w.e.f 01.11.2003. Admittedly, the civil court decided the lis between the parties on 06..08.2011 by dismissing the suit. So before the amending act came into force, the Trial Court had already concluded the suit and an appeal had been filed by the plaintiff/respondents. The parties have participated in the suit voluntarily and the suit has been decided by the competent court. The appeal is the continuation of the suit, but the appeal should always lie to a higher forum.

45. Since the amending act is silent about the forum of appeal in cases where the suit had been decided by the competent civil court before incorporation of amendment in the Waqf Act , therefore, the First Appellate Court was competent court to decide the appeal, and the objection of jurisdiction raised in the appeal is devoid of merit.

46. Thus, for the reasons given above, no substantial question of law arises in the present appeal which needs to be answered by this Court. Consequently, the appeal lacks merit and is hereby ***dismissed*** with no order as to costs.

(2024) 5 ILRA 794
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Second Appeal No. 350 of 2024

Dinesh Chandra ...Appellant
Versus
Santosh Kumar @ Hari Prakash & Ors. ...Respondents

Counsel for the Appellant:
Pankaj Agarwal, Vishakha Pande

Counsel for the Respondents:
Rama Shanker Mishra

A. Specific Relief Act, 1963 -Section 19 (1)(b) - Transfer of Property Act, 1882, S. 3 "a person is said to have notice" - S. 3, Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property shall be deemed to have notice of such instrument as from the date of registration, provided that - (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, (2) the instrument has been duly entered in books kept u/s 51 of that Act, and (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act. Unless the three conditions enumerated in the first proviso to Explanation-I are complied with and established on record, so that after the due registration of the instrument, the entries have been made as contemplated under Sections 51 and 55 of the Registration Act, no benefit of the expression "a person is said to have notice" in the interpretation clause defined in Section 3 of the Act, 1882, can be extended to a party, that on registration of an instrument, a person is supposed to have notice about such fact. (Para 28)

B. The Plaintiff/Appellant instituted a suit for specific performance of contract with regard to three registered agreements to sell. It was pleaded that the defendant 1st set illegally executed a sale deed in favour of the defendant 2nd set in respect of the suit property. Defendant 2nd set pleaded that they are bona fide purchasers of the suit property for value and that they had no knowledge about the execution of any agreement to sell. *Held:* Pleading in the plaint is silent in respect of the compliance of condition nos. 2 and 3 enumerated in the First Proviso to Explanation-I. Fulfilment of the above three conditions is necessary to seek the benefit of Explanation-I to the expression "a person is said to have notice". (Para 27)

C. Transfer of Property Act, 1882, S. 3 "a person is said to have notice" – S. 3 Explanation II - Any person acquiring any immovable property shall be deemed to have notice of the title, if any, of any person who is, for the time being, in actual possession thereof. Held: To claim the benefit of Explanation II, the plaintiff must demonstrate that he is in possession of the suit property. In the present case, the Subordinate Courts have returned a finding that the plaintiff is not in possession of the suit property. Therefore, the plaintiff cannot claim the benefit of Explanation II. (Para 31)

Dismissed. (E-5)

List of Cases cited:

Ram Niwas (Dead) through LRS. Vs Bano (Smt.) & ors., (2000) 6 SCC 685

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

1. Heard learned counsel for the appellant and the learned counsel for the respondents.

2. The plaintiff/appellant has preferred the present Second Appeal challenging the judgement and decree dated 12.02.1986 passed by the Additional Civil Judge, Shahjahanpur in Original Suit No.130 of 1984 and judgement and decree dated 03.04.2024 passed by the Additional District Judge, Court No.43, Shahjahanpur dismissing the appeal of the plaintiff/appellant.

3. Brief facts of the case are that the plaintiff instituted a suit for specific performance of contract with regard to three agreements to sell dated 24.08.1983, 14.12.1983 & 06.01.1984 in respect to the suit property described in the plaint against the respondent nos.1 & 2 (defendant nos. 1 & 2) and respondent nos. 3 to 7 (defendants no. 3 to 7). For convenience, the plaintiff/appellant is referred to as 'plaintiff' and respondents no.1 & 2 are referred to as 'defendant 1st set' and respondents no.3 to 7 are referred to as 'defendant 2nd set'.

4. The plaintiff instituted the suit on the ground that three agreements to sell dated 24.08.1983, 14.12.1983 & 06.01.1984 executed between him and defendant 1st set were duly registered in the office of Sub-Registrar, Shahjahanpur. The plaintiff pleaded that he was ready and willing to perform his part of the contract, but the defendant 1st set failed to perform their part of contract. It is further pleaded that the defendant 1st set illegally executed the sale deed dated 06.01.1984 in favour of the defendant 2nd set in respect to the suit property, which gave the plaintiff cause of action to institute the suit for the above relief.

5. The suit was contested by the defendant 1st set by filing a written statement denying the allegations made in the plaint. The defendant 2nd set also filed a written statement denying the averments in the plaint. The defendant 2nd set further pleaded that they are bonafide purchasers of the suit property for value and they had no knowledge about the execution of any agreement to sell, therefore, the suit for specific performance against them deserves to be dismissed.

6. The Trial Court framed as many as nine issues. However, the Trial Court on the issue of "whether the agreement to sell was validly executed" held that the three agreements to sell were duly executed by the defendant 1st set in favour of the plaintiff. The Trial Court framed issue no.8 "whether the defendant 2nd set had any knowledge about the three agreements to sell and the defendant 2nd set are bonafide purchasers".

7. The Trial Court in detail considered the testimony of PW1(Dinesh Chandra), PW2 (Puttu Lal) & PW3 (Rajendra Prasad) and recorded a finding that though PW1 had stated that the defendant 2nd set had knowledge about the agreement to sell, however, PW2 and PW3 stated that they don't know whether any information about agreements to sell was given to the defendant 2nd set. The Trial Court further considered the testimony of DW2 (Siya Ram) who categorically deposed that the defendant 2nd set did not know of the execution of the agreement to sell. The Trial Court further noted that no documentary evidence was filed on record which could establish that the defendant 2nd set had knowledge about the execution of agreements to sell between the plaintiff and defendant 1st set.

8. The Trial Court further noted the argument of the learned counsel for the defendant 2nd set and stated that since the

sale deed was executed by the defendant 1st set in their favour within one month from the date of execution of the agreement to sell, and it takes about a month in making relevant entries in the registration office regarding the execution of any agreement to sell in respect of any property or creation of any charge over the property, and since no entry showing execution of any agreement to sell in respect of said property was recorded in the records of the Registrar Office as contemplated under law, therefore, the defendant 2nd set could not collect any document or information about the alleged agreement to sell from the Office of Registrar.

9. The Trial Court after noticing the above facts held that the defendant 2nd set are bonafide purchasers for value, and they had no knowledge about the execution of agreements to sell. Consequently, the Trial Court concluded that the relief of specific performance of contract cannot be granted in the facts of the present case. After recording the above finding, the Trial Court denied the relief of the execution of the sale deed in pursuance of three agreements to sell. However, the Trial Court granted the relief of refund of earnest money paid by the plaintiff to the defendant 1st set under the agreements to sell.

10. The Trial Court further considered in detail the judgement of Original Suit No.429 of 1984 instituted by the defendant 2nd set against the defendant 1st set and the plaintiff, and also the fact that after the sale deed was executed in favour of the defendant 2nd set, the names of defendants 2nd set have been recorded in the rights of record. Consequently, it concluded that the defendant 1st set and plaintiff is not in possession of the suit property.

11. Feeling aggrieved by the judgement of the Trial Court, the plaintiff preferred Civil Appeal No.36 of 1986. The First Appellate Court affirmed the finding of the Trial Court on the issue that the agreements to sell executed between the plaintiff and defendant 1st set were valid. The First Appellate Court while considering the issue whether the defendant 2nd set are bonafide purchasers considered in detail the evidence on record and also the judgement of the Trial Court in Original Suit No.429 of 1984 instituted by the defendant 2nd set against the defendant 1st set and the plaintiff for mandatory injunction, which was decreed by the Trial Court, and has attained finality since it was neither assailed by the defendant 1st set nor by the plaintiff.

12. The First Appellate Court on appreciation of evidence on record found that the defendant 2nd set are bonafide purchasers for the value, and therefore, they are entitled to the benefit of Section 19 (b) of the Specific Relief Act. Consequently, it dismissed the appeal and affirmed the judgement of the Trial Court.

13. Challenging the aforesaid judgment, learned counsel for the appellant has contended that the Subordinate Courts have erred in law in dismissing the suit inasmuch as once a finding has been recorded by the Subordinate Courts that the agreements to sell were validly executed, this implies that due notice of the agreement to sell is to everybody, and Subordinate Courts have failed to consider “Interpretation Clause” in Section 3 of the Transfer of Property Act, 1882 (hereinafter referred to as “Act, 1882”). The learned counsel for the appellant laid emphasis on “a person is said to have notice” in 'Interpretation Clause' to contend that in view of Explanation-I to the expression “a

person is said to have notice", it shall be deemed that after the registration of agreement to sell as per law, everyone has notice about execution of the agreement to sell and burden of proof was upon the defendant 2nd set to establish that they had no knowledge or information about the three agreements to sell. It is submitted that in the instant case, since the defendant 2nd set had failed to discharge their burden of proving that they had no knowledge or information about the agreement to sell, therefore, the Subordinate Courts have erred in law in dismissing the suit. In this respect, learned counsel for the appellant has placed reliance upon the judgement of the Apex Court in the case of ***Ram Niwas (Dead) through LRS. Vs. Bano (Smt.) and Others, (2000) 6 SCC 685.***

14. Per contra, learned counsel for the respondents would contend that defendant 2nd set are entitled to the benefit and protection of Section 19 (b) of the Specific Relief Act inasmuch as defendant 2nd set are bonafide purchasers for value. It is submitted that the defendant 2nd set had proved by leading cogent evidence that they had no knowledge or information about the execution of the agreement to sell, and the Subordinate Courts have recorded categorical findings after appreciating the evidence on record that the defendant 2nd set had no knowledge about execution of the three agreements to sell, consequently, the Subordinate Courts returned a finding that the defendant 2nd set are bonafide purchasers having no knowledge or information about the execution of the three agreements to sell. It is contended that the finding returned by the Subordinate Courts on the aforesaid issue is a finding of fact.

15. It is further contended that the expression "a person is said to have notice" referred to in Section 3 of the Act, 1882 is not attracted in the instant case inasmuch as there is no pleading in the plaint that after execution of the agreement, the conditions enumerated in First Proviso to the Explanation-I to the expression "a person is said to have notice" had been complied with. Accordingly, he submits that the benefit of the expression "a person is said to have notice" in Section 3 of the Transfer of Property Act cannot be extended to the plaintiff.

16. He further placed reliance upon explanation II to the expression "a person is said to have notice" in Section 3 of the Act, 1882 and submits that in the instant case, it is proved on record that the plaintiff was not in possession over the suit property and defendant 2nd set are in possession of the suit property, and in such view of the fact, expression "a person is said to have notice" as quoted in Section 3 of the Act, 1882 is not attracted in the present case. Accordingly, he submits that the finding returned by both the Subordinate Courts are finding of fact and no substantial question of law arises in the present second appeal which calls for the invocation of the power of this Court under Section 100 of C.P.C.

17. I have considered the rival submissions advanced by the learned counsel for the parties.

18. So far as the question whether the three agreements to sell were duly executed or not, there is no dispute about the fact that three agreements to sell in favour of the plaintiff were duly executed by the defendant 1st set given the finding returned by the Trial Court as well as Appellate Court in this regard.

19. The sole question which invites the attention of this Court is whether the defendant 2nd set are the bonafide purchasers for value without knowledge to entitle them to protection provided under Section 19 (1) (b) of the Specific Performance Act. The Trial Court in this respect considered the testimony of PW1, and also the testimony of PW2 and PW3 and found that though PW1 had stated that defendant 2nd set knew about the execution of agreements to sell, however, PW2 and PW3 had stated that they did not give any information about the three agreements to sell to the defendant 2nd set.

20. The Trial Court further noticed that DW2 (Siya Ram) had stated in his testimony that he did not know of the execution of agreements to sell. The Trial Court further considered the fact that the sale deed had been executed in favour of the defendant 2nd set within one month from the date of execution of the agreements to sell, and since necessary entries were not made in the Office of Registrar, therefore, defendant 2nd set could not obtain any information or relevant document from the Office of Registrar about the execution of the agreements to sell in respect of the suit property. Consequently, it held that the defendant 2nd set are bonafide purchasers of the suit property and are entitled to the protection provided under Section 19 (1) (b) of the Specific Relief Act.

21. The Appellate Court also considered in detail the testimony of the witnesses led by the plaintiff as well as defendants and also the judgement of the Trial Court in Original Suit No.429 of 1984 instituted by the defendant 2nd set against the plaintiff and defendant 1st set for mandatory injunction, which was decreed by the Trial Court in favour of the defendant 2nd set and has attained finality since no appeal was preferred against the judgement and decree of the Trial Court in Original Suit No. 429 of 1984 either by the plaintiff or by the defendant 1st set. After appreciating the aforesaid facts and evidence on record, the Appellate Court found that the plaintiff was not in possession of the suit property.

22. The Appellate Court also considered the fact that after the execution of the sale deed in favour of the defendant 2nd set, their names have been mutated in the rights of record and they are in possession of the suit property. The first Appellate Court held that the appellant could not demonstrate that the finding of the Trial Court with respect to the possession was perverse or against the record.

23. Now, before proceeding as to "whether the plaintiff is entitled to the benefit of expression "a person is said to have notice" referred in interpretation clause (3) of the Act, 1882, it would be apt to reproduce the same:-

"a person is said to have notice" of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be

and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section

30 of the Indian Registration Act, 1908 (XVI of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908) and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in

books kept under Section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly

entered in the indexes kept under Section 55 of that Act.

Explanation II- Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the

time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires

notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

24. Reading of the said expression in the "Interpretation Clause" reveals that a person is supposed to have notice of a fact when he actually knows the fact or though he ought to have known this fact, but because of his wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he could not acquire the knowledge of such fact. The said expression explains that in case a transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property subsequently is supposed to have notice of such instrument from the date of its registration.

25. Learned counsel for the appellant has laid emphasis upon the Explanation-I to submit that in the instant case, the transaction of agreements to sell has been effected by the registered document, and therefore, the defendant 2nd set who acquired the said property is supposed to have notice of the three agreements to sell from the date of its registration.

26. It is pertinent to note that Explanation-I is attracted only when the conditions stipulated in First Proviso to the Explanation-I are complied with, which are:-

(1) the instrument has been registered and its registration has been completed in the manner prescribed by the Indian Registration Act, 1908 and the rules made thereunder;

(2) the instrument or memorandum has been duly entered or filed, as the case may be in books kept under Section 51 of that Act and

(3) the particulars regarding the transaction to which the instrument relates

have been correctly entered in the indexes kept under Section 55 of that Act.

27. In the present case, the first condition enumerated in the proviso i.e. registration of agreement to sell has been completed in the manner provided by the Registration Act and the Rules framed thereunder are complied with. Condition nos.2 and 3 enumerated in First Proviso are not fulfilled in the instant case as is evident from the perusal of the plaint since the Plaint reveals that the pleading in the plaint is silent in respect to the compliance of condition nos. 2 and 3 enumerated in the First Proviso to Explanation-I. Fulfilment of the above three conditions is necessary to seek the benefit of Explanation-I to the expression "a person is said to have notice". In other words, to seek the benefit of the expression "a person is said to have a notice", the plaintiff has to establish that the above three conditions enumerated in the proviso to Explanation-I have been fully complied with.

28. There is no pleading in the plaint that the instrument or memorandum had been duly entered and filed in the books kept under Section 51 of the Registration Act, and particulars of the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of the Registration Act. Unless three conditions enumerated in the First proviso to Explanation-I are complied with and established on record that after the due registration of the instrument, the entries have been made as contemplated under Sections 51 and 55 of the Registration Act, no benefit of the expression "a person is said to have notice" in the interpretation clause defined in Section 3 of the Act 1882, in the opinion of the Court, can be extended to a party that on registration of an instrument, a person is supposed to have notice about such fact. Thus, for the aforesaid reason, the submission of the counsel for the appellant regarding Explanation -I to the expression "a person is said to have notice" is devoid of merits and is rejected.

29. At this stage, it would also be apposite to consider Explanation-II to the expression "a person is said to have notice" which states that any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice or title, if any, of a person who is for the time being in actual possession.

30. At this stage, it would be appropriate to consider the judgment of the Apex Court in the case of **Ram Niwas (Supra)** relied upon by the learned counsel for the appellant. Relevant Paragraphs No. 7 to 9 of the said judgement are reproduced below:

"7. Thus, it is seen that a statutory presumption of "notice" arises against any person who acquires any immovable property or any share or interest therein of the title, if any, of the person who is for the time being in actual possession thereof.

8. The principle of constructive notice of any title which a tenant in actual possession may have, was laid down by Lord Eldon in Daniels Vs. Davison (Ves at P.254). The learned Law Lord observed:

"Upon one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession."

9. That principle has been followed by various High Courts in India. (See : Faki Ibrahim vs. Faki Gulam

Mohidin, AIR 1921 Bombay 459; Mahadeo vs. S.B.Kesarkar, AIR 1972 Bombay 100; Tiloke Chand Surana vs. J.B.Beattie & Co., AIR 1926 Calcutta 204; Parthasarathy Aiyer vs. M. Subbaraya Gramany, AIR 1924 Madras 67 and Mummidi Reddi Papannagiri Yella Reddi vs. Salla Subbi Reddi, AIR 1954 A.P. 20).”

31. Since to claim the benefit of Explanation-II, the plaintiff has to demonstrate that he is in possession of the suit property whereas in the present case, the Subordinate Courts have returned the finding based upon the appreciation of evidence on record that the plaintiff is not in possession over the suit property and the counsel for the appellant could not demonstrate that finding on the issue of possession by the Subordinate courts is perverse or against the record, therefore, the plaintiff cannot claim the benefit of Explanation-II. In such view of the fact, the judgement of the Apex Court in the case of Ram Niwas (Supra) is not applicable in the facts of the present case.

32. Since, the Subordinate Courts have returned the finding that the defendant 2nd set are the bonafide purchasers for the value without knowledge and are in possession of the suit property, and the finding in this respect are finding of fact based upon proper appreciation of fact on record, therefore, this Court is of the view that the judgement and decree passed by the courts below are based upon sound principles of law and do not call for any interference by this Court.

33. Since no substantial question of law arises in the present appeal, therefore, the appeal lacks merit and is, accordingly **dismissed** with no order as to costs.

(2024) 5 ILRA 801

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

THE HON’BLE SARAL SRIVASTAVA, J.

Second Appeal No. 352 of 2024

Jamia Urdu Aligarh Regd ...Appellant
Versus
Jamia Urdu Sanstha & Ors. ...Respondents

Counsel for the Appellant:
Pradeep Kumar Upadhyay

Counsel for the Respondents:

A. Indian Evidence Act, 1872 - Sections 61, 62, 63, 64 & 65 - Proof of Document by Secondary Evidence - S. 61 provides that the contents of a document may be proved either by primary evidence or secondary evidence. S. 64 mandates that a document must be proved by primary evidence, except in the circumstances mentioned in S. 65 of the Act. To take benefit of S. 65, a party must establish that it could not produce the primary evidence for bona fide reasons. In this case, original sale deed was not produced before the lower court; only a certified copy of the sale deed was filed i.e. secondary evidence. Plaintiff did not laid any factual foundation in the plaint or filed an application seeking leave of the Court to prove the sale deed by secondary evidence, citing the absence of primary evidence (i.e., the original sale deed). Held: The plaintiff failed to provide a factual foundation justifying the non-production of primary evidence; therefore, the certified copy of the sale deed, being secondary evidence, could not be admitted as evidence. (Para 22)

B. Civil Law - Limitation Act, S. 3: The question of limitation is a pure question of law. If it is evident from the pleadings that the suit is barred by limitation, and there is no need to examine any question of fact to

conclude that the suit is barred, the Court has jurisdiction u/s 3 of the Limitation Act to address the issue of limitation, even if the defendant has not raised a plea of limitation or if no issue regarding limitation has been framed. In the present case, plaintiff alleged that the first and second defendants colluded to fraudulently execute the sale deed dated 27.12.2001. Plaintiff instituted the suit in 2010, approximately nine years after the sale deed's execution. However, the plaintiff did not state the date on which he acquired knowledge of the execution of the sale deed. To circumvent the issue of limitation, plaintiff deliberately did not seek the cancellation of the sale deed; instead, he prayed for a decree of permanent injunction to restrain the second defendant from interfering with his possession of the suit property. *Held:* Despite the issue of limitation not being raised before the Trial Court and the First Appellate Court, the High Court addressed it in the second appeal. The limitation for filing a suit for cancellation of a sale deed is three years; thus, the suit was barred by limitation and rejected since the question of limitation is a pure question of law. (Para 33, 35)

Dismissed. (E-5)

List of Cases cited:

1. Appaiya Vs Andimuthu @ Thangapandi & ors., 2024 (1) JCLR 99 (SC)

2. H. Siddiqui (Dead) by LRS. Vs A. Ramalingam, (2011) 4 SCC 240

3. Rakesh Mohindra Vs. Anita Beri & ors., (2016) 16 SCC 483

4. Jagmail Singh & anr. Vs Karamjit Singh & ors., (2020) 5 SCC 17

5. Narne Rama Murthy Vs Ravula Somasundaram & ors., (2005) 6 SCC 614

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

1. Heard learned counsel for the appellant.

2. The present appeal has been preferred by the plaintiff/appellant challenging the judgement and decree dated 05.03.2024 passed by the First Appellate Court i.e. Additional District Judge, Court No.14, Aligarh in Civil Appeal No.34 of 2017 as well as judgement and order dated 13.01.2017 passed by the Additional Civil Judge (Senior Division), Court No.2, Aligarh in Original Suit No.914 of 2010.

3. The case of the plaintiff/appellant (hereinafter referred to as 'plaintiff') is that the plaintiff is a registered educational institution having Registration No.625/1983-84 (Renewal No.551/1995) under the Societies Registration Act, 1860, and Smt. Saba Khan is the Registrar of the said institution who is competent to verify and sign the plaint. As per the plaintiff's case, the plaintiff purchased a piece of land measuring 1250.07 square yards out of Khasara No.539 situated at Dhorra Muafi, Pargana & Tehsil Koil, District Aligarh as detailed in Schedule-A at serial no.1 by registered sale deed dated 31.03.1997 executed in pursuance of registered agreement to sale dated 06.03.1997 for a sale consideration of Rs.10,62,500/-.

4. The plaintiff purchased another piece of land measuring 1250.07 square yards abutting the said land towards the southern side of the above land as detailed in Schedule-A at serial No.2 out of Khara No.539 situated at Dhorra Muafi, Pargana & Tehsil Koil, District Aligarh by another sale deed dated 31.03.1997 executed in pursuance to agreement to sell dated 06.03.1997. It is further stated that on

01.06.2010, respondent nos.1 & 2 (defendant first set) and respondent no.3 (defendant second set) (hereinafter referred to as defendant first set and defendant second set) came on the spot and tried to take forcible possession over 111 square yards land out of total land purchased by the plaintiff by the two sale deeds detailed above to raise illegal construction.

5. The further case of the plaintiff is that after getting the knowledge of the sale deed dated 27.12.2001, the plaintiff applied for the certified copy of the said sale deed on 02.06.2010 which was made available to the plaintiff on 05.06.2010. The plaintiff came to know for the first time about the contents of the sale deed and also the fraud and misrepresentation played by the defendant's first set and the defendant's second set in collusion with each other in getting the sale deed dated 27.12.2001 executed.

6. It is further stated that the defendant first set in collusion with the defendant second set created a fake institution in the name of 'Jamia Urdu Sanstha' which is akin to the name of the plaintiff's institution to usurp the property detailed in Schedule-A and to use the registration number of the plaintiff i.e. Jamia Urdu Aligarh. It is further stated that a fraudulent power of attorney was executed on 28.09.2001 in respect of the property of Schedule-A in favour of defendant no.2 (Imran Sabir) who as attorney holder of Jamia Urdu Sanstha, transferred the plot measuring 111 square yards out of Khasra No.539 to the defendant second set detailed at the foot of the plaint as Schedule-B by sale deed dated 27.12.2001.

7. The plaintiff has prayed for the following relief in the aforesaid backdrop:-

(A). That a decree for declaration be passed in favour of the plaintiff and against the defendants. It be declared that the alleged sale deed dated 27.12.2001 alleged to be executed by defendant No.1 through defendant No.2 as attorney holder in favour of defendant IInd Set with regard to the property in question as detailed at the foot of the plaint in Schedule 'B' registered in Bahi No.1 Zild No.3236 on pages 505 to 512 at No.221 registered on 10.1.2002 in the office of the sub-Registrar, Koil, Aligarh and the information to this effect be sent to the office of the sub-Registrar, Koil, Aligarh.

(B). That a decree for permanent prohibitory injunction be passed in favour of the plaintiff and against the defendants, the defendants their agents, servants, subordinates, relatives and associates be restrained from taking forcible possession and raising illegal construction over the property in question and also restrain from transferring, alienating and disposing off the property in question as detailed at the foot of the plaint in Schedule 'B' or otherwise in any manner whatsoever.

(C). Cost of the suit be awarded to the plaintiff and against the defendants.

(D). Any other relief or reliefs which may be just and proper be also granted to the plaintiff and against the defendants which may be beneficial to the plaintiff in the circumscribes of the case as also in the opinion of the Hon'ble Court."

8. It appears that the defendant did not appear to contest the suit and the Trial Court proceeded ex-parte. The Trial Court framed the following issues:-

"1. परिशिष्ट अ में वर्णित सम्पत्ति का स्वामित्व वादी में निहित है।

2. सम्पत्ति विवादित जिसे वादपत्र के परिशिष्ट ब में वर्णित किया गया है वह परिशिष्ट अ में वर्णित सम्पत्ति का भाग है।

3. सबा खान वादी जामियां उर्दू की रजिस्ट्रार है।

4. प्रतिवादी संख्या-1 एक फर्जी संस्था है जिसने वादी की पंजीकरण संख्या का कपट के द्वारा दुरुपयोग करते हुये बैनामा लिखाया है। ‘‘

9. The Trial Court held that the plaintiff despite having been granted several times did not produce evidence to establish its title over the suit property. The Trial Court further recorded a finding that the plaintiff had filed the true copy of the sale deeds dated 31.03.1997 and 04.06.1997 which had been executed by Nahida Nijami and Jamal Nijami in favour of Jamia Urdu Shiksha Sanstha. The Trial Court while considering the issue whether the scheduled property described in Schedule-B in the plaint is also a part of the property of Schedule-A held that since it is admitted that after the purchase of the land, no construction had been raised, therefore perusal of the boundaries in respect of plot described in Schedule-A and Schedule-B discloses that boundaries of the plot of Schedule-A are not the same which have been shown as boundaries of Schedule-B. The Trial Court further held that the plaintiff failed to establish that the total area of Khasra No.539 was 2500.14 square yards. Accordingly, it concluded that the property described in Schedule B is not part of the property of Schedule A.

10. The Trial Court further held that the plaintiff had failed to establish that defendant no.1-Jamia Urdu Sanstha and plaintiff-Jamia Urdu Aligarh (Registered) are two different societies and Saba Khan was the Registrar of the society of Jamia Urdu Aligarh. The said finding has been returned by the Trial Court on the ground that the plaintiff did not adduce any evidence to establish that the plaintiff and defendant no.1-Jamia Urdu Sanstha are two different societies and Saba Khan was the Registrar of the plaintiff's society. Consequently, the Trial Court found that the plaintiff had failed to prove its case and accordingly, the Trial Court dismissed the suit.

11. The plaintiff being aggrieved by the judgment and decree of the Trial Court preferred a civil appeal which was also dismissed by the First Appellate Court by recording a finding that the plaintiff did not adduce any evidence regarding registration of the society of the plaintiff nor did it produce the constitution of the society. The First Appellate Court further noted that it is evident from the sale deed dated 04.06.1997 that the name of Jamia Urdu Shiksha Sanstha is recorded in the sale deed dated 04.06.1997 whereas the plaintiff in the suit has named itself as 'Jamia Urdu (Registered)'.

12. The First Appellate Court further noted that the plaintiff did not adduce any documentary evidence to establish under what name the plaintiff's society has been registered. Accordingly, it concluded that the name of the plaintiff-Jamia Urdu (Registered) is different from the name mentioned in the sale deed dated 04.06.1997 paper no.32Ga/10 namely Jamia Urdu Shiksha Sanstha. Accordingly, the First Appellate Court concluded that since there was difference in the name of the society, therefore the plaintiff ought to have filed the necessary evidence to establish that the society of the plaintiff is the valid society. The First Appellate Court also found that the plaintiff did not adduce any evidence to prove its title, therefore, the Trial Court has not committed any illegality in dismissing the suit.

13. Challenging the above two orders, learned counsel for the appellant has

contended that the finding of the Trial Court, as well as the First Appellate Court, is perverse inasmuch as the plaintiff has filed the certified copy of the sale deed which is secondary evidence and being a public document was liable to be read in evidence, therefore, the Trial Court, as well as First Appellate Court, has erred in law in concluding that the plaintiff had failed to establish its title over the suit property. In support of his submission, he has relied upon the judgment of the Apex Court in the case of ***Appaiya Vs. Andimuthu @ Thangapandi & Others 2024 (1) JCLR 99 (SC).***

14. I have considered the submission advanced by learned counsel for the appellant and perused the record.

15. The suit has been filed by Jamia Urdu Aligarh (Registered) through its Registrar Smt. Saba Khan. The case of the plaintiff is that the plaintiff's society is the registered society under the Societies Registration Act, 1860 and is running an educational institution. The plaintiff for playground, purchased the suit property by two sale deeds dated 31.03.1997 out of Khasara No.539 situated at Dhorra Muafi, Pargana & Tehsil Koil, District Aligarh.

16. According to the plaintiff, the defendant first set- Jamia Urdu Sanstha is a fake society, and it has no authority to grant power of attorney to the defendant's second set-Imran Sabir, therefore, the sale deed executed by the defendant's first set in favour of defendant second set in respect to 111 square yard was illegal. The plaintiff in the aforesaid backdrop had prayed for the relief, extracted above.

17. It is admitted on record that original sale deeds were not filed on record and only the certified copy of the sale dee dated 31.03.1997 has been filed on record which is secondary evidence.

18. Section 61 of the Indian Evidence Act, 1872 (hereinafter referred to as 'Act, 1872') provides that the contents of a document may be proved either by primary evidence or secondary evidence.

19. Section 62 of the Act, 1872 deals with primary evidence and Section 63 of the said Act defines secondary evidence.

20. Section 64 of the Act, 1872 provides that a document must be proved by primary evidence except in cases hereinafter mentioned i.e. the circumstances mentioned in Section 65 of the Act, 1872. Section 65 of the Act, 1872 is reproduced herein below:-

"Section 65. Cases in which secondary evidence relating to documents may be given.- *Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-*

(a)When the original is shown or appears to be in the possession or power-

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b)when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other

reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

21. In the instant case admittedly, primary evidence i.e. original sale deed was not produced before the court below. As per Section 64 of the Act, 1872, a document must be proved by primary evidence except in cases which have been enumerated in Section 65 of the Act, 1872.

22. In the present case, no factual foundation has been laid by the plaintiff in the plaint or by filing any application seeking leave of the Court to prove the sale deed by secondary evidence on the ground that they do not have the primary evidence i.e. original sale deed. The law is settled that to take the benefit of Section 65 of the Act, 1872, the party has to establish that for bona fide reasons, it could not produce the primary evidence. In the present case, the plaintiff did not lay any factual foundation giving reasons for not producing the primary evidence, therefore, the certified copy of the sale deed being secondary evidence could not be read in evidence.

23. In this respect, it would be beneficial to have a glance at a few judgements of the Apex Court where the Apex Court has elaborated the preconditions for proving a fact by secondary evidence.

24. The Apex Court in the case of ***H.Siddiqui (Dead) by LRS. Vs. A. Ramalingam (2011) 4 SCC 240*** in paragraph 12 has held as under:-

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved by law. The court has an obligation to decide the question of the admissibility of a document in secondary evidence before making endorsement thereon. (Vide Roman

Catholic Mission v. State of Madras AIR 1966 SC 1457; State of Rajasthan v. Khemraj (2000) 9 SCC 241, LIC v. Ram Pal Singh Bisen (2010) 4 SCC 491 and M. Chandra v. M. Thangamuthu (2010) 9 SCC 712).”

25. In the case of ***Rakesh Mohindra Vs. Anita Beri and Others (2016) 16 SCC 483,*** the Apex Court again reiterated that if a party desires to give secondary evidence, it has to lay down the factual foundation that despite best effort, it is not able to produce primary evidence for the reason beyond its control. Paragraphs nos. 15 & 20 of the said judgement are reproduced herein below:-

“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party that relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.”

20. It is well settled that if a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.”

26. In this respect, it would be apt to reproduce paragraphs nos.11, 13, 14 & 17 of the judgment of the Apex Court in the case of ***Jagmail Singh and Another Vs. Karamjit Singh and Others (2020) 5 SCC 178:-***

“11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished.

13. In the matter of Rakesh Mohindra v. Anita Beri (2016) 16 SCC 483 this Court has observed as under:-

“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.”

14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui v. A. Ramalingam (2011) 4 SCC 420, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law."

27. In the case of ***Appaiya (supra)*** relied upon by the learned counsel for the appellant, the Apex Court after considering the various provisions of The Indian Evidence Act, 1872 namely, Sections 61 to 65, Section 74, Section 77, Section 79 and Section 57 (5) of the Registration Act held that the High Court has erred in holding that Exhibit A-1 sale deed dated 27.08.1928 could not be admitted in evidence. The case of ***Appaiya (supra)*** is distinguishable and the law postulated in the said case is not applicable in the facts of the present case inasmuch as in the case of ***Appaiya (supra)***, the issue before the Apex Court was not that the precondition to prove a document by secondary evidence has been complied with or not whereas in the present case, it is evident from the record that the precondition to prove the sale deed dated 27.12.2001 by secondary evidence has not been complied with inasmuch as plaintiff did not lay any factual foundation establishing that despite its best effort, it could not give primary evidence.

28. Further, this Court may note that the First Appeal Court has recorded a categorical finding that the plaintiff has failed to establish its title by producing cogent evidence. The First Appellate Court also recorded a finding of fact that no evidence had been adduced by the plaintiff to establish that Smt. Saba Khan was the Registrar of the plaintiff's society. The First Appellate Court further held that the sale deed dated 31.03.1997 registered on 04.06.1997 reveals that the sale deed was executed by one 'Jamia Urdu Shiksha Sanstha' whereas the plaintiff is Jamia Urdu (Registered) and it failed to establish that they are the same and there is no difference between plaintiff and Jamia Urdu Shiksha Sanstha. The aforesaid finding returned by the First Appellate Court is a finding of fact, and learned counsel for the appellant did not assail the said finding.

29. It is further pertinent to note that the suit has been filed on the ground that the sale deed dated 27.12.2001 executed by the defendant's first set in favour of the defendant's second set was without authority.

30. The suit was instituted in the year 2010 and there is no pleading in the plaint as to the date on which the plaintiff acquired the knowledge about the execution of the sale deed dated 27.12.2001. Paragraphs No.5 & 6 of the plaint are reproduced hereinbelow:-

"5. That on 1.6.10 the defendants in collusion with each other came on spot and tried to take forcible possession with a view to raise illegal construction over 111

square yards land out of total land 2500.14 square yards aforesaid but they could not get success in their illegal design due to the resistance made by the plaintiff and its employees. However the defendants and their associates clearly alarmed and threatened that they will take forcible possession over 111 square yard land as detailed at the foot of the plaint in Schedule 'B' which is the subject matter in the instant suit and will raise illegal construction and further threatened to transfer, alienate and dispose off the same at any opportune moment.

6. That after getting the knowledge of the said sale deed dated 27.12.2001 the plaintiff applied for obtaining the certified copy of the same on 2.6.2010 which could be available to the plaintiff on 5.6.2010 then the plaintiff for the first time came to know about the contents of the same and also about the fraud, cheating, and misrepresentation committed by the defendants in collusion with each other in obtaining the said sale deed dated 27.12.2001 which is absolutely fraudulent, fictitious, fabricated and forged document which deserves to be declared as null and void on following grounds:-

(A). That the defendants in collusion with each other planned to usurp and swallow up the property of Schedule 'A' of the plaintiff, for that purposes the defendants in collusion with each other collusively, maliciously, fraudulently and fictitiously created a fake institution Jamia Urdu Sanstha and connected the registration No. of the plaintiff i.e. Jamia Urdu, Aligarh and its the then Registrar who is no more in the mortal world without any right and authority executed a General Power of Attorney dated 28.9.01 with regard to the property of Schedule 'A' in favour of defendant No.2 who as attorney holder of Jamia Urdu Sanstha transferred, alienated and disposed of a plot measuring 111 square yards out of Khasra No.539 (out of the land of the plaintiff of Schedule 'A') situated at Dhorra Maufi, Pargana & Tehsil Koil, District Aligarh as detailed at the foot of the plaint in Schedule 'B' by virtue of registered sale deed dated 27.12.2001 for a total sale consideration of Rs.80,000.00/-. The said plot has been transferred out of the land of the plaintiff of Schedule 'A' of which the defendants have no right and authority to do the same in any manner whatsoever.

(B). That the then Registrar Anwar Syeed had no right and authority appointed the general power of attorney holder dated 28.09.01 in favour of defendant No.2 nor defendants Ist Set or the then Registrar of Jamia Urdu, Aligarh or Jamia Urdu Sanstha Aligarh had any right and authority to transfer, alienate or dispose off the land in question or its part to defendants Ist Set in any manner whatsoever more particularly when the institutional property (plaintiff's property) could/cannot be transferred, alienated or disposed off in any manner whatsoever.

(C). That defendant IInd Set never acquired any right, title or interest in the property of Schedule 'B' on the basis of fictitious and forged sale deed dated 27.12.2001. Furthermore, she never became the owner nor got possession over the same.

(D). That the transaction of the sale deed dated 27.12.2001 is absolutely a fake and imposter transaction which does not carry any weight in the eye of law nor the same is recognized under any law.

(E). That no amount of sale consideration ever passed under the said alleged sale deed nor any amount is deposited in the account of the plaintiff.

(F). That the said alleged sale deed never acted upon either on spot or on record.

(G). That the alleged sale deed dated 27.12.2001 is outcome of collusion and connivance of scribe, witnesses, employees of the office of Sub-Registrar, Koil, Aligarh and also of the defendants."

31. The plaintiff to circumvent the question of limitation deliberately did not seek the cancellation of the sale deed dated 27.12.2001 inasmuch as the plaintiff to seek the cancellation of the sale deed had to establish that the suit had been filed within three years from the date it acquired knowledge of the execution of sale deed whereas in the present case, the plaintiff did not state the date of knowledge of the sale deed.

32. The plaintiff has not assailed the sale deed dated 27.12.2001 and surreptitiously, prayed for a decree of permanent injunction restraining the defendant second set from interfering with the possession of suit property.

33. This Court is conscious of the fact that this issue was not raised before the Trial Court and the First Appellate Court, therefore, this Court may not deal with the said issue in the second appeal, but the law is settled that the question of limitation is a pure question of law, and if it is manifest from the pleading that the suit is barred by limitation, and no question of fact is to be gone into to conclude that the suit is barred by limitation, the Court under Section 3 of the Limitation Act has jurisdiction to look into the question of limitation, even if no plea of limitation has been set up by the defendant or no issue is framed regarding limitation. In such an event, the suit deserves to be rejected since the question of limitation is a pure question of law.

34. In this respect, it would be apt to reproduce paragraph 5 of the judgement of Apex Court in the case of ***Narne Rama Murthy Vs. Ravula Somasundaram and Others (2005) 6 SCC 614:-***

"5. We also see no substance in the contention that the suit was barred by limitation and that the courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter."

35. In the present case, the plaintiff has not stated the date on which he acquired the knowledge of the execution of the sale deed dated 27.12.2001. The limitation for filing a suit for cancellation of the sale deed is three years. The suit was instituted in the year 2010 about 9 years after the date of execution of the sale deed. The facts in the present case demonstrate that the plaintiff deliberately did not pray for the cancellation

of the sale deed since the limitation for filing a suit for cancellation of the sale deed is three years whereas in the present case, the suit has been instituted after about 9 years from the date of execution of sale deed. From the pleading in the plaint, it is evident that the suit is barred by limitation and the question of limitation in the instant case is a pure question of law and not a mixed question of fact and law.

36. Therefore, this Court for the aforesaid reason is also of the view that the suit of the plaintiff is nothing but an abuse of the process of law since the plaintiff knew that it could not succeed in the suit being barred by limitation if it prays for cancellation of sale deed.

37. In such view of the fact, this court is of the view that no substantial question of law is involved in the present appeal which needs to be answered by this Court. Consequently, the appeal lacks merit and is hereby ***dismissed*** with a cost of Rs.25,000/-.

(2024) 5 ILRA 811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Special Appeal No. 441 of 2024

Rajendra Singh & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Aklank Kumar Jain, Arun Kumar Rana

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Basic Education Act, 1972 – Right of Children to Free and Compulsory Education Act, 2009 – Assistant teacher – Essential qualification – Petitioner did not possess Teacher Eligibility Test – Effect – After according approval, the petitioner were appointed, but no salary was paid – Validity challenged – Held, TET was an essential qualification with effect from the date of notification dated 23.8.2010 issued by NCTE. Admittedly, in the present case, the recruitment process had commenced later on and therefore, it was mandatory that the petitioners must possess TET qualification at the time of selection, which they did not possess. (Para 14)

B. Service Law – Selection – Requisite qualification – No date was fixed in the advertisement, on which a candidate may possess requisite qualification – Effect – Held, uncertainty of the date may also lead to a contrary consequence viz. even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, as it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily – In the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. (Para 17)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. Writ A No. 12908 of 2013; Shiv Kumar Sharma Vs St. of U.P. & ors. decided on 31.05.2013

2. Rakesh Kumar Sharma Vs Govt. of NCT of Delhi; 2013 SCC Online SC 674

3. Dipitimayee Parida Vs St. of Orissa; 2008 (10) SCC 687

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

1. Heard Sri Aklank Kumar Jain, learned counsel for the appellants-petitioners and Sri Devesh Vikram, learned Additional Chief Standing Counsel for the State-respondents.

2. Present Special Appeal has been preferred assailing the validity of the impugned judgment and order dated 12.03.2024 passed in Writ A No. 17951 of 2018 (Ratnesh Kumar and 3 others vs. State of U.P. and 5 others).

3. It appears from the record that "Jwala Prasad Tiwari Junior High School, Bhauti, Kanpur Nagar"1, is a recognised & aided Junior High School. The institution is governed by the provisions of U.P. Basic Education Act, 19722; the rules framed thereunder and the provisions of U.P. Junior High School (Payment of Salary to Teachers and other employees) Act, 19783. The District Basic Education Officer, Kanpur Nagar vide order dated 25.6.2011 had accorded approval for filling up four vacant posts of Assistant Teacher in the institution. The meeting of Selection Committee, which also consisted the nominee of District Basic Education Officer, was held on 15.12.2011, wherein appointment of petitioners was recommended for approval. Finally, the District Basic Education Officer, Kanpur Nagar vide order dated 12/13.3.2012 had accorded approval to the petitioners' appointment. Accordingly, the appointment letters were issued in favour of the petitioners on 13.3.2012 and they joined their services on 17.3.2012.

4. Once the petitioners were not paid their salary then they moved a representation before the respondent authorities on 26.10.2012. Finally, the District Basic Education Officer, Kanpur Nagar vide order dated 12.07.2018 had rejected the claim of the petitioners on the ground that they did not possess the Teachers Eligibility Test4, which is an essential qualification under the Right of Children to Free and Compulsory Education Act, 20095. The petitioners had filed the writ petition for quashing the aforesaid order dated 12.07.2018 and after hearing learned counsel for the parties, learned Single Judge vide impugned judgement and order dated 12.03.2024 has proceeded to dismiss the writ petition with following observations:-

"13. Learned counsel for respondents on the basis of above conclusion submitted that TET was an essential qualification w.e.f. from the date of notification dated 23.8.2010 issued by NCTE and admittedly in present case recruitment process was commenced later on, therefore, it was mandatory that petitioners must possess TET qualification at the time of selection, but admittedly they did not.

14. In Sarvesh Kumar Yadav (supra), co-ordinate Bench of this Court has not referred the above judgment passed by Full Bench though it was prior to it. It appears that it was not brought into the notice of co-ordinate bench, therefore, conclusion of it cannot be relied upon, therefore, in Shiv Kumar Sharma (supra), a Full Bench has categorically held that TET was an essential qualification in any recruitment process commenced after date

of relevant notification i.e. 23.8.2010, therefore, no benefit could be granted to petitioners in regard to Clause 5 of subsequent notification issued by NCTE dated 29.7.2011.

15. In the aforesaid circumstances argument of learned Senior Counsel are unsustainable since they are contrary to the decision of Full Bench in Shiv Kumar Sharma (supra).

16. Accordingly, I do not find that petitioners have any legally sustainable claim as well as benefit of subsequent TET Examination could also not be granted.

17. There is no illegality in the impugned order.

18. Writ petition is accordingly dismissed."

5. Learned counsel for the appellants-petitioners in this backdrop submits that the selection of petitioners was held strictly in accordance with the Rules and their selection was also recommended for approval by the Selection Committee, which included the nominee of the District Basic Education Officer. Finally, the District Basic Education Officer vide order dated 12/13.3.2012 had accorded approval to the selection of the petitioners. The appellants were duly appointed on the post of Assistant Teachers in the institution on 13.3.2012 and they joined their services on 17.3.2012. At the time of appointment of the petitioners, the passing of TET as an essential qualification was not included in the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 19786. The TET was introduced by Notification dated 23.8.2010 issued by National Council for Teachers Education7 in reference to Clause (N) of Section 2 of Act, 2009 and the Act, 2009 was made effective only from 1st of April, 2010.

6. It is submitted that the State of U.P. had framed Rules under the Act, 2009 and notified the same on 27th of July, 2011. The Government Order dated 5th of December, 2012 provided that under the Act, 2009 and Rules framed thereunder in 2011, the TET has been prescribed as an essential qualification for Teachers of Junior Basic and Senior Basic Schools. Under Section 23 (1) of the Act, 2009 it has been provided that all those Teachers, who did not possess the requisite TET qualification, were to obtain the said qualification within five years from the appointed date as notified by the Academic Authority i.e. N.C.T.E. The last date for obtaining such qualification was 31.03.2015. In the Government order dated 07th of September, 2011 a mention has merely been made that after the notification of the Act, 2009 there is need for holding TET. The standards for holding such tests have been prescribed and the U.P. Madhyamik Shiksha Parishad has been given the responsibility for holding such test.

7. It is the case of the petitioners also that the NCTE was notified as Academic Authority by the Central Government under the Act, 2009 and it issued its first notification prescribing the minimum eligibility qualification only on 23rd of August, 2010 and the said notification dated 23rd of August, 2010 was further amended on 29th of July, 2011 and guidelines for conducting the TET were issued by the State Government thereafter on 7th of September, 2011. It is also submitted that none of the Government orders relied upon by the District Basic Education Officer prohibited the appointment of teachers under the existing Rules. The Act, 2009 and the Rules framed thereunder by the State Government in the year 2011 could not have put the ban on selection of teachers to be held by various

Junior High Schools for the vacancies arising in between the notification of the Act in 2009 upto the notification of amended Rules in 2011. As the teaching being an essential service, hence the selections of teachers could not be put on hold merely because of notification of the Act of 2009. It was, thus, clarified by the Government order dated 5th of December, 2012 that relaxation for obtaining the minimum TET qualification was extended upto 31st of March, 2015. Admittedly, the petitioner nos.3 and 4 had qualified TET in 2013-2014 respectively. The amendment in relevant Rules, 1978 prescribes TET as an essential qualification, which was notified only on 5.12.2012 i.e. subsequent to the commencement of the recruitment process of the petitioners and could not be given retrospective effect. Therefore, they are entitled for payment of their salary.

8. Per contra, Sri Devesh Vikram, learned Additional Chief Standing Counsel appearing for the State respondents has vehemently opposed the appeal and submits that the TET was an essential qualification with effect from the date of notification dated 23.08.2010 issued by the NCTE. Admittedly, in the present case the recruitment process was commenced later on and therefore, it was mandatory that the petitioners must possess TET qualification at the time of selection but admittedly they did not possess the TET qualification. The notification dated 23.08.2010 is reproduced here under:-

"राष्ट्रीय अध्यापक शिक्षा परिषद्

अधिसूचना

नई दिल्ली, 23 अगस्त,2010

फा.सं. 61-03/2010/एनसीटीई (एन.एंड एस.)- निः शुल्क एवं अनिवार्य बाल शिक्षा अधिनियम,2009 (2009 का 35) की धारा 23 की उप-धारा (1) द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए और स्कूली शिक्षा और साक्षरता विभाग, मानव संसाधन विकास मंत्रालय, भारत सरकार द्वारा जारी दिनांक 31 मार्च, 2010 की अधिसूचना सं. का.आ. 750(अ) के अनुसरण में राष्ट्रीय अध्यापक शिक्षा परिषद् एतद्द्वारा इस अधिसूचना की तिथि से निःशुल्क और अनिवार्य बाल शिक्षा अधिनियम,2009 की धारा 2 के खण्ड (ढ) में संदर्भित स्कूलों में कक्षा I से VIII में अध्यापक के रूप में नियुक्ति की पात्रता हेतु निम्नलिखित न्यूनतम योग्यता निर्धारित करती है-

1. न्यूनतम योग्यता-

(1) कक्षा I-V

(क) न्यूनतम 50% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं प्रारंभिक शिक्षा शास्त्र में द्विवर्षीय डिप्लोमा (जिस नाम से भी जाना जाता हो)

या

न्यूनतम 45% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं प्रारंभिक शिक्षा शास्त्र में द्विवर्षीय डिप्लोमा (जिस नाम से भी जाना जाता हो) जो राष्ट्रीय अध्यापक शिक्षा परिषद् (मान्यता, मानक और क्रियाविधि) विनिमय, 2002 के अनुसार प्राप्त किया गया हो।

या

न्यूनतम 50% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं 4 वर्षीय प्रारंभिक शिक्षा शास्त्र स्नातक (बी.एल.एड)

या

न्यूनतम 50% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं शिक्षा शास्त्र

में द्विवर्षीय डिप्लोमा (विशेष शिक्षा)

और

(ख) राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा निरूपित मार्गदर्शी सिद्धान्तों के अधीन उपयुक्त सरकारों द्वारा आयोजित (अध्यापक पात्रता परीक्षा (टी.ई.टी.) में उत्तीर्ण।

(I) कक्षा VI-VIII

(क) बी.ए./ बी.एस.सी. और प्रारंभिक शिक्षा शास्त्र में द्विवर्षीय डिप्लोमा (जिस नाम से भी जाना जाता हो)

या

न्यूनतम 50% अंकों के साथ बी.ए./बीएस.सी. एवं शिक्षा शास्त्र में एकवर्षीय स्नातक (बी.एड)

या

न्यूनतम 45% अंकों के साथ बी.ए/बी.एससी. एवं शिक्षा शास्त्र में एकवर्षीय स्नातक (बी.एड.) जो इस संबंध में समय-

समय पर जारी राष्ट्रीय अध्यापक शिक्षा परिषद् (मान्यता, मानक और क्रियाविधि विनिमय के अनुसार प्राप्त किया गया हों

या

न्यूनतम 50% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं वर्षीय प्रारंभिक शिक्षा शास्त्र स्नातक (बी.एल.एड.)

या

न्यूनतम 50% अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं 4 वर्षीय बी.ए./बी.एससी एड, या बी.ए.एड./बी.एसी.सी.एड

या

न्यूनतम 50% अंकों के साथ बी.ए/बी.एस.सी एवं एक वर्षीय बी.एड. (विशेष शिक्षा)

और

(ख) राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा निरूपित मार्गदर्शी सिद्धान्तों के अधीन उपयुक्त सरकारों द्वारा आयोजित [अध्यापक पात्रता परीक्षा (टी.ई.टी) में उत्तीर्ण]।

*2. **अध्यापक शिक्षा में डिप्लोमा/डिग्री पाठ्यक्रम-** इस अधिसूचना के संदर्भ में केवल राष्ट्रीय अध्यापक शिक्षा परिषद् (राअशिप) द्वारा मान्यता-प्राप्त अध्यापक शिक्षा शास्त्र में डिप्लोमा/डिग्री पाठ्यक्रम मान्य होगा। शिक्षा शास्त्र में डिप्लोमा (विशेष शिक्षा) और बी.एड. (विशेष शिक्षा) के लिए केवल भारतीय पुनर्वास परिषद् (आरसीआई) द्वारा मान्यता-प्राप्त पाठ्यक्रम मान्य होगा।*

*3. **विशेष अनिवार्य प्रशिक्षण -** वह व्यक्ति,.*

(क) जिसके पास न्यूनतम 50% अंकों के साथ बी.ए./बी.एससी और बी.एड. योग्यता है, कक्षा I से V में नियुक्ति के लिए 1 जनवरी, 2012 तक पात्र होगा, बशर्ते कि वह नियुक्ति के बाद प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यता प्राप्त -6-माह का विशेष प्रशिक्षण प्राप्त कर ले।

(ख) जिसके पास डी.एड. (विशेष शिक्षा) या बी.एड. (विशेष शिक्षा) की योग्यता है, उसे नियुक्ति के बाद प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद द्वारा मान्यता प्राप्त -6 – माह का विशेष प्रशिक्षण प्राप्त करना आवश्यक होगा।

*4. **इस अधिसूचना की तिथि से पहले नियुक्त अध्यापक-** इस अधिसूचना की तिथि से पूर्व कक्षा I से VIII के लिए नियुक्त निम्नलिखित श्रेणी के अध्यापकों को उपर्युक्त पैरा (1) में निर्धारित न्यूनतम योग्यता हासिल करने की आवश्यकता नहीं है :-*

(क) राष्ट्रीय अध्यापक शिक्षा परिषद् (स्कूलों में अध्यापकों की भर्ती के लिए न्यूनतम योग्यताओं का निर्धारण) विनियम, 2001 (समय-समय पर यथा संशोधित) के अनुसार 3 सितम्बर, 2001 अथवा उसके बाद नियुक्त अध्यापक।

किन्तु बी.एड. की योग्यता रखने वाले कक्षा I से V के अध्यापकों या बी.एड. (विशेष शिक्षा) या डी.एड. (विशेष शिक्षा) की योग्यता रखने वाले अध्यापकों को प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यता प्राप्त 6 माह का विशेष प्रशिक्षण प्राप्त करना होगा।

(ख) कक्षा I से V के शिक्षा स्नातक (बी.एड) योग्यताधारी अध्यापक जिसने पूर्व में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा अनुमोदित 6 माह का विशेष आधारभूत अध्यापक पाठ्यकम (विशेष बी.टी.सी.) पूरा कर लिया है।

प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यता प्राप्त 6 माह का विशेष प्रशिक्षण प्राप्त कर ले।

(ख) जिसके पास डी. एड. (विशेष शिक्षा) या बी.एड. (विशेष शिक्षा) की योग्यता है, उसे नियुक्ति के बाद प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यता प्राप्त 6 माह का विशेष प्रशिक्षण प्राप्त करना आवश्यक होगा।

*4. **इस अधिसूचना की तिथि से पहले नियुक्त अध्यापक** :- इस अधिसूचना की तिथि से पूर्व कक्षाIसे VIII के लिए नियुक्त निम्नलिखित श्रेणी के अध्यापकों को उपर्युक्त पैरा (1) में निर्धारित न्यूनतम योग्यता हासिल करने की आवश्यकता नहीं है :-*

(क) राष्ट्रीय अध्यापक शिक्षा परिषद् (स्कूलों में अध्यापकों की भर्ती के लिए न्यूनतम योग्यताओं का निर्धारण) विनियम, 2001 (समय-समय पर यथा संशोधित) के अनुसार 3 सितम्बर, 2001 अथवा उसके बाद नियुक्त अध्यापक।

किन्तु बी.एड. की योग्यता रखने वाले कक्षा I से V के अध्यापकों या बी.एड. (विशेष शिक्षा) या डी.एड. (विशेष शिक्षा) की योग्यता रखने वाले अध्यापकों को प्रारंभिक शिक्षा शास्त्र में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यता प्राप्त 6 माह का विशेष प्रशिक्षण प्राप्त करना होगा।

(ख) कक्षा I से V के शिक्षा स्नातक (बी.एड) योग्यताधारी अध्यापक जिसने पूर्व में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा अनुमोदित 6 माह का विशेष आधारभूत अध्यापक पाठ्यक्रम (विशेष बी.टी.सी.) पूरा कर लिया है।

(ग) भर्ती नियमों के अनुसार 3 सितम्बर, 2001 से पहले नियुक्त अध्यापक।

*5. **कुछ मामलों में इस अधिसूचना की तिथि के बाद नियुक्त अध्यापक -** इस अधिसूचना की तिथि से पूर्व यदि सरकारों अथवा स्थानीय प्राधिकारियों अथवा विद्यालयों द्वारा विज्ञापन जारी कर अध्यापकों की नियुक्ति की प्रक्रिया आरम्भ कर दी गई है,*

ऐसी स्थिति में नियुक्तियाँ, राष्ट्रीय अध्यापक शिक्षा परिषद् (स्कूलों में अध्यापकों की भर्ती के लिए न्यूनतम योग्यताओं का निर्धारण) विनियम, 2001. (समय-समय पर यथासंशोधित) के अनुसार की जा सकती है।"

9. It is further submitted that while dismissing the writ petition, learned Single Judge vide impugned judgment dated 12.3.2024 has considered the Act, 2009 and rightly held that the TET was an essential qualification in any recruitment process commenced after the date of relevant notification i.e. 23.8.2010 and therefore, no benefit could be granted to the petitioners in regard to Clause 5 of subsequent notification issued by the NCTE dated 29.7.2011. The notification dated 29.07.2011 is reproduced hereunder:-

"राष्ट्रीय अध्यापक शिक्षा परिषद्

अधिसूचना

नई दिल्ली, 29 जुलाई, 2011

फा. सं. 61-1/2011/राअशिप (मा.तथा मा.)- निःशुल्क एवं अनिवार्य बाल शिक्षा अधिनियम, 2009 (2009 का 35) के खण्ड 23 की उप-धारा (1) द्वारा प्रदत्त शक्तियों का, प्रयोग करते हुए और स्कूली शिक्षा और साक्षरता विभाग, मानव संसाधन विकास मंत्रालय, भारत सरकार द्वारा जारी दिनांक 31 मार्च, 2010 की अधिसूचना संख्या का.आ. 750 (अ) के अनुसरण में, राष्ट्रीय अध्यापक शिक्षा परिषद् (राअशिप) एतद्वारा अध्यापक के रूप में नियुक्ति के लिए पात्र होने के वास्ते न्यूनतम अर्हताएं निर्धारित करने वाली दिनांक 23 अगस्त, 2010 की फा. संख्या 61-1/2010-राअशिप (मा. तथा मा.) के रूप में भारत के राजपत्र, असाधारण के भाग III, खण्ड 4 में प्रकाशित संख्या 215 दिनांक 25 अगस्त,2010 की अधिसूचना में एतद्वारा निम्न संशोधन करती है (जिसका उल्लेख मूल अधिसूचना के रूप में किया जाएगा)-

(I) मूल अधिसूचना के पैरा 1 के उप-पैरा (1) के स्थान पर निम्न प्रतिस्थापित किया जाएगा, नामतः :-

1. न्यूनतम अर्हताएं:

(i) कक्षा I से V

(क) न्यूनतम 50 प्रतिशत अंकों के साथ उच्चतर माध्यमिक (अथवा इसके समकक्ष) तथा प्रारम्भिक शिक्षा में द्विवर्षीय डिप्लोमा (चाहे उसे कोई भी नाम दिया गया हो)

अथवा

न्यूनतम 45 प्रतिशत अंकों के साथ उच्चतर माध्यमिक (अथवा इसके समकक्ष) एवं प्रारम्भिक शिक्षा शास्त्र में द्विवर्षीय डिप्लोमा चाहे जिस किसी नाम से जाना जाता हो जो राष्ट्रीय अध्यापक शिया परिषद् (मान्यता मानदण्ड और क्रियाविधि) विनियम, 2002 के अनुसार प्राप्त किया गया हो।

अथवा

न्यूनतम 50 प्रतिशत अंकों के साथ उच्चार माध्यमिक (अथवा इसके समकक्ष) तथा 4 वर्षीय प्रारम्भिक शिक्षा शास्त्र में स्नातक (बी.एल.एड.)

अथवा

न्यूनतम 50 प्रतिशत अंकों के साथ उच्तर माध्यमिक (अथवा इसके समकक्ष) तथा शिक्षा शास्त्र (विशेष शिक्षा) में द्विवर्षीय दिप्लोमा

अथवा

स्नातक तथा प्रारम्भिक शिक्षा में द्विवर्षीय डिप्लोमा (चाहे जिस किसी नाम से जाना जाता हो)

तथा

(ख) राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा इस प्रयोजन के लिए जारी किए गए मार्गदर्शी सिद्धान्तों के अनुसार उपयुक्त सरकार की आयोजित अध्यापक पात्रता परीक्षा (टी.ई.टी.) में पास होना।

(II) मूल अधिसूचना के पैरा 1 के उप-पैरा (ii) के स्थान पर निम्न प्रतिस्थापित किया जाएगा, नामत:

1. (ii) कक्षा VI-VIII

(क) स्नातक और प्रारम्भिक शिक्षा में द्विवर्षीय दिप्लोमा (चाहे जिस किसी नाम से जाना जाता हो)

अथवा

न्यूनतम 50 प्रतिशत अंकों के साथ स्नातक एवं शिक्षा शास्त्र में एक वर्षीय स्नातक (बी.एड.)

अथवा

न्यूनतम 45 प्रतिशत अंकों के साथ स्नातक एवं शिक्षा शास्त्र में एक वर्षीय स्नातक (बी.एड.) जो इस सम्बन्ध में समय-समय पर जारी किए गए राष्ट्रीय अध्यापक शिक्षा परिषद् मान्यता मानदण्ड तथा क्रियाविधि) विनियमों के अनुसार प्राप्त किया गया हो।

अथवा

न्यूनतम 50 प्रतिशत अंकों के साथ उच्चतर माध्यमिक (अथवा इसके समकक्ष) एवं 4 वर्षीय प्रारम्भिक शिक्षा शास्त्र में स्नातक (बी. एल. एड.)

अथवा

न्यूनतम 50 प्रतिशत अंकों के साथ उच्चतर माध्यमिक (या इसके समकक्ष) एवं 4 वर्षीय बी.ए./बी.एस.सी.एड. या बी.ए.एड./बी.एस.सी.एड.

अथवा

न्यूनतम 50 प्रतिशत अंकों से साथ स्नातक तथा एक वर्षीय बी.एड. (विशेष शिक्षा)

तथा

(ख) राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा इस प्रयोजन के लिए जारी किए गए मार्गदर्शी सिद्धान्तों के अधीन उपयुक्त सरकार द्वारा आयोजित अध्यापक पात्रता परीक्षा (टी.ई.टी.) में उत्तीर्ण।

(III) मूल अधिसूचना के पैरा 3 के स्थान पर निम्न प्रतिस्थापित किया जाएगा, नामतः

(1) ***प्राप्त किया जाने वाला प्रशिक्षण-*** *ऐसा व्यक्ति भी-*

(क) जिसने न्यूनतम 50 प्रतिशत अंकों के साथ स्नातक और बी.एड. अर्हता अथवा इस सम्बन्ध में समय-समय पर जारी किए गए राष्ट्रीय अध्यापक शिक्षा परिषद् (मान्यता मानदण्ड और क्रियाविधि) विनियमों के अनुसार न्यूनतम 45 प्रतिशत अंकों के साथ स्नातक तथा शिक्षा में एक वर्षीय स्नातक (बी.एड.) उत्तीर्ण किया हो, जनवरी 2012 तक कक्षा I से V तक के लिए नियुक्त किए जाने का पात्र होगा बशर्ते कि नियुक्ति के बाद वह प्राम्भिक शिक्षा में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा मान्यताप्रदत्त 6 महीने का विशेष कार्यक्रम पूरा कर ले।

(ख) वह व्यक्ति, जिसने डी.एड. (विशेष शिक्षा) अथवा बीएड (विशेष शिक्षा) उत्तीर्ण की हो, नियुक्ति के बाद प्रारम्भिक शिक्षा में राष्ट्रीय अध्यापक शिक्षा परिषद् द्वारा प्रदत्त 6 महीने का विशेष कार्यक्रम पूरा करेगा।

(ग) आरक्षण नीतिः आरक्षित श्रेणियों जैसे कि एस.सी./एस.टी.ओ.बी.सी.पी.एच. आदि के अभ्यर्थियों को अर्हक अंकों में 5 प्रतिशत तक की छूट दी माएगी।

(IV) मूल अधिसूचना के पैरा 5 के स्थान पर निम्न प्रतिस्थापित किया जाएगा, नामतः

5. (क) कुछ मामलों में इस अधिसूचना की तिथि के बाद नियुक्त अध्यापक- *इस अधिसूचना की तिथि से पूर्व यदि सरकारों अथवा स्थानीय प्राधिकारियों अथवा विद्यालयों द्वारा विज्ञापन जारी कर अध्यापकों की नियुक्ति की प्रक्रिया आरम्भ कर दी गई है, ऐसी स्थिति में नियुक्ति, राष्ट्रीय अध्यापक शिक्षा परिषद् (स्कूलों में अध्यापकों की भर्ती के लिए न्यूनतम योग्यताओं का निर्धारण) विनियम, 2001 (समय-समय पर यथासंशोधित के अनुसार की जा सकती हैं।*

(ख) इस अधिसूचना में उल्लिखित न्यूनतम योग्यता मानदण्ड भाषा, सामाजिक अध्ययन, विज्ञान आदि के अध्यापकों के मामले में लागू होते हैं। शारीरिक शिक्षा के अध्यापकों के मामले में शारीरिक शिक्षा अध्यापकों के लिए उल्लिखित न्यूनतम योग्यता मानदण्ड लागू होंगे। कला शिक्षा, शिल्प शिक्षा, गृह विज्ञान, कार्य शिक्षा आदि के अध्यापकों के मामले में राज्य सरकारों तथा अन्य स्कूल प्रबन्धक वर्गों द्वारा निर्धारित पात्रता मानदण्ड तब तक लागू रहेंगे जब तक कि ऐसे अध्यापकों के सम्बन्ध में राष्ट्रीय अध्यापक शिक्षा परिषद् न्यूनतम योग्यताएं निर्धारित नहीं कर देती।

विक्रम सहाय, संयोजक

[विज्ञापनIII/4/13I/2011/सा.]

टिप्पणीः- मूल अधिसूचना दिनांक 23 अगस्त 2010 की फा.स.61-1/2011/राअशिप (मा. तथा मा.) के रूप में भारत के राजपत्र असाधारण के भाग III के खण्ड 4में प्रकाशित हुई थी।"

10. We have carefully gone through the submissions advanced by the learned counsel for the parties as well as the records and find that while passing the impugned judgment and order dated 12.3.2024 the learned Single Judge has proceeded to consider the Full Bench judgement of this Court in ***Shiv Kumar Sharma vs. State of U.P. and Ors8*** alongwith other connected cases, wherein, the Full Bench had framed following questions for consideration:-

"(a) What does the phrase "minimum qualifications" occurring in Section 23 (1) of the right of Children to Free and Compulsory Education Act, 2009 (the Act) mean - whether passing the 'Teacher's Eligibility Test', is a qualification for the purposes of Section 23 (1), and it insistence by the NCTE in the Notification dated 23.8.2010 is in consonance with the

powers delegated to the NCTE under Section 23 (1) of the Act?

(b) Whether clause 3 (a) of the Notifications dated 23.8.2010 and 29.7.2011 issued by the NCTE under Section 23 (1) of the Act, permits persons coming under the ambit of that clause to not undergo the 'Teacher's Eligibility Test', before they are eligible for appointment as Assistant Teachers? What is the significance of the words "shall also be eligible for appointment for Class-I to V upto 1st January, 2012, provided he undergoes, after appointment an NCTE recognized six months special programme in elementary education"?

(c) Whether the opinion expressed by the Division Bench in Prabhakar Singh and others Vs. State of U.P. and others, 2013 (1) ADJ 651 (DB), is correct in law?"

11. Finally, the Full Bench had answered all the above three questions with following observations:-

"The questions that have been therefore framed by us are answered as follows:-

1. The teacher eligibility test is an essential qualification that has to be possessed by every candidate who seeks appointment as a teacher of elementary education in Classes 1 to 5 as per the notification dated 23.8.2010 which notification is within the powers of the NCTE under Section 23(1) of the 2009 Act.

2. Clause 3(a) of the notification dated 23.8.2010 is an integral part of the notification and cannot be read in isolation so as to exempt such candidates who are described in the said clause to be possessed of qualifications from the teacher eligibility test.

3. We approve of the judgment of the division bench in Prabhakar Singh's case to the extent of laying down the interpretation of the commencement of recruitment process under Clause 5 of the notification dated 23.8.2010 but we disapprove and overrule the ratio of the said decision in relation to grant of exemption and relaxation from teacher eligibility test to the candidates referred to in Clause 3 (a) of the notification dated 23.8.2010, and consequently, hold that the teacher eligibility test is compulsory for all candidates referred to in Clause 1 and Clause 3 (a)."

12. We have also considered very carefully the contents of the impugned judgment and the case set up by the appellants-writ petitioners in context of the law laid down by the Hon'ble Supreme Court of India in **Rakesh Kumar Sharma Vs. Govt. of NCT of Delhi9**, wherein the following observations have been made by Hon'ble Supreme Court in Paras 6, 16 and 17:-

"6. There can be no dispute to the settled legal proposition that the selection process commences on the date when applications are invited. Any person eligible on the last date of submission of the application has a right to be considered against the said vacancy provided he fulfils the requisite qualification.

16. In the instant case, the appellant did not possess the requisite qualification on the last date of submission of the application though he applied representing that he possessed the same. The letter of offer of appointment was issued to him which was provisional and conditional subject to the verification of educational qualification, i.e., eligibility, character verification etc. Clause 11 of the letter of offer of appointment dated 23.2.2009 made it clear that in case

character is not certified or he did not possess the qualification, the services will be terminated. ***The legal proposition that emerges from the settled position of law as enumerated above is that the result of the examination does not relate back to the date of examination. A person would possess qualification only on the date of declaration of the result. Thus, in view of the above, no exception can be taken to the judgment of the High Court.***

17. It also needs to be noted that like the present appellant there could be large number of candidates who were not eligible as per the requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the appellant would be violative of the doctrine of equality, a backbone of the fundamental rights under our Constitution. A large number of such candidates may not have applied considering themselves to be ineligible adhering to the statutory rules and the terms of the advertisement.

There is no obligation on the court to protect an illegal appointment. Extraordinary power of the court should be used only in an appropriate case to advance the cause of justice and not to defeat the rights of others or create arbitrariness. ***Usurpation of a post by an ineligible candidate in any circumstance is impermissible****. The process of verification and notice of termination in the instant case followed within a very short proximity of the appointment and was not delayed at all so as to even remotely give rise to an expectancy of continuance.*

The appeal is devoid of any merit and does not present special features warranting any interference by this court. The appeal is accordingly dismissed." (Emphasis supplied)

13. In the case of ***Dipitimayee Parida Vs. State of Orissa10*** Hon'ble Supreme Court has held as under:-

"16. ***Even otherwise, ordinarily the qualification or extra qualification laid down for the recruitment should be considered as on the last date for filing of the application.*** *This has been so held in Rekha Chaturvedi v. University of Rajasthan [1993 Supp (3) SCC 168 : 1993 SCC (L&S) 951 : (1993) 25 ATC 234] stating: (SCC p. 175, para 10):*

"10. ***The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to be stated to be rejected****. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications.* ***Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence viz. even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications.*** *But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the*

advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications." (Emphasis supplied)

14. We find that the TET was an essential qualification with effect from the date of notification dated 23.8.2010 issued by NCTE. Admittedly, in the present case, the recruitment process had commenced later on and therefore, it was mandatory that the petitioners must possess TET qualification at the time of selection, which they did not possess. In **Shiv Kumar Sharma** (supra), the Full Bench has categorically held that TET was an essential qualification in any recruitment process commenced after date of relevant notification i.e. 23.8.2010, therefore no benefit could be granted to the petitioners in regard to Clause-5 of subsequent notification issued by the NCTE dated 29.7.2011.

15. Learned Single Judge, while considering the claim set-up by the appellants-petitioners has considered that TET was essential qualification with effect from the date of notification dated 23.08.2010 issued by the NCTE. In the present case, the recruitment process commenced later on. Admittedly, at the time of initiation of the recruitment process, even on the last date of submission of the form, the appellants-petitioners were not inhering the essential qualification of TET. Therefore, in such circumstances, by no stretch of imagination, the said provision can be relaxed, as it is already answered by the Full Bench in **Shiv Kumar Sharma**'s case (supra). Therefore, there is no infirmity in the order passed by the learned Single Judge, which warrant any interference in this intra court appeal.

16. In the case of **Rakesh Kumar Sharma** (supra), the applicant did not possess the requisite qualification on the last date of submission of the application, though he applied, representing himself that he possessed the same and the provisional/conditional letter of offer of appointment was issued to him. Clause 11 of the letter of offer of appointment dated 23.2.2009 made it clear that in case character is not certified or he did not possess the qualification, the services will be terminated. Hon'ble Supreme Court has held that the result of the examination does not relate back to the date of examination. Like the present appellant there could be large number of candidates, who were not eligible as per the requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the appellant would be violative of the doctrine of equality.

17. In **Dipitimayee Parida** (supra) Hon'ble Supreme Court has held that unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates, who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence viz. even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, as it may leave open a scope for malpractices. The date of

selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/ notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications.

18. In view of the law laid down by the Apex Court in the case of **Rakesh Kumar Sharma** (supra) and **Dipitimayee Parida** (supra), we find that the instant appeal lacks merit and is hereby **dismissed.**

(2024) 5 ILRA 821
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2024

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ - A No. 3863 of 2018

Smt. Raj Kishori Kushwaha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Aishwarya Kumar Singh, Anand Kumar Yadav, Rajesh Kumar Singh, Rupesh Sharma

Counsel for the Respondents:
C.S.C., Arun Kumar, Chhaya Gupta

A. Service Law – UP Basic Education Act, 1972 – UP Basic Education (Teacher) Service Rules, 1981 – Payment of salary – Petitioner discharged the duty of In-charge Headmistress for more than 29 years, but no salary of the same was paid – Mandamus sought – Held, the petitioner is entitled for higher salary even for ad-hoc basis on the post of Headmistress. (Para 7 and 12)

Writ petition allowed. (E-1)

List of Cases cited:

1. Dr. Jai Prakash Narayan Singh Vs St. of U.P.; 2014 (3) SCC 1644

2. Smt. P. Grover Vs St. of Hary. & anr.; AIR 1983 SC 1060

3. Secy.- Cum-Chief Engineer, Chandigarh Vs Hari Om Sharma & ors.; AIR 1998 SC 2909

4. St. of Punj. & anr. Vs Dharam Pal; (2017) 9 SCC 395

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Mr. C.B. Yadav, learned Senior Counsel for the petitioner and Ms. Chhaya Gupta, learned counsel for the respondents no.2 to 5 and learned Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has made the following prayer:-

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondents to provide the salary to the petitioner to the post of Head Mistress w.e.f. 17.02.1988 of the college in question namely Zila Pachayat Kanya Uchchatar Madhyamik Vidyalaya Mauaima Allahabad, with all consequential benefits, forthwith.

(ii) .....
(iii) ...."

3. Brief facts of the case are that the Zila Pachayat Kanya Uchchatar Madhyamik Vidyalaya situated at Mauaima, Allahabad is a recognized institution under the Provision of Uttar Pradesh Basic Education

Act, 1972 (U.P. Act No.34/17) and U.P. Basic Education (Teacher) Service Rules, 1981. The petitioner was appointed as an Assistant Teacher in pursuance of the appointment letter dated 27.09.1982 issued by the competent authority. Thereafter, the petitioner joined her services on 01.10.1982 and since then, she was discharging her services without any break or complaint. Since on 25.01.1988, one Madhu Rani Srivastava, who was discharging her duties as permanent Headmistress, expired. Thereafter, the petitioner was discharging her duties as in-charge Headmaster from 15.02.1988 and since then, the petitioner was discharging her duties as Headmistress. Thereafter, the petitioner got superannuated on 31.07.2017, but the payment has not been made to the petitioner for the post of Headmistress. Hence, the present writ petition.

4. Sri C.B. Yadav, learned Senior Counsel appearing for the petitioner has submitted that since 1988 to till 2017, the petitioner discharged her duties diligently as Officiating Headmistress, which has not been denied by the respondents. He has further submitted that there is neither any complaint against the petitioner nor any material has been brought on record to show that the petitioner did not possess due qualification for being appointed as Headmistress, but all the more, salary for the post of Headmistress has not been paid to the petitioner. He next submitted that the petitioner was only paid salary for the post of Assistant Teacher instead of for the post of Headmistress. He prays for allowing the present writ petition and issuance of mandamus.

5. *Per contra*, learned Standing Counsel has submitted that the petitioner was not duly appointed as Headmistress, therefore, the salary for the post of Headmistress cannot be disbursed to her. He has further submitted that the petitioner was duty bound to discharge her duties as Headmistress till absence of any regular appointed Headmaster/Headmistress, therefore, the petitioner was rightly paid the salary for the post of Assistant Teacher. He prays for dismissal of this writ petition.

6. After hearing the parties, the Court has perused the records.

7. Admittedly, it is not in dispute that the petitioner was appointed on the post of Assistant Teacher and thereafter, the post of Headmaster fell vacant on 25.01.1988 on account of death of One Madhu Rani Srivastava. Thereafter, from 17.02.1988, the petitioner was discharging her duties as Headmistress without any break, compliant or interruption. In the counter affidavit, it has specifically been accepted that the petitioner was discharging her services as in-charge Headmistress. It is not the the case of the respondents that the petitioner does not possess the required qualification to be appointed as Headmistress in the institution in question, therefore, the petitioner cannot be permitted to suffer from any inaction of the respondents for not appointing regular Headmaster. On the one hand, the petitioner was discharged her duties continuously as Headmistress without pay for the said post, on the other hand, she was only paid salary of the post of Assistant Teacher. It is not in dispute that the petitioner discharged her services as Headmistress in the institution in question for more than 29 years.

8. This Court in the case of ***Dr. Jai Prakash Narayan Singh Vs. State of U.P., (Civil Misc Writ Petition No 23627 of 2014), reported in 2014 (3) SCC 1644,*** *the Full Bench of this Court, after considering*

the various judgments, has held that while discharging as Officiating Principal, the Principal would be entitled for salary of the said post. The relevant paragraph no.57-A of the said judgment is quoted as below:-

"57 ……

(i) ……

(ii) An officiating principal appointed under the Statutes of the University, which are pari materia to the provisions of Statute 10-B of the First Statutes would be entitled to claim the payment of salary in the regular grade of principal for the period during which he or she has worked until a regularly selected candidate has been appointed and has assumed charge of the office."

9. The Hon'ble Apex Court in the case of ***Smt. P. Grover Vs State of Haryana and Anr, AIR 1983 Supreme Court 1060***, has held that the petitioner was discharging her duties as Basic Education Officer on an acting basis, and therefore, she is entitled for the salary of such higher post.

10. Similarly, the Hon'ble Apex Court in the case of ***Secy.- Cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma & Ors., AIR 1998 Supreme Court 2909*** has held that if a person is promoted to the higher post or put to officiate on that post, or stop-gap arrangement is made to place him on higher post, entitle for higher salary.

11. The Hon'ble Apex Court in the case of ***State of Punjab and Anr. Vs. Dharam Pal, (2017) 9 SCC 395,*** after considering the above referred two judgments, has held that the petitioner is entitled to the benefit of pay-scale for higher officiating post.

12. In view of the facts as stated above as well as law down by the Full Bench of this Court and various judgments passed by the Hon'ble Apex Court, the petitioner is entitled for higher salary even for ad-hoc basis on the post of Headmistress.

13. Accordingly, the writ petition is **allowed.**

14. A mandamus is issued in favour of the petitioner for payment of arrears of salary along with all consequential benefits with effect from 17.02.1988 till date, she discharged her duties as Headmistress in the institution in question, within a period of one month from the date of production of certified copy of this order before the concerned respondent.

(2024) 5 ILRA 823
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2024

BEFORE

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

Writ - A No. 12955 of 2023

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

Counsel for the Petitioner:
Sandeep Maniji Bakhshi

Counsel for the Respondents:
CSC, Vijay Kumar Dubey

A. Service Law – UP Nagar Palika Non Centralized Services Retirement Benefits Regulations, 1984 – Reg. 2(m) – Post retiral benefits – Qualifying service – Reckoning of services rendered as daily wage employee claimed – Permissibility – Held, the period of service rendered by the petitioner as a daily-wager and in the non-pensionable establishment, followed by

regularization, has to be reckoned as qualifying service towards grant of pension and gratuity to the petitioner, besides whatever other retiral benefits are dependent upon qualifying service being rendered. (Para 16)

B. Service law – Post retiral benefits – Pendency of Judicial proceeding or Inquiry by Administrative Tribunal – Effect – Held, if departmental proceedings or an inquiry by the Administrative Tribunal or judicial proceedings, which certainly include criminal trial, are pending against a government servant, a principle extendable to an employee of the Nagar Panchayat, regular and full pension and gratuity cannot be paid until conclusion of the trial, which are described as judicial proceedings – The payment of gratuity would have to await the conclusion of trial, and so far as pension is concerned, provisional pension is payable, which would be slightly less than the final pension to be sanctioned and paid – The other dues, of course, like provident fund, group insurance and leave encashment would be payable. (Para 17)

Writ petition allowed in part. (E-1)

List of Cases cited:

1. Prem Singh Vs St. of U.P. & ors.; (2019) 10 SCC 516

2. Ram Sewak Yadav Vs St. of U.P. & ors.; 2024:AHC:17407

3. Shivgopal & ors.Vs St. of U.P. & ors.; 2019 (5) ADJ 441 (FB)

4. St. of U.P. & ors.Vs Mahanand Pandey & anr.; 2021 (6) All LJ 37

5. Jagdhari Vs St. of U.P. & anr.; 2024:AHC:75212

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

1. This writ petition has been instituted praying that a *mandamus* be issued to the Executive Officer, Nagar Panchayat, Magahar, District Sant Kabir Nagar to grant the petitioner his pension and other post retiral benefits.

2. The petitioner was appointed a Tax Moharrir on 01.04.1989 by the Nagar Panchayat, Magahar, District Sant Kabir Nagar (for short, 'the Nagar Panchayat'), when it was a notified area, on a daily-wage of Rs.30/- per day. The petitioner joined with the Nagar Panchayat, the day he was appointed. The case of the petitioner is that, according to the Government Orders dated 08.01.1992 and 03.02.1992, the petitioner was entitled to be regularized. He draws the Court's attention to the Government Order dated 08.01.1992, which provides that employees working on daily-wages, who have been appointed before 11.10.1989 and completed three years of continuous service with 240 days in each calendar year, are entitled to be regularized in service.

3. It is the petitioner's case that the Government Order aforesaid provides that those who have not completed three years' service, their services will not be terminated and they would be absorved in future as regular employees. The petitioner asserts that he has been in continuous employ of the Nagar Panchayat from the date of his appointment, to wit, 01.04.1989, until his retirement. Thus, the petitioner was entitled to be regularized pursuant to the Government Orders last mentioned, but was not. He represented his case with the Nagar Panchayat seeking regularization, but was paid no heed.

4. The petitioner points out that there were a number of permanent posts lying vacant with the Nagar Panchayat, but the petitioner, whenever he raised his claim to be regularized in service, was given verbal

assurance and nothing more. He was told that he would be accommodated in future as there was no permanent vacancy available in the establishment of the Nagar Panchayat. Two persons, however, were appointed in the Nagar Panchayat establishment by the then Officer-in-Charge, Nagar Panchayat, Basant Ram, the Sub-Divisional Officer, Khalilabad, then part of District Basti. The aforesaid illegal appointment, according to the petitioner, was made because the appointee was a true brother of one Ram Poojan Dubey, an employee of the Nagar Panchayat and other man appointed, was a true brother of the then Officer-in-Charge of the Nagar Panchayat, Basant Ram. Basant Ram, being the Appointing Authority, made both these illegal appointments. These appointments were to the petitioner's prejudice, whose claim for regularization was pending without consideration. It is pointed out that the services of the two men, who were inducted illegally, to wit, Jai Shankar Dubey and Ram Kewal, have been regularized as Clerks in the establishment of the Nagar Panchayat w.e.f. 25.05.1992.

5. The petitioner and other similarly circumstanced employees represented against the above illegal appointments and regularization of the aforesaid employees, which led the Commissioner, Basti Division, Basti to address a letter to the Director, Local Bodies, bringing to the Director's notice the illegal appointments made in the Nagar Panchayat. It was reported that the appointments of Jai Shankar Dubey and Ram Kewal were contrary to Government Orders. There were various other illegalities that had fouled these appointments. Nothing in consequence happened and the petitioner represented again to the Commissioner, Basti Division to consider his case for regularization. The Commissioner found the petitioner's claim to be worthy, but nothing came of it.

6. In the circumstances, the petitioner filed Civil Misc. Writ Petition No.279 of 2000, claiming relief of regularization in service, based on the Government Orders introducing a regularization scheme. The aforesaid writ petition was dismissed by a learned Single Judge of this Court vide order dated 22.02.2011. The petitioner carried a special appeal to the Division Bench, being Special Appeal No.1837 of 2011. The said appeal, according to the petitioner, is still pending. In the meantime, the petitioner's services were regularized on 03.02.2011 and he is working regularly. The petitioner asserts that he has rendered more than 32 years of service with the Nagar Panchayat and regularized 9 years prior to his retirement.

7. The grievance of the petitioner is that he has served the Nagar Panchayat for 32 years, but not granted any retirement benefits. The petitioner claims that he has retired from service on 01.01.2021, a year and a half until time when this petition was instituted, but nothing towards his retirement benefits was paid despite repeat claims and representations. In substance, therefore, what the petitioner seeks is the reckoning of all his 32 years of service with the Nagar Panchayat for the purpose of grant of post retiral benefits. The respondents, on the other hand, say that he is disentitled because he has rendered only 9 years of regular service prior to his retirement, which is not qualifying service for the purpose of pension and other post retiral benefits.

8. A supplementary affidavit was filed by the petitioner, wherein it was averred that the petitioner has not been paid gratuity nor his group insurance or leave encashment. It

is asserted that he has served for more than 30 years as a daily-wager, which is an appointment temporary in nature, whereafter he was regularized in the year 2011. He served for more than 9 years as a regular employee. He relies upon the law laid down by the Supreme Court in Prem Singh v. State of Uttar Pradesh and others, (2019) 10 SCC 516 to submit that all his services continuously rendered in whatever capacity these might be have to be reckoned towards his qualifying service for the purpose of his entitlement to pension, gratuity, leave encashment, group insurance and other post retiral benefits.

9. On 08.08.2023, a notice of motion was issued to the Executive Officer of the Nagar Panchayat, asking him to show cause by filing a personal affidavit why the petitioner's post retiral benefits and pension have not been paid. A personal affidavit was filed by the Executive Officer of the Nagar Panchayat, which has been read by the Court as a counter affidavit. It does not say much about the petitioner's entitlement to pension and post retiral benefits. Instead, it says that a criminal case is pending against him at the instance of the Nagar Panchayat, being Case Crime No.64 of 2021, under Sections 420, 467, 468, 471, 120-B IPC, P.S. Kotwali Khalilabad, District Sant Kabir Nagar and another Case Crime No.301 of 2021, under Section 409 IPC, P.S. Khalilabad, District Kabir Nagar. The petitioner had been arrested in the said cases.

10. So far as the entitlement of the petitioner to pension is concerned, all that the respondents, in the personal affidavit of the Executive Officer, say is that they undertake that in case anything is due in retiral benefits to the petitioner, the respondents are ready to pay the same without delay. It is also said that the petitioner has concealed facts regarding receipt of retiral dues, that have already been paid to him after scrutiny of his records.

11. A supplementary counter affidavit dated 29th October, 2023 has also been filed on behalf of the Nagar Panchayat by the Executive Officer. The stand taken in Paragraph No.3 of the supplementary counter affidavit is that the services rendered by the petitioner in the regular establishment, do not constitute qualifying service and for the said reason, the Nagar Panchayat did not provide other benefits to the petitioner. It is next averred in Paragraph No.5 of the supplementary counter affidavit that the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 (for short, 'the Act of 2021') is applicable to employees of the State Government and not employees of Non-Centralized Services of the Nagar Panchayat. In substance, therefore, the respondents accept the position that the Act of 2021 does not apply to the petitioner's case. It is next averred in Paragraph No.6 that the principle in Prem Singh (supra) does not apply to the Nagar Panchayat.

12. On the pleadings of parties exchanged, this petition was admitted to hearing on 06.11.2023, which proceeded forthwith. Judgment was reserved.

13. Heard Mr. Sandeep Maniji Bakhshi, learned Counsel for the petitioner, Mr. Vijay Kumar Dubey, learned Counsel appearing on behalf of the President of the Nagar Panchayat and its Executive Officer and Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel, appearing on behalf of the State-respondents.

14. There are two issues, which are involved in this case. One is about the

petitioner's entitlement to receive a retirement pension taking into account the entire period of his service, most of which was as a daily-wager, and the other is, if the petitioner is entitled to receipt of pension and gratuity pending the two criminal cases against him.

15. So far as the first issue is concerned, the regulations that apply regarding payment of retirement benefits to employees of Nagar Panchayats, Nagar Palikas, other than members of Centralized Services, are the Uttar Pradesh Nagar Palika Non Centralized Services Retirement Benefits Regulations, 1984 (for short, 'the Regulations of 1984'). Qualifying service has been defined in Regulation 2(m) with reference to Article 368 of the Civil Service Regulations. It is on the foot of that definition of qualifying service that the respondents here regard the period of service rendered by the petitioner on daily-wages as service, not entitling the petitioner to pension and related post retiral benefits. They rely upon the period of service rendered by the petitioner post regularization in service. This issue fell for consideration before me in Ram Sewak Yadav v. State of U.P. and others, Neutral Citation No. - 2024:AHC:17407, where it was held:

"13. Nevertheless, this Court leaves this issue open in the matter, inasmuch as this case may be decided effectively on a different point altogether. The principle laid down by the Supreme Court in Prem Singh can be said to be negated by the Act of 2021, in cases where the said Act applies. In the present case, it is common ground between parties that the Act of 2021 does not apply; rather, the entitlement of the petitioner is governed by the Regulations of 1984. It is true that the Act of 2021 would not affect the petitioner's rights, but the decision in Prem Singh was rendered in the context of Rule 3(8) of the Rules of 1961 and Regulation 370 of the Civil Services Regulations of U.P. in case of work-charged employees, who had worked for a long period of time, holding that non-consideration of long service in the work-charged establishment would be discriminatory in view of the note appended to Rule 3(8) of the Rules of 1961, which says that 'If service rendered in a non-pensionable establishment, work-charged establish-ment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service'. This note appended to Rule 3(8) (supra) was regarded as creating a class without an intelligible differentia bearing nexus with the object of classification, and, therefore, discriminatory when compared to a case of continuous work-charged establishment. It was in the context of Rule 3(8) of the Rules of 1961 and Regulation 370 of the Civil Services Regulations of U.P. that continuous service in the work-charged establishment was held by their Lordships of the Supreme Court to entitle the employee to a reckoning of the work-charged period with service rendered in the regular establishment.

14. Regulation 2(m) of the Rules of 1984 reads:

"2. Definition.– …..

(m) "qualifying service" means service which qualified for pension, in accordance with the provisions of Article 368 of the Civil Service Regulations, as

amended from time to time, excepting the following:

(i) periods of temporary or officiating service in a non-pensionable establishment under the Municipal Board concerned;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies:

Provided that period of continued, temporary or officiating service under the Municipal Board concerned shall count as qualifying service if it is followed by confirmation on the same post or any other post without any interruption of service.

NOTE-If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment it will not constitute an interruption of service."

15. Now, the definition of 'qualifying service' in Regulation 2(m) of the Regulations of 1984 is almost cast in the same terms as that in Rule 3(8) of the Rules of 1961, that were read down by the Supreme Court in Prem Singh to hold that services rendered in the work-charged establishment would be treated as 'qualifying service' under the last mentioned Rules for the purpose of grant of pension. The principle in Prem Singh, to reckon continuous service in the work-charged establishment as 'qualifying service' under Rule 3(8) of the Rules of 1961, has been extended in its application to continuous service of any kind, such as those rendered on daily-wages or ad hoc basis, followed by regularization, on the same post and in the same capacity. These principles have been adopted, particularly, in case of long retention in service on daily-wages or ad hoc basis or work-charged establishment, followed by regularization. Without reference to much authority on this point, it would suffice to refer to a decision of this Court in Kallu Ali v. State of U.P. and others, 2022 (4) AWC 3840, a case relating to an employee of a Development Authority, who had worked for a long time on daily-wages and then regularized in service. The issue had arisen in Kallu Ali (supra) in the context of his qualifying service for the purpose of entitlement to pension. After a copious review of authority on the point in Kallu Ali, it was held:

"28. The authorities referred to herein above and those of this Court clearly hold that if an employee has discharged duties whether temporarily or as a daily wager or on ad hoc basis on a post for which requirement was there and services of such an employee have come to be regularized on the said post or in the same capacity, the period spent before regularization should be considered and added to pensionable services. The courts have not approved the act and conduct of the employer to deny pension to its employee if he has rendered a number of substantial year of continuous service in an establishment leading to his / her regularization if such an establishment holds a pensionable service. The State Government has been taken to be a model employer and a State being a welfare State, the courts have shown serious concern in the event an employee who has spent all his life in the service of such establishment, stands denied pension on his attaining the age of superannuation and being retired as such."

16. The line of decisions noticed in Kallu Ali and the extension of the principle to various classes of employees, who had

worked outside the regular establishment followed by regularization, asking their service rendered dehors the rules to be reckoned for the purpose of their qualifying service, entitling them to pension etc., are all based on the principle in Prem Singh. In the opinion of this Court, this line of decisions would pose some difficulty in cases of employees of establishments of the State Government, to which the Act of 2021 applies and which, as said earlier, virtually upturns the principles laid down by the Supreme Court in Prem Singh. This would, however, not be the case about establishments, to which the Act of 2021 does not apply. It has already been noticed that there is no issue in this case that the Act of 2021 does not apply to the respondents. What, therefore, follows is that the law laid down in Prem Singh would govern the rights of employees in the respondents' establishment. The decisions that have followed and extended the principle in Prem Singh to classes of employees functioning dehors the rules followed by regularization for the purpose of reckoning their qualifying service, entitling them to pension, would squarely apply to the petitioner's case.

17. In the opinion of this Court, therefore, the petitioner is entitled to the reckoning of his services rendered on ad hoc basis w.e.f. 02.09.1988 until his regularization in service on 26.03.2006 for the purpose of determining his post retiral benefits.....”

16. To the clear understanding of this Court, therefore, the period of service rendered by the petitioner as a daily-wager and in the non-pensionable establishment, followed by regularization, has to be reckoned as qualifying service towards grant of pension and gratuity to the petitioner, besides whatever other retiral benefits are dependent upon qualifying service being rendered.

17. This takes us to the other issue, if on account of the two First Information Reports registered against the petitioner, the petitioner is not entitled to pension and gratuity. The position appears to be fairly well settled that if departmental proceedings or an inquiry by the Administrative Tribunal or judicial proceedings, which certainly include criminal trial, are pending against a government servant, a principle extendable to an employee of the Nagar Panchayat, regular and full pension and gratuity cannot be paid until conclusion of the trial, which are described as judicial proceedings. The payment of gratuity would have to await the conclusion of trial, and so far as pension is concerned, provisional pension is payable, which would be slightly less than the final pension to be sanctioned and paid. The other dues, of course, like provident fund, group insurance and leave encashment would be payable. This principle is well settled in view of the authority of the Full Bench of this Court in Shivgopal and others v. State of U.P. and others, 2019 (5) ADJ 441 (FB), a Bench decision of this Court in State of U.P. through Principal Secretary and others v. Mahanand Pandey and another, 2021 (6) All LJ 37 and a very recent decision of mine in Jagdhari v. State of U.P. and another, Neutral Citation No. - 2024:AHC:75212. The petitioner has certainly not been sanctioned any pension, provisional or final, nor has he been paid gratuity. This is because the respondents have disputed his right to receive pension and gratuity on account of the petitioner not having rendered qualifying service to the respondents' understanding. This reasoning of the respondents, we have not accepted, as already indicated. The petitioner is entitled to pension as well as gratuity, so far as his

rights under the Regulations of 1984 go. It is not known to this Court if the two FIRs lodged against the petitioner have resulted in charge-sheets and matured into judicial proceedings, taking the shape of criminal trials, pending against the petitioner. If indeed in either of two FIRs registered against the petitioner, he has been charge-sheeted and the criminal trial, which has to be regarded as a judicial proceedings against him, is/ or pending, all that the petitioner can receive is his provisional pension. He will not receive gratuity.

18. The question of entitlement to the award of final pension and gratuity would have to be decided after conclusion of trial. At the same time, provisional pension in accordance with rules would have to be sanctioned for the petitioner and paid to him, to which he is entitled under the Regulations of 1984. So far as the other post retiral benefits, such as leave encashment, group insurance and GPF are concerned, it is not known to the petitioner, if these have been paid. The respondents have said somewhere that some of these benefits have been paid. If these have been paid, there is no further obligation. But if not, the petitioner would be entitled to the payment of each of these.

19. In the circumstances, this writ petition succeeds and allowed in part. The petitioner is held entitled to sanction of a retirement pension and gratuity, reckoning the entire period of his service with the respondents, including the period of his daily-wage service. However, if he is facing a criminal trial, he will, for the time being, be sanctioned and paid a provisional pension and not his gratuity. The sanction and payment of final pension and gratuity would be for the respondents to consider after conclusion of the pending criminal trial, if any. However, if no criminal trial is pending against the petitioner, final pension would have to be sanctioned for him forthwith and both pension and gratuity would become payable. The respondents will scrutinize the petitioner's records and if any other retiral dues, like leave encashment, group insurance and GPF, whatever be due under the rules, has not been paid, the same too shall be paid. The respondents shall be under a command to undertake the necessary reckoning and discharge their obligations to pay the petitioner his post retiral benefits, as above directed, within a period of one month of the receipt of this judgment.

20. No costs.

(2024) 5 ILRA 830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

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

Writ - A No. 14354 of 2023

Smt. Mannu Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Love Lesh Kumar Verma

Counsel for the Respondents:
C.S.C., Gopal Krishna Pandey

A. Service Law – Constitution of India – Article 14 & 16 – Termination – Post of Safai Karmchari – Appointment of petitioner was made on the post vacant due to resignation of her father-in-law – Father-in-law resigned with the condition that his daughter-in-law be given appointment – Permissibility – Held, every post in the establishment of the Nagar Palika has to be filled up in accordance with rules, conforming to Article 14 of the

Constitution that give equal opportunity to all citizens. It would never be open to the Executive Officer to appoint a person, driven by considerations like personal favour, sympathy, acquaintance and the like – Appointment to public posts, as already said, has to follow a mechanism of recruitment known to law, which affords equal opportunity to all citizens. A retiring employee cannot virtually transfer his office to a member of his family, by nominating him/her to a public authority, whose employment he is demitting. An appointment of this kind is so thickly violative of the scheme of equality in public employment enshrined under Articles 14 and 16 of the Constitution. (Para 14 and 17)

B. Service Law – Constitution of India – Article 23 – Begar – Appointment was made dehors the rules – Salary paid towards the service, how far can be recovered – Held, since the petitioner, under the colour and by dint of whatever kind of appointment order, was issued in her favour on 15.12.1994, has rendered work as a Safai Karmachari for the Nagar Palika Parishad and then its successor Nagar Nigam, cannot be asked to pay back whatever she has drawn towards salary and other emoluments. If that were permitted, it would be making the petitioner render begar, something prohibited under Article 23 of the Constitution. Therefore, the respondents are not entitled to recover any emoluments from the petitioner for the work done by her. (Para 18)

Writ petition dismissed. (E-1)

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

1. This writ petition is directed against an order dated 05.07.2023 passed by the Commissioner, Jhansi Division, Jhansi, dismissing the petitioner's appeal, arising out of an order dated 13.10.2022 passed by the Nagar Ayukt, Nagar Nigam, Jhansi, terminating her services.

2. The petitioner was appointed a Class-IV employee, a *Safai Karmchari*, by the Executive Officer, Nagar Palika Parishad, Jhansi *vide* an order dated 15.12.1994. The petitioner was issued with a show cause notice dated 25.07.2022 by the Nagar Swasthya Adhikari, Nagar Nigam Jhansi, the Nagar Palika being upgraded to a Nagar Nigam since the petitioner's appointment, asking her to show cause regarding the validity of her appointment within seven days. The petitioner was asked to show cause about the validity of her appointment on ground that at the time of her appointment, she had suppressed the fact that her husband, Brij Mohan, was in government service. The other reason indicated was that she was appointed after her father-in-law, Chandu son of Ramjani, a *Safai Karmchari*, resigned his post and in the vacancy caused by his resignation, the petitioner was appointed, about which the petitioner did not have any legal right. The petitioner says that she has been working as a Class-IV employee regularly since the date she joined. She submitted her reply to the show cause on 25.07.2022.

3. It is the petitioner's case that there is no complaint or adverse material against her during the period of her service. A memo dated 17.09.2022 was issued to the petitioner by the Nagar Swasthya Adhikari, asking her to appear for the purpose of a personal hearing on 20.09.2022 at 11:00 a.m. and have her say in the matter of validity of her appointment. In compliance with the memo dated 17.09.2022, the petitioner submitted her reply on 20.09.2022. The Nagar Ayukt, *vide* order dated 13.10.2022, terminated the petitioner's services on ground that it was made *dehors* the rules, depriving her of all terminal benefits. The petitioner appealed the order to the Divisional Commissioner, but the appeal

too was dismissed *vide* order dated 05.07.2023.

4. Aggrieved, this writ petition has been instituted under Article 226 of the Constitution.

5. This Court *vide* orders dated 29.08.2023, 04.10.2023 and 16.10.2023 required the Nagar Ayukt, the Collector of Jhansi, the Commissioner of the Division and the Secretary, Urban Development, Government of U.P., Lucknow, to show cause why damages may not be awarded to the petitioner for the invaluable loss of those years of her life, when the petitioner could have secured lawful public or private employment. These orders were passed on the foot of a *prima facie* opinion that the petitioner was appointed to a public post *dehors* the rules that did not confer any right upon her to continue in public employment. By very detailed orders, it was impressed upon the various respondents, who were asked to file their personal affidavits, that the then Executive Officer of the Nagar Palika and the incumbent, who was functioning as the Collector, also holding charge of the Administrator of the Nagar Palika at the relevant time, by display of an act of mercy and on a humanitarian ground, granted appointment to the petitioner, which could never have been done. This resulted in the petitioner being made to serve the Nagar Palika, subsequently the Nagar Nigam, in terms of an appointment that was void. This caused *prima facie* the petitioner to be rendered directionless in the advanced years of her life and deprived of all economic security. It was these factors, which required the respondents to show cause why damages may not be awarded to her for offering her a void appointment. The orders, that was passed by this Court on 29.08.2023, and, particularly, the one on 04.10.2023, required the Executive Officer of the Nagar Palika, Jhansi, which should be understood as a reference to the Nagar Ayukt, Nagar Nigam, Jhansi and the Divisional Commissioner, to file their affidavits indicating the present location and status of the Executive Officer of the Palika, who offered the petitioner this appointment and the Divisional Commissioner of Jhansi at the relevant time. The Divisional Commissioner in his affidavit, as well as the Nagar Ayukt in the one that he filed, informed the petitioner that the appointment was made by the Executive Officer at the relevant time under the directions of the Administrator of the ex-Nagar Palika.

6. The Commissioner of the Division in his affidavit said that the Collector of the District was functioning as the Administrator and it was he, who sanctioned the making of a void appointment in the petitioner's favour. The identity of the Commissioner at the relevant time was disclosed, because he was dead. The name of the Nagar Ayukt at the relevant time was disclosed, but not his whereabouts. Nothing was disclosed about the District Magistrate, who had shown the act of 'mercy and compassion' in offering a void appointment to the petitioner way back in the year 1994. This Court, therefore, asked the Secretary, Urban Development, Government of U.P. to show cause why suitable compensation be not awarded.

7. In the personal affidavits filed by the Secretary, the Commissioner of the Division, the Collector, Jhansi, which are there on record, the stand taken is that the petitioner has been paid, for whatever services she has rendered, and she cannot be paid any compensation or damages because there is no provision in the U.P. Municipalities Act, 1916 or the U.P. Nagar

Nigam Mahapalika Adhiniyam, 1959 or the Rules/ Regulations framed thereunder or Government Orders to pay compensation after termination of her illegal and void appointment.

8. This explanation against the damages has been given in the personal affidavit of the District Magistrate, Jhansi dated 03.11.2023. There is an identically worded explanation in an identically worded affidavit submitted by Ajay Kumar Shukla, Secretary, Urban Development, Government of U.P., Lucknow given in Paragraph No.13 of his affidavit dated 06.11.2023. There is also an identical explanation, though expressed in slightly different words, in the personal affidavit filed by the Divisional Commissioner, Jhansi. It reads:

"It is further most respectfully submitted here that the service rules, that are applicable in the case of petitioner, or any other rules for the time being in force, do not provide for awarding of any such compensation to any person and thus in absence of any such provision in the relevant rules the deponent's hands are tied, even though the deponent has full sympathies with the petitioner and the Hon'ble Court has been very considerate in taking such view in favour of the petitioner."

9. There was an earlier round of personal affidavits, one filed by the Nagar Swasthya Adhikari, respondent No.4, dated 13.09.2023; an affidavit dated 12.09.2023 filed by the Nagar Ayukt, Nagar Nigam, Jhansi; and, an affidavit dated 13.10.2023 filed by the Divisional Commissioner, Jhansi. There is another personal affidavit filed by the Nagar Ayukt dated 13.10.2023. Apart from these affidavits, there is a short counter affidavit dated 06.11.2023 filed by the Nagar Ayukt, Nagar Nigam, Jhansi and another counter affidavit dated 07.09.2023 filed by the Divisional Commissioner. There is a solitary rejoinder by the petitioner dated 27.09.2023, answering the counter affidavit dated 07.09.2023 filed by the Divisional Commissioner. This makes for all the pleadings that were exchanged between parties in compliance of the various orders that this Court passed from time to time, already detailed. The parties having exchanged all these affidavits by 06.11.2023, on the said date, it was admitted to hearing, which proceeded forthwith. Judgment was reserved.

10. Heard Mr. Love Lesh Kumar Verma, learned Counsel for the petitioner, Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Suresh Singh, learned Additional Chief Standing and Mr. Vishal Tandon, learned State Law Officer, all appearing on behalf of respondents Nos.1, 2, 3 and 6, and Mr. Gopal Krishna Pandey, learned Advocate appearing on behalf of respondent Nos.3 and 5, the Nagar Ayukt and the Nagar Swasthya Adhikari, Jhansi.

11. Upon hearing learned Counsel for the parties, this Court is of opinion that the petitioner was indeed retained in service by the ex-Nagar Palika, Jhansi, now represented by the Nagar Nigam, through an order of appointment, that is void *ab initio*. The order of appointment dated 15.12.1994 passed by the Executive Officer, Nagar Palika Parishad, Jhansi, reads:

"पत्रांक दिनांक

श्री चन्दू पुत्र रजवानी सफाई कर्मचारी नगर पालिका परिषद, झाँसी द्वारा प्रस्तुत शपथ पत्र आवेदन पत्र एवं मुख्य चिकित्साधिकारी का प्रमाण पत्र के आधार पर स्वेच्छा से सेवा निवृत्त होने का निवेदन किया गया है कि श्री वृजमोहन की पुत्रबधू श्रीमती मन्नू को उनके स्थान पर सेवा मे रखा जाये।

जिलाधिकारी / प्रशासक ने उनके द्वारा प्रस्तुत अभिलेखो को दृष्टिगत करते हुये, दया एवं माननीय आधार पर श्रीमती मन्नू पत्नी बृजमोहन को पालिका.... मे रखे जाने की स्वीकृति प्रदान की गई है।

श्री चन्दू पुत्र रमजानी सफाई कर्मचारी नगर पालिका परिषद झाँसी स्वैच्छा से त्याग पत्र आदेश के दिनांक से स्वीकृत किया जाता है। नियमानुसार उन्हे दो माह का वेतन पालिका मे जमा करना होगा।

श्री चन्दूपुत्र रमजानी की सेवा निवृत्त के कारण हुये रिक्त पद पर श्रीमती मन्नू पत्नी बृजमोहन की अस्थाई नियुक्ति सफाई कर्मचारी से निर्धारित समान्य मे की जाती है।

श्रीमती मन्नू नियमानुसार कार्यभार ग्रहण करते हुये नगर स्वास्थ्य सरकारी कार्यालय मे उपस्थित हो और अपना चिकित्सा प्रमाण पत्र आदि प्रस्तुत करे।

ह० अस्पष्ट
अधिशासी अधिकारी
नगर पालिका परिषद, झॉसी।

पृष्ठांकन- 850 / 9211/ दिनांक 15-12-94

प्रतिलिपि :- 1- नगर स्वास्थ्य अधिकारी को आवश्यक कार्यवाही एवं सूचनार्थ।

2- लेखाकार / कार्यालय अधीक्ष को सूचनार्थ।

3- सम्बन्धित कर्मचारियो को अनुपालनार्थ।

ह० अस्पष्ट
अधिशासी अधिकारी
नगर पालिका परिषद, झॉसी।"

12. A reading of the said appointment order *ex facie* shows the most serious kind of malfeasance and misuse of authority in public office by the then Executive Officer of the Nagar Nigam and the Collector of Jhansi, who was functioning as the Administrator of the Palika. It shows that a Safai Karmachari, Chandu son of Ramjani had chosen to submit his resignation from service, described as 'voluntary' because of health reasons supported by a medical certificate from the Chief Medical Officer, but subject to a condition that his daughter-in-law, Smt. Mannu, the petitioner be given service in the Nagar Palika on the post vacated by Chandu. The order of appointment recites that the Collector/ Administrator, upon looking to the record showing mercy and on humanitarian grounds, had granted permission to Smt. Mannu wife of Brij Mohan, the petitioner, to be appointed to the Palika service. The order of appointment further says that the 'voluntary' resignation submitted by Chandu, *Safai Karmachari* is accepted from the date of the order. It was further directed that Chandu would have to deposit two months' salary with the Nagar Palika in accordance with rules. The order then goes on to say that on the post vacated by Chandu, Smt. Mannu, the petitioner is appointed a *Safai Karmachari* on a temporary basis in the pay scale as admissible.

13. The petitioner's appointment letter has to be read not only as the source of her right to hold the post of a *Safai Karmachari* with the Nagar Nigam, but also regarded as true for everything recorded therein. After all, the respondents do not disown the date of appointment and say that the Executive Officer has issued it. What they say is that the appointment, that it purports to make in favour of the petitioner, is absolutely illegal, *dehors* the rules, and, therefore, void. The Nagar Palika, that is the predecessor body of the Nagar Nigam, was like the Nigam, a statutory body. It was governed by the Act of 1916 and the rules framed thereunder. Sections 71, 74 and 75 of the Act of 1916 read:

"71. Power of Municipality to determine permanent staff.- Except as provided by Sections 57, 66, 58 and 70, and subject to any general or special directions as the State Government may, from time to time, issue a Municipality may, by special, resolution, determine what servants are required for the discharge of the duties of the

Municipality and [their qualifications and conditions of service.

74. Appointment and dismissal of permanent superior staff.- Subject to the provisions of Sections 57 to 73, servants on posts in the non-centralised service, carrying scale of pay equal to or higher than the lowest scale of pay admissible to the clerical staff, shall be appointed and may be dismissed, removed or otherwise punished, or the services of a probationer may be terminated, by the President, subject to the right of appeal, except in the case of the termination of the service of a probationer, to such authority within such time and in such manner as may be prescribed :

Provided that appointments on the posts of Tax Superintendent, Assistant Tax Superintendents, Inspectors, Head Clerks, Sectional Head Clerks, Sectional Accountants, Doctors, Vaids, Hakims and Municipal Fire Station Officers, shall be subject to the approval of the Municipality.

75. Appointment of permanent inferior staff.- Except as otherwise provided, the Executive Officer shall appoint servants carrying scales of pay lower than the lowest scale of pay referred to in Section 74 :

Provided that in the case there is no Executive Officer, the said appointment shall be made by the President.

14. The power to appoint inferior staff, as it is called by the Act of 1916, vests in the Executive Officer. The scheme of the Act of 1916, like any other public body, that is an instrumentality of the State, constituted, governed and regulated by statute, did not provide for appointment to a regular post in its establishment, according to whim and caprice of its officers, even the Appointing Authority. Every post in the establishment of the Nagar Palika has to be filled up in accordance with rules, conforming to Article 14 of the Constitution that give equal opportunity to all citizens. It would never be open to the Executive Officer to appoint a person, driven by considerations like personal favour, sympathy, acquaintance and the like. The same would hold true about the power or authority of a person placed in higher charge of a Nagar Palika like the Administrator thereof, when under the Act of 1916, the Municipal Board could be superseded and an Administrator appointed by the Collector or the Collector himself discharged those functions.

15. This Court believes from a reading of the letter of appointment issued in favour of the petitioner that it was issued by the Executive Officer with the leave and permission of the Administrator of the Nagar Palika, who was the Collector of the District at the relevant time. An attempt has been made by the incumbent Collector to bail out his predecessor by acknowledging that it was not possible to appoint the petitioner at all the way she was appointed by the Executive Officer, but wants this Court to doubt that the appointment was granted by the Executive Officer with the Collector's permission. About this issue, it is averred in paragraph No.6 of the affidavit filed by the incumbent Collector of the District dated 06.11.2023:

"6. ..... It is further reflects from the perusal of the aforesaid order that the erstwhile Executive Officer, Nagar Palika Parishad, Jhansi referred to some approval allegedly was given by the erstwhile District Magistrate/ Administrator and in pursuance thereof granted appointment to the petitioner on the post of safai karmchari that fell vacant due to resignation/ voluntary retirement of her father in law....."

16. This Court is convinced that the erstwhile Collector would have proven to be

a robust support for the Executive Officer to pass a shockingly illegal order of the kind that he did while appointing the petitioner in terms of the order of appointment dated 15.12.1994. The reason is that an employee or an officer of any organization is also a citizen of the country and Indian citizens over generations have mystical faith, utterly ill-found, in the omnipotence of the Collector of the District. A reading of the appointment order dated 15.12.1994 shows that the Executive Officer has referred to the Collector's permission to appoint the petitioner in place of her father-in-law, who resigned on account of ill-health, adopting a merciful and humanitarian approach. The employment of these words show the Executive Officer's veneration for the Collector's authority, in the foreshadow of which he passed an absurdly illegal and utterly void order, appointing the petitioner to a post of the Nagar Palika establishment, borne on the public exchequer. The petitioner's father-in-law, being unwell, could have resigned his position alright, but never put a condition that his daughter-in-law be appointed in his place.

17. Appointment to public posts, as already said, has to follow a mechanism of recruitment known to law, which affords equal opportunity to all citizens. A retiring employee cannot virtually transfer his office to a member of his family, by nominating him/ her to a public authority, whose employment he is demitting. An appointment of this kind is so thickly violative of the scheme of equality in public employment enshrined under Articles 14 and 16 of the Constitution, that the appointment made in the petitioner's favour must be held void. The order of termination from service that has been passed, it is lamentable has come too late. Lamentable it is both for the petitioner and the Nagar Palika, now represented by their successor Nagar Nigam. It is so for the petitioner because the order of appointment has allowed her to live a whole life in a sand castle, which has met its logical end in the impugned order of termination. It is bad for the Nagar Palika and their successor Nagar Nigam because an employee, who was never appointed at all to the post of a sweeper in their establishment, has functioned and drawn salary borne on the State Exchequer.

18. The petitioner cannot be permitted to continue on a post, to which she has never been appointed under the rules. At the same time, since the petitioner, under the colour and by dint of whatever kind of appointment order, was issued in her favour on 15.12.1994, has rendered work as a *Safai Karmachari* for the Nagar Palika Parishad and then its successor Nagar Nigam, cannot be asked to pay back whatever she has drawn towards salary and other emoluments. If that were permitted, it would be making the petitioner render *begar*, something prohibited under Article 23 of the Constitution. Therefore, the respondents are not entitled to recover any emoluments from the petitioner for the work done by her. The petitioner, on the other hand, is not entitled to continue in the respondent Nagar Nigam's harness any further.

19. In the considered opinion of this Court, therefore, the impugned order does not call for any interference by this Court in the exercise of our jurisdiction under Article 226 of the Constitution.

20. Subject to the remarks, forbearing the respondents from recovering any emoluments already paid to the petitioner, this petition fails and is **dismissed**.

21. There shall be no order as to costs.

(2024) 5 ILRA 837
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 433 of 2020

M/S Mid Town Associates ...Petitioner
Versus
Additional Commissioner Grade-2 (Appeal), Judicial Division IInd, State Tax, Moradabad & Ors. ...Respondents

Counsel for the Petitioner:
Suyash Agrawal

Counsel for the Respondents:
Arvind Kumar Mishra

A. Integrated Goods and Services Tax Act (IGST Act), 2017 - Central Goods and Services Tax Act, 2017 (CGST Act) - E-Way Bill - Penalty - mens rea - Minor error in documentation - Under Rule 138 (A) (b) of the CGST Rules, the person in charge of a conveyance must carry a copy of the E-Way Bill in physical form or the E-Way Bill number in electronic form. The presence of mens rea for evasion of tax is a sine qua non for imposing a penalty. A minor error in documentation cannot be a valid ground for passing penalty orders by the authorities.

B. In this case, the truck was detained because the goods were being transported without an E-Way Bill. The petitioner downloaded the E-Way Bill on 21.05.2019 at 08:38 AM, and the interception occurred at 08:52 AM, indicating that the E-Way Bill was downloaded before the interception. Although the driver could not provide a hard copy, he informed the respondent No. 2 about the E-Way Bill number. The authorities failed to verify the E-Way Bill number on the GST portal. The respondents argued that the absence of a hard copy constituted a violation. However, since the E-Way Bill was downloaded prior to interception, and the driver communicated the E-Way Bill number, respondent No. 2 was unjustified in imposing the penalty. The only violation was technical, as the E-Way Bill was not physically present. Moreover, the invoice matched the goods in the vehicle, indicating no mens rea for tax evasion. The issuance of the show cause notice and penalty order on the same day shows that the petitioner was not given an opportunity to respond, violating principles of natural justice. (Para 8, 13)

Allowed. (E-5)

List of Cases cited:

1. M/S. Hindustan Herbal Cosmetics Vs St. of U.P. & ors. (Writ Tax No. - 1400 of 2019, decided on January 2, 2024)

2. Falguni Steels Vs St. of U.P. (2024) 124 GSTR 10

3. M/S Globe Panel Industries India Private Limited Vs St. of U.P. & ors. (Writ Tax No. - 141 of 2023, decided on February 5, 2024)

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

1. This is a writ petition under article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a writ of certiorari quashing the impugned order dated January 4, 2020 passed in appeal by Additional Commissioner Grade-2 (Appeal), Judicial Division 2nd State Tax, Moradabad/respondent No. 1. The said appeal was preferred against the penalty order dated May 21, 2019 passed by Assistant Commissioner, State Tax, Mobile Squad, Unit – III, Moradabad/respondent No. 2.

FACTS

2. Factual matrix leading to the instant petition is delineated below:

a) The petitioner is a registered dealer, who deals in manufacturing, trading and exporting of handicraft iron, glass, wax, marble, tiles, wooden handicraft etc.

b) On May 20, 2019, the goods in question were being transferred by the petitioner from Chandigarh to USA through Inland Container Depot (ICD), Moradabad vide Invoice No. MID/126. A truck bearing No. HR 38 P 8575 was assigned for the transportation of the said goods from Chandigarh to Moradabad.

c) On May 21, 2019 at 08:52 am, the respondent No. 2 intercepted the aforesaid truck at Moradabad and detained the same on the ground that the goods loaded on the truck were being transported without E-Way bill.

d) Subsequently, an order of detention under Section 20 of the Integrated Goods and Services Tax Act (hereinafter referred to as 'the IGST Act') read with Section 129 (1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act") was passed on the same day, that is, on May 21, 2019 by the respondent No. 2 on the ground of presumption that the goods were being transported with the intention to evade tax due to the non production of E-Way Bill.

e) A notice under Section 20 of the IGST Act read with Section 129 (3) of the CGST Act dated May 21, 2019 was issued to the petitioner directing him to show cause as to why an amount of tax of Rs.2,90,011/- along with a penalty of same amount ought not to be recovered from him.

f) On the same day of issuing the show cause notice, the respondent No.2 passed the penalty order under Section 20 of the IGST Act read with Section 129 (3) of the CGST Act.

g) Against the order dated May 21, 2019 passed by the respondent No. 2, the petitioner filed an appeal before the respondent No.1, who vide its order dated January 4, 2020, dismissed the said appeal and affirmed the order passed by the respondent No. 2.

h) Being aggrieved by the order dated January 4, 2020, the petitioner has preferred the instant petition.

CONTENTIONS OF THE PETITIONER

3. Sri Suyash Agrawal, learned counsel appearing on behalf of the petitioner has made the following submissions:

i. The petitioner had downloaded the E-Way Bill for the goods in question on May 21, 2019 at 08:38 am and the interception took place on the same day at 08:52 am which means the E-Way Bill was downloaded prior to the interception of the goods.

ii. In the show cause notice issued to the petitioner, a time limit of 7 days was mentioned to submit the reply but without waiting for 7 days and without giving an opportunity of hearing to the petitioner, the respondent No. 2 illegaly passed the penalty order.

iii. The minor mistake in documentation was without any fraudulent intent or gross negligence and the same was later on rectified by downloading the E-Way Bill. This minor mistake of the petitioner is protected under Section 126 (1) of the CGST Act.

iv. As provided under rule 138 (A) (b) of the CGST Rules, the person incharge of a conveyance shall carry a copy of the E-Way Bill in physical form or E-Way bill number in electronic form. In the present case, although the driver of the vehicle could

not provide a hard copy of the E-Way Bill to the respondent No. 2, yet he informed the respondent No. 2 about the E-Way bill number.

v. Since the E-Way Bill was downloaded prior to the interception of the goods and the driver of the vehicle informed the respondent No. 2 about the E-Way Bill number, the respondent No. 2 was not justified in passing the penalty order.

CONTENTIONS OF THE RESPONDENTS

4. Learned Standing Counsel appearing on behalf of the respondents has made the following submissions:

i. At the time of interception, the vehicle in question was in transit without there being the mandatory E-Way Bill which is a clear violation of the provisions of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as 'the UPGST Act').

ii. The proceedings under Section 129 (1) of the UPGST Act were initiated in view of the aforesaid anomaly.

iii. The proceedings initiated under Section 129(1) & 129(3) of the UPGST Act were just, proper and in accordance with the law.

iv. The penalty imposed and the entire proceedings were in consonance with the Rules and Law, particularly highlighting the necessity of E-Way Bills during transportation.

v. The appellate authority made a decision after due consideration of facts and materials, and thus upheld the penalty order.

ANALYSSIS AND CONCLUSION

5. I have heard the counsel appearing for the parties and perused the material on record.

6. In the present case, the pivotal question pertains to the compliance of E-Way bill as requried under the provisions of the CGST/UPGST Act and related rules. The petitioner contends that compliance was timely achieved, while the respondents argued that the absence of an E-Way bill during transit constituted a violation.

7. The crux of the dispute lies in the interpretation of statutory provisions regarding E-Way bill, the presumption of tax evasion in its absence, and the procedural fairness in penalty imposition.

8. It is clear from the perusal of the record that the show cause notice and the penalty order both were issued on the same day, which indicates that no opportunity of hearing was given to the petitioner to submit his reply which is a gross violation of the principles of natural justice.

9. Upon a perusal of the E-Way Bill downloaded by the petitioner, it is clear that even though the driver could not produce the hard copy of the E-Way Bill before the respondent No. 2, yet it was downloaded prior to the interception of the vehicle.

10. This Court had dealt with a similar issue in case of **M/S. Hindustan Herbal Cosmetics V. State Of U.P. And 2 Others** (WRIT TAX No. - 1400 of 2019 decided on January 2, 2024) wherein it has been held that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. The Court further emphasized that a minor error in the documentation can not be a valid ground for passing of the penalty orders by

the authorities. Relevant paragraph of the judgment is delineated below:

"8. Upon perusal of the judgments, the principle that emerges is that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. A typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. In the case of M/s. Varun Beverages Limited (supra) there was a typographical error in the e-way bill of 4 letters (HR – 73). In the present case, instead of '5332', '3552' was incorrectly entered into the e-way bill which clearly appears to be a typographical error. In certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Typically when the error is a minor error of the nature found in this particular case, I am of the view that imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law."

11. This Court in case of **Falguni Steels v. State of U.P. reported in (2024) 124 GSTR 10** has held that in a case where the E-Way Bill is downloaded and produced before passing of the penalty order by the authorities and no mens rea can be inferred from the act of the petitioner, there is no justification in passing of the penalty order by the authorities. Relevant paragraph of the judgment is quoted below:

"17. Once both the e-way bills were presented before passing of the penalty order, and all the documents including the tax invoices, were found to be in order, respondent No. 2 had no sound rationale to pass the impugned order dated February 20, 2019. A bare reading of the said order would show that the presence of the tax invoices, was recorded by respondent No. 2. Furthermore, respondent No. 2 also rejected the e-way bills which were generated post the detention of the goods, since the same in its opinion, was contrary to the provisions of the UPGST Act, 2017/CGST Act, 2017. Nowhere in the said impugned order, it has been recorded that there was any definite intention to evade tax. The essence of any penal imposition is intrinsically linked to the presence of mens rea, a facet conspicuously absent from the record. The order, therefore, stands vulnerable to challenge on the grounds of disproportionate punitive measures meted out in the absence of concrete evidence substantiating an intent to evade tax liabilities."

12. The law laid down in **Falguni Steels (supra)** was also followed by this Court in case of **M/s Globe Panel Industries India Private Limited v. State Of U.P. And Others** (Writ Tax No. - 141 of 2023 decided on February 5, 2024). Relevant paragraph of the judgment is extracted below:

"4. This Court in M/s Hindustan Herbal Cosmetics v. State of U.P. and Others (Writ Tax No.1400 of 2019 decided on January 2, 2024) and M/s Falguni Steels v. State of U.P. and Others (Writ Tax No.146 of 2023 decided on January 25, 2024) held that mens rea to evade tax is essential for imposition of penalty. The factual aspect in the present case did not indicate any intention whasoever to evade tax. Furthermore, the documents that have been relied upon by the petitioner have not been considered by the authorities. The authorities have dealt with the issue with regard to the expiry of the E-Way Bill and held that no explanaiton was offerred by the petitioner with regard to the fresh

generation of the E-Way Bill, as the same had expired ten days before the detention. However, it is to be noted that the goods in the vehicle were for two e-Invoices and two E-Way Bills and only one E-Way Bill had expired. There is no dispute with regard to the consignor and consignee nor any dispute with regard to the description of the goods in the vehicle. In relation to the e-Invoices and the E-Way Bills, the authorities have not been able indicate any intention whatsoever on behalf of the petitioner to evade tax. Indubitably, there is a technical violation that has been committed by the petitioner. However, the authorities have not been able to indicate in any manner that the E-Way Bill had been used repeatedly nor have they made out any case with regard to an intention to evade tax by the petitioner. Accordingly, this Court is of the view that such a technical violation by itself without any intention to evade tax cannot lead to imposition of penalty under Section 129(3) of the Act. This view is fortified by a catena of judgments as indicated above."

13. In the facts and circumstances, it is clear that only violation is a technical one wherein E-Way Bill was not present in the vehicle. However, it is clear that the E-Way Bill had been downloaded prior to the interception of the vehicle. Furthermore, invoice and the E-Way Bill matched with the goods in the vehicle, and accordingly, one can infer that there was no mens rea for the evasion of tax.

14. In light of the above discussion, I am of the view that there was no intention to evade tax on the part of the petitioner. Further, respondent authorities failed to check the genuinness of the E-Way Bill number as informed by the driver from the GST portal and did not provide an opportunity of hearing to the petitioner which was against the principles of natural justice which strenghtens my view that the authorties did not act in accordance with the law.

15. Accordingly, the writ petition is allowed. The impugned orders dated January 4, 2020 and May 21, 2019 are hereby quashed and set aside.

16. The respondent authorities are directed to refund the amount of tax and penalty deposited by the petitioner within a period of four weeks from the date of this judgment.

(2024) 5 ILRA 841
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matter Under Article 227 No. 1441 of 2024

Shankar Lal Gupta ...Petitioner
Versus
Ashok Kumar Gupta & Anr. ...Respondents

Counsel for the Petitioner:
Dipti Tiwari, Manas Bhargava

Counsel for the Respondents:
Manish Tandon

Civil Law – Civil Procedure Code,1908 - Order XXI Rule 97, 98, 99, 100 & 102 - Transfer of Property Act – Section 52 - Petitioner claims to be in possession of property by virtue of transfer of possession by erstwhile tenant - Executing court rejected his application filed under O. XXI R. 97 C.P.C - Held, petitioner is transferee of property by tenant who was ousted by decree of eviction - No agreement between landlord and petitioner - There was no lawful transfer of premises by tenant to

third party, if third party paid any amount of consideration to enter into possession by writing on a piece of paper, which is an unregistered document, his status is liable to be reduced to a trespasser - He was given possession with tacit consent of decree holder, every transaction was claimed between petitioner and erstwhile tenant – Trial court directed him to produce documents, failed to produce any document except an unregistered agreement and tax receipts - Documents don't give any conclusive proof of title, to sustain possession of petitioner so as to entitle him to resist recovery of possession - Petition lacks merit, dismissed. (Para 3, 9, 13)

Petition dismissed. (E-13)

List of Cases cited:

1. Jahid Khan & anr. Vs Suresh Chand Jain & ors., 2013 (6) ADJ 547

2. Salik Ram Singh @ Salik Ram Vs Additional District Judge, Court No.- 3, Gonda & ors., 2022 (3) ADJ 380

3. Sudhir Kumar & ors. Vs Smt. Omwati & ors.; 2018 (6) AWC 6113

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

1. Supplementary affidavit filed today is taken on record.

2. Heard Sri Manas Bhargava, learned counsel for the petitioner and Sri Manish Tandon, learned counsel for the contesting respondents.

3. Petitioner before this court claims to be in possession of the property in question by virtue of transfer of possession given to him by erstwhile tenant and is aggrieved by the order passed by the executing court rejecting his application being Paper No.- 4-C filed under Order XXI Rule 97 C.P.C.

4. Petitioner does dispute the title of decree holder in respect of the property in question but submits that manner in which his application is rejected is against the principle contained in the provisions of Order XXI Rule 97, 98, 99 and 100 C.P.C.

5. It is further contended by learned counsel for the petitioner that he has instituted a suit for permanent prohibitory injunction against the decree holder being O.S. No.- 1269 of 2023 in which he is enjoying temporary injunction order against decree holder and, therefore, so long as interim order is continuing, petitioner cannot be evicted by the executing court in satisfaction of the decree.

Learned counsel for the petitioner has placed reliance upon the judgment of a coordinate Bench of this Court in the case of **Jahid Khan and another v. Suresh Chand Jain and others, 2013 (6) ADJ 547** and in the case of **Salik Ram Singh @ Salik Ram v. Additional District Judge, Court No.- 3, Gonda and others, 2022 (3) ADJ 380.**

6. *Per contra*, Sri Manish Tandon, learned counsel for the respondent- decree holder submits that against the order of temporary injunction passed in the suit, the decree holder had preferred misc. Civil Appeal No.- 117 of 2023 which has now been finally disposed of on 15th May, 2024 rejecting 6-C application and setting aside the order dated 4th October, 2023 passed by the trial court. Thus, according to him, there is no more injunction operating in favour of the petitioner.

7. It is also submitted by learned counsel for the respondent that petitioner is a rank trespasser and has stepped into the shoes of tenant after the decree of eviction was passed. So, any transfer of possession even by executing an unregistered document is of no value and would stand hit by Section 52 of the Transfer of Property Act. It is contended that if any amount has been paid by the petitioner to the erstwhile tenant of the answering respondent – decree holder, petitioner has a right to recover the same by instituting an appropriate suit but he cannot resist the recovery of possession of the premises as a lawful transferee of the property. He submits that if such unscrupulous elements are permitted to bank with the trespass activity, then there will be no end of litigation and it will become very easy to frustrate a lawful decree repeatedly.

8. In support of his argument learned counsel for the respondent has relied upon the judgment of a coordinate Bench in the case of **Sudhir Kumar and others v. Smt. Omwati and others; 2018 (6) AWC 6113.**

9. Having heard learned counsel for the respective parties and their arguments raised across the bar and having noticed the pleadings raised before this Court as well as before the executing court, the admitted position comes out to be that answering respondent is the title holder of the suit property. It is also an admitted position that petitioner was nowhere in scene when the judgment and decree was passed by the trial court. As per his own pleadings he is a transferee of the property by a tenant who was ousted by the decree of eviction. There being no agreement between the landlord and the petitioner and the earlier sitting tenant faced with the decree of eviction, in my considered view, there could not have been any lawful transfer of premises in question by such tenant to a third party and if third party paid any amount of consideration to enter into possession by writing a note on a piece of paper, which in the present case is admittedly an unregistered document, his status is liable to be reduced to a trespasser.

10. It is settled law that no one can pass on a better title than what he has, so any such transfer of possession by a person holding it to be entitled to pass on a possession is liable to be rendered as unlawful and void. The petitioner did institute a suit in which ultimately he has lost injunction application at the stage of appeal. Pleadings as to possession are only to the effect that he is occupying the premises easementary. For a person to have lawful possession to resist a decree holder, the claim to be set up must be a genuine one. One has to show that he was a bona fide purchaser or person with bona fide possession of the property to resist the execution proceedings instituted by the decree holder. In the case of Sudhir Kumar (supra) the Court has dealt with this aspect of the matter referring Order XXI Rule 102 of C.P.C. The Court vide paragraph 6 has held thus:

"6. A perusal of the record shows that admittedly, Anant Ram had sold the property (which was subject- matter of agreement to sale) to the applicants/appellants on 10.6.1997. The Civil Appeal No. 66 of 1996 has been decided on 8.10.1999, meaning thereby that the disputed property has been sold during the pendency of Civil Appeal No. 66/1996, which is not permissible under law in wake of the bar created by the doctrine of lis pendens and also in view of Order XXI, Rule 102, C.P.C.

(1) Order XXI, Rule 102 of Civil Procedure Code runs as under:

"Rule not applicable to transferee pendente-lite.- Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

(2) A bare perusal of the above cited provision leaves no room for any doubt that any pendente-lite transferee of the subject-matter of the decree will have no right and will not be entitled to offer any resistance or obstruction in delivery of possession to the decree-holder of the subject- matter of the decree, in execution of the decree. Accordingly, he would not be entitled to file objections under Order XXI, Rule 97 of the Civil Procedure Code. A further perusal of the provisions contained in Rule 102 would make it clear that no such defence would be available to such pendente-lite transferee that he was a bona-fide purchaser with consideration and without notice.

Rule 102 of Order XXI of the Civil Procedure Code, need to be necessarily read with the provision of Section 52 of the Transfer of Property Act, 1882. For a ready reference Section 52 of the Transfer of Property Act, 1882 is reproduced hereinbelow :

"Transfer of property pending suit relating thereto.-During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and. in which any right so immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation.-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, oƨ has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

(3) A bare perusal of the provision contained in Section 52 of the Transfer of Property Act would also make it clear that defence of being bona-fide purchaser with consideration and without notice are not available to pendente-lite transferee.

(4) Thus, the applicant- objector was not entitled or competent to resist or obstruct the delivery of the subject-matter of the decree to the decree-holder."

(Emphasis added)

11, Insofar as the judgment in the case of Jahid Khan (supra) is concerned, resistance or obstruction to possession of immovable property if set up by a person has to be adjudicated upon, suffice it to hold that there has to be given a harmonious construction of the different rules provided under Order XXI as Rule 98 to 101 C.P.C.

12. Some semblance of genuine right has to be found in the application itself moved by a person resisting recovery of possession in order to attract the principle of adjudication.

13. From a bare reading of various paragraphs of miscellaneous application filed under Order XXI Rule 97 C.P.C., the only pleading is that he was given possession with a tacit consent of the decree holder, otherwise every transaction was claimed between the petitioner and the erstwhile tenant. This application has been considered on merits and it has been held that petitioner was required earlier under order dated 2nd August, 2022 to produce the necessary documents but he failed to produce any document except an unregistered agreement and the tax receipts.

14. The Court has categorically recorded a finding that these documents do not give any conclusive proof of title to sustain possession of the petitioner so as to entitle him to resist recovery of possession.

The court sitting in revision has affirmed the order of the trial court and held that the court cannot go beyond the decree as the plea was taken that the court passing the decree had no jurisdiction to pass it.

15. I, therefore, do not find any error in the findings returned even by the court sitting in revision.

16. Insofar as the judgment in the case of Salik Ram (supra) is concerned, that case is in the setting of different facts and, therefore, distinguishable. It is to be borne in mind that merely because the provisions are there entitling a third party to resist the recovery of possession, does not mean that the court will embark upon an inquiry in every case in detail. The court as a matter of fact will have to look into the genuine case set up and if a third party fails to lead any evidence, this Court has no option but to hold him such a party who would be not entitled to any possession. Order XXI Rule 102 of C.P.C. is very much clear on the point.

17. Thus, petition lacks merit and is, accordingly, dismissed.

(2024) 5 ILRA 845
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Matter Under Article 227 No. 4127 of 2023

Mamta Kapoor & Anr. ...Petitioners
Versus
Vinod Kumar Rai ...Respondent

Counsel for the Petitioners:
Mr. Ujjawal Satsangi

Counsel for the Respondent:

Civil Law - Commercial Courts Act, 2015 - Section 2(1)(c)(vii) – Definition - Commercial Dispute - Petitioners and Respondent entered into business agreement for running Hotel – In pursuance of this, a total amount of Rs.30,00,000/- was to be paid by petitioners to respondent as security - Thereafter, the petitioners approached electricity department for verification of dues and to obtain electricity connection - The Petitioners were informed about installation of separate transformer for electricity supply - Petitioners informed the Respondent, asked to obtain necessary certification from electricity department - Disputes arose between them - Petitioners approached Commercial Court - Refused, on the ground that it was not used for trade or commerce – Impugned order - Held, agreement between both parties was for business operation and management of Hotel - Disputes of

immovable properties, such as hotels, resorts, office buildings, shopping centres, etc fall within definition of commercial dispute – As per Agreement, purpose was to facilitate and manage commercial activities - The Commercial Court's narrow interpretation, overlooks the broader commercial context of agreement, fails to recognize commercial nature of dispute – Impugned order was quashed. (Para 2, 14, 16)

Petition allowed. (E-13)

List of Cases cited:

1. Ambalal Sarabhai Enterprises v KS Infraspace LLP reported in (2020) 15 SCC 585

2. Vasu Healthcare Pvt. Ltd. Vs Gujarat Akruti TCG Biotech Limited & 1(S) reported in 2017 SCC OnLine Guj 724

3. Jagmohan Behl Vs St. Bank of Indore reported in 2017 SCC OnLine Del 10706

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

1. The instant application under Article 227 of the Constitution of India has been preferred by Mamta Kapoor and Anurag Kumar Gupta (hereinafter referred to as 'the Petitioners') against the order dated January 17, 2023 passed by the Presiding Officer, Commercial Court, Varanasi in Misc. (Civil) Suit No. 375/2022.

FACTS

2. I have laid down the factual matrix of the instant lis below:

a. Petitioners and Vinod Kumar Rai (hereinafter referred to as 'the Respondent') entered into a business agreement on July 7, 2022 for running, operating and managing Hotel Niveditta, situated at B-30/1-A-1-D, Assi, Varanasi (hereinafter referred to as 'the Hotel').

b. In pursuance of the aforesaid agreement, a total amount of Rs.30,00,000/- was to be paid by the Petitioners to the Respondent as security and the possession of the Hotel was to be taken over by the Petitioners. Thereafter, the Petitioners, approached the electricity department for verification of dues and to obtain appropriate electricity connection at the Hotel. The Petitioners were informed about the requirement of the installation of a separate transformer at the Hotel for electricity supply. The Petitioners informed the Respondent about the said requirement and asked them to apply or obtain the necessary certification from the electricity department.

c. However, disputes and differences arose between the parties and the Petitioners approached the Commercial Court, Varanasi.

d. The Commercial Court, Varanasi vide order dated January 17, 2023 refused to entertain the suit filed by the Petitioners on the ground that since the Hotel was not being used for trade or commerce, the dispute cannot be considered as falling within the ambit of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 (hereinafter referred to as 'the CC Act').

e. Aggrieved by the aforesaid order dated January 17, 2023, the Petitioners have preferred the instant application under Article 227 of the Constitution of India before this Court.

Contentions By The Petitioners

3. Shri Ujjawal Satsangi, learned counsel appearing for the Petitioners has made the following submissions before this Court:

a. A perusal of the agreement between the parties would show that although the nomenclature used for referring it is "Rent Agreement" but the clauses therein refer to a business operation and management agreement.

b. Clause 4 of the agreement between the parties specifies that the Petitioners will be permitted to use the premises of the Hotel only for running a hotel and for no other purpose. Moreover, Clause 18 further clarifies that the Petitioners were prohibited from keeping the Hotel closed for over a period of 15 days. It was further provided therein that if the Petitioners keep the Hotel closed for more than 15 days, then the Respondent would have the right to take over the Hotel and only if the Petitioners, upon notice, agree to run the Hotel, the agreement will continue otherwise it would be deemed that the Petitioners are not interest in running the Hotel and as such the agreement will be terminated. A combined reading of all these clauses goes on to show that though the nomenclature used in the agreement dated July 7, 2021 is "tenancy/rent", the agreement is in the nature of operation and management of a hotel.

c. It is apparent from the perusal of the facts and circumstances that the dispute in the instant case relates to a commercial dispute under Section 2(1)(c) of the CC Act and therefore, the Commercial Court was required to register the suit as a proper suit and thereafter afford an opportunity to the Petitioners to argue on merits.

d. Rather than marking the suit as a Commercial Suit, as warranted under law, the Commercial Court, registered the suit as a Misc. Civil Case, which is an anomaly, and unrecognised under the eyes of law.

e. Commercial Court incorrectly applied the law laid down by the Hon'ble Supreme Court in ***Ambalal Sarabhai Enterprises -v- KS Infraspace LLP*** reported in **(2020) 15 SCC 585** to conclude that the Hotel was never used for trade and commerce and therefore the suit instituted by the Petitioners was unmaintainable.

f. A perusal of the agreement would show that it was for the operation and management of a hotel, along with its equipment and assets. Therefore, evidently, the Hotel was being used for trade and commerce.

g. In light of the aforesaid facts, it is expedient in the interest of justice that the impugned order dated January 17, 2023 passed by the Presiding Officer, Commercial Court, Varanasi in Misc. (Civil) Suit No. 375/2022, be set aside. The Petitioners have no other equally efficacious and alternative remedy, other than approaching this Court under Article 227 of the Constitution of India.

Analysis and Conclusion

4. I have heard the learned counsel appearing on behalf of the Petitioner and perused the materials on record.

5. Before dealing with the instant case on merits, this Court would like to put on record that despite several opportunities afforded to the Respondent, none appeared to argue on his behalf. The fate of the Petitioners cannot be left at the mercy of the Respondent who does not seem to be interested in the instant matter. The failure on part of the Respondent suggests a disregard for this Court's process and time. Therefore, this Court, despite the fact that no arguments have been made by the Respondent, has proceeded to adjudicate the instant case on merits.

6. The main issue in the instant case is that whether the Hotel was being used by

the Petitioners for trade and commerce, and therefore, the Commercial Court erred in dismissing the suit filed by the Petitioners.

7. Since the definition of a commercial dispute is contained in Section 2(c) of the CC Act, I have extracted it below:

*"**2. Definitions**.—(1) In this Act, unless the context otherwise requires,—*

*****

(c) "commercial dispute" means a dispute arising out of—

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

(ii) export or import of merchandise or services;

(iii) issues relating to admiralty and maritime law;

(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) construction and infrastructure contracts, including tenders;

(vii) agreements relating to immovable property used exclusively in trade or commerce;

(viii) franchising agreements;

(ix) distribution and licensing agreements;

(x) management and consultancy agreements;

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

(xiv) mercantile agency and mercantile usage;

(xv) partnership agreements;

(xvi) technology development agreements;

(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;

(xviii) agreements for sale of goods or provision of services;

(xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;

(xx) insurance and re-insurance;

(xxi) contracts of agency relating to any of the above; and

(xxii) such other commercial disputes as may be notified by the Central Government.

Explanation.—A commercial dispute shall not cease to be a commercial dispute merely because—

(a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;"

(Emphasis Added)

8. Agreements relating to immovable property used exclusively in trade or commerce fall under the purview of "commercial disputes" as defined by Section 2(c)(vii) of the CC Act. This categorization highlights the specific nature of such agreements and their inherent connection to commercial activities. Immovable property in this context usually refers to land and buildings used solely for business purposes, such as offices, factories,

warehouses, retail spaces, and other commercial establishments. These properties are distinct from residential or mixed-use properties, emphasizing their exclusive dedication to facilitating business operations.

9. Commercial disputes involving immovable property typically arise from agreements like lease contracts, sale agreements, joint development agreements, and mortgage arrangements. Lease agreements for commercial properties can lead to disputes over rent payments, lease renewals, property maintenance, and compliance with lease terms. For instance, conflicts may occur if a tenant defaults on rent or violates lease conditions, or if a landlord fails to provide agreed-upon services or attempts to unlawfully evict a tenant. Similarly, sale agreements for commercial properties can result in disputes concerning payment terms, transfer of property titles, and fulfilment of contractual obligations. Issues such as misrepresentation of property conditions, delays in possession, and breaches of contractual terms are common points of contention.

10. The expression "used" in Section 2(c)(vii) of the CC Act makes it clear that the immovable property must be actually used or being used for the purpose of "trade or commerce" and not "likely to be used" or "to be used". In legal parlance, "used" generally implies active and current utilization rather than hypothetical or intended future use. This interpretation aligns with the principle that a legislation is designed to address present conditions and real-world applications rather than speculative scenarios. Reference in this regard can be made to the judgment of the Gujarat High Court in ***Vasu Healthcare Private Limited -v- Gujarat Akruti TCG Biotech Limited & 1(S)*** reported in 2017 SCC OnLine Guj 724. Relevant paragraph is extracted herein:

"33. Therefore, if the dispute falls within any of the clause 2(c) the dispute can be said to be "commercial dispute" for which the Commercial Court would have jurisdiction. It is required to be noted that before the learned Commercial Court the original plaintiff relied upon section 2(c)(i), 2(c)(ii) and 2(c)(xx) of the Commercial Courts Act only. Learned Counsel appearing on behalf of the original plaintiff has candidly admitted and/or conceded that the case shall not fall within clause 2(c)(i); 2(c)(ii) or 2(c)(xx) of the Commercial Courts Act. It is required to be noted that before the learned Commercial Court it was never the case on behalf of the original plaintiff that case would fall within section 2(c)(vii) of the learned Commercial Court. Despite the above we have considered on merits whether even considering section 2(c)(vii) of the Commercial Courts Act, the dispute between the parties can be said to be "commercial dispute" within the definition of section 2(c) of the Commercial Courts Act or not? Considering section 2(c)(vii), "commercial dispute" means a dispute arising out of the agreements relating to immovable property used exclusively in trade or commerce. As observed hereinabove, at the time of filing of the suit and even so pleaded in the plaint, the immovable property/plots the agreements between the parties cannot be said to be agreements relating to immovable property used exclusively in trade or commerce. As per the agreement between the party after getting the plots on lease from the GIDC, the same was required to be thereafter developed by the original defendant No. 1 and after providing all infrastructural

facilities and sub-plotting it, the same is required to be given to other persons like the original plaintiff. It is the case on behalf of the original plaintiff that as the original defendant No. 1 has failed to provide any infrastructural facilities and develop the plots and therefore, a civil suit for specific performance of the agreement has been filed. There are other alternative prayers also. Therefore, it cannot be said that the agreement is as such relating to immovable property used exclusively in trade or commerce. It is the case on behalf of the original plaintiff that as in clause (vii) of section 2(c), the pharseology used is not "actually used" or "being used" and therefore, even if at present the plot is not used and even if it is likely to be used even in future, in that case also, section 2(c)(vii) shall be applicable and therefore, the Commercial Court would have jurisdiction. The aforesaid has no substance. As per the cardinal principle of law while interpreting a particular statute or the provision, the literal and strict interpretation has to be applied. It may be noted that important words used in the relevant provisions are ***"immovable property used exclusively in trade or commerce****". If the submission on behalf of the original plaintiff is accepted in that case it would be adding something in the statute which is not there in the statute, which is not permissible. On plain reading of the relevant clause it is clear that the expression "used" must mean "actually used" or "being used". If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, "likely to be used" or "to be used". The word "used" denotes "actually used" and it cannot be said to be either "ready for use" or "likely to be used"; or "to be used". Similar view has been taken by the Bombay High Court (Nagpur Bench) in the case of Dineshkumar Gulabchand Agrawal (Supra) and it is observed and held that the word "used" denotes "actually used" and not merely "ready for use". It is reported that SLP against the said decision has been dismissed by the Hon'ble Supreme Court."*

11. The Delhi High Court in ***Jagmohan Behl -v- State Bank of Indore*** reported in 2017 SCC OnLine Del 10706 held that a harmonious reading of Section 2(c)(vii) of the CC Act would include all disputes arising out of an agreement relating to an immoveable property being used exclusively for trade and commerce, be it a dispute for realisation of money given in the form of security or any other relief pertaining to such an immoveable property. Relevant paragraphs are extracted below:

"9. In order to appreciate the controversy, we would first reproduce the relevant definition clause, i.e. 2(1)(c)(vii), as also the explanation thereto:—

"Definitions.-(1) In this Act, unless the context otherwise requires

(c) "commercial dispute" means a dispute arising out of-

(vii) agreements relating to immoveable property used exclusively in trade or commerce;

Explanation.-A commercial dispute shall not cease to be a commercial dispute merely because-

(a) It also involves action for recovery of immoveable property or for realisation of monies out of immoveable property given as security or involves any other relief pertaining to immoveable property;

(b) One of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

10. The explanation in the present case has to be read as part and parcel of clause (vii), for the language of the explanation shows the purpose, and the construction consistent with the purpose which should be placed on the main provision. The main provision, therefore, has to be construed and read in the light of the explanation and accordingly the scope and ambit of sub-clause (vii) to clause(c), defining the expression "commercial dispute", has to be interpreted. The explanation harmonises and clears up any ambiguity or doubt when it comes to interpretation of the main provision. In S. Sundaran Pillai v. V.R. Pattabiraman (1985) 1 SCC 591, it was observed that explanation to a statutory provision can explain the meaning and intendment of the provision itself and also clear any obscurity and vagueness to clarify and make it consistent with the dominant object which the explanation seems to sub-serve. It fills up the gap. However, such explanation should not be construed so as to take away the statutory right with which any person under a statute has been clothed or to set at naught the working of the Act by becoming a hindrance in the interpretation of the same.

11. Clause (c) defines the "commercial dispute" in the Act to mean a dispute arising out of different sub-clauses. The expression "arising out of" in the context of clause (vii) refers to an agreement in relation to an immoveable property. The expressions "arising out of" and "in relation to immoveable property"1 have to be given their natural and general contours. These are wide and expansive expressions and are not to be given a narrow and restricted meaning. The expressions would include all matters relating to all agreements in connection with immoveable properties. The immoveable property should form the dominant purpose of the agreement out of which the dispute arises. There is another significant stipulation in clause (vii) relating to immoveable property, i.e., the property should be used exclusively in trade or commerce. The natural and grammatical meaning of clause (vii) is that all disputes arising out of agreements relating to immoveable property when the immoveable property is exclusively used for trade and commerce would qualify as a commercial dispute. The immoveable property must be used exclusively for trade or business and it is not material whether renting of immoveable property was the trade or business activity carried on by the landlord. Use of the property as for trade and business is determinative. Properties which are not exclusively used for trade or commerce would be excluded

12. The explanation stipulates that a commercial dispute shall not cease to be a commercial dispute merely because it involves recovery of immoveable property, or is for realisation of money out of immoveable property given as security or involves any other relief pertaining to immoveable property, and would be a commercial dispute as defined in sub-clause (vii) to clause (c). The expression "shall not cease", it could be asserted, has been used so as to not unnecessarily expand the ambit and scope of sub-clause (vii) to clause (c), albeit it is a clarificatory in nature. The expression seeks to clarify that the immoveable property should be exclusively used in trade or commerce, and when the said condition is satisfied, disputes arising out of agreements relating to immoveable property involving action for recovery of immoveable property, realization of money out of immoveable property given as security or any other relief pertaining to immoveable property would be a commercial dispute. The expression "any other relief pertaining to immoveable

property" is significant and wide. The contours are broad and should not be made otiose while reading the explanation and sub-clause (vii) to clause (c) which defines the expression "commercial dispute". Any other interpretation would make the expression "any other relief pertaining to immoveable property" exclusively used in trade or commerce as nugatory and redundant.

13. Harmonious reading of the explanation with sub-clause (vii) to clause (c) would include all disputes arising out of agreements relating to immoveable property when used exclusively for trade and commerce, be it an action for recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property."

12. In ***Ambalal Sarabhai (supra),*** the Hon'ble Supreme Court propounded that a dispute relating to an immovable property if it falls under Section 2(1)(c)(vii) of the CC Act, would qualify as a commercial dispute. Relevant paragraph is extracted below:

"37. A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2(1)(c) of the Act viz. "the agreements relating to immovable property used exclusively in trade or commerce". The words "used exclusively in trade or commerce" are to be interpreted purposefully. The word "used" denotes "actually used" and it cannot be either "ready for use" or "likely to be used" or "to be used". It should be "actually used". Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above."

13. What emerges from a reading of the aforesaid judicial pronouncements is that, for a dispute arising out of an immovable property to be qualified as a commercial dispute, following conditions must be satisfied:-

a. For a dispute arising out of an immovable property to be qualified as a commercial dispute, an immovable property must be actually used or being used for the purpose of "trade or commerce" rather than being merely "likely to be used" or "to be used" This interpretation emphasizes the necessity for active and current utilization of the immovable property in commercial activities. The term "used" in Section 2(c)(vii) of the CC act excludes the notion of mere readiness or potential for future utilization.

b. The immovable property in question must be exclusively used for trade or commerce. Any other incidental or non-commercial use may disqualify the dispute from being categorized as a commercial dispute.

c. The question that whether a dispute arising out of an agreement relating to an immovable property would qualify as a commercial dispute would necessitate a contextual analysis, and consideration of the specific language and purpose of the contractual provisions of the agreement in question.

d. Commercial disputes encompass all relevant disputes arising from agreements relating to immovable property exclusively used for trade and commerce. This includes disputes for recovery of property, realization of money, or any other relief pertaining to commercial activities.

14. Coming to the factual matrix of the instant case at hand, it is apparent that the agreement between the Petitioners and the Respondent was exclusively for the business operation and management of the

Hotel, which would make any dispute arising out of the said agreement fall within the definition of a commercial dispute. Disputes arising out of business operation and management agreements of immovable properties, such as hotels, resorts, office buildings, shopping centres, and other commercial real estate, fall within the definition of a commercial dispute as outlined in Section 2(c)(vii) of the CC Act.

15. However, the Commercial Court, Varanasi held that the Hotel was never "actually used" for the purposes of trade or commercial and dismissed the suit filed by the Petitioners. Relevant portion from the impugned order dated January 17, 2023 passed by the Commercial Court, Varanasi is extracted herein:

"उपरोक्त विवेचना से स्पष्ट होता है कि वादिनी द्वारा प्रस्तुत वाद में उल्लेखित परिसर संख्या उपरोक्त होटल का संचालन वाणिज्यिक विद्युत की आपूर्ति न होने के कारण व्यापार व वाणिज्यिक रूप से वास्तविक प्रयोग कभी नहीं किया गया तथा माननीय उच्चतम न्यायालय द्वारा ।उइंसंस ैंतंइींप म्दजमतचतपेमे स्पउपजमक के अन्तर्गत सुस्थापित विधि व्यवस्था के अनुसार वादिनी द्वारा प्रस्तुत वाद जो प्रकीर्ण सिविल वाद संख्या 375/2022 के रूप में दर्ज है की सुनवाई का क्षेत्राधिकार वाणिज्यिक न्यायालय वाराणसी को प्राप्त नहीं है तथा वादिनी का उपरोक्त प्रकीर्ण सिविल वाद तथा उसके साथ संलग्न वाद पत्र अस्वीकार किये जाने योग्य है।

आदेश

प्रकीर्ण सिविल वाद संख्या 375/2022 ममता कपूर व अन्य बनाम विनोद कुमार राय वाणिज्यिक न्यायालय को सुनवाई का क्षेत्राधिकार न होने के कारण अस्वीकार किया जाता है। कार्यालय को निर्देशित किया जाता है कि वह वादिनी की सम्पूर्ण पत्रावली नियमानुसार वादिनी अथवा उसके अधिकृत व्यक्ति को वापस प्राप्त कराये।"

16. A perusal of the factual matrix of the instant case would show that the Commercial Court, Varanasi was not justified in dismissing the suit filed by the Petitioners which would warrant the exercise of this Court's powers under Article 227 of the Constitution of India. The Hotel was actually being used for trade and commerce, and the agreement between the parties was for the purpose of business management and operations exclusively. It is evident from the nature of the agreement that the primary purpose was to facilitate and manage commercial activities related to the Hotel. Therefore, the argument that the Hotel was not "actually used" for trade or commerce lacks merit, as the very purpose of the agreement was to engage in commercial activities related to the operation of the Hotel. The Commercial Court's narrow interpretation overlooks the broader commercial context of the agreement and fails to recognize the commercial nature of the dispute.

17. Accordingly, the impugned order dated January 17, 2023 is quashed and set aside with a direction upon the Commercial Court, Varanasi to hear the suit filed by the Petitioner on merits, expeditiously and preferably, within a period of 6 months from the date of receipt of a certified copy of this order.

18. With the above directions, the instant application is allowed. There shall be no order as to the costs.

(2024) 5 ILRA 853
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matter Under Article 227 No. 6277 of 2024

Shri Shree Chand Jain ...Petitioner
Versus
Rent Tribunal13th Adj Agra & Ors. ...Respondents

Counsel for the Petitioner:
Sudeep Harkauli

Counsel for the Respondents:
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Civil Law – U.P. Regulation of Urban Premises Tenancy Act, 2021 - Sections 10, 33(2), 35(2), 35 - Petitioner filed application u/s 10 of Act, 2021 - In that case, interim rent was fixed at the rate of Rs. 750/- per square feet - Respondent filed recall application, also filed Writ Petition in High Court, disposed of , direction to decide the recall application within time bound period - Recall application was rejected – Scope of provisions - Held, in all eventuality applications/appeals to be decided maximum within a period of 60 days from date of filing - If not decided within time, reasons has to be recorded in writing - In the matter of Asian Resurfacing, Apex Court has issued direction to Trial Court to send photocopy/scanned copy of record after retaining the same so that proceedings are not held up - Filing of appeal against review/recall order without pre deposit of 50% amount, thereafter summoning of original record by Rent Tribunal withholding the execution proceedings is misuse of process of law – Directions accordingly. (Para 3, 8, 9, 13)

Petition disposed of. (E-13)

List of Cases cited:

Asian Resurfacing of Road Agency P. Ltd. & ors. Vs Central Bureau of Investigation (Criminal Appeal Nos. 1375-1376 of 2013)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Sudeep Harkauli, learned counsel for the petitioner and Sri I.P. Srivastava, learned Additional Chief Standing Counsel for the State.

2. Present petition has been filed with the following prayers:-

"(i) To direct the Rent Tribunal to decide the Rent Control Appeal No.56 of 2023 within a time bound period of 60 days as provided in the Act.

(II) To direct the Rent Tribunal to return the records of the case under Appeal No. 56 of 2023 and under all other similar appeals to the Rent Authority so that case can be adjudicated there, and to direct the Rent Tribunal not to unnecessary summons records of the cases pending before the Rent Authority or summon only copies of the record from Rent Authority if at all required giving specific reasons as to why the copy of the record is required/necessary for deciding the appeal.

(iii) To direct the Rent Tribunal to comply with the provisions of mandatory deposit of 50% of the amount as required under the Act."

3. Sri Sudeep Harkauli, learned counsel for the petitioner submitted that after repealing of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as Act, 2021) has been enacted and also U.P. Regulation of Urban Premises Tenancy Rules, 2021 (hereinafter referred to as Rules, 2021) framed thereunder. He next submitted that petitioner has filed an application under Section 10 of Act, 2021, which was numbered as Case No. 5808 of 2022. In the said case, order dated 16.9.2022 has been passed fixing the interim rent at the rate of Rs. 750/- per square feet. Thereafter, respondent has filed an application to recall the order dated 16.9.2022. He has also approached this Court by filing Writ-A No. 12100 of 2023, which was disposed of vide order dated 26.7.2023 with direction to decide the recall application within time bound period. In pursuance of the said order, recall application was heard and rejected

vide order dated 17.11.2023. Recall/review application has been filed against the fixation of interim rent and as such its rejection confirms the fixation of interim rent.

4. He next submitted that there is provision of appeal under Section 35 of Act, 2021 against the orders passed by the Rent Authority. Section 35 of Act, 2021 provides pre deposits of 50% of the payable amount and in the present case, 50% of the payable amount would be 50% of the interim rent fixed by the order dated 16.9.2022. Against the review/recall order, rent appeal no.56 of 2023 has been filed without deposit of aforesaid amount, which is against the provisions of Act, 2021. The said appeal was entertained, original record of Appellate Authority has been summoned by the Rent Tribunal. He firmly submitted that no appeal has been filed against the order of fixation of interim rent dated 16.9.2022 rather than it has been filed against the recall/review order dated 17.11.2023. He lastly submitted that order of fixation of interim rent dated 16.9.2022 has never been challenged.

5. Learned counsel for the petitioner further submitted that after summoning the original record, petitioner is not in a position to initiate execution application to execute the order of interim rent dated 16.9.2022. He next submitted that as provided in Section 33 (2) & 35(2) of Act, 2021, direction may be issued to Rent Tribunal to decide the appeal at the earliest clarifying that pendency of such appeal may not be a ground for staying of any execution proceedings, if filed. He further submitted that direction may also be issued to rent tribunal not to summon the original record and in case original record is required, only photocopy/scanned copy duly certified by the Rent Authority may be sent. In support of his contention, he has placed reliance upon the judgment of Apex Court in the case of **Asian Resurfacing of Road Agency P. Ltd. and Ors. Vs. Central Bureau of Investigation** passed in **Criminal Appeal Nos. 1375-1376 of 2013** decided on **25.4.2018**. He lastly submitted that while challenging any order of interim maintenance or final eviction, direction may also be issued to Rent Tribunal to ensure the compliance of statutory provision of pre deposit of 50% of the payable amount as provided in Section 35 of 2021, Act.

6. Sri I.P. Srivastava, learned Additional Chief Standing Counsel for the State has not opposed and disputed the submission so made by the learned counsel for the petitioner. He also submitted that in the larger interest of justice, suitable direction may be issued to Rent Tribunal/Rent Authority to ensure the compliance of provision Act & Rules, 2021 in its spirit.

7. I have considered the rival submissions advanced by the learned counsel for the petitioner as well as Sri I.P. Srivastava, learned Additional Chief Standing Counsel for the State and perused the record as well as judgment relied upon. The first issue is before this Court about the time in which appeal is to be decided, therefore, Section 33(2) & 35(2) of Act, 2021 are relevant, which are being quoted hereinbelow:-

"Section 33(2) *The Rent Authority or Rent Tribunal, as the case may be, shall endeavour to dispose the case as expeditiously as possible, not exceeding a period of more than sixty days from the date of receipt of the application or appeal.*

Provided that where any such application or appeal, as the case may be

could not be disposed of withing the said period of sixty days, the Rent Authority or Rent Tribunal, as the case may be, shall record its reason in writing for not disposing of the application or appeal within that period.

***Section 35(2)** Upon filing an appeal under sub-section (1), the Rent Tribunal shall serve notice, along with a copy of memorandum of appeal to the respondent and fix a hearing not later than thirty days from the date of service of notice of appeal on the respondent and the appeal shall be disposed of within a period of sixty days from such date of service."*

8. From perusal of the aforesaid sections, it is apparently clear that in all eventuality applications/appeals have to be decided maximum within a period of 60 days from the date of filing. In case it is not decided within the same time, reasons has to be recorded in writing.

9. Second issue is about the summoning of original record from the Rent Authority. Similar issue was before the Apex Court in the matter of **Asian Resurfacing (Supra)** in which Apex Court has issued direction to trial Court to send the photocopy/scanned copy of the record after retaining the same. The said judgment is quoted hereinbelow:-

"1. Heard learned counsel for the parties.

2. In view of judgment of three Judge Bench dated 28th March, 2018 and after considering the material on record. we do not find any ground to interfere with the order framing charge.

3. Accordingly, the trial Court is directed to proceed with the matter pending before it. All contentions of the parties are left open which may be gone into by the trial Court. Parties are directed to appear before the trial Court on 14th May, 2018.

4. To give effect to directions in judgement of this Court dated 28th March, 2018, noted above, we direct that wherever original record has been summoned by an appellate/revisional Court, photocopy/scanned copy of the same may be kept for its reference and original returned to the trial Courts forthwith.

5. We also direct that if in future the trial Court record is summoned, the trial Courts may send photocopy/scanned copy of the record and retain the original so that the proceedings are not held up. In cases where specifically original record is required by holding that photocopy will not serve the purpose, the appellate/revisional court may call for the record only for perusal and the same be returned while keeping a photocopy/scanned copy of the same.

6. A copy of this order be sent to all the High Courts."

10. From perusal of the aforesaid order, Apex Court has issued specific direction to trial Court to send the photocopy/scanned copy of the original record retaining the same so that the proceedings are not held up. Ratio of law laid down by the Apex Court in the matter of **Asian Resurfacing (Supra)** shall also be applicable in the present case. This Court cannot take different view, therefore, it is always on the part of Rent Authority to send photocopy/scanned copy after retaining the original records to Rent Tribunal, if summoned. A letter of certification may also be annexed alongwith photocopy/scanned copy of the record.

11. The third issued was before this Court for direction to deposit of 50% amount in terms of Section 35 of Act, 2021. Same is quoted hereinbelow:-

"35. Appeal to Rent Tribunal (1) Any person aggrieved by an order passed by the Rent Authority may prefer an appeal along with a certified copy of such order to the Rent Tribunal within the local limits of which the premises is situated, within a period of thirty days from the date of that order:

Provided that no appeal shall lie unless the appellant pre-deposits fifty percent of the entire payable amount under the impugned order of the Rent Authority.

(2) Upon filing an appeal under sub-section (1), the Rent Tribunal shall serve notice, along with a copy of memorandum of appeal to the respondent and fix a hearing not later than thirty days from the date of service of notice of appeal on the respondent and the appeal shall be disposed of within a period of sixty days from such date of service.

(3) Where the Rent Tribunal considers it necessary in the interest of arriving at a just and proper decision, it may allow filing of documents at any stage of the proceedings in appeal:

Provided that no such document shall be allowed more than once during the hearing.

(4) The Rent Tribunal may, in its discretion, pass such interlocutory order during the pendency of the appeal, as it may deem fit.

(5) While deciding the appeal, the Rent Tribunal may, after recording reasons therefor, confirm, set aside or modify the order passed by a Rent Authority."

12. From perusal of the same it is apparently, clear that there is no exception to skip away from pre deposit of 50% the entire payable amount under the impugned order of the rent authority at the time of filing of appeal. In case any order is under challenged having direction of payment of any amount, no appeal can be entertained against the said order without pre deposit of 50% amount as mandated in Section 35 of Act, 2021.

13. Filing of appeal against the review/recall order without pre deposit of 50% amount and thereafter summoning of original record by the Rent Tribunal withholding the execution proceedings is nothing, but misuse of process of law.

14. Therefore, under such facts and circumstances as well as law laid down by the Apex Court, the petition is **disposed of** with the following directions:-

(i) Rent Tribunal/Rent Authority is directed to decide the appeals/applications as the case may be, strictly within the time limit provided in Section 33(2) & 35(2) of Act, 2021 i.e. 60 days. In case same is not decided within the prescribed time, they shall record reasons in writing for the same.

(a) In light of aforesaid observations, present Rent Appeal No. 56 of 2023 shall also be decided in terms of Section 33(2) & 35(2) of Act, 2021.

(ii) In case of summoning record by the **Rent Tribunal, Rent Authority** shall send the photocopy/scanned copy of the same alongwith letter of certification retaining the original record for further proceedings in accordance with provisions of Act & Rules, 2021. **Rent Tribunal** is also directed to ensure the compliance of above noted direction and in case original record is send by the **Rent Authority**, **Rent Tribunal**, after retaining the photocopy/scanned copy of the same, shall send back the original record to Rent Authority maximum within a period of two weeks from the date of receiving the same.

(iii) **Rent Tribunal** is further directed not to entertain any appeal in contrary to provision of Section 35 of Act,

2021 without pre deposit of 50% of the amount payable under the order of **Rent Authority**. In case original order is not under challenged, only order of review/recall as discussed herein above is under challenge without deposit of 50% amount, original order shall not be treated under challenge and any interim order granted in appeal against review/recall order shall not be treated stay of original order. It would also be open for the applicant to initiate execution proceedings, if advised.

15. Registrar General is directed to circulate the copy of this order to all **Rent Authority** and **Rent Tribunal** of State of Uttar Pradesh for necessary compliance at the earliest.

(2024) 5 ILRA 858
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2024

BEFORE

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

Matter Under Article 227 No. 6584 of 2023

Smt. Hema & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sujan Singh

Counsel for the Respondents:
G.A., Niharika Dubey, Vishakha Dubey

Civil Law – Code of Criminal Procedure, 1973 – Sections 125, 127 & 362 – Scope of Section 362 Cr.P.C in maintenance - Maintenance petition was filed u/s 125 Cr.P.C - Allowed ex-parte, an amount of Rs. 10,000/- pm had been awarded in favour of petitioner no. 1, and an amount of Rs. 2,000/- in favour of petitioner no. 2 – Respondent no. 2 filed recall application, allowed - During subsequent proceedings, maintenance petition was dismissed for non-prosecution - On the same date, the petitioners moved restoration application – Dismissed – Impugned order – Held, proceedings for maintenance u/s 125 Cr.P.C. are of a summary nature, object of the same is to provide immediate relief to applicant - The embargo contained in Section 362 held to be relaxed in proceedings u/s 125, and the court having not become functus officio after passing of final order, the recall application filed seeking restoration of case, could not be rejected by assigning a reason that Court was not empowered to entertain the same – Hence, impugned order was set aside and matter was remitted for passing fresh order. (Para 5, 6, 37, 44, 46)

Petition partly allowed. (E-13)

List of Cases cited:

1. Kusum Devi Vs Ram Chandra Maurya, 2004 1 Crimes(HC) 153

2. Kehari Singh Vs St. of U.P., 2005 0 CrLJ 2330

3. Jagmohan Arora Vs Saroj Arora, 2011 LawSuit(Del) 2381

4. Suhird Kamra Vs Neeta & anr., 1988 (14) DRJ 282

5. Sanjeev Kapoor Vs Chandana Kapoor & ors., (2020) 13 SCC 172

6. Sankatha Singh Vs St. of U.P., AIR 1962 SC 1208

7. Sooraj Devi Vs Pyare Lal, (1981) 1 SCC 500

8. Simrikhia Vs Dolley Mukherjee, (1990) 2 SCC 437

9. Hari Singh Vs Harbhajan Singh Bajwa, (2001) 1 SCC 169

10. St. Vs K.VS Rajendran, (2008) 8 SCC 673

11. Mahua Biswas Vs Swagata Biswas, (1998) 2 SCC 359

12. Badshah Vs Urmila Badshah Godse, (2014) 1 SCC 188

13. R (on the application of Quintavalle) Vs Secretary of St. for Health, (2003) 2 All ER 113 (UK House of Lords)

14. Stock Vs Frank Jones (Tipton) Ltd., (1978) 1 WLR 231 (UK House of Lords)

15. Bhuwan Mohan Singh Vs Meena & others, (2015) 6 SCC 353

16. Smt. Dukhtar Jahan Vs Mohammed Farooq, (1987) 1 SCC 624

17. Vimala (K.) Vs Veeraswamy (K.), (1991) 2 SCC 375

18.Kirtikant D. Vadodaria Vs St. of Gujarat, (1996) 4 SCC 479

19. Allahabad Bank & Anr. Vs All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44

20. Bharat Singh Vs Management of New Delhi Tuberculosis Centre, New Delhi & Ors, (1986) 2 SCC 614

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

1. Heard Sri Sujan Singh, learned counsel for the petitioners, Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-respondent and Ms. Niharika Dubey, learned counsel appearing for the respondent no. 2.

2. The present petition has been filed seeking to assail the order dated 02.01.2023 passed by the Principal Judge, Family Court, Agra in Misc. Case No. 2053 of 2022, under Section 125 Cr.P.C., arising out of Maintenance Case No. 783 of 2014 (Smt. Hema and another Vs. Dhirendra Pratap Singh).

3. The order dated 02.01.2023, which is subject matter of challenge in the present petition, was passed upon an application No. 3A filed by the petitioners seeking a recall of an earlier order dated 29.10.2022 and to restore the case to its original number.

4. The aforesaid application was dismissed by the Principal Judge, Family Court stating that after dismissal of an application under Section 125 Cr.P.C., no application seeking restoration of the case was entertainable. It was also observed that the petitioner could file a second application under Section 125 Cr.P.C.

5. Attention of the Court has been drawn to the factual aspects of the case by pointing out that the proceedings under Section 125 Cr.P.C. were instituted by filing a maintenance petition on 05.09.2014, which was allowed ex-parte by an order dated 08.09.2016, in terms whereof an amount of Rs. 10,000/- per month had been awarded in favour of the petitioner no. 1, and an amount of Rs. 2,000/- in favour of the petitioner no. 2.

6. It is stated that the aforesaid ex parte order was recalled by a subsequent order dated 26.11.2018, upon an application by the respondent no. 2.

7. It is submitted that, on 29.10.2022, which was the date fixed in the case, the petitioner upon reaching the court was informed that the case had been taken up and an order had been passed dismissing the maintenance petition for non-prosecution. Immediately thereupon, on the same date, the petitioners are stated to have

moved a restoration application seeking recall of the order. The restoration application was taken up, on 02.01.2023, and the same was dismissed.

8. Aggrieved by the aforesaid order, the present petition has been preferred.

9. Contention of the counsel for the petitioners is that there was no want of bona fides or lack of diligence on part of the petitioners and the conclusion drawn by the court to the contrary, is erroneous.

10. It is submitted that the restoration application having been moved, on the same date, the court concerned ought to have allowed the same, in the interest of justice.

11. As regards the conclusion drawn by the court concerned with regard to the restoration application being not entertainable, in proceedings under Section 125 Cr.P.C., it is urged that same would not be legally sustainable. To support the aforesaid submission, reliance, in this regard, has been placed on decisions in **Kusum Devi Vs. Ram Chandra Maurya**[1]; **Kehari Singh Vs. State of U.P**.[2]; **Jagmohan Arora Vs. Saroj Arora**[3]; **Suhird Kamra Vs. Neeta and Another**[4] and **Sanjeev Kapoor Vs. Chandana Kapoor and Others**[5].

12. Counsel appearing for the respondent no. 2 has sought to contend that the petitioners having moved a second application seeking maintenance, which is pending, there would be no plausible reason for them to seek restoration of the earlier application.

13. In this regard, learned counsel for the petitioners has drawn attention of the Court to the specific assertion in the petition wherein the petitioners have undertaken that in the event of the earlier maintenance petition being restored to its original number, the petitioners would withdraw the second application filed for the purpose.

14. The principal question, which falls for consideration, is as to whether, in proceedings under Section 125 Cr.P.C., upon an order having been made, the court concerned can be held to be functus officio for the purposes of entertaining an application seeking recall, and that any application which has been moved for recall of an order rejecting the maintenance petition for non-prosecution, would amount alteration of the judgment so as to barred by Section 362 Cr.P.C.

15. For ease of reference, the provisions contained under Sections 125(1), 125(5) and 127 Cr.P.C. relating to orders for maintenance of wives, children and parents, under Chapter-IX of the Cr.P.C. are being extracted below:-

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

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

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

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

(d) his father or mother, unable to maintain himself or herself,

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

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

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

Explanation. – For the purposes of this Chapter, –

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

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

* * *

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

127. ***Alteration in allowance***. – (1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that –

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage.

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order –

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom monthly allowance for the maintenance and interim maintenance or any of them has been ordered to be paid under section 125, the civil court shall take into account that sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of the said."

16. Section 362 of the Cr.P.C., which creates an embargo on the court not to alter the judgment, would also be required to be adverted, and the same is reproduced below:-

"Section 362.Court not to alter judgement.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

17. Section 125(1) Cr.P.C. which empowers the Magistrate to pass an order for maintenance of wives, children and parents, uses the expression 'as the Magistrate may from time to time direct', which is indicative that while passing an order under Section 125(1) Cr.P.C., the Magistrate may have to exercise jurisdiction, as required, from time to time

18. Section 127(1) Cr.P.C. contains a provision relating to alteration in allowance, and in terms thereof, the Magistrate is empowered to alter an order passed under Section 125. In terms of sub section (2) of Section 127, the Magistrate is empowered to cancel or vary the order passed under Section 125 Cr.P.C.

19. The legislative scheme contained under Section 125 and 127 Cr.P.C., referred to above, indicates that that while making an order for maintenance under Section 125(1) Cr.P.C., the Magistrate may be required to exercise jurisdiction, from time to time, upon fulfillment of the conditions specified thereunder. Section 127 Cr.P.C. contemplates situations wherein the Magistrate may pass an order cancelling or varying the earlier order made under Section 125 Cr.P.C.

20. The aforementioned provisions under Sections 125(1) and 127 Cr.P.C., which empower the Magistrate to exercise jurisdiction for passing of orders from time to time, as the occasion requires, and also varying or cancelling the order, would go to show that as per the legislative scheme contained under Sections 125 and 127 Cr.P.C., the Magistrate after passing of the judgment or final order, in proceedings under Section 125 Cr.P.C., cannot be said to have become functus officio.

21. This brings us to the question as to whether the embargo contained in Section 362 Cr.P.C. prohibiting the court to alter or review its judgment or final order disposing of the case, would be applicable to an order of maintenance under Section 125 Cr.P.C.

22. In **Sanjeev Kapoor Vs. Chandana Kapoor and others**[6], after examining the legislative scheme as delineated by Sections 125 and 127 Cr.P.C., and the express provisions where an order passed thereunder can be cancelled or altered, it was held that the embargo as contained in Section 362 Cr.P.C. is relaxed in proceedings under Section 125 Cr.P.C. The observations made in the judgment, in this regard, are as follows:

"25. In Section 125 CrPC the expression used is "as the Magistrate may from time to time direct". The use of the expression "from time to time" has purpose and meaning. It clearly contemplates that with regard to the order passed under Section 125(1) CrPC, the Magistrate may have to exercise jurisdiction from time to time. Use of the expression "from time to time" is in exercise of jurisdiction of the Magistrate in a particular case. Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. defines "time to time" as follows:

"Time to time. As occasion arises."

26. The above legislative scheme indicates that the Magistrate does not become functus officio after passing an order under Section 125 CrPC, as and when the occasion arises the Magistrate exercises the jurisdiction from time to time. By Section 125(5) CrPC, the Magistrate is expressly empowered to cancel an order passed under Section 125(1) CrPC on fulfilment of certain conditions.

27. Section 127 CrPC also discloses the legislative intendment where the Magistrate is empowered to alter an order passed under Section 125 CrPC. Sub-section (2) of Section 127 CrPC also empowers the Magistrate to cancel or vary an order under Section 125. The legislative scheme as delineated by Sections 125 and 127 CrPC as noted above clearly enumerated the circumstances and incidents provided in the Code of Criminal Procedure where the court passing a judgment or final order disposing of the case can alter or review the same. The embargo as contained in Section 362 is, thus, clearly relaxed in the proceedings under Section 125 CrPC as indicated above."

23. The scope of Section 362 Cr.P.C. was also considered, and it was held that the rigour contained in the section, is relaxed in two conditions, that is to say, where power to alter or review a judgment or final order is provided either; (i) by the Code of Criminal Procedure itself, or (ii) any other law for the time being in force. As regards the embargo put on the criminal court to alter or review its judgment, it was observed that the same is with a purpose and object. Referring to the earlier decisions in **Sankatha Singh v. State of U.P**.[7], **Sooraj Devi vs. Pyare Lal**[8], **Simrikhia v. Dolley Mukherjee**[9], **Hari Singh v. Harbhajan Singh Bajwa**[10], **State v. K.V. Rajendran**[11], **Mahua Biswas v. Swagata Biswas**[12]; and the law summarized therein, it was observed that criminal justice delivery system does not clothe criminal courts with power to alter or review a judgment or final order disposing of a case except to correct the clerical or arithmetical errors.

24. In order to examine the extent to which the rigour of the embargo as contained in Section 362 Cr.P.C., would be relaxed in the context of the powers to be exercised in proceedings relating to passing of maintenance orders under Section 125 Cr.P.C., it would be necessary to take a view of the legislative scheme contained in Sections 125 to 127 Cr.P.C.

25. The scope of the legislation relating to maintenance under Section 125

Cr.P.C. and its social objective was examined in **Badshah v. Urmila Badshah Godse**[13] and applying the principle of purposive interpretation, it was held that in the context of a 'social justice legislation', the Court must give effect to that construction, which would be responsible for smooth functioning of the system for which the statute had been enacted. It was observed as follows:

"13.3. ... in such cases, purposive interpretation needs to be given to the provisions of Section 125 Cr.P.C. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

'It is, therefore, respectfully submitted that “social context judging” is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.'14

15. The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.”

26. The role and duty of Court, in the context of change in law with change in society, was explained, and referring to the observations made by **Benjamin N. Cardozo**[15], and also the observations made in **Gray's Lectures on 'The Nature and Sources of the Law**[16], the following observations were made:-

16. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly

changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

17. Cardozo acknowledges in his classic

'… no system of jus scriptum has been able to escape the need of it.'

and he elaborates:

'It is true that codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. … There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a Judge's troubles in ascribing meaning to a statute. …

Says Gray in his lectures:

"The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the Judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." '

18. The court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision — libre recherché scientifique i.e. "free scientific research". We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 Cr.P.C., to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice."

27. The proposition that for construing an enactment effort should be made to give effect to the legislative purpose, has been consistently followed. In this regard, reference may be had to the decision in **R (on the application of Quintavalle) Vs. Secretary of State for Health**[17], wherein the following observations were made:-

"8. The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

28. Similar observations were made in **Stock Vs. Frank Jones (Tipton) Ltd.18**,

wherein wherein referring to the rule in Hydon's case, it was held as follows:-

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction . . . which goes by the name of "the rule in Heydon's Case" (1584) 3 Co. Rep. 7b. (Nowadays we speak of the "purposive" or "functional" construction of a statute.)"

29. The provisions with regard to grant of maintenance under Section 125 Cr.P.C. and the duty of the husband towards the wife in regard thereof, came up for consideration in the case of Bhuwan Mohan Singh vs. Meena & others19, and referring to the earlier decisions in **Smt. Dukhtar Jahan v. Mohammed Farooq**[20], **Vimala (K.) v. Veeraswamy (K.)**[21] and **Kirtikant D. Vadodaria v. State of Gujarat**[22] it was held that the proceedings are summary in nature and they intend to provide a speedy remedy and achieve a social purpose. The observations made in the judgement in this regard are as follows :-

"7. We are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act 1984. In Smt. Dukhtar Jahan v. Mohammed Farooq (1987) 1 SCC 624, the Court opined that: (SCC p. 631, para 16)

"16. .....Proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."

8. A three-Judge Bench in Vimala (K.) v. Veeraswamy (K.) (1991) 2 SCC 375, while discussing about the basic purpose under Section 125 of the Code, opined that: (SCC p. 378, para 3)

"3. Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

9. A two-Judge Bench in Kirtikant D. Vadodaria v. State of Gujarat (1996) 4 SCC 479, while adverting to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

"15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

30. The principle of applying a liberal construction to a remedial legislation such as the one above, has been emphasised

in the **Construction of Statues by Crawford**[23] in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

31. To a similar effect is the observation made by **Blackstone in Construction and Interpretation of Laws**[24], which is as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

32. In the context of 'beneficial construction' as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes**[25], as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

33. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association**[26], and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

34. Reference may also be had to the case of **Bharat Singh Vs. Management of New Delhi Tuberculosis Centre, New Delhi & Ors.**[27], where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11. ...the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is

ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

35. The Court's function, in view of the foregoing discussion, would thus be to construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment.

36. Chapter IX of the Code of Criminal Procedure, 1973 contains provisions for making orders for maintenance of wives, children and parents. The subject matter of the provisions contained under the chapter though essentially of a civil nature, the justification for their inclusion in the Cr.P.C., is to provide a more speedy and economical remedy than that available in civil courts for the benefit of the persons specified therein.

37. The proceedings for maintenance under Section 125 Cr.P.C. are of a summary nature and the purpose and object of the same is to provide immediate relief to the applicant.

38. The legislative scheme contained under Sections 125 to 127 Cr.P.C. being in the nature of a benevolent provision having a social purpose with the primary object to ensure social justice to the wife, child and parents, who are unable to support themselves so as to prevent destitution and vagrancy, the provisions contained therein have to be interpreted in a beneficent way so as to subserve the object of the enactment rather that to negate it.

39. The embargo under Section 362 Cr.P.C., when read in the context of the provisions of Sections 125-127 Cr.P.C., would have to be understood in a manner so as to advance the social object of the legislation rather than to whittle it down. It may be noticed that the embargo put by Section 302 on the court to alter or review its judgment or final order disposing of the case, is subject to certain exceptions contained therein. The legislature, was, perhaps conscious that there may arise situations where altering or reviewing of a judgment would be contemplated under the provisions of the Code itself or any other law for time being in force, which is perhaps the reason that the exceptions to the general embargo, have been engrafted in the section itself.

40. In a situation where there is possibility of adopting differing constructions of a statutory provision, the duty of the court, applying the principle of purposive construction, would be to give effect to that construction which would advance the object for which the enactment has been made rather than to adopt that construction which would reduce the legislation to a futility.

41. It is beyond question, the duty of courts, in construing statutes, to give effect to the intent of the law makers and to seek for that intent in every way. The object and interpretation of construction of statutes is to ascertain the meaning of the legislation and to ensure that the provisions are

interpreted so as to subserve that intent. There is a general presumption that an enactment has to be given a purposive interpretation with a construction that best gives effect to the purpose of the enactment.

42. The provision relating to orders for maintenance under Section 125 Cr.P.C., being in the nature of a 'social justice legislation', the role and duty of the Courts, in the said context, would be to understand the purpose of the enactment and to help the law achieve its objective.

43. Taking into the view the social objective of the legislative scheme with regard to grant of orders for maintenance, under Chapter IX of the Cr.P.C., and applying the principle of purposive construction, the provisions contained under Sections 125-127 when read in conjunction with Section 362, would lead to the conclusion that the embargo contained under Section 362, is expressly relaxed in proceedings under Section 125 Cr.P.C.

44. The embargo contained in Section 362 having been held to be relaxed in proceedings under Section 125 and the court having not become *functus officio* after passing of the final order, the recall application which had been filed seeking restoration of the case, could not have been rejected by assigning a reason that the Court was not empowered to entertain the same.

45. The order dated 02.01.2023 passed by the Principal Judge, Family Court, Agra in Misc. Case No. 2053 of 2022, in Maintenance Case No. 783 of 2014, is therefore unsustainable, and is, accordingly, set aside.

46. The matter is remitted to the court concerned for passing of a fresh order on the recall application, in the light of the observations made above.

47. The court concerned would be expected to make an endeavour to dispose of the recall/restoration application as expeditiously as possible.

48. The petition stands allowed to the extent as indicated above.

(2024) 5 ILRA 869
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/s 482 No. 11995 of 2024

Rajiv Malhotra ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Abhay Mani Tripathi, Sri Nipun Singh

Counsel for the Respondent:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Negotiable Instrument Act, 1881-Section 138-quashing of summoning order-complaint of opposite party was dismissed in default-Proceeding under section 138 NI Act is quasi civil in nature, therefore a bar of section 362 CrPC will not apply if the complaint is dismissed for want of prosecution at the initial stage-the Apex court observed that if the order was not passed on merit, the same could be recalled by the same court-even if there is a condition that before presentation of cheque, notice should be given to the drawer of cheque, even then on bouncing of such conditional cheque, offence u/s 138 NI Act will be attracted if no

information is given to the drawer of the cheque-notice of demand through courier service is valid service for section 138 NI Act, but the presumption of service u/s 27 of the General Clauses Act cannot be invoked for the notice sent through courier till the amendment is made under section 27 of the General Clause Act so as to include the courier service apart from registered post-Service of notice through Whatsapp u/s 138 NI Act will be deemed to be served as per the procedure of section 13 of I.T. Act and no separate rule for prescribing the delivery of service is required. (Para 1 to 28)

The application is dismissed. (E-6)

List of Cases cited:

1. Major General A.S Gauraya & anr, Vs S.N. Thakur & anr. (1986) 2 SCC 709

2. Krishan Lal Vs Sangeeta Aggarwal Cri. Misc. No. M- 79076 of 2006

3. Smt. Preeti Kamal Kothari Vs St. of U.P. & anr. (2016) SCC OnLine All 461.

4. Indus Airways Pvt Ltd & ors. Vs Magnum Aviation Pvt Ltd & anr.(2014) 12 SCC 539

5. Vishnu Agarwal Vs St. of U.P. & anr.(2011) 14 SCC 813

6. Sunil Todi & ors. Vs St. of Guj. & anr.(2021) SCC OnLine SC 1174

7. St. of U.P. Vs Jogendra Singh (1963) AIR SC 1618

8. Deepak Kumar & anr. Vs St. of U.P. & anr.(2006) SCC OnLine All 1536

9. Ali Jan Vs St. of U.P. & anr. (2020) SCC Online All 75

10. Deepak Kumar & anr. Vs St. of U.P.

11. Shri Ishar Alloy Steels Ltd. Vs Jayaswals Neco Ltd (2001) 3 SCC 609

12. Rajendra Vs St. of U.P. & anr. Appl. u/s 482 No. 45953 of 2023

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

1. Heard Sri Bhuvnesh Kr. Singh, learned counsel for the applicant, Sri Sushil Kr. Chaturvedi, learned counsel for opposite party No.2 and Sri Rajeev Kr. Singh, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of entire proceeding of Complaint Case No. 14 of 2018 (Smt. Manju Sharma vs. Jitendra Mangala), u/s 138 N.I. Act, P.S. Tajganj, District Agra, pending before the Additional Court No.1, Agra as well as summoning order dated 1.9.2018.

3. The factual matrix giving rise to the present case are that the complaint was filed by opposite party No.2 against the applicant u/s 138 N.I. Act. In the aforesaid complaint, it was mentioned that cheque was issued by M/s Prerana Construction Pvt. Ltd., but only the present applicant who is the proprietor of the company M/s Prerana Construction Pvt. Ltd. was impleaded as accused. The court below after perusal of the record, summoned the present applicant by summoning order dated 1.9.2018 and by way of present application, the proceeding of aforesaid complaint case is under challenge.

4. Learned counsel for the applicant submits that it is undisputed that the cheque in question was issued on behalf of the company M/s Prerana Construction Pvt. Ltd., but while filing the impugned complaint, the company in question was not impleaded as accused. Therefore, the proceeding cannot be proceeded against the

accused who is the proprietor of the company who is vicariously liable only when the company is impleaded as a party in the complaint. Therefore, the impugned complaint is barred by Section 141 N.I. Act. Learned counsel for the applicant also argued that in case paragraphs No. 6 of 13 of ***Himanshu vs. B. Shivamurthi and another; (2019) 3 SCC 797***, Hon'ble Apex Court observed that the complaint, in absence of the company, is defective and at this stage company cannot be arrayed. Therefore, fresh complaint is also barred because fresh notice is required to be given to the company which is necessary for arising of the cause of action.

5. per contra learned counsel for opposite party No.2 and learned A.G.A. submitted that the cheque in question was issued on behalf of the company by the applicant, therefore, he is personally liable, therefore, there is no illegality in the summoning order and the impugned proceeding.

6. Considering the rival submissions of the parties and on perusal of the record, it appears that the cheque in question was issued on behalf of the company M/s Prerana Construction Pvt. Ltd. to opposite party No.2, but while filing the impugned complaint, opposite party No.2 did not implead the company as accused which is the basic requirement u/s 141 N.I. Act.

7. The Apex Court also in the cases of ***Aneeta Hada vs. M/S God Father Travels and Tours Pvt. Ltd.; (2012) 5 SCC 661, Himanshu vs. B. Shivamurthi and another; (2019) 3 SCC 797, Dilip Hariramani vs. Bank of Baroda; 2022 LiveLaw (SC) 457 as well as N. Harihara Krishnan vs. J. Thomas 2018 (3) SCC 663*** observed that without impleading the body corporate which includes the company itself, proceeding u/s 141 N.I. Act cannot be proceeded.

8. So far as the contention of learned counsel for the applicant that fresh complaint after impleading the company is also barred because Hon'ble Apex Court in the case of ***Himanshu vs. B. Shivamurthi (supra)*** has observed that in absence of notice of demand, being served on the company, the company cannot be arrayed as accused, is concerned, in the case of ***Himanshu vs. B. Shivamurthi (supra)*** the issue was whether on objection raised by the accused that company was not impeaded as party in the complaint filed for dishonoring of the cheque on behalf of the company but the High Court has permitted to implead the company and Hon'ble Court observed that as the statutory demand notice was not issued to the company, therefore, at this stage company cannot be proceeded by impleading the same in the complaint. Paragraphs No. 6, 11 & 13 of the ***Himanshu vs. B. Shivamurthi (supra)*** are being quoted as under:-

"6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of

compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

9. In the case of ***Himanshu vs. B. Shivamurthi (supra)*** drawer of the cheque during the pendency of the proceeding before the Apex Court also deposited the entire cheque amount showing his bona fide which was also directed to be paid to the complainant at the time of disposal of the case. However, in the present case situation is totally different. In the impugned complaint, the applicant was not impleaded in his personal capacity but was impleaded as proprietor of the company M/s Prerana Construction Pvt. Ltd. and notice was also served upon the company M/s Prerana Construction Pvt. Ltd. through the applicant, being its proprietor/executive director. It is not in dispute that the applicant is active director of the company in question as per the allegation of the complaint and also involved in its day to day business. Therefore, notice upon the applicant, being director of the company, will be deemed to be notice upon the company itself.

10. Therefore, facts of the ***Himanshu vs. B. Shivamurthi (supra)*** are different from the present case. Therefore, ratio of ***Himanshu vs. B. Shivamurthi (supra)*** will not be applied in the present case. Even otherwise, the applicant can raise all his defence during trial.

11. Hon'ble Apex Court in the case of ***NEPC Micon Ltd. vs. Magma Leasing Ltd.; 1999 (4) SCC 253*****,** observed that **it is the duty of court to interpret Section 138 N.I. Act consistent with the legislature intent and purpose so as to suppress the mischief and advance the remedy. Therefore, second complaint by impleading the company is not barred for bouncing of the cheque in question issued by the company M/s Prerana Construction Pvt. Ltd.**

12. Even otherwise, the drawer of the cheque in the case of ***Himanshu vs. B. Shivamurthi (supra)*** deposited the cheque amount before Hon'ble Supreme Court, showing his bone fide. However, in the present case order sheet shows that though the complaint was filed in the year 2018, the applicant as well as his company tried their best to avoid facing trial, despite issuance of summons and bailable warrant, therefore, such type of drawer of cheque should not be allowed to take benefit of technicality at the cost of justice.

13. In view of the above legal position, the present complaint is not maintainable as the company M/s Prerana Construction Pvt. Ltd. was not impleaded as a party. In view of the above, the proceeding of Complaint Case No. 14 of 2018 (Smt.

Manju Sharma vs. Jitendra Mangala), u/s 138 N.I. Act, P.S. Tajganj, District Agra is hereby quashed.

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

15. However, opposite party No.2 is permitted to filed fresh complaint by impleading the company, namely, M/s Prerana Construction Pvt. Ltd., within a period of one month.

(2024) 5 ILRA 873
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/s 482 No. 8779 of 2024

Indraveer Singh & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Gautam, Mohd. Shamim, Nafees Ahmad

Counsel for the Respondent:
Ajay Sengar, G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 482-Negotiable Instruments Act, 1881-Section 138-quashing of entire proceedings-in the present case on the basis of the complaint, statement documents, cognizance was taken by the earlier court not having jurisdiction, which was subsequently transferred to the judicial magistrate, orai-section 460(e) Crpc provides that if the cognizance of an offence is taken erroneously in good faith under Clause (a) of Section 190(1) of Crpc by a court not having jurisdiction, even then same will not vitiate the proceeding-Therefore the transferee court will continue to proceed from that stage instead of hearing the complaint afresh.(Para 1 to 17)

The application is dismissed. (E-6)

List of Cases cited:

1. Yogesh Upadhyay & anr. Vs Atlanta Ltd. (2023) SCC Online SC 170

2. Dashrath Rupsingh Rathod Vs St. of Mah. (2014) 9 SCC 129

3. V.Velu, S/o Veduppan Vs Chennakrishnan, S/o. Venkataraman, CRLA No. 398 of 2011

4. Bridgestone India Pvt Ltd. Vs Inderpal Singh (2016) 2 SCC 75

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

1. Heard Sri Mohd. Shamim, learned counsel for the applicants, Sri Ajay Sengar, learned counsel for opposite party no.2 and Sri Uday Bhan, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of Complaint No. 40 of 2024 (Old Complaint no.5095/2019 and Complaint No.427 of 2021) (Smt. Iksharajey Versus Indraveer Singh and Another), under Section-138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act, 1881'), Police Station-Kotwali Orai, District-Jalaun, pending in the Court of learned Judicial Magistrate, Jalaun, as well as impugned order dated 01.02.2024.

3. The contention of learned counsel for the applicants is that the cheque in question was presented in the account of opposite party no.2 in State Bank of India, Jalaun, but the complaint was filed at Orai. Thereafter, the applicants moved an application before the learned Sessions

Judge, who by order dated 03.01.2024, transferred the case from Orai to Jalaun on the ground that the Court at Jalaun had jurisdiction as per Section-142(2) of the Act, 1881. After transferring this case to Jalaun, the applicants moved an application before the Court concerned, requesting that cognizance be taken by the Court at Orai, which was not competent to take cognizance. Therefore, a fresh proceeding of cognizance may be initiated, but the Judicial Magistrate, Jalaun, rejected that application.

4. Learned counsel for the applicant relied upon the judgment of Apex Court passed in the case of ***Yogesh Upadhyay and another Vs. Atlanta Limited, 2023 SCC Online SC 170***, in which it is observed that when the cognizance was taken by the Court, which has no jurisdiction, then the amendment made in Section 142 of N.I. Act in pursuance of the judgment of Apex Court in the case of ***Dashrath Rupsingh Rathod Vs. State of Maharashtra, [(2014) 9 SCC 129]***, the complainant should be transferred to the Court with jurisdiction as per the amended provision.

5. Learned counsel for opposite party no.2 has submitted that even if the cognizance was taken by the Court having no jurisdiction is a bona fide mistake, then transferring the same to the Court having jurisdiction will not make the cognizance illegal and the transferee Court which will proceed further from the stage of enquiry or trial. Learned counsel also submits that as per sub-clause (2) of Section 142 of N.I. Act, an offence under Section 138 N.I. Act can be inquired into and tried only by a Court within whose local jurisdiction the cheque was presented for collection and bounced.

6. Learned counsel for opposite party no.2 has also relied upon the judgment of Madras High Court passed in ***Criminal Appeal No.398 of 2011, V. Velu, S/o. Vedappan Vs. Chennakrishnan, S/o. Venkataraman***, in which Apex Court observed that if the cognizance was taken in good faith by the Court not having jurisdiction, the cognizance order could not be set aside because such irregularity will not vitiate the proceedings.

7. After hearing the rival submissions of learned counsel for the parties and on the perusal of the record, it appears that the impugned complaint was earlier filed before the Court of Chief Judicial Magistrate, Jalaun at Orai, who, after perusal of the complaint as well as a statement under Section 200 Cr.P.C. and also the documents on record, summoned the applicants. After that, on the applicant's application, that complaint was transferred to the Judicial Magistrate, Orai, District Jalaun, by the District Judge, Jalaun at Orai, by order dated 03.01.2024. After transferring the impugned complaint before the Court of Judicial Magistrate, Orai, District Jalaun, applicant no.1 filed an application on 01.02.2024 praying that the earlier summoning order passed by Chief Judicial Magistrate, Jalaun at Orai was without jurisdiction. Therefore, the complaint should be heard again on merit, and a fresh summoning order may be passed, but that application was rejected by an order dated 01.02.2024.

8. Sub-sections (2) of Section 142 and 142-A of N.I. Act was introduced w.e.f. 15.06.2015. As per Section 142 sub-section (2), an offence under Section 138 N.I. Act can be inquired and tried by the Court within whose local jurisdiction the Branch of Bank where the holder in due course was maintaining the account, in which cheque was presented for collection. Section 142-A

N.I. Act provides that all cases under Section 138 N.I. Act shall be deemed to be transferred to the Court having jurisdiction under Section 142 (2) N.I. Act. Section 142 sub-section (2) as well as Section 142-A of N.I. Act are being quoted as under :-

"142. Cognizance of offences.—

(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of Clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

Section 142A. Validation for transfer of pending cases.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or direction of any court, all cases transferred to the Court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015 (ord. 6 of 2015), shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the Court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that Court under sub-section (1) and such complaint is pending in that Court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same Court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that Court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the Court, such Court shall transfer the case to the Court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015 (ord. 6 of 2015), before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

9. Hon'ble Apex Court in paragraph no.22 of ***Dashrath Rupsingh Rathod (supra),*** observed that in the complaint under Section 138 N.I. Act, where the accused has been summoned and appeared by a Court that has no jurisdiction over that complaint, will be transferred to the Court having jurisdiction. The competent Court will proceed, and all other complaints, including that complaint where the accused has not been properly served, shall be returned to that complaint for filing in proper Court. Paragraph no.22 is being quoted as under:-

"22. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence i.e. applicability to complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged respondent-accused who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other complaints (obviously including those where the respondent-accused has not been properly served) shall be returned to the complainant for filing in the proper Court, in consonance with our exposition of the law. If such complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time-barred."

10. After the judgment of ***Dashrath Rupsingh Rathod (supra),*** an amendment was made in Section 142 by adding Section 142 (2) and Section 142A was inserted by the amendment of the year 2015 in the Negotiable Instruments Act. As per the new Section 142 (2), the jurisdiction to inquire and try was given to that Court where the cheque was delivered for collection through an account.

11. The issue of jurisdiction under 142 N.I. Act was again considered in the case of ***Bridgestone India Private Limited vs. Inderpal Singh, (2016) 2 SCC 75***. In this judgment, the Apex Court observed that an amendment was made in Section 142, sub-section (2), and Section 142-A of N.I. Act will have a retrospective effect, therefore, if the complaint is not filed in the Court, which has no jurisdiction as per Section 142(2) N.I. Act, that complaint would be transferred to the Court having jurisdiction. Paragraph nos. 13, 14 and 15 of ***Bridgestone India Private Limited (supra)*** are being quoted as under:-

"13. A perusal of the amended Section 142(2), extracted above, leaves no room for any doubt, specially in view of the Explanation thereunder, that with reference to an offence under Section 138 of the Negotiable Instruments Act, 1881, the place where a cheque is delivered for collection i.e. the branch of the bank of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction.

14. It is, however, imperative for the present controversy, that the appellant overcomes the legal position declared by this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142-A was inserted into the Negotiable Instruments Act. A perusal of sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non obstante clause in sub-section (1) of Section 142-A. Likewise, any judgment, decree, order or direction issued by a court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied that the judgment rendered by this Court in Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673] would also not non-suit the appellant for the relief claimed.

15. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section 142-A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673] , would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonour of the cheque in the present case arises."

12. Hon'ble Apex court in the case of ***Yogesh Upadhyay and another (supra)***, after relying upon the judgement of ***Bridgestone India Private Limited (supra)***, has been observed that even the Supreme Court can exercise power under Section 406 Cr.P.C., to transfer the cases pending in the Court which has not had jurisdiction to the Court having territorial jurisdiction and also other complaints filed in different Courts to the Court where the first complaint was filed or transferred in the Court having territorial jurisdiction as per Section 142 sub-section (2) of N.I. Act.

13. So far as the contention of learned counsel for the applicants that if the cognizance was taken by a Court that does not have jurisdiction, then after transferring it to the Court having jurisdiction, the Court will have to hear the complaint afresh and has to pass fresh summoning order is concerned, to decide this issue Sections 460, 461 and 462 of Cr.P.C. are relevant, which are being quoted as under:-

"460. Irregularities which do not vitiate proceedings.—If any Magistrate not empowered by law to do any of the following things, namely:—

(a) to issue a search-warrant under Section 94;

(b) to order, under Section 155, the police to investigate an offence;

(c) to hold an inquest under Section 176;

(d) to issue process under Section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190;

(f) to make over a case under sub-section (2) of Section 192;

(g) to tender a pardon under Section 306;

(h) to recall a case and try it himself under Section 410; or

(i) to sell property under Section 458 or Section 459,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

461. Irregularities which vitiate proceedings.—If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:—

(a) attaches and sells property under Section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under Section 133 as to a local nuisance;

(i) prohibits, under Section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-section (1) of Section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under Section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under Section 397, for proceedings; or

(q) revises an order passed under Section 446,

his proceedings shall be void.

462. Proceedings in wrong place.—No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."

14. From a perusal of Section 460 Cr.P.C., it is clear that Section 460 (e) Cr.P.C. provides that if the cognizance of an offence is taken erroneously in good faith under Clause (a) of Section 190 (1) of Cr.P.C. by a Court not having jurisdiction, even then same will not vitiate the proceeding. Again, Section 462 Cr.P.C. also prescribes that no finding, sentence or order of Criminal Court will be set aside only on the ground that inquiry, trial or other proceedings have been arrived at in the wrong Court unless an error has the effect of causing failure of justice.

15. In the present case, on the basis of the complaint, statement and documents on record, cognizance was taken by the earlier Court not having jurisdiction, which was subsequently transferred to the Judicial Magistrate, Orai; this will not in any way occasion a failure of justice to the applicant because transferee court itself has to consider the same complaint and document and pass order on the basis of prima facie satisfaction. Section 461 (k) Cr.P.C. further provides that if the cognizance is taken by a Court which is not competent under Section 190(1)(c) Cr.P.C., only then the cognizance will vitiate the proceeding. However, in the present case, cognizance was taken under Section 190 (1) (a) Cr.P.C., not under Section 190(1)(c) Cr.P.C. Therefore, cognizance will not be vitiated under Section 461 (k) of Cr.P.C.

16. In the present case, the earlier Court of Chief Judicial Magistrate, Jalaun at Orai, after taking evidence on an affidavit under Section 145 N.I. Act summoned the accused persons. Subsequently, accused persons, including applicant no.1, appeared before the Court below. Therefore, in view of the above legal position, the transferee Court will continue to proceed from that stage instead of hearing the complaint afresh.

17. In view of the above, there is no illegality in the impugned order dated 01.02.2024. Therefore, the present application is **dismissed**.

(2024) 5 ILRA 879
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/s 482 No. 9294 of 2023
&
Application U/s 482 No. 1090 of 2023

Dr. Irfaq @ Mohammad Irfaq Husain ...Petitioner

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Abhay Mani Tripathi, Sri Nipun Singh

Counsel for the Respondent:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482 & 125-the applicant challenged the maintenance order granted to his estranged wife and their two minor daughters-the applicant invoking a DNA test report, contended that he was not the biological father of one of the daughters-The court, however, dismissed the applicant's plea for a fresh DNA test and rejected the quashing of the lower court's orders-the court found that the applicant's plea for a DNA test was primarily an attempt to avoid paying maintenance-court directed the applicant to clear any outstanding payments within one month and continue making regular payments henceforth.(Para 1 to 33)

B. Section 112 of the Indian Evidence Act presumes the legitimacy of a child born during a valid marriage unless non-access between the spouses is proven. Bald and unsubstantiated allegations of adultery, without any concrete evidence of non-access, are sufficient to rebut the presumption of legitimacy.(Para 17 to 32)

The application is dismissed. (E-6)

List of Cases cited:

1. Rambhau & anr.Vs St. of Mah. (2001) 4 SCC 759

2. Nand Lal Wasudeo Badwaik Vs Lata Nandlal Badwaik & anr.(2014) 2 SCC 576

3. Deepanwita Ray Vs Ronobroto Roy (2015) 1 SCC 365

4. Priyanka Janardhan Patil Vs Janardhan Raghunath Patil (2022) SCC Online SC 1047

5. Gautam Kundu Vs St. of W.B. (1993) AIR 2295

6. Aparna Ajinkya Firodia Vs Ajinkya Arun Firodia (2023) SCC Online SC 161

7. Ashok Kumar Vs Raj Gupta & ors. (2022) 1 SCC 20

8. Inayat Ali & ors.. Vs St. of Telangana, CRLA No. 1569 of 2022

(Delivered by Hon'ble Rahul Chaturvedi, J.)

[1] Heard Sri Manish Tiwari, learned Senior Counsel assisted by Sri Ausim Luthra and Sri Manu Srivastava, learned counsels for the applicant, Sri Hari Om Rai and Sri Hardev Prajapati, learned counsel for the private opposite party, learned A.G.A. for the State of U.P. at length and perused the records.

Since, the pleadings have been exchanged between the parties and the matter is ripe for final submissions. Keeping in view that the applicant/revisionist are the one and the same person Dr. Ifraq @ Mohammad Ifraq Husain and the gravamen of both the proceedings are almost akin and similar and therefore, for the sake of brevity and convenience, the Court after clubbing both the proceedings, is proposing to proceed and decide by the common judgment.

[2] In the application under section 482 Cr.P.C filed on 24.02.2023, the applicant is Dr. Ifraq @ Mohammad Ifraq Husain who has made Smt. Shazia Parveen his wife, Km. Aleena and her sister Km. Adeeba through her legal guardian Smt. Shazia Parveen as opposite party nos.2, 3 and 4 respectively with the following prayer :-

"Application under section 482 Cr.P.C. and quash the order dated 20.01.2023 passed by learned IIIrd Additional Sessions Judge, Kasganj, in Criminal Appeal No.19 of 2022 (Dr. Ifraq Husan Vs. Smt. Shazia Parveen), Police station-Sector Ganjdundwara, District-Kasganj under section 125 Cr.P.C.
It is further necessary and expedient in the interest of justice that this Hon'ble Court may graciously be pleased to order for a fresh DNA test of the applicant and the respondent no.3 and 4 during the pendency of the present Criminal Misc. Application Under Section 482 Cr.P.C. before this Hon'ble Court."

[3] On 20.02.2023, yet another Criminal Revision was filed invoking the power under section 397/401 Cr.P.C. by the same Dr. Ifraq @ Mohammad Ifraq Husain making aforesaid persons who are his wife and two daughters as respondent nos. 2 to 4 assailing the legality and validity of the orders dated 07.04.2022 passed by learned Gram Nyayalay, Patiali, Kasganj while deciding the case no.100 of 2019 under section 125 Cr.P.C. so preferred by Smt. Shazia Parveen against her husband Dr. Ifraq @ Mohammad Ifraq Husain claiming maintenance by the impugned order, learned Magistrate has awarded desired amount as maintenance to his wife and daughters and when the same was challenged in Criminal Appeal No.19 of 2022 (Dr. Ifraq @ Mohammad Ifraq Husain Vs. Smt. Shazia Parveen), learned IIIrd, Additional Sessions Judge dismissed the criminal revision preferred by the revisionist Dr. Ifraq @ Mohammad Ifraq Husain vide impugned judgment and order dated 30.01.2023.

The prayer sought is as follows :-

"That in view of the aforesaid facts and circumstances, of the present case, it is expedient in the interest of justice that this Hon'ble Court may graciously be pleased to allow this Criminal Revision and set-aside the order dated 07.04.2022, passed by learned Gram Nyayalaya, Patiali, Kasganj in Case No.100 of 2019(Smt. Shazia Parveen and others Vs. Dr. Ifraq) under section 125 Cr.P.C. and also the order dated 30.1.2023 passed by III Additional Sessions Judge, Kasganj in Criminal Appeal No.19 of 2022 Police station-Dundwara, District-Kasganj.

It is further necessary and expedient in the interest of justice that this Hon'ble Court may graciously be pleased to stay the effect and operation of order dated 07.04.2022 passed by learned Gram Nyayalaya, Patiali, Kasganj in case no.100 of 2019 (Smt. Shazia Parveen and others Vs. Dr. Ifraq) under section 125 Cr.P.C. and also the order dated 30.1.2023 passed by III Additional Sessions Judge, Kasganj in Criminal Appeal No.19 of 2022 Police station-Dundwara, District-Kasganj during the pendency of the present Criminal Revision before this Hon'ble Court."

[4] Before dissecting the facts and grounds of the case, it is essential and imperative to introduce the parties and the background of the case so as to understand the controversy involved and its better appreciation.

The applicant Dr. Ifraq @ Mohammad Ifraq Husain is the husband of Smt. Shazia Parveen (opposite party no.2) and father of opposite party nos.3 and 4 who are the minor daughters of the aforesaid couple during subsistence of their marriage.

The marriage of Dr. Ifraq @ Mohammad Ifraq Husain and Smt. Shazia Parveen was solemnized as per Muslim rites and customs on 12.11.2013. This married couple and their inter se relationship lasted up to the year 2017 and thereafter, she started residing with her parents on account of maltreatment received by her from her own husband and in-laws, as a result of scanty dowry.

[5] On 09.07.2019, she insisted to be maintained by her husband and therefore, the proceeding under section 125 Cr.P.C. was initiated against her husband claiming maintenance for herself and for her two minor daughters. After institution of the proceedings, learned trial Judge on 04.12.2019, have passed an ex-parte judgment and order against her husband fixing certain amount of monthly maintenance. It is asserted by the husband that this ex parte order was passed behind his back and without having any knowledge.

Left with no other option, an Application under section 126(2) Cr.P.C. was moved by the applicant, that as soon as he came to know about the proceedings, he moved a recall application and the said application was eventually allowed at the cost of Rs.5,000/- in favour of the private respondents.

[6] While aforesaid proceeding was pending before Gram Nyayalaya, Patiali, Kasganj, father-Dr. Ifraq @ Mohammad Ifraq Husain surreptitiously and without any knowledge or consent has taken the samples of her daughter to ascertain the paternity of those minor girls and has obtained a DNA report from DNA Labs India Genetic Research and Development Centre, Hyderabad on 15.10.2018. This indeed was shocking that the applicant, taking advantage of his profession as a doctor, has

managed to extract sample of two minor daughters aged about 5 years and 7 years respectively. The underline idea for this exercise was to anyhow avoid maintenance of two young girls, if it is found that applicant is not their father. The said report was filed by means of an Application No.43B dated 17.12.2021 and the learned Magistrate vide order dated 02.03.2022 have passed an order, directing that the said DNA Report from DNA Labs India Genetic Research and Development Centre, Hyderabad be kept on record and the objections were invited from the wife.

[7] Despite of the fact that the sufficient material were placed before learned Gram Nyayalaya, Patiali, Kasganj, learned Magistrate on 07.04.2022 pleased to allow the amount of maintenance to all the three namely Smt. Shazia Parveen from the date of filing of application for Rs.4,000/- and from the date of order for Rs.10,000, Km. Aleena from the date of application for Rs.3,000/- and from the date of order for Rs.5,000/-, Km. Adeeba from the date of application for Rs.3,000/- and from the date of order for Rs.5,000/-.

[8] Dissatisfied by the aforesaid judgment, Dr. Ifraq @ Mohammad Ifraq Husain has preferred Criminal Appeal No.19 of 2022 before the Sessions Judge Court No.3, Kasganj against judgment and order dated 07.04.2022 and also an application 21B moved under section 391 Cr.P.C. during the pendency of the same seeking a DNA analysis of his minor daughters, opposite party nos.3 and 4.

[9] The said appeal was rejected by the learned Sessions Judge by a well reasoned order on 30.01.2023 and the prayer for collecting the additional evidence in the shape of ordering the DNA profiling of her daughters.

[10] The aforesaid are the bare skeleton undisputed facts and thus, the Court is proposing to decide by the common judgment after clubbing both the proceedings.

[11] As it is evident from the name, the applicant/revisionist-Dr. Ifraq @ Mohammad Ifraq Husain is a medical practitioner. From the pleadings, it has come out that the applicant Dr. Ifraq @ Mohammad Ifraq Husain got married with opposite party no.2 on 12.11.2013. It is alleged that after the marriage, she was subjected to dowry related harassment and there was demand of Rs.5 lacs and motorcycle from the opposite party no.2 or her family members and on this score, she was constant target of humiliation, innuendos and sometimes, she was subjected to physical assault upon her by her husband and in-laws. Even though, she has given birth to two baby daughters on the different occasions. Giving birth to two daughters have escalated the miseries upon her, as such eventually in the year 2017, she was driven out/left from her marital place.

[12] As mentioned above, she has initiated the proceeding under section 125 Cr.P.C on 14.12.2019 and the same was ex-parte allowed in favour of opposite party no.2. However, the said order was recalled in exercise of power under section 126(2) Cr.P.C. imposing cost of Rs.5,000/-.

[13] On 18.01.2021, husband has filed detailed objection stating therein that the opposite party no.2 has left the marital home because the applicant was unable to

fulfil her exorbitant demands and her demand for separate living. It is alleged that the applicant has divorced her as she was involved in extra-marital relationship with a boy Saleem. Not only this, applicant-Dr. Ifraq @ Mohammad Ifraq Husain is not a biological father of one of the girl relying upon the so-called DNA report dated 15.10.2018.

[14] After getting convinced, the applicant-Dr. Ifraq @ Mohammad Ifraq Husain using his medical skills, in a clandestine fashion, has taken out the sample from his minor daughter Km. Aleena claiming that he is not his biological father and sent the said sample for the DNA profiling. The sample were sent to DNA LABS India Genetic Research and Development Centre, Hyderabad on 15.10.2018 and the said result of the DNA profiling is as follows :-

"The alleged father is excluded as the biological father of the tested child. Based on testing results obtained from analysis of the DNA loci listed, the probability of Paternity is 0." meaning thereby the applicant is not a biological father of the aforesaid girl.

The applicant wanted to bring on record the DNA report and other co-related documents in the proceedings. Accordingly, the aforesaid application was taken on record. However, time was granted to opposite party no.2 to file its rebuttal by the next date fixed.

[15] The said DNA report from Hyderabad Lab was filed by the applicant before the learned Magistrate and vide order dated 02.03.2022, the said report was taken on record by the order of the concerned Magistrate by the application no.43B.

Thus, the entire tussle is to direct the opposite party no.2, 3 and 4 to give its samples by the order of the Court so that the paternity of the girl may be established.

Section 391 of Cr.P.C. and its applicability

The Court has an occasion to peruse the provisions of Section 391 of Cr.P.C. which reads thus :-

"391. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

[16] On a plain reading of the aforesaid provision, it empowers the Appellate Court to take further evidence or direct it to be taken. The catch expression of this provision **is "…..the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and ……..." .**

While elaborating the aforesaid expression, it is evident that it is the complete and undiluted judicial discretion of

the Appellate Court that such additional evidence is necessary. It is not, either of the contesting parties may pre-empt or suggest that the additional evidence is required in this case. As it is evident from the expression itself that in the event, the Appellate Court so feels or decides to have additional evidence, he shall record its reason for doing so and then only ask for the additional evidence. In the judgment of ***Rambhau and another Vs. State of Maharashtra***, reported in ***2001 4 SCC 759***, it is said that there is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 Cr.P.C. But this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. However, it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard. Section 391 Cr.P.C. was introduced in the statute-Book for the purpose of making it available to the Court, not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer." Needless to mention here that it is exclusive domain of Appellate Court to have or not to have such additional evidence. None of the parties before him can compel the Appellate Court to give directions in this regard.

[17] Any insistence by the appellant would be construed that he is stepping in the shoes of the Appellate Court or usurping the powers of the Appellate Court to give a direction to the Appellate Court so that a DNA profiling of two young daughters may be done as the applicant is under some unfounded impression ? that he is not their biological father. The Appellate Court should not have exercised this power to clear off the perception of appellant exercising his powers under section 391 Cr.P.C. This is not a true import of Section 391 Cr.P.C. as it is evident from the aforesaid observation by the Hon'ble Apex Court in the case of ***Rambhau's case (supra)*** and the learned Magistrate and learned Appellate Court has rightly rejected the application under section 391 Cr.P.C.

As mentioned above, when the matter was pending before the Gram Nyayalaya, Patiali, Kasganj, the applicant using his profession, has managed to take out a blood samples of his own blood and blood of his daughter Aleena and sent it to DNA Labs India as it is evident from its report, that by the order of Dr.Ifraq, this DNA report entitling "Personal Piece of Mind Paternity Test" was conducted to establish as to whether the applicant is biological father of a girl or not and after holding the so-called test by the DNA Labs India, has given its report "The allged father is excluded as the biological father of the tested child. Based on testing results obtained from analysis of the DNA loci listed, the probability of Paternity is 0".

Since, the said report was conducted by the order of applicant-Dr. Ifraq @ Mohammad Ifraq Husain and not at the behest of any judicial order and therefore, no importance could be attached to the said application and that is the reason behind requesting the Appellate Court to exercise its power under section 391 Cr.P.C. to hold a DNA profiling of his daughter-Aleena.

[18] Per contra, Sri Hari Om Rai, learned counsel for the respondent has drawn the attention of the Court to Section 112 of Evidence Act, which reads thus :-

112. Birth during marriage, conclusive proof of legitimacy.

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The aforesaid provision of Evidence Act is in two parts. (i) a person was born during the continuation of valid marriage between his mother and any man or within 280 days after its dissolution, and the mother is remained unmarried, then it shall be a conclusive proof that he is a legitimate son of that man ;(ii) Unless it can be shown that the parties to their marriage has no access to each other at any time when he could have been begotten.

The Section is based on the principles that when a particular relationship such as marriage, is shown to exist, then its continuation must prima facie be presumed under the section of fact that any person was born :-

(I) During the continuation of valid marriage between the mother and any man

OR

(ii) Within 280 days of its dissolution and the mother remain unmarried, shall be conclusive proof that he is legitimate son of that man unless the parties had no access to each other at any time when he could have begotten.

The evidence that a child is born during wedlock is sufficient to establish its legitimacy and shift the burden of proof to the parties seeking to establish the contrary.

The presumption under this Section is conclusive presumption of law which can be displaced only by the proof of non access between the parties to the marriage at a time when according to the ordinary course of nature, husband could have been the father of the child. This expression conclusive proof " is used in the section means proof as lay down under section 4 of the Indian Evidence Act. Access and non-access connote existence and non-existence of opportunities for marital intercourse.

It is the principle of law that "Odiosa et inhonesta non sunt in lege prae sumenda" (Nothing odious or dishonourable will be presumed by the law). So the law presumes against vice and immorality. One of the strongest illustrations of the principle, is the presumption in favour of legitimacy of children in a civilized society. But, where illegitimacy seems as common as marriage and legitimacy, a presumption of legitimacy cannot be drawn and legitimacy or illegitimacy will have to be proved like any other fact in issue."

The provision of Section 112 of Indian Evidence Act is based on principles. ***Peter est quem nuptiae demonstrant****(father is one whom marriage indicates). When child was born during valid marriage, it is a conclusive proof of its legitimacy unless strong and cogent evidence is led to prove otherwise.*

[19] By dissecting the aforesaid provision of Section 112 of Evidence Act, it reveals that :

(a) During the continuation of a valid marriage between his mother and any man

;

(b) Within 280 days after its dissolution, the mother remain unmarried ;

(c) Unless it can be shown that the parties to the marriage had no access to each other

[20] The presumption as to paternity in this section only arises in connection with the offspring of the married couple. The section applies to legitimacy of children of a married person only, On the birth of child during marriage, the presumption of legitimacy is conclusive no matter how soon the birth occurs after the marriage.

The section does not lay down the maximum period of gestation and therefore, does not bar the proof of legitimacy of a child born more than 280 days after dissolution of marriage, the affect of section being nearly that no presumption in favour of legitimacy is raised and question must be decided simply upon the evidence for and against legitimacy. A person born within 280 days after the death of his father, is presumably legitimate son when a person claims under this section, to be a son of deceased person, he must prove that he was born within 280 days after the death of his father.

Under this section, child born in a wedlock, should be treated as a child of the person who was, at the time of his birth, the husband of mother unless it is shown that he had no access to the mother at the time of its conception. Quite irrespective of the question whether the mother was married woman or not at the time of conception, where the wife was pregnant on the date of marriage and the husband had no access to the wife before the marriage, there was no question of calling aid the presumption under Section 112 of Evidence Act. By "having no access" is meant having no opportunity of sexual intercourse and in order to displace the conclusive presumption, it must be shown that no such opportunity occurred down to a point of time so near to the birth as to render paternity impossible. To rebut the legal presumption under this Section, it is for those, who dispute the paternity of a child, to prove non-access of the husband to his wife during the period when with respect to the date of its birth, it must, in ordinary course of nature, have been begotten. Mere fact that husband and wife were residing separately in the close proximity of the distances, is not a sufficient proof of non-access.

[21] The Supreme Court observed that the presumption which under section 112 of Evidence Act contemplates, is conclusive presumption of law which can be displaced only by the proof that the particular fact mentioned in the Section, namely, non-access between the parties to the marriage at the time when according to ordinary course of nature, the husband could have been the father of the child. Non-access can be established not merely by positive or the direct evidence, it can be proved undoubtedly like any other fact by evidence, either direct or circumstantial which is relevant to the issue, though as presumption of legitimacy is highly favoured by the law, it is necessary that proof of non-access is clear and satisfactory. The non-access would include incapability of access on account of impotency, want of virility or masculinity because of immature age or other physical incompetency.

Sri Manish Tiwary, learned counsel for the applicant while buttressing his contention, has relied upon the following citations in his favour :-

(i) Nand Lal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another reported in (2014) 2 SCC 576 ;

(ii) Deepanwita Roy Vs. Ronobroto Roy reported in (2015) 1 SCC 365;

(iii) Priyanka Janardhan Patil Vs. Janardhan Raghunath Patil reported in 2022 SCC Online SC 1047 ;

[22] Let us examine the aforesaid cases one by one. In paragraph no.14, in ***Nand Lal Wasudeo Badwaik*** case, the Hon'ble Apex Court, in no uncertain terms, have clearly spelled out that a child born during the continuation of a valid marriage, shall be conclusive proof that a child is a legitimate child of a man to whom the lady giving birth as married. The provision makes legitimacy of a child to be a conclusive proof if the condition aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage had no access to each other at any time when the child could have begotten. Paragraph no.16, 17 and 18 of the aforesaid judgment deserves special by the Court, which is quoted hereinbelow :-

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

[23] Adopting the aforesaid ratio of the aforesaid case of ***Nand Lal Wasudeo Badwaik***, the case of ***Deepanwita Roy's(supra)*** was also decided. While

deciding the case of Deepanwita Roy, the Court has adopted the reasoning in toto.

The Court has occasion to peruse the facts of the aforesaid case in which Lata Nand Lal Badwaik has filed an application under section 125 Cr.P.C. claiming maintenance for herself and his daughter inter alia alleging that she started living with her husband from 20.06.1996 and stayed with him for about two years and during that period, she got pregnant from the applicant. She was sent for delivery at her parent's place where she has given birth to a baby girl. However, this claim of the girl was resisted by her husband and also denied that the baby girl does not belong to him. According to her husband, he has got no physical relationship with his wife. The Court while allowing the maintenance at the rate of Rs.900/- to the wife and Rs.500/- to the daughter on 10.01.2011, passed an order and under the directions of the Court, the DNA test was carried out in which, it has come out that the appellant Nand Lal Badwaik is excluded to be the biological father of Neha Nand Lal Badwaik, baby girl. The Court has given direction to conduct her DNA test.

However, it is evident that comparing the facts of the present case, is entirely different from the aforesaid case as there is no order by any of the learned court below to go for any DNA test as there is no pleading of non-access by the husband/applicant with her wife Ms. Shazia.

[24] In the present case, as mentioned above, the prayer is to quash the order dated 20.01.2023 passed by IIIrd Additional Sessions Judge, Kasganj while deciding the Criminal Appeal No.19 of 2022 Dr. Ifraq @ Mohammad Ifraq Husain Vs. Smt. Shazia Parveen, Police Section-Sector Ganjdundwara, Kaganj, under section 125 Cr.P.C. and also order for fresh DNA test of the applicant, respondent nos.2 to 4 in the present case.

The details of the present case has already been spelled out in the earlier part of the judgment which needs no repetition. However, it is clear that the marriage between the applicant and respondent no.2 was solemnized as per Muslim rites on 12.11.2013. On account of scanty dowry, she was subjected to cruel and inhuman treatment. Resultantly, she was compelled to leave the company of her husband in the year 2017. During the subsistence of the marriage, she gave birth to two baby girls namely Km. Aleena and Km. Adeeba. In paragraph no.12 of the petition, it has been mentioned that opposite party no.2 was leading adulterous life as counter allegation upon the chastity of his wife, and, therefore, in a most clandestine fashion without taking consent of opposite party no.2, Ms. Shazia Parveen or her daughter Km. Aleena, taken the relevant sample and sent for DNA Labs India Genetic Research and Development Centre, Hydrabad to check his paternity, while taking the advantage of his profession, and obtained the certificate that the applicant is not a biological father of opposite party no.3, Km. Aleena.

There is no order of the Court to conduct such test. The interesting feature of this case is that in the entire pleading of the case, there is not a whisper that the applicant has got no access to his wife during the subsistence of the marriage i.e. 12.11.2013 to 2017, the date of her desertion from the company of her husband. A bald allegation has been pasted upon his wife that she was leading adulterous life, is of no consequence. The requirement of the law is otherwise. It is the applicant, who has to

establish that during the subsistence of marriage, he has got no access to his wife which has resulted to the birth of two baby girls. After she diserted the company of her husband, one fine morning, a brain wave attached the applicant and he has managed to take the samples in a surreptitious way without any information or consent and sent the aforesaid sample to the Centre. The report from the aforesaid DNA Centre is the base on which he wants to shun away from his responsibility of her father. As mentioned above, there is not a whisper in the entire pleadings that the applicant has got no access to his wife during this period.

[25] In a celebrated judgment in the case of ***Gautam Kundu vs. State of West Bengal AIR 1993 2295***, Hon'ble the Apex Court has boiles down following conditions :-

(1) that courts in India cannot order blood test as matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong primafacie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.

Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly Criminal Appeal will stand dismissed. Cr, M.P.No. 2224/93 in S.L.P.(cr No. 2648/92 filed by Respondent No. 2 will stand allowed. She is permitted to withdraw the amount without furnishing any Security.

[26] Weighing the facts of the present case, with the aforesaid guidelines, it goes without saying that the base of the entire case, the said DNA report obtained by the applicant is nothing but a trash and cannot be relied upon. The DNA test cannot be ordered as a matter of course. There must be strong prima facie case that husband must establish non-access with his wife in order to dispel the presumption under section 112 of the Evidence Act and the Court has to weigh on an iron balance, far reaching implications and consequence ordering the blood test/DNA test, whether it will affect of branding a child as a bastard and the mother as unchaste woman. No one can be compelled to give sample of the blood for analysis. On these parameters, the applicant has failed to establish or even plead in his pleadings that he has got no access to his wife during subsistence of marriage from 12.11.2013 to the year 2017. Mere making a baseless and bald allegation that his wife is an unchaste woman, leading adulterous life, would have no consequence and would be construed that this crude attempt on his part, is nothing more than to avoid payment of maintenance to the kids.

[27] In the recent case of ***Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia*** reported in ***2023 SCC Online SC 161***, Hon'ble the Apex Court has examined this

tricky legal question from the point of view of a young boy or girl and its adverse impact on the psyche of that boy, whose legitimacy is under challenge by none other than his own father. In this small world, where every information is one's finger tip, the child has to quest to find out his real father. He also has to cope up with confused state of mind whether a person to whom he considers his father is shunning away and anyhow wants to get rid of this relationship.

It is undeniable that the finding as to illegitimacy, if revealed in the DNA test, would at very least adversely effect the child's tender mind. It can cause not only confusion in the mind of the child but quest to find out who the real father is and a mixed feeling towards to a person who may have nurtured the child but is not a biological father. Not knowing who is one's father, would create a mental trauma in that child. One can imagine if after coming to know the identity of the biological father, what greater trauma and stress would impact on a young' s mind proceeding which are in realm have a real impact on not only child but also on the relationship between the mother and the child itself, which is otherwise sublime. It has been said that the parent of a child may have illegitimate relationship but a child borne out of such relationship cannot carry a stamp of illegitimacy on his forehead. As such, a child has no role to play in its birth. An innocent child cannot be traumatized and subjected to extreme stress and tension in order to discover its paternity and that is why Section 112 of the Evidence Act speaks about the conclusive presumption regarding the paternity of the child subjected to rebuttal as provided in the second part of the aforesaid Section. A child should not be lost in its search of paternity. The precious childhood and youth cannot be lost in quest to know one's paternity. Therefore, the wholesome object of Section 112 of Evidence Act which confers the legitimacy of the child born during the subsistence of valid marriage subjected to the same being rebutted by strong and cogent evidence and perceived. Children of today are citizens and the future of a nation. The confidence and happiness of a child who is showered with love and affection by both parents is totally distinct from that of a child who has no parents or has lost a parent and still worse, is that of a child whose paternity is in question without there being any cogent reason for the same. The plight of a child whose paternity and thus his legitimacy, is questioned would sink into a vortex of confusion which can be confounded if Courts are not cautious and responsible enough to exercise discretion in a most judicious and cautious manner. following paragraph are relevant for consideration of the present case which are as follows :-

"Indian Law has proceeded on the assumption that parents are persons who beget a child or who assume the legal obligations of parenthood through formal adoption of child. Under the Indian legal spectrum, a husband is strongly presumed to be the father of a child born to his wife. Thus, there is a strong presumption regarding the paternity of a child. This presumption can be overcome only by evidence precluding any procreative role of the husband, such as by showing that the husband and wife had no access to each other at the relevant time of possible conception. In the absence of proof of non-access, the law considers the husband's paternity to be conclusively established if they cohabited when the child was likely to have been conceived. By allowing rebuttal with proof, that the husband could not have been the biological father, the marital presumption was implicitly premised, in

part, on a policy linking parenthood with biological reproduction and on an assumption about the probability of the husband's genetic contribution. The presumption protects social parentage over biological parentage. Scientific proof now makes it possible to know with virtual certainty whether a man is genetically related to a child. As a result, Courts are routinely confronted with husbands seeking to disavow their paternity based on newly acquired DNA evidence, notwithstanding them having long performed the social role of father to a child. The short question in the present appeal is as to how a Court can prevent the law's tidy assumptions linking paternity with matrimony, from collapsing, particularly when parties are routinely attempting to dislodge such presumptions by employing modern genetic profiling techniques."

[27] Further, questions surrounding paternity have a significant impact on the identity of a child. Routinely ordering DNA tests, particularly in cases where the issue of paternity is merely incidental to the controversy at hand, could, in some cases even contribute to a child suffering an identity crisis. It is also necessary to take into account that some children, although born during the subsistence of a marriage and on the desire and consent of the married couple to beget a child, may have been conceived through processes involving sperm donation, such as intrauterine insemination (IUI), in-vitro fertilisation (IVF). In such cases, a DNA test of the child, could lead to misleading results. The results may also cause a child to develop a sense of mistrust towards the parents, and frustration owing to the inability to search for their biological fathers.

Further, a child's quest to locate its biological father may compete with the right to anonymity of the sperm donor. Having regard to such factors, a parent may, in the best interests of the child, choose not to subject a child to a DNA test. It is also, antithetical to the fundamentals of the right to privacy to require a person to disclose, in the course of proceedings in rem, the medical procedures resorted to in order to conceive.

[28] Hon'ble Supreme Court while deciding the aforesaid judgment, has declined to grant any permission to carry out desired DNA test of the boy Master 'X' on the ground that the case of respondent-husband is that if the DNA test is allowed, and the same reveals that he is not a biological father of Master 'X' as a corollary, it would be proved that appellant's wife committed adultery, we do not find favour with the approach suggested by the respondent husband to prove adultery on the following reasons:-

i. It is not in dispute that Master "X", the son stated to be born to the Appellant-wife from the wedlock, was born in the year 2013. DNA testing, cannot be used as a short cut to establish infidelity that might have occurred over a decade ago or subsequently after the birth of Master "X".

ii. In the circumstances of the present case, we are unable to accept that a DNA test would be the only way in which the truth of the matter can be established. The respondent-husband has categorically claimed that he is in possession of call recordings/transcripts and the daily diary of the appellant, which may be summoned in accordance with law to prove the infidelity of the appellant. Therefore, it seems to us that the respondent is in a position to attempt to make out a case based on such evidence, as to adultery/infidelity on the part of the appellant.

iii. No plea has been raised by the respondent-husband herein as to non-access in order to dislodge the presumption under Section 112 of the Evidence Act. Therefore, no prima-facie case has been made out by the respondent which would justify a direction to conduct a DNA test of Master "X".

iv. No adverse inference can be raised in the instant case regarding the legitimacy or paternity of Master "X" vis-Ã -vis the appellant herein, on her declining to subject Master "X" to a paternity test. Further, on the appellant declining to subject Master "X" to a paternity test, no adverse inference can be drawn as regards the alleged adultery on the part of the appellant herein can be raised. In our view, the allegation of adultery has to be proved by the respondent herein de hors the issue of paternity of Master "X".

[29] Imbibing and accepting the aforesaid reasoning in toto, this Court is also of the view that kids who were born during the subsistence of marriage in between 2013-17 and the applicant, at no point of time, have ever pleaded in his pleadings that he has got no access to cohabitate with his wife, then in order to facilitate the applicant, if DNA test is being ordered, and God forbid if the result goes otherwise that would lead to disastrous results, not only putting a question mark upon the life of a mother and the child who has got no say in this incident. The inter se relationship between the husband and the children would seriously be jeopardized and would lead to a picture where nobody would be a gainer. More particularly when there is no pleading regarding any non-access by the applicant in the company of the applicant.

In yet another judgment in the case of ***Ashok Kumar Vs. Raj Gupta and others*** reported in *(2022) 1 SSC 20* while underlying the power and the duty of the Court to decide the case on such other evidence, adverse inference from the refusal to undergo DNA tests, held that in a circumstances where other evidences is available to prove or dispute the relationship, the Court should ordinarily refrain from ordering blood test like DNA test against the will of the party who is to be subjected to such test. It is burden upon the litigating party to prove his case adducing evidences in support of his plea and the Court cannot compel the party to prove his case in the manner suggested by the contesting parties subject to the drawing of adverse inference, if so warranted in the facts of the case. Whether the DNA test should be permitted on the child is to be analysed through the prism of the child and not through the prism of the parent. The child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open for the husband to prove by otherwise evidence, the adulterous conduct of his wife but the child's right to identity should not be allowed to sacrifice.

What comes out of the DNA test is the main product, is the paternity of the child which is subjected to a test. Incidently, the adulterous conduct of the wife also establishes as a by-product Though, the very same process. To say that the wife should allow the child to undergo the DNA test, to enable the husband to have a benefit of both product and the by-product or in alternative the wife should allow the husband to have a benefit of the byproduct by invoking Section 114 of the Evidence Act, if she denies not to subject child a DNA test, is really to leave the choice between the devil and the deep sea to the wife.

[30] In this piquant situation, where the wife and his child's dignity and honour

is at stakes, the Court should doubly sure and should not pass an order in a routine way or rather exceptionally.

Even otherwise, in such a circumstances, if the DNA test is being carried out in a normal routine way, it would open the pandora's box for the unscrupulous husbands to challenge the paternity of their off springs. In fact, DNA test should be at the last resort. Its the liability of the husband to establish the fact that he has got no access to his wife or for any physical reason he is permanently incapacitated to cohabitate with his wife.

[31] The presumption of legitimacy of a child can only be displaced by strong preponderance of the evidence and not merely by balance of probabilities, but at the same time, the test of preponderance of probability is too light as that might expose many children to the peril of illegitimised. If a Court declares that husband is not a father of his wife's child, without tracing out his real father, the fall out on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundance caution as a matter of public policy, law cannot afford to allow such consequences befalling an innocent child on the strength of mere tilting of probability. Its corollary is the burden of plaintiff husband should be higher than standard of preponderance of probabilities. The standard of proof in such case must at least be of a degree in between two as to ensure that there was no possibility of child conceived to plaintiff husband.

Last but not the least ***Inayat Ali and ors. Vs State of Telangana*** in Criminal Appeal No.1569 of 2022 decided on 15.09.2022, it has been observed that merely because something is permissible under the law, cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical anatomy of a person. Consequence thereof would not be confined to the question as to whether such an order would result in a testimonial compulsion but it encompass the right of privacy as well. Such direction would violate the privacy right of the person subjected to such test and could be prejudicial to the future of two children who were also sought to be brought within the ambit of trial Court's direction. Therefore, judgment and order of High Court was set-aside by the Hon'ble Apex Court.

[32] In the light of above discussion, where there is serious differences and disputes between the appellant and opposite party no.2 and they have decided to part with their relationship in the 2017 then, as mentioned above, in order to avoid the award of maintenance to the opposite party no.3 Ms. Aleena, this gimmickry in the shape of DNA Report, was conducted at the behest of the appellant who on his own in a clandestine fashion, taken out the samples and obtained a report from DNA Lab India, Hyderabad that he is not a biological father of the opposite party no.3. This test report as mentioned is simply a trash and cannot be relied upon nor any order for conducting a de novo DNA report could be ordered in the absence of any pleading regarding non-access of applicant with his wife-opposite party no.2 during last four years of subsistence of marriage. The Court would rather presume otherwise, unless the applicant must establish the fact either directly or by circumstances that his wife was unchaste woman, leading an adulterous life. Then, only if Court finds it

necessary, may in exceptional circumstances, direct the DNA test. Making a bald and whimsical allegation upon the chastity of his wife, is not only derogatory but also an attempt to avoid to pay the maintenance amount.

Therefore, the Court is declined to grant any relief to the applicant- Dr. Ifraq @ Mohammad Ifraq Husain to quash the order dated 20.01.2023 passed by IIIrd Additional Sessions Judge, Kasganj in Criminal Appeal No.19 of 2022 under section 125 Cr.P.C. or grant any fresh direction to hold a fresh DNA test of the applicant and respondent nos.3 and 4 for the reasons mentioned above. In addition to this, the prayer sought in the Criminal Revision 1090 of 2023 to set-aside the order dated 07.04.2022 passed by learned Gram Nyayalaya, Patiali, Kasganj in Case No.100 of 2019 Ms. Shazia Parveen Vs. Dr. Ifraq @ Mohammad Ifraq Husain and also the order dated 30.01.2023 passed by IIIrd Additional Sessions Judge, Kasganj cannot be granted for the reasons mentioned above. Both the petitions is devoid of merit and accordingly dismissed by instant composite judgment.

[33] It is further directed that applicant would clear off all the outstanding (if any) pursuant to above orders, within a period of one month from the production of certified copy of this judgment and the applicant shall keep on paying the amount, from the first fortnight of every month starting from 01.07.2024.

(2024) 5 ILRA 894
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/s 482 No. 17464 of 2024

Vijay Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Pandey, Nandini Mishra

Counsel for the Respondent:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 482-Negotiable Instruments Act, 1881-Section 138-challenge to entire proceedings-dishonour of cheque- missing cheque-account closed-this is considered equivalent to insufficient funds in the account, the drawer can be held liable-a statutory presumption arises u/s 139 of the NI Act that the cheque was issued in discharge of a debt or liability-this presumption must be rebutted by the drawer during the trial-The court held that defenses like claims of a missing cheque or disputing the grounds for dishonor ie. Account closed are questions of fact-these issues should be addressed during the trial and cannot be grounds for quashing the proceedings u/s 482 crpc.(Para 1 to 14)

The application is dismissed. (E-6)

List of Cases cited:

1. Electronics Trade & Tech. Devp. Corp. Ltd. Secunderabad Vs Indian Technologists & Engrs (Electronics) Pvt. Ltd. & anr.(1996) 2 SCC 739

2. M/S Modi Cements Ltd. Vs Shri Kuchil Kumar Nandi (1998) 3 SCC 249

3. NEPC Micon Ltd & ors. Vs Magma Leasing Ltd (1999) 4 SCC 253

4. Laxmi Dyechem Vs St. of Guj. (2012) 13 SCC 375

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

1. Heard learned counsel for the applicant and Sri Raj Bahadur Verma, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the summoning order dated 07.02.2024 as well as entire proceeding of Complaint Case No.6594 of 2023 (Rahul Vs. Vijay Kumar), under Section 138 of N.I. Act, Police Station Kotwali, District Ghaziabad, pending in the court of learned Civil Judge (S.D.) F.T.C., Ghaziabad.

3. Opposite party no.2 had filed a complaint against applicant under Section 138 N.I. Act with the allegation that opposite party no.2 had given Rs.3,00,000/- on the request of applicant in the month of October, 2022, thereafter, just to repay that amount applicant issued a Cheque No.737727 dated 04.07.2023 of Rs.3,00,000/- from his account maintaining by him in Shivalika Mercantile Co-operative Bank Ltd. Branch Bhatiya Road, Ghaziabad, same was presented before the bank on 11.07.2023, but the same was returned by the bank on 12.07.2023 with the endorsement 'account closed'. Thereafter, opposite party no.2 sent registered notice on 09.08.2023 to the applicant demanding the payment of cheque amount within 15 days, but applicant has not paid any amount, therefore, the complaint was filed and statement under Section 200 Cr.P.C. was also filed on affidavit and the learned Magistrate on the basis of material on record, summoned the applicant by order dated 07.02.2024 after condoning the delay in filing the complaint by order dated 08.11.2023 which is impugned in the present case.

4. Contention of learned counsel for the applicant is that the cheque in question was missing cheque for which the applicant has already filed a police report on 13.07.2022 and also filed complaint for stopping the payment, but the opposite party no.2 has misused the cheque and filed the complaint, therefore, the cheque cannot be said to be issued in discharge of any liability. The impugned proceeding deserves to be quahsed on this ground itself. Second contention of learned counsel for the applicant is that the cheque in question was returned by the bank with the endorsement 'account closed', not for insufficiency of fund, therefore, no liability under Section 138 of N.I. Act is attracted.

5. Per contra, learned A.G.A. for the State has submitted that the defence raised by learned counsel for the applicant are disputed question of fact, same can be decided during the trial and on this ground proceeding cannot be quashed.

6. After considering the rival submissions of learned counsel for the parties and on perusal of record, this Court is of the view, whether the cheque was missing cheque, this question is disputed question of fact, same can be decided during trial. Even otherwise police complaint regarding missing of cheque was not lodged as per the procedure but a simple application was submitted before S.H.O. of the concerned police station.

7. So far as the second contention of learned counsel for the applicant is concerned, the cheque has been bounced and returned by the bank with the endorsement of 'account closed'.

8. Hon'ble the Apex Court in the case of ***Electronics Trade And Technology***

Development Corporation, Ltd. Secunderabad Vs. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another, reported in ***1996 (2) SCC 739***, observed that if cheque is returned by the bank which was issued in discharge of any liability with the endorsement, (1) 'refer to the drawer of cheque' (2) 'instructions for stop payment' and (3) 'exceeds arrangements'. Even then same will amount to dishonour within the meaning of Section 138 N.I. Act., if the drawer of cheque fails to pay the cheque amount within 15 days from the receiving of demand notice. Paragraph no.5 of judgment passed in the case of ***Electronics Trade And Technology Development Corporation, Ltd. Secunderabad (supra)*** is being quoted as under:-

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, ?refer to the drawer? (2) ?instructions for stoppage of payment? and stamped (3) ?exceeds arrangement?, it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

9. Hon'ble Apex Court in the case of ***M/S. Modi Cements Ltd. Vs. Shri Kuchil Kumar Nandi*** reported in ***(1998) 3 SCC 249***, observed that if the cheque is returned by the bank with the endorsement 'stop of payment', even then the liability under Section 138 N.I. Act will be attracted because of presumption of under Section 139 N.I. Act, when despite receiving the demand notice drawer of cheque fails to pay the cheque amount. Hon'ble the Apex Court also observed in that case if the reason for stop payment is excluded under Section 138 N.I. Act, then same would be contrary to the object of Section 138 and 139 of N.I. Act and that will make Section 138 N.I. Act a dead letter. Paragraph nos.16, 18, 20 and 21 of the judgement passed in the case of ***M/S. Modi Cements Ltd. (supra)*** are quoted as under:-

"16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is intituled as "Of Penalties in Case of Dishonour of Certain Cheques for Insufficiency of Funds in the Accounts" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corpn. Ltd. [(1996) 2 SCC 739 : 1996 SCC (Cri) 454] in para 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on

instructions, Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the statute-book.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corpn. Ltd. [(1996) 2 SCC 739 : 1996 SCC (Cri) 454] (SCC p. 742)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly"

(emphasis supplied)

in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold."

10. Hon'ble Apex Court in the case of ***NEPC Micon Limited and others Vs. Magma Leasing Limited*** reported in ***1999 (4) SCC 253***, observed that if the cheque is returned by bank with the endorsement 'account closed', it would amount to returning the cheque unpaid because the amount of money standing in the account of drawer is insufficient to dishonour the cheque as required under Section 138 of N.I. Act, therefore, it would be sufficient for issuing process under Section 138 N.I. Act. Hon'ble Apex Court also observed that Section 138 of N.I. Act is a penal statute, therefore, it is the duty of Court to interpret it consistent with the legislative intend and purpose to promote efficacy of banking in commercial or contractual transaction. Paragraph nos.14 and 15 of the case of NEPC Micon Limited and others (supra) are quoted as under:-

"14. Lastly, we would refer to the decision by a three-Judge Bench of this Court in the case of Modi Cements Ltd. v. Kuchil Kumar Nandi [(1998) 3 SCC 249] dealing with a similar contention and interpreting Section 138 of the Act. In that case, the Court referred to the earlier

decisions in the case of Electronics Trade and Technology Development Corpn. [Electronics Trade and Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454] and K.K. Sidharthan v. T.P. Praveena Chandran [(1996) 6 SCC 369 : 1996 SCC (Cri) 1340] and agreed that the legal proposition enunciated in the aforesaid decisions to the effect that if the cheque is dishonoured because of "stop payment" instruction to the bank, Section 138 would get attracted. It also amounts to dishonour of the cheque within the meaning of Section 138 when it is returned by the bank with the endorsement like (i) in this case, "referred to the drawer" (ii) "instructions for stoppage of payment" and stamped (iii) "exceeds arrangement". The Court observed that the object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transaction in business on negotiable instruments and to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Thereafter, the Court disagreed with other views expressed in the aforesaid two cases and held that once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The Court further held that it will make Section 138 a dead letter if the contention that by giving instruction to the bank to stop payment immediately after issuing a cheque against the debt or liability, the drawer can easily get rid of the penal consequences notwithstanding the fact that deemed offence was committed. Finally, the Court held that Section 138 of the Act gets attracted only when the cheque is dishonoured.

15. In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above "brush away the cobweb varnish, and shew the transactions in their true light" (Wilmot, C.J.) or (by Maxwell) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited". Hence, when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in Section 138 of the Act."

11. Hon'ble the Apex Court in the case of ***Laxmi Dyechem Vs. State of Gujarat*** reported in ***(2012) 13 SCC 375***, observed that even if a cheque is returned by the bank with the endorsement 'signature differ' even that is sufficient to issue process for Section 138 N.I. Act because after dishonouring the cheque, drawer gets statutory notice giving him opportunity to arrange the payment of amount covered by

cheque and it is only when the drawer despite getting opportunity on receiving said notice failed to make the payment within 15 days, proceeding under Section 138 N.I. Act is initiated.

Paragraph no.16.2 and 17 of the Laxmi Dyechem (supra) is being quoted as under:-

"16.2. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

17. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna case in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in Electronics Trade & Technology Development Corpn. Ltd. The view expressed by this Court in Electronics Trade & Technology Development Corpn. Ltd. that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case10. The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138."

12. From the above legal position, it is clear that if the cheque is dishonoured and returned with following endorsement, then it will be sufficient for prima facie case for issuing process under Section 138 N.I. Act:-

(i) case referred to drawer
(ii) instruction for stoppage of payment
(iii) exceeds arrangement
(iv) insufficient fund
(v) signature differed or mismatch
(vi) account closed

13. Though, despite the above mentioned endorsement by the bank for returning the cheque summoning the drawer of cheque under Section 138 N.I. Act is proper but presumption under Section 139 N.I. Act or disputing the above endorsement on the part

of the bank can always be raised during trial but same cannot be ground for quashing the complaint proceeding at initial stage.

14. In the present case also, the cheque in question was returned by the bank with the endorsement 'account closed', therefore, in view of above legal position, there is no illegality in summoning the application under Section 138 N.I. Act. Therefore, the present application fails and accordingly **dismissed**.

(2024) 5 ILRA 900
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Capital Case No. 17 of 2021

Prem Singh Prajapati ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Smt. Aradhana Singh, Sri Rajiv Lochan Shukla

Counsel for the Respondents:
Sri Ananad Vikram Singh, G.A., Sri Vibhuti Narayan Singh

A. Capital case-Criminal Procedure Code,1973- Sections 374(2) & 366- Indian Penal Code, 1860-Sections 302, 201, 363 & 376AB - POCSO Act,2012 - section 5/6 - appellant challenged the conviction-a two year old girl was sexually assaulted by the appellant and later found dead in the pond-circumstantial evidence i.e. last seen, extra judicial confession and DNA report could not be proved by the prosecution-the forensic report shows that the biological evidence did not conclusively link the appellant to the crime, and the medical report indicates that the victim died of drowning-the appellant argues about insufficient evidence, inconsistencies in witness testimonies, some of whom turned hostile-Held, in view of the detailed finding recorded in the above case the appellant is entitled to get benefit of doubt.(Para 1 to 97)

B. Falsus in Uno, Falsus in Omnibus-The legal doctrine suggests that if a witness is found to have lied on one point, their entire testimony may be disregarded. In this case, witnesses like Akash Sharma and others provided inconsistent statements, raising questions about their reliability. The defense used this doctrine to challenge the credibility of key prosecution witnesses.

C. Proof beyond reasonable Doubt-In criminal cases, especially capital punishment cases, the standard of proof is "beyond reasonable doubt". Any reasonable doubt in the prosecution case must result in acquittal. The defense emphasized that the lack of direct evidence, the contradictions in witnesses statements, the absence of conclusive forensic proof, and the possibility of the child accidentally drowning raise reasonable doubts about the appellant's involvement.

D. Last seen Evidence-the last seen theory implies that the person last seen with the victim is presumed to be involved in the crime unless they can provide an explanation. The theory must be used with caution. In this case, witness, Akash Sharma claimed to have seen the accused with the victim near the pond. The defense questioned the credibility of this testimony, especially since the witness did not immediately report this to anyone and the police did not record this statement promptly.

E. Extra-Judicial confession-extra judicial confessions, if reliable, can be used as evidence. However, they need to be corroborated by other facts and circumstances. In this case, two witnesses,

were supposed to have heard the accused confess to the crime, but both turned hostile and denied making such statements to the police.

The appeal is allowed. (E-6)

List of Cases cited:

1. Dharam Deo Yadav Vs St. of U.P. (2014) 3 SCC 125

2. Mukesh & anr. Vs St. of NCT of Delhi (2017) AIR SC 2161

3. Santosh Kumar Singh Vs St. thru CBI (2010) 9 SCC 747

4. Kamalananth Vs St. of T.N. (2005) 5 SCC 194

5. Bhagwan Das Vs St. of Raj. (1957) AIR SC 589

6. Kamti Devi Vs Poshi Ram (2001) 5 SCC 311

7. Ravi S/o of Ashok Ghumare Vs St. of Mah. (2019) AIR SC 5170

8. Manoj & ors. Vs St. of M.P. (2022) SCC Online SC 677

9. R Vs Dohoney & Adams

10. Javed Shaukat Ali Qureshi Vs St. of Guj. (2023) 9 SCC 164

11. Vadivelu Thevar Vs St. of Madras (1957) 0 AIR SC 614

12. Sharad Birdhichand Sarda Vs St. of Mah. (1984) AIR SC 1622

13. Shivaji Sahabrao Bobade & anr. Vs St. of Mah. (1973) 2 SCC 793

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. eference No. 14 of 2021 has been made by the Court of Additional Sessions Judge/Special Judge (POCSO Act), Bulandshahr for confirmation of capital punishment awarded to appellant Prem Singh Prajapati in Sessions Case No. 1021 of 2020. The Jail Appeal being Capital Case No.17 of 2021 has been filed by the appellant challenging the judgment of conviction dated 9.11.2021 holding the appellant guilty of offence under Section 302, 201, 363, 376 AB of IPC and Section 5M/6 of POCSO Act and the order of sentence dated 10.11.2021, vide which the appellant was awarded death sentence to be hanged till death.

2. he Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri Rajiv Lochan Shukla, learned counsel for the appellant, Sri Bibhuti Narayan Singh, learned counsel for the informant and learned A.G.A. for the State.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. Facts of the case are that informant-Shivam Sharma (PW-1) s/o of Arun Sharma, resident of Village Harnot, Police Station – Shikarpur gave a written complaint to S.H.O. Shikarpur, District – Bulandshahr stating :

"today on 10.4.2020 at about 2.10 p.m. in the afternoon, my niece 'K' (name of the victim is not disclosed) daughter of Ankur Sharma aged about 2 years had gone out to play. She was searched outside but she could not be found. Please register a complaint and search my niece.

Description 1- Age 2 years and 1 month, colour fair, face round, wearing yellow coloured T-shirt and green coloured Kachcha / underwear and light blue coloured slippers.

Dated 10.07.2020
Applicant
Mobile No. 6395011916
Shivam
8859281459
S/o Arun sharma
Village Hirnot
Police Station Shikarpur
Bulandshahr ”

6. On the basis of above written report, Constable Sunil Kumar typed the chick F.I.R. under Section 363 of IPC and case was registered on 10.7.2020 at 19:07 hours on receiving information in the Police Station vide G.D. Number 044.

7. The distance from the place of occurrence to the Police Station was reported to be 8 kms. The case was handed over to Sub Inspector Sukhpal Singh for investigation.

8. During the investigation, the police conducted the search operation and dog squad was called at the spot to recover the victim. Posters were also pasted for searching the missing girl and intense search was conducted in the nearby houses. The victim was also searched in the nearby temples and mosques etc. Services of divers were taken to search a pond near the house of the victim. Later on, informant and his father informed the Investigating Officer that the dead body of the victim is found in the pond near the house of the appellant-Prem Singh and one Kailash. The dead body was recovered from pond situated at on back side of the Gher (Cattle House) of the father of the appellant. During investigation, it was found that the appellant kidnapped the minor child and by committing rape on her, had thrown her in the pond and she died due to drowning. The dead body was recovered on 12.7.2020. The Panchayatnama was prepared by Sub Inspector Sukhpal Singh on 12.7.2020 at about 11.50 a.m. and it completed at 14.02 pm. The Punchs were Shivam, Akash, Devendra, Ravindra and Kushal Goswami. It was recorded in the Panchayatnama that when police party reached the pond, the dead body of the minor child was floating and her hands and feet were visible. The dead body was recovered from the water and she was identified as victim ‘K’ by the informant and other family members. On physical appearance of the dead body, her eyes were coming out, there was mark of injury on the right side of the face, the teeth were also coming out and the skin was coming out near the vagina. Therefore, as per the opinion of the Panchs, the postmortem of the dead body was got conducted. After the panel of doctors conducted the Postmortem, the DNA sample was sent to find out, if rape was committed and the exact reason of the cause of death.

9. Thereafter, the Investigating Officer prepared recovery memo, collected photographs, a forwarding letter to C.M.O. sample seal etc. and through Constable Satendra Kumar and Lady Constable Jyoti, the dead body was sent for postmortem. The postmortem was conducted by a team of Dr. Sarita Yadav, Dr. Ajay Kumar and Dr. Mukesh Singh at Babu Banarsidas Government Hospital, Bulandshahr on 12.07.2020 at 4.10 p.m. The report was taken by the Investigating Officer. Accused Prem Singh was arrested on 13.07.2020 at 11.30 p.m. His medical examination was done at Community Health Centre, Shikarpur and samples were taken for his DNA profile and DNA Samples of deceased and accused were sent to the Forensic Science Laboratory, Lucknow. The clothes of the accused were also taken in possession.

10. After adding the provisions of the POCSO Act, further investigation was handed over to S.H.O. Umesh Kumar Pandey who recorded the statements of the witnesses and recovered clothes of the accused worn at the time of incident and also prepared the site plan. On completing the investigation, the charge-sheet against accused-Prem Singh Prajapati under Section 363, 302, 201, 376 AB of IPC read with Section 5M/6 of the POCSO Act was submitted before the Court. Thereafter, copy of the charge-sheet was supplied to the accused and charges were framed in the aforesaid section which were read over to the accused. However, he did not plead guilty and claimed trial.

11. In prosecution evidence, Shivam Sharma (PW-1) appeared and stated that age of the deceased 'K' was two years and she was daughter of his real elder brother Ankur Sharma. He knew accused Prem Singh whose house is in front of his Gher (Cattle shed). On 10.7.2020, at about 2.00 pm, his niece 'K' had gone out to play. After some time, they started searching for her but she could not be found. Thereafter, he reported a missing person's report by giving a written complaint to the Police Station -Shikarpur. This witness had given the details of clothes worn by the deceased as per the F.I.R. version. This witness further stated that he had given statement to the S.H.O. after giving aforesaid report raising a doubt on accused Prem Singh, Pushpendra alias Pushi and one Vinod. The Tehrir (written report) given to the Police Station was Ex. Ka-1 which bears his signature and scribed by him. He further stated that dead body of victim was found at about 11.30 am on 12.7.2020 from the pond on the back side of the Gher (Cattle Shed) of accused-Prem Singh. This witness also stated about the injuries visible on the dead body. He stated that the deceased was wearing black coloured string on her left hand and a yellow coloured locket around her neck with a red coloured string. At the time of Panchyatnama (Inquest Report), he was also appointed as Panch and had signed on the Panchayatnama. This witness stated that after the recovery of the dead body, Naresh and Om Prakash told him that Prem Singh Prajapati had committed rape on her niece 'K' and, thereafter, in order to destroy the evidence, he had thrown 'K' in the pond when she was unconscious and, thus, he stated that he had every reason to believe that Prem Singh had committed rape on his niece 'K' and had thrown her in the pond resulting into her death.

12. In cross examination, this witness stated that he had not seen any person taking his niece 'K'. At the time of incident, there were six members who were present at home and PW-1 was also present at home. The pond was 50 yards away from his house. This pond is spread over one bigha of land and was full of water. On receiving the information of missing of minor girl, senior police officers i.e. Inspector General of Police and Senior Superintendent of Police came to the village. The news was published in the newspaper and media and lot of hue and cry was there in the public.

13. This witness stated that he came to know about the missing of the girl at about 2.00 pm and, on 10.7.2021 and 11.7.2021, they searched the minor girl. This witness stated that he was informed by Akash Sharma when he was standing outside his house regarding recovery of the dead body on 12.7.2020 at about 11.30 am and they informed the police. At that time, about 100-150 persons gathered. The police prepared the site plan, however, at the spot,

the police did not record any report and registered the report at 6.00 pm, in the police station. He does not remember if police had done any investigation at the sport or prepared the site plan or recorded any statement of witnesses.

14. He further stated that house of accused-Prem Singh is towards west side of this house. The accused is doing job of plying Horse cart (Tanga). Accused have five children. The witness further stated that he is doing a private job in Delhi, however, after the lock down, he was residing at home. After the girl was found missing, they searched in the house of Girraj, Naresh and Om Prakash. Up to 5.00 pm, he was searching the minor girl along with his parents, grandfather-Atveer Sharma, his uncle's son and villagers. At the time of search, 30-40 persons were there and, thereafter, he went the police station to register the report. This witness stated that after he has raised doubt on Pushpendra alias Pushi, appellant-Prem Singh Prajapati and Vinod, the police arrested them. He stated that he had given this statement of having doubut on Pushpendra alias Pushi, appellant-Prem Singh Prajapati and Vinod to police after one and a half hours of recovery of dead body. Dead body of victim 'K' was seen for the first time by Akash who is son of his father's elder brother. This witness stated that about investigation conducted at the sport, however, stated that in the complaint (Ex.Ka-1), he had not informed the police about raising doubt on Pushpendra alias Pushi, appellant-Prem Singh Prajapati and Vinod. This witness also stated that house of Anil, Kailash and Prem Singh open towards the pond. This witness denied a suggestion that victim 'K' while playing, slipped into the pond and died due to drowning and that Prem Singh has not committed the offence.

15. Arun Sharma (PW-2) deposed that deceased 'K' was his grand daughter who is daughter of his son Ankur Sharma. He know accused Prem Singh Prajapati whose Gher is in front of his Gher. This witness also stated that the complete description as stated by PW-1 regarding clothes worn by the victim at the time when she had gone out of the house, recovery of dead body as well as the injuries which were apparent on her body. He also stated that in his statement, he has raised doubt on Prem Singh, Pushpendra and Vinod. On 12.7.2020 after recovery of dead body, Om Prakash and Naresh, resident of his village, informed him that Prem Singh has committed rape with 'K' and to conceal the offence, he has thrown her in unconscious condition in the pond and she died. He further stated that on the identification of Prem Singh, the police recovered one Baniyan, one nikar, one half shirt worn by Prem Singh and wet earth from the spot. Three small hairs were glued to the Baniyan which was taken in the possession along with one cloth were also taken in. He had signed the recovery memo. In cross examination by defence, this witness stated that Prem Singh is an agricultural labourer and his house is towards south of his house about one and a half k.m. away. Prem Singh is a married person having four daughters, one son and his elder daughter is aged about 9-10 years and remaining daughters are younger to her. The pond from where the dead body was recovered, is spread over two and half bigha of land. He further stated that at the time of incident four members were there in the house. His younger son, Shivam Sharma had gone to Shikarpur. He further stated that his granddaughter in the morning had gone to the house of Naresh to play as his son Kunal aged about seven years has taken his granddaughter to play at about 11:00 a.m., his grand daughter had gone to the house of

Naresh to play and at 1:00 p.m.,Kunal dropped her back. He has informed the S.H.O. about this incident of 'K' going out to play at the house of Naresh but the same is not recorded in his statement. This witness stated that about 3:00 p.m., they started searching for 'K'. They searched her in the house of Kailash, Prem Singh, Giriraj, Vinod and other neighbours. About 25-30 persons including Anil, Rajeev, Bhagwat, Toka, Kailash, Mukesh, Naresh and Om Prakash Sharma also joined in search for the child. After three and a half hours, his son has gone to police station for recording the missing report and police came around 7:00 p.m. and at night I.G. and D.I.G. also reached there.On 10/11.7.2020 the police again came to search 'K'. The missing news was aired on TV and news paper. This witness stated that there is a barbed wire fixed by Prem Singh, Girraj and Vijay Pal for stopping the access to the pond. However, he is not showing to the police. This witness stated that on 10.7.2020 after he has raised doubt on Prem Singh, Pushpendara and Vinod, police arrested them and taken them away. This witness also stated about the injuries seen on the dead body of the victim. On 12.7.2012 after recovery of dead body, Om Prakash and Naresh resident of village informed that Prem Singh has committed rape with victim 'K' and to conceal the commission of offence, he has thrown the victim in a pond when she was unconscious. However, the police has not recorded this fact in his statement. Though, Om Prakash has informed after the dead body of 'K' was received.

16. In his further cross examination, it is stated that about the recovery effected from accused-Prem Singh i.e. T-shirt, Baniyan etc. and he and one Veer Pal signed the recovery memo. He has not seen anyone throwing the victim in the pond. He denied the suggestion that the victim had slipped in the pond and died due to drowning.

17. Om Prakash (PW-3) stated that he knew Prem Singh as well as Ankur Sharma and his daughter deceased 'K'. On 10.7.2020 at about 5:00 to 6:00 pm., he came to know that victim 'K' aged about two years is missing. On 10.7.2020 at about 2:30 p.m., he has not seen deceased 'K' out side the Gher of Giriraj Prajapati and he had no knowledge how victim 'K' has died. This witness was declared hostile and was cross examined by ADGC stated that the pond is spread over of three bigha of land and the water level rise during the rainy season. He stated that the children of Prem Singh are quite young . He also pleaded ignorance if Prem Singh has barbed wire by fixing wooden planks. He further stated that after missing of 'K', many officer of police came to the village. On the date of place he was also present before the Police. The police inquired from the villagers but on that date the police did not enquire from him. Dead body of 'K' was recovered on 12.7.2020 and he had reached at the spot. Naresh has also reached there, he had no information. He denied a suggestion that from his mobile number 7409370572, he informed the SHO as stated in the statement under Section 161 Cr.P.C. He also denied the suggestion given by ADGC that on 10.7.2020, he met on Naresh residents of village and at that time, both of them have seen victim 'K' aged about two years going near the Gher of Giriraj Prajapati or on that date they have also seen Prajapati coming 4-5 steps behind the victim 'K'. This witness also denied that on 12.7.2020, Naresh called him at his house and told that on the date of incident, Prem Singh and Prajapati was going behind the 'K'and no other person was nearby and seen both Om Prakash and Naresh have seen this

incident. They should call Prem Singh and inquired from him. He further denied that thereafter, he and Naresh called Prem Singh and when inquired about the incident, Prem Singh caught hold of feet of both Om Prakash and Naresh and by saying that he had committed wrong. On the date of incident, when 'K' was going back to home, he called her to play with a lamb inside his Gher. Thereafter, he took 'K' in her lap and by laying her down on the floor of the room, he committed wrong with her and when the victim started crying due to pain, he pressed her face and she became unconscious and due to fear, he had thrown her in the pond. This witness denied that he made this statement to the S.H.O. by a making call from his mobile phone.

18. This witness stated that he came to know only two months ago when he received summon from the Court that he is a witness in the case. He stated that neither there is any enmity nor any dispute between the family of the informant and accused Prem Singh and they were having cordial relation. This witness specifically denied that in presence of Naresh and himself, accused Prem Singh has admitted his guilt.

19. In cross examination by defence counsel, he stated that the police never recorded the statement regarding the incident. He further stated that he has no knowledge who has committed the offence with victim 'K'. He also stated that if the child goes towards the ponds, he can slip inside the pond.

20. Naresh Kumar (PW-4) stated that he knew Prem Singh who is the resident of village and also know Ankur Sharma and victim 'K' who went missing on 10.7.2020. He specifically denied that on 10.7.2020, he had seen victim 'K' outside the Gher of Giriraj Prajapati and has no knowledge how she has died. This witness was declared hostile and was cross examined by the public prosecutor. This witness denied all the allegations of making the statement to the S.H.O. that he along with Om Prakash on 10.7.2020 at about 11:00 to 12:00 a.m., he met with Om Prakash outside the Gher of Kailash and have seen victim 'K' in front of Gher, Giriraj Prajapati or that Prem Singh was following her 4-5 yards behind.

21. This witness also denied that on the date of the incident, at about 11:00-12:00 a.m. his son Kunal has dropped victim 'K' back to her home. He has given his mobile no.9720384110 and further stated that he has not made any phone call to the police for giving any information on the basis of which, his statement was recorded. He further stated that on 12.7.2020, he has not met Om Prakash either personally or on mobile phone, he had a talk with him. He or Om Prakash have not given any information to Arun Sharma on the date of incident. This witness further denied that he and Om Prakash called Prem Singh and inquired that on the date of incident, why he was going behind 'K' and if he has committed any offence then Om Prakash caught hold of their feet and admitted he has committed a mistake and has taken victim 'K' to her house on pretext of playing with a lamb and thereafter, he took her inside his Gher and committed the offence by laying her down on the earth. He also denied that Om Prakash informed that when she started crying, he pressed her mouth and she became unconscious and then he has thrown her inside the pond. He also denied the suggestion that in order to help Prem Singh, he is giving false information in cross examination by defence he denied that he stated that he has no information how the 'K' has died.

22. Rakesh Giri (PW-5) deposed that he knew Prem Singh Prajapati, who is resident of his village and also know Ankur Sharma and his daughter victim-K. He had knowledge that on 10.7.2020, the victim-K went missing and then he got information on 12.7.2020 that her dead body was recovered. He stated that on 10.7.2020 he has not seen Prem Singh playing with victim-K and has no knowledge how she died. This witness was declared hostile. In cross examination by ADGC, he gave the description of the location of the house of Prem Singh, the village pond and the house of Arun Sharma. He stated that he had come to the court premises at 10:00 am and met an Advocate who is of from his village and had some talk with him and came to the court. This witness stated that his wife is not maintaining good health and is a heart patient and, therefore, he do not want to be a party to any good or bad with any person. He stated that victim-K went missing on 10.7.2020 and on 12.7.2020 when dead body of victim-K was recovered, he has not given statement to the police. He has come to the fact that he is witness in this case only 4-5 days before. He has not met any senior police officer regarding the case and has not given any statement to the police 3-4 days after the incident, when confronted with the statement under section 161 Cr.P.C, he has stated that he has not given any such statement and gave his mobile number (9758981085) which is recorded in his statement under Section 161 Cr.P.C but stated that he has not given any information to the police from his mobile number. He denied that he has made a statement that he has seen Prem Singh Prajapati playing with victim-K by keeping her in his lap and for that when dead body of the victim was recovered on 12.7.2020, he had reason to believe that the offence is committed by Prem Singh Prajapati. In cross examination by defence, he stated that he has no knowledge who committed offence.

23. Dr. Sarita Yadav (PW-6), a member of the medical board, who conducted the postmortem of the victim-K with the prescription. She stated that the decease had worn T-Shirt, underwear, one locket in yellow metal around her neck, sleepers and there was no stiffens on the dead body. During postmortem, the following injuries were found :-

“ Gynae Opinion
On examination pinkish in colour seen

Distended abdomen eyes ball is coming out from its sockets; hairs detachable, nails detachable, intestine & omentum is coming out through vagina. Skin goozy, skin peeled off a places. Wound present on right face, neck bone exposed & teeth exposed. No mark of external injury seen in all over body. Genital & pelvis injury opinion given by lady Dr. Sarita Yadav.”

Injury present between inner aspect of thigh and vulva – Omentum and intestine is coming out through vaginal orifice. Sample taken.

1. Anal swab
2. Oral swab
3. Vulvae Swab
4. Vaginal Swab
5. Vaginal slide
6. Vulvale slide
7. Scalp hairs
8. Nail of left hand
9. Nail of right hand

Handed over to accompanied Constable for DNA Examination (Sexual violence cannot be ruled out however final opinion reserved pending availability of

F.S.L. report; sexual violence cannot be ruled out)."

24. This witness stated that in her opinion, the deceased has died around 2:30 pm on 10.7.2020. The cause of death was Asphyxia due to drowning. Post mortem report was exhibited as KA-2. This witness stated that the intestine and omentum were coming out of vagina of the deceased and in her opinion, there is strong possibility of committing rape before murder and this can be verified after receiving the FSL report. In cross examination by defence, she stated that the dead body of the deceased was filled with water and there is a possibility that intestine can come out of vagina due to filling up of water in intestine, but if there is possibility of injury on the intestine to come out. It is not possible to give opinion regarding pink colour injury. The same can be caused while fall on a rough place or wood. She stated that she has given a statement to the Investigating Officer that in case of sexual violence, no report can be given till DNA report is received. However, she stated that cause of death was Asphyxia due to drowning. There was no injury on the back, hip or head of deceased.

25. Akash Sharma (PW-7), the main prosecution witness stated that on 10.7.2020 at about 2:00 pm, he was coming back from his field to have lunch, when he reached out side the Gher of Prem Singh Prajapati, he had seen that Prem Singh Prajapati was carrying victim-K in his lap and was going towards the pond in a perturbed condition. There is a wooden plank fixed on the main door and therefore, inside of the Gher is visible. Thereafter, he had food at his home and went to Delhi for some work. He returned back to his village-Hirnot on 12.7.2020 at about 9-10 am, then he got information that victim-K, daughter of Ankur Sharma is missing and the police and the villagers are searching for her. Police recovered the dead body of the victim from a pond on the back side of Gher of Prem Singh Prajapati in his presence. She was wearing one chocolate colour T-shirt, green colour underwear and blue sleepers. The police prepared Panchayatnama and he was also one of the Punch. The original Panchnama was shown to the witness and he identified his signature.

26. This witness stated that he has informed the police that on 10.7.2020 at about 2:00 pm, he had seen Prem Singh Prajapati carrying victim-K towards the village pond situated on back side of his Gher. However, he can not tell why the police has not recorded this in his statement.

27. This witness further stated that he has seen the dead body of the victim and there was an injury mark on the neck and her intestines were coming of her private part. He has every believe that on 10.7.2020 at about 2:00 pm in the afternoon Prem Singh Prajapati has committed rape of the victim and in order to conceal his offence he threw her in the pond when she was unconscious and due to drowning, she died. In cross examination, he stated that the pond is spread over in 2 bighas of land. He further stated that in regard to the incident, he met the police at the time of preparation of Panchayatnama and thereafter in the evening and after that he never met the police. In cross examination by defence, he further stated that his father's name is Vivek Kumar Sharma, who has a brother by the name Neetu Sharma. Neetu Sharma has no other name. His grandfather's name is Atveer Sharma. Atveer Sharma has no child by the name of Arun Sharma and he do not know whether Neetu Sharma and Arun Sharma are the same person. When asked

about a person standing in the court whether Neetu Sharma is father of Shivam Sharma, he said that he is uncle of his village relation. He denied that he has concealing the name of Arun Sharma deliberately. On a question why he did not stop Prem Singh Prajapati when he was carrying victim-K in his lap towards the pond and why he did not raise voice this witness stated that he was in a hurry. He stated that he was one of the Punch of the Panchyatnama alongwith Kunal, Shivam and Devendra Sharma. The opinion was written by Shvam. While preparing Panchayatnama, he has informed the police person present at the spot and he has seen Prem Singh Prajapati carrying victim-K towards the pond in a perturbed condition. This witness further stated that thereafter, the police picked up Prem Singh Prajapati and stated that this fact should not be told to anyone else. This witness stated that he has gone to Delhi during lockdown on a motorcycle and his mobile number is 7289060476. This witness pleaded ignorance that the missing news of the the victim was aired on TV and published in newspapers. He stated that at about 9:30 am, he reached the village and the dead body was recovered at about 11:00 am and when he reached home, his family members informed about missing of victim-K, but he did not inform to any villagers or police person that he has seen Prem Singh Prajapati, taking the victim in a perturbed condition towards the pond. On seeing the dead body in the pond, he informed the police about the aforesaid incident. On a specific question, he stated that he has informed this fact to the police but if the same is not recorded, he can not give any explanation. He further stated that he has not seen Prem Singh Prajapati throwing victim-K in the pond but has only seen him taking her towards pond in a perturbed condition. This fact was told to the Investigating Officer while recording his statement. In the end of cross examination, this witness stated that Neetu Sharma is real paternal uncle, Shivam Sharma is son of Neetu Sharma. Similarly, Ankur Sharma is also son of Neetu Sharma and is real brother of Shivam Sharma. With this relation, deceased 'K' was real grand daughter of my real paternal uncle. However, he has not denied the suggestion that he is making a false statement.

28. Sukh Ram Singh, Sub Inspector (PW-8) stated that on receiving information, he started investigation and reached at the spot and prepared the site plan. This witness her given complete details of the investigation about pasting posters and giving news by beat of drums and other modes and by following a dog squad inspection.

29. He prepared the memo of recovery of dead body. He prepared inquest report, Panchyatnama, which is Ex-Ka-4. Thereafter the other document regarding recovery of dead body, photograph of dead body, letter of CMO for postmortem were prepared which are Ex-KA- 5 to 9. He has also recorded statement of witness Naresh Kumar and Om Prakash in case diary, Site plan of the recovery of dead body was prepared which is Ex-Ka-10. After adding of section 302, 201, 376 IPC and 5(m)/6 of POCSO Act, the further investigation was handed over to the SHO. In further cross examination, he stated that he was present when the dog squad reached to search the victim. The clothes of the victim were kept before the dog squad for smelling and the dog squad led towards the forest area and did not enter anybody's house. This witness stated that the informant at the first instance did not inform him about any doubt. The dog squad could not find any success and

thereafter nearby house of Shivam Sharma i.e. of Naresh Sharma and Om Prakash Sharma were also searched and other Gher were also searched. The pond from where the dead body was recovered were 6-8 feet deep and was fully filled with dirty water. The pond was open from all four sides and anybody can have access to the pond. He stated that the Gher of Kailash, Prem, Singh, Pushpendra and Vinod are open towards the pond and no door are fixed on the same. He further stated that on 11.7.2020 they searched for the victim towards the field abutting the forest. He further stated that Arun Sharma stated that the door of his Gher is remained open from about 2-2:30 pm. Victim-K has gone somewhere. He further stated that during his investigation, informant Shivam Sharma did not make any statement that after recovery of the dead body, Naresh and Om Prakash of the village informed him that Prem Singh Prajapati disclosed that after commuting rape of victim, in order to conceal his offence and thrown her in the village pond when she was unconscious. When he reached at the spot and Shivam and his father informed him about recovery of dead body on 12.7.2020, he has not recorded any statement of informant Shivam. He stated that the statement of Arun Sarma recorded was at 9-10 am on 12.7.2020, in which he has not informed that Om Prakash and Naresh had told him that Prem Singh has committed rape of victim-K and thrown her in a pond when she was unconscious.

30. On a specific question whether while preparing the inquest report, Akash Sharma has told that he has seen Prem Singh taking victim-K, carrying her in his lap in a perturbed condition towards the pond. This witness replied, may be he has informed. Again on a pointed question when he was asked whether statement of Akash Sharma was recorded, he stated that he had told computer operator whose name was Adesh, who typed statement of Akash Sharma, but he might had forgotten to write the same. Again on a specific question, whether he has recorded this fact in the Panchyatnama in writing this witness stated that there is no such column in the Panchayatnama where the statement of witness is recorded.

31. This witness further stated that he has for the first time stated in the court during cross examination that Aakash Sharma informed that he had seen the accused taking away the victim.

32. SHO Umesh Kumar Pandey (PW-9) stated that after adding of sections 302, 376 AB, 201 IPC and 5M/6 of the POCSO Act, the further investigation was carried out by him. On 13.07.2020, he along with Prem Singh came in his Gher. From a peg on the wall, Prem Singh gave a dirty white undershirt and stated that he was wearing the same and after washing it he has put it on the Peg. From the undershirt, three hairs were recovered. Then he identified the place where he committed wrong with the victim which was towards the Eastern side of the wall and was wet. He recovered a half sleeves shirt, a blue check lower with a mark Flying Machine and a dirty white coloured, towel clothes/Angosha on which the blood stains were visible were removed by Prem Singh from his body and were taken in possession. He was asked to wear other clothes. The sample of the earth was also taken. All the three hairs were kept in a plastic transparent bag and the clothes were kept in a separate sealed packet. The sample seal was prepared. The recovery memo was dictated to Senior Sub-Inspector-Shubash Singh who scribed the same and thereafter the witnesses signed on the same. On seeing the memo, he stated that it is the same which

was exhibited as Ka-11 and was entered in the CD. He has also prepared the Naksha Nazri (site plant) which is Ex.Ka-12. After taking samples for DNA testing, the same was handed over to Head Moharir and he was directed that the DNA sample of the deceased and the accused be sent to Forensic Science Laboratory, Lucknow immediately. Section 376 AB of IPC was added in place of Section 376 IPC. Thereafter, application for recording statement of accused under Section 164 CrPC was filed before the court on 15.7.2020. The accused was produced before the A.C.J.M., Bulandshahar but the accused refused to record his statement under Section 164 of Cr.P.C.. The DNA sample through Constable Sarfaraz was sent to Forensic Science Laboratory, Lucknow. The statements of other witnesses of Panchayatnama and the police officials who joined the investigation were recorded. The Forensic Science Laboratory was found closed due to Corona. Thereafter, again through Constable Kalraaj, the sample of DNA testing was sent to Lucknow on 19.7.2020. The postmortem report for taking expert opinion and the videography of the spot was sent to Additional Director Medical and Legal Expert, Lucknow. The report of Medical and Legal Expert was received through Constable Sarfraj on 21.7.2020 and, thereafter, Section 5M/6 of the POCSO Act were added. The copy of the same is Ex.Ka-13.

33. In cross examination, this witness stated that statement which was made by Akash Sharma is recorded in the Case Diary at No.9 dated 18.7.2020. Prem Singh was arrested on 13.7.2020 at 11:30 a.m. This witness stated that he has recorded the statement of Akash Sharma only once. He further stated that when he reached the Gher of Prem Singh, it was locked. From the house of Prem Singh, the passage leading to the pond is open and any person has free access. The lock was opened by Prem Singh, however, this fact of opening lock by Prem Singh is told in the court for the first time and it is not recorded in the Case Diary. He denied that arrest memo was not prepared at the spot. From the personal search of accused, no money or Matchbox or tobacco was recovered. In the room, there was a cot and a box. Counsel stated that the fact that the accused was asked to change the clothes inside the room, is also told before the court for the first time. He further stated that Akash Sharma did not inform him that he had seen accused taking away victim 'K' in his left towards pond. He denied that he admitted that Senior Police has come on the spot and under their pressure he had made Prem Singh as an accused. He further stated that till the time the proceedings of Inquest Report was completed, name of none of the accused came forward.

34. Sunil Soni (PW-10) stated that he was posted as a Clerk in the Police Station and has typed the Chik FIR on computer which is Ex.Ka-14. He also entered Rapat No. 44 dated 10.7.2020 at 19.07 p.m. and computerised copy of the GD (Ex. Ka-15). For recording FIR, Shivam Sharma had come on foot and after one hour, the copy of the same was given to him.

35. Thereafter the statement accused-Prem Singh was recorded under Section 313 Cr.P.C. and all the incriminating evidence was put to him. He stated that the informant has given a false statement that Om Prakash and Naresh has informed that the appellant has committed rape with the victim and has thrown her in the pond. With regard to the statement of Akash Sharma who had stated to the police on 10.7.2020 at about 2:00 p.m., he had seen Prem Singh carrying the victim towards the pond, is also

a false statement. Regarding the police investigation, he stated that the entire proceeding has been done in the police station by making false recovery. On specific question while has has been tried in this case, the accused replied that on account of party faction in the village, he has been falsely implicated by the police to show that the case is quickly solved. The appellant has been implicated in the case on the basis of false fact. When he was asked to explain if anything, he wants to save in defence, accused stated that he has four young daughters and one son. He is a poor man and the police in order to so quickly solving the case, he has been falsely implicated. No defence evidence was laid. Thereafter, the Trial Court by impugned judgment of conviction held the appellant guilty of offence vide order of sentence, awarded him death sentence.

36. The present reference is sent by the Additional Sessions Judge for confirmation of death sentence.

37. Jail appeal is also filed.

38. Lower Court's record is received.

39. Paper books are prepared.

40. Sri Rajiv Lochan Shukla, learned counsel for appellant, Sri Vibhuti Narayan Mishra, learned counsel for informant and the learned AGA for State are heard and with their assistance, the entire Trial Court's record is scrutinized and reappreciated.

41. Learned counsel for the appellant has argued that the entire case is based on circumstantial evidence and the complete chain of circumstantial are not complete.

42. With regard to the last seen evidence, it is argued that as per the informant, the victim 'K' aged about two years went missing at about 2:00 p.m. on 10.7.2020. It is further stated that case of the informant that he alongwith his family members and many other persons of the village searches for the minor girl in the houses vicinity including the house of the appellant, however, she could not be traced. Thereafter, a complaint- Tahrir (Exhibit – Ka-A) was given to the police and at about 19:07 hours the chick FIR was registered under Section 363 IPC which is Exhibit-Ka-14.

43. Learned counsel for the appellant submits that in this complaint, no one was suspected. It is argued that while appearing as PW-1, the informant stated that when the dead body of the victim was recovered on 12.7.2020 at about 11:00 a.m., the police was informed which came at the spot, recovered the dead body and prepared the inquest report. Learned counsel for the appellant further submits that at that time the victim was wearing all the clothes i.e. a maroon colour t-shirt, green colour nikar and blue colour sleepers. It is further argued that PW-1 stated that he was also a Punch in the inquest report and had signed along with other Punches. After the recovery of the dead body, Naresh and Om Prakash resident of village told him that Prem Singh Prajapati after committing rape with victim 'K', in order to conceal his crime and thrown her in unconscious condition in the pond situated in the back side of the house.

44. Learned counsel for the appellant submits that the victim 'K' went missing on 10.7.2020 at about 2:00 p.m. and her dead body was recovered after two days on 12.7.2020 at about 11:30 to 12:00 a.m. and it is unbelievable that in the intervening period, Naresh Singh and Om Prakash did not informed PW-1 that the appellant has committed the offence.

45. Learned counsel has further argued that in cross examination of PW-2, grandfather of the victim that when they were searching for the missing child, Om Prakash, Naresh and Kailash reached immediately after the dead body of child was fond. It is submitted that in such eventuality, it is unbelievable that two witnesses did not inform the informant about role of the appellant.

46. Learned counsel further argued that the story cooked up by the prosecution of last seen from the statement of PW-7 Akash Sharma is totally unbelievable. This witness has stated that on 10.7.2020 at about 2:00 pm, he was coming back from his field to have his lunch at his house when he saw Prem Singh Prajapati in front of his Gher carrying victim-K in his lap and was going towards the pond in a perturbed condition. Thereafter, he informed nobody at his home and went to Delhi for some work and returned on 12.7.2020 and he got information that victim-K is missing and police are searching for her. This witness is a Punch of the Panchyatnama. However, he stated that at the time of Panchyatnama, he has not given aforesaid information regarding role of Prem Singh Prajapati to the police though he has stated that he informed it to the police but the police did not recorded it in his statement.

47. Learned counsel submits that this shows that this witness has cooked up a story of last seen against the appellant. It is also submitted that in the evening after the inquest report was complete, has met the police personnel, but he did not inform them about the incident.

48. Learned counsel further submitted that this witness is not giving correct statement by saying that during Corona he has gone to Delhi on 10.7.2020 and returned back on 12.7.2020 only when the dead body of the victim-K was recovered.

49. Learned counsel submits that this witness is also witness to the recovery of the dead body from the pond. He next submits that the witness intentionally tried to conceal his relationship with the victim as well as the informant by stating that he did not know what is the correct name of Neetu Sharma and denied that his real name is Arun Sharma i.e. PW-1. He even denied his relationship with PW-2 though in the cross examination, this witness clearly admitted that the father of this witness and grandfather of the victim-K are real brothers. Counsel submits that this witness tried to conceal this relationship as he was introduced as witness later on. It is also submitted that on a pointed question regarding informing the Investigating Officer that he has seen Prem Singh Prajapati carrying the victim-K and going towards the Pond in a perturbed condition, he stated that that 'yes' he has informed him but he don't know why this fact was not recorded by the Investigating Officer.

50. Learned counsel submits that this witness is not at all a reliable person.

51. With regard to extra judicial confession, it is argued that both the witnesses of extra judicial confession in clear and unequivocal terms have denied about this fact.

52. It is argued that PW-1 and PW-2 have stated that after the recovery of the dead body, PW-3, Om Prakash and PW-4 Naresh told them that accused Prem Singh Prajapati came to them and admitted his guilt and prayed for mercy. However, while

appearing as PW-3, Om Prakash has clearly stated that on 10.7.2020, he came to know that victim aged about two and a half years went missing and he got this information at about 5:16 pm. He clearly stated that on 10.7.2020, he has not seen victim-K going in front of Gher of accused Prem Singh Prajapati and he has no knowledge how she has died. This witness was declared hostile and in cross examination by prosecutor, he further denied having made any such statement under section 161 Cr.P.C. to Investigating Officer from his mobile phone. He denied the suggestion that he and Naresh had seen the victim outside the house of the accused and they have also seen the accused was calling her from 4-5 feet behind. In further cross examination, he stated that neither he nor Naresh or Prem Singh Prajapati did inquire why he was calling victim-K on the date of the incident on which the accused confessed that he took the victim to her Gher and he committed the offence thereafter he pressed her mouth and she become unconscious, he threw her in the pond. This witness also stated that there was no enmity or dispute in the family of the informant and Prem Singh Prajapati. He further stated that police never recorded his statement in this regard. Similarly, statement of PW-4 Naresh, who also denied the incident as well as making a statement to the Investigating Officer on mobile phone regarding the confession made by accused Prem Singh Prajapati. Both the PW-3 and W-4 stated that they came to know that they are witness in the Court only when they received summons.

53. Learned counsel has argued that the statement of these two witnesses prove that PW-8 Akash Sharma is telling lie when he stated that on 10.7.2020, he had seen the accused carrying victim-K in his lap going towards village Pond, with regard to the same date and time, prosecution has set up a case that Om Prakash and Naresh have also seen the accused Prem Singh Prajapati carrying the victim and both these witness have clearly denied this fact.

54. Learned counsel submits that the evidence regarding last seen evidence as well as extra judicial confession are totally missing. It is further argued that name of PW-3, PW-4 or PW-7 were not disclosed appellant as suspect in the complaint which is Ex-KA, by the informant.

55. Learned counsel next argued that it has come in the statement of the prosecution witnesses including the Investigating Officer that the recovery of dead body is from open place, i.e. in a village Pond where the cattle house Anil, Kailash and Prem Singh Prajapati exist.

56. Learned counsel submits that except for the informant none of the witness have stated that they were barbed wire rather it is admitted that any person can have access to the Pond and, therefore, possibility of the minor victim sleeping into the pond can not be ruled out.

57. Learned counsel submits that in the subsequent statement, the informant gave name of three persons as suspect i.e. appellant Prem Singh Prajapati, one Pushpendra Pushi and Vinod though no was named in the first complaint i.e. Ex-KA-1. It is submitted that it has come in the statement of Investigating Officer PW-9 that immediately, all the three persons were arrested. However, nothing has come on the record in the charge sheet what happened to investigation regarding Pushpendra alias Pushi and Vinod. The counsel submits that even these two suspects were not cited as prosecution witness.

58. He next argued that FSL report submitted by the prosecution did not connect the appellant's biological DNA with that of the DNA of the victim K. It is argued that the certain articles were recovered from the possession / pointing out of the appellant, those are the under garments (Baniyan) which was washed and were allegedly worn by the appellant during the commission of the offence and three small hairs were also recovered from the undergarments (Baniyan) of the appellant. The FSL report submitted does not connect the applicant's DNA to that of the deceased and vice versa. The alleged biological strain of male origin found in the vaginal swab on slide and Vulval swab could only generate partial DNA profile and did not match with the DNA generated from the applicant. No DNA examination appears to have been conducted for the three hairs found on the vest (Baniyan).

59. Learned counsel submits that from the rest place of offence on the pointing out of the appellant 'moist earth' was recovered with faded blood stained alongwith half sleeve T-Shirt, Sleepers mark with mud , Gray Colour Towel.

60. Learned counsel for the petitioner has drawn reference to the F.S.L. Report which read as under :

"विधि विज्ञान प्रयोगशाला, उत्तर प्रदेश, लखनऊ

Forensic Science Laboratory Uttar Pradesh,Lucknow

प्रेषक, निदेशक/संयुक्त निदेशक

विधि विज्ञान प्रयोगशाला उत्तर प्रदेश, लखनऊ

लखनऊ- 226006

सेवा में,

Additional Superintendent of Police (अपराध)

BULANDSHAHAR

पत्रांक 2020XDNA000874

दिनांक

अपराध संख्या 284/2020 राज्य बनाम Prem Singh

अधिनियम/धारा CHL/5m,CHL/6, IPC/201, IPC/302, IPC/363, IPC/376

पुलिस स्टेशन/थाना SHIKARPUR

मृतक/मृतका का नाम

जी०डी० संख्या

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनाँक 20-07-2020 को विशेष वाहक द्वारा प्राप्त हुए।

सील का विवरण

एक सर्वमोहर थर्माकोल डिब्बा, नौ लिफाफा तीन बण्डल, एक डिब्बी व एक पैकेट जिनमें थर्माकोल डिब्बा (1) व डिब्बी (15 पर) "C.H...BS,पी.एम. लिफाफा (2) से (10) व पी.एम. बण्डल (11) पर- P.M.BSR तथा बण्डल (12) व (13) एवं पैकेट (14) पर- SIGNATURE + S.I.U.P.P. "मुद्रानमूनानुसार की छाप अछत थी।

प्रदर्शों का विवरण

1. नमूना रक्त I एक सर्व मोहर मूल थर्माकोल डिब्बा से (अभि.प्रेम सिंह से)

2. वेजाइनल स्वैब व स्लाइड I दो सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

3. वुलवल स्वैब व स्लाइड I दो सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

4. एनल स्वैब I एक सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

5. ओरल स्वैब I एक सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

6. स्कैल्प हेयर I एक सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

7. टुकड़े नेल I दो सर्व मोहर मूल लिफाफा से (मृतका-काव्या,पी.एम. 537/20 से)

8. कच्छा सड़ा-गला I एक सर्व मोहर मूल बण्डल से (मृतका-काव्या,पी.एम. 537/20 से)

9. टी-शर्ट सड़ा-गला I

10. लाल धागा मय ताबीज व लाकेट I

11. जोड़ी चप्पल I

12. वरमूडा I एक सर्वमोहर मूल बण्डल से (अभि. प्रेम सिंह से)

13. लोअर I

14. बनियान I

15. शर्ट I

16. अंगोछा I

17. मिट्टी I एक सर्वमोहर मूल बण्डल से (घटना स्थल से)

18. बाल I एक सर्वमोहर मूल पैकेट से (अभि. प्रेम सिंह से)

19. काटन स्वैब खूनालूद I एक सर्वमोहर मूल डिब्बी से (अभि. प्रेम सिंह से)

20. हेड हेयर I

21. थ्रोट स्वैब I

22. नेल क्लिपिंग I

परीक्षण परिणाम

प्राप्त प्रदर्श (1) से (22) में डी एन ए परीक्षण किया गया।

प्रदर्श (2) व (3) (काव्या से) पर उपस्थित बायलोजिकल द्रव्य के स्रोत में पुरुष विशिष्ट एलील की उपस्थिति पायी गयी किन्तु आंशिक डी एन ए प्रोफाइल जेनरेट होने के कारण स्रोत प्रदर्श (1) (प्रेम सिंह से) से मिलान के सम्बन्ध में अभिमत दिया जाना सम्भव न हो सका। (HID&Y-STR KIT)

स्रोत प्रदर्श (1) व (19) एक समान व पुरुष मूल का पाया गया। (HID STR KIT)

प्रदर्श (4) से (7) (मृतका से), (12) से (16) व (20) से (22) (अभि. से) से आंशिक डी एन ए प्रोफाइल जेनरेट हो सका। (HID STR KIT)

स्रोत प्रदर्श (8) से (11), (17) व (18) से डी एन ए निष्कर्षण न हो सका।

डी एन ए परीक्षण में जेनेटिक एनालाइजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया।

उक्त परीक्षण में मानक विधियाँ प्रयोग में लाई गई।

नोट-1- समस्त प्रदर्शों को परीक्षणोंपरान्त एक सर्व मोहर बण्डल में रखकर वापस लौटाया जा रहा है।

2- कृपया परीक्षित प्रदर्शों की वापसी की शीघ्र व्यवस्था करें।

उप निदेशक

पी०एस०यू०पी०-ए०पी० 5 विधि विज्ञान प्रयोगशाला-19-02-2020-(1630)-30,000 प्रतियां-(कम्प्यूटर/टी/अ विधि विज्ञान प्रयोगशाला, उ०प्र० महानगर, लखनऊ) "

61. Counsel has also referred to the opinion given by the State Medico Legal Cell, Lucknow which has given cause of death as Asphyxia due to drowning. The opinion given in this report reads as under :

"Opinion- In PMR the protrusion from vaginal orifice of momentum (intestine) proves the vulva and vaginal orifices were lacerated with peritoneum of the deceased. So the (digital) may be penile thrush cannot be excluded."

62. The next argument raised by the counsel for the appellant is that an ante time F.I.R. was lodged on 10.7.2020 at about 19.07 hrs. and name of the appellant was neither disclosed in the first Tehrir (complaint) or chick F.I.R. though it was reported that the victim is not traceable.

63. It is also submitted that during the Trial, both PW-1 and PW-2 stated that huge mob was present at the scene of occurrence along with many political persons and higher police officials including D.I.G and S.S.P. and, therefore, there was pressure on the Investigating Authority to workout the crime quickly and, in that process, the Investigating Officer has illegally named the appellant as accused.

64. It is also submitted that the statement of Akash Sharma (PW-7) is not reliable as this witness had stated that he had seen the deceased carrying the victim in his lap and going towards the pond in a perturbed condition. However, this witness, without verifying the same or informing it to the family of the victim, went to Delhi on the

same day after having meal as per his depositions. Counsel submits that there is no explanation given by this witness why he had not disclosed the family of the victim about this fact immediately on 10.7.2020.

65. It is also submitted that PW-7 is not a witness of commission of rape or murder of the victim and he has been introduced just as a link of the circumstantial evidence through the subsequent story, by introducing Om Prakash (PW-3) and Naresh Kumar (PW-4), both the witnesses of extra judicial confession before whom the appellant allegedly confess the commission of crime, however, they have not supported the prosecution story. Counsel argued that all the three witnesses i.e. PW-7, PW-3 and PW-4, as per the prosecution version, had seen the victim in the company of the appellant on 10.7.2020 around the same time but, neither PW-7 has seen PW-3 & PW-4 at the spot at that time nor PW-3 or PW-4 have seen PW-7 at the spot.

66. Counsel submits that even the recovery effected from the appellants, at his pointing out, while he was in custody, did not corroborate the prosecution story and the recovery memo sent for forensic examination did not lead any incriminating discovery.

67. Counsel for the appellant has laid much emphasized on the fact that PW-7 for the first time in the Court has stated the fact that he had seen Prem Singh carrying victim 'K' in his lap and going towards a pond in perturbed condition.

68. Learned counsel for the appellant submits that this improvement cannot be made by the prosecution witness by stating a fact for first time in Court. A reference is drawn to Section 145 of Evidence Act, 1872 which read as under : -

"145. Cross-examination as to previous statements in writing*. – A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*

69. Learned counsel for the appellant submits that since this witness has not made any previous statement before the police under section 161 Cr.P.C. upon which he can be cross examined, the making of such statement for the first time in the Court is not admissible.

A reference is also drawn to Sections 161 and 162 of Criminal Procedure Code, 1973 which read as under :

"161. Examination of witnesses by police *:-(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

[Provided that statement made under this sub-section may also be recorded by audio-video electronic means.]

[Provided further that the statement of a woman against whom an offence under section 354, section 376A, section1 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of The Indian Penal Code is alleged to have been committed or attempted, shall be recorded, by a woman police officer or any woman officer."

***162. Statements to police not to be signed : Use of statements in evidence** . -(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, **"whether in a police diary or otherwise**," or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:*

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act.

Explanation.--An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

It is argued that in the absence of any statement of PW-7 recorded by the Investigating Officer in terms of Section 161 of Cr.P.C., PW-7 could not make such improvised statement for the first time while recoding his examination-in-chief.

70. It is also submitted that the prosecution version of extra judicial confession also stands falsified from the fact that if the appellant had made extra judicial confession of committing rape upon victim and throwing her in the pond, if came to the notice of the Investigating Agency, still dead body was not recovered on the pointing out of the appellant.

71. It is submitted that place of occurrence is a cattle house (gher of appellant) and there is no door either in front of this cattle house or on the back side leading to the pond and there is ample chance that any person may have access to scene of occurrence and commit offence as suggested to the prosecution witness. It is

also submitted that there is no barbed wire or gate on the cattle house.

72. Counsel has lastly argued that appellant is a poor agricultural labour as admitted by the prosecution witnesses and the Investigating Officer. He has four daughters and a son. The eldest child was 9 years of age at the time of incident. Counsel submits that he was found to be an easy prey by the Investigating Agency in order to hush up the investigation under the pressure as political person and senior police officers were monitoring the investigation.

73. Counsel submits that it has come in prosecution evidence that three persons namely Pushpendra alias Pushi, Vinod and appellant were suspected, however, the entire investigation is silent that after the arrest of all the three persons what investigation was carried out with regard to other two persons and in what manner they were found to be innocent. Nothing has come on record as to what type of investigation was carried out against these two persons and, therefore, the appellant has been falsely implicated.

74. Learned counsel for the appellant submits that it is also provided under Section 162 Cr.P.C. that statement recorded by the Police under Section 161 Cr.P.C. can be used by the accused to contradict or confront such witness in the manner provided under Section 145 of Evidence Act, 1872. It is further submitted that even in case of PW-3 and PW-4, no statement under Section 161 Cr.P.C. was recorded as it has come in the statement that Investigating Officer (PW-10) that he has only recorded the case diary on receiving a telephonic call from PW-3 and PW-4. Even no statement is recorded by using audio-video electronic means recording statement of i.e. PW-3 & PW-4 if they had given any information on mobile phone to Investigating Officer.

75. Learned counsel for the appellant submits that Section 172(3) of Cr.P.C. provides that neither the accused nor his agents shall be entitled to call for such case diary and, therefore, in the absence of any separate statement of PW-3, PW-4 & PW-7 recorded by the Investigating Officers under Section 161 Cr.P.C., the statement made by PW-7 by improving the facts cannot be read in evidence as the right of accused is prejudiced as he has no right to call for the case diary of the Police for confronting the witnesses.

76. Learned counsel for the appellant submits that though PW-10 has given an explanation that he has dictated the statement made by PW-7 to the typist named Adesh Panchang who prepared the same, had omitted to write it, the same is a mistake. Learned counsel submits that this typist named Adesh Panchang was never cited as a prosecution witness to explain it.

77. Learned counsel for the appellant further submits that S.I. Sukhpal Singh (PW-8) stated that for the first time, he has said so in his cross examination in the Court that Akash Sharma told him that he had seen the accused carrying the victim and he has not stated so in examination-in-chief.

78. Learned counsel for the appellant submits that the FIR is ante-timed as nothing has come on record that after registration of FIR on 10.7.2020, till recovery of dead body of the victim any investigation was carried out by the Police and in fact the FIR was registered only after the recovery of dead body on 12.7.2020.

79. In reply, learned AGA for State submits that as per the opinion given by State Medico Legal Cell, Lucknow with reference to the PMR, it has submitted that this opinion clearly show that the victim 'K' was subjected to rape. It is next contended that even the injuries as noticed in postmortem report also suggests that she was subjected to rape as PW-6, the doctor who conducted the postmortem has given a definite opinion that the possibility of the rape cannot be ruled out, however, the same will be ascertained on receiving the FSL report.

80. Learned counsel then referred to the FSL report wherein, it is opined that Exhibits -2 & 3 (of victim 'K') in the source of biological cerium, male allele is found but only partial DNA profile was generated and, therefore, it is not possible to give an opinion regarding matching of the same with the source (one Prem Singh).

81. Learned AGA for State has further argued that during the course of investigation, the police wanted to record the statement of accused under Section 164 Cr.P.C. but he has refused to give consent. A reference is also drawn to the last line of examination-in-chief of PW-3 where he has stated that accused should be punished. It is next argued that from the statement of PW-6, the doctor who conducted the postmortem, it has come that possibility of rape cannot be ruled out and the same was proved from the DNA result.

82. Learned AGA for State has further argued that it is a normal practices in State of Uttar Pradesh that the statements under Section 161 Cr.P.C. are recorded in the case diary only. It is further argued that the recovery of dead body is just on the back side of the Gher (cattle House) of accused where the access can be made through his Gher. It is contended that after the arrest of the accused, upon his discloser, the clothes worn by him at the time of commission of offence were recovered and from the under shirt/ Baniyan, three hairs were recovered and as per FSL report, the same matched with the blood sample of the appellant.

83. Learned AGA for State has further submitted that the discloser can be either verbally or written or by gesture. It is submitted that Akash Sharma (PW-7) is a witness of recovery who is an independent witness.

84. Learned counsel appearing for informant has argued that the chain of circumstances is complete as from the statement of PW-7, the last seen evidence is proved and from the statements of PW-3 and PW-4, the extra judicial confession made by the appellant is followed by the recovery of clothes from him. It is also submitted that mere fact that Akash Sharma is a relative of the informant, is not a ground to discard his statement.

85. Learned counsel for the informant has further argued that it has come in the statement of PW-3 & PW-4 that before coming to Court, they had gone to meet an advocate of their village and thereafter they had come to record their statement. This shows that both these witnesses are won over by the accused.

86. In reply, learned counsel for appellant submits that from the statement of Investigating Officer it is clear that the pond has an open access for all and as per medical dictionary 'Allele' means as under:-

"An allele is one of two or more versions of DNA sequence (a single base or

a segment of bases) at a given genomic location. An individual inherits two alleles, one from each parent, for any given genomic location where such variation exists. If the two alleles are the same, the individual is homozygous for that allele. If the alleles are different, the individual is heterozygous"

It is submitted that D.N.A. report nowhere prove the case of prosecution.

87. Learned counsel for appellant submits that in fact both PW-3 and PW-4 have stated that they came to know about, they being prosecution witness only when they received summons from the Court and, therefore, in ordinary course, if they met an advocate of their village to know about the case, no adverse inference can be drawn in this regard.

88. Learned counsel for the appellant submits that the confession setup by the prosecution being a deficient evidence, if not proved cannot be used against the appellant.

89. It would be relevant to refer to certain judgment of Supreme Court of India on scientific investigation of DNA.

90. In **Dharam Deo Yadav vs. State of U.P., 2014 (3) Apex Court Judgements (SC) 125**, it is observed as under :

33. We are in this case concerned with the acceptability of the DNA report, the author of which (PW21) was the Chief of DNA Printing Lab, CDFD, Hyderabad. The qualifications or expertise of PW21 was never in doubt. The method he adopted for DNA testing was STR analysis. Post-mortem examination of the body remains (skeleton) of Diana was conducted by Dr. C.B. Tripathi, Professor and Head of Department of Forensic Medical I.M.S., B.H.U., Varanasi. For DNA analysis, one femur and one humerus bones were preserved so as to compare with blood samples of Allen Jack Routley. In cases where skeleton is left, the bones and teeth make a very important source of DNA. Teeth, as often noticed is an excellent source of DNA, as it forms a natural barrier against exogenous DNA contamination and are resistant to environmental assaults. The blood sample of the father of Diana was taken in accordance with the set up precept and procedure for DNA isolation test and the same was sent along with taken out femur and humerus bones of recovered skeleton to the Centre for D.N.A. Fingerprinting and Diagnostics (CDFD), Ministry of Science and Technology, Government of India, Hyderabad. PW21, as already indicated, conducted the DNA Isolation test on the basis of samples of blood of Routley and femur and humerus bones of skeleton and submitted his report dated 28.10.1998. DNA Fingerprinting analysis was carried out by STR analysis and on comparison of STR profile of Routley. When DNA profile of sample found at the scene of crime matches with DNA profile of the father, it can be concluded that both the samples are biologically the same.

34. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling.

DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.

91. Similar View is taken in **Mukesh and Anr. Vs. State of NCT of Delhi, 2017 AIR (SC) 2161**. The operative portion of the order read as under :

"443. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA – De- oxy-ribonucleic acid, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.

444. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:-

"DNA.- De-oxy-ribonucleic acid, *the nucleoprotein of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms.*

The material in a cell that makes up the genes and controls the cell. (Biological Term)

DNA finger printing*. A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)"*

In the same Law Lexicon, learned author refers to DNA identification as under:

DNA identification*. A method of comparing a person's deoxyribonucleic acid (DNA) – a patterned chemical structure of genetic information – with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. – Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)*

445. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A Cr.P.C. *is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.*

446. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in ***Santosh Kumar Singh v. State*** *through CBI (2010) 9 SCC 747, the Court held as under:-*

"65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.
66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in Kamalanantha v. State of T.N. (2005) 5 SCC 194 We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during

the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.

67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In ***Bhagwan Das v. State of Rajasthan*** *AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.*

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in ***Kamti Devi v. Poshi Ram*** *(2001) 5 SCC 311. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9." [emphasis added].*

447. ……..xxx……..

448. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in origin, consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay."

92. In **Ravi s/o of Ashok Ghumare Vs. State of Maharashtra, 2019 AIR (SC) 5170**, the Supreme Court has observed as under :

"34. The unshakable scientific evidence which nails the appellant from all sides, is sought to be impeached on the premise that the method of DNA analysis "Y-STR" followed in the instant case is unreliable. It is suggested that the said method does not accurately identify the accused as the perpetrator; and unlike other

methods say autosomal-STR analysis, it cannot distinguish between male members in the same lineage.

35. We are, however, not swayed by the submission. The globally acknowledged medical literature coupled with the statement of P.W.11 – Assistant Director, Forensic Science Laboratory leaves nothing mootable that in cases of sexual assualt, DNA of the victim and the perpetrator are often mixed. Traditional DNA analysis techniques like "autosomal- STR" are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y-Chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as excalpatory evidence and is extensively relied upon in various jurisdictions throughout the world. 1&2. Science and Researches have emphatically established that chances of degradation of the `Loci' in samples are lesser by this method and it can be more effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the

1"Y-STR analysis for detection and objective confirmation of child sexual abuse", authored by Frederick C. Delfin – Bernadette J. Madrid – Merle P. Tan – Maria Corazon A. De Ungria.

2"Forensic DNA Evidence: Science and the Law", authored by Justice Ming W. Chin, Michael Chamberlain, A,y Roja, Lance Gima.

DNA analysis process, the probative value of the forensic report as well as the statement of P.W.11 are very high. Still further, it is not the case of the appellant that crime was committed by some other close relative of him. Importantly, no other person was found present in the house except the appellant.

36. There is thus overwhelming eye-witness account, circumstantial evidence, medical evidence and DNA analysis on record which conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. We, therefore, unhesitatingly uphold the conviction of the appellant."

93. In **Manoj and others vs. State of Madhya Pradesh, (2022) SCC Online SC 677**, the Supreme Court has observed as under :

"138. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata40 was relied upon. The relevant extracts of the article are reproduced below:

"Deoxyribonucleic acid (DNA} is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with Intercalated proteins. Twenty- three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set

goes to each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G}, Thymine (T} and Cytosine (C) along with sugar- phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to Individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA} found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures. Only 0.1 % of DNA (about 3 million bases} differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

…… DNA Profiling Methodology DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA Profiling Is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y- STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or vasectomized" male. Cases In which DNA had undergone environmental stress and biochemical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.

DNA Profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available In the laboratory. The analysis principles, however, remain similar, which include:

1. isolation, purification & quantitation of DNA

2. amplification of selected genetic markers

3. visualising the fragments and genotyping

4. statistical analysis & interpretation.

In DNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:….

Statistical Analysis

A typical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

3) Inconclusive: The data does not support a conclusion Of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken Into consideration while reporting a match. Paternity of Maternity Indices and Likelihood Ratios are calculated further to support the match.

Collection and Preservation of Evidence If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling."

139. In an earlier judgment, ***R v Dohoney & Adams*** *the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.*

140. The Law Commission of India in its report, observed as follows:

"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."

94. After hearing the counsel for the parties, we find that the finding recorded by the Trial Court at point 'A' regarding the age and identity of the deceased-victim 'K' is correct and same is upheld.

1. Nature of commission of Offence :- Similarly, the finding recorded by the Trial Court at point 'B' regarding the nature of commission of offence is also upheld that victim 'K' aged about 02 years was subjected to penetrative sexual assault. The Trial Court has recorded a finding that it is very unfortunate that the special Forensic Science Lab has though recorded a finding regarding presence of male allele yet due to partial generation of DNA profile, it is observed that it is not possible to match the same with source Ex-1 i.e. the blood sample of the accused. The Trial Court has also recorded that the Forensic Science Lab by not giving a definite report has escaped the official duty. We therefore, uphold the finding of the Trial Court that as per Postmortem Report (Ex.Ka.-7), the cause of death of victim-K was drowning in a pond after she was subjected to sexual assault.

At point 'C', (1) the Trial Court recorded a finding that on 10.7.2020, the Victim went missing and an F.I.R. was registered at 19.07 hrs, however, the name of the accused was not mentioned. Since the victim was a child of two years, the F.I.R. was registered under Section 363 IPC as a child of such a young and tender age cannot go missing on her own. Therefore, the Trial Court has rightly recorded this finding.

(2) **Recovery of Dead body**: The Trial Court has rightly recorded that the dead body was recovered on 12.7.2020 and thereafter, Inquest Report/Punchayatnama was done, videography was done and the dead body was sent for postmortem which was conducted on the same day at about 5.00 pm.

(3) **Reliability of Prosecution Witnesses** : The Trial Court has recorded that all the prosecution witnesses specially PW-3, PW-4 & PW-5, even if belongs to the same village and the same caste and community, their testimony cannot be disbelieved.

At point (4), the Trial Court recorded that even though the three witnesses namely, PW-3, PW-4, PW-5, were declared hostile, however the same does not affect the prosecution version is not the correct appreciation.

95. **However, we do not agree with the finding recorded by the Trial Court regarding indictment of accused-appellant in commission of the offence**.

96. We record our finding contrary to the finding recorded by the Trial Court for the following reasons:

1-A. Akash Sharma (PW-7) is the main witness on whom the defence has led much stress that this witness is not a reliable witness. In the opening part of his examination-in-chief, this witness, with regard to relationship with the informant (PW-1) and grand father of victim 'K'. PW-2 has clearly denied any relationship so much so to the extent that victim-K was in fact daughter of his real paternal uncle who is son of PW-2. However, at the fag end of the cross examination, this witness admitted that Arun Sharma (PW-2) is his real grand father and victim-K is daughter of Ankur Sharma and the grand daughter Atvir Sharma and thus she is his niece.

The reason for concealing the relationship with PW-1 and PW-2 is apparent on record as Firstly PW-7 has set up the evidence of last seen and stated that on 10.7.2020 at about 2.00 pm, he was coming back from his field to have lunch and when he reached out side the cattle shed

(gher) of Prem Singh, he was carrying victim-K in his lap and in a perturbed condition was going towards the pond. The reason to conceal the relationship with PW-1 and PW-2 (his own grand father) is that PW-7 could not give any explanation that if he has seen the minor girl (his niece) aged two years in the lap of a stranger i.e. accused-Prem Singh who in a perturbed condition was carrying her towards the pond, he would have immediately responded to the situation. Since this story was cooked up later on, in order to avoid giving explanation to such situation, PW-7 concealed the relationship with PW-1 and PW-2.

Secondly, the subsequent part of statement of this witness is also not trustworthy when he states that thereafter he had lunch and went to Delhi for some work. It was Corona period at that time and this witness stated that he had gone to Delhi on motorcycle as lock of his rented house at Delhi was broken. He returned back on 12.7.2020 at about 9-10.00 AM i.e. the date when the dead body of the victim-K was recovered at 11.30 AM. It is unbelievable that from 10.7.2012 till 12.7.2020 this witness has no knowledge that his niece Victim-K is missing and not only senior police officials like D.I.G., S.S.P. but the whole village was searching for her, therefore, the first version of last seen evidence given by this witness becomes highly doubtful.

Thirdly, this witness states that he had seen the dead body of victim and informed PW-1 in this regard. Arun Sharma (PW-2) real uncle of PW-7 stated that he got this information from Akash Sharma (PW-7). Thereafter, PW-7 also was also a witness to the Panchayatnama/Inquest Report along with four other persons. In cross examination, this witness stated that he has informed the police after recovery of the dead body that on 10.7.2020, he had seen Prem Singh carrying victim-K towards the pond. However, he admitted that no such statement was recorded by the police and he cannot tell its reason. This also falsify the evidence of last seen set up by PW-7.

Fourthly, this witness further stated in examination-in-chief that he has every reason to believe that on 10.7.2020 at about 2.00 pm, Prem Singh committed rape with victim-K and to conceal his offence has thrown her in pond situated on the backside of his cattle shed (gher). Again at the cost of repetition, looking at the close relationship of this witness with PW-2 as well as victim-K, it is unbelievable that for a period of two days he was staying in Delhi and did not inform the aforesaid last seen evidence to anyone in the village including the informant.

It is worth noticing a perusal of the zimni order dated 26.08.2021 passed by the Trial Court shows an application was moved on behalf of defence to summon the call details regarding mobile phone of PW-7 and his location of the aforesaid three days. However, the said was declined by the Trial Judge on the ground that same has been filed at a very delayed stage.

This witness stated that even at the time of preparation of inquest report, he has informed the police about the last seen of victim-K with Prem Singh but the same was not recorded.

Fifthly, yet another reason to disbelieve the testimony of PW-7 is that he had stated that at about 2:00 pm on 10.7.2020 he had seen Prem Singh Prajapati carrying victim-K in his lap going towards the pond. This date and time coincide with the date and time set up by prosecution through two witnesses of extra judicial confession i.e. PW-3 Om Prakash and PW-4 , though both these witnesses were declared hostile and did not support

prosecution version but the case as projected by the prosecution is that first PW-3 and PW-4 had seen victim K going on foot in front of Gher/cattle shed of Prem Singh Prajapati and the accused was seen following her 4-5 steps behind. The times set up by the prosecution of seeing victim K by PW7 and PW-3 and PW-4 coincides but all these witnesses have not seen each other at the relevant time which makes presence of PW-7 at the spot doubtful. Even PW-9 Umesh Kumar, the second Investigating Officer, in cross examination has clearly stated that Akash Sharma did not inform him that he had seen the accused carrying victim-K in his lap going towards the pond. Similar is deposition of PW-8 Sukh Ram Singh, Sub Inspector who also stated that for the first time in Court he has stated this fact, in cross examination that Akash Sharma had seen the accused taking the victim-K. The site plan/ Naksa Nazri prepared by the Investigating Officer as Exhibit Ka-3, Ka-10 & Ka-12 show that at point B where the dead body was recovered is more closer to the house of one Kailash which is situated on the western side of Gher of Prem Singh Prajapati.

Lastly, PW-8 – Sukh Ram Singh, Sub Inspector, for the first time, has set up a new version in the Court when in cross examination, to a specific question whether while preparing inquest report, Akash Sharma told him about the fact that Prem Singh Prajapati while in perturbed condition was taking victim-K towards pond, this witness replied may be so informed. Again on question if said information was given by Akash Sharma and his statement was recorded, PW-8 replied that I have told this to computer operator named as Adesh Panchang and maybe due to omission, he forgot to record the same. Another question asked to this witness was whether while preparing inquest report, the aforesaid factum of Prem Singh Prajapati carrying victim-K towards pond was recorded in Panchyatnama in writing, this witness replied that there is no such column in Panchayatnama to record it. Statement of PW-8 also makes it clear that, in fact, no such statement was made by PW-7 to him regarding role of the appelant otherwise this primary evidence would have been immediately taken notice and recorded in the statement of Akash Sharma. By mere saying that it is an omission on the part of computer operator Adesh Panchang is unbelievable as even the computer operator is not examined to explain the omission on his part. It has been held by the Supreme Court in **Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164** while relying upon earlier judgment in **Vadivelu Thevar Vs. State of Madras, 1957 0 AIR (SC) 614** that generally speaking, oral testimony of a witness can be classified into three categories namely (i) Wholly reliable; (ii) Wholly unreliable and (iii) Neither wholly reliable nor wholly unreliable. Therefore, this Court finds that the statement of PW-7 is not at all reliable qua the evidence of last seen of accused with victim.

1-B. Credibility of PW-3 Om Prakash and PW-4 Naresh and PW-5- Rakesh Giri qua extra judicial confession of accused.

All these witnesses did not support the prosecution version to prove the extra judicial confession made by the accused/appellant before them as set up by the prosecution.

PW-3 clearly stated that he is resident of the same village and know Prem Singh Prajapati. He also stated that he knew and could identify the deceased victim-K, who is daughter of Ankur Sharma. He stated that in evening about 5:00 pm he came to know that victim-K has gone missing and clearly stated in examination-in-chief that on 10.7.2020, he had not seen victim-K in

front of cattle shed/Gher of the accused and has no knowledge about the cause of her death. This witness was declared hostile and in cross examination by the public prosecutor, he stated that when senior police officers had come in search of the victim, he was present in the village and police inquired from him as well. He further stated that at the time of recovery of dead body on 12.7.2020, he was present at the spot, but police did not record his statement. The statement of this witness recorded under Section 161 Cr.P.C. in case diary in original was confronted to him, but he denied the same. He even denied that from his mobile number, he has informed the SHO that on 10.7.2020 in front of Gher/Cattle shed of the accused, he met PW-4 Naresh and both of them had seen victim-K, aged 2 years, coming on foot and accused was calling him from 4-5 feet behind. This witness further denied that on 12.7.2020, PW-4 called him at his home and asked him that since they have seen Prem Singh Prajapati following victim-K at the date of offence, therefore, both of them should call accused and inquire from him why he was following victim-K. This witness further denied that Prem Singh Prajapati in front of him and PW-4 Naresh beg pardon touching their feet and by saying that he has committed wrong and he has called victim-K to play with a lamb and out of lust, he committed wrong with victim and when she cried, he pressed her mouth and she became unconscious and due to fear he had thrown her in the pond. This witness denied the suggestion that on mobile phone that he has given this information to the SHO.

This witness stated that there is no enmity in the family of the informant and the accused. In cross examination by the defence counsel, this witness stated that police never recorded his statement.

Similar is the statement of PW-4, who was also declared hostile are stated on the same line as stated by PW-3. This witness stated that about one month ago, he came to know that he is witness in the court when he received the summon from the Court. In cross examination by the public prosecutor again similar suggestion regarding giving information to the SHO from his mobile number and recording of his statement under Section 161 Cr.P.C. in case diary was denied.

This witness further stated that victim-K did not come to his house on 10.7.2020 at about 11:00 am and about 1:00 pm his son Kunal dropped her at her home. Both these witness have stated that before coming to the Court they had met an advocate of their village and thereafter they come to depose in the Court. Trial court has taken adverse view of this fact that after due legal consultation they have not supported the prosecution version, whereas the suggestion given to them in this regard by the public prosecutor was denied rather both the witness stated that they came to know that they are witness in the Court when they received the summon from the Court, and therefore, meeting an advocate may be to find out the nature of case in which they have been summoned by the Court and no adverse inference can be drawn.

Apparently, neither in the examination-in-chief nor in cross examination by ADGC, regarding their statement recorded in the case diary purported to be statement under Section 161 Cr.P.C., both the witness denied that they have made any such statement.

So far as the statement of PW-5-Rakesh Giri is concerned even this witness stated he has not seen Prem Singh playing with victim ‘K’ on 10.7.2020 and had no knowledge how she died. This witness was also declared hostile. In cross examination,

he was confronted with the statement given to police, however he denied the same. He even denied suggestion that for not giving the statement, he had verbal altercation with the family of Arun Sharma. He even denied from his suggestion, he has given information to the Investigating Officers that on 10.7.2020 at about 2:00-2:30 p.m., when he had gone to thrown garbage near the house of Arun Sharma, he had seen Prem Singh Prajapati playing with Victim 'K' by carrying her in his lap. He also denied that he had stated to the police that Prem Singh has committed the offence. Even this witness stated that he had met a lawyer of his village and thereafter he has come to the Court. Therefore, this witness like PW-3 and PW-4 has also not supported the prosecution version of the last seen of Victim 'K' in the company of accused Prem Singh. At the cost of repetition again it is noticed that even the time given by the prosecution of last seen by this witness coincide with the time assigned to PW-3 & PW-4 but none of them has seen each other at the relevant time and place which also makes the prosecution case doubtful. Therefore, even no credibility can be given to PW-5.

A perusal of the statement of PW-9, the second Investigating Officer, who took the investigation after adding of section 5/6 of POCSO Act show that it is, nowhere stated that he recorded statement of both PW-3 and PW-4, either after inquiring this fact from them in person or by way of recording a separate statement. Even the suggestion given to PW-3 and PW-4 that from their mobile number they have given information to the Investigating Officer was also not so as stated by PW-8 and PW-9, the Investigating Officers. Therefore, prosecution in order to cover its case for not recording statement under Section 161Cr.P.C. gave suggestion to PW-3 and PW-4 that on the mobile phone of the Investigating Officer, they have stated the fact about seeing Prem Singh Prajapati on 10.7.2020 following victim-K or that on 12.7.2020 accused came to their house and made extra judicial confession. Therefore, Court find that no reliance can be placed on the statement of PW-3 and PW-4 and prosecution has failed to prove the evidence of last seen as well as the extra judicial confession of the appellant before PW-3 and PW-4.

So far the statement of PW-1 Shivam Sharma, the informant is concerned, this witness has only given information to the police regarding missing of his niece victim-K on 10.7.2020 on which Chick FIR was registered at 19:07 pm. This witness stated that after recovery of dead body PW-3 Om Prakash and PW-4 Naresh informed him that accused committed rape with victim-K and to conceal his offence had drawn her in the pond in her unconscious condition.

This witness in cross examination stated that on 12.7.2020, PW-7 Akash Sharma told him about recovery of the dead body. He further stated that accused ply a horse cart (Tanga) and has five minor children. He further stated that in the complaint, he has not given name of any accused and after recovery of dead body of victim, he named Prem Singh Prajapati, Pushpendra alias Pushi and Vinod as he has doubt on these three persons on 12.7.2020.

PW-2 Arun Sharma grandfather of victim-K gave description of cloth worn by the victim-K, who went missing at about 2:00 pm on 10.7.2020. After her dead body was recovered on 12.7.2020, he has raised doubt on Prem Singh Prajapati, Pushpendra alias Pushi and Vinod. This witness also stated that PW-3 and PW-4 told him that Prem Singh Prajapati by committing rape of victim-K had drowned her in pond. In cross examination, this witness stated that on the

date of incident her grand daughter , victim-K, had gone in the house of PW-4 Naresh as his son Kunal aged about 7 years, took her at about 11:00 am and at about 1:00 pm thereby Kunal left his grand daughter back him. However, this witness has not stated this fact to the Investigating Officer in the said matter.

This witness stated that while doing search they have also searched the house of Prem Singh Prajapati – accused and people who were searching alongwith him included PW-3 Om Prakash and PW-4 Naresh on 10.7.2020.

This also show that PW-3 and PW-4 never made any such statement to the police i.e. PW-8 and PW-9 about last seen of the accused on that date. Further this witness stated that on 12.7.2020, he has informed the Investigating Officer that PW-3 Om Prakash and PW-4 Naresh told him about the offence committed by the accused, but the police did not record the same in his statement. All these facts show that PW-3 and PW-4 never informed either PW-1 and PW-2 or the police about involvement of accused Prem Singh Prajapati for that precise reason that they did not support prosecution version.

It has come in the statement of PW-1 and PW-2 that when they raised suspicion on three persons namely Pushpendra alias Pushi, accused Prem Singh Prajapati and one Vinod, police arrested all of them. However, PW-8 and PW-9 did not utter a single word in this regard about investigation carried out with regard to Pushpendra alias Pushi and Vinod. This show that amongst all the three named persons, appellant Prem Singh Prajapati, who was a poor person, as it has come in evidence that he ply a horse cart (Tanga) and has five minor children, was an easy pick by the police to solve the mystery of murder and hush up the investigation because it is admitted by all the witness that senior police officer and media have taken up the matter and even dog squad was called which went to the house of the accused Prem Singh Prajapati on the date of incident and ultimately led police party towards forest,but no clue could be find. It is also worth noticing that no statement of accused – appellant was recorded under Section 164 Cr.P.C. for making any statement before the police admitting his guilt as it has come in the investigation of the Investigating Officer (PW-8) that the appellant has refused to make any such statement before the Court. However, no order of ACJM, Bulandshahr regarding this fact is proved on record. It is held in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622***, that in order to prove offence based on circumstantial evidence, the following conditions may be proved :

(152.) A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in ***Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra, 1973 2 SCC 793*** *where the following observations were made:*

" Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be; and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(153.) These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

In view of the judgment of Supreme Court in **Sharad Birdhichand Sarda (supra)**, this Court finds that prosecution has failed to prove the evidence of last seen as well as extra judicial confession from the statements of PW-3, PW-4 & PW-5. The statement of PW-7 is found to be totally unreliable. Further both PW-3 and PW-4, the two witnesses of alleged extra judicial confession made by the appellant- Prem Singh Prajapati confessing his guilt is also not proved as both these witnesses were also declared hostile and did not support the prosecution version despite lengthy cross examination by ADGC.

1-C. **DNA Report** - With regard to the DNA regard as reproduced above, in a very casual manner, the report is prepared that in EX-2 & 3 derived from biological serum of the victim in which allele was found, due to partial generation of DNA profile, it is not possible to match the same with blood sample of accused Prem Singh Prajapati through HID & Y-STR KIT was used. Similarly, from Ex-4 to 7 which are allele swab, oral swab, scalp hair and nails, partial DNA could be generated. Therefore, no decision could be taken regarding source 8 to 11, 17 and 18 of the accused person i.e. clothes, hairs, nail clippings, throats swab and all worth articles recovered from the spot. The report show that in DNA examination by Genetic Analyzer and Gene Mapper were used.

A perusal of zimni order of Trial Court would reveal that this DNA report was not even exhibited, as even the original of this report dated 3.11.2020 which is at Page-11 of the lower court's record do not bear any exhibit number. However, as per Section 293 of Cr.P.C. same can be read in evidence only if a right to rebut is given to accused.

PW- 8 & 9, Investigating Officers, in examination-in-chief have nowhere relied upon this report, therefore, putting up this report to the accused while recording statement under Section 313 Cr.P.C., neither report was supplied to him nor opportunity was granted to him to cross examine the Investigating Officer. Question No. 13 in statement under Section 313 read as under : -

"Question No.13 : - The report of Forensic Science Lab, Lucknow along with SCD Document No.45A regarding blood sample, Vaginal Swab, Vulval Swab, anal swab, Nails, three hairs, nails, earth and clothes is filed in the Court, what you have to state about this report ; Answer- The report of the laboratory is prepared wrongly."

In view of the judgment of the Supreme Court in **Dharam Deo Yadav's Case (Supra), Mukesh and Anr's Case (Supra), Ravi s/o Ashok Ghumare's Case (Supra)** and in Manoj and others' Case (Supra), as no consistent DNA profile could be generated to match blood sample of accused with the vaginal swab, anal swab,

oral swab, and vulval swab of the victim, and therefore, no reliance can be placed as DNA report as rightly held by the trial Court.

1-D. Role of Two Investigating Officers - So far the role of two Investigating Officers is concerned, it is apparent that PW-8, S.I. Sukhpal, the first Investigating Officer has given description of the investigation carried on 10.7.2020 and 11.7.2020 and after recovery of dead body on 12.7.2020 he stated that he recorded the statement of PW-7, Naresh in C.D. on 12.7.2020 and also of Om Prakash Sharma. In cross examination, this witness stated that when dog-squad was called, the dog did not enter into house of any person and rather led the team towards the forest area and was not successful. This witness stated even searches were conducted in the house of PW-3 and PW-4 as well. As noticed above, on a specific question whether Akash Sharma informed that he had seen Prem Singh carrying victim 'K' towards the pond in perturbed condition at the time of preparing Panchayatnama/ inquest report, this witness stated that may be so. In the second similar question, this witness stated that 'Yes' it was informed but he had told the computer operator- Adesh Panchang about this part of the statement but he omitted the write the same. When he was specifically asked whether in the Panchayatnama, this fact was added to which he stated that there no such provision. This witness also stated that for the first time in cross examination, he had stated that Akash Sharma told him about carrying deceased, therefore, as observed above, the statement of this witness with regard to information given to him by Akash Sharma which is not recorded in examination-in-chief and in cross examination, a vague explanation is given that he has informed computer operator- Adesh Panchang to type the same but he had omitted to do so which reflects that in fact no statement was made or if given, this Investigating Officer was so casual, unprofessional and unbelieving of responsible police officer that in the investigation that he even did not try to read the typed statement to and ensure that the correct facts are stated.

So far as PW-9, the second Investigating Officer, SHO-Umesh Kumar Pandey is concerned, he has recovered under shirt (banyan) which the accused had washed and hanged the same on a peg and from the said under shirt, three hairs were recovered and as per disclosure of the accused, the place where the offence was committed was near the wall and was wet. As noticed above, all the recoveries were subject to examination by FSL and no positive report regarding committing of rape by the appellant was found as per the DNA examination. This witness has also stated that when the accused was presented before A.C.J.M., Bulandshahar for recording his statement under Section 164 Cr.P.C., he refused however neither the application was moved before the A.C.J.M., Bulandsahr nor any such order of A.C.J.M, Bulandshahr is on record which also shows that this witness has conducted the investigation in a very casual and irresponsible manner.

Both PW-8 & PW-9 did not exhibit the FSL report in their statement in terms of Section 293 Cr.P.C. and, therefore, the accused had no right to cross examine both these witnesses on FSL report as admittedly the scriber of the FSL report was not examined because it did not support the prosecution version. No explanation has been given by both the Investigating Officers i.e. PW-8 & PW-9 when a specific statement is made by the PW-2 that he had named three persons i.e. Pushpendra @ Pushi, Vinod and appellant- Prem Singh as suspect and the police has arrested all the three persons however both these witnesses

are silent about the investigation carried out qua the other two persons.

Learned counsel for the appellant has raised argument that since the case was monitored by the Senior Police Officer and there was a political pressure and even the media had highlighted the same, therefore, in order to hush up the investigation, the appellant being a poor person who used to ply Tanga was a soft target by the Investigating Officer to involve him in the case and conclude the investigation cannot be ruled out.

As per the prosecution version, PW-3, PW-4 & PW-5 have recorded their statements under Section 161 Cr.P.C. with the Investigating Officer by giving information through their mobile phones. Both the Investigating Officers (PW-8 & PW-9) did not record their statement by using audio video mode and rather recorded the same in the daily general diary in a casual manner. Thus, no separate statement under Section 161 Cr.P.C. was recorded by making a face to face investigation from PW-3 and PW-4 and PW-5 which could be contradicted in their cross examination. Therefore, both the Investigating Officers did not follow the procedure under Section 161(3) Cr.P.C., Section 162 Cr.P.C., read with Section 145 of Evidence Act, 1872.

Though, the learned AGA for State has submitted that this is a standard procedure in the entire State of Uttar Pradesh that statement under Section 161 Cr.P.C. are recoded in general diary only, however, no such instructions or notifications of the State Government contrary to the provision of Cr.P.C. is on record.

97. **In view of the above, we hold that the finding recorded by the Trial Court that victim 'K' was subjected to penetrative sexual assault and was later on murdered is upheld. However, we find that three important links in the chain of circumstantial evidence i.e. last seen, extra judicial confession and DNA report could not be proved by the prosecution, in view of the detailed finding recorded above, to prove that the appellant-accused committed the offence and he is entitled to get benefit of doubt.**

98. Therefore, the present appeal is allowed. The reference made by the Trial Court for confirmation of capital punishment is declined. The jail appeal filed by the accused appellant, Prem Singh Prajapati stands allowed. He is acquitted of the charges. He be released forthwith if not required in any other case on furnishing of requisite surety bonds.

99. The record and proceedings be sent back to the Trial Court forthwith.

(2024) 5 ILRA 936
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.05.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Appeal No. 194 of 1989

Hari Shanker & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Shri Nagendra Mohan

Counsel for the Respondent:
Govt. Advocate, Ambrish Kumar Pandey, M.L. Syal, Ram Kishore Gupta, Sarojini Bala Yadav, Shashi Kiran Arya, Shiv Kumar, Vijay Kumar Tewari

A. Criminal Law-Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code, 1860-Section 302-challenge to-conviction-the three accused allegedly shot the deceased at his home in retaliation for his role in their prior arrest-the conviction of the appellants was primarily based on the eyewitness testimonies of the deceased's sons who claimed to have witnessed the shooting-the minor delay in filing of FIR was considered justified due to trauma of the witnesses and the distance between crime scene and the police station-on the basis of forensic evidence and cross-examination, only one accused fired fatal shots-no forensic evidence supported the involvement of other two accused in the actual shooting-Hence, the court partially allowed the appeal acquitting two accused for lack of evidence while affirming the conviction and sentence of one accused.(Para 1 to 33)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Marwadi Kishor Parmanand & anr. Vs St. of Guj. (1994) 4 SCC 549

2. Jai Shree Yadav Vs St. of U.P. (2004) SAR (Cri) SC

3. Kaki Remesh & ors. Vs St. of A.P. (1994) SCC (Cri) 1214

4. Gajoo Vs St. of U.K. (2013) Cri. LJ 88 SC

5. Brahma Giri Vs St. of U.P. (2004) 2 JIC 723 All

6. Narendra & ors. Vs St. of U.P.(2006) 56 ACC 288

7. Hardev Singh etc. Vs Harbhej Singh & ors. (1996) 4 Crimes 216 SC

8. Seeman alias Veeranam Vs St. by Insp. of Police (2005) Cri.L.J. 2618 SC

9. Nachhattar Singh Vs St. of Punj. (1998) SCC Cri 949

10. Sher Singh & Anr. Vs St. of Har. (1994) Cri. L.J. (1980) SC

11. St. of U.P. Vs Sheo Sanehi (2005) 52 ACC 113

12. Amar Singh Vs Balwinder Singh & ors. (2013) 46 ACC 619 SC

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

1. Present Criminal Appeal under Section 374 (2) Cr.P.C. has been filed by the accused-appellants Hari Shanker, Lavkush and Radhey Lal against judgment of conviction dated 25.02.1989 and order of sentence dated 27.02.1989, passed by learned IInd Additional Sessions Judge, Lucknow in S.T. No.356 of 1987, arising out of Case Crime No.108 of 1987, under Section 302 I.P.C., Police Station Banthara, District Lucknow. By the impugned judgment and order, appellants have been convicted for the offence under Section 302 IPC and sentenced to undergo imprisonment for life.

2. The factual matrix of the case is that, on 20.06.1987 the informant Om Prakash Yadav had given a written Tehrir at Police Station - Banthara, District Lucknow that today, i.e. on 20.06.1987, he was washing his hands and legs at the platform of the well, situated in front of his house. A cot was also lying near the well upon which his sister Shanti and younger brother Shri Prakash were sitting. His father Raja Ram Yadav was sitting at the Thakht (wooden plank) under the thatched roof, which is adjacent to the main gate of his house. At about 7.15 P.M., accused persons Hari Shanker, Lavkush and Radhey Lal reached near the well. Hari Shanker was carrying a gun, whereas Lavkush and Radhey Lal were carrying country made pistols in their hands. Hari Shanker exhorted, abused and

threatened them and all the persons reached near his father and opened fire upon him by their gun and country made pistols. Having received the bullet injuries, his father cried and fell down on the ground from the Takht (wooden plank). He died on the spot. All the three accused persons giving threat to life ran away towards east. The occurrence was witnessed by Siddh Nath and other persons of the Village along with the informant, his brother and sister. Due to the fear of firearm, nobody could resist the accused persons. The informant further mentioned that earlier accused persons were named in the occurrence of loot, which took place at the house of Cheda Yadav and Ram Kishan Yadav, and the accused were having doubt that his father Raja Ram has named them in the above occurrence. As a matter of fact, before the present occurrence, the accused Hari Shanker and Lavkush were arrested by the police of Police Station Banthara for carrying illegal arms. In that arrest also, the accused were having doubt that they were caught by the police at the pointing out of his father. Due to the above enmity, they have killed him in above manner.

3. On the basis of the above complaint/Tehrir, an F.I.R. was lodged by the police of Police Station Banthara at 23.10 hours on 20.06.1987, vide Case Crime No.180/1987, under Section 302 IPC. The distance of the Police Station from the place of occurrence has been shown as 8.00 Kms.

4. After completion of the investigation of the case, Charge sheet, against all the three accused persons was filed in the court of Chief Judicial Magistrate, who committed the case to the Sessions Court. The trial court framed the charge under Section 302 IPC against all the three accused persons. The accused persons denied the charges and claimed for their trial.

5. On behalf of the prosecution, PW 1 Om Prakash, PW 2 Shri Prakash, PW 3 S.I. Krishna Pal, PW 4 Suresh Kumar, PW 5 Arjun Singh (second Investigating Officer), PW 6 Dr. V.N. Singh gave their oral evidence.

6. After completion of the prosecution evidence, accused persons recorded their statement under Section 313 Cr.P.C., in which they denied the commission of the offence. Further, they stated that they were falsely implicated in the case by the informant due to enmity. No oral evidence has been produced by the accused persons.

7. In the oral statement, PW 1 Om Prakash has reiterated the prosecution story, as mentioned in the F.I.R. Further, he has mentioned in his examination-in-chief that Hari Shanker and Lavkush shot fire at his father by gun as well as country made pistol.

8. The witness PW 2 Shri Prakash has also reiterated the prosecution story as mentioned in the F.I.R. and supported the evidence of PW 1.So far as the occurrence of firing is concerned, he has mentioned in his examination-in-chief that first of all Hari Shanker shot fire at his father by his gun. Having received the injury of that bullet, his father fell down on floor from wooden plank (Takhat). He further stated that the accused Lavkush also shot fire at his father by his country made pistol. He has further stated in his cross-examination that the accused Lavkush and Hari Shanker shot total three fires at his father. As a result of fire, some pallets also struck onto the wall of his house and some pallets were scattered on the floor. Further, he has stated that Hari Shanker shot

first fire at his father, who sustained the bullet injury on his chest. Hari Shanker also fired (third bullet) at his father. Further, he has stated that Hari Shanker shot two fires at his father. He also stated that the above fact was told by him to Investigating Officer, if he has not mentioned it in his statement under Section 161 Cr.P.C., he cannot say its reason.

9. PW 3, Krishna Pal has proved the proceedings of Inquest, Spot Memos, Recovery Memos of pallets and blood stained soil and clothes of deceased. He also proved the recovery memo of two empty cartridges of 12 bore from the place of occurrence.

10. PW 4, Suresh Kumar has proved the Chik F.I.R. as well as G.D. Entry.

11. Witness PW 5 Arjun Singh has proved the statement of witnesses under Section 161 Cr.P.C. He has also proved the interrogation of the accused persons.

12. Dr. V.N. Singh deposed as PW 6. He has conducted the autopsy of the deceased on 22.06.1987. He has stated that deceased had received two firearm wounds, which were as under :-

(i) One firearm (wound of entrance) 4 C.M. X 3 C.M. X chest cavity deep, on left side of the chest of deceased, just below the nipple. At the place of wound, blackening, tatooing and charring was also present. The margins of wound were inverted and torn.

(ii) Firearm (wound of entry) 3 C.M. X 2.5 C.M. X abdominal cavity deep, towards right side of the back of the abdomen, at 6 'O' Clock position. Charring and tatooing were present at the place of wound. Its margins were inverted and raptured. He has also recovered 03 piece of wads and 20 small piece of pallets from left lunge and chest cavity of the deceased. He has also recovered two piece of wads and 36 small pallets from abdominal cavity, liver and intestine of deceased. Total 05 piece of wads and 56 piece of pallets were recovered from the body of the deceased Raja Ram Yadav.

The cause of death was mentioned as shock and hemorrhage, as a result of antemortem injuries. He has further opined that the above injuries may be caused by the fire from gun.

13. Learned trial court, after considering the facts and evidence as well as arguments of both the sides, convicted and sentenced all the named accused persons, under Section 302 I.P.C., which has been assailed by the accused/appellants in the present appeal.

14. Learned counsel for the appellants has submitted that the trial court has wrongly assessed the evidence of prosecution. None was the eye witness of occurrence. The evidence of witness PW 1 and PW 2 is not reliable as they are related witnesses. The dead body was sent by police for post mortem with inordinate delay. There are discrepancies and exaggerations in the statement of prosecution witnesses. There was no proof of third fire. The Investigating Officer has not found any sign of bullet on the wall of the house of deceased. Witness PW 2 has specifically stated that deceased was hit by two bullets. It has been stated by the prosecution witnesses that Hari Shanker fired on deceased twice. From the spot, 02 empty cartridges of 12 Bore were found, which show that the deceased was hit by bullet fired by the gun. Learned trial court has mechanically assessed the evidence and convicted all the accused persons. The conviction as well as sentence of the accused

persons is bad in the eye of law, hence, the order of conviction is liable to be set aside, and the appeal deserves to be allowed.

15. Learned A.G.A., replying the arguments advanced by learned counsel for the appellants, has submitted that eye witnesses of fact PW 1 and PW 2 have proved the prosecution case. They were present at their house at the time of occurrence and are eye witnesses of the occurrence. Their presence at their house is natural. The motive of the offence is proved as there was previous enmity between the assailants and the deceased. The evidence of prosecution has no contradiction on substantial points. The prosecution story is supported with the medical as well as the documentary evidence filed by the prosecution. There is no ground to implicate the accused persons falsely. The order of the trial court is just and proper. The appeal has no force and is liable to be dismissed.

16. We have heard the arguments of both the sides and perused the record.

17. At the very outset, learned counsel for the appellants has submitted that there was delay in lodging the F.I.R. On the above point, the record shows that the date and time of occurrence has been shown in the First Information Report as approximately 7.15 P.M. on 26.06.1987 and the F.I.R. of the occurrence was lodged at police station on the same day at 11.10 P.M. The distance from the place of occurrence to the Police Station has been shown as 08 Kms. In his oral evidence Witness PW 1 has stated that after 4- 4 ½ hours of the occurrence, he had gone to Police Station to lodge the F.I.R. The above statement corroborates the timing as mentioned in the F.I.R. Further, he has stated that he had gone police station by foot and it took 1 ½ – 2 hours' time in reaching the police station. Witness PW 1 is the eldest son of the deceased Raja Ram Yadav. In the year 1987 he was about 20 years old. The occurrence of firing took place in his presence, naturally at that teen age the power of thinking of the informant must have been ceased to take appropriate decision quickly. He might be under fear that if he would go to police station by covering the distance of 8 Kms. in darkness of night he might be attacked by the accused persons on the way. Therefore, some time must have been passed in taking decision for going to police station for lodging the F.I.R. The entry of G.D. indicates that along with informant Prem Kumar Yadav, S/o Shri Gajram Yadav, Mihi Lal, S/o Bhoop Yadav also accompanied him to Police Station. Definitely along with other two persons he couraged to go to the Police Station. In the cross examination the informant has not stated anything contrary. The statement of witness PW 1 is supported by the statement of witness PW 2, who is the brother of the informant as well as eye witness of occurrence, he has stated that his brother Om Prakash had gone to the Police Station at about 8.00 P.M. There might be some difference in estimating time, which is natural. Witness PW 4 HCP Suresh Kumar has proved Chik F.I.R. and G.D. entry as well as timing of lodging F.I.R., which corroborates the statement of PW 1. The accused/appellants could not point out any contradiction in the cross examination of witness PW 4 on the above point. Hence, in absence of any proof otherwise or any discrepancy in the statement of witness, it cannot be said that F.I.R. has been lodged by informant with any inordinate delay.

18. Learned counsel for the appellants has further submitted that no one was the eye witness of the occurrence and the occurrence took place in the darkness of

night and there is no statement regarding the presence of light at the place of occurrence.

19. According to the F.I.R. the occurrence took place on 20.06.1987 at about 7.15 P.M. It was the month of June when in general till 7.30 P.M. the sky remains lighter. The accused persons were already known to the informant. No question has been asked from the accused side in the cross examination of the witnesses of fact regarding the absence of light or identification of the accused persons. Hence, the above objection of learned counsel for the appellants has no substance.

20. In the F.I.R. the witness PW 1 and PW 2 have shown their presence at the time of occurrence. The witness PW 1 has stated that on the date of occurrence, he had not gone to his work place. The reason for his absence from workplace has not been asked by the lawyer of defence in his cross examination. The witness PW 1 has also supported the statement of PW 2 by saying that at the time of occurrence Shri Prakash was also present there. He has rightly not shown presence of his other brothers Ram Prakash and Umesh as they were not present at the time of occurrence. The reason has been shown that his mother was suffering from Cholera and she had gone to the doctor with Sunder Lal, Raj Karan, Prem and Umesh. The going of four persons with informant's mother for treatment indicates that she might have been in critical condition due to Cholera. His father had not gone with his mother due to the reason that he had given fire to the dead body of informant's grand mother. As per the rituals and customs prevail in Hindu community, the person who gives fire to the dead body does not move anywhere from his house and passes his time for 10 days separately. Hence, it is apparent that PW 1 never tried to enhance the number of eye witnesses falsely. The above statement of PW 1 and PW 2 strengthens the credibility of their statements/evidence and makes their presence at the time of occurrence probable.

21. Further, witness PW 2 has also corroborated the statement of PW 1 and he has shown the presence of PW 1 along with him at the time of occurrence. Witness PW 2 has also stated that on the date of occurrence witness PW 1 had not gone to his service as he had complain of pain in his stomach. In his cross examination PW 1 also took the constant stand that he had not gone to place of his work on the date of occurrence. Therefore, in absence of specific reply in their cross examination otherwise as well as taking into consideration the positive assertion of witness PW 1 and 2, more particularly, in absence of any doubtful circumstance or evidence, it cannot be said that witness PW 1 and PW 2 were not present at his residence or were not eye witnesses of the occurrence.

22. Learned counsel for the appellants further argued that post mortem of deceased Raja Ram Yadav took place on 22.06.1987 at 1.00 P.M. It should have been done on 21.06.1987. The reason of delay has not been shown, such delay makes the prosecution story doubtful. On the above point the record indicates that the occurrence of murder took place at 7.15 P.M., F.I.R. was lodged at 11.10 P.M. Thereafter, the Investigating Officer has reached on the spot in the darkness of night. That is why the proceedings of inquest could not be started in night. The memo of inquest (Ext – Ka-2) indicates that on 21.06.1987 at about 6.00 A.M. the inquest proceeding was started which was completed by 7.45 A.M. on 21.06.1987. Thereafter, the collection of evidence on the spot, taking the statement of

witnesses, wrapping of dead body in cloth and fixing seal on the dead body would have been consuming considerable time, then after that the S.I. arranged to bring the dead body to police station. The distance of mortuary has been shown as 24 Kms., accordingly it can be presumed that the day hours as well as the timing for conducting post mortem would have been over for that day. The Form-13 of police paper only shows that the dead body was sent to mortuary on 21.06.1987. The time of its arrival at mortuary has not been mentioned. Usually after sun set or in darkness of night the autopsy of the body is not done in mortuaries, except by specific order of district administration. In such a scenario, if the post mortem of the deceased took place on 22.06.1987, it cannot be said that the delay was manipulated for any doubtful reason. Witness PW 2 has stated in his evidence that he reached in about 3 – 3½ hours at Medical College along with dead body. Certainly after reaching at Medical College some time would have been elapsed in paper work for handing over and taking over the dead body for autopsy and in completing the above formalities the time for conducting the post mortem of the deceased would have passed. The witness PW 6 has also opined that the fatal injury would have been caused to the deceased at about 7.15 P.M. on 20.06.1987. Nothing has been cross examined by the counsel for the appellants with the above witness. Therefore, it cannot be said that the prosecution story has been falsely drafted with any manipulation or doubtful circumstance. If the autopsy of the deceased was started at 1.00 P.M. on 22.06.1987 it cannot itself prove that prosecution story is false.

23. Learned counsel for the appellants has submitted that the witnesses of fact PW 1 and PW 2, both are sons of deceased. They are related witnesses. No independent witness has been examined by the prosecution. The person Sidhnath, S/o Shivdeen who has been alleged as the eye witness of the occurrence in the F.I.R. and is the neighbour of the informant, has not been produced in evidence, therefore, in the absence of any independent witness, the evidence of PW 1 and PW 2 as well as prosecution story cannot be relied upon. Apart from that, in the charge-sheet also, so many independent persons, namely, Ram Lal, Babu Lal, Radhey Lal, Parmeshwar, Shripal have been mentioned as the prosecution witnesses but none of them have been produced by the prosecution in support of the prosecution story.

24. In reply, learned A.G.A. has submitted that it is very common, particularly, in the rural areas, where most of the people are backward and illiterate. If any independent person had seen any criminal offence/occurrence, they would not prefer to give their evidence as witness. Generally they did not want to be enimical with the accused persons, who are known to them also. Our police enquiries are also not much friendly with such witnesses. In the present case, witnesses PW 1 and PW 2 have stated in their evidence that they were present at the time of occurrence. Both the persons are sons of the deceased and their presence at the place of occurrence is natural. Deceased was having other sons, namely, Ram Prakash and Umesh. The witness PW 1 fairly stated in his statement that at the time of occurrence they were not present at the place of occurrence. Both the witnesses, PW 1 and PW 2, have described the occurrence properly. There is no substantial discrepancy in their evidence. If the witnesses are narrating the occurrence truly, some discrepancies are bound to occur and

exaggerations in their statements are also natural.

25. (i) In the case of **Marwadi Kishor Parmanand and another Vs. State of Gujarat, (1994) 4 SCC 549**, it has been held in paragraph 31 as under :-

"31.The evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. Some contradictions and omissions even in the evidence of a witness who was actually present and had seen the occurrence are bound to occur even in the natural course. It is a sound rule to be observed that where the facts stated by an eyewitness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and are also consistent in all material details as well as on vital points there would be no justification or any valid reason for the court to view his evidence with suspicion or cast any doubt on such evidence. In the present case as discussed above we find that the solitary witness Ranchhodbhai, PW 1 is a wholly reliable witness and his evidence in itself, without any further corroboration is enough to sustain the conviction of the two appellants for the crime they are charged with, but we find that the evidence of the sole eyewitness Ranchhodbhai finds corroboration on material aspects from the evidence of Jayantilal PW 6, Makkar PW 8, Dr Nathani PW 10, Dr Avasia PW 11, Dr Joshi PW 12 and the Head Constable Moolchand PW 18. Thus the corroboration is also not lacking in the present case and there was hardly any ground or any possibility of taking the view which is unfortunately taken by the learned trial Judge. In our considered opinion the trial court clearly fell in serious error in rejecting the truthful version made by the sole eyewitness PW 1 whose evidence does not suffer from any infirmities, much less the unwarranted criticism made by the trial court. The High Court was therefore, in exercise of its powers under Section 378 and 386, Criminal Procedure Code, fully justified to reverse the erroneous findings recorded by the trial court. We find ourselves wholly in agreement with the view taken by the High Court and the conclusions recorded by it. Consequently the appeal deserves to be dismissed."

(ii) In the case of **Jai Shree Yadav Vs. State of U.P., 2004 SAR (Criminal) Supreme Court**, the Apex Court has held in paragraph 21 as under :-

"21.It is also true that PW1 was not available to the Police for nearly 10 days after the incident but the explanation given by this witness is quite plausible that his family was afraid for his safety hence he went to his in-laws' place and remained there and it is only when things settled down he decided to come out and give a statement to the Police. The possibility of his fear of retaliation is supported by the evidence of PW-8 I.O. who stated that there was tension in the village and at the time of funeral of the deceased he had to make Police bandobust which indicates the possibility of PW-1's apprehension and his consequent non-availability to the investigating agency. There is one other aspect of this case which will have to be borne in mind while considering the evidence of PW-1. His name has been mentioned in the FIR as a person who was present at the time the incident took place. It is also stated in the FIR that in the said incident PW-1 was injured. We have already noticed that the prosecution has established that this complaint was filed in the Salempur Police Station at 5.30 p.m. If

really this witness was not present at the time of incident in question we do not think PW-3 would have included his name without even knowing the whereabouts of this witness on that day and by attributing an imaginary injury to him. In his examination in chief this witness has clearly narrated the incident involving the named accused persons as also the overt acts attributed to them. Of course in the cross examination the defence has brought out that this person is closely connected with deceased Abid Ali therefore a suggestion was made that he was deposing falsely. This suggestion has been denied by the appellant. In the cross examination defence has brought about certain omissions, contradictions and improvements in the evidence of this witness. These shortcomings in the evidence of this witness will have to be considered in the background of the fact that this witness was subjected to nearly 217 questions over a period of 14 months i.e. his cross examination starting on 14.8.1994 and ending on 28.11.1995. Both the courts below have taken judicial notice of this fact, not only in regard to this witness but in regard to other witnesses also and have come to the concurrent conclusion that when a witness is subjected to such lengthy arduous cross examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions therefore those infirmities will have to be appreciated in the back ground of ground realities which makes the witness confused because of the filibustering tactics of the cross examining Counsel."

(iii) In the case of **Kaki Ramesh and others Vs. State of Andhra Pradesh, 1994 SCC (Cri) 1214**, the Apex Court has held that it is well established rule that exaggerations, embellishments and inconsistencies on the fringe do not make witnesses unreliable.

26. As per law, the family members as well as interested witnesses are also competent witnesses for giving evidence.

*(i) It has been held by Apex Court in the case of **Gajoo v. State of Uttarakhand, 2013 CRI.L.J. 88 (SC)**, in paragraph 15 as under :-*

"15. Once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It has unequivocally come on record through various witnesses, including PW4, that there was a 'Satyanarayan Katha' at the house of Chetu Ram which was attended by various villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In such cases, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with the above-stated principles, the Courts would not be justified in overlooking such valuable piece of evidence."

*(ii) In the case of **Brahma Giri Vs. State of U.P., [2004 (2) JIC 723 (All)]** it has been held that evidentiary value of testimony of the interested witness/statement of family member of the deceased is not to be rejected on the ground of his relation with victim. However, Court is required to scrutinized his statement with care.*

*(iii) In the case of **Narendra and others Vs. State of U.P., [2006 (56) ACC 288**], a Co-ordinate Bench of this Court has held in paragraph 18 as under :-*

*"18.We have considered the submission and in our opinion there is no substance in this submission. It is a settled position that there is no proposition in law that relatives are to be treated as untruthful witness, just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence. Being relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong person in the crime, so as to allow the real culprits to escape unpunished. The submission of the non-examination of other witnesses is concerned, mere failure to examine all the witnesses who may have witnessed the occurrence will not result in outright rejection of the prosecution case if the witnesses examined by the prosecution are found to be truthful and reliable. Moreover, we cannot ignore the reality that many eye-witnesses shy away from giving evidence for obvious reasons. In the case of **Ravi v. State, 1988 (25) ACC 168 (SC**), it has been observed that "It is settled by a catena of cases by this Court that the evidence of eye-witnesses cannot be rejected merely because they are related. In such a situation, the evidence of PW 2 in the present case, there is no strong motive or ill will on the part of PW 2 to exonerate the real person who caused the injuries to her son and to implicate the accused."*

*(iv) In the case of **Hardev Singh, etc. Vs. Harbhej Singh and others, 1996 (4) Crimes 216 (SC)**, the Apex Court has in paragraph 16 has held as under :-*

"16.Coming to the finding as regards the non-examination of independent eye witnesses who saw the incident in question we must hasten to add that it is completely erroneous and unmerited. The prosecution has examined Hardev Singh (P.W. 2) and an injured witness Suba Singh (P.W. 3), although some other villagers did come at the place of incident but in our opinion merely because other independent witnesses were not examined could not be a ground to discredit the evidence of these two eye witnesses. This Court time and again has emphasised that the evidence of close relations who testified the facts relating to the occurrence be not rejected merely on the ground that they happened to be the relatives. All that this Court has ruled is that the evidence of such witnesses be scrutinised very carefully. We have very carefully gone through the evidence of Hardev Singh (P.W. 2) and Suba Singh (P.W. 3) who were consistent in their evidence as regards the details of assault caused by the respondents (accused). Both the witnesses have given minute details in regard to the weapons used by each of the accused and the manner in which they have assaulted Harbhajan Singh in front of the house of Chanan Singh. They also stated that A-1 fired from his gun at Harbhajan Singh causing him bleeding injuries. They further stated that the second shot fired by A-1 missed the target. It is true that the medical evidence does indicate two gun shot injuries. In the facts and circumstances of the case non explanation of the gun shot injury No.6 by these two eye witnesses would neither dilute their evidence nor their presence could be doubted. It is the positive case of both the witnesses that Harbhajan Singh had come to the house of Chanan Singh to help him in the construction work. There is nothing in their evidence which can persuade us to disbelieve the story narrated as regards the assault on Harbhajan Singh. Coming to the assault on Baldev Singh caused by the respondents (accused), Hardev Singh (P.W.

2) and Suba Singh (P.W. 3) had stated that Baldev Singh, on noticing that the respondents (accused) were coming towards him, left the driver's seat and went to the trolley to escape himself from the probably attack by the accused. Harbhej Singh (A-1) gave a lalkara and thereupon Amrik Singh (A-3) climbed up the trolley and chopped off the leg of Baldev Singh with gandasa. Gurmej Singh (A-4) also climbed up the trolley and gave 2-3 blows on his left arm from the sharp side of gandasa. Mohan Singh (A-5) also gave a gandasa blow from the sharp side on his chest. After inflicting injuries to Baldev Singh the accused fled away. Both these witnesses were searchingly cross-examined by the defence but there is hardly any material brought on record to discredit their evidence. The evidence of both these witnesses in our considered view unmistakably proves that the respondents (accused) who were the members of the unlawful assembly having a common object to cause the murders of Harbhajan Singh and Baldev Singh did cause such bodily injuries to them as a result thereof they met with homicidal deaths."

(v) In the case of ***Seeman alias Veeranam Vs. State by Inspector of Police, 2005 CRI.L.J. 2618 (SC)****, the Apex Court in paragraph 4 has held as under :-*

"4. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement."

(vi) In the case of ***Nachhattar Singh Vs. State of Punjab, 1998 SCC (Cri) 949****, the Apex Court in paragraphs 3 and 4 has held as under :-*

"3. The High Court has held that both Daya Singh and Kulwant Singh were present in the house at the time of the incident. Their presence in their own house at that time was quite natural. If they were present in their house then obviously they could have seen the assault on their mother by the appellant. Both the courts below have thought it proper to accept their evidence and we see no reason to differ from the finding recorded in that behalf.

4. The contention raised on behalf of the appellant was that the witnesses could not have been in their house at the time when the incident took place. It was late evening time and therefore their returning to the house from their shop at that time cannot be regarded as unnatural or improbable. As we are of the view that the High Court was right in confirming the conviction of the appellant on the basis of the evidence of the two eye witnesses, this appeal has to be dismissed."

(vii) In the case of ***Sher Singh and another Vs. State of Haryana, 1994 CRI.L.J. 1980 (SC),*** *the Apex Court has held in paragraph 5 as under :-*

"5. Merely because PWs 2 and 3 are related to the deceased, that by itself is not a ground to reject their evidence. As a matter of fact PW 2 would be the last person to implicate somebody falsely. It is to be noted that he went to the village, informed his parents and rushed to the police station which is 19 kilometres away and gave the report without any delay."

(viii) In the case of ***State of U.P. Vs. Sheo Sanehi, [2005 (52) ACC 113]****, the Apex Court in paragraph 16 has held as under :-*

"16. So far as PWs 3 and 4 are concerned, PW 3 is nephew of deceased Devi Din whereas PW 4 is widow of the said deceased, as such they are natural witnesses and their presence at the alleged place of occurrence cannot be doubted. The names of these two witnesses were disclosed in the First Information Report itself and they supported the prosecution case in all material particulars in their statements made before the police as well as in Court and no infirmity could be pointed out in their evidence, excepting that they were related to the deceased persons and inimical to the accused. It is well-settled that merely because a witness is related to the prosecution party and inimical to the accused persons, his evidence cannot be discarded if the same is otherwise trustworthy. In the case on hand, we do not find any infirmity whatsoever in the evidence of PWs 1, 3 and 4, as such it is not possible to disbelieve them, especially in view of the fact that their evidence is supported by medical evidence as well as objective findings of the investigating officer, but the High Court has committed a serious error in discarding their testimonies on this score."

27. In the case in hand, we have considered the evidence of PW 1 and PW 2 thoroughly. They have been cross examined by the counsel for the appellants at length, but in their cross examination too, no such fact came on surface which may lead to some other story or fact. Hence, it cannot be said that in absence of any independent witness the prosecution story has not been proved.

On the above point, the Apex Court, in the case of **Amar Singh Vs. Balwinder Singh and others, 2003 (46) ACC 619 (SC),** in paragraph 15, has held as under :-

"15. Another reason given by the High Court for acquitting the accused - respondents is that two other injured witnesses, namely, Kashmira Singh and Pritam Singh and one Ramesh, whose name was mentioned in the FIR, were not examined. Shri Ashwani Kumar, learned senior counsel appearing for the accused-respondents has vehemently urged that the purpose of a criminal trial is not to support the prosecution theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the public prosecutor is to represent the administration of justice and therefore the testimony of all the available eye witnesses should be before the Court and in support of this contention he has placed reliance on State of U.P. & Anr. v. Jaggo alias Jagdish & Ors., AIR 1971 SC 1586. It is true that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether effect of their testimony is for or against the case of the prosecution. However, that does not mean that everyone who has witnessed the occurrence, whatever their number be, must be examined as a witness. The prosecution in the present case had examined three eye-witnesses who were all injured witnesses. The mere fact that Kashmira Singh and Pritam Singh were not

examined cannot lead to an inference that the prosecution case was not correct. The aforesaid two witnesses had been given up by the prosecution on the ground that they had been won over by the accused. These two persons are not family members of the first informant Amar Singh and it is quite likely that they did not want to get involved in any dispute between the first informant and his sons on the one hand and the accused on the other hand as they had no interest in the land belonging to Jangir Dass Sadh which was being earlier cultivated by Gurdial Singh, father of A-1 and A-2 but had been taken an year earlier by the first informant Amar Singh. The contention raised by learned counsel fails to take notice of Section 134 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. A similar contention has been repelled by this Court in a very illustrating judgment in Vadivelu Thevar v. State of Madras, AIR 1957 SC 614 and it will be useful to take note of para 11 of the report, which reads as under :

".....The contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in S.134, which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well recognised maxim that "Evidence has to be weighed and not counted." It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished."

28. Section 134 of the Evidence Act says that no particular number of witnesses in any case are required for proving any fact. If two eye witnesses prove the prosecution case properly, it is sufficient to establish the F.I.R. version. In the present case, PW 1 and PW 2 have been found reliable and credible.

29. So far as the complicity of the appellants in the occurrence is concerned, it has been mentioned in the F.I.R. that all the three accused persons, namely, Hari Shanker, Lavkush and Radhey Lal were carrying firearms in their hands. Hari Shanker was carrying gun and rest of the accused persons were having country made pistols in their hands. All the three accused persons shot fire at his father. In his examination-in-chief the witness PW 1 has stated that Hari Shanker and Lavkush fired upon his father by their gun and country made pistol respectively and having received injury his father fell down. This witness has not taken the name of third accused Radhey Lal. Witness PW 1 has further stated in his cross examination that when the accused opened fire at his father, the face of his father was towards east side. As his father received the firearm injury, he fell down from the wooden plank and thereafter another fire was shot at him by the accused. This part of statement of PW 1 is supported by Post Mortem Report, which shows one wound of entry on chest at left side. After receiving this injury his father fell down from wooden plank, in that turning the injured fell down on floor, from back side of the body, thereafter the second fire hit his abdomen towards right side. Further, PW 1 has stated that the accused persons fired three bullets but one bullet hit the wall of his house. Witness PW 2 has also

stated in his examination-in-chief that first fire was shot by Hari Shanker at his father by the gun and when he fell down on floor from plank Lavkush fired at him by country made pistol. This witness PW 2 in his cross examination has stated that accused Radhey Lal was standing near him. He had told this fact to Darogaji. In this way PW 1 and PW 2 both have not assigned any role of Radhey Lal to fire at his father.

30. The witness PW 2 further stated that as the accused persons came at his house, accused Lavkush and Hari Shanker went towards his father. He further stated that he has not given the statement to Darogaji that all the three persons had shot fire at his father. He does not know how this statement was written in his statement under Section 161 Cr.P.C. by Investigating Officer. He further stated that Lavkush and Hari Shanker had shot total three fires at his father out of which one hit the wall. In this way although there is some exaggeration in the F.I.R. as well as examination-in-chief of the witness that all the three accused persons shot fire at the victim, yet on perusal of his cross-examination and the post mortem report, it is found that his father had received only two firearm injuries. The witness further stated that one bullet hit the wall of his house but during investigation no sign or bullet mark has been noted by the Investigating Officer while making spot inspection, hence, the story of firing by all the three accused persons is not liable to be believed. Witness PW 2 has specifically mentioned in his cross-examination that accused Radhey Lal has not fired at his father. Witness PW 1 has stated that accused shot two fires at his father from very short distance. This fact stands proved by the post mortem report where in both the firearm injuries blackening, charring and tatooing was found present on the wounds. Witness PW 2 in his cross examination at page 7 has stated that Hari Shanker has shot first fire by his gun at his father, which hit the chest of his father. He has further stated that the third bullet was also fired by Hari Shanker. Further he has stated that he had told Darogaji that Hari Shanker had shot two fires at his father. During the spot inspection, the Sub Inspector found two empty cartridges of 12 bore. In general the 12 bore cartridges are used in gun and in country made pistols the offenders usually use 32 bore cartridges.

The bore is measured by the internal diameter in inches or by the number of lead balls of the size precisely fitting the barrel, which can be made from one lb. of lead. The most commonly it is 12 bore used in gun having bore diameter 0.729 inches.

The wad which has been found from the dead body of deceased Raja Ram Yadav is generally present in the shotgun cartridges, which may be made of both the cardboard and stout paper (air cushion) or plastic. The wad is impregnated with grease, which lubricates the wad.

31. Both the witnesses PW 1 and PW 2 have stated that one bullet shot (fire by Lavkush) hit the wall of his house but no sign of such bullet mark was found during the spot inspection as well as no empty cartridges of 32 bore has been found from the place of occurrence. The witness PW 6 has found two wounds of entry in the autopsy of the victim Raja Ram Yadav, for which he had opined that the injury has been caused by gun. Therefore, it is proved that only appellant Hari Shanker had fired two bullets from his gun at deceased Raja Ram Yadav. In absence of any sign of fire by country made pistol, we do not find involvement of appellants Lavkush and Radhey Lal in the offence. Thus, while

convicting accused/appellants Lavkush and Radhey Lal, the learned trial court has failed to assess the evidence properly which are available on record.

32. The formal witnesses PW 3 to PW 6 have proved the documentary evidence of prosecution and in their cross examination no otherwise fact or circumstance has been found which is adverse to prosecution story. Hence, the appeal is liable to be allowed partly.

33. Accordingly, the appeal is **partly allowed**. The judgment of conviction and order of sentence passed by learned trial court in respect of both the appellants, namely, accused/appellants - Lavkush and Radhey Lal is set aside. They are on bail. They need not surrender. Their sureties are discharged.

34. So far as the appeal on behalf of accused/appellant Hari Shanker is concerned, the same is **dismissed**. The conviction and sentence order passed by the learned trial court against the appellant - Hari Shanker is affirmed. Appellant - Hari Shanker is on bail. He shall surrender before the trial court concerned immediately to serve out the sentence. In case the appellant Hari Shanker fails to surrender before the trial court concerned, the trial court concerned shall issue N.B.W. against the appellant Hari Shanker. If appellant Hari Shanker appears or brought before the trial court concerned, he shall be sent to jail for serving out the sentence as awarded by the trial court.

35. Let a copy of this judgment along with the trial court record be sent to the trial court concerned for necessary compliance.

(2024) 5 ILRA 950
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 2531 of 2013

Dr. J.N. Mishra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Govind Saran Hajela

Counsel for the Respondent:
Govt. Advocate, R P Singh Parihar, Rajesh Shankar Srivastava

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2)-Indian Penal Code, 1860-Section 302 - Arms Act,1959 - Section 30 - challenge to –conviction-the deceased was the son-in-law of the appellant-tension arose between them-his son-in-law came to his clinic and challenged him by putting under the threat of tamancha and his bodyguard fired upon him-even after having first gunshot, he again tried to kill the appellant giving more than reasonable apprehension to the accused-he might be killed by the deceased-the appellant's own life and future life of his daughter was at stake and spur of moment, he has to take the call, in this situation he has chosen to save his life-The court held that the power and force used by the appellant while eliminating his son-in-law, is not excessive or beyond the limits and he has acted in exercising the right of private defense.(Para 1 to 37)

The appeal is allowed. (E-6)

List of Cases cited:

1. Periyasamy Vs St. (2024) SCC Onlin SC 314

2. Darshan Singh Vs St. of Punj. & anr.(2010) 2 SCC 333

3. James Martin Vs St. of Ker. (2004) SCC (Cri) 487

4. Ex CT. Mahadev Vs The Dir. Gen. B.S.F & ors. (2022) LiveLaw (SC) 551

5. Dharam Vs St. of Har. (2007) 15 SCC 241

6. Jangir Singh Vs St. of Punj. CRLA No. 2499 of 2009

7. Gopal & anr. Vs St. of Raj. (2013) 2 SCC 188

(Delivered by Hon'ble Rahul Chaturvedi, J. & Hon'ble Ms. Nand Prabha Shukla, J.)

[1] Heard Sri Govind Saran Hajela, learned counsel for the appellant, Sri R.P. Singh Parihar and Sri Sudhir Singh Chauhan, learned counsels for the complainant and Sri Satyendra Tiwari, learned A.G.A. for the State at length and perused the records.

[2] Paper book is ready and learned counsels for the contesting parties are ready to argue the case finally on the merit of the case. We are in the receipt of citations supplied to the Court by the respective counsels in support of their contentions.

[3] By means of the present appeal under section 374(2) Cr.P.C., the appellant is assailing the legality and validity of the judgment and order dated 07.05.2013 passed by learned Additional Sessions Judge, Court No.2, Shahjahanpur while deciding S.T. No.457 of 2010 arising out of case crime no.155 of 2010, under section 302 IPC and Section 30 of the Arms Act, police station-Jalalabad, District-Shahjahanpur thereafter convicting and sentencing the appellant under section 302 IPC with life imprisonment and fine of Rs.50,000/-, under section 30 of the Arms Act for six months rigorous imprisonment and a fine of Rs.2,000/- and in default of fine, one month additional imprisonment was awarded to the appellant.

FACTS OF THE CASE :

[4] Before coming to the merit of the case, it is relevant to give a bird's eye view to the factual aspect of the issue. As surfaced from the FIR, (I) informant is Ashok Kumar Dubey s/o Ramswaroop, for the incident of 02.03.2010 at 18:00 hours in the evening, the FIR came into existence on the same day at 23:30 hours. The distance from the place of occurrence to the police station is hardly three furlong (603.50 mtr.) ;(ii) the FIR was lodged against the appellant Dr. J.N. Mishra ; Seema(wife of the appellant), Nidhi(daughter of the appellant and wife of the deceased) and one unknown person ; (iii) As per the allegations made in the FIR, informant's son Sudhanshu (25 years) got married with daughter of the appellant Nidhi. As per the allegation, the appellant wanted to make Sudhanshu as his 'ghar-jamai' to look after his nursing home but as per the social norms and traditions, Sudhanshu declined this offer of his father-in-law and on this score, there was deep rooted discord and differences between them; (iv) In order to resolve this tangle, 'panchayat' was convened on 02.03.2010 around six in the evening at the clinic of the appellant Dr. J.N. Mishra at Jalalabad whereby the informant, his wife Pushpa and his son-Sudhanshu went to the clinic where the appellant, his wife-Seema and his daughter-Nidhi and one unknown person were present. All of a sudden during heated altercation, the host/accused-apellant started hurling filthy abuses and thereafter on the exhortation made by Nidhi, wife of the deceased, the appellant and unknown person

pumped fires upon his son-in-law Sudhanshu, who died on the spot. Anyhow, the informant and his wife Pushpa could save his life and lodged the present FIR at 11:30 p.m. after the delay of 5.30 hrs.

[5] After lodging of the FIR, Investigating Officer of the case has taken dead body of Sudhanshu(deceased) for the post mortem and after having thorough investigation into the matter, submitted the report under section 173(2) Cr.P.C. against the appellant Dr. J.N. Mishra alone, dropping the name of other co-accused persons of the FIR. The said charge sheet was submitted under section 302 IPC and Section 30 of the Arms Act only against accused/appellant. Consequently, learned Magistrate took the cognizance of the offences and being cognizable offence, committed to the court of sessions for trial.

[6] Learned trial Court on 26.07.2010 has framed the charges against the appellant under section 302 IPC and since, there is recovery of licensee rifle of 315 bore having no.93 AB 1985 and therefore, Section 30 of the Arms Act was added among the charges which were duly explained to the appellant to which the appellant denied from the charges and insisted to be tried.

[7] The prosecution, in order to establish the case, produced seven witnesses of fact as well as formal witnesses, out of which Ashok Kumar Dwivedi as PW-1, Pushpa@Pushpalata as PW-2, Nawab as PW-3, Dr. Suresh Kumar Vashisth as PW-4, S.I. Vinay Pal Singh as PW-5, S.S.I. Surendra Singh as PW-6, and Constable 962 C.P. Jakir Hussain as PW-7 were produced. Besides above, 16 different documents were also produced by the prosecution during trial which were duly proved and were exhibited during trial.

[8] Soon after the prosecution witnesses were over, statements under section 313 Cr.P.C. was recorded of the accused in which he has denied every allegations of the FIR and the story of the prosecution and has submitted that, he has been falsely implicated in the present case. He further submitted that he has got no son and the deceased-Sudhanshu, who was his son-in-law, was insisting to transfer his newly raised clinic in his name and when appellant denied to do so, then in order to eliminate the appellant, Sudhanshu pointed his tamancha over his father-in-law(appellant). In order to defend the accused-appellant, the gunner of the appellant fired upon Sudhanshu, killing his own son-in-law. He further stated that Sudhanshu was his son-in-law and was unemployed. He was having all sorts of bad habits including drinking. Taking into account the holistic view of the matter and strained relationship between them, accused appellant was apprehensive about his own safety and that is why he engaged a private shadow-gunner whose name was Harpal@Babba. On the date of incident, it was next day of Holi and his son-in-law came to the clinic of the appellant and took out his tamancha, extended threat to eliminate the accused/appellant. Sensing imminent danger and threat upon the life of his master, his shadow gunner fired from his rifle eliminating Sudhanshu. At the relevant time, neither wife of the appellant nor his daughter Nidhi as alleged in the FIR was allegedly present over the place of occurrence. Sudhanshu came to him all alone. After the incident, police personally informed the parent of the deceased, then they came to Jalalabad and lodged the FIR. It was further revealed that his shadow gunner Harpal@Babba died naturally during trial. In order to establish the case,

defence has also produced one Ram Nath Pandey as DW-1.

[9] We have requested learned counsel for the appellant to provide his written arguments and counsel for the appellant has provided date and events, moot points for the determination of the present appeal and citations on which they want to rely upon. Learned counsel for the appellant, during the course of arguments, have hammered his submissions upon two following points :-

(i) That the FIR was delayed by 5:30 hours, meaning thereby for the incident of 6 p.m. in the evening, the FIR was lodged at 11:30 p.m. where the police station is hardly three furlong (603.50 mtr) away from the place of occurrence and there is no justifiable reason coming forward to explain this inordinate delay.

(ii) The alleged killing of son-in-law Sudhanshu was in exercise of power of right of self-defence and the deceased was carrying tamancha in his hand after extending threats to the appellant, which has created sufficient amount of apprehension in the mind of the appellant regarding his life and the fire was opened in exercise of power to right of self-defence.

The question as to whether while exercising his right of self-defence, the accused/appellant or his shadow-gunner have crossed his limits while exercising his powers?

[10] Before appreciating and analysing the judgment impugned by the learned trial Court, it is mandatory to overview the testimonies of the witnesses of fact, so as to appreciate the controversy involved in its correct perspective.

DELAYED FIR :

[11] It is admitted by PW-1 and PW-2 in their respective testimonies, that for the incident of 6 p.m. on 02.03.2010, the FIR was registered at 23:30 hours where the police station is hardly three Furlong (603.50 mtr.) away from the place of occurrence. Learned trial Court, while dealing with this issue at Page-16 of the judgment, has given undue advantage and importance to the informant that after the incident, he was literally frightened and shaken that he could not lodge the FIR within reasonable time. Though, the police station is not very far from the place of occurrence. But learned trial Court has given undue weightage to the explanation given by the informant that after the incident, instead of rushing to either doctor or police station after the incident, he has taken his wife Pushpa to bus station and sent her to Farrukhabad with the instruction to inform his family members about alleged shootout and only after few persons came from Farrukhabad to Jagdishpur, then only he/informant got the FIR lodged at 11:30 p.m. through Om Kiran, the scribe.

[12] At page-2 of the cross-examination, informant stated that he was deeply frightened to see the murder of his son right in front of his eyes. He stated that in this firing transaction, he and his wife has not obtained a single scratch over them. After the incident, he came to his son, turned his dead body and thereafter, taken her wife to bus station to get her boarded in the bus and started waiting for the persons to come from Farrukhabad. He stated that "घटना के बाद मैंने अपनी पत्नी को फर्रुखाबाद की बस में बैठा दिया था उस बस का नंबर मुझे याद नहीं है उस यात्रा की टिकट मेरी पत्नी ने ली थी मैंने नहीं ली थी" This seems to be most unnatural conduct on the part of the parent, whose son was allegedly murdered by the accused-appellant/his body guard right in front of their eyes, as claimed in the FIR.

[13] From the aforesaid analysis, it is clear that the present FIR was registered after unexplained delay of 5:30 hours where the police station is hardly three furlong (603.50 mtr.) from the place of occurrence as stressed by learned counsel for the appellant. Yet another connected aspect of the issue is that, 02.03.2010 was the next day of Holi and it was six in the evening, Surendra Singh, S.S.I. was S.H.O. police station-Jalalabad on the date of incident. However, he was put before the court as PW-6 and was cross-examined, where he has stated that "घटना वाला दिन होली का दूसरा दिन था गश्त व् पिकेट चल रही थी थाने से घटना स्थल की दूरी करीब तीन फ़र्लांग की है मृतक सुधांशु का मोबाइल नंबर मैंने लिखा था घटना की सूचना मुझे 15 मिनट के अंदर नहीं मिली थी बल्कि वादी ने आकर दी थी मेरे थाने जलालाबाद में वायरलेस है कोतवाली फतेहगढ़ में वायरलेस है"

On conjoint reading of both the statements, it is clear that it was the next day of Holi and incident is at 6 p.m in the evening where it is claimed that the police party was on the picket to maintain public peace and order. This serious incident has taken place within a range of three furlong (603.50 mtr.) from the place of occurrence and the police party remain oblivious of this serious shoot out in the evening at 6 and it is the informant who has given this information after 5:30 hours, which itself castes serious question mark upon the way and manner this shoot out have taken place and thereafter FIR was lodged after inordinate delay. The conduct of the informant, as mentioned in their cross-examination that after shoot out, he has only turned the dead body of his son and rushed to the bus station to sent his wife to Farrukhabad instead of going to the doctor or to the police station. All this aspect of the issue are most unnatural and against normal human behaviour.

RIGHT OF PRIVATE DEFENCE :

[14] The second aspect of the issue is as to whether this shoot out was as a result of exercising the right of private defence by the accused appellant and the injuries sustained by the deceased-Sudhanshu ? After the death of Sudhanshu, deady body was sent by the police for autopsy. Dr. Suresh Kumar Vashisth, PW-4 who conducted the autopsy on 03.03.2010 at 1:30 p.m. has submitted that (i) there was a gun shot injury of 0.9 cm x 0.8 cm x embedded under the chest below the right shoulder of 15 cm. The margins were inverted and blackening and tattooing were present, (ii) gun shot wound of exit of 1.5 cm x 1 cm which corresponded to the injury no.1 from the back side of the shoulder of 15 cm below. Both the injuries were through and through, (iii) wound of entry of 1 cm x 0.8 cm x inside the stomach which is embedded inside the right buttock. Around both the wound, there was blackening and scotching, suggestive of the fact that fire over the deceased was from the close proximity, say about 2-3 meters. As a result of second gun shot injury, deceased's right pelvic girdle was found fractured. The brain was paled, third rib was fractured, both the lobs of lungs were scattered. The heart was empty and within plural cavity, there was two ltrs. of blood present and the cause of injury was excessive blood loss. The doctor also took out one metallic bullet inside the stomach which was sealed and handed over to the police personally.

[15] At this juncture, learned counsel for the appellant has submitted that the recovery of the metallic bullet attains significance. Since, there is no resistance of bone inside the stomach, full metallic bullet was recovered but when the said bullet was

sent to the F.S.L. examination, the F.S.L. examination report in its report dated 04.09.2010 the expert opined that the said bullet was engraved with the sign 'E B-1' when compared with rifle no.AB-93-1985. It cannot be compared as peculiar feature of the bullet recovered from inside the body were completely missing. It is also mentioned in the F.S.L. report that the alleged recovered bullet 'E B-1' was in mutilated and incomplete one. It is shocking that the doctor has handed over the complete bullet in a sealed cover but the Investigating Officer of the case is sending bullet which is incomplete and mutilated one. Thus, under the circumstances, the expert has expressed his inability to give any opinion with regard to the operation by that rifle. This is classic example which put grave question mark about the standard of investigation and the working of the police. This is a million dollar question and it is the police who has to give explanation for this deep rooted incompetence which has given benefit to the defence.

Exercise of right of private defence and its applicability in the present case

[16] Before coming to the aspect of the issue, it is imperative that as many as three named and one unknown person were made accused in the present case and the police after holding thorough investigation, have dropped the name of two named accused persons namely Ms. Seema and Nidhi and one unknown person from the charge sheet. It is admitted fact that, the deceased Sudhanshu got married with Nidhi and specific role has been attributed to her i.e. of exhortation to his father/accused. The appellant/accused has given deadly blow upon the deceased, who was her husband. PW-6, Surendra Singh, S.H.O, was entrusted with the investigation, asked his subordinate Shri Ram Lakhan Singh to assess the authenticity of this allegation against Nidhi Mishra as she was entrusted with positive role. Sri Ram Lakhan Singh went to Aligarh and after collecting sufficient material from various quarters, submitted that on the date and time of the incident, she was at Aligarh preparing for her B.A.M.S. examination from Aligarh University. Therefore, after being satisfied, the police has dropped the name of Nidhi Mishra from the charge sheet. It is stated that these non-charge sheeted named accused persons were never tried by the prosecution to summon them in exercise of power under section 319 Cr.P.C.

[17] Now, coming to the real issue which has resulted into this unfortunate incident. The informant Ashok Kumar Dubey has casted positive story that on the eve of convening 'panchayat' to resolve the deep rooted discord between his son and appellant/accused, after the exhortation made by Nidhi Mishra, his father/unknown person has given fire upon his own son-in-law. This was serious allegation given by the counter part of the appellant upon his own samdhi and daughter-in-law. Whereas PW-3, Nawab in his testimony, has changed the entire texture of the case. The interesting feature is that PW-3 has not been declared Hostile by the Court. In his testimony, PW-3, Nawab, in no uncertain terms, have revealed that on 03.03.2010 right in front of his eyes, the police has taken out one tamancha and 2-3 live cartridges and blood soaked earth was also taken from the place of occurrence. PW-3 put a signature over the recovery of 315 bore tamancha and the cartridge by the police from the place of occurrence.

He further stated that he and the appellant enjoys the common wall in

between two shops. At that relevant point of time, he came to the clinic of the appellant. Tamancha was loaded one and at the relevant time, neither the informant nor his wife Smt. Pushpa was present in the clinic. The accused appellant is having one Nursing home. The deceased often abused his own father-in-law on phone and was insisting to transfer the property(nursing home) in his name and this was the sole bone of contention between them. As soon as he came to the clinic, the deceased pointed out tamancha upon his father-in-law, the appellant. It is the body guard/gunner who has given first blow upon Sudhanshu(deceased) apprehending threat to his master/appellant and the second fire was given, when Sudhanshu again tried to eliminate his father-in-law by fixing his target. This testimony of Nawab assumes extreme importance as he is independent witness of the incident as prosecution witnesses. He stated in his cross-examination that :

''अभियुक्त जगदीश नारायण मिश्रा की दूकान मेरे पड़ोस में है |मैं घटना के समय अपनी दुकान पर था इस तमंचा में एक कारतूस लगा हुआ था |घटना के समय मृतक के पिता अशोक कुमार व माता श्रीमती पुष्पा दुकान पर मौजूद नहीं थे| मुल्जिम का नर्सिंग होम बरेली जलालाबाद रोड पर नया निर्मित है मृतक अभियुक्त से फ़ोन पर गली गलोच करता था व नर्सिंग होम वाली सम्पति व अन्य सम्पति अपने नाम हस्तानांतरण के लिए कहता था इसी बात का विवाद था | दूकान पर मुल्जिम के अंगरक्षक हरिपाल उर्फ़ बब्बा व दो तीन लोग मौजूद थे |अंगरक्षक ने ही मृतक सुधांशु पर फायर किया था |दूसरा फायर घूमकर सुधांशु ने फिर करना चाहा तो अंगरक्षक ने दूसरा फायर फिर सुधांशु पर किया |उस समय सीमा व निधि दूकान पर मौजूद नहीं थे''

[18] From the place of occurrence, the police has recovered one 315 bore country made pistol from the right hand of Sudhanshu(deceased) and two live cartridges. The natural query is that, if somebody is going to have 'panchayat' to resolve the tangle, why anybody would carry weapon with him? Moreover, when the son-in-law is going to meet his own father-in-law and why the father-in-law would kill his own son-in-law, making her daughter widow unless and until something very serious is expecting to occur for the life and security of father-in-law/appellant himself.

This issue has to be resolved from the testimonies of the various witnesses. There are two parallel stories (i) Father-in-law has eliminated his own son-in-law on the exhortation made by her own daughter Nidhi Mishra as the deceased has declined the offer to become ghar-jamai. (I) There is shoot out between accused/appellant and the deceased son-in-law as he came to meet the accused-appellant with different design with weapon in his possession, to eliminate his own father-in-law for the sake of his property. Thus, Right of Private Defence is now claimed by the appellant-accused.

[19] Per contra, counter theory has been narrated by the accused/appellant that it is the son-in-law who became greedy and asking his father-in-law to transfer his entire property including clinic in his name which was declined by his father-in-law. On this score, there was a long drawn bad breath and differences between the father-in-law and son-in-law. Infuriated by this, son-in-law Sudhanshu came on the fateful day with tamancha of 315 bore and pointed on his own father-in-law which resulted into gunning down of his own son-in-law Sudhanshu in exercise of power of right to private defence by accused/appellant. The police has recovered the said tamancha and prepared its recovery memo. In the "Inquest report" too, there is reference of alleged tamancha of 315 bore and its specifications. Thus, it cannot be said that this tamancha was planted one. PW-3, Nawab in his

testimony and thereafter formal witnesses have supported this angle of the case.

[20] Learned counsel for the appellant has strenuously argued that this unfortunate incident has taken place in exercise of power of right of private defence and has pointed out following relevant sections of IPC in connection with present case which reads thus :-

The private defence is defined in Section 96 of IPC which says nothing is offence which is done in exercise of right of private defence. Section 97 of IPC provides that right to private defence of the body and the property which reads thus :-

"97. Right of private defence of the body and of property.—

Every person has a right, subject to the restrictions contained in section 99, to defend—(First)— His own body, and the body of any other person, against any offence affecting the human body;(Secondly)— The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

Section 100 of IPC provides that when the right of private defence of body extends of causing death. Section 100 of IPC is quoted hereinbelow :-

"The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

1. Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

2. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

3. An assault with the intention of committing rape;

4. An assault with the intention of gratifying unnatural lust;

5. An assault with the intention of kidnapping or abducting;

6. An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

7. An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act."

Section 102 IPC is quoted hereinbelow :-

"The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed;

and it continues as long as such apprehension of danger to the body continues."

[21] In addition to this, learned counsel for the appellant has relied upon the judgment of Hon'ble the Apex Court in the case of ***Periyasamy Vs. State reported in (2024) SCC Online SC 314***. The Hon'ble

Apex Court while dealing with the above aspect of the issue have referred the 'Right of Private Defence' in paragraph no.18 of the above judgment which is quoted hereinbelow :-

"The principle is best captured in the following words found in Russel on Crime, 11th Edition Vol.I

"... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable".

[22] Though, the Right of Private Defence is nowhere defined in the IPC. It would depend on the circumstances of each case that such right is available or not, is determined within the said boundaries only. No test in abstract can be laid down for determining whether the person legitimately acted in private defence. The law only provides that a person claiming such right bears the onus to prove the legitimacy of his action done in furtherance thereof and it is not the Court to presume the presence of such circumstance or the truth in such plea being taken.

[23] In another judgment in the case of ***Darshan Singh Vs. State of Punjab and another***, reported in ***(2010) 2 Supreme Court Cases 333*** Hon'ble the Apex Court has mentioned the following principles regarding Right of Private Defence :-

" 3. The following principles of right to private defence emerge :-

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and

civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of selfcreation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) Even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existenc-e-Of the right of private defence beyond reasonable doubt.

(ix) The IPC confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

[24] **Now moot question for determination are in two fold (I) whether action of assault on the part of accused appellant was in exercise of right of private defence ? (ii) Whether he has exceeded his limits in exercise of private defence by giving successive fires upon the deceased ?**

[25] From the aforesaid postulates propounded by Hon'ble Apex Court, it is mere reasonable apprehension in the mind of the accused is sufficient to put a right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give Right of Private Defence. It is enough that if accused apprehends that such an offence is contemplated and it is every likely to be committed if Right of Private Defence is not exercised. The Right of Private Defence commences as soon as reasonable apprehension arises and it is co-terminus with the duration of such apprehension. It is unrealistic to expect a person under the assault to modulate his defence step by step with arithmetical exactitude. In this regard, there is yet another judgment relied by learned counsel for the appellant that in the case of ***James Martin Vs. State of Kerala reported in 2004 Supreme Court Cases (Cri) 487*** , paragraph no.18 of which is quoted hereinbelow :-

"Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances."

[26] In this regard, the conditions formulated in **Darshan Singh's** case (supra) is of great importance. Similarly, in the case of **James Martin (supra)**, it was observed by Hon'ble the Apex Court that, 'situations have to be judged from the subjective point of view of the accused concerned in the surrounding, excitement and confusion of moment confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force then was necessary used in the prevailing circumstances on the spot, it would be inappropriate as held by the court to adopt test by detached objectivity which would be so natural in a court room, or that would seem absolutely necessary to a perfect cool bystander.

A person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

[27] Learned counsel for the appellant has drawn the attention of the Court to the recent judgment in the case of ***Ex. CT. Mahadev Vs. The Direction General, B.S.F and ors***. Reported in ***2022 LiveLaw (SC) 551*** , paragraph no.21 of which is quoted hereinbelow :-

"21. To sum up, the right of private defence is necessarily a defensive right which is available only when the circumstances so justify it. The circumstances are those that have been elaborated in the IPC. *Such a right would be available to the accused when he or his property is faced with a danger and there is little scope of the State machinery coming to his aid. At the same time, the courts must keep in mind that the extent of the violence used by the accused for defending himself or his property should be in proportion to the injury apprehended. This is not to say that a step to step analysis of the injury that was apprehended and the violence used is required to be undertaken by the Court; nor is it feasible to prescribe specific parameters for determining whether the steps taken by the accused to invoke private self-defence and the extent of force used by him was proper or not. The Court's assessment would be guided by several circumstances including the position on the spot at the relevant point in time, the nature of apprehension in the mind of the accused, the kind of situation that the accused was seeking to ward off, the confusion created by the situation that had suddenly cropped up resulting the in knee jerk reaction of the accused, the nature of the overt acts of the party who had threatened the accused resulting in his resorting to immediate defensive action, etc. The underlying factor should be that such an act of private defence should have been done in good faith and without malice. "*

Learned counsel for the appellant has further drawn the attention of the Court to the judgment of Hon'ble Apex Court in the case of ***Dharam Vs. State of Haryana*** reported in ***(2007) 15 SCC 241***, paragraph no.61 of which is quoted hereinbelow :-

"18. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence."

[28] Hammering his submissions on the above quoted observation by the Hon'ble Apex Court, Sri Hajela, learned counsel for the appellant underlines, that it

is the human psyche at the spur of moment which reacts to ward of the danger and to save himself, which is basic human instinct. It cannot be weighed on any golden scale or with any mathematical precision. It differs from person to person, situation to situation and no steel jacket or airthematical formula could be propounded to meet out such a situation. At the time, the accused has to see how his life could be saved from such a grim situation, when his opponent has fixed his target towards him or trying to liquidate him from the close proximity. Anything could happen at any time. It is neither possible or prudent to laid down the abstract parameters which can be applied to determine as to what means or force could be used by person under calamity. He could flee away from the site or he became aggressor. Answer to such type of question depends upon the host of factors, like prevailing circumstance at the spot, his feeling at relevant time, the confusion and the excitement depending upon the nature of assault upon him etc. If we judge the action of appellant that, it is clear cut case of the prosecution that appellant has exceeded his limits while exercising his valuable right of private defence by giving successive fires upon the deceased, ensuring his death. But, if we examine the testimony of PW-3, Nawab, who in no uncertain terms states that the deceased even after receiving first gun shot upon his person again aimed at the appellant by his tamancha from a close proximity. This scenario could be well visualized and appreciated that the appellant in exercise of his right of private defence commences as soon as reasonable apprehension arises and co-terminus with that duration that reasonable apprehension lasts. There cannot be steel jacket formula that while exercising this right, only single shot is good enough. But, fact remains that this exercise of right of private defence can never be vindictive or malicious, as it would be repugnant to very concept of private defence.

[29] Under the circumstances, let us examine the facts of the present case and speculate the circumstances hypothetically in which the appellant/accused was placed. He was pitted against his own son-in-law/deceased with illegal tamancha in his hand and was standing right in front of him in the close proximity. There was heated altercation which had already taken place and both of them are against each other standing nearby. It could be anybody's call. The shadow/gunner has given first fire upon appellant causing serious injury over his vital part. The aggressor again turned and fixed the target over the accused person, the second shot was fired upon him causing his death, as it is clearly indicated in the deposition of PW-3, Nawab in his cross-examination, in which he stated that :

"दूकान पर मुल्जिम के अंगरक्षक हरिपाल उर्फ़ बब्बा व दो तीन लोग मौजूद थे |अंगरक्षक ने ही मृतक सुधांशु पर फायर किया था |दूसरा फायर घूमकर सुधांशु ने फिर करना चाहा तो अंगरक्षक ने दूसरा फायर फिर सुधांशु पर किया |उस समय सीमा व निधि दूकान पर मौजूद नहीं थे"

It is true that no fire was made by the deceased upon the appellant, but it has given rise to a serious apprehension in the mind of appellant/shadow gunner, that if no action is taken by them in next few seconds, it is just possible that deceased may kill the appellant. The decision has to be taken within spur of moment or rather fraction of seconds.

[30] It is almost settled by the various pronouncement by the Hon'ble Apex Court that the situation has to be judged from subjective satisfaction of the individual accused. No father-in-law would

eliminate his own son-in-law making his own daughter widow, unless and until he is put under the serious and extra-ordinary peril in which his own survival is under immense threat and severe danger. If the deceased is carrying the tamancha in his hand, going for the alleged panchayat, this by itself is surprising that he was expecting something untoward may happen in which he may use the weapon. Exactly, the same thing happened, when he put his tamancha fixing the target upon his own father-in-law, then in that situation, it could be anybody's call. Even after having the first gun shot, he again turned up and fixed the target again giving more than reasonable apprehension to the accused, that again there is chance to be eliminated. Under these circumstances, second/successive shot was fired upon the deceased in order to save the appellant's life. Thus, by no stretch of imagination, it could be termed that second shot was vindictive or driven by some malice. In fact, the accused appellant is now looser from both the sides. He might be killed by the deceased who is his son-in-law or even after killing the deceased, though, the appellant has saved himself, but has made his daughter widow as argued by Sri Hajela, learned counsel for the appellant.

[31] Learned A.G.A. as well as counsels for the informant submits that, this is nothing but a cold blooded murder by the accused/appellant, who brutally killed his own son-in-law by giving successive fires upon him to ensue his death. Assuming for the sake of argument that the deceased was carrying country made 315 bore tamancha in his hand, but not a single shot was fired by him. It is not the question of firing by the tamancha, but it has given sufficient apprehension in the mind of appellant, that he would be murdered, if he does not exercise his valuable right of private defence.

[32] Per contra, learned counsel for the complainant as well as learned A.G.A. have referred the judgment in the case of ***Jangir Singh Vs. State of Punjab*** in Criminal Appeal no.2499 of 2009 decided on 31.10.2018, paragraph no.12 of which is quoted hereinbelow :-

"The law on this aspect of causing disproportionate harm and exceeding right to private defence is amply clear. In cases of disproportionate harm leading to death of the aggressor, sentence under section 304 part-I is the appropriate sentence."

[33] There is yet another judgment of Hon'ble Apex Court in the case of ***Gopal and another Vs. State of Rajasthan*** reported in ***(2013) 2 Supreme Court Cases 188***, paragraph no.17 of which is quoted hereinbelow :-

"Regarding the plea of private defence, it is useful to refer a decision of this Court in V. Subramani & Anr. Vs. State of T.N. (2005) 10 SCC 358. The following principles and conclusion are relevant:

"11. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not

necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. (1968) 2 SCR 455, State of Gujarat v. Bai Fatima,(1975) 2 SCC 7, State of U.P. v. Mohd. Musheer Khan, (1977) 3 SCC 562, and Mohinder Pal Jolly v. State of Punjab,(1979) 3 SCC 30.) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P.,(1979) 2 SCC 648 runs as follows: (SCC p. 654, para 9) "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence." The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

[34] The accused appellant in his 313 Cr.P.C. statement, in his last reply stated that his son-in-law(deceased) came to his clinic and challenged him by putting under the threat of tamancha and his bodyguard fired upon him. The injured deceased even after having one gun shot injury again revived and turned and tried to fix his target then only the second fire was fired.

The DW-1, Sri Ram Nath Pandey in his testimony stated that he went to appellant's clinic to fetch medicines where there were few patients and the accused appellant along with his private body guard

were present. His son-in-law came and started hurling filthy abuses. The deceased was interested in property(clinic) to transfer in his name. He further stated, :

''सुधांशु कोई फायर नहीं कर पाया था केवल ताना था डॉक्टर साहब के अंगरक्षक हरपाल उर्फ़ बब्बन ने सुधांशु के गोली मार दी सुधांशु को मैं पहले से जनता था की वह डॉक्टर साहब के दामाद है"

Learned counsels for the complainant underline that the deceased had only fixed his target but did not fire. I am unable to accept this argument of counsels for the informant. As mentioned above, it is subjective satisfaction of the accused as to how he cope with the situation. No mathematical formula could suffice the objective. It is the reasonable apprehension which counts.

[35] After hearing learned counsels for the contesting parties and the authorities cited by them, the Court has occasion to analyse the submissions and the legal pronouncement in this regard. As rightly pointed out by Hon'ble the Apex Court that there cannot be golden parameters or arithmetical formula to judge that the force used by the aggressor is excessive or beyond the limits. As mentioned, neither it is prudent nor desirable to lay down any abstract parameters to determine as to whether the means and force adopted by threatened person was proper or not ? The answer to this query depends upon the host of the factors aggressor's own psyche, his own temperament and behaviour, his own feeling at the relevant time, the confusion and the excitement depending upon the nature of assault upon him. The weapon carried by the aggressor and he is in near proximity, all these factors has to be counted while deciding that the appellant has transgressed his limit of right of private defence or not. Whether he has any vindictive or malicious idea in eliminating the deceased ? As mentioned above, the inter se relationship between the appellant and deceased was quite delicate. The appellant's own life and the future life of his daughter was at stakes and spur of moment, he has to take the call. In this situation, he has chosen to save his life after, subjectively satisfying himself and thereafter decided to kill his own son-in-law. As rightly pointed out by Sri Hajela that the appellant is looser from both the sides and as such, we are of the opinion that the power and force used by the appellant while eliminating his son-in-law, is not excessive or beyond the limits and he has acted in exercising the right of private defence.

[36] Thus, from the aforesaid discussion, we are unable to accept the findings and the conclusion recorded by learned Additional Session Judge, Court No.2, Shahjahanpur in deciding the S.T. No.457 of 2010 arising out of case crime no.155 of 2010 under section 302 IPC and Section 30 of the Arms Act, police station-Jalalabad, District-Shahjahanpur convicting the appellant and sentencing for life imprisonment under section 302 IPC and fine of Rs.50,000/- and under section 30 of the Arms Act for six months rigorous imprisonment and a fine of Rs.2,000/-.

[37] The present appeal stands **ALLOWED**. The judgment and order dated 07.05.2013 passed by learned Additional Sessions Judge, Court No.2, Shahjahanpur in S.T. No.457 of 2010 arising out of case crime no.155 of 2010 is hereby set-aside. The appellant is on bail. He need not to surrender but his sureties are discharged and the appellant is set at liberty forthwith, if not wanted in any other case.

(2024) 5 ILRA 965
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 5218 of 2016
With
Criminal Appeal Nos. 5501 of 2016, 5502 of 2016 & 5649 of 2016

Dhruvjeet Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Babu Lal Ram, A, A, Amrendra Nath Singh, Bed Prakash Rai, Gavendra Pal Singh

Counsel for the Respondent:
G.A., Rajesh Kumar Singh

A. Criminal Law- Criminal Procedure Code, 1973-Section 374(2)-Indian Penal Code, 1860-Sections 302, 307, 323, 504, 506, 147, 148 & 149 - Criminal Law Amendment Act,2013 - Section 7 - Arms Act, 1959 - Section 3/25 - challenge to – conviction-appellants were convicted of murder of one Havildar in the Army following an earlier altercation-both PW-1 and PW-2 claimed to have witnessed the attack-their accounts were consistent, despite minor discrepancies raised during cross-examination-medical evidence confirmed that deceased died of firearm injuries-PW-3 and PW5 corroborated the injuries sustained by the deceased-weapons were recovered from the accused and ballistic reports matched the cartridges found at the crime scene-the motive was rooted in animosity between the accused and the deceased over prior disputes in the market-Thus, the court upheld the conviction of all accused-all five accused were sentenced to life imprisonment.(Para 1 to 63)

The appeal is allowed. (E-6)

List of Cases cited:

1. Ashabai Machindra Adhagale Vs St. of Mah. & ors. (2009) AIR SC 1973

2. U.P. Vs Naresh (2011) 4 SCC 324

3. Dilip Singh & ors. Vs St. of Punj. (1953) AIR SC 364

4. Bur Singh Vs St. of Punj. (2009) AIR SC 157

5. Jarnail Singh Vs St. of Punj. (1996) 1 SCC 527

6. Mukesh & anr.Vs St. for NCT of Delhi & ors. (2017) AIR SC 2161

7. Mukesh Singh & anr.Vs St. for NCT of Delhi

8. Mah. Vs Bharat Fakira Dhiwar CRLA No. 1246 of 1997

9. St. of H.P. Vs Jeet Singh (1999) 4 SCC 370

10. Jainul Haque Vs St. of Bih. (1974) AIR SC 1651

11. Suresh & anr. Vs St. of U.P. (2001) 3 SCC 673

12. Surendra Chauhan Vs St. of M.P. , 2000 4 SCC 110

(Delivered by Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the appellants, learned counsel for the respondent No.2 and learned AGA for the State and perused the material placed on record.

2. As all these criminal appeals have arisen out of same judgement of conviction and sentence, hence, these are being decided by this common judgement:-

3. Above noted Criminal appeals have been preferred by the accused appellants

namely, Dhruvjeet Singh, Vimlesh Singh, Santosh Singh, Rakesh Singh and Akhilesh with a prayer to set aside the judgment and order dated 26.9.2016, passed by Additional Sessions Judge/Special Judge Gangster Act, Court No.3, Ghazipur in Sessions Trial No.256 of 2013, State of U.P. vs. Dhruvjeet Singh and others in Case Crime No.136 of 2013, under Sections 147, 148, 149, 302, 307, 323, 504, 506 IPC and Section 7 of Criminal Law Amendment Act and Section 3/25 of Arms Act, Police Station Gahmar, District Ghazipur, whereby, they have been convicted and sentenced as under:-

(i) to undergo life imprisonment, with fine of Rs.10,000/-each and in default thereof they have to undergo six months additional imprisonment, under Section 302/149 IPC;

(ii) to undergo ten years rigorous imprisonment, with fine of Rs.5,000/-each and in default thereof they haveto undergo six months additional imprisonment, under Section 307/149 IPC;

(iii) to undergo six months imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo two months additional imprisonment, under Section 323 IPC;

(iv) to undergo one year imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo two months additional imprisonment, under Section 504 IPC;

(v) to undergo one year imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo two months additional imprisonment, under Section 506 IPC;

(vi) to undergo two years imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo two months additional imprisonment, under Section 147 IPC;

(vii) to undergo two years imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo two months additional imprisonment, under Section 148 IPC;

(viii) to undergo three months imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo one month additional imprisonment, under Section 7 of Criminal Law Amendment Act;

(ix) appellants namely, Rakesh Kumar Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh were also convicted and sentenced to undergo one year imprisonment, with fine of Rs.1,000/-each and in default thereof they have to undergo three months additional imprisonment, for charge under Section 3/25 of Arms Act. All the sentences are directed to run concurrently.

4. The prosecution case in brief is that the informant Digvijay Singh, son of Harivansh Singh, resident of Village Patti Khemanrai, Police Station Gahmar, District-Ghazipur, lodged an FIR at police station concerned on 25.4.2013, by presenting a written report (Ext.Ka1) with averment that on 25.4.2013 in the evening, his elder brother Ajay Singh, who was posted in Bengal Engineering (Army), Pune, as Hawaldar, informant, his father and uncle Shiv Shanker Singh were conversing in compound of the house, at around 20:15 hours, accused Dhruvjeet Singh arrived there with his four sons Rakesh Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh and exhorted his sons to kill informant's side as they have increased their attitude. Thereupon, the four sons of Dhruvjeet opened fire on Ajay Singh, the elder brother of informant, indiscriminately, which hit him on chest and right hand and he fell down being seriously injured in pool of blood. The informant ran to save him but

accused Vimlesh Singh hit him on his right ear by butt of his firearm. When Shiv Shanker Singh, the uncle of informant, ran to save the informant, Akhilesh Singh and Santosh Singh lifted him and dashed him on the ground. They assaulted him brutally by hockey sticks, which were lying nearby the place of incident. The assailants fled away towards east by their two motorcycles after flashing their firearms. A panic and pall of horror prevailed in the locality due to this daring act of the accused persons and the people of locality got panicked and closed the windows and doors of their house being scared by the incident. The informant rushed to police station for lodging the FIR with the injured, his elder brother namely, Ajay Singh.

5. The FIR (Ext.Ka-1) was lodged on 25.4.2013, at 20:40 hours against five named accused persons under Sections 147, 148, 149, 307, 504, 506 IPC and Section 7 of Criminal Law Amendment Act and a case was registered at police station vide relevant GD entry at the same time under said sections. S.O. Ram Nihor Singh (PW-11) took over investigation of the case himself on the date of lodging of the FIR and recorded statement of the informant and author of FIR. The injured was unconscious as he had suffered several firearm shots. The Investigating Officer rushed the injured Ajay Singh to District Hospital, Ghazipur for treatement by keeping him in his official vehicle and sent other Sub Inspector and Constables at place of incident. He produced the injured Ajay Singh at District Hospital at 21:30 hours but Doctors declared him dead. He kept the dead body in mortuary and memo of death information was sent from hospital to Police Station Ghazipur, Kotwali. The informant had also received injuries and his medico legal examination was also conducted. He had suffered three injuries. The Investigating Officer went back to police station and added Sections 302, 323 IPC due to death of the injured Ajay Singh vide GD Entry No.37, time 23:45 hours, on 25.4.2013. He visited the spot and held a spot inspection at the pointing out of informant. On 26.4.2013, he prepared site plan (Ext.Ka19). He also collected four number of empty cartridges of .32 bore, two live cartridges of .32 bore and one number of live cartridge of 12 bore from spot of the incident in presence of witnesses namely, Harihar Singh and Janardan Singh. He sealed the ammunitions and prepared a sample seal under his signature. He also prepared a recovery memo of live and empty cartridges recovered from the spot and got signature of said witnesses thereon. He proved said recovery memo as Ext.Ka-20. He also took into possession plain earth and blood stained earth from the place of occurrence and prepared its seizure memo, which was marked as Ext.Ka-21 and Ka-22 during evidence of Investigating Officer. He also collected four broken pieces of two hockeys, which was found on the place of incident and prepared its recovery memo under his signature, which is marked as Ext.Ka-23. He recorded statements of the informant and his uncle, injured Shiv Shanker Singh, who were present on the place of incident, on 27.4.2013. The Investigating Officer entered medico legal examination report of the informant and also injured Shiv Shanker Singh in case diary. He arrested accused Dhruvjeet Singh on 28.4.2013 from Railway crossing Gahmar and prepared his arrest Memo i.e. Ext.Ka-10. On 6.5.2013, an information was entered in Parcha No.10 of the case diary to the effect that accused Santosh Singh, Vimlesh Singh and Akhilesh Singh had surrendered in the Court. Investigating Officer recorded their statement in District Jail, Ghazipur after

obtaining permission of the Court. Their police custody remand was obtained by Investigating Officer by orders of the Court dated 10.5.2013. Accused Rakesh Singh was arrested in New Delhi on 1.5.2013, at 13:15 hours from his place of posting and his arrest memo (Ext.Ka-7) was prepared by PW-7. He was produced before C.J.M., Ghazipur on 4.5.2013. On pointing out of accused Rakesh Kumar Singh, a TVS Apache motorcycle bearing Registration No.UP61J9907 was recovered on 7.5.2013, which was used in the offence by the accused persons, from dense shrubs which had grown around pump canal in village Gahmar, situated in the east of the village. The accused told the police team that after the incident, he fled away from the place of incident alongwith his brother Santosh Singh by this motorcycle and concealed it there. The accused Rakesh Kumar Singh also took out a country made pistol of 7.65 bore on which words 'Automatic Pistol' and "Made in USA" was engraved, from tool box of the motorcycle. For want of any gun number, it was treated as a countrymade pistol. The accused confessed to have shot the deceased by this pistol. Separate recovery memo was prepared in presence of witnesses namely, Sanjay Kumar Singh, Manoj Kumar Singh regarding said vehicle and firearm and Section 3/25 of Arms Act was added in penal sections on the basis of said recovery. The Investigating Officer also recovered a countrymade pistol of 12 bore on pointing out of accused Santosh Singh pursuant to police custody remand order dated 10.5.2013 on 11.5.2013 from shrubs (Toddy Palm Tree) nearby the same shrubs grown around said pump canal at 10:30 hours and recovery memo was prepared in presence of public witnesses namely Harendra Singh and Satrudhan Singh. Section 3/25 Arms Act was also added on the basis of said recovery against accused Santosh Singh. On 11.5.2013, the Investigating Officer recovered a country made pistol of .315 bore at pointing out of accused Akhilesh Singh pursuant to police custody remand order dated 10.5.2013 from the vicinity of same pump canal in Village Gahmar towards south of Kulward constructed on a roadside Nala at and a case under Section 3/25 of Arms Act was added in penal sections against him on 11.5.2013. The Investigating Officer also recovered a motorcycle C.B.Z. (Black Color) bearing No.UP61M3239 and a countrymade pistol of 32 bore, which was kept in tool box of motorcycle during police custody remand of accused Vimlesh Singh and charge under Section 3/25 of Arms Act was also added against him on the basis of said recovery. The Investigating Officer (PW-11) had also prepared site plan of places of recovery of 2 vehicles and 4 firearms and proved these as Ext.Ka-24 to Ka-27. The inquest on dead body of deceased Ajay Singh was carried out on 25.4.2013 by S.I. Deena Nath Dubey. He prepared inquest report, which is proved as Ext.Ka-3. He prepared Ext.Ka-29 Photo Nash, Report R.D Ext.Ka-27, Challan Nash Ext.Ka-28, Report CMO Ext.Ka-31, sample seal dead body Ext.Ka-30 and dispatched dead body for postmortem through Constables of Police. The Investigating Officer obtained sanction for prosecution of accused Rakesh Kumar Singh, Santosh Kumar Singh, Akhilesh Kumar Singh and Vimlesh Singh for charge under Section 3/25 Arms Act from District Magistrate. He sent the ammunitions recovered from the place of occurrence and firearms recovered from the accused persons for ballistic examination at Forensic Science Laboratory, Mahanagar Lucknow. Four empty cartridges of .7.65mm were found to have matched with firearm recovered at the pointing out of from accused Rakesh Singh in ballistic examination report. Similarly, in serological

examination of blood stained earth taken from the place of occurrence, stains of blood were found thereon but it could not be classified, as the same was disintigerated. The Investigating Officer submitted chargesheet against all the five named accused persons after concluding the investigation under aforesaid sections and separate chargesheet under Section 3/25 of Arms Act against accused persons namely, Rakesh, Akhilesh, Santosh and Vimlesh was filed. Incharge Chief Judicial Magistrate took cognizance of the offence on 24.6.2013 and committed the case to Court of Session for trial after complying with provisions of Section 207 of Cr.P.C.

6. The learned Additional Session Judge, Court No.5, Ghazipur framed charge under Sections 147, 302/149, 307/149, 323/149, 504, 506 IPC and 7 of Criminal Law (Amendment) Act against all the five named accused persons on 10.3.2014 and also framed charge under Section 3/25 of Arms Act against Santosh Singh, Akhilesh Singh, Vimlesh Singh and Rakesh Kumar Singh on same day. The accused persons denied the charge and claimed to be tried.

7. The prosecution examined PW-1, Digvijay Singh; PW-2, Shiv Shanker Singh; PW-3 Dr. Mohd Jamil Ahmad, the author of injury reports of injured Digvijay Singh; PW-4 S.I. Deena Nath Dubey, the author of inquest report of the deceased; PW-5, Dr. Naresh Prasad Chaudhari, the author of medico legal Examination report of the injured Shiv Shanker Singh; PW-6, S.I. Rudrabhan Pandey, who arrested accused Rakesh Singh, who was posted at C.A.M.S. (Centre For Automated Military Survey) after taking necessary permissions from competent offices on 1.5.2013 at 13:15 hours from Delhi; PW-7, Himendra Singh, the then Incharge Outpost, Sevrai, Police Station Gahmar carried out part investigation of the case and arrested accused Dhruvjeet Singh on 28.4.2013. The prosecution also examined PW-8, Dr. Pragati Kumar, who conducted postmortem examination on dead body of deceased Ajay Singh and PW-9, Constable Anand Rao, who is a witness of recovery, PW-10, Constable Muharrir Shiv Ram Tiwari, the author of chik FIR, PW-11, S.H.O. Ram Nihor Mishra.

8. Learned trial court recorded statements of accused persons under Section 313 Cr.P.C. after conclusion of prosecution evidence. They also filed their written statements under Section 233 (3) of Cr.P.C. The accused examined Nagina Singh as DW-1 in defence evidence.

9. Learned trial court on appreciation of oral evidence and material on record, in the light of submissions of learned counsels of both the parties, recorded verdict of guilt against accused persons namely, Dhruvjeet Singh, Rakesh Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh for charge under Sections 147, 148, 149, 302, 307, 323, 504, 506 IPC and also recorded conviction of accused Rakesh Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh for charge under Section 3/25 of Arms Act and sentenced them for said charges as above. Feeling aggrieved by the impugned judgement and order, the accused persons have assailed the same in instant appeals.

10. PW-1, Digvijay Singh, is informant in the case. He stated in his evidence that on 25.4.2013, his brother Ajay Singh, who works as Engineer in Military, State of West Bengal, had gone to market in connection with some shopping with related to marriage of his cousin Archana, which

was scheduled to be held on 29.4.2013. In order to travel to market, his brother Ajay Singh had borrowed motorcycle of one Arvind Singh, his co-villager. When this fact was known to accused Dhruvjeet Singh, he became angry as there was enmity between Dhruvjeet Singh and Arvind Singh for two years due to litigations. When his brother Ajay Singh came to Gahmar Bazar in the evening, Dhruvjeet Singh met him on that date and told him that he had became very familiar to his enemies and he would see him and them. He also abused him after uttering these words. When his brother objected to this, Dhruvjeet Singh engaged in brawl with him. The people who were present in the market had intervened and got them separated. His brother came to home thereafter he was talking to the informant and his uncle Shiv Shanker Singh with regard to incident which took place in the market with Dhruvjeet Singh. Suddenly, at around quarter to 8:00 PM in the evening, accused Dhruvjeet Singh, Santosh Singh, Akhilesh Singh, Rakesh Singh and Vimlesh Singh entered into the boundary of the informant and Dhruvjeet Singh exhorted his sons, the co-accused "IN SALO KA MAN BAHUT BADH GAYA HAI. AAJ INHE JAAN SE MAR DALO". These five persons came there in planned and consulted manner. On exhortation of Dhruvjeet Sngh, the other accused opened indiscriminate fire towards the informant and his family members, who were sitting there. His elder brother Ajay Singh sustained firearm injuries n his chest and right hand and he fell down in pool of blood on the ground having been seriously injured and started twisting and turning of body due to acute pain. The informant ran to the place to save his brother whereupon Vimlesh Singh hit him by butt of his pistol on his right ear. Thereupon his uncle Shiv Shanker Singh came forward to save the informant but Akhilesh Singh and Santosh Singh assaulted him by hockeys, which were lying there. After assaulting the informant, his brother and uncle, the accused persons fled away by their motorcycles towards east while flashing their firearms and threatening the informant's side. The incident caused flutter and state of fear in the village and silence prevailed in the locality. The people closed windows and doors of their houses. Ajay Singh, the brother of the informant, got unconscious due to firearm injury. The informant filed a written report at police station Gahmar regarding the incident, which he proved during his evidence as Ext.Ka-1. The informant identified the accused persons namely, Santosh Singh, Akhilesh Singh, Rakesh Singh and Vimlesh Singh as assailants. The FIR was registered on his written report. The inquest on dead body of the deceased was conducted at Civil Hospital, Ghazipur by police of Police Kotwali Ghazipur. The inquest report also bears signature of Pw-1. In cross-examination, the witness has stated that Gahmar is a very large village, which consists of 200 to 224 patti. He stated that his father is retired from Army and was working at NCL, Singrauli. His brother Dhananjay and deceased Ajay were also serving in Army. He worked in Vodafone at Sultanpur. His uncle Harishanker had retired from Army and was serving at Ara (Bihar) thereafter. Injured Shiv Shanker Singh, his another uncle, was working in a transport company. Arvind Singh also belongs to his patti (Khandan) and his son Kishan Singh serve in Army. A case of attempt to murder was registered against Kishan Singh and others at the instance of accused Vimlesh Singh, which was proceeding prior to two years of this incident. He came to his village two days prior to the incident on getting leave and his brother deceased Ajay Singh came to the village 4-5 days prior to the

incident. There is only one exit in his house, which opens towards north. There is boundary wall, which surrounded his house, which is ten feet in height and cemented. There is one iron gate in his boundary wall towards west. There was no enmity between family of informant and accused persons prior to this incident. Accused Dhruvjeet Singh was around 50 to 55 years of age at the time of incident. The house of accused persons is 50 meters far from his house. He went to police station by motorcycle after the incident alongwith Sanjay after 5 to 7 minutes of the incident. He firstly informed Darogaji about the incident and thereafter presented a written report to him which was written by him. They reached at police station around 8:24 PM. The proceeded to Sadar Hospital, Ghazipur by vehicle arranged by Darogaji and reached there around 9:30 PM. The witnesses came there by another vehicle. They came back to police station around 1:00 hours in the night from hospital and stayed there for 20 to 25 minutes. He pointed the place of incident to Darogaji on next day at around 6:30 to 7:00 AM, who collected empty cartridges and two broken hockey sticks from the place of incident. Thereafter they came to hospital at 10:30 AM together with police personnels and stayed there up to 11:00 AM. The inquest on dead body of the deceased was conducted around 12:00 to 12:30 hours at Police Station. He also signed the inquest report alongwith other panch witnesses. The witness further stated that he is not able to explain as to why he failed to divulge the previous altercation which took place in Gahmar Market between deceased and accused Dhruvjeet Singh in his written report. He further stated that his statement was recorded by Investigating Officer thrice during investigation, in which he told him about the altercation which took place between Ajay Singh and Dhruvjeet Singh in the market on the date of incident. He had seen pistols/countrymade pistols in the hands of accused persons during the incident. Six cartridges are loaded in pistol and one or two in countrymade pistol. He has not divulged in his report that which of the accused persons was armed with which type of firearm. He could not recollect as to how many shots were fired on the spot as accused were firing indiscriminately. Blood fell on the spot. He stated to Investigating Officer that Akhilesh and Santosh assaulted his uncle by hockey sticks.

11. PW-2, Shiv Shanker Singh is injured and uncle of the informant and deceased. He has stated in his sworn testimony before the Court that on 29.4.2013 marriage of his daughter Archana Singh was fixed and he had gone to Ghazipur to purchase a motorcycle for giving in the marriage. On 25.4.2013, he came back to home in the evening and was conversing with his brother Harivansh Singh and nephews namely, Digvijay Singh and Ajay Singh regarding preparations of the marriage. They also discussed the incident of the day in which Dhruvjeet Singh had threatened Ajay Singh and engaged in some brawl with him earlier on that date. Ajay Singh was narrating this incident to them. In the meanwhile, accused Dhruvjeet Singh emerged there alongwith his sons namely Vimlesh Singh, Rakesh Singh, Santosh Singh and Akhilesh Singh and entered into the boundary of the witness. He challenged the witnesses stating that "IN SALO KA MAN BAHUT BADH GAYA HAI. AAJ INHE JAAN SE MAR DALO". Thereupon, the four sons of Dhruvjeet Singh opened fire by their respective firearms indiscriminately on informant's side, in which Ajay Singh sustained firearm injuries and he fell down and was squirming. When Digvijay Singh, the nephew of the witness, rushed to save Ajay Singh, Vimlesh Singh hit him by butt of his firearm on his ear.

Thereafter, the witness ran to rescue Digvijay Singh but Santosh Singh and Akhilesh Singh threw him and assaulted him by hockey sticks in which he suffered much injuries. The accused fled away from the spot after threatening the witnesses of life towards east. Pall of terror prevailed in the locality due to this incident and people closed the door and windows of their house. The witness sent injured Ajay Singh to police station Gahmar by a motorcycle driven by PW-1, Digvijay Singh. Digvijay Singh filed a written report at police station on the basis of which the case was registered at police station concerned. His medical examination was carried out at Government Hospital Bhadaura. He pointed out the place of incident to Darogaji. In cross-examination, the witness stated that on fateful day, he had gone to Ghazipur in day hours by motorcycle, which was driven by Dharamraj Singh, his brother-in-law. After performing the work in Ghazipur in connection with purchase of motorcycle, he came back to his place in the evening. The main exit of his house is towards west. His house is surrounded with cemented boundary wall, which is ten feet in height. When he reached in his boundary, his elder brother Harivansh and nephews Digvijay Singh and Ajay Singh were present there and they were talking together. The assailants stood about two paces away from them. Nobody received pellet injuries except the deceased Ajay Singh in the incident. Ajay Singh fell down after receiving firearm injuries. He sustained three firearm shots in standing position and he fell down on the ground. The shots were fired by pistols and countrymade pistols. His medical examination was conducted on next date at around 9:00-10:00 AM. Ajay Singh had told him regarding the altercation and scuffle with Dhruvjeet Singh in the market in the evening. He told the Investigating Officer that his brother Harivansh Singh could hardly perform his daily routine and lack of mobility. The house of Dhruvjeet Singh situates eastward of his house after two houses. He pointed out the place of occurrence to Darogaji.

12. PW-3, Dr. Mohd. Jamil Ahmad conducted medico legal examination of the injured Digvijay Singh on 25.4.2013, at 10:40 hours and proved his injury report as Ext.Ka-2 in his evidence. At the time of examination, the Doctor noted following injuries on his person:-

(i) lacerated wound of 1cm X 0.2cm X skin deep, right side of back of ear pinna, which middle side;

(ii) lacerated wound of 1.5cm X 0.2cm X skin deep, right ear pinna just back side of injury No.1;

(iii) lacerated wound of 0.5cm X 0.2cm X skin deep, back side of just root of right ear pinna.

In the opinion of Doctor injury Nos.1 to 3 were caused by hard and blunt object and were simple in nature. Duration was fresh.

13. PW-4, S.I. Deena Nath Dubey conducted inquest on dead body of the deceased on 26.4.2013 and prepared inquest report in his hand writing and proved the same as Ext.Ka-3. He stated that the deceased Ajay Singh died due to firearm injuries. He conducted inquest proceeding at Sadar Civil Hospital, Ghazipur. He received information of death of Ajay Singh and it was entered vide Report No.54, time 22:10, GD dated 25.4.2013, Police Station Kotwali Sadar, District Ghazipur. The dead body was kept in mortuary of the hospital. He handed over the body to constables at 12:30 hours after the inquest. He was not aware of registration of any case at police station

concerned regarding this incident so long as he carried out inquest proceeding. He did not find any police staff of police station Gahmar during inquest.

14. PW-5, Dr. Naresh Prasad Chaudhari conducted medico legal examination of injured Shiv Shanker Singh on 26.4.2013, at CSC, Bhadaura, District Ghazipur at 10:00 AM and proved the same as Ext.Ka-4 by his evidence. According to the PW-5 following injuries were found on the person of the injured:

(i) contusion and swelling of 3cm X 2cm left side of face;

(ii) contusion and swelling of 3cm X 2cm in the left side of frontal head;

(iii) contusion and swelling of 2cm X 2cm on the left shoulder;

(iv) contusion and swelling of 2cm X 2cm on the forearm.

In the opinion of the Doctor, all the injuries were simple in nature and caused by hard and blunt object. Duration was about one day. The medico legal examination of both the injured namely, Digvijay Singh and Shiv Shanker Singh was conducted on letter of S.O. Gahmar as police case.

15. PW-8, Dr. Pragati Kumar conducted the post mortem examination on the person of deceased Ajay Singh on 26.4.2013 and prepared the postmortem examination report in his hand writing and signature and proved the same as Ext.Ka-11 by his evidence during trial. He stated that on 26.4.2013, he was posted as Medical Officer at Police Hospital, Police Line, Ghazipur. The dead body of Ajay Singh was brought for postmortem by two constables namely, Raghunath Singh and Homeguard Laxman Pal of police station Gahmar. The deceased was aged around 38 years. Rigor mortis was present in both the upper and lower extremities.

***Antemortem Injuries:-**

(1) firearm injury 1cm X 1cm, circular in shape and 6 cm middle to right nipple. Inverted margins. Collar of abrasion is present. Profused bleeding present i.e. wound of entry;

(2) wound of exit is 2 cm X 2.1cm at left side of back of chest (lateral side) 25cm above left iliac crest. Profused bleeding present. Margins everted. After probing, it was found that this injury was exit wound of injury No.1. Both the lungs, muscles and heart of the deceased got lacerated due to this injury.

(3) firearm injury of 1.2cm X 1.1cm, 8 cm below right nipple. Margins inverted. Collar of abrasion present i.e. wound of entry. Track is towards abdomen. One metallic bullet 1cm X 1cm cylindrical in shape was recovered and two wad piece recovered from the injury.

(4) firearm injury of 0.9cm X 0.9cm at right arm, above elbow. Margin inverted i.e. entry wound. 1.2cm X 1.2cm at front of right elbow. The projectile tract fractured in elbow bone.

*** Internal Examination:-**

pleura lacerated. Syngenesis in walls and ribs. Right and left lungs lacerated. Heart lacerated and empty. Pericardium lacerated. There is wads and one metallic cylindrical bullet recovered from lower part of abdomen, sent to S.P. Ghazipur through constables, who brought the dead body for postmortem. Semi digested food was found in stomach. Gases and liquid were found in small intestine. Gases and faecal matter detected in large intestine. Kidney and pancreas were lacerated. Bladder was empty. Time of death was about one day. In the opinion of Doctor,

cause of death was haemorrhagic shock as a result of antemortem firearm injuries.

16. In cross-examination, Dr. Pragati Kumar stated that all the antemortem wounds of entry were in right side of the body. The directions of wound No.3 was from upper to lower side. He has noted direction of Injury No.4. Injury No.5 is its exit wound. Injury Nos.1 and 3 were caused from a distance of more than 5 feet, which implies that the distance of weapon of assailant and the deceased was more than five feet. He could not say that injury no.1 and 4 were pellet injuries or caused by bullet. Injury No.2 and 5 are exit wounds of injury no.1 and 4 and, therefore, he did not find any residue of ammunitions therein. The state of stomach reveals that the deceased had taken meal five hours earlier. He could not tell with certainty that deceased had eased himself prior to the incident. The bullet recovered from the dead body was not produced before him at the time of evidence. The duration of death from postmortem noted in PM report implies that he died 18 to 24 hours earlier to the postmortem.

17. PW-5, S.I. Rudrabhan Pandey conducted part investigation of the case in absence of PW-10, Ram Nihor Mishra and visited place of posting of accused Rakesh Singh in C.A.M.S. (Army) New Delhi and after completing necessary formalities arrested him on 1.5.2013 on being handed over by his Officers and produced him before C.J.M., Ghazipur on 3.5.2013, from where he was remanded to judicial custody.

18. PW-7, S.I. Himendra Singh carried only one day's investigation on 28.4.2013 and arrested accused Dhruvjeet Singh at 21:00 hours.

19. PW-9, Constable Anand Rao stated that on 7.5.2013, he was posted as constable at Police Station Gahmar. On that date, accused Rakesh Kumar Singh was brought out from District Jail, Ghazipur for recovery of weapon of offence and he alongwith police team proceeded by official Bolero Jeep in search of the weapon. On that date, on pointing out of Rakesh Singh, a motorcycle used by accused persons for fleeing away from the place of incident after offence and one countrymade pistol of 7.65 bore, which was in serviceable condition, in which magazine was loaded, was recovered by police team near eastern pump canal at Gahmar. The recovered firearm was sealed on the spot at around 11.30 hours and a copy of recovery memo was given to the accused. In cross-examination, the witness stated that the recovery memo was signed by S.O. Ram Nihor Mishra, the police witnesses and public witnesses. On that date, at pointing out of accused Akhilesh Singh, a countrymade pistol of .315 bore, which was used in the commission of offence of murder of Ajay Singh was recovered in presence of public witnesses Harendra Singh and Satrudhan Singh. The weapon was sealed on the spot and accused was taken into custody for charge under Section 3/25 of Arms Act, at 11:30 AM. On the same date, accused Vimlesh Kumar Singh got a motorcycle CBZ recovered on his pointing out, which was used by him and co-accused Akhilesh Singh for fleeing away from the place of occurrence after commission of murder of Ajay Singh. A countrymade pistol .32 bore was also recovered at pointing out of accused Vimlesh, which was sealed on the spot and its recovery memo was signed by S.O. Ram Nihor Mishra, police personnel and public witnesses. It was 12:30 hours of day. He proved the recovery of four firearms as Ext.Ka-12, Ka-13, Ka-14 and Ka-15 by his evidence. In cross-examination, the

witness has stated that he proceeded from police station on 7.5.2013, at 6:00 AM alongwith S.O. Ram Nihor Mishra and two constables. They reached District Jail, Ghazipur at 7:30 AM and got their entry made in jail register. They reached place of recovery at around 9:00 AM alongwith accused persons. Motorcycle was lying in open and in unclaimed position. There were 8-9 people on the spot at the time of recovery. No statement of accused was taken during their journey from place of incident. Their Government vehicle was parked 100 meters away from the place of recovery. He signed recovery memos on asking of S.O. Ram Nihor Mishra. He was not acquainted with the accused. They brought back the accused to jail at 3:00 PM. They made entry of firearms at police station at 8:00 PM. On 11.5.2013, his departure from police station occurred at 6:00 AM. S.O. Ram Nihor Mishra and three constables were along side him. They came to District Jail, Ghazipur at 7:30 AM and S.O. Ram Nihor Mishra made his entry in the jail register. He brought out three accused persons from jail within 10 to 15 minutes and proceeded to Gahmar alongwith them at around 8:00 AM. The three accused persons were taken to probable places of recovery. The place of recovery was 30 to 35 kms. away from District Jail, Ghazipur. It took one and half hours in reaching the place of recovery form district jail. The country made pistol, which was recovered on the pointing out of accused Akhilesh was kept in open and was not brought out from dickey of the motorcycle. The weapons recovered on the pointing out of the accused persons were deposited at police station at 10:00 PM. He had not signed on sealed covers of firearms recovered at the pointing out of the concerned accused persons.

20. PW-10, Shiv Ram Tiwari, the then Constable Muharrir of Police Station Gahmar, stated in his evidence that he was posted as constable muharrir at police station Gahmar on 25.4.2013 and on that day on the basis of written report produced by Digvijay Singh, son of Harivansh Singh; he registered a case vide Crime No.136 of 2013, under Sections 147, 148, 149, 307, 504, 506 IPC and Section 7 of Criminal Law Amendment Act vide chik No.30 of 2013, at 20:40 hours against accused persons named in the written report. He proved the chik FIR as Ext.Ka-16 by his evidence. He proved extracts of GD of registration of case Report No.32, time 20:40 hours dated 25.4.2013, on which Ext.Ka-17 was marked. He also proved extracts of amended GD dated 25.4.2013, Report No.37, time 23:45 hours whereby Section 302/323 IPC was added. He proved these extracts of GD by producing original GD from police office before the Court. In cross-examination, he stated that in chik FIR, endorsement of Chief Judicial Magistrate is made on 7.5.2013. He stated that he is unable to explain the delay occurred in production of chik FIR before the Chief Judicial Magistrate after 12 days of its lodging. He further stated that in original GD, there is no mention of dispatch of special report to senior officers with regard to present case. The signature of C.O. on original GD is undated. He further stated that on 25.4.2013, the injury memo of injured Digvijay Singh was prepared and on 26.4.2013 injury memo of injured Shiv Shanker Singh was prepared. Prior to registration of this case vide crime No.136 of 2013, a case was registered vide Crime No.135 of 2013 at 9:15 hours on 25.4.2013. In between these two cases, no other case was registered on that date.

21. PW-11, S.H.O. Ram Nihor Mishra is the Investigating Officer of the

case. He proved steps taken towards investigation of the case. He has stated in his evidence that this case was registered vide Crime No.136 of 2013 in his presence on written report produced by injured informant Digvijay Singh at Police Station Gahmar. The chik FIR was prepared on the basis of this written report by Constable Muharrir Shiv Ram Tiwari (PW-10). After registration of case, the witness signed chik FIR. He took over the investigation of the case just after its registration. He recorded statement of the informant on same day. The injured Ajay Singh was unconscious due to firearm injuries. He rushed immediately to hospital by Government vehicle alongwith informant to District Hospital, Ghazipur and sent other sub-inspectors and constables to place of occurrence. He admitted the injured to District Hospital, Ghazipur at 21:30 hours in the night but Doctors declared him dead. He got the dead body kept in the mortuary of the hospital from where death memo was sent to police station Kotwali. He also got medico legal examination of the informant conducted and mention its description in case diary. He sustained three injuries. He came back to police station and on account of death of the injured Ajay Singh and simple injuries of the witnesses, Section 302 and 323 IPC were added vide GD Report No.37, time 23:45 hours, dated 25.4.2013. He visited the place of incident alongwith the informant on 26.4.2013 and conducted spot inspection at the pointing out of the informant. He prepared site plan of the place of incident on which Ext.Ka-19 is marked.

22. He further stated that he had taken into possession four number of empty cartridges of .32 bore, two live cartridges of .32 bore, one live cartridge of 12 bore related to present case from the place of occurrence, in presence of witnesses Harihar Singh and Janardan Singh. He sealed the cartridges on the spot after preparing the specimen seal. He has also prepared a recovery memo of these empty and live cartridges in presence of the witnesses in his hand writing and signature and also obtained signature of witnesses thereon. He proved the recovery meme as Ext.Ka20 by his evidence. He also prepared an inventory of blood stained and plain earth taken from the place of occurrence, which bears his signature as well as signature of witnesses on which Ext.Ka21 and Ka-22 is marked. The witness also proved seizure memo of two broken hockey sticks, total in four number of pieces, which bears signature of the witness and other witnesses, on which Ext.Ka-23 has been marked. The witness has also stated that on 28.4.2013, the investigation was taken over by S.I. Himendra Singh, due to his proceeding on leave. He tried to arrest accused Rakesh Singh from Delhi as he was posted there in Army. He again resumed investigation of the case after his arrival from leave on 6.5.2013. He received an information regarding surrender of accused Santosh Singh, Vimlesh Singh and Akhilesh Singh in the Court as accused Rakesh Singh had already been arrested. He recorded statement of these three accused persons at District Jail, Ghazipur with permission of the Court. On 6.5.2013, he obtained police custody remand of accused Rakesh Singh and on 7.5.2013, at his pointing out during police custody remand a motorcycle TVS Apache (Black Color), bearing Registration No. UP61J-9907 and one countrymade pistol of 7.65 bore was recovered in the vicinity of pump canal situated eastward of village Gahmar in presence of witnesses Sanjay Singh and Manoj Kumar. He prepared recovery memo under his hand writing and signature and obtained signature of witnesses thereon, Ext.Ka-12 is marked on this paper. He sealed this countrymade pistol

in a clothe and prepared sample seal thereof. He prepared site plan of place of recovery of 7.65 bore firearm, which is marked as Ext.Ka-24. He also recorded statement of accused Rakesh Singh in Parcha No.11-A of case diary on same day. On 1.5.2013, he obtained police custody remand of accused Vimlesh Singh, Santosh Singh and Akhilesh Singh and took them out from the jail for effecting the recoveries. On that day, one countrymade pistol of 0.12 bore was recovered on pointing out of accused Santosh Singh and he prepared its recovery memo under his writing and signature, on which Ext.Ka-13 is marked. This recovery was effected 100 meters eastward of said pump canal in Village Gahmar in presence of public witnesses namely Harendra and Satrudhan. He sealed the recovered firearm on the spot and prepared its specimen seal. He also prepared site plan of place of recovery on which Ext.Ka-25 is marked. He recovered a countrymade pistol of 0.32 bore used in the offence at the instance of accused Vimlesh Singh and prepared its recovery memo in his signature and writing in present of same witnesses on which Ext.Ka-15 is marked. He prepared site plan of place of recovery as one countrymade pistol was recovered at pointing out of accused Vimlesh on which Ext.Ka-26 is marked. Thereafter, he recovered one countrymade pistol of .315 bore in the vicinity of said pump canal on pointing out of accused Akhilesh Singh and took the same in his possession and prepared it recovery memo and sealed the firearm on the spot after preparing sample seal, Ext.Ka14 is marked on said recovery memo. The witness proved site plan of recovery memo of this firearm as Ext.Ka27 during his evidence. After effecting the recoveries, he produced three accused persons before jail and they were again taken into jail custody. He recorded statement of panch witnesses and other witnesses on 16.5.2013, 28.5.2013, 10.6.2013 and after finding sufficient evidence against accused persons for their prosecution, filed a chargesheet against all the four named accused persons under Sections 147, 148, 149, 302, 307, 504, 506 IPC and Section 7 of Criminal Law Amendment Act, on which Ext.Ka-28 is marked. The witness produced two small boxes containing blood stained and plain soil collected from place of incident before the Court on which material Ext.1, 2 and 3 was marked. He produced firearms allegedly recovered at the pointing out of accused persons separately before the Court, which was kept in sealed cover and were received back after ballistic examination, which are described as .12 bore countrymade pistol (ME-6), one countrymade pistol 7.65 mm (.32 bore) (ME-7), one pistol of 7.65 mm (ME-8) and one countrymade pistol (katta) (ME-9) .315 bore before the Court. He also produced two empty cartridges of .12 bore recovered from the place of incident, on which Material Ext.10 was marked. He also produced two empty cartridges and two bullets on which T.C.-5 and T.C.-6 was marked and proved the same as ME-11 and ME-12 was marked on the envelop. He produced two bullets and two empty cartridges kept in another envelop as ME-13 and ME-14. He produced one live cartridge of .12 bore Shaktiman before the Court recovered from the place of incident as ME-15 and four empty cartridges recovered from the spot and kept in an envelope on which E.C.-1, 2, 3 and 4 was marked and proved the same as ME-17 and ME-18 was marked on envelope. He also produced one lead slug and two wads (plastic) recovered from the dead body as ME-23 and two wad pieces as ME-24. He also proved extracts of G.D. dated 27.4.2013, report No. 9 time 7:15 AM, being in his hand writing and signature by

comparing the same with the original as Ext.Ka-26. He proved inquest report of deceased Ajay Singh, authored by S.I. Deena Nath Dubey, as secondary evidence, on which Ext.Ka-3 is marked. The witness proved report of forensic science laboratory with regard to ballistic examination of firearms recovered in the case as Ext.Ka-33, Ka-34, Ka-35 and Ka-36 by his evidence. The witness stated that during spot inspection of place of incident he had not found any motorcycle or bicycle. He proved the police forms prepared by S.I. Deenanath Dubey, the author of inquest report in his absence as Ext.Ka-27 to Ka-30, regarding whom he stated that he had worked with him at police Station Gahmar at the time of incident and was acquainted with his writing and signature. In inquest report (Ext.Ka-3), no crime number is mentioned. In inquest report, it is not shown as to with which police station the case relates. There is overwriting at the beginning of the inquest proceeding in regard to date. The author of inquest report had not stated that any report was lodged at any police station with regard to said dead body. He prepared site plan at the pointing out of informant. House of informant is one storey, which is surrounded by a boundary wall towards north and westwards. A pitch road situates in the eastern and northern side of this boundary and is adjacent to the boundary wall. The accused were about two meters away from the deceased at the time of incident. Apart from the body of the deceased, he had not found any sign of firearm shot at any place during investigation. He was not apprised of the source of light during the incident. He had shown an electric poll in site plan but there is no mention of installation of any bulb or burning of light on the said place. He had not mention number of empty and live cartridges found on the place of incident in description of inspection of place of incident. He prepare site plan firstly and then recovery memo of cartridges. This case was registered in his presence. On the basis of recovery of an empty cartridge and live cartridges, he believes that the cartridges of 32 bore and 12 bore were used in the offence. He received bullet recovered from the body of the deceased in sealed cover and had not inspected the same by opening the seal. He sent the same for ballistic examination to Forensic Science Laboratory in sealed cover. He effected recovery of firearms from four accused persons namely Rakesh Kumar Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh by obtaining police custody remand from the Court. The witness denied the defence suggestion that in tool box of the motorcycle recovered at the pointing out of accused, it was not possible to keep firearm (ME-8). He did not find any cartridge or empty at the time of recovery of ME-8 and a motorcycle was also recovered at the pointing out of accused Vimlesh and from its tool box, a countrymade pistol of 32 bore was recovered. The lock of motorcycle as well as of its tool box were found opened. There also is overwriting in timing of recovery on Ext.Ka-14 and Ka-15. He deposited the motorcycles and firearms recovered at the pointing out of accused persons at the police station. Section 302 and 323 IPC were added in penal sections vide GD report No.37, time 23:45 hours, dated 25.4.2013, after death of injured Ajay Singh because there were injured persons also and Section 323 IPC was left in chik FIR due to inadvertence. According to GD report No.9, time 17:15 AM, dated 27.4.2013, he recovered four empty cartridges and three live cartridges from the place of occurrence, as shown in the recovery memo. The case property produced before the Court does not consist of broken pieces of hockey sticks. He has proved two live and two empty cartridges

and one bullet by his evidence, which are marked as Material Ext.10 to 17. He was not present at the time of inquest proceeding.

23. After conclusion of prosecution evidence, statement of accused persons have been recorded under Section 313 Cr.P.C., in which they have stated that the witnesses have falsely testified against them and the FIR is ante timed. PW-2, Shiv Shanker Singh also testified falsely as he is uncle of the informant. PW-3, Doctor Mohd. Jamil Ahmad, has prepared false injury report of Digvijay Singh and PW-5 has also prepared false injury report of Shiv Shanker Singh. PW-8, Dr. Pragati Kumar, who is also author of postmortem report, has also give false statement. PW-9, Constable Anand Rao has given false evidence under influence of his higher officers. All the police actions are wrongly carried out under influence of the informant. The witnesses have testified falsely against them. The investigation is tainted and result of undue influence of the informant.

24. Accused persons filed their written statement under Section 233 (2) Cr.P.C., wherein the accused Dhruvjeet Singh has stated that the injury reports of informant Digvijay Singh and his uncle Shiv Shanker Singh are fake and forged. In fact, they had not received any injury in the incident. The deceased was shot at by unknown persons and the witnesses were not present at that time. The accused and his sons are wrongly implicated in the case due to enmity and village partibandi. He had not met the deceased in the market on the fateful day, in fact, the accused and his sons are implicated in the case at the behest of Arvind Singh and his son Amrendra Singh @ Kishan Singh, who is posted in Army in view of his enmity with the accused persons on account of a case under Section 307 IPC instituted by accused Vimlesh Singh. Kishan Singh was companion and helper of deceased Ajay Singh. The informant, deceased and Kishan Singh were exerting pressure on accused persons to strike a compromise in said case of Section 307 IPC and on refusal of accused side to compromise that case, they harboured animosity with the accused persons and when Ajay Singh was shot at by unknown persons, the accused and his sons were roped in the case falsely. Similar written statements have been given by the other accused persons. Accused Vimlesh Singh has stated that Ajay Singh was killed in the darkness of night and the informant and Shiv Shanker Singh have assumed themselves as witness by procuring the injury reports, in which fake injuries are shown. All the four accused persons have denied to have made any recovery of vehicle or weapon of offence on their pointing out. Accused Rakesh Singh also stated that the weapon attributed to him cannot fit in the tool box of the motorcycle alleged to have been recovered on his pointing out.

25. The accused persons examined D.W.-1, Nagina Singh, in defence evidence, who stated that informant Digvijay Singh is his neighbour. He heard sound of firing in his shahen three years prior to his evidence before the Court. He rushed to the spot. It was 8:00 PM and there was no light in the village at that time. There was darkness. When he reached there, other people had also arrived there. He had seen Dhruvjeet Singh and his sons there. Ajay Singh was lying on the ground and had sustained firearm injury. He had not seen any other person present there having received firearm shot. He had not seen the persons who had shot the deceased as the assailants as they had already left the place. People who were there could not see the assailants. In cross-

examination by the informant, this witness has stated that when he reached on the spot some people told him that Harihar and Ramveer Singh had shot the injured. He had not conversed with Dhruvjeet Singh and his sons in this matter. When he reached the spot, he had seen Dhruvjeet Singh and his four sons standing there. Uma Shanker Singh his a relative of Dhruvjeet Singh but he is not of same lineage, to which Dhruvjeet Singh belong. He entered in the hatha (compound) of Digvijay Singh from northern gate. This is wrong to say that he has falsely testified in the Court being cousin of Dhruvjeet Singh.

26. Feeling aggrieved by the jdugement and order of learned trial court, by which the appellants have been convicted for said charges and sentenced, as stated herein above, filed present criminal appeal under Section 374 Cr.P.C. before this Court.

27. Learned counsel for the appellants submitted that the judgement and order passed by the learned trial court is illegal and bad in the eye of law. Learned trial court has miserably failed to appreciate the evidence on record in proper perspective and in fact has misread the evidence appearing on record. Thus, the learned trial court has recorded conviction of the appellants and sentenced them without considering the full facts and circumstances of the case. The weapon of offence allegedly recovered at the pointing out of accused persons during their police custody remand did not match with the empty cartridges allegedly recovered by the Investigating Officer from the place of incident, which also belies the complicity of accused persons in the offence. No specific role has been attributed to accused Dhruvjeet Singh in the offence except the allegation of exhorting his sons to attack the informant's side. Nevertheless, he has also been convicted and sentenced in the same manner like his sons, who are attributed role of firing. In fact, entire prosecution version is manufactured and none of the accused persons have been involved in present murder case. The investigation is perfunctory and full of discrepancies. There is no consistency in the version of alleged eye-witnesses. In FIR no motive has been attributed to accused persons for committing the offence. However, in evidence this fact is developed in statement of witnesses that some altercation took place on the fateful day between accused Dhruvjeet Singh and the deceased in Gahmar market as the deceased had borrowed the motorcycle of his co-vi Arvind Singh, for visiting the marked in connection with some necessary purchasing as marriage of his cousin Archana Singh was scheduled on 29.4.2013 and Tilak Ceremony had already been performed. Dhruvjeet Singh got furious to this and he met the deceased in Gahmar market on that day in the evening and abused as well as threatened because he was inimical to Arvind Singh from whom deceased had borrowed motorcycle. This is hardly believable that a person would get the other, who is his co-villager, killed only on account of this weak motive that the deceased had borrowed motorcycle for carrying out some purchasing from a person with whom the accused side was inimical.

28. Learned counsel for the appellants submitted that the learned trial court failed to consider many anomalies in prosecution evidence. As per the prosecution story, a countrymade pistol of .315 bore has been recovered from the pointing out of appellant No.2 Akhilesh Singh but the empty cartridge of .315 bore has not been recovered from the place of occurrence and as per the recovery memo

dated 26.4.2013, prepared by Investigating Officer (Ext.Ka-20), the empty cartridge of .32 bore had been found at the place of occurrence alongwith two live cartridge of .32 bore and one live cartridge of 12 bore. The appellants are not having any prior criminal history. They have been falsely implicated in the case. The appellant Rakesh Kumar Singh and Akhilesh Singh have undergone about 11 years of actual imprisonment in this case and appellant Vimlesh and Santosh have undergone about 8 years of actual imprisonment in this case.

29. Per contra, learned AGA appearing for the State submitted that the appellants have been convicted and sentenced by learned trial court on the basis of credible, cogent and ample evidence, which appeared on the record. All the facts, circumstances and evidence produced before the Court below were duly considered by the learned trial court while passing the impugned order, which is just, legal and proper and has been passed strictly in accordance with law after coming to the conclusion that the accused appellants committed the offence in question and which is proved beyond all reasonable doubt. This is a case of gruesome murder of an Army personnel who had visited his native place on leave to participate in marriage ceremony of his cousin. There was enmity between Kishan Singh and his father Arvind Singh and accused Vimlesh Singh. Accused Vimlesh Singh had lodged an FIR under Section 307 IPC against Kishan Singh and others and due to this criminal litigation, the accused side got enraged to find out the proximity of deceased with Arvind Singh and Kishan Singh. The appeals are devoid of merits and deserves to be dismissed.

30. The prosecution case in nutshell which prosecution side claims to have proved on the basis of oral evidence, medical evidence and also by scientific evidence produced from Forensic Science Laboratory is that the informant Digvijay Singh (PW-1) lodged an FIR at police station Gahmar on 25.4.2013 at 20:40 hours by producing a written report (Ext.Ka-1) with averment that his elder brother Ajay Singh works in Bengal Engineering (Army), Pune on the post of Hawaldar. On 25.4.2013, the informant, his father Harivansh Singh, his uncle Shiv Shanker Singh (PW-2) and his brother Ajay Singh were talking together in the boundary of their house at 8:15 PM, the accused Dhruvjeet Singh appeared alongwith his four sons namely Rakesh Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh and exhorted his sons to kill informant's side whereupon his sons opened fire indiscriminately on informant's side wherein his elder brother Ajay Singh suffered firearm injuries on his chest and right hand he fell down in pool of blood. The informant ran to save him but Vimlesh Singh attacked him by butt of his firearm on his right ear which caused him injury. His uncle Shiv Shanker Singh also ran to save him but Akhilesh Singh and Santosh Singh, threw him on the ground and assaulted him by hockey sticks, which were lying nearby, badly. Thereafter, assailants fled away by two motorcycles towards east. The incident caused panic and terror in the locality (mohalla) and people shut their windows and doors having been scared. The informant stated during trial as PW-1 that after happening of the incident, he carried injured Ajay Singh to police Station by a motorcycle from the place of incident, which was driven by him and his brother Sanjay Singh was sitting on back side of the motorcycle. He moved for police station just after the 5 to 7 minutes of the incident. Any other person had not accompanied them. They stayed at police station for 10 minutes

and they narrated the incident to Darogaji and thereafter they filed a written report of the incident. The reached police station at around 8:24 hours. They moved to District Hospital, Ghazipur alongwith injured Ajay Singh by a vehicle arranged by Darogaji and reached hospital at about 9:30 PM. They were also accompanied by Darogaji and two constables. His brother Sanjay Singh and some other persons also reached at District Hospital by another vehicle. Injured Ajay Singh died during journey or on his arrival at hospital in the night. This death is recorded in Police Station Kotwali Ghazipur on 22:10 hours (10:10 PM) on 25.4.2013. The case was initially lodged under Sections 147, 148, 149, 307, 504, 506 IPC and Section 7 of Criminal Law Amendment Act and after receiving death memo from the hospital, Section 302/323 IPC was added in penal section vide GD No.37, time 23:45 hours on 25.4.2013. The inquest on dead body of deceased was carried out by Kotwali police on 26.4.2013 between 11:00 AM to 12:13 PM and postmortem examination was done on same day at 2:00 PM, wherein five firearm injuries were detected, out of which two injuries were wound of entry and two injuries were wound of exit and one firearm injury on chest was not having corresponding exit wound. One metallic bullet 1cm X 1cm cylindrical in shape and 2 wads piece was recovered, which was stucked between intestine. PW-8, Dr. Pragat Kumar, who is author of postmortem report opined the cause of death as haemorrhagic shock as a result of antemortem firearm injuries. Medico legal examination of injuries of informant Digvijay Singh (PW-1) was conducted at District Hospital, Ghazipur on 25.4.2013, at 10:40 PM, in which three lacerated wound were detected on different parts of right ear, which were found fresh in duration and were of simple nature. Injury report of injured Shiv Shaker Singh (Ext.Ka-4) reveals that his medico legal examination was conducted on 26.4.2013 at CSC, Bhadaura, Ghazipur at 10:00 AM and four contusions were found on head, shoulder, forearm and face. These injuries were also found simple and their duration was one day old. Thus, the injury reports of injured Digvijay and Shiv Shanker Singh correspond to the date and time of death of deceased propounded in prosecution version.

31. Prosecution has examined the aforesaid injured witnesses namely Digvijay Singh and Shiv Shanker Singh, who are brother and uncle of the deceased in support of prosecution version as eye-witnesses. We are not inclined to subscribe the defence suggestion that as the injuries of PW-1 and PW-2 were found simple in their medico legal examination, these could be manufactured or manipulated in injury report. This fact is noticeable that medico legal examination of Digvijay Singh (PW-1) and Shiv Shanker Singh (PW-2) has been conducted on injured memo (chitthi majroobi) issued by Ram Nihor Mishra (PW-11) under his signature, in which injuries of these injured are also corroborated the injuries mentioned in medico legal injury report prepared by Dr. Jamil Ahmad (PW3) and Dr. Naresh Prashad Chaudhari (PW-5), respectively. Although, no independent witness has been produced in support of prosecution version, yet the place of occurrence is established by evidence of eye-witnesses as Investigating Officer as compound of the house of the informant and deceased. The family members are inmates of the house and being injured witness also could be the natural witnesses and their presence cannot be doubted. This fact has also emerged during evidence that on fateful day deceased Ajay Singh had visited market for purchasing

some goods as marriage of his cousin Archna Singh, who is daughter of his uncle and injured Shiv Shanker Singh, was fixed on 29.4.2013. He had borrowed motorcycle of one Arvind Singh of his mohalla for this purpose and this infuriated Dhruvjeet Singh as he thought that he was increasing proximity with Arvind Singh, to whom latter was having enmity due to previous litigation. The witnesses have also deposed that prior to the incident on same day Dhruvjeet Singh abused and assaulted the deceased in Gahmar market being enraged due to the fact that the deceased had borrowed motorcycle of his enemy (Arvind Singh). Although, this fact has not been mentioned in FIR and has surfaced in sworn testimony of the witnesses before the Court yet the case being based on direct evidence of eye-witnesses, non introduction of motive in FIR itself will not be damaging to prosecution case, as the defence has nowhere suggested that there were no inimical relations between Arvind Singh and accused side. This fact has also emerged during evidence and has not been denied by defence that Kishan Singh, who is also a defence personnel, was accused in a criminal case lodged against him at the instance of accused Vimlesh Singh for attempt to commit murder. Kishan Singh had also come on leave at the time of this incident. Kishan Singh belong to caste of the informant and he admitted that they were having normal relationship. The PW-1 has also stated that he was four brothers in all, out of whom one Sanjay Singh had died during trial and the other Ajay Singh is deceased in this case. He has only one surviving brother namely Dhananjay Singh. Deceased visited his native place by taking leave of 4-5 days prior to the incident. Dhananjay Singh was also working somewhere else and he was not present on the date of incident. Informant has stated that he was working in Vodafone at Sultanpur at the time of incident and he came to his village two days prior to the incident. His father Harivansh Singh was also an ex-serviceman, who worked for sometime after retirement in Power House, Singrauli. There was only one motorcycle in his house, which was taken in the name of his brother Dhananjay Singh. Deceased went back to home on fateful day around 8:00 PM. The informant also came back to home at around 7:45 PM. He had gone on feet in the village and came back to home. The main exit of his house is towards north and a pathway is adjacent to his exit. The accused Dhruvjeet Singh was blessed with five sons, out of whom four are accused in the case and fifth is Toofani. Accused Rakesh was also serving in Army and come to his native place on leave. Toofani was on his duty at the time of incident. Thus, the investigation in the case was carried out by PW-11, S.H.O. Ram Nihor Mishra. The witnesses have also stated that Harivansh Singh, the father of deceased, was present on the spot but he was physically invalid and could hardly pursue his daily chores.

32. So far as the sufficiency of motive is concerned, there may be force in defence argument that the motive introduced in prosecution evidence is not so strong as to drive the accused persons to commit a heinous offence like murder. Learned counsel for the appellant contended that only due to the fact that the deceased had borrowed motorcycle of a person with whom accused side was on inimical terms will not be a driving force for the accused side to kill the deceased. The law is well settled that in a case based on direct evidence of eye-witnesses, absence or insufficiency of motive loses its significance to much extent. Hon'ble Apex Court in recent judgement of **Shankar vs. State of**

Maharashtra, passed on 15.3.2023 in Criminal Appeal No.954 of 2011, observed that is is also settled law that the motive loses all its importance in a case where direct evidence of eye-witnesses is available.

33. In **Shivaji Chintappa Patil vs The State Of Maharashtra** also Apex Court held that *"Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. In the present case, the motive introduced in evidence of witnesses has been proved by evidence and the case being based on direct evidence, we are not inclined to explore the sufficiency of motive introduced and proved in prosecution evidence."*

34. FIR in present case has been lodged with utmost promptitude as the date and time of occurrence shown in FIR as well as in evidence of prosecution witnesses is shown as 25.4.2013, at 20:15 hours and the FIR has been lodged within half an hour of the incident. In Chik FIR (Ext.Ka-4), the distance of police station from place of occurrence is shown as 1 kms only due to the fact that FIR has been lodged with utmost promptness, it cannot be treated as ante time as contended during submissions of appellant's counsel. There is nothing on record which could form basis to arrive at an inference that the FIR is ante time. There is an endorsement in heading of original copy of FIR (Ext.Ka-4) that vide GD report No.37, time 23:45 hours, dated 25.4.2013, Section 302/323 IPC is added. Therefore, we do no interpolation in FIR. The prosecution case can not be doubted only due to the certain facts which are later on introduced in evidence of eye-witnesses are missing in FIR. These facts does not form part of the incident as such. Hon'ble Supreme Court in **Ashabai Machindra Adhagale vs State Of Maharashtra & Ors, AIR 2009 SC 1973**, held that it is well settled that a first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported.

35. So far as the place of occurrence is concerned, in FIR itself, it is stated that the occurrence took place within the four corners of the house of the informant where he was sitting with his brother deceased Ajay Singh, uncle Shiv Shankar Singh and father Harivansh Singh and accused persons arrived there suddenly, who are appellants before this Court, opened fire causing fatal injuries to deceased Ajay Singh at 8:15 PM, who later succumbed to injuries within few hours of the incident at District Hospital, Ghazipur for his hospitalization. The place of occurrence is also proved by evidence of PW-11, S.H.O. Ram Nihor Mishra, who has proved site plan/sketch map of the place of occurrence prepared on pointing out of the informant and marked as Ext.Ka-19 by the evidence of Investigating Officer. The place of occurrence is shown in the site plan as 'sehan' of the informant where injured was shot at. The Investigating Officer also took into possession four pieces of two hockey sticks from the place of occurrence and collected four empty cartridge shells and one .12 bore live cartridge, two live cartridges .32 bore and took these in his possession. The suggestion has been given to PW-2 from defence side during cross-examination that Ajay Singh was shot at in the darkness of night by some unknown person and no such occurrence as propounded by prosecution occurred. Eye-witnesses have stated in their evidence that deceased sustained three firearm shots in the incident. PW-2 has clarified during cross-

examination that the deceased suffered firearm shots while standing and thereafter he fell down. He was east facing when the occurrence took place. He was shot at by the pistol and katta (countrymade pistol). The place of occurrence shown and proved by prosecution in the case also finds support from evidence of DW-1, Nagina Singh, who stated in his examination-in-chief that firearm was shot in the sehan of Digvijay Singh (PW-1). He rushed to the place on hearing sound of firearm shot at that time. It was 8:00 PM. There was no light in the village. Some other persons also reached there. Dhruvjeet Singh and his all the sons present there. Ajay Singh was lying on the ground having suffered firearm shot. He could not see the assailants as they had run away. In cross-examination on behalf of the informant, he stated that deceased was carried to hospital by a Bolero Jeep on arrival of police. He heard that Harihar Singh and Ram Briksh Singh had shot the deceased on the place of incident. Had some other persons would have shot the deceased, the informant, who is real brother, must have named them in his written report (Ext.Ka-1). Hon'ble Supreme Court in State of **U.P. v. Naresh, reported in (2011) 4 SCC 324**, held as under:-

"The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence."

36. Hon'ble Supreme Court in **Dalip Singh And Others vs State Of Punjab, AIR 1953 SUPREME COURT 364**, held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The aforesaid dictum of Supreme Court was followed in case of **Bur Singh vs. State of Punjab, AIR 2009 SC 157.**

37. Even from evidence of DW-1, the place of occurrence is proved and statement of DW-1 lends support to prosecution case to some extent as he stated that he found accused persons on place of incident soon after the incident. Thus, in present case of direct evidence based on eye-witnesses examined on behalf of the prosecution, the evidence of defence witness can be used for limited purpose only for lending assurance to the conclusion already drawn on the basis of evidence of eye-witnesses regarding presence of all the accused persons on the place at the time of incident. Even DW-1 has stated that he visited the sehan of the informant at around

8:00 PM, which is the time of incident in prosecution version.

38. Hon'ble Apex Court in **Jarnail Singh vs. State of Punjab, (1996) 1 SCC 527**, observed that in *"criminal cases the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and, therefore, if it fails to adduce satisfactory and reliable evidence to discharge that burden it cannot fall back upon the evidence adduced by the accused persons in support of their defence to rest its case solely thereupon. In the instant case, however, we find that the learned Courts below made use of the evidence of D.W.5 only for lending assurance to the conclusions already drawn by the learned Courts on the basis of the evidence of P.Ws 4 and 6. Such a course is legally and legitimately permissible, for D.W.5 was subjected to cross-examination - and in fact cross-examined - at the instance of the appellants after being cross examined by the Public Prosecutor. That the appellant could not elicit any answer in his favour thereby would not alter the position as regards the admissibility. relevancy or worth of the evidence of the above witness."*

39. We find no force in submissions of learned counsel for the appellants that as the injuries of PW-1 and PW-2 were of simple in nature and they did not suffer any firearm injury during the incident, their presence on the spot is doubted. The witnesses have stated that prior to some time of the incident, some altercation took place between accused Dhruvjeet Singh and deceased in the market with regard to borrowing of motorcycle by the deceased from his enemy namely, Arvind Singh. The indignation of the accused side was on account of conduct of the deceased and this could have driven them to target the deceased and the informant and his uncle were assaulted only when they intervened to save the deceased. There was no intention of the accused persons to kill or cause fatal injuries to witnesses, thus, only due to the fact that the witnesses have not sustained any serious injury which would dangerous to life or some firearm injury, it cannot be inferred that they were not present on the spot and they had not seen the occurrence.

40. From perusal of record and evidence of PW-11, the Investigating Officer of the case, it appears that named accused Rakesh Singh was arrested in New Delhi from his place of posting as he was also an Army personnel. The Investigating Officer filed a report before his Superior Officer for seeking permission to arrest him and after completion of formalities, he was arrested on 1.5.2013 and was produced before the Court from where he was remanded to custody in present case on 3.5.2013. After his arrest, the Investigating Officer sought the police custody remand for recovery of motorcycle and pistol used in commission of the offence. Similarly, other accused persons, who are projected as assailants in the case namely, Vimlesh Singh, Akhilesh Singh and Santosh Singh surrendered before the Court. The Investigating Officer recorded their statement under Section 161 Cr.P.C. in jail and sought their police custody remand for recovery of weapon used in the commission of offence, which was allowed by the court of CJM, Ghazipur vide order dated 10.5.2013. The Investigating Officer recovered one motorcycle TVS Apache (black color), by which the appellant Rakesh Singh and his brother Santosh Singh fled after commission of the offence and concealed the same in dense shrubs lying nearby pump canal towards east of village Gahmar and one country made pistol of 7.65

bore used in the commission of offence was recovered from its tool box in presence of public witnesses namely Sanjay Singh and Manoj Kumar Singh. The Investigating Officer has proved the recovery memo of this motorcycle and firearm by his evidence on which Ext.Ka-12 has been marked. Similarly, the Investigating Officer recovered a motorcycle CBZ during police custody remand of accused Vimlesh Kumar Singh at the pointing out of said Vimlesh Kumar Singh, which was also concealed in the same locality from where the weapon of offence and one motorcycle used in the commission of offence was recovered at the instance of accused Rakesh Singh on 7.5.2013. Accused Vimlesh Kumar Singh inserted his right hand in the tool box of said motorcycle and took out a countrymade pistol of 32 bore and handed over the same to the Investigating Officer. This motorcycle is alleged to have been used by Vimlesh Kumar Singh and his brother Akhilesh Singh while fleeing away from the village after commission of the offence. The Investigating Officer proved this recovery memo as Ext.Ka-15. The Investigating Officer also recovered a countrymade pistol of 315 bore on pointing out of accused Akhilesh Singh after obtaining his police custody remand vide order dated 10.5.2013 of learned CJM, Ghazipur, on 11.5.2013, which was also recovered from the same locality. Thus, one TVS Apache motorcycle and pistol of 7.65 mm bore, which is said to be countrymade has been recovered on the pointing out of accused Rakesh Singh on 7.5.2013 and three firearms are recovered on 11.5.2013 at the pointing out of other accused persons on 11.5.2013 during their police custody remand. The recovery memos are proved by the Investigating Officer during his evidence before the Court. These recoveries are preceded by the statement of concerned accused persons recorded in case diary under Section 161 Cr.P.C. However, the Investigating Officer has admitted that he has not recorded separate disclosure statements of the accused persons for effecting recovery of the weapons of offence and the vehicles used by the accused persons for making good their escape after commission of offence. The Investigating Officer has also proved the seizure memo of four empty cartridges of 32 bore and two live cartridges of 32 bore and one live cartridge of 12 bore from the place of occurrence at the time of his local inspection in the morning of 26.5.2013 as Ext.Ka-20. The Investigating Officer has also proved the memo of taking into possession of four pieces of hockey sticks recovered from the place of occurrence as Ext.Ka-23.

41. If we look into postmortem report of the deceased, we find that deceased suffered five firearm injuries on his person, out of which injury No.2 is exit wound of injury no.1 and injury no.5 is exit wound of injury no.4. Injury No.3, which is detected on chest of the deceased is not having any corresponding exit wound and for that reason, one cylindrical metallic bullet of 1cm X 1cm was recovered between his intestine during postmortem examination on dead body of the deceased. This was wound of entry of 1.2cm X 1.1cm. Its margin was inverted. This injury caused damage to intestine and kidney of the deceased. Injury no.1, which is firearm injury 1cm X 1cm in circular shape on chest of the deceased and Injury No.2 is wound of exit of 2.0cm X 2.1cm at left side of back of chest. Injury no.4 is firearm injury of 09cm X 09.cm on right arm and injury no.5 was found on knee of right arm, which is wound of exit. Thus, this fact has been proved by evidence of eye-witnesses and medical evidence that the deceased had received three firearm injuries

in the incident, which proved fatal and he succumbed to the injuries within few hours of receiving the same. This fact also emerged in evidence that profuse bleeding occurred from the wounds which expedited the death.

42. The prosecution evidence with regard to place of occurrence is also fortified by the report of forensic science laboratory dated 8.7.2013, in which it is stated that in sealed boxes having plain earth and blood stained earth, large part of Item No.1 (mitti khoonaluda) blood stains were found. Four pistols purportedly recovered from accused persons on their pointing out alongwith four number of empty cartridges of 7.65 mm KF, two live cartridges of 7.65 mm KF and one live cartridge of .12 bore, shown in recovery memo Ext.Ka-20 and one led slug (ball shot), and two number of wads (plastic) were sent for ballistic examination through Cricle Officer, Zamania, District Ghazipur to forensic science laboratory, Mahanagar Lucknow. The ballistic expert in his report (Ext.Ka-33) dated 27.5.2017 has stated that the disputed 7.65 mm cartridges marked as EC-1 to EC-4 (recovered from place of occurrence as empty cartridges) were found to have been shot by pistol marked as 3/25 of 2015. This pistol is shown to have been recovered from accused Rakesh Singh. Let slug (ball shot) marked as B-1 connected with PM No.186/2013 was used in 12 bore standard cartridge used in smooth barrel firearm and wads (tikli) marked as W-1 and W-2 are part of .12 bore cartridge. This shows that all the four used cartridges recovered from place of occurrence by Investigating Officer on 26.4.2013 got matched with firearm of 7.65 mm pistol, which is alleged to have been recovered from accused Rakesh Singh. One led slug (ball shot) recovered during post mortem examination of deceased from seat of his injury No.3 was part of standard cartridge of 12 bore. Similarly. The plastic wads recovered from seat of injury No.2 were also part of 12 bore cartridge as shown in ballistic expert's report. As no other empty cartridge was recovered from place of occurrence during investigation and all the empties recovered there from matched with the gun recovered on pointing out of accused Rakesh Singh, the firearms recovered on pointing out of other accused persons could not be matched by any empty cartridge shells. However, one metallic bullet of 1cm X 1cm cylindrical in shape, mentioned in postmortem report and having been recovered from seat of injury No.3 of the deceased, which was found stucked in between intestines, is found to have been used in standard cartridge of .12 bore. If we go through the recovery memos of firearms, which were recovered at the pointing out of accused persons, we find that one .12 bore country made pistol was recovered from accused Santosh Singh during his police custody remand on his pointing out, thus, on the basis of the scientific evidence emerging from report of ballistic expert, this lead slug which is shown as metallic bullet in postmortem examination report can safely be attributed to accused Santosh Singh, which would have been emitted from the firearm of 12 bore recovered from his pointing out during his police custody remand on 11.5.2013. His active participation in the offence is also fortified with the fact that in FIR version as well as in statement of the witnesses namely, PW-1 Digvijay Singh and PW-2 Shiv Shanker Singh, this fact emerged that Akhilesh Singh and Santosh Singh lifted and dashed PW-2 Shiv Shanker Singh on ground when he tried to save the informant while being assaulted by accused Vimlesh Singh by butt of his weapon and thereafter both accused Akhilesh and Santosh Singh gave beating to

him by hockey sticks which were lying nearby the place of incident. In ballistic examiner's report (Ext.Ka-33), it is stated that one piece of lead slug (ball shot) marked by B-1 was made of lead metal and it was partially disfigured. Its diameter was 17mm and signs of collision/striation, tiny parallel grooves were visible. Thus, on the basis of recovery of 12 bore firearm at the pointing out of accused Santosh Singh, injury No.3 of the deceased, as appearing in postmortem report, appears to have been caused by accused Santosh Singh by his 12 bore katta (country made firearm) on the basis of recovery of partially disfigured lead slug from the seat of injury No.3 during postmortem examination. In recovery memo of firearms Ext.Ka-13 (at the instance of accused Santosh Singh), Ext.Ka-14 (at the instance of accused Akhilesh Singh, Ext.Ka-15 (at the instance of accused Vimlesh Singh, two public witnesses namely Satrudhan Singh and Harendra Singh are enjoined as witnesses of recovery and in recovery memo of accused Rakesh Singh (Ext.Ka-12) public witnesses namely, Manoj Kumar Singh and Sanjay Kumar Singh are enjoined. Although, they were not produced during trial to prove these recovery memos and same are proved by evidence of PW-9 Anand Rao and are exhibited by his evidence. Subsequently, this recovery memos are also proved by evidence of Investigating Officer, S.H.O. Ram Nihor Mishra, who has given details of the process of recovery of these firearms by police team headed by him. These recoveries are preceded by recording of statements of four accused persons under Section 161 Cr.P.C. by the Investigating Officer during their custody.

43. Statement of PW-2, Shiv Shanker Singh during trial to the effect that just after the incident, informant Digvijay Singh carried the deceased to police station on motorcycle, which he drove himself and deceased was got seated behind him and he was held by Sanjay Singh, this statement was corroborated by extracts of GD of registration of case at police station vide report No.32, time 20:40 hours, dated 25.4.2013, Police Station Gahmar, which is proved by PW-10, the author of this GD entry as Ext.Ka-17 and in this extract of GD, it is mentioned that at 20:40 hours, dated 25.4.2013, Digvijay Singh, son of Harivansh Singh, resident of Village- Gahmar Patti Khemanrai, Police Station Gahmar, District- Ghazipur, appeared alongwith injured Ajay Singh, who is his brother and produced one written report under his hand writing and signature, on the basis of which chik FIR has been registered vide Crime No.136 of 2013, under Sections 147, 148, 148, 307, 504, 506 IPC and Section 7 of Criminal Law (Amendment) Act. Time of occurrence is 20:15 hours, dated 25.4.2013 and place of occurrence is Village- Patti Khemanrai, which is one kilometre far from Police Station Gahmar. In this GD entry (Ext.Ka-17), injuries of injured Ajay Singh and informant Digvijay Singh are mentioned. In Ext.Ka18, which is extract of GD report No.37, time 23:45 hours, dated 25.4.2013, S.O. Ram Nihor Mishra (PW-11) has mentioned that he was taking injured Ajay Singh to district hospital, Ghazipur for treatment but he died on way due to injuries suffered and he placed the dead body in mortuary and came back to police station alongwith informant Digvijay Singh. He also mentioned therein that Section 302 and 323 IPC is added in penal sections mentioned in chik FIR.

44. In present criminal appeals, only appellant Dhruvjeet Singh has been enlarged on bail by orders of this Court and other convicts/appellant are held in jail

custody and undergoing sentence awarded in impugned judgement. In FIR itself, the informant has stated that he has come to police station to lodge the FIR together with his elder brother Ajay Singh, who is injured. There is some inconsistency in the statement of PW-1 and PW-2 regarding mode and manner in which the deceased was taken to police station after the incident. PW-1 has stated in his cross-examination that after the incident he rushed to the police station alongwith Sanjay Singh by motorcycle driven by him. They stayed at police station for ten minutes whereas PW-2 has stated that the deceased was taken to police station in injured condition by laying him on motorcycle driven by PW-1 and Sanjay Singh, who appears to be brother of the informant and deceased, who was pillion rider but this fact is proved by documentary evidence that deceased was produced at police station at the time of lodging of FIR. This fact is also proved by ocular testimony of PW-1 and PW-2 as well as antemortem injuries of the deceased that he sustained three firearm shots and total five antemortem injuries as two wounds of entry were coupled with wounds of exit, as discussed above. This fact also appeared in evidence that blood oozed out from the injuries and it was found on the spot. PW-1 clarified in his evidence that his clothes got smeared with blood of his brother and he had shown his blood stained clothes to Darogaji but he could not tell as to whether any documentation thereof was made by him. In any manner this may be a specie of faulty investigation. A suggestion has been given by learned counsel for the defence during cross-examination of both the witnesses of fact that the deceased was killed in darkness of night by unknown person and accused persons are roped in due to village partibandi at the behest of Kishan Singh against whom accused side is litigant. Witnesses have denied this suggestion outrightly. PW-1 has admitted in cross-examination that his statement was taken by Investigating Officer thrice and some contradiction are bound to occur yet no material contradiction could be noticed by us in the sworn testimony of the witnesses and their previous statement recorded by Investigating Officer. The informant Digvijay Singh (PW-1) has stated in FIR as well as in his evidence before the Court that accused Vimlesh Sing assaulted him by butt of his weapon on his ear due to which he got injured and when his uncle Shiv Shanker Singh came to his rescue, Akhilesh Singh and Santosh Singh thrown him on ground and assaulted him by hockey sticks. Thus, the witness has been confronted with wrong question during cross-examination that he had not stated in his FIR that Shiv Shanker Singh was assaulted by accused persons by hockey sticks and he has stated that his fact is narrated by him in Ext.Ka-1. Statement of PW-1 that he was assaulted by accused Vimlesh by butt of his weapon remained intact for want of cross-examination on this score from accused side. He has also stated that he had seen pistol/katta in the hands of accused persons. However, he had used word 'weapon' in his FIR. From perusal of FIR itself, it appears that the informant meant for firearms where he used words 'illegal weapons' because he has stated therein that on exhortation of Dhruvjeet Singh his four sons engaged in indiscriminate firing by their weapons on informant's side in which his elder brother Ajay Singh received serious injuries. Thus, there is no doubt that the informant meant firearms where he used word 'weapon' in FIR and he has clarified this in his evidence during trial. Hon'ble Apex Court in **Mukesh and Another vs. State for NCT of Delhi and others, AIR 2017 SC 2161** (Three Judge Bench) (Nirbhaya rape and murder

case) observed that if there are no material discrepancies and contradiction in the testimony of a witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, exaggerations, embellishment etc. The distinction between material discrepancies and normal discrepancies are that the minor discrepancies do not corrode the credibility of a party's case but material discrepancies doe so. In present case, the contradictions and discrepancies pointed out in the statement of the witnesses of fact by defence side are not of such nature that it could be termed as material contradictions or discrepancies in their statements. This is settled law that testimony of a witness before the Court can be contradicted by his own previous statement and not by the previous statement of another witness.

45. So far as the allegations and proof of recovery of firearms during police custody remand of accused Rakesh Singh, Santosh Singh, Akhilesh Singh and Vimlesh Singh, who are real brothers at their pointing out, is concerned, the recoveries are effect by PW-11, the Investigating Officer and police team in presence of public witnesses as stated in his evidence as well as in recovery memo but it appears that the public witnesses were not forthcoming to testify the factum of recovery of firearms at pointing out of the accused persons and, therefore, the recovery has been proved by the evidence of police witnesses in the case. There is no legal mandate that in absence of the testimony of public witnesses of recovery or discovery of fact effected during police custody at the instance of accused on the basis of his disclosure statement under Section 27 of Evidence Act, the testimony of police witnesses which is otherwise not disbelievable will not be considered. In **Mukesh Singh and Another vs. State For NCT of Delhi (supra),** Hon'ble Apex Court observed as under:-

83. In this context, we may fruitfully reproduce a passage from State of U.P. v. M.K. Anthony:-

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. ..."

84. In Harijana Thirupala v. Public Prosecutor, High Court of A.P.[44], it has been ruled that:

"11. .... In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of

probabilities, its intrinsic value and the animus of witnesses."

85. In Ugar Ahir v. State of Bihar[45], a three-Judge Bench held:

"7. The maxim falsus in uno, falsu in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

46. Hon'ble Supreme Court in State of **Maharashtra vs. Bharat Fakira Dhiwar (Criminal Appeal No.1246 of 1997)**, placed reliance on a case of **State of H.P. vs. Jeet Singh, reported in (1999) 4 SCC 370**, wherein held as under:-

"26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it. The said ratio has received unreserved approval of this Court in successive decisions. (Jaffar Hussain Dastagir v. State of Maharashtra [(1969) 2 SCC 872], K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788], Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330], Shamshul Kanwar v. State of U.P. [(1995) 4 SCC 430], State of Rajasthan v. Bhup Singh [(1997) 10 SCC 675])."

47. Charges were framed by learned trial court on 10.3.2014 in Hindi in following manner:-

"मैं चन्द्रहास राम, अपर सत्र न्यायाधीश, कक्ष संख्या-5, गाजीपुर एतद्वारा आप 1-ध्रुवजीत सिह 2- राकेश कुमार सिंह 3 विमलेश सिंह 4 सन्तोष सिंह एवं 5- अखिलेश सिंह को निम्नलिखित आरोप से आरोपित करता हूँ:-

प्रथमः- यह कि दिनांक 25-04-2013 को समय 20-15 बजे वादी मुकदमा दिग्विजय सिंह के घर के सामने स्थित ग्राम गहमर (पट्टी खैमेन राय) थाना-गहमर जिला- गाजीपुर में वादी पक्ष को चोटें पहुँचाने की नीयत से हाकी आदि असलहों से लैश होकर विधि विरूद्ध जमाव कायम किया। इस प्रकार आप लोगों ने भा०द०सं० की धारा 147 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः- यह कि उपरोक्त दिनॉक, समय व स्थान पर आप लोगों ने वादी पक्ष को चोटें पहुँचाने की नियत हाकी व आग्नेयास्त्र से लैस होकर नाजायज मजमा कायम किया। इस प्रकार आप लोगों ने भा०द० सॅ० की धारा 148 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

तृतीयः यह कि उपरोक्त दिनॉक, समय एवं स्थान पर आप लोगों ने अपने सामान्य उद्देश्य की पूर्ति में जान मारने की नीयत से वादी के बड़े भाई अजय सिंह की गोली मारकर हत्या कर दी। इस प्रकार आप लोगों ने भा०द०सं० की धारा 302 सपठित धारा 149 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

चतुर्थः- यह कि उपरोक्त दिनॉक, समय एवं स्थान पर आप लोगों ने अपने सामान्य उद्देश्य की पूर्ति में वादी के दाहिने कान में इस आशय व ज्ञान में प्राणघातक चोट पहुँचाया कि यदि उक्त चोट से वादी की मृत्यु हो जाती तो आप हत्या के दोषी होते। इस प्रकार आप लोगों ने भा०द०स० की धारा 307 सपठित धारा 149 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय में है।

पंचमः- यह कि उपरोक्त दिनाँक, समय एवं स्थान पर आप लोगों ने अपने सामान्य उद्देश्य की पूर्ति में वादी के चाचा शिवशंकर सिंह को हाकी आदि से मारकर साधारण चोटें पहुँचाया। इस प्रकार आप लोगों ने भा०द०स० की धारा 323 सपठित धारा 149 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

षष्टम्:- यह कि उपरोक्त दिनाँक, समय एवं स्थान पर आप लोगों ने वादी पक्ष के लोगों को गाली गुप्ता दिया जिससे शान्ति भंग हो। इस प्रकार आप लोगों ने भा०द०स० की धारा 504 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में हैं।

सप्तम्:- यह कि उपरोक्त दिनाँक, समय एवं स्थान पर आप लोगों ने वादी पक्ष के लोगों को जान मारने की धमकी देकर अभित्रास कारित किया। इस प्रकार आप लोगों ने भा०द०स० की धारा 506 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

अष्टम्:- यह कि उपरोक्त दिनाँक, समय एवं स्थान पर आप लोगों द्वारा किये गये उक्त आपराधिक कृत्य से आस पास के लोगों में दहशत फैल गयी और लोग डर से इधर-उधर भागने लगें। इस प्रकार आप लोगों ने धारा 7 क्रिमिनल ला अमेन्डमेन्ट ऐक्ट के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

एतद्द्वारा आप लोगो को निर्देशित किया जाता है कि उक्त आरोप के तहत आपका परीक्षण इस न्यायालय द्वारा किया जाय।"

48. From a bare perusal of charge No.4th, it appears that the learned trial court framed that charge under impression that the informant was assaulted by the accused persons in prosecution of common object on his right ear with intention and knowledge to cause his death and if by that injury, he would have died, they would be guilty of charge of murder. Learned trial court has not discussed in impugned judgement as to how the said charge has been proved in the case. The injuries of informant (PW-1) Digvijay Singh are found to be simple in his injury report by its author Dr. M.J. Anwar (PW-3), who proved this injury report as Ext.Ka-2 by his evidence. He categorically stated in his evidence that the injury was of simple nature. It was caused by hard and blunt object. All the three injuries were found on same place of right ear. The injuries were not bone deep. He has not mentioned oozing of blood from the injury on ear of the injured. It has come in evidence of the injured PW-1 that when he rushed to save his brother Ajay Singh when he fell down on being shot by the accused persons, accused Vimlesh Singh hit him on his right ear by the butt of his pistol. The butt of a pistol is a hard and blunt object. Thus, neither the nature of injury nor the impact of injury suggests that accused Vimlesh Singh had assaulted PW-1 by the butt of his pistol by knowledge to kill him and had it been so, he would tried to fire a shot at him and would not use the blunt portion of the firearm to hit PW-1, that too by solitary impact. The charge under Section 307/149 IPC is neither made out nor proved in the case. However, keeping in view the recovery evidence of firearms, which is preceded by disclosure statement of four accused persons namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh, in this regard, is found to be corroborated by Investigating Officer under Section 161 Cr.P.C. during their police custody remand and sanction for prosecution granted by District Magistrate

in exercise of powers under Section 39 of Arms Act vide order dated 10.6.2013, which is proved by evidence of Investigating Officer, Ram Nihor Mishra (PW-11); Charge under Section 25 of Arms Act is proved beyond reasonable doubt against all the four accused persons. There is evidence to the effect that on their pointing out a TVS Apache motorcycle used in escaping of accused Rakesh Kumar Singh and Santosh Singh after this incident and recovery of a pistol of 7.65 mm bore, on which 'MADE IN USA' was written and this pistol matched with four empty cartridges recovered from place of occurred by Investigating Officer. Charge under Section 25 of Arms Act has been proved against accused Rakesh Kumar Singh. Similarly, charge under Section 25 Arms Act has been proved against accused Santosh Singh, Akhilesh Singh and Vimlesh Singh on account of proof of recovery of one country made pistol of 12 bore on pointing out of accused Santosh Singh, one countrymade pistol of .315 bore on pointing out of accused Akhilesh Singh and one CBZ motorcycle used in abscondance of accused Vimlesh Singh and Akhilesh Singh after the incident and one country made pistol of 32 bore recovered on1 1.5.2013, on pointing out of accused Vimlesh Singh.

49. In present case, five accused persons who include Dhruvjeet Singh, the father and his four sons are attributed role of causing murder of deceased Ajay Singh, who was brother of the informant by creating riot by forming unlawful assembly on the date, time and place of incident having armed with firearms. This is evident on the basis of evidence on record that deceased received three firearm shots at the time of incident. Four used cartridges were collected from the spot by Investigating Officer on next day of the incident, when he visited the spot and prepared the sketch map of the place of incident. All these four cartridges of 7.65 mm (.32 bore) matched with firearm recovered on 7.5.2013 on pointing out of the accused/convict Rakesh Kumar Singh, who was posted in Army in New Delhi at that time. Deceased was also posted in military. As all the four empty cartridges matched with firearm recovered on pointing out of Rakesh Kumar Singh, the firearm recovered on pointing out of other accused persons namely, Santosh Singh, Vimlesh Singh and Akhilesh Singh could not be matched with any empty cartridge as per the report of FSL dated 27.5.2015 on which Ext.Ka-34 and Ka-35 has been marked. However, one lead metal slug (partially disfigured) which was found stucked in between intestines of the deceased in his injury No.3, was found to have belonged to standard cartridge of 12 bore and on the basis of this recovery of lead slug, the direct evidence of involvement of accused Santosh Singh causing firearm injury to deceased by his weapon is corroborated. The firearm recovered from accused Vimlesh Singh could also not be matched with any of the empty cartridges in FSL Report but the evidence of eye-witnesses i.e. PW-1 and PW-2 makes it manifestly evident that he assaulted the informant on his ear by butt of his pistol resulting in three lacerated wounds on a particular place behind his right ear. This is another thing that the injuries were found to be simple. Thus, accused Vimlesh Singh appears to have used blunt side of his firearm causing injuries to the informant when he rushed to save the deceased when he fell down after being seriously injured by assailants. The fourth accused namely, Akhilesh Singh has been assigned specific role together with Santosh Singh to have caused simple injuries to PW-2 Shiv Shanker Singh, the uncle of the informant, when he tried to rescue the informant from

being assaulted by accused. In FIR as well as in evidence of PW-2, this fact emerged that accused Akhilesh Singh and Santosh Singh assaulted PW-2 by hockey sticks, which were lying nearby and the Investigating Officer collected four pieces of hockey sticks on 26.4.2013 at the time of spot inspection. Due to slackness of prosecution, the hockey sticks could not be produced during evidence of PW-11 but on perusal of evidence of eye-witnesses, this fact is established that PW-2 was assaulted by these two accused persons by hockey sticks. This is not the case of prosecution that the accused persons were armed with hockey sticks and the prosecution is specific that the hockey sticks were lying in the vicinity of place of incident. Accused Dhruvjeet Singh, the father of other accused persons, is attributed role of exhorting co-accused, who are his sons to kill informant's side and co-accused persons are alleged to have acted upon this and opened indiscriminate fires on informant's side, which resulted in causing of fatal injuries to the deceased with whom Dhruvjeet Singh had picket up quarrel in Gahmar market on the same date earlier as he borrowed motorcycle of one Arvind Singh with whom accused side was inimical. Except the deceased none of the witnesses or family members of the deceased have sustained any firearm injuries but only due to this fact, the eye-witnesses account could not be disbelieved or faulted with keeping in view the back ground of the incident. Although, PW-1 and PW-2 have given eye-witness account of the commission of offence and have attributed role of indiscriminate firing on deceased to all the four sons of accused Dhruvjeet Singh yet the injuries of the deceased can be connected with accused Rakesh Kumar Singh and Santosh Singh. No firearm injury can be connected with weapon/firearm recovered at the instance of accused Vimlesh Singh and Akhilesh Singh, although the recovery of one firearm each has been proved in the case at the instance of four accused persons.

50. So far as the role of Dhruvjeet Singh is concerned, he is father of alleged assailants. He has been attributed role of exhorting his sons to kill the informant's side whereupon co-accused are alleged to have fired upon the deceased. This is admitted fact that Dhruvjeet Singh was bare arm. He was not wielding any weapon in his hand when his sons were armed with firearms. The question of exhorting his sons to kill the informant's side looses its significance as some of the co-accused were already prepared to kill the deceased and PW-1 and PW-2 are assaulted by Vimlesh Singh, Santosh Singh and Akhilesh Singh, only when they intervened.

51. In case of **Jainul Haque vs State Of Bihar, AIR 1974 SC1651**, Hon'ble Supreme Court in para 8 of its judgment has held as under:

"The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant."

52. In **Suresh and another vs State Of U.P. 2001 3 SCC 673**, Hon'ble Supreme Court in para 24 of its judgment has held as under:

"24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, IPC. So the act mentioned in Section 34, IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e. g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. "

53. In **Surendra Chauhan VS State Of M. P. , 2000 4 SCC 110**, Hon'ble Supreme Court in para 11 of its judgment has held as under:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. Ramaswami Ayhangar & Ors. v. State of Tamil Nadu2. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. Rajesh Govind Jagesha v. State of Maharashtra3. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

54. From the law laid down in the above referred cases it can be deduced that

evidence of exhortation is a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by ascribing to that person role of an exhortation to the assailant to assault the victim. Unless the evidence in this respect is clear, cogent and reliable, no conviction can be recorded against the person alleged to have exhorted the actual assailant.

55. Thus, in the light of legal proposition cited above and on facts of the case, the complicity of accused Dhruvjeet Singh in the offence and his implication in the case in view of the fact that he exhorted his sons to kill the informants side on date, time and place of occurrence does not inspire confidence and his involvement in the offence appears to be doubtful. He deserves to be accorded benefit of doubt, in respect of all charges. This is also noteworthy that except alleged exhortation, no overtact has been attributed to him in the evidence of witnesses of fact.

56. In view of finding complicity of accused Dhruvjeet Singh in the offence doubtful and not believable in ordinary course of nature, the charges under Sections 147, 148 IPC fails in respect of accused persons. Keeping in view facts and circumstances of the case, the conviction and sentence of the appellant for charge under Sections 147 and 148 IPC is set aside.

57. Consequently, we are of the considered opinion on the basis of eye-witness account as well as recovery, the evidence adduced by police witnesses in the case that the accused persons namely, Rakesh Kumar Singh and Santosh Singh in furtherance of common intention committed murder of deceased Ajay Singh by causing injuries to him by opening firearm shots at him with intention to kill him on the date, time and place of incident. Thus, the charge under Section 302/34 IPC is proved against them beyond reasonable doubt. Conviction of accused Dhruvjeet Singh, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh recorded by learned trial court for charge under Section 323 IPC for causing simple injuries to injured namely, Digvijay Singh and Shiv Shanker Singh is partly affirmed in respect of accused Vimlesh Singh, Santosh Singh and Akhilesh Singh as charge under Section 323 is not proved beyond reasonable doubt against accused Dhruvjeet Singh and Rakesh Kumar Singh. There is specific allegation against accused Vimlesh Singh, Santosh Singh and Akhilesh Singh for causing injuries to PW-1 and PW-2 by hard and blunt object.

58. On the basis of discussion herein above, the conviction and sentence of appellants for charge under Section 307 IPC read with Section 149 IPC is set aside.

59. One abusive word has been attributed to accused appellant Dhruvjeet Singh in FIR as well as in evidence of witnesses regarding his exhortation to co-accused but none of the co-accused are alleged to have intentionally insulted or provoked the informant's side to commit breach of peace and complicity of appellant Dhruvjeet Singh has not been found to be proved in the offence beyond reasonable doubt, therefore, the charge under Section 504 IPC fails and the conviction and sentence for charge under Section 504 IPC is accordingly, set aside.

60. There is no specific averment against the appellants that they threatened the informant, deceased or any of their family members with life at the time of the incident, therefore, due to lack of specific

allegation and evidence in respect thereof, charge under Section 506 IPC has not been proved against the appellants beyond reasonable doubt and hence, conviction and sentence recorded by the trial court against the appellants is consequently set aside.

61. This fact finds place in FIR as well as in sworn testimony of eye-witness that due to daring act of accused persons by which the deceased Ajay Singh was shot dead in the late evening on the date of the incident, a panic created in the locality and people shut the doors of their houses and started running here and there to find safe place, thus, we find no factual or legal error in recording of conviction and sentence awarded by learned trial court in respect of appellants Rakesh Kumar Singh, Santosh Singh, Vimlesh Singh and Akhilesh Singh for charge under Section Section 7 of Criminal Law (Amendment) Act.

62. With above findings and conclusions drawn after re-appreciation and re-scrutinization of evidence on record, we direct as follows:-

(1) Conviction and sentence recorded against accused Dhruvjeet Singh for charge under Sections 147, 148, 302/149, 307/149, 323, 504, 506 IPC and Section 7 of Criminal Law Amendment Act is set aside and he is acquitted of all the charges by this modified order.

(2) Conviction and sentence of appellants namely Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Section 307 read with Section 149 IPC is set aside and they are acquitted of this charge.

(3) Conviction and sentence of appellants namely, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Section 323 IPC is affirmed. Appellant Rakesh Kumar Singh is acquitted of charge under Section 323 IPC.

(4) Conviction of appellants namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Section 302/149 IPC is modified and altered to the extent that the appellants Vimlesh Singh and Akhilesh Singh are acquitted of charge under Section 302/149 IPC and appellants Rakesh Kumar Singh and Santosh Singh are instead convicted of charge under Section 302/34 IPC but their sentence of life imprisonment and fine of Rs.10,000/- payable by each in impugned order is affirmed.

(5) Appellants namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh are acquitted of charge under Sections 504 and 506 IPC and their conviction and sentence recorded by the learned trial court for these charges is hereby set aside.

(6) The conviction and sentence of appellants namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Sections 147 and 148 IPC recorded by the learned trial court is hereby set aside and they are acquitted of these charges.

(7) The conviction and sentence of appellants namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Section 7 of Criminal Law (Amendment) Act is affirmed.

(8) The conviction and sentence of appellants namely, Rakesh Kumar Singh, Vimlesh Singh, Santosh Singh and Akhilesh Singh for charge under Section 3/25 of Arms Act is affirmed.

(9) The period undergone by the convicts/appellants shall be liable to be set off/adjusted to sentence of term imposed against them by this modified order.

(10) All the sentences shall run concurrently.

63. Accordingly, present Criminal Appeal No.5218 of 2016 is **allowed** and Criminal Appeal Nos.5501 of 2016, 5502 of 2016 and 5649 of 2016 are **partly allowed** and the impugned order assailed in these criminal appeals stand modified/altered to the extent stated as above.

64. Appellants Dhruvjeet Singh, Vimlesh Singh and Akhilesh Singh are directed to furnish a personal bond, each and two sureties each in the likeamount to the satisfaction of the learned trial court/Session Judge, Ghazipur as the case may be, in compliance of Section 437-A of Cr.P.C. within seven days of their release from jail pursuant to this modified order as they have already undergone the modified sentence as awarded in present judgement. Appellants Rakesh Kumar Singh and Santosh Singh will serve out the sentence as modified in present judgement in accordance with law, as they are stated to be in jail custody in present offence.

65. Let a certified copy of this judgement and lower court record be sent back forthwith to Session Judge, Ghazipur for compliance.

(2024) 5 ILRA 999
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 5905 of 2018

Saurabh Kumar ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Lav Srivastava, Anurag Pathak, Arun Kumar Sharma, Rajan Srivastava, Randhir Singh, Sanjay Kumar Yadav, Sr. Advocate

Counsel for the Respondent:
G.A., Amit

A. Criminal Law-Criminal Procedure Code,1973-Section 374(2), 319-Indian Penal Code, 1860-Sections 302 & 34-Challenge to – conviction-appellant along with co-accused was convicted of murder-the appellant was not initially named in the FIR-his name was introduced late in the investigation-he was brought into trial u/s 319 Crpc-no direct evidence or recovery of incriminating materials linking him to the crime-no clear motive was established –no active participation is established against the appellant-prosecution failed to establish evidence of conspiracy of the appellant with co-accused-The court held that findings recorded by the trial court is not based on correct and proper appreciation of evidence-hence, the conviction of the appellant on the basis of present set of evidence cannot be sustain.(Para 1 to 62)

The appeal is allowed. (E-6)

List of Cases cited:

1. St. of U.P. Vs Naresh & ors. (2011) 4 SCC 324

2. Rohtash Vs St. of Raj. (2006) 12 S.C.C. 64

3. Ranjeet Singh Vs St. of M.P. (2011) 4 S.C.C. 336

4. Dilip Singh Vs St. of Punj. (1953) AIR SC 364

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

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

7. Jaikam Khan Vs St. of U.P. (2022) 1 Crimes SC

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

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the appellant assisted by Sri K.K. Pandey as well as Sri Dileep Kumar, Senior Counsel assisted by Sri Amit Singh, learned counsel for the informant, learned A.G.A. representing the State of U.P. On account of certain gray areas in the instant appeal we have sought an assistance from the learned counsel for the appellant to further argue the case and clarify those areas in the appeal. Which was done by the counsel in the month of May, 2024 and now we are in position to decide the matter finally on merits. After hearing the rival submission we are proposing to decide this matter finally on merits.

2. From the record it reveals that there are two connected Appeals 5905 of 2018 in Re- Saurabh Kumar Vs. State of U.P. & Criminal Appeal No. 7075 of 2018 in Re- Bhanu Urf Bhanu Pratap. Both the appellants have preferred the afore-mentioned appeals. Accused-appeallants namely, Bhanu Pratap and Saurabh Kumar filed these separate appeals assailing the legality and validity of judgement dated 03.10.2018 passed by Additional Sessions Judge/ FTC-2 Bijnor whereby both the aforesaid mentioned namely Bhanu Urf Bhanu Pratap and the appellant Saurabh Kumar were convicted by the concerned trial court. Now for the sake of convinience, we have clubbed the records/ memo of both the appeals and they are being jointly decided.

From the order sheet of Criminal Appeal No. 7075 of 2018, it reveals that Sri Satendra Tiwari learned A.G.A. informed the Court, that pending appeal the appellant Bhanu Urf Bhanu Pratap died about two years back and as such his appeal Criminal Appeal No. 7075 of 2018 stood abated and consigned to record vide order dated 21.09.2023 by the Bench of this Court.

Thus, the current situation is that the only appeal No. 5905 of 2018 in Re: Saurabh Kumar is pending for final adjudication.

3. **Saurabh kumar,** the appellant before us, has preferred the instant Criminal Appeal, under section 374(2) Cr.P.C., challenging the validity and legality of the judgment and order dated 03.10.2018, passed by Additional Sessions Judge/Fast Track Court No.2, Bijnor, in Session Trial No.105 of 2016, emanating from case crime no. 381 of 2015, Police station- Mandawar, Disrtict Bijnor wherein, he has been convicted under section 302 read with section 34 I.P.C., and sentenced to life imprisonment, with a fine of Rs.50,000/- and in default of payment of fine, the appellant has been directed to undergo three years additional imprisonment, along with co-accused Bhanu alias Bhanu Pratap.

4. *Sri Rajiv Lochan Shukla, learned counsel for the appellant at the outset informed the Court that the present appellant Saurabh Kumar is neither named in the FIR nor charge sheeted accused and has been summoned by learned trial judge vide order dated 06.09.2016 in the excercise of power under Section 319 Cr.P.C.*

He further states that the name of the appellant Saurabh Kumar for the first time floated by the informant after one month and five days of the lodging of the FIR. It is submitted that, no plausible or convicing reason was forwarded by the proseuction for this unexplained delay and this sea change/ addition in the tone, tenure and texture of the prosecution story which is

extremely relevant for the present case and having a potential for, far reaching repercussion upon the authenticity and vericity of the prosecution story.

5. In short conspectus, the genesis and portray of the prosecution case as mentioned in FIR and other undisputed facts and circumstances is that on 02.11.2015 at about 7:50 P.M., a Tehrir (report) was given by Kamesh Singh (informant/complainant) at Police Station- Mandawar, District-Bijnor, divulging therein that at about 7.00 p.m. when *his uncle Dr. Narendra Kumar was present in his clinic, situated in his residence at village-Kamalpur, P.S. Mandawar, District Bijnor, Bhanu Pratap Singh (since dead), resident of Kamlapur, came at his clinic for having the medicine. His uncle asked him to sit and wait. It caused great annoyance and irritation to him. Bhanu could not squeeze his ire and fury and opened firing, with an intention to eliminate Dr. Narendra Kumar (uncle of the complainant). Consequently, he sustained fatal fire-arm injury over his abdomen.* The complainant took prompt step of informing, by giving a Tehrir (Ext Ka-1), regarding the said incident, alongwith the injured in a precarious condition to the police station Mandawar, where a letter to the District hospital, Bijnor was prepared and sent along with the injured to the hospital for the treatment and necessary medico legal action.

6. On the basis of the above stated scribe (Tehrir), dated 02.11.2015 at about 7.50 p.m. a Criminal Case No. 381 of 2015, under Section 307 IPC was registered against accused Bhanu Pratap alone, at P.S. Mandawar, District Bijnor. Particulars of which were entered into chik FIR Ext ka-21 and G.D. Kaimi Ext Ka-22 Initially, the investigation of the case was entrusted to S. I. Guru Pal Singh.

7. Injured Narendra Kumar was admitted at District Hospital Bijnor and was medically examined there. Since there was fatal injury on the vital part of his body i.e. abdomen, his condition was not improving, rather deteriorating. Hence, he was referred to Meerut on the same day for better and proper treatment at about 8.30 p.m. While the family members of the injured Narendra Kumar was taking him to Meerut, he scummed to his injuries on the way, at about 11.25 pm.

DEVELOPMENTS DRUING INVESTIGATION

**** The information to this effect Ext Ka-2 was given by Kamesh Singh (Complainant) on 03.11.2015 to the police station concerned. Accordingly, the case was converted into Section 302 IPC. In addition to this revelant information regarding the demise of the deceased on account of gunshot injury, the informant has tried swell the number of witnesses for the obivious reasons and as such he himself along with his aunt Dinesh Devi w/o late Narendra Kumar Rajput has become two eye witnesses of the incident who have seen Bhanu alias Bhanu Pratap while running away from the place of occurrence, carrying illegal tamancha in his right hand.**

It is strange, that the name of appellant Saurabh Kumar does not find place even in the application dated 03.11.2015.

**** Sri Shukla, learned counsel for the appellant has drawn our attention to an application dated 01.12.2015, addressed to S.P. Bijnor signed by the informant annexing the two affidavits of Sandeep and Amit who have given their own affidavits. By this application the informant is of the view that those**

applications should be kept on record and taken into consideration while investigation done by Sri Shyam Singh Negi I.O. of the Crime Branch.

**** In addition to above learned counsel for the appellant has drawn our attention to yet another application on behalf of first informant Kamesh, addressed to S.P. Bijnor dated 07.12.2015 (Ext. No. Ka- 3) whereby for the first time the informant states that in witch he was in the stage of shock and mental trauma and turbulance, while lodging of the parent FIR dated 02.11.2015 but now after gethering the infomration from the various quarters, the informant Kames states that, the main auther of the incident is Bhanu alias Bhanu Pratap with the help and aid of Saurabh Kumar (present appellant) has committed this offence. He further states after lapse of more than one month period that this unfortunate incident was witnessed by the Amit and Sandeep who shared this information to the first informant that they have seen the assaulants and the appellant Saurabh Kumar running away from the place of occurrence after comming of offence. He further accuses that the local police is trying to save the present appellant Saurabh Kumar from this offence. It has been mentioned that the present Saurabh Kumar have actively participated in the commission of the offence as he was nurturing enimical relationship qua his uncle Narendra Singh, the deceased. Sri Shukla further states that the name of the present appellant has surfaced after one month and five days after lodging of the original FIR on 02.11.2015.** That is how the name of the present appellant Saurabh Kumar came into light after much an inordinate delay, admittedly after collecting the information from various quarters. Under circumstances embellishment in the prosecution story cannot be completely ruled out. However, this aspect of the issue would be well considered in the subsquent paragraph of the judgement.

Learned counsel for the appellant, drawn our attention to the Ext. Ka- 5, 16.12.2015 whereby the first informant after one month and forteen days, realising his blunder that no motive has been attributed to the present appellant in the FIR, in order to fill in the blank, and after having the legal advice for the first time have tried to insert the motive in the present offence.

We have perused Ext. Ka-5 dated 16.12.2015 whereby he has mentioned that in fact the present appellant Saurabh Kumar was having the serious differences and tangle with son of the deceased namely Harsh. On this account the deceased went to Saurabh Kumar's place and have scolded him and has given to two-three slap to the him. This is the reason attributed for the alleged enimical relationship between the appellant and the deceased. This information was shared by the informant Kamesh after one month and sixteen days of the lodging of the FIR.

This picemeal improvement in the prosecution story and the every stage of investigation casting a serious doubt and shift from the primary prosecution story, which considerably corrodes the authenticity and veracity of the prosecution story. The informant at every stage is move an application inserting new fact and feature in the prosecution story just to fill up the lacunas as per legal advice received to the informant.

8- On being informed about demise of Dr. Narendra Kumar, the police administration came into action and ensued investigation. The investigating officer took into custody the corpse of the deceased Narendra and carried out the requisite

formalities and arranged to keep the corpse at mortuary. On 03.11.2015 after completion of requisite formalities like appointment of panchan, I.O. got prepared panchnama (Inquest) of the dead body of the deceased. It is opined in the inquest report, marked as Ext Ka-8, that cause of death of the deceased is fire-arm injury sustained by him in his abdomen, nevertheless in order to ascertain the exact cause of death autopsy of the dead body was proposed. In Post Mortem Report, Ext Ka-9, the doctor opined that the death of the deceased Narendra Kumar has occurred due to profuse bleeding and asphyxia, as a result of gun shot injury. Meanwhile, the investigation was transferred to S.O./S.I. Surendra Kumar Pachori.

9. The I.O./S.I. Surendra Kumar Pachori inspected the place of occurrence, prepared the site plan at the instance of complainant and recorded the statements of the witnesses u/s 161 Cr.P.C. and on getting the tip off and clue from the police sympathizer with respect to presence of accused Bhanu, arrested him on 04.11.2015 at about 7.00 p.m. and recovered a country-made pistol with a empty cartridge in its barrel, allegedly used in the incident, at his instance, from a plastic sack filled with paddy, from the room of a tube-well. Recovery memo Ext Ka-17 and site plan of place of recovery Ext Ka-26 was prepared in the presence of witnesses and recovered weapon physical Ext-6 & cartriges physical Ext-7,8,9, was sealed on the spot. The recovered weapon was sent to Forensic Science Laboratory for forensic examination.

10. It transpires from the record that on arrest of the accused Bhanu and recovery from him, a Case Crime No.382 of 2015, under Section 25 of Arms Act was also registered, against him.

11. In view of the applications moved by complainant, I.O. strived to collect evidence about involvement of Saurabh in the crime, but he found no such evidence against him. However, I.O. after due investigation collecting sufficient material and evidence, showing the complicity of accused Bhanu only, submitted charge sheet against him ,under Section 302 I.P.C. and 25 Arms Act in the court of learned C.J.M., Bijnor. Even after holding the thorough investigation the I.O. of the case could not collect anything incriminating against the appellant Saurabh Kumar and therefore the charge sheet No. 02 under Section 302 I.P.C. was submitted only against the Bhanu alias Bhanu Pratap and not against the appellant which has led to the creation of S.T. No. 105 of 2016.

Similarly, Case Crime No. 382 of 2015 under Section 25 of Arms Act the IO of the case has submitted the charge No. 2145 of 2015 against the co-accused Bhanu alias Bhanu Pratap which has eventually given rise to S.T. No. 106 of 2015.

As mentioned above, name of the appellant Saurabh Kumar does not find place in both the charge sheets but was summoned in the excersise of power under Section 319 Cr.P.C. in S.T. No. 105 of 2016 under Section 302 I.P.C.

12. Learned C.J.M. took cognizance of the case. Being exclusively triable by the court of sessions, committed it to the Sessions vide its order dated 24.02.2016 for trial, where the case was registered as S.T. No. 105 of 2016 and S.T. No. 106 of 2016 against Bhanu under Section 302 I.P.C. and Section 25 Arms Act respectively and later transferred it to the court of Additional Sessions Judge/ Fast Tract Court No. 2, Bijnor.

13. Learned Sessions Judge framed charges under Section 302 I.P.C. and Section 25 Arms Act against the Bhanu (since deceased) on 29.03.2016 and accused Saurabh was charged under Section 302/34 I.P.C. on 21.10.2016. The accused appellant Saurabh, including co-accused, abjured the charges, "plead not guilty, and claimed to be tried".

14. The prosecution, in order to bring charges home, against accused persons / appellant, examined following witnesses in the ocular evidence as under:-

Sr no.	Name	PW Nos.	Remarks
1.	Kamesh Singh	P.W.-1	(nephew of the deceased)
2.	Dinesh Devi	P.W.-2	(wife of the deceased
3.	Sandeep Kumar	P.W.-3	(nephew of the deceased
4.	Dr. Yogendra Tirkha	P.W.-4	conducted post - mortem
5.	S.I. Gurupal Singh	P.W.-5	I.O.
6.	S.I. Surendra Singh Pachori	P.W.-6	I.O.
7.	S.I. S.S. Negi (Cr. Branch)	P.W.-7	I.O.
8.	Dr. Ram Singh	P.W.-8	Dr.(issued Referance Slip)
9.	Dr. Prem Prakah	P.W.-9	Conducted-medico legal
10.	S.I. Satish Kumar	P.W-10	I.O.

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

Sr no.	Documents Exhibited	Proved by	Ext Nos.
1	Tehrir	P.W.-1	Ext. Ka- 1
2	Application after demise of deceased dated 03.11.2015 to S.O. Mandawar	P.W.-1	Ext. Ka- 2
3	Application dated 07.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 3
4	Application dated 01.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 4
5	Application dated 16.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 5
6	Affidavit of Sandeep	P.W.-3	Ext. Ka- 6
7	Recovery Memo of country-made pistol	P.W.-3	Ext. Ka- 7
8	Panchayatnama of Dead body	P.W.-3	Ext. Ka- 8
9	Post-mortem Report	P.W.-4	Ext. Ka- 9

10	Letter to R.I., Letter to Doctor, Photo Lash, Challan Lash, Photo Bullet, Sample Seal	P.W.-5	Ext. Ka- 10 to Ka-14
11	Site Plans regarding place of occurrence, recovery of the weapon and chakroad	P.W.-6	Ext. Ka-15,Ka-16
12	F.S.L Reports	P.W.-7	Ext.Ka - 17,Ka18
13	Call Detail Report	P.W.-7	Ext. Ka-19
14	Charge-Sheet U/S 302 IPC	P.W.-7	Ext. Ka-20
15	Chik FIR	P.W.-7	Ext. Ka- 21
16	Kaimi G.D.	P.W.-7	Ext. Ka-22
17	Place of occurrence Plan	P.W.-7	Ext. Ka- 23
18	Reference Slip	P.W.-8	Ext. Ka- 24
19	Medical Report	P.W.-9	Ext. Ka- 25
20	Site plan with Khsra	P.W.-10	Ext. Ka- 26
21	Charge-Sheet U/S 25 Arms Act	P.W.-10	Ext. Ka- 27
22	Application forchange of the I.O.toC.O. Bijnor	P.W.-10	Ext. Ka- 28
23	Chik FIR regard Arms Act	P.W.-10	Ext. Ka- 29
24	Dakhila G.D.	P.W.-10	Ext. Ka- 30
25	Chik FIR regard Crime No. 381/2015 u/s 307 IPC	P.W.-10	Ext. Ka- 31
26	Entry G.D.	P.W.-10	Ext. Ka- 32
27	Carbon copy Tarmimi G.D	P.W.-10	Ext. Ka- 33

16. Besides, in further corroboration to prosecution case, it has also exhibited physical objects in its evidence as under:-

Sr no.	Objects Exhibited	Pws: who proved	Ext Nos.
1	Four Images on the time of Postmortem and One photo of bullet which came out of the body.	P.W.-4	Physical Ext 1 to 5
2	Contry Made Pistol (Tamancha)	P.W.-5	Physical Ext.- 6
3	Three Cartridge	P.W.-5	Physical Ext.- 7,8,9
4	Bullets recovered from dead body	P.W.-5	Physical Ext.- 10, 11
5	Paper Coverd Bullet	P.W.-5	Physical Ext.- 12

6	Bundle	P.W.-5	Physical Ext.- 13
7	White Polythene	P.W.-5	Physical Ext.- 14
8	C.D. which could not be played	P.w.-6	Physical Ext.- 15
9	Cloths	P.w.-6	Physical Ext.- 16

17. On conclusion of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C., with reference to prosecution evidence on record. As many as 42 queries were put to him by the learned trial court. In his statement he denied that renounced the prosecution story and stated that complainant got prepared wrong and false affidavits of various persons, which contains not even an iota of truth. He know, nothing about the incident as stated in prosecution. He denied his presence on the place of occurrence at the time of incident, firing by Bhanu upon the deceased with a country made pistol in his abdomen, his medical treatment at district hospital Bijnor or Meerut. He stated that FIR is based on a wrong facts. Incident was not seen by the complainant Kamesh and his aunt Dinesh Devi who reached there on hearing the fire. In answer to a suggestive query he stated that it is wrong to say, that PWs saw fleeing him along with Bhanu Pratap after fire. He did not comment that the post mortem of the deceased conducted on 03.11.2015 in district hospital Bijnor. He stated that the site plan was wrongly prepared and nothing incriminating was recovered from him.

The appellant stated that the evidence of PW- 1 Kamesh, PW-2 Dinesh Devi, PW-3 Sandeep Kumar, is wrong and not believable. He further stated that evidence of PW-4 doctor Yogendra Tirkha. PW-5 Gurupal Singh, PW-6 S.I. Surendra Singh Pachori, PW-7 Shyam Singh Negi, PW-8 Ram Singh, PW-9 doctor Prem Prakash, PW-10 S.I. Satish Kumar is wrong and reports are wrongly prepared by them. He was falsely implicated due to enmity and he is innocent.

18. The accused/ appellant did not adduced any oral or documentary evidence in his defence.

19. The Learned Trial Court after examining and evaluating the testimony of the prosecution witnesses, oral and documentary, and other material on record, came to the conclusion that there is a complete chain of evidence showing the complicity of accused appellant in the commission of the said crime and the prosecution has successfully been able to prove its case beyond reasonable doubts, pointing the guilt against the accused persons and as such convicted Bhanu alias Bhanu Pratap under Section 25, Arms Act and sentenced him for one year imprisonment along with fine of Rs.1,000/-. The appellant Saurabh too was convicted in Session Trial No.105 of 2016, under Section 302 read with 34 IPC for life imprisonment with fine of Rs.50,000/- with default clause. Thus, it is evident that the learned trial judge after taking the recourse of Section 34 I.P.C., have roped the appellant under Section 302 read with 34 I.P.C.

20. Broadly speaking learned counsels for the appellant putforth following arguments in his favour:

A- **Appellant Saurabh Kumar is not named in the FIR**:- It has been argued by the counsel for the appellant that appellant is not named in the FIR dated 02.11.2015 nor his name figure in the

application given by the informant to the S.P. Bijnor on very next date dated 03.11.2015. Nor any role attributed to the appellant in his 161 statement given to the police. As mentioned above at the very belated stage about one month and five days name of the appellant has figured along with his so called accomplice Bhanu alias Bhanu Pratap. From the application it is evident that the actual role of firing has been attributed to the co-accused Bhanu alias Bhanu Pratap and it is alleged that when actual offence was taken place the present appellant was standing over the channel and after the incident both of them fled away from the place of occurrence. Interesting feature of the case is that informant and his aunt Dinesh Devi both of them claims that they are the eye witness of the incident but surpringingly neither in the FIR nor in the statement 161 Cr.P.C. nor given application to the S.P. Bijnor has even wisper the name of the present appellant. It is only after gathering information from the various quarters friends and relatives have tried to stigmatize falsely implicate the appellant in this offensive.

B- **Appellant is not charge sheeted accused**:- that it is pertinent to point out that though the information vis-a-vis and other witnesses have tried to figured the name of the appellant as a perpetrator of the crime but during the course of the investigation no active participation of the appellant was found hence after thoroughly investigated the matter the investigating officer submitted the chaege sheet against the Bhanu Pratap but no charge sheet have filed against the appellant.

C- **No motive to the appellant**:- That though during the course of investigatio the enmity was established between the co-accused Bhanu Pratap and the deceased i.e. Ext. Ka- 23 but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap.

D- **No Recovery from the appellant**:- That it is also pertinent to point out that there is no connecting material against the appellant to connect in the present crime in question even the alleged weapon of crime was also recovered from the alleged co-accused Bhanu Pratap whereas no recovery of any weapon or any incrementing material was recovered from the possession or pointing out of the appellant.

E- **Appellant Summoned u/s 319 of Cr.P.C**. That it is also pertinent to point out that after filing the police report and during the course of trial the prosecution have filed an application u/s 319 of Cr.P.C. but without considering the material the then available on record and without prpoerly appreciated the evidence the learned Court concerned have summoned the appellant vide its order dated 06.09.2016.

F- **Disputed Place of Occurrence**:- That it is also pertinent to point out that the place of occurrence is higly doubtful which create a serious shadow of doubt on the testimony of the P.W.- 1 & P.W. - 2.

G- Referring the evidence and other relevant material placed by the prosecution on record, learned counsel for the appellant, Sri Rajiv Lochan Shukla, has assiduously argued that appellant was neither named in the tehrir (Ext Ka-1) nor in first information report (Ext Ka-21). Nothing incriminating material recovered from his possession or pointing out. There is no eye witness of the incident or who have seen the accused Saurabh committing the crime and running away from the scene of occurrence. The witnesses examined by the prosecution are interested and partition. There are material contradictions in their statements. Place of occurrence is also disputed. The name of the appellant for the first time came on the

surface in an application dated 07.12.2015 (Ext Ka-3) moved to SP Bijnor.

The application contains concocted, deliberated and after thought story. He was not charge sheeted by the I.O. Appellant was erroneously summoned u/s 319 Cr.P.C., to face the trial. Above all, no motive is attributed to the appellant although during the course of investigation, the enmity was established between the co-accused Bhanu Pratap and the deceased regarding chak road but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap. statements of PW-1 complainant Kamesh , PW-2 Dinesh Devi and PW-3 Sandeep Kumar are not reliable and believable. He finally argued that prosecution has failed to prove its case beyond reasonable doubts. There is no justification to convict and sentence to a person against whom there is no complete chain of evidence pointing towards the guilt. The learned trial judge failed to take into account and appreciate the discrepancies occurring in the evidences. The finding of guilt recorded by the court below are not based on proper and correct evaluation and appreciation of evidence, rather the learned trial judge has drawn adverse inference while there is no evidence worth name available against the appellant showing his complicity. Therefore, the impugned judgment and order convicting and sentencing the appellant in the aforesaid crime is not sustainable in the eyes of law and the same is liable to be set aside and the appellant deserves to be absolved of the charges of murder under Section 302 read with section 34 IPC. These arguments have been further elaborated in the course of evaluation of evidence.

Per contra, learned counsel for the informant as well as learned A.G.A. representing the State, and learned private counsel for the complainant opposed the submissions advanced by the learned counsel for the appellant and contended that evidence has to be weighed and not counted. If the evidence is cogent, credible and trustworthy having a ring of complete chain of incident, it cannot be jettisoned. The emphasis is laid on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is submitted that there are sufficient materials to depict the involvement of the appellant in the commission of said offence. The fatal injury to Dr. Narendra Kumar has been caused in a very brutal and horrific manner with the sole object of taking away his life. The prosecution has fully proved that the accused appellant has shared in the commission of said offence. It is compatible to illustrate here that Dr, Narendra Kumar (deceased) has been shot in a very diabolical and gruesome manner with the sole object of taking vengeance. The execution of crime has been carried out in a pre-planned and pre-concerted manner, which is conspicuous on record. If there is any defect in investigation or inconsistencies in the testimony of prosecution witnesses, the entire prosecution story cannot be discarded. The findings of guilt recorded by the trial court are based on correct appreciation and evaluation of evidence on record. Blackening of the wound can be found only when the shot is found from a distance of three to four feet and not beyond the same.

The learned A.G.A. as well as learned counsel for the complainant further argued that First Information Report as noticed herein above was lodged at the quickest possible time. As per prosecution case the incident has occurred on 02.11.2015 at about 07.00 p.m. and tehrir (Ext Ka-1) of the same was presented to P.S. Mandawar at 07.35 p.m. on the same day. The first information report is not supposed to be an encyclopedia of the entire event. The

learned trial judge has found sufficient materials to take cognizance against the appellant by allowing the application under Section 319 Cr.P.C. The findings recorded by the trial court cannot be said to be erroneous or perverse. (P.W.-1) Kamesh Singh and (P.W.-2) Dinesh Devi, who are the eye witnesses of the case, have fully supported the prosecution version. The ballistic report also supports the prosecution version, as the country made pistol, which was used in the commission of crime, was recovered on the pointing out of accused Bhanu. Thus, learned trial judge has sifted and weighed entire evidence on record and has rightly convicted and sentenced the appellant.

Learned counsel for the informant, has further elaborated these arguments of during the course of analysis of evidence.

22. In view of the rival submissions made by learned counsels for the parties and having gone through the material available on record and having regard to entire gamut of the case, the only question that falls for our consideration is whether the trial court committed any error in passing the impugned judgment and order. Therefore, their submissions will be tested on the touchstone of the given evidence, undisputed facts and circumstances and legal scenario.

Analysis of the issues involved

21. Now, we propose to analyse ocular evidence adduced by the prosecution. PW-1 complainant Kamesh, PW-2 Dinesh Devi, are the witnesses of facts. They were examined twice by the prosecution. Once when appellant was not made an accused and second time when he has been summoned u/s 319 Cr.P.C.

22 **PW-1 Kamesh Singh** is the complainant of the case. He claimed himself to be an eyewitness of the incident. He has deposed that on 02.11.2015 he was sitting in the residence of his uncle Dr Naraendra Kumar at about 07.00 p.m. Bhanu along-with his companion saurabh, came at the clinic of his uncle, which is situated in his residence. Bhanu entered in the clinic, while Saurabh stood near Chanel. As soon as Dr. Narendra got up to give the medicine, Bhanu shot him by country made pistol, with the intention of killing him. The bullet hit the abdomen of his uncle. As soon as he and his aunt ran outside to catch the accused, Bhanu and Saurabh, ran away waving the pistols in their hands. He has also stated that about 8-9 months before the incident, some hot altercation had taken place between Saurabh and his uncle's son Harsh kumar then his uncle had gone to the residence of Saurabh and reprimanded and scolded him and even slapped Saurabh three four times. Since then appellant Saurabh was nurturing animus and grudge against his uncle Dr. Narendra. Saurabh and Bhanu are the teaching in the same school and are close friends. A few days before the incident, Saurabh had told Dhyan Singh and Ankur of Basi that Dr. Narendra to be killed. After the incident they took injured to the police station, where he gave a scribe (Therir), Ext. Ka-1, about the incident, which is in his writing and signature. The witness proved the scribe as Ext. Ka-1. At the time of occurrence he was sitting with his aunt Dinesh Devi in the Varandah in side her residence. Thereafter injured Dr. Narendra was brought to District Hospital Bijnor, where viewing his pitiable condition doctor refereed him to Meerut. He died on the way to Meerut. They return to police station, and gave the information in writing, Ext Ka-2. about demise of Dr. Narendra Kumar. This application is also in his writing and his signature. The witness

proved it. He further stated that on 07.12.2015 he gave an application to the S.P. Bijnor to take appropriate action against the police officers because Saurabh was arrested by the police and after keeping for one night in the police station, set him free. He further stated that before 05.11.2015 he has given an other application. Similarly on 01.12.2015 and 16.12.2015, he gave other applications along-with the affidavits, to S.P. Bijnor. He proved these applications as Ext Ka 4 and Ka 5. Besides he, Sandeep and Amit are also witnessed, Bhanu and Saurabh, after shooting his uncle Dr. Narendra, both of them has country made pistol in their hands, while running Bhanu was saying to Saurabh that he has shot Narendra, as per your direction, save me.

23. PW-1 complainant Kamesh has been thoroughly cross examined by the learned counsel for the defence. In his cross examination he stated that earlier he had been a doctor, but now has left the medical practice and running the business of RCM and forming. On the day and time of the incident he was sitting in the Varandah of the residence of his uncle. He had gone there by chance, just to meet his uncle at about 6.30-7.00 p.m. His aunt was also there. He reached at police station at about 7.30-7.45 pm where on the dictation of Daroga Ji he wrote the tehrir Ext Ka-1. He had told to Daroga ji that he was present at the spot at the time of the occurrence but it is correct that the same has not been scribe in Ext Ka-1. I have seen the incident. When he gave the tehrir, it was well with in his knowledge that the fact that he was present at the time of incident and witnessing the evidence, is not written in the tehrir. When he inquired about this daroga ji answered that complete the formalities and take the injured for treatment. At an other place he confessed that he has not communicated to any one that he have seen the incident. At that time, he never gave in writing to any one that he witnessed the occurrence. He has not made any complaint about. The fact that daroga ji Surendra Singh Pachauri restrained him in writing his statement in this regard in the tehrir. When the investigation handed over to the crime branch, he had not disclosed to them that FIR was written as per dictation of Surendra Singh Pachauri and not voluntarily by him. He had given a first application on 05.12.2015 regarding the incident, which is not on record. However, photocopy of the same was annexed by him to his application u/s 319 Cr.P.C. He had orally informed about the demise of his uncle on the very day of his death, he do not remember the date. It it true that in Ext Ka-3, it is not mentioned that he witnessed the incident, even in Ext Ka 4 dated 01.12.2015, it was not mentioned that he witnessed the incident. He , his uncle and aunt were sitting in the Varandah of the residence. There is only a window between the clinic and residence. Uncle had gone to the clinic room to give medicine, he and his aunt remained sitting in the Verandah. When the fire took place, he was sitting near aunt. On hearing fire he got up and ran to see as to what has happened. He ran towards uncle and found him hit by a bullet in his stomach. When he reached, the aunt came with him, the doctor was standing after being shot, both of us made him sit on the chair. He had motor cycle with him. Uncle was taken to the hospital to the car. His uncle's son had gone to call Gaurav, the car owner. It would have taken 20-25 minutes the car to arrive. He did not gave any first aid to the injured uncle during that time. Even uncle did not ask to give him any medicine. There was no bleeding when my uncle was shot. No blood had poured on the ground at the scene of the incident. Only a little bit of blood was on the clothes. He spent about 20 minutes in the police station concerned. There after went to

District hospital, Bijnor. He admitted the injured uncle, but his signature is not obtained in this behalf. His injured uncle was sent from Bijnor to Meerut. He has never told to any police officer, that there was a dispute between his uncle and Bhanu regarding chak road. There was no dispute between them. If the inspector did not mention this in his statement, he cannot tell the reason. He saw Saurabh and Bhanu running. A part from him Sandeep and Amit of his village also saw Bhanu and Saurabh running away after shooting his uncle Narendra. He was not refrained from telling this to crime branch. Such an statement was not written by any previous officer or in any application that while running away, Bhanu was telling Saurabh that he had shot Dr. Narendra as per his instructions, save him.

24. In his further cross-examination PW-1 has stated that the incident took place at about 7.00 p.m. It was dark. Electricity was being supplied and tube light was on in the clinic room and street light of the village was also supplied. Injured went up to vehicle by foot but no bloodstained found there in the car. He has not named Dinesh Devi as witness, in the application by which he informed the death of his uncle. In the application dated 07.12.2015 he has not mentioned that he had seen Saurabh on the spot. While going to Meert by ambulance police personnel were with them. On returning they managed to keep the dead body in the mortuary. The witness has referred the narration between him and his injured uncle. He told to I.O. that he and his aunt reached on the spot and both of them saw Bhanu running with a pistol. He further stated that he has shown the place where he his uncle and aunt were sitting and having tea. He did not pointed out the place from which he saw the Bhanu. They were having tea sitting in the Varandah and not in the courtyard. This Verandah is situated towards south from the courtyard. If these places are not exhibited by the I.O. in the site plan he cannot say anything about it. After the incident nobody of the vicinity reached at the place of occurrence after hearing the sound of fire and running the accused. It was known to me prior to lodging of FIR that there is an enmity between the Saurabh and the deceased due to which he wants to take revenge. He denied the suggestion that he has named Saurabh after deliberation with the relatives. At the time of occurrence noon of the village or vicinity present on the spot. The person running after committing the crime was wrapped with a loi.

25. **PW- 2 Dinesh Devi**, is the wife of the deceased Dr. Narendra Kumar. In her testimony she has attributed role of firing to the alleged accused Bhanu Pratap. She deposed that she knows accused Saurabh and Bhanu. They are close friends and both of them teach in same school. At the time of incident they were posted in the village-Teetarpale. Bhanu was Prerak and Saurabh was teacher. She further stated that about 5-6 months before the incident, there was a altercation in between her son Harsh and Saurabh. At this, her husband Narendra Kumar went to the residence of the Saurabh, scolded and slapped him. Since then Saurabh was nurturing enmity with her husband. On 02.11.2015 at 7.00 p.m. She was in her home with Dr. Narendra. Kamesh had also come there and was sitting in her residence. Dr. Saheb was sitting next to them near the window of the clinic. Bhanu and Saurabh came there. Bhanu entered inside the clinic and Saurabh stood near the Chanel. As soon as her husband Dr. Narendra got up to give medicine to Bhanu, he immediately shot him. We took care injured Dr. Saheb picked him up and brought him to the police station in the

vehicle. Thereafter he was brought to Bijnor hospital. There from, he was being taken to Meerut hospital, but on the way he succumbed. Amit and Sandeep have told her that they have seen Bhanu and Saurabh running with country made pistol and Bhanu was saying to Saurabh that he has killed the doctor, save him.

26. The witnesses was thoroughly cross examined. In her cross examination she deposed that when she reached near his husband she saw running the person who has hit him with bullet. He was not wrapping any loi. When doctor shaheb went to give medicine. He was fired upon after 10-15 minutes. She do not know whether he has given medicine before the firing. This is true that a shutter opens outside in the clinic room. There is open place between the shutter and the road. The road is in the south of his residence at the distance of 6 to 7 fit. Accused after coming out the shutter firstly ran towards east and then towards south then there is jungle. It is also true that at the time of incident, it was dark but lights were on. She do not know whether the site plan was prepared as per his indications or on some other basis. Varandah means a roofed structure and court yard means open place. The door of the room, where the incident occurred, opens towards east in the place under the roof. She denied the suggestions put-forth to her.

27. **PW- 3 Sandeep Kumar** has deposed in his examination that he know the accused Bhanu and Saurabh. Both of them are resident of the same village. On 02.11.2015 at about 07.00 P.M. He was returning from Jungle. His co-villager Amit met him in front of his house. When they reached near the residence of Dr. Narendra, they heard the sound of fire. They approached towards of the residence of the Dr. Narendra. and saw running away Saurabh and Bhanu, holding country made pistol in their hands, from the front of the residence of the deceased. Bhanu was saying to Saurabh that I have shot Dr. Narendra on your direction, save me. They were frightened. Injured Dr. Narendra was taken away to district hospital by his nephew Kamesh. 5-6 months before the incident, there was a scuffle in between Harsh son of Dr. Narendra and Saurabh. At this, Narendra Kumar went to the residence of the Saurabh, scolded and even slapped him. Since then Saurabh had harbored hostility with Dr. Narendra Kumar. He has given an affidavit, Ext Ka 6, to S.P. Bijnor on 01.12.2015. The witness further stated that on 04.11.2015 accused Bhanu was arrested and a country made pistol was recovered, at his instance. The recovery memo was prepared at the spot, which bears his signature also. The witness proved it as Ext Ka-7. He further stated that on 03.11.2015 inquest of the dead-body of the Narendra was conducted . He was a witness to inquest report, Ext Ka - 8.

28. The witnesses is also cross examined. In his cross examination, he admitted that deceased Dr. Narendra was his real uncle and the complainant Kamesh is his real cousin. On the day of occurrence he was coming from jungle, he saw Saurabh and Bhanu fleeing from a distance of 2-3 meters, from the residence of Dr. Narendra. He saw them from 25-30 meters from the residence of the deceased. He saw them in the light installed in the balcony of the house of the deceased. When accused were passing him, he did not ask them, where from they are coming. Then he came to his residence, thereafter he reached to the residence of doctor saheb. Kamesh was taking doctor out his residence. He did not accompanied them. He do not know who had gone with doctor

then he did not went inside doctor's residence. He received the news in the village that the doctor has expired. Latter he went to the hospital but Doctor saheb did not met him in the hospital. So he returned at about 10-12 o' clock to his residence. He remained in his residence next day throughout the day. He has told next day to Kamesh that he saw Saurabh and Bhanu going. He him self gave affidavit, Ext. Ka-6, to S.P. Bijnor. In the affidavit he has not written that deceased and Bhanu have some dispute regarding chak road and if it is there in the affidavit, it is wrong. The affidavit was given after one month of the incident. He confessed that it is true that they have taken doctor to the hospital, before he reached. He has stated to the investigating officer that Saurabh and Bhanu were running with pistols in their hands and Bhanu was saying to Saurabh that he has shot doctor as per his instruction, now save me. He has signed the recovery memo of Bhanu but he do not know from where Bhanu was arrested and where from recovery was made. He was not informed by anyone about the incident. He had no talk with aunt till next day. He had not gone inside the residence of his uncle nor he accompanied him while he went for treatment to Meerut. He attended the postmortem of his uncle. Other relatives were also present there, except his aunt Dinesh Devi at the postmortem house. His residence is situated only two meters away from the residence of the deceased.

29. **P.W.-4 Yogendra Tirkha** conducted the postmortem of the deceased on 03.11.2015. During autopsy he found following ante-mortem injuries on the body of the deceased doctor Narendra Kumar:-

(1)- Gunshot entry wound 3 x 1.5 cm. x 1 x depth could not be measured during examination, with inverted margin on the right side of the wall in front of the chest and abdomen at the 5 o'clock position of the clock, 12 cm below the right nipple, the edges of the scar were bent downwards. There were marks of blackening and tattooing of marked 30x24 cm around the wound.

(2)- A metallic bullet was recovered, embedded in the flesh on the posterior abdominal wall.

Opinion:- In the opinion of the doctor, the above injuries may have been caused on 02.11.2015 at about 07.00 P.M. by fire arm.

In his opinion Cause of death was shock and hemorrhage, as a result of ante-mortem fire-arm injury of the deceased. The witness proved the post-mortem report as Ext. Ka-9.

The witness also deposed that at the time of autopsy he got prepared four photographs of the dead boy and one photo was also photographed the bullet which was recover from the body of the deceased. He proved these photographs and bullet as physical Exts. 1 to 5.

30. PW- 4 is also put to cross examination wherein he stated that only one bullet was hit to the deceased which was embaded in the body. No pellets were recovered from the dead body. He was shot from the distance of 2-3 fit.

31. **PW- 8 Doctor Ram Singh**, deposed that Doctor V.K. Shukla prepared the reference slip referring the injured doctor Narendra Kumar to the medical collage Meerut for further treatment. The reference slip is in the hand writing and signature of doctor of doctor V.K. Shukla. He is conversant with his writing. Thus, he proved the reference slip, in secondary evidence, as Ext. Ka- 24

32. **P.W.- 9 Dr. Prem Prakash**, medico-legally examined the injured Narendra Kumar on 02.11.2015 at about 8.25 pm. He found the following injuries upon the body of the injured:-

1. Lacerated wound 03 x 1.5 cm. x depth could not ascertained on right abdomen, 10 cm. below right nipple at 5 o' clock position. There was reddish blackening tattooing in 25 cm. x 16 cm. surrounding the wound.

The doctor further stated that the injury was kept under observation and x-ray was advised. Doctor has opined that the injury could have been caused by some fire-arm that includes tamancha at about 7.00 p.m. on 02.11.2015. The witness proved the injury report as Ext. Ka- 23. In his examination, he has deposed that he cannot tell the distance between injured and place wherefrom the fire was opened. In his opinion it was approximately 10 fit. He found the injury fresh.

33. **P.W.-5 S.I. Gurupal Singh, P.W.-6 S.I. Surendra Singh Pachori, P.W.-7 S.I. Shyam Singh Negi** are I.O.s of the case, who deposed that they conducted the investigation the matter and proved various prosecution documents like request for PM, site plan, chik, charge sheet and kaimi G.D. from Ext. Ka-10, to Ext. Ka-23. and physical Ext. from Ext. 6, 7, 8, 10, 11 to 16. and P.W.-10 Satish Kumar proved chik FIR, Kaimi G.D. and G.Ds. from Ext. Ka-26 to Ext. Ka-33. and various other documents. These witnesses were put under detailed cross examination also.

In the nutsell above is the material relied upon by the prosecution to establish the guilt of the appellant Saurabh Kumar. After examining the aforementioned material critically and in a reasonable prosepective it is highly unlikley that for a insinificant and severe incident said to have been taken place about 7-8 months back, the accused appellant would nurture the anamosity for aforesaid period and implicate his friend to commit the offence and he remain a silent spectator of the incident. It is most unlikely that while fleeing away from the place of occurrence, the accmplice Bhanu alias Bhanu Pratap would say to the accused appellant that commonding your direction I have committed the offence as per your commond and guidence, now you (the accused appellant), he has to save him from the clutches of the police and this conversation would be overheard by Sandeep and Amit. This narration is picturised the absuerdity of the prosecution story would be apparent.

Presence of the appellant at the place of occurrence

34. The first question to be scrutinized is as to whether the appellant was named in the first scribe (tehrir), Ext. Ka- 1, on the basis of which chik FIR Ext. Ka-21, was lodged at the police station concerned and his presence on the place of occurrence at the time of incident and participation in the occurrence. Learned counsel for the appellant Sri Rajiv Lochan Shukla has assiduously contended that appellant is not named either in tehrir Ext Ka-1, or chik FIR Ext Ka 21, or any other evidence. FIR was launched against Bhanu Pratap only u/s 307 I.P.C. His name did not surface any where. No incriminating article is recovered from his possession or at his pointing out. He was introduced for the first time in an application moved by the complainant on 07.12.2015 i.e. after a delay of one month and five days, from the incident. As a matter of course appellant's name has been introduced by the

complainant after due consultation and deliberation, with a view to implicate him . Learned G.A. and private counsel of the appellant refuted the argument of the learned counsel for appellant.

35. Per contra, learned G.A. contended that FIR is not supposed to be encyclopedia of the entire facts therefore, it is not necessary to mention each and every thing pertaining to the case. The complainant was in a state of shock at the time of occurrence and in a hurry to report and carry the injured to hospital for treatment, so while writing the scribe he could miss the fact that Bhanu and his associate Saurabh both, went to the clinic of the deceased in the pretext of taking medicine. Bhanu entered in the clinic and fired at the deceased, while Saurabh remain stood near the channel. This fact has been deposed by PW-1 Kamesh and PW-2 Dinesh Devi who are eye witnesses of the occurrence and Sandeep Kumar and Amit also, who saw both of them running, waving the country made pistols in their hands. They also heard Bhanu while running saying to Saurabh that he has shot Dr. Narendra as per his direction, save him. PW-3 Sandeep has been examined by the prosecution. He confirms it by stating that while running Bhanu was saying to Saurabh "मैंने तुम्हारे कहने से डॉ. नरेंद्र को गोली मार दी है, मुझे बचा लेना" In these conditions, the factum of participation of the Saurabh in the crime is amply clear. Therefore, anonymizing the name of the appellant in the FIR is not fatal to the prosecution case.

36. It is well established proposition of law and jurisprudence that FIR is not an encyclopedia of entire case wherein each and every, minor or major, fact is to be mentioned, yet it must state skeletal features, there by disclosing the commission of the offence. As for as the argument, that FIR does not contains the names of the all the accused persons, is concerned it has to be kept in the mind that if any overt act is attributed to a particular accused among the assailant, it must be given greater assurance about his participation in the crime. In this context reference to certain authorities would be fruitful .

In, **State of Uttar Pradesh v. Naresh and Others (2011) 4 SCC 324**, placing reliance on **Rohtash vs State of Rajasthan (2006) 12 S.C.C. 64** and **Ranjeet Singh Vs state of M.P. (2011) 4 S.C.C. 336**, the Apex Court held as under:-

"It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused."

37. In view of the above legal scenario the question is whether appellant Saurabh has been implicated indeed owing to his participation in the said crime or he has been falsely implicated by way of after-thought or not. It must be judged having

regard to the entire factual scenario of the case. In this regard it is worth quoting the tehrir Ext. Ka-1 which reads as under:-

" महोदय निवेदन है कि मेरे चाचा जी डा० नरेंद्र कुमार अपने क्लीनिक पर जो घर पर ही है, मौजूद थे । समय करीब 7 बजे सांय गॉव का भानू S/O राम किशन निवासी कमालपुर क्लीनिक पर आया तथा मेरे चाचा से दवा लेने के लिए आया तथा मेरे चाचा ने कहा बैठो अभी दवा देता हूं। इसी बात पर नाराज होकर जान से मारने की नियत से मेरे चाचा के गोली मार दी, जो उनके पेट मे लगी है। इन्हें उपचार हेतु अस्पताल ले जाना है रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा करें। (02.11.15)"

38. Since, chik FIR Ext. Ka- 21 has been registered on the basis of the tehrir, Ext. Ka- 1, hence, it is the ditto version of tehrir as mentioned above.

39. As discussed above, the complainant moved several applications on different dates to the S.O. Mandawar and S.P. Bijnor. An birds eye view of these applications will be helpful in finding out the actual fact.

(i)- On 03.11.2015 complainant Kamesh gave an application to the S.O. Mandawar, Bijnor, which read thus:-

महोदय,

निवेदन इस प्रकार है दिनाक 02.11.2015 को मेरे चाचा डॉ. नरेंद्र कुमार राजपूत पुत्र स्वर्गीय तेजराम सिंह निवासी ग्राम कमाल पुर थाना मंडावर को जान से मारने की नियत से भानु पुत्र रामकिशन निवासी कमाल पुर थाना मंडावर जिला बिजनौर ने गोली मार दी थी जो गंभीर रूप से घायल हो गई थी मैं उन्हें थाने लेकर आया था और मुकद्दमा लिखवाया था गंभीर रूप से घायल होने के करण जिला अस्पताल बिजनोर उपचार हेतु लेकर गए थे डॉक्टरो ने उन्हें इलाज हेतु जनपद बिजनौर से मेरठ को रेफर किया था मैं अपने चाचा जी को इलाज हेतु मेरठ लेकर जा रहा था रास्ते में ही उन्होंने अपना दम तोड़दिया है उनका मृत शरीर सदर अस्पताल की मोर्चरी में रखा है थाना सूचना देने के लिए पुन: आया हूं क़ानूनी कार्यवाही करने की कृपा करे आपको बताना चाहता हूं कि मेरे चाचा को भानु पुत्र रामकिशन ने जब गोली मारी थी तो गोली कि आवाज सुनकर के मैं तथा मेरी चाची दिनेश देवी पत्नी नरेंद्र कुमार राजपूत के साथ मौके पर आ गए हम दोनों ने मौके से भानु पुत्र रामकिशन को भागते हुए देखा है जब भानू मौके से भागा था उस समय इसके दाहिने हाथ में तमंचा भी था मेरे चाचा की मृत्यु दिनांक 02.11.2015 को समय करीब 11.25 बजे रात्रि में हो गई है

अत: आपसे अनुरोध है कि उक्त संबंध में आवश्यक कानूनी कार्रवाई करें! (03.11.2015)

(ii) On 01.12.2015 the complainant Kamesh singh gave another application Ext Ka-4 to SP Bijnor divulging therein that some important witnesses were inquired by the IO. These witnesses are important to reach at right conclusion of the case. Hence, the annexed affidavits of the deponents sandeep and Amit, be sent to IO Inspector Shyam Singh Negi.

(iii) On 07.12.2015 he moved another application before S.P., Bijnor which reads thus:-

महोदय,

निवेदन है कि दिनांक 02.11.2015 को शाम समय लगभग 7 बजे गांव के भानु वा सौरभ ने प्रार्थना के चाचा डॉ नरेंद्र की हत्या गोली मार के कर दी थी। जिसकी रिपोर्ट प्रार्थी ने थाना मंडावर में अपराध क्रमांक 381/2015 धारा 307 आईपीसी के तहत लिखाई थी। जिसे बाद में धारा 302 में तरमीम कर दिया गया। प्रार्थी ने भानू के विरुद्ध रिपोर्ट लिखाई थी। चुनकी वह परेशान व सदमे में आ गया था और रिपोर्ट लिखने से पूर्व उसकी किसी से बात नहीं हुई थी। वास्तव में यही है कि प्रार्थी के चाचा की हत्या भानु द्वारे सौरभ पुत्र शेर सिंह के सहयोग सेकी गयी है।, इस घटना को अमित वा संदीप ने भी देखा है। लेकिन थानेया पुलिस सौरभ को बचा रही है और जनबूझकर सौरभ के विरुद्ध कार्यवाही नहीं कर रही है। जबकी सौरभ पूरी तरह से प्रार्थी के चाचा की हत्या में संलिप्त रहा है। और सौरभ से प्रार्थी के चाचा मृत डॉ नरेंद्र सिंह की दुश्मनी थी अगर सौरभ के विरूद्ध कार्यवाही नहीं होती है तो अपराधी साफ बच निकलेगा सौरभ के विरूद्ध पर्याप्त साक्ष्य है। परिस्थितियो में सौरभ को गिरफ़्तार किया जाना वा उसके विरुद्ध भी कार्यवाही होना अति आवश्यक है इसके बाद से सौरभ ने प्रार्थी के परिवार और गवाहों को धमकाना शुरू कर दिया है। इस से पूर्व भी प्रार्थी श्रीमान जी को प्रार्थना पत्र प्रेषित कर चूका है।

अत: श्रीमान जी प्रार्थना है कि विवेचक अपराध शाखा को आदेश देने की कृपा करें कि वह सौरभ पुत्र शेर सिंह.....के विरुद्ध कार्यवाही करे। (07.12.2015)

(iv) On 16.12.2015 the complainant Kamesh gave yet another application to the SP Bijnor, the relevant part of the application may be reproduced here under :-

"मुझे ज्ञात हुआ है कि पूर्व विवेचक थाना प्रभारी मंडावर द्वारा भानु वा नरेंद्र सिंह के बीच चकरोड का विवाद अपनी विवेचना में अंकित किया है जबकी वस्तविकता ये है कि उनके मध्य चकरोड का कोई विवाद नहीं था मेरे गांव के सौरभ पुत्र शेरसिंह वा मेरे चचेरे भाई हर्ष पुत्र डॉ नरेंद्र सिंह के बीच आपसी कहा सुनी हो गई थी जिसपर डॉ नरेंद्र सिंह (मृतक) ने सौरभ को उसके घर जाकर डाट डपट व मारपीट कर दिया था जिस से सौरभ नरेंद्र सिंह से रंजिस रखने लग गया था जिस से सौरभ ने भानु से मिलकर एक षड़यंत्र रचकर डॉ नरेंद्र सिंह की हत्या की है मैं सत्यता से श्रीमान जी को अवगत करना चाहता हूं इसलिए मैं अपने गांव के मौजिज लोगो/ गवाहान के शपथ पत्र श्रीमान जी की सेवा में प्रस्तुत कर रहा हूं जिनका विवेचना में शामिल कराया जाना न्यायहित में अत्यन्त आवश्यक है!

अत: श्रीमान जी से प्रार्थना है प्रार्थी के प्रार्थना पत्र के साथ संलगन शपथ पत्र को उपरोक्त शपथ पत्र को विवेचना में शामिल करा कर कार्यवाही कराये जाने के आदेश पारित करने की कृपा की जाए!" (16.12.2015)

40. A bare perusal of the scribe, Ext. Ka-1, reveals that appellant Saurabh has not been named in it. Similarly the name of the appellant is anonymized in the chik FIR, Ext. Ka 21, there is not even a whisper in these documents about the complicity, presence and participation of the present appellant in the crime. In the application dated 03.11.2015 Ext. Ka-2, which is intended to furnish information to PS concerned, about the demise of Dr Narendra Kumar, complainant added that when his uncle was shot by Bhanu, on hearing the sound of fire, he and his aunt Dinesh Devi, came to the spot, both of them saw Bhanu running from the spot having a pistol in his right hand. Thus, Pw-1 and Pw- 2 has introduced a new story before the court that at the time of incident Bhanu entered into the clinic whereas Saurabh remain standing near the channel. PW-2 who is the wife of the deceased, in her testimony has attributed role of firing to the alleged accused Bhanu. On the basis of this application it could safely be inferred that PW-1 Kamesh and his aunt PW-2 Dinesh Devi, has not witnessed any assailant firing on the deceased and as such they are not eye witness. At the most what they witnessed after reaching on the spot, only running away one and only one Bhanu with a pistol in his right hand. Thus, Kamesh and Dinesh Devi were introduced for the first time as the eye witness, while they do not saw appellant Saurabh on the spot or running him. No other witness was named in the application.

41. It is for the first time the complainant introduced the name of the Saurabh as an author of the crime who assisted Bhanu in committing the crime, by moving an other oft quoted application dated 07.12.2015, Ext Ka-3, wherein he divulged that Bhanu with the assistance of the appellant Saurabh killed the deceased Dr. Narendra. But he further improved the prosecution version by saying that at the time of launching the FIR, on account of shock and disquiet of his mantel faculty, he could not disclose the name of co-accused Saurabh in the written scribe, but this explanation seems is not acceptable. Because the name of the appellant was brought on surface afterthought and at a very belated stage.

42. The complainant also introduced Sandeep Kumar and Amit as eye witness of the incident in application dated 7.12.2015. Prosecution has not examined Amit as a witness. However, as the statement of Pw- 3 Sandeep Kumar reveals that he saw Saurabh and Bhanu from a distance of 25-30 meters running and talking. Thus, he is also not an eye witness of the commission of crime. This story of overhearing the conversation between these

two assailants was floated by PW- 3 after more than one and half month.

43. Since the woes and throes of the complainant remain unattended by the authorities and complainant has been running from pillar to post agitating his grievances. He moved an other application (Ext Ka-5) on 16.12.2015, to the SP Bijnor, wherein he stated that Saurabh in association with named co accused Bhanu committed said crime. He spelled out the details of enmity or reasons (motive) for rendering assistance to Bhanu to commit the incident. Thus, none of the witnesses of the prosecution saw committing/ firing at the deceased. It follows that no active overt act of committing the crime is attributed to the appellant and his name was introduced with a view to implicate him at a belated stage. The testimonies of the prosecution witnesses is not believable, in this regard and create doubts about the truthfulness of these witnesses.

44. Now the question is that whether there was any possibility of witnessing and identifying appellant standing near channel or running away after the commission of crime in conspiracy with each other.

45. In his deposition PW-1 complainant Kamesh admitted that he was sitting in side the residence of the deceased in Verandah having a cup of the tea with his aunt and the deceased. When assailant came, his uncle went in his clinic room to give him medicine. In the spur of movement the assailant fired and ran away. Although in the site plan, Ext Ka-15, proved by the IO PW-6 S.I. Surendra Kumar Pachauri, the said Verandah in not shown. Neither the exact point where from PW-1 and PW-2 witnessed the incident is exhibited. Only a open court yard has been depicted. IO has not shown the existence of window in said to be in the northern wall of the clinic room. It may be omission on the part of IO but it is enough to conclude that it is improbable to see the incident sitting in the court yard by these witnesses. Whatever it may be, one thing is certain that a person standing near the channel in the southern wall of the clinic, who was trying to hide himself could not be seen by witnesses sitting in the court yard attached to clinic room. Thus deposition of PW-1 and PW-2 in this regard is not believable. PW-3 Sandeep is also not an eye witness to the incident. Even if his statement is believed at all even then he has not seen appellant committing the crime. It transpires that it is by way of improvement of the prosecution case, his name was introduced as an eye witness. In his deposition he admitted that he has seen Saurabh and Bhanu from a distance of 25-30 meters fleeing with pistol. He heard Bhanu saying to Saurabh that he has fired Dr. Narendra you save me. It is highly improbable that any person involved a heinous crime like murder, would so loudly cry that he has committed murder and it is also not believable if he was whispering the said statement and a person standing away 25 to 30 meters to heir away. That too, he has not disclose this to complainant at an earliest, while the person murdered was his real uncle and the statement PW-1 and PW-2 are nothing but hearsay statement, not admissible in evidence. As for as PW-3 Sandeep is concerned he is also not an eye witness of occurrence and his presence at the spot is also doubtful. For the shake of argument, if their statement is considered to even then, they only saw assailant fleeing away from the scene of the occurrence with pistol with their hands. It was not possible for the witnesses to identified the person running, from his back or hearing the

statement of Bhnau to Saurabh that he has shot Dr. Narendra as per your instructions, now you save me. The above discussion leads the one and only conclusion all these witnesses is eye witnesses and there presence at the spot at the time of the occurrence is highly doubtful.

46. Thus, unnaming the appellant Saurabh in the FIR and in the applications moved by the complainant as well as doubtfulness of witnessing him at the spot is important and creates a question mark before the truthfulness of the prosecution case and thus the roots of the prosecution case turns lax. In these circumstances it may be safely concluded that the factum of presence of the appellant on the spot or other vise has not been proved by the prosecution beyond shadow of doubts. In these conditions unnaming of the appellant in FIR is fatal to the prosecution case.

Partisan and interested witnesses

47. Now, we may consider the submission of learned counsel for the appellants that PW-1, PW-2 and PW-3 are relatives of the deceased and they are highly partisan and interested witnesses of the incident, being nephews and wife of the deceased, their statement could not relied upon. Learned AGA refuted this argument and contended that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person.

48. The above submission was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364**. and enunciated the following principles:-

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

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

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

50. Again in **S. Sudershan Reddy and others Vs. State of A.P (2006) 10 SCC**

163, the Hon'ble Supreme Court has held as under:-

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

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

51. Thus, we find that Hon'ble Apex Court in its enumerable decisions has categorically held that evidence of eye-witness, if found truthful, can not be discarded simply because the witnesses were relatives of the deceased.

The only caveat is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution.

52. In the present case PW-1 is complainant in the matter. He is nephew of the deceased of the Dr. Narendra and PW-2 Dinesh Devi is the wife of the deceased. An other witness of PW-3 Sandeep is also the real nephew of the deceased Dr. Narendra. Thus they are closely related to the deceased, but as discussed above all these witnesses are not the eye witnesses who have seen the appellant committing the crime. Their evidence about the presence of the appellant on the spot is also doubtful and not believable. As a matter of course it is the case of circumstantial evidence. If at all their evidence it believe and relied upon, they saw appellant running with pistol from the scene of occurrence and not firing upon the deceased. Although PW-1 & PW-2 has deposed that the co-accused Bhanu was close friend of the Saurabh and both of them committed the crime in connivance but there is no inspiring evidence in this regard amidst circumstances of the case. Yet another aspect of the issue required into consideration that the alleged incident has taken place on 02.11.2015 and for the first PW- 3 Sandeep who claim himself to be a witness while runing away the assailant but he along with Amit is giving his affidavits, after considerable delay i.e. 16.12.2015. This by itself smacks foul about his presence over the site.

Appellant is not charge sheeted

53. The learned counsel for the appellant has submitted that it is pertinent to point out that though the informant vis a vis other witnesses have tried to figured the name of the appellant as a perpetrator of the crime but during the course of the investigation no active participation of the appellant was found. Hence, even after thorough and due investigation the investigating officer submitted the charge sheet only against the Bhanu Pratap, and no charge sheet have filed against the appellant Saurabh.

54. The learned counsel for the appellant has submitted that it is also pertinent to point out that after filing the

police report during the course of trial the prosecution have filed an application u/s 319 of Cr.P.C. but without considering the material, then available on record and without properly appreciated the evidence the learned trial court summoned the appellant Saurabh vide its order dated 06.09.2016. Thus, the appellant Saurabh arraigned as accused in pursuant under section 319 Cr.P.C vide order dated 21.10.2016 to face the trial the co-accused Bhnau Pratap under section 302/34 IPC passed by the trial court. It has been discussed above all the three witnesses of the facts have not seen the appellant at the spot committing the crime.

No Recovery from the Appellant

55. The learned counsel for the appellant has submitted that it is also pertinent to point out that there is no connecting material against the appellant to connect him in the present crime in question. The alleged weapon of crime are any other incriminating material was not recovered from the alleged co-accused Bhanu Pratap whereas no recovery of any weapon on any incriminating material was recovered from the possession or pointing out of the appellant.

No Motive to the Appellant

56. The learned counsel for the appellant has submitted that though during the course of investigation the enmity was established between the co-accused Bhanu Pratap and the deceased but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap. However Learned G.A. refuted this argument. He contended that about 8-9 months before the present incident some hot altercation had taken place between the Saurabh and son of the deceased Harsh Kumar, then his uncle had gone to the residence of Saurabh and reprimanded and scolded him and even slapped him 3-4 times. So, Saurabh was nurturing animus and grudge against the deceased. Saurabh and Bhanu were teaching in the same school and are close friend. Bhanu killed Dr. Narendra with the assistance of Saurabh and thus he had a strong motive to commit the said crime. The learned AGA further submitted that anyway motive occupies back seat in a case of direct evidence, as the present case is. Therefore, prosecution need not prove the motive.

57. In **Jaikam KhanV/S The State of Uttar Pradesh 2022 1 Crimes (SC) 01** and in a plethora of other cases Apex Court has observed no doubt in case of direct evidence and ocular testimony being found to be trustworthy, reliable and cogent, it will not be necessary for prosecution to prove the motive for the crime. However in the present case as be have already held herein above that testimony of the eye witnesses could not to be wholly reliable , the motive aspect would be a relevant factor.

Contradictions and Discrepancies in prosecution evidence

58. That the witnesses PW-1 Kamesh singh has admitted that statement of the deceased was recorded in the hospital in his presence and a video CD was also prepared by the then investigating officer. PW-5 in the part IO Gurupal Singh has corroborated the testimony of PW-1 in his deposition. PW-7 IO Shyam Singh Negi has specifically stated in his deposition that on 22.12.2015 he has prepared a site plan of the disputed place on account of which the Bhnau Pratap and deceased were having inimical relations and the site plan was

prepared at the instance of PW-1 same in available on record as Ext Ka-23. However PW-1 has denied any animosity on this count between the too.

59. As discussed above PW-1 and PW-3 are the real nephews of the deceased while PW-2 is his wife. In the facts of the circumstances of the case Harsh son of the deceased was alleged to be present at the spot, but prosecution did not examined him. It may be mentioned that he was an important eye witness as per statement of PW-1 and PW-2., motive of hot altercation between Harsh and appellant Saurabh resulting in nurturing animus and grudge against Dr. Narendra .

60. Thus, appellant was not named in first information report. His name find no place even after due investigation by the I.O. in the police report/ charge sheet . Name of the accused arraigned only in an application moved by the complainant under section 319 Cr.P.C. No active participation is established against the appellant. Prosecution has failed to establish evidence of conspiracy of the appellant with co-accused Bhanu. There is no recovery of any incriminating article or weapon from the appellant or at his instance or pointing out. In these circumstances prosecution could not establish its case beyond reasonable doubts. The truthfulness of the prosecution case in itself is highly doubtful and against the material on record.

61. From the prolix and verbose discussions, we arrives at the conclusion that the findings of guilt recorded by the Trial Court is not based on correct and proper appreciation and appraisal of evidence. The life and liberty of any person cannot be downsized on the touchstone of doubt. Regard being had to the given facts and circumstances of the case in its entirety and upon hearing the learned counsel for the parties, the conviction and sentence of the appellant on the basis of present set of evidence cannot sustain. Consequently the conviction and sentence of the appellant under section 302/34 IPC deserves to be set aside.

62. Resultantly, the appeal is ALLOWED and the judgment and order dated 03.10.2018 passed by the trial court in Session Trial No.105 of 2016 to the extent of appellant Saurabh is hereby set-aside. The appellant-Saurabh Kumar is on bail. He need not surrender, rather the appellant is set at liberty. The appellant who is on bail, shall stand discharged from his liabilities of bail bonds.

63. The copy of the judgment be sent to the trial court to incorporate entry with respect to result of this appeal in the relevant register. The compliance be recorded, under intimation to this Court within two months.

64. Trial Court Record be remit back.

(2024) 5 ILRA 1022
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 31 of 2021
Connected with
First Appeal No. 33 of 2021

Dr. Bijoy Kundu ...Appellant
Versus
Smt. Piu Kundu ...Respondent

Counsel for the Appellant:
Rohit Tripathi, Syed Zulfiqar Husain Naqv

Counsel for the Respondent:
Saurabh Misra, Ajeet Kumar Singh, Ved Prakash Verma

Hindu Marriage Act, 1955 - Section 13 - Divorce - S. 13 provides for grant of divorce and enumerates various grounds on which the same may be granted. Each of those grounds are independent of each other. Each of those grounds are mutually exclusive of each other, which is evident by the use of the disjunctive 'or' to separate each ground from the other, and there is no reason to read 'or' conjunctively as it will lead to absurdity. In the instant case, the Family Court, after returning a finding that "cruelty" has been inflicted by the respondent-wife on the appellant-husband, refused to grant divorce to the husband on the ground that the ground of "desertion" could not be proved by the appellant-husband. *Held*: - Cruelty can by itself be a ground for dissolution of marriage. Once cruelty was proved, the suit for divorce had to be decreed. (Paras 25, 26, 27)

Allowed. (E-5)

List of Cases cited:

1. K. Srinivas Vs K. Sunita 2014 (16) SCC 34

2. Mangayakarasi Vs M. Yuvraj 2020 (3) SCC 786

3. Ravi Kumar Vs Julmi Devi 2010 (4) SCC 476

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Mr. Rohit Tripathi, learned counsel for appellant and Mr. D.P. Singh Somvanshi, learned counsel for the respondent.

(2) These appeals under Section 19 (1) of the Family Court Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 have been filed by the appellant/husband, assailing the judgment and decree dated 15.02.2021 passed by the Principal Judge/District Judge, Family Court, Lucknow, whereby Regular Suit No. 886 of 2012 filed by the appellant/husband under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage was dismissed and Regular Suit No. 29 of 2013 filed by the respondent/wife under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal right was decreed in favour of the respondent/wife.

(3) Since the above-captioned appeals arise out of a common factual matrix and judgment, hence they are being decided by a common order.

FACTS

(4) Shorn of unnecessary details, the facts, in brief, which give rise to the appeals herein are as follows :-

In both these appeals, the appellant is the husband and the respondent is the wife. Appellant got married with respondent on 27th November, 1986. Two sons were born out of the wedlock of the parties. According to the appellant, after conceiving both sons, his wife (respondent herein) was not interested in him at all and started misbehaving with him in front of servants and other members of the family. It has been alleged by the appellant that on one day, his wife (respondent herein) locked him in toilet; his wife used to connect/co-relate him with a lady residing next door; she abused his parents in front of his children; after 2003, she stopped even giving food to him; though he took her to U.S.A. for 18 months/Europe for 4 months; in the year 2008, he arranged for a visit to Kerala with his entire family but the respondent strictly refused for it; since 2003, only course of

communication between them was either through sons or SMS or handwritten notes, which even spilled over at the time of offering tea/lunch etc.; and since 2003, respondent is living separately with the appellant under the same roof. According to the version of the appellant, in compelling circumstances, he instituted a suit, bearing Regular Suit No. 886 of 2012 (hereinafter referred to as 'First Suit'), under Section 13 of the Hindu Marriage Act, 1955 for declaring his marriage with the respondent as null and void.

(5) After filing the aforesaid suit on 28.04.2012, the respondent-wife had lodged four cases against the appellant/husband, namely, (a) case under provisions of the Domestic Violence Act; (b) case for Maintenance under Section 125 Cr.P.C.; (c) Criminal Case under Sections 498A/323/504/506/406 I.P.C.; and (d) under provisions of Dowry Prohibition Act, for which Police Complaint was lodged in November, 2012. Subsequently, the defendant/respondent/wife had also instituted a suit, bearing Regular Suit No. 29 of 213 (hereinafter referred to as the '**Second Suit'**), under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. Both suits were clubbed together and heard analogously by the Family Court.

(6) The respondent/defendant/wife had filed his written statement in the aforesaid suits and denied the allegations made by the appellant/plaintiff/husband. She set up her own version of the case in as much as she has stated that she conceived two male children, namely, Vishwendu Kundu and Diyendu Kundu and after their birth, she had to take care of her children as well as had to fulfill her own duties and responsibilities; she never ignored her own duties and responsibilities towards her husband/appellant; she never locked the plaintiff/appellant; all the decisions with respect to the children were taken by the plaintiff/appellant; appellant himself wanted the children to study in convent school, therefore, he got them admitted at St. Francis College, Lucknow; he also wanted the children to become Engineers and she only used to help the children in doing daily chores; the relation between the plaintiff/appellant and defendant/wife continued as usual, they cohabited as and when the plaintiff/appellant wanted; and the defendant as a wife took care of the plaintiff in all possible ways.

(7) On the basis of pleadings and documents, the Family Court framed following issues in the First Suit filed by the appellant for dissolution of marriage :-

"1. Whether as asserted in the plaint defendant behaved with the plaintiff with cruelty and deserted him ?

2. Whether the defendant forbade the plaintiff from conjugal relationship ?

3. Whether the suit is legally tenable ?

4. Whether the plaintiff is entitled for any relief ?"

(8) However, since no issues were framed in the Second Suit filed by the respondent/wife for restitution of conjugal right, therefore, the Family Court framed following issues for proper adjudication of the Second Suit filed by the respondent/wife :-

"1. Whether the defendant has withdrawn himself from the society of the plaintiff ?

2. Whether the plaintiff is entitled to restitution of conjugal rights ?

3. Whether the plaintiff is entitled to any other relief ?"

(9) In support of their respective cases, both appellant and respondent got examined themselves as P.W.1 and D.W.1, respectively. Except them, no one was examined to prove their case as set up by either of them. Documentary evidence was also led, details of which are mentioned in the impugned judgment.

(10) The Family Court stated that many a times efforts have been made for an amicable settlement, but on the basis of allegations which have been levelled by both the parties against each other, mediation between the parties was not successful.

(11) The Family Court, after appraising both, oral as well as documentary evidence, decided the issues framed in both the suits.

A. As far as the First Suit filed by the husband/appellant for dissolution of marriage, the issue were decided in the following manner :-

Issue Nos.	**Issues**	**Decision of the Family Court**
Issue No.1	Whether as asserted in the plaint defendant behaved with the plaintiff with cruelty and deserted him ?	The said issue was decided in affirmative in part in favour of the plaintiff /appellant by returning a finding that the husband had succeeded in bringing home the charge of cruelty against the defendant/respondent. So far as the issue of desertion, the Family Court had decided it against the appellant/ husband. Thus, issue no.1 has been partly answered in favour of the appellant/plaintiff so far as it relates to the ground of cruelty.
Issue No.2	whether the defendant forbade the plaintiff from conjugal right ?	The said issue was decided by the Family Court in negative and against the plaintiff/appellant.
Issue No.3	whether the suit is legally tenable ?	The said issue was decided in affirmative in favour of the plaintiff/appellant.
Issue No.4	whether the plaintiff is entitled for any relief ?	The said issue was decided by the Family Court in negative against the appellant.

B. As far as the Second Suit filed by the wife/respondent for restitution of conjugal rights, the issues were decided in the following manner:

Issue Nos.	**Issues**	**Decision of the Family Court**
Issue No.1	Whether the defendant has withdrawn himself from the	The said issue was decided in favour of the respondent and against the appellant.

	society of the plaintiff	
Issue No.2	Whether the plaintiff is entitled to restitution of conjugal rights,	The said issue was decided by the Family Court in affirmative and in favour of respondent and against the Appellant/ Husband.
Issue No.3	whether the plaintiff is entitled to any other relief,	The said issue was decided in favour of the respondent by recording finding that the respondent would be entitled to get costs.

(12) In this backdrop, the Family Court had dismissed the First Suit filed by the appellant and decreed the Second Suit filed by the respondent and passed a decree for restitution of conjugal rights in favour of the respondent vide judgment and decree dated 15.02.2021. It is this judgment and decree dated 15.02.2021, which have been challenged in the above-captioned appeals.

SUBMISSIONS

(13) Assailing the impugned judgment/decree, learned Counsel for the appellant submitted that cruelty by the respondent/wife towards the appellant having been found to be proved by the Family Court, the only logical corollary of its finding was to order dissolution of marriage even if desertion was not proved but surprisingly the Court below dismissed the suit for divorce and has allowed the suit of respondent/wife for restitution of conjugal rights, which is apparently erroneous and perverse both on facts and law. The finding of the Court below on the issue of cruelty has not been challenged by the respondent, therefore, the appeal is liable to be allowed on this count itself.

(14) The appellant cannot be forced to live with the respondent once cruelty meted out by her to the appellant is proved and this by itself disentitled her to relief but the Court below has missed out on this relevant and apparent aspect.

(15) Appellant's Counsel did not advance any argument nor attempted to demonstrate as to how the finding of the Family Court on the question of desertion was perverse or erroneous in any manner.

(16) Learned Counsel for the petitioner further submitted that parties are staying separately since March, 2012 i.e. prior to three weeks from the date of filing of divorce petition by the appellant/husband and during that period, no attempt was ever made by the respondent/wife for reconciliation and even when the appellant tried to make the issue settled, it all went in vain, therefore, the marriage having been irretrievably broken down, the appellant is entitled for a decree of Divorce on the ground of Cruelty. In this regard, he has relied upon the decision of the Apex Court in **Inderjeet Singh Grewal Vs. State of Punjab and another** : (2011) 12 SCC 588 and **Sureshtha Devi Vs. Om Prakash** : (1991) 2 SCC 25.

(17) *Per contra*, the learned Counsel representing the respondent/wife could not putforth any argument much less an acceptable one as to how the suit for divorce could have been dismissed once a finding favourable to the appellant/plaintiff

had been recorded on the issue of cruelty. He submitted that the respondent had made all efforts to respect the sacred relationship between the parties all through out and is still ready to look after the appellant with the assistance of her sons. According to him, mere long period of separation could not tantamount to irretrievable break down of marriage. He lastly submitted that there is no perversity or illegality in the impugned judgment/decree passed by the Family Court.

ANALYSIS

(18) We have carefully perused the pleadings and documents on record and heard the respective learned Counsel representing the parties at length.

(19) The point which falls for our determination as to whether, in view of the finding of cruelty by the respondent/wife towards the appellant/husband as returned by the Family Court in the context of issue no.1 framed by it, the appellant/plaintiff is entitled to a decree of divorce and the suit of the respondent under Section 9 of the Hindu Marriage Act, 1955 is liable to be dismissed; whether the Family Court has erred in dismissing the suit of the appellant and allowing the suit of the respondent in spite of the finding in favour of the appellant on the issue of cruelty in terms of Section 13 (1) (i-a) of the Act, 1955 as amended by U.P. Act No. 13 of 1962.

(20) The Family Court after considering the pleadings, oral and documentary evidence on record, has categorically recorded a finding that cruelty as a ground for seeking divorce has been proved by the appellant/plaintiff. Relevant extract of the judgment containing his conclusions on the issue is quoted below :-

"Since issue no.1 takes in its fold allegations of cruelty, hence in this regard observations of this Court are a must. Apart from the pleadings of the plaint regarding cruelty perpetrated by the defendant, admission of the defendant herself is relevant in this regard. The plaintiff has filed documents per list C-71/1 to C-71/26 and has also got it substantiated by his oral testimony as rendered at page 1 and 2 of his statement-in-chief. The defendant has been subjected to a lengthier cross-examination and as D.W.-1 she has stated at page-10 of her cross-examination that it is true that she has filed a reply in the case instituted under Domestic Violence Act and whatever she has written in paragraph 4 of it, all they are correct……..Thereby the defendant has stated, that it is the respondent, (plaintiff in the first suit) who is of a promiscuous virtue he has had several long relationships and undesirable association with other woman and the respondent had several times contacted sexually transmitted disease which could be discerned by the fact that the respondent was regularly under the treatment of Dr. S.K. Jain, Sexologist……That the respondent is illegitimate son of his father Late Dr. B.N. Kundu, who at the age of 50 years deserted his legally wedded wife with whom he had a legitimate son and without valid and legal divorce started to live with another woman named Late Kamla Kundu inheriting such immoral values from his unmarried parents the respondent is now revealing his genetic traits.

Apart from it also it has been mentioned herein before that after filing of instant divorce case, the defendant filed several cases in quick succession against the plaintiff including criminal case U/S 498A, 323, 504, 506 IPC with false and absurd allegations which was quashed by the Hon'ble High Court in Criminal Misc.

Application No. 5246/2013. Accordingly all the allegations of demand of dowry, cruelty and mis-appropriation of property and breach of trust etc. were found baseless. This fact is further substantiated by the documents filed by the plaintiff namely C-71/39 to C-71/47. Also it has been stated by the plaintiff that the defendant locked him in toilet from inside and this statement of the plaintiff could not have been got controverted even by his cross-examination. All these facts sufficiently indicate that the defendant has behaved with cruelty with the plaintiff and these instances cannot be termed as stray incidents of day to day life."

(21) This finding on the issue of cruelty has not been challenged by the respondent/wife nor even in this appeal in terms of Order XLI Rule 22 of the Code of Civil Procedure. This finding has, therefore, attained finality. It being so one fails to understand as to how the appellant's suit for divorce could have been dismissed. The fact the other ground taken by the appellant/plaintiff which was of desertion referable to Clause (ib) of sub-section (1) of section 13 of the Act, 1955 could not be proved, was immaterial.

(22) Although the findings of the Family Court on the issue of cruelty has not been challenged, we have also gone through the pleadings and evidence on record including oral and documentary evidence keeping in mind the decision of Hon'ble the Supreme Court in case of **K. Srinivas Vs. K. Sunita** :. 2014 (16) SCC 34, **Mangayakarasi Vs. M. Yuvraj** : 2020 (3) SCC 786 as also in the case of **Ravi Kumar Vs. Julmi Devi** 2010 (4) SCC 476 and the judgments referred in the impugned judgment and we do not find any perversity or illegality in the said findings.

(23) Section 13 of the Act, 1955 reads as under :-

"13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub—normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) * * * * *

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

(viii) ***

(ix) ***

Explanation.—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the ommencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

(24) U.P. Amendment to Section 13 (1) (i-a) is as under :-

"(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or"

(25) It is apparent that Section 13 of the Act, 1955 provides for grant of divorce

and enumerates various grounds on which the same may be granted. It enacts that "any marriage solemnized whether before or after the commencement of this Act' may be dissolved on petition presented either by the husband or by the wife or any of the grounds specified therein. Clause (i-a) of sub section (1) of section 13 of the Act, 1955 declares that a decree of divorce may be based by a court on the ground that after solemnization of marriage, the opposite party has treated the petitioner with cruelty subject to the State amendments to Section 13 (1) (i-a) in this regard. There are other grounds also mentioned in the said sub section (i) of section 13 of Hindu Marriage Act and each of these grounds are independent of each other. It has to be understood that each of these grounds are mutually exclusive to each other which is evident by use of the disjunctive 'or' to separate each ground from the other and there is no reason to read 'or' conjunctively as it will lead to absurdity. Thus, cruelty can by itself be a ground for dissolution of marriage. However, it seems that learned Family Court, after returning a finding that "cruelty" has been inflicted by the respondent-wife on the appellant-husband, refused to grant divorce to the husband presumably on the ground that the ground of "desertion" could not be proved by the appellant-husband.

(26) Interestingly, instead of allowing the suit for divorce, it has decreed the suit of the respondent for restitution of conjugal rights which is apparently incongruous and irreconcilable with finding on the issue of cruelty recorded in the context of the suit for divorce in favour of the appellant/husband and against the wife. This finding itself constituted a valid ground and a reasonable cause within the meaning of Section 9 of the Act, 1955 for the husband not to live with the respondent and for the Family Court to dismiss the suit of the wife under Section 9 of the Act, 1955, but this material aspect has been omitted from consideration.

(27) In view of the above discussion, we have no hesitation in determining that once cruelty was proved, the suit for divorce had to be decreed and the suit of the wife had to be dismissed, subject of course to the provision of Section 13A of Act, 1955, but, the Family Court has erred on facts and law in not doing so. The point of determination is answered accordingly.

(28) We have not expressed any opinion on the issue of desertion as recorded by the Family Court because the appellant's Counsel did not press the said ground.

(29) At this juncture, it would be apt to mention that this case has travelled from the Family Court to this Court. The suit for divorce was filed in 2012, whereas suit under Section 9 of the Act, 1955 was filed in 2013. The decision of the Family Court is of 15.02.2021. The records reveal that both the appellant and respondent are now living separately for the last more than a decade i.e. since 2012. Even prior to 2012 i.e. from 2003 till three weeks prior to filing of the suit in 2012, though they were living in a house under the same roof, there was no communication between them and they communicated only through SMS/calls. Two sons were borne out of their wedlock prior to 2003, both of whom are well educated. Both sons are living with respondent/wife. Repeated efforts by the Courts for reconciliation or settlement have resulted in failure. At the very initial stage, the Family Court had sent the parties for mediation, which did not succeed. This Court had also sent them for mediation, which also failed. On the last date, this Court

had also requested the parties to explore the possibility of them living together, but nothing materialized. This Court had also made an effort by asking the parties to come with some mutual settlement, but in vain, meaning thereby that every single effort of the Court and the mediators, towards the compromise or settlement has led to a blind alley.

(30) The husband and wife, who are before us, have been living separately since the last more than a decade. There are bitter allegations of cruelty from both the sides and multiple litigations have taken place between the two in the last more than a decade. This embittered relationship between the appellant and respondent which has not witnessed any moment of peace for the last more than a decade or more is a martial relationship only on paper. The fact is that this relationship has broke down irretrievably long back.

(31) In the facts and circumstances of this case also, it is not a fit case for grant of alternative relief of judicial separation under Section 13A of the Act, 1955.

(32) Although there are allegations and counter allegations between the parties about their financial status, however, we find that the respondent did not seek permanent alimony under Section 25 of the Act, 1955 presumably because she was seeking restitution of conjugal relationship, though she could have done so as an alternative relief in the suit for divorce but we find that before us also there is no such pleading by parties nor any prayer made nor any evidence on record, therefore, we leave it open to the respondent to initiate separate proceedings in this regard as per law.

(33) Based on the discussions made hereinabove, without interfering with the findings of the Family Court with regard to issue nos. 1 and 2, its findings and conclusions with regard to relief no. 3 in Regular Suit No. 886 of 2012 filed under Section 13 of the Act, 1955 are set aside. Consequently, the judgment and decree dated 15.02.2021 dismissing Regular Suit No. 886 of 2023 for divorce is also set-aside, Regular Suit No. 886 of 2012 is decreed. The marriage between the appellant and respondent is dissolved. Liberty is granted to the respondent to initiate separate proceedings under Section 25 of the Act, 1955 as per law.

(34) The judgment and decree 15.02.2021 allowing the Regular Suit No. 29 of 2013 is set-aside. Regular Suit No. 29 of 2013 filed under Section 9 of the Hindu Marriage Act, 1955 is dismissed.

(35) Both the appeals are allowed in the aforesaid terms.

(36) Parties to bear their own costs.

(2024) 5 ILRA 1031
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 1202 of 1984

State ...Appellant

Versus

Khajan ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
Sa Shah, Raghvendra Kumar Mishra

Criminal Law-Indian Penal Code-1860-Sections 148, 149, 307 & 323- Government Appeal against the judgment by which the accused-respondent has been acquitted by the trial court- Injuries are simple in nature and even as per the doctor opinion, the injuries may be manipulated, manufactured or self inflicted- A very little blood oozed out from the wound caused by alleged firearm injury , which neither fell on his clothes nor any blood was found on the cot nor any pellet or wad was recovered at the place of incident which creates serious dent in the prosecution story and makes it unreliable -Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted-First informant and the accused-respondents were on highly inimical terms.

Appeal dismissed. (E-15)

List of Cases cited:

1. Sadhu Saran Singh Vs St. of U.P. (2016) 4 SCC 397

2. Harljan Bhala Teja Vs St. of Guj. (2016) 12 SCC 665

3. Rajesh Prasad Vs St. of Bihar & anr.

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Sri Jitendra Kumar Jaiswal, learned AGA for the State, Raghvendra Kumar Mishra, learned counsel for the accused-respondent and perused the record.

2. The present Government Appeal has been filed against the judgment and order dated 19.1.1984 passed by 7th Addl. Sessions Judge, Aligarh in S.T. No. 246 of 1983 (State Vs. Khajan and others), P.S. Harduaganj, District- Aligarh, by which the accused-respondent has been acquitted for the offence under Section 307 read with Section 149 IPC and Section 323 read with Section 149 IPC as well as under Section 148 IPC.

3. Shorn of unnecessary details, the prosecution case as unraveled in the first information report, which was lodged by one Veerpal Sharma (P.W.-2) on 1.5.1982 at 3 P.M. in police station- Harduaganj, District- Aligarh in respect of an incident occurred on 30.4.1982 at 11 p.m. in the night. It is alleged that on the fateful night, the first informant alongwith his servant Ranvir were sitting in his Khalihan and were conversing while his son Satyadev was sleeping beside them, when accused-respondent Khajan son of Chhiddu, Shamshad son of Basheer, Haneef son of Maseet, Edal son of Manik, Ramji Lal son of Lal Singh, Habib son of Bindu allegedly reached there and stated to kill Veerpal, consequent thereto Khajan fired a shot at him, however it missed the target, on which all others exhorted Shamshad to assault him, consequent to which, Shamshad fired a shot at him by a country made pistol. He in order to rescue himself, bent down, yet he received injuries on his head.

4. It is further stated that Ramji Lal and Hanif armed with farsa also stood there, Edal assaulted him by lathi whereas Hanif assaulted him by the reverse side of the ballam, consequent to which, he fell down and his servant was also assaulted by them. At the time of assault, his son was raising alarm from a distance. He alongwith his servant also raised alarm, consequent to which, Khubi and Soran and several other persons reached there, who in the moon light and in the flash of torch, saw and identified the assailants, however seeing the said witnesses, the assailants ran away.

5. It is further stated that he is having prior enmity with Edal and the other accused persons, who are members of his gang, on the basis of said written report given by Veerpal, a first information report was registered vide Case Crime No. 77 of 1982, under Sections 147/149 and 307 IPC, Police Station- Harduaganj, District-Aligarh. On the basis of said written report, which has been proved and marked as Exbt. Ka-3, the first information report was registered, which has been proved and marked as Exbt. Ka-6.

6. After registration of the said first information report, the victims Ranvir and Veepal were sent for medical examination at Primary Health Centre, Harduaganj, Aligarh, whereas Dr. D.P. Singh has examined their injuries and prepared the injury report, which has been proved and marked as Exbt. Ka-1 and Exbt. Ka-2. The doctor has noted the following injuries :-

Injuries of Ranvir Singh

1. Abraded bruise 1 x 1/4" X 1/2" on the lateral aspect of right side of abdomen in the mid auxillary line just adjacent to the right iliac crest at the level of umblicus. Pink red in appearance surrounded by a diffuse ill defined swelling.

2. Bruise 2" X 1 / 2 " on the left side of back 4" x 1 / 2" away from mid line and 2" x 1/4" below the lower end of left scapula bone. Pink red in appearance. Both the above injuries are simple in nature caused by same blunt object, duration 1/2 day old.

Injuries of Virpal Sharma

1. Lacerated wound 1" X 1/8" X 1/10" on the scalp in the mid line, horizontally placed. Whose base and margins are charred and tail end towards the right temple, surrounding hair are also charred and burnt.

2. Abrasion 1/2" X 1/20" on the fronto-lateral aspect of left shoulder joint 1 x 1/2" below the top of shoulder.

3. Bruise 2 x 1/2" X 1 x 1/4" on the front and top aspect of left shoulder joint. Pink red in appearance.

4. Abraded Bruise 1 x 3/4" X 1/2" on the postero-lateral aspect of the middle of left forearm. Pink red in appearance.

5. Bruise 1 x 1/4" X 1/2" on the back of left elbow joint. Pink red in appearance. All the above injuries are simple in nature. Injury No.1 appears to be caused by some fire-arm whereas all others are caused by some blunt object. Direction from 1/5" left to right. Duration 1/2 day old.

All injuries are simple in nature. Injury No.1 appears to be caused by some firearm whereas others are caused by blunt object. Duration ½ day old.

7. After registration of the said first information report, investigation of the case was entrusted to Diwan Singh (P.W.-4) on 10.5.1982. The Investigating Officer thereafter recorded the statement of Head Moharrir and visited the place of incident and recorded the statement of first informant Veerpal and on his pointing out prepared the site-plan, which has been marked as Exbt. Ka-4. He thereafter recorded the statement of Satyadev and other witnesses and after concluding the investigation, has submitted charge-sheet against the accused persons on 8.6.1982.

8. On the basis of said charge sheet, learned Magistrate has taken cognizance and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial, where it was registered as Session Trial No. 246 of 1983 (State vs. Khajan and others). The trial court on 27.8.1983 framed the charges against the

accused persons under Section 307 read with Section 34 IPC. The charges were read out and explained to the accused who did not plead guilty and claimed to be tried. Further vide order dated 4.10.1983 charges under Sections 307/149, 323/149, 147, 148 were also framed, which was read out to the accused respondents, who abjured the charges, pleaded not guilty and claimed to be tried.

9. During the course of trial, the prosecution in order to prove the guilt against the accused respondents have produced as many as two witnesses of fact and and two formal witnesses. Their testimony in brief is enumerated hereunder :-

10. Dr. D.P. Singh (P.W.-1) is the medical officer, who had medically examined two injured witnesses, namely Veerpal Singh and Ranvir Singh on 1.5.1982 at Primary Health Centre, Harduaganj, who are said to have been brought by constable Amar Singh, Police Station- Harduaganj. The injuries on the person of victims have already been mentioned above.

11. During cross examination, he stated that the duration of said injuries could vary 6 hours on either side. He further stated that the injuries found on the person of Ranvir could be manufactured. The injury No. 1 of Veerpal can also be manufactured/manipulated by touch of some heated iron object, however, injury nos. 2, 3, 4 and 5 can very well be manufactured.

12. Veerpal Sharma (P.W.-2) is the first informant of the case and injured witness. He, in his testimony has stated that the incident had taken place about one and half year back at about 11:30 p.m. in the khalian where Ranvir and Satyadev were also present. It was a moon lit night, when Khajan, Shamshad, Hanif, Ramji Lal, Edal and Habib reached khalian. Khajan and Shamshad were having country made pistol, Hanif and Ramji Lal were having farsa, Edal was having ballam and Habib was having a lathi. On their reaching, Khajan stated to kill him by opening fire and with an intention to assault, opened fire, however it missed the target then Habib armed with lathi and Edal armed with ballam started assaulting him from the reverse side of the ballam. Hanif and Ramji Lal asked Shamshad to assault him, on which Shamshad opened fire by a country made pistol, consequent to which, he received injuries on his head. Hanif and Habib armed with lathi also caused injuries to him and Ranvir also received injuries, who was hit by Habib with lathi. On raising alarm, number of witnesses reached there, however the assailants escaped.

13. It is further stated that father of appellant Edal had instituted a case under Section 307 IPC against him, in which, about one month and ten days back he was acquitted of the said offence, consequent to which, Edal was having enmity with him and on account of which he was assaulted by the accused persons. During cross examination, he stated that a case under Section 307 IPC was instituted against him, in which, he alongwith Amar Singh and Mohan were accused, in which, he has been acquitted, Habib was a witness in the said case. On the day of incident, he was present in the khalihan from the very morning alongwith Ranvir. His son reached the khalian at 7 a.m. bringing his food and did not return back home. The day of incident was a moon lit night, however, after one and a half hours of the incident it became dark. He had disclosed to the Investigating Officer that at the time when assailants reached

there, he was sitting on the cot and Khajan opened fire upon him. After the said fire, two assailants started assaulting him with lathi by giving four blows each, however he did not fell on the cot and stood up. When Hanif exhorted Shamshad to open fire, he fired a shot, however, he did not fell down but bent down. Fire shot by Khajan did not hit him. It is true that Khajan first fired upon him but it did not hit him then two other assailants hit him by a lathi and ballam and then Shamshad fired upon him. He did not state to the Investigating Officer that after Shamshad opened fire then he was assaulted by lathi and ballam. The said incident continued for about 5-6 minutes, however no blood fell on the cot or on the wearing apparels and only a very little blood oozed out from his head injury.

14. He did not find any pellets at the place of incident nor any blood and further denied the suggestion that he was not fired upon by a country made pistol and the injuries were manufactured. Injuries of Ranvir also did not bleed. It is wrong to state that he has lodged the report in collusion with the police. The injuries were examined at 9 a.m.

15. Ranvir Singh (P.W.-3) is the other eye witness and he stated that on the fateful night at about 11 p.m., he alongwith Veerpal and Satyadev were present at the khalian when Khajan, Shamshad, Hanif, Habib, Ramji Lal and Edal reached there, Veerpal questioned as to who it was, then Khajan stated to kill him and fired a shot, however, the shot did not hit Veerpal. Thereafter Habib and Edal started assaulting Veerpal by lathi and reverse side of the ballam. Then Hanif exhorted Shamshad to open fire, who shot a fire, which grazed through the head of Veerpal. He along with Veerpal received injuries. The witnesses were identified in moon light, who ran away towards the river. Khajan and Shamshad were having country made pistol, Hanif and Ramji Lal were having farsas, Edal was having ballam and Habib was having lathi. His injuries were examined by the doctor.

16. During cross examination, he stated that the report in respect of incident was scribed by Om Prakash in moon light. Veerpal injuries were seen by Moharrir. Veerpal injuries were caused by firearm. Veerpal was not wearing clothes smeared with blood. A very little blood oozed out from his wound. Shamshad fired upon Veerpal in a standing position facing each other from the distance of 2-3 paces. Shamshad first hit and then others hit. Veerpal was given 3-4 lathi blows. He was interrogated by the Investigating Officer after 8-10 days of the incident. He further stated that it is wrong to state that no incident took place and he received injuries.

17. Diwan Singh (P.W.-4) is the Investigating Officer of the instant case, who has recorded the statement of the witnesses and prepared the site plan and after concluding the investigation, had submitted charge sheet. During cross examination, he stated that Veerpal in his statement under Section 161 Cr.P.C. had disclosed that all the assailants came near him and stated to kill Veerpal then Khajan opened fire, which did not hit him and he narrowly escaped then all the accused-persons exhorted Shamshad to kill him, consequent to which, Shamshad opened fire though he bent down but still pellets hit his head. Hanif and Ramji Lal stood there holding farsa whereas Edal and Habib assaulted him by lathi and reverse side of the ballam.

18. Thereafter, statement of accused persons under Section 313 Cr.P.C. has been recorded by putting all the incriminating

circumstances to the accused-respondents. The accused-respondents denied the incident and clearly stated that on account of past enmity, they have been falsely implicated, however the defence has not led any evidence. The trial court after appreciating the evidence and material on record has held that the prosecution has failed to prove its case against the accused-respondent and thus acquitted all the accused-respondent by holding that rest of the accused except Ramji Lal are neither the relatives of Edal with whom victim Veerpal was having serious enmity but they are not even their friends and had no animosity with him, however just on account of fact that Veerpal was an accused in a case of attempt to murder of Manik father of Edal, in which case he had been acquitted just one month before and, as such, in order to settle their scores and to teach a lesson to Edal he has been falsely implicated in the present case. The trial court further stated that the accused-respondent is alleged to have opened fire upon the victim from a distance of 2-3 paces, however he received only a grazing injury on his head though he is said to have bent down when the fire was made. The trial court has further held that even Edal was armed with ballam but he is said to have assaulted Veerpal from its reverse side. Further Hanif and Ramji Lal though armed with farsa but they did not wield any farsa blow on him and merely stood there as a spectator, which circumstance appears to be highly improbable in the facts and circumstance of the case and creates a dent in the prosecution story.

19. The trial court has further held that even doctor, who noted the injuries on the person Veerpal pointed out that except injury No. 1, all the injuries of Veerpal are simple in nature. Even injury No. 1 is too superficial and could not necessarily be caused by firing. If the injury had been caused by pellets, some pellets could have been found in the injury but no X-ray was done. Even the doctor, who had examined the injuries has opined that the said injuries could be manipulated/manufactured. Admittedly, accused-respondents are said to have assaulted the victim, who were armed with lethal weapons like farsa, ballam, lathi and country made pistol but none of the injuries found on the person of the victim is grievous in nature and even the ballam is said to be used from the reverse side, as such, the prosecution story is found to be highly doubtful, on the basis of which, the accused-respondents are liable to be acquitted. Furthermore, firing was made only from a distance of 2-3 paces after extending their hands, yet only a grazing injury is said to have been caused to the victim, which in the facts and circumstances of the case appears to be highly improbable and not worth credence.

20. Learned Additional Government Advocate for the State has submitted that the testimony of P.W.-2 and P.W.-3, who are injured witnesses, inspires confidence and as such, their testimony cannot be lightly discarded. The assailants were known to witnesses P.W.1 and P.W. 2 and, as such, in the moon light they have been identified to have caused injuries. The medical examination report also corroborates the prosecution story and injury No. 1 caused to Veerpal cannot be self inflicted and therefore, the finding of acquittal recorded by the trial court is wholly illegal and liable to be set aside.

21. Per contra, learned counsel for the accused-respondent has submitted that Veerpal was an accused in an attempt to murder case of Manik, father of Edal, however, only about one and a half month

back, he was acquitted in the said case and after his acquittal Veerpal in order to settle his scores and to teach a lesson to Edal and his witnesses, concocted the present prosecution story and by manufacturing the injuries falsely implicated the accused respondents in the said case. Even witnesses of the aforesaid case and their relatives have been falsely implicated in the instant case. He has further submitted that the manner, in which, incident is said to have taken place and the injuries, which is said to have been caused to the injured do not match and infact are self inflicted, manipulated and manufactured, just with an intention to falsely implicate the accused-respondent as held by the trial court.

22. Learned counsel for the accused-respondents has further submitted that only one fire arm injury is said to have been received by Veerpal on his head when he bent down to rescue him, however if we go through the nature of the said injuries then possibility of said injury being manufactured or manipulated or self inflicted cannot be ruled out. Admittedly, even according to the statement of the witnesses, a very little blood oozed out from the said wound, which in normal course is not possible particularly when he is said to have been hit by a fire arm causing a pellet injury hitting his head. Even the doctor in his statement has stated that the said injury could be manufactured or manipulated.

23. Learned counsel for the accused-respondent has further submitted that there are material contradictions in the statement of P.W.-2 and P.W.-3 regarding manner of incident. Accused Hanif and Habib are cousins and Shamshad is their nephew. Since Habib was a witness in the case under Section 307 IPC and, as such, they have been falsely implicated. Even Edal and Ramji Lal are also cousins and were on inimical terms with Veerpal as he was prosecuted for the offence of attempt to murder of Manik, father of Edal in which Habib was a witness and in the backdrop of the said circumstance, the accused respondent has been falsely implicated.

24. The trial court after making a detail discussion and considering each and every aspect of the matter, has rightly recorded the finding of acquittal, which as per settled proposition of law, cannot be said to be perverse, illegal and impossible as held by the Hon'ble Supreme Court in several of its decision.

25. Having considered the rival submissions made by the learned counsel for the parties and taking into consideration the evidence adduced before the trial court, the prosecution case is that in the night at 11-30 p.m. Accused-persons, who were six in numbers reached at the khalian of the victim Veerpal and a shot was fired by accused-respondent Khajan, however, it missed the target, though it is said to have been fired from a distance of 2-3 paces. Moreover, the victim Veerpal have been assaulted by Habib with lathi and Edal from the reverse side of the ballam, which injuries are too superficial. It is further stated that on the exhortation of Hanif and Ramji Lal as per the statement of P.W.-2, Shamshad opened fire, which hit him on his head though P.W. 2 in his statement stated that all the accused persons exhorted to open fire. It is further stated that servant Ranvir was also assaulted, who too received simple injury on his person.

26. Now when we go through the injuries of the two injured persons, we find that their injuries are simple in nature and even as per the doctor opinion, the injuries

may be manipulated, manufactured or self inflicted. Only an injury said to be caused on the head of the victim Veerpal by firing from a country made pistol is noteworthy, however if we carefully look to the nature of the said injury, it also appears to be manipulated as admittedly even according to the prosecution own case, a very little blood oozed out from the said wound, which in our opinion, is not possible looking to the firearm injury allegedly caused to him. Had the said injury been caused by a pellet hitting his head, then blood would have considerably oozed out but even according to the prosecution own case, a very little blood oozed out, which neither fell on his clothes nor any blood was found on the cot nor any pellet or wad was recovered at the place of incident. To quote:

"यह झगड़ा करीब 5-6 मिनट हुआ था चारपाई या पहने हुए कपड़ो पर खून नहीं गिरा था मेरे सर की चोट से थोड़ा सा खून निकला था यह मैने नहीं देखा कि मौके पर छर्रे गिरे थे या नहीं, मैने खोखा कारतूस भी नहीं देखा।"

The said circumstance particularly creates a serious dent in the prosecution story and, in our opinion, makes it highly doubtful as held by the trial court.

27. Admittedly, even according to the prosecution own case, victim Veerpal was an accused in an attempt to murder case of Manik father of Edal, in which, very recently about one month back, he was acquitted of the said charge and the possibility that in order to settle personal scores and teach a lesson to Edal son of Manik and the witnesses of the said case, who have also been made an accused in the instant case and their close relatives have been falsely implicated. It is well settled principle of law that prior enmity cuts both ways. It may be motive for the commission of the crime but at the same time can well be used for false implication. Thus, in the backdrop of the said facts and circumstances, false implication of the accused-respondents cannot be ruled out.

28. The trial court by impugned judgment and order has considered each and every aspect of the matter and has passed an order acquitting the accused, which in our opinion is just, proper and legal. It is well settled principle of law that there is a presumption of innocence in favour of the accused, which further has been concretised by recording the finding of acquittal against the accused-respondent.

29. The law with regard to interference by the Appellate Court is very well crystallized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments, which are as reproduced below:

"13. In case of **Sadhu Saran Singh vs. State of U.P. (2016) 4 SCC 397**, the Supreme Court has held that:-

"In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction

in law to review and relook the entire evidence on which the order of acquittal is founded."

14. Similar, in case of **Harljan Bhala Teja vs. State of Gujarat (2016) 12 SCC 665**, the Supreme Court has held that:-

"No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open far the appellate court to express the right conclusion after re-appreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused."

30. This Court in the case of ***Rajesh Prasad v. State of Bihar and Another*** encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not distrub the finding of acquittal recorded by the trial court."

31. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised

within the four corners of the following principles:-

1. That the judgment of acquittal suffers from patent perversity;

2. That the same is based on a misreading/omission to consider material evidence on record;

3. That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

32. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court.

33. In view of the above settled principles of law and after examining the present case, we find that the first informant and the accused-respondents were on highly inimical terms. Even possibility of the injuries being self inflicted/manipulated or manufactured by the injured persons cannot be completely ruled out as rightly held by the trial court. All the injuries caused to two injured Veerpal and Ranvir are simple in nature. Even the injury on his head cannot be caused in the manner as described by the injured witness Veerpal by a fire arm hitting his head only a very little blood coming out from his wound creates serious dent in the prosecution story and makes it unreliable. The possibility of the said injury being manipulated as opined by the doctor (P.W.-1) cannot be ruled out.

34. In our opinion, the trial court has passed well reasoned and detailed order, which in view of settled principle of law regarding reversal of acquittal needs no interference by this Court. The view taken by the trial court cannot be said to be perverse, impossible and illegal and, as such, present Government Appeal filed by the State has no force and is accordingly **dismissed**.

35. Trial court's record be remitted back forthwith

(2024) 5 ILRA 1040
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 1974 of 1983

State of U.P. ...Appellant
Versus
Nanda & Ors. ...Respondents

Counsel for the Appellant:
A.G.A., Sri B.P. Gupta, Sri Bhagwat Prasad, Sri Prakhar Srivastava, Sri S.N. Mulla

Counsel for the Respondent:
Sri T. Rathore, Sri Archit Mandhyan, Sri Markanday Singh, Sri Nikhil Kumar, Sri Pramod Kumar Vishwakarma, Sri Rishabh Kumar Sri S.S. Rathore

Criminal Law-Indian Penal Code-1860-Sections 324, 307, 300 & 302- Government Appeal against the judgment and order whereby the accused-respondents have been acquitted of the charges leveled against them- A fight (Maarpeet) between the members of prosecution and the defence, in which members of both sides have caused injuries to each other in their private defence- That the accused persons exceeded their right of private defence by causing two injuries to the deceased Jagarnath by lathi and knives as well as by causing three injuries to the other deceased Nand Lal by knives and lathi and as many as five injuries to the first informant by lathi and knives as also causing one injury of spear to P.W.-4- On the other-hand both the

deceased had not exceeded their rights of private defence in causing injuries to the accused persons- Incident in question occurred on a spur of moment and in the heat of passion the same would be covered under the 4th Exception to Section 300 I.P.C- Trial court not examined the evidence led by the prosecution in correct perspective and the finding returned by it cannot be sustained-Acquittal of the accused-respondents reversed- Convicted for the offence under Part-1 of Section 304 of I.P.C. and sentenced to undergo six years rigorous imprisonment with fine of Rs. 10,000/- each.

Appeal partly allowed. (E-15)

List of Cases cited:

1. Jai Deo Vs St. of Pun. 1963 Cr.L.J. 493

2. Darshan Singh Vs St. of Pun. & anr.r (2010) 2 SCC 333

3. Genda Singh & ors.Vs St. of U. P. (2008) 11 SCC 791

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. Heard Mr. J.P. Tripathi, learned A.G.A. for the State and Mr. Nikhil Kumar, learned counsel for surviving accused-respondents as well as perused the record.

2. The instant Government Appeal is directed against the judgment and order dated 16th May, 1983 passed in Sessions Trial No. 138 of 1981 (State Vs. Nanda & 3 Others) arising out of Case Crime No. 106/81 of 1981 (71 of 1981), under Sections 324, 307 and 302 of I.P.C., Police Station-Machhali Shahr, District-Jaunpur, whereby the accused Nanda, Ram Siromani, Ram Janak, Ram Lagan have been acquitted of the charges levelled against them as the prosecution has failed to prove its case against the accused beyond reasonable doubt.

3. During the pendency of the instant Government Appeal, one of the accused-respondent, namely, Nanda has already expired and the instant Government Appeal qua accused-respondent Nanda has been abated by this Court vide order dated 6th October, 2021.

4. The prosecution case as borne out from the records of the present government appeal is that on a written report given by the informant/P.W.-1 Ram Murat (Ram Murti Patel) dated 8th July, 1981 (Exhibit-ka/1), first information report (Exhibit-Ka/7) came to be registered on 8th July, 1981 at 1650 hrs. (04:50 p.m.) at Police Station-Machhali Shahr, District-Jaunpur against the accused Nanda, Ram Siromani, Ram Janak, Ram Lagan under Sections 324, 307 and 302 of I.P.C. In the written report, it has been alleged by the informant/P.W.-1 that he was a resident of Viillage-Madhupur, Police Station- Badshahpur, Ditrict-Jaunpur. He lived with his family at Nandlal house, who was his maternal grandfather situated in Village Bhatadih, Police Station-Machhili Shahr, District-Jaunpur. The house of his cousin maternal uncle, namely, Jagannath was adjacent to his house. The sump (Nabdan) of his house was on the east side of the house. The sump (Nabdan) used to flow in front of the house of accused Nanda and then turn towards north going towards the fields. On 8th July, 1981, at around 01:00 p.m., when the accused Nanda along with his sons, namely, Ram Janak, Ram Shiromani and Ram Lagan was blocking the drain (Nali) of their sump, Jagannath forbade them, on which the accused ran towards him to beat him then Jagarnath raised an alarm, on which the informant/P.W.-1, his father-in-law Nanda Lal, his mother Smt. Piyari, mother of Jagarnath, namely, Smt. Angani rushed to rescue him. In the meanwhile, the accused Ram Janak, Ram Shiromani and Ram Lagan, who had pushed maternal

grandfather of the informant, namely, Nand Lal on the ground, also started assaulting him. The accused Ram Lagan with a stick, whereas the accused Ram Shiromani and Ram Janak assaulted the maternal grand-father of the informant with knives. The accused Nanda assaulted his mother with Lathi due to which she sustained injury on her back. The accused Ram Janak assaulted the mother of Jagarnath with knife due to which she sustained injuries on her hand. On hearing the alarm of informant's side, Ram Bahore and Babu Lal @ Kabu arrived and saw the occurrence and they scolded the accused. Due to the injuries caused by the accused, his maternal grand-father Nand Lal and his maternal uncle Jagarnath died on the spot. Their dead bodies were taken to the Police Station with the help of villagers through Eekka.

5. After lodging of the first information report, P.W.-9 Rajendra Singh Chauhan, who was the then Station House Officer of Police Station-Machhalishahr, prepared the inquest report of the dead bodies of the deceased Nand Lal and Jagarnath and other papers required for post-mortem. After keeping the dead bodies of both the deceased in sealed covers, the same was sent to the Mortuary for post-mortem through Constable Jata Shanker Mishra (P.W.-8) and Ram Shanker Singh. P.W.-9 the Investigating Officer, namely, Rajendra Singh Chauhan recorded the statement of informant/P.W.-1 at the Police Station. Thereafter P.W.9 reached the place of occurrence at 09:00 p.m. in the night for searching the accused. On the next day i.e. 9th July, 1981 in morning, P.W.-9 recorded the statement of Smt. Angana, Piyari, Ram Bahor and Babu Lal. He prepared the site plan. He also collected the blood stained earth and plain earth from the place of occurrence and prepared its recovery memo (Exhbit-ka/22) Blood was also found at the sitting place/room (Baithaka) of house of accused Nanda, which was collected by P.W.-9 and a recovery memo was prepared which was marked as Exhibit-ka/23. The accused Nanda was arrested on 9th July, 1981 whereas the other accused surrendered before the court concerned and they were sent to jail.

6. The injured Ram Murat had been sent to the Primary Health Centre, Machhalishahr for medical examination by P.W.-9, where he was medically examined by Dr. B.K. Singh (P.W.-6) on 8th July, 1981 at 05:00 p.m. who found following injuries on his person:

"1. Lacerated wound 4 cm x 1.2 cm x scalp deep, middle of head. Margin torn, jagged, irregular, swollen and bleeding present.

2- Lacerated wound 2.4 cm. x 04 cm x scalp deep, left side head 11 cm above the left ear. Margin torn jagged irregular and bleeding present.

3- Lacerated wound 1.5 cm x 0.4 cm x bone deep right side chin margin torn jagged irregular swollen and bleeding present.

4- Punctured wound rounded diameter 0.2 cm depth 2.4 cm right side back 2 cm below lower end of scalp 1.4 cm. deep upward and forward margin lacerated. Slit like opening bleeding present.

5- Abrasion 6 cm. x 1.5 cm back of left forearm. Lower part. Bleeding present."

7. P.W.-6 has opined that the first three injuries were caused by blunt object like lathi. Injury no.4 was caused by pointed weapon. The last injury was opined to have been caused by friction.

8. Other injured, namely, Smt. Piyari and Smt. Angana have also been examined by the same doctor i.e. Dr. B.K. Singh (P.W.-6) on the next day of incident i.e. 9th July, 1981 at 11:30 a.m. and 12:00 noon respectively. P.W.-6 Dr. B.K. Singh found only one swelling 2 cm x 0.4 cm right side buttock region upper part on the person of Smt. Piyari and he has opined that the same has been caused by blunt object, which is simple in nature. On the person of Smt. Angana, P.W.-6 has found a punctured wound 0.3 cm x 0.1 cm right palm back lateral surface. He also found no bleeding and margin of wound was joint with lymph of blood and margin was clean cut. He opined that the said injuries are simple in nature and has been caused by some pointed weapon.

9. An autopsy of the deceased Jagarnath has been conducted by Dr. A.K. Sarin (P.W.-7) on 9th July, 1981 at 11:30 p.m. and in the autopsy report (Exhibit-ka/2), the cause of death of the deceased Jagarnath has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

"1- Lacerated wound 2.5 cm x 0.5 cm x scalp deep on top of head. 13 cm. on above the root of nose.

2- Penetrating wound with sharp margins 2.5 cm x 1 cm x cavity deep on the left back of chest just medial to medial border of scapula 17 cm. below the left shoulder joint."

On internal examination of body of the deceased Jagarnath, P.W. 7 found six ounce of blood in the left side of chest. The left pleura and lung was lacerated. He also found that there was a punctured wound 1.5 cm. x 1 cm in the heart.

10. Dr. A.K. Sarin (P.W.-7) has also conducted the autopsy of the deceased Nand Lal on 9th July, 1981 at 12:30 p.m. and in the autopsy report (Exhibit-ka/3), the cause of death of the deceased Nand Lal has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

"1-Lacerated wound 1 cm x 0.3 cm x bone deep on right side of scalp 4.5 cm above the right ear.

2- Abrasion 1 cm x 0.4 cm over the left side neck 1.5 cm behind the left ear.

3- Penetrating wound 3 cm x 0.5 cm x cavity deep on left side chest 1 cm left mid line. 18 cm above the posterioriliac crest."

On internal examination of the body of deceased Nand Lal, P.W.-7 found 1 litre of blood in the left side of chest. He also found that the left pleura and lung was lacerated.

11. After conclusions of the statutory investigation under Chapter XII Cr.P.C. Rajendra Singh Chauhan (P.W.-9) has submitted the charge-sheet (Exhibit-Ka/24) against all the accused persons, namely, Nanda, Ram Janak, Ram Lagan and Ram Siromani.

12. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 7th November, 1981, the concerned Court framed charges against the accused-persons under Sections 323, 324/34, 323/34, 302/34.

13. The charges were read out and explained in Hindi to the accused, who pleaded not guilty and claimed to be tried.

14. The trial started and the prosecution has examined as many as 14 witnesses, who are as follows:-

1	Ram Murat (complainant) (cousin nephew and grand-	P.W.-1

	son of the deceased Jagarnath and Nand Lal respectively)/eye witness as per the prosecution	
2	Ram Bahor (resident of village of both the deceased)/another independent eye witness as per the prosecution	P.W.-2
3	Piyari Devi, daughter and cousin sister of both the deceased Nand Lal and Jagarnath respectively, injured eye-witness of the incident as per the prosecution	P.W.-3
4	Smt. Angana, mother of the deceased Jagarnath/another injured eye-witness of the incident as per the prosecution	P.W.-4
5	Babu Lal, resident of village of both the deceased/independent eye-witness of the incident, as per the prosecution	P.W.-5
6	Dr. B.K. Singh, Medical Officer, P.H.C., Macchalishahr, Jaunpur, who medically examined the injured Smt. Ram Piyari, Angana Devi and Raj Murat/Ram Murat, Smt. Indrani Devi	P.W.-6
7	Dr. A.K. Sarin, Orthopaedic Surgeon, District Hospital, Jaunpur, who conducted the post-mortem of the bodies of both the deceased Jagar Nath and Nand Lal	P.W.-7
8	Constable Jata Shanker Mishra, who took the dead bodies of both the deceased to the Mortuary along with Constable Ram Shanker Singh	P.W.-8
9	Sub-Inspector Rajendra Singh Chauhan, who investigated the case	P.W.-9
10	Devi Prasad, Clerk in the office of Chief Medical Officer, Jaunpur	P.W.-10
11	Constable Jagarnath Tiwari	P.W.-11
12	Moti Ram, who was one of the witness of recovery memos prepared by the Investigating Officer	P.W.-12
13	Constable Udhaybhan Pandey, the then incharge of Maalkhana Moharir, Sadar Jaunpur	P.W.-13
14	Sub-Inspector Amarjeet Singh Chauhan	P.W.-14

15. The defence has also adduced two witnesses in support of their case:

1	Dr. R.P. singh, Medical Officer, District-Jail, who medically examined the accused Nanda, Ram Shiromani, Ram Lagan	P.W.-14
2	Jokhai Singh, the then Village Pradhan, Village Bhattadeeh, Police Station-Machhalisharh, District-Jaunpur	D.W.-2

16. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 8th July, 1981	Ex.Ka./1

2	First Information Report dated 8th July, 1981	Ex.Ka./7
3	Recovery memo of "Gamchha"	Ex. Ka./31
4	Recovery memo of "Gamchha"	Ex. Ka/32
5	Recovery memo of blood stained earth and plain earth dated 9th July, 1981	Ex.Ka./22
6	Recovery memo of blood stained earth and plain earth dated 9th July, 1981	Ex.Ka./23
7	Post-mortem report of deceased Jagarnath dated 9th July, 1981	Ex.Ka./2
8	Post-mortem report of deceased Nand Lal dated 9th July, 1981	Ex.Ka./3
9	Site Plan with index dated 8th July, 1981	Ex.Ka./21
10	Report of chemical examiner dated 26th October, 1981	Ex.Ka./33

17. The defence in order to discard the prosecution case and also to establish to be a cross case has produce following documentary evidence, which have been marked as exhibits:

1	Medical examination report of accused Nanda dated 11th July, 1981	Ex.Kha./2
2	Medical examination report of accused Ram Siromani dated 14th July, 1981	Ex.Kha./3
3	Medical examination report of accused Ram Lagan dated 14th July, 1981	Ex. Kha./4

18. After completion of the prosecution evidence, statements of the accused-respondents Nanda, Ram Janak, Ram Lagan and Ram Siromani were recorded under Section 313 Cr.P.C. The accused-respondent Nanda, while giving their statements in the Court, denied the prosecution evidence. In counter, it has been stated by the accused that sitting place (Baithaka) of his house is situated towards north east of the house of deceased Nand Lal and Jagarnath. There was a charani (manger) (fodder eating pot) towards south west. When the deceased Jagarnath tried to demolish the said charani (manger), wife of accused Nanda, namely, Smt. Indrani objected on which the deceased Jagarnath started abusing her. Wife of accused Nanda, namely, Indrani also abused him. Consequently, the deceased Nand Lal, Jagarnath and the informant/PW..-1 Ram/Raj Murat came to the house of accused Nanda with lathi. They assaulted Indrani with lathi on her head. When the accused Nanda tried to rescue his wife, they assaulted him. When the accused Ram Lagan and Ram Siromani started rescuing the accused Nanda and his wife Indrani, the deceased Nand Lal, Jagarnath and Ram/Raj Murat (first informant) also assaulted them by lathi then the accused Ram Lagan and Ram Siromani wielded lathi and ballam in defence, on account of which the deceased Nand Lal, Jagarnath and Ram/Raj Murat (first informant) sustained injuries. During the above scuffle (marpeet), the injured Agana and Smt. Ram Piyari also came nearby and sustained injuries. When the accused Nanda was going to the police station with a written report to lodge the first information report, the Investigating Officer apprehended him on the way and his report

was snatched and thrown by him on the way. His report was not written by the Police. He also sustained injuries in the alleged scuffle (marpeet). His medical examination was conducted in the jail. His wife Indrani has been paralysed. The accused Ram Lagan and Ram Siromani reiterated the same version as stated by the accused Nanda. Fourth accused Ram Janak denied his involvement in the alleged crime by stating that at the time of occurrence, he was not present.

19. The medical examination of wife of the accused Nanda, namely, Indrani was conducted by same doctor, who has medically examined the injured Ram/Raj Murat (first informant), injured Smt. Angana and Smt. Ram Piyari i.e. Dr. B.K. Singh (P.W.-6) on 10th July, 1981 at 03:00 p.m. He found following injuries on the person of Indrani:

"1. Lacerated wound 1.3 cm x 0.3 cm x scalp deep on right side of head 10 cm. above right ear. Margin torn jagged irregular, swollen pus was present with swelling 3.8 cm x 2.4 cm. around the injury. P.W.-6 advised X-ray. According to him, the injury found on the person of Indrani was about 48 hours old and caused by blunt object."

20. The accused Nanda was medically examined in jail by D.W.-1 Dr. R.P. Singh, Medical Officer District Jail, Jaunpur on 11th July, 1981 at 11:00 a.m., who found following injuries on his person:

"1- Abraded contusion obliquely on the right side of back extending downwards medially by from the inferior angle of scapular towards back bone.

2- Lacerated wound dressing done on the back of left forearm 3 ½ " x 1/4" x muscle deep one inch above wrist joint.

3- Traumatic swelling 2" x 1/2" on the back of left thumb."

D.W.-1 opined that all injuries are simple in nature and the same have been caused by blunt object.

21. D.W.-1 also medically examined the accused Ram Siromani in jail on 14th July, 1981 at 10:30 a.m. and he found following injuries on his person:

"1. Contusion 5" x 1/2" obliquely on the left side of back over scapular region.

2. Contusion 2"x1/2" transversely on the left side of back 2" below inferior angle of scapula.

3. Contusion of black colour 3" x 1" transversely on the right side of back 7" below inferior angle of right scapula.

4- Contusion 2" x 1" on the right side of back transversely 1/2" above injury no.3.

5- Abrasion 2" x 1/2" scabbed obliquely on the outer part of left arm 6" below shoulder joint."

Qua injuries found on the body of accused Ram Siromani, D.W.-1 opined that all injuries simple, which have been caused by blunt object about 5-6 days back.

22. The accused Ram Lagan has also been examined by D.W.-1 on 14th July, 1981 at 10:45 a.m. in District Jail Janpur and following injuries were found on his person:

"1- Multiple scabbed abrasion in the area of 3" x 1" on the right shoulder.

2- Multiple scabbed abrasion (in some scabbing shred off) in the area of 3" x

2" on the right side of back 2" below nape of neck.

3- Scabbed abrasion in the area of 1" x 1" on the left side of back 1" below nape of neck 1/2" lateral to vertebral column.

4- Scabbed abrasion in the area of 3" x 2" on the left arm on inner aspect 3" below axilla with scabbing shredding off.

5- Abrasion scabbed 1/2" x1/4" on the inner part of right leg just above medial malleolus."

Doctor i.e. D.W.-1 found that injuries on the body of accused Ram Lagan were simple and caused by friction against hard substance and blunt weapon and the same has been caused about 5 to 6 days back.

23. On the basis of above evidence oral as well as documentary adduced during the course of trial, while accepting the argument of the learned counsel for the accused that the murder of both the deceased has been committed in private defence, the trial court has recorded its finding that all the eye witnesses stated that Maarpeet (quarrel) took place for more than two minutes. They also stated that several blows were given to the person of the deceased Jagarnath and Nand Lal and because of that both the deceased would have received aforesaid meager number of injuries. The circumstance of the case read with the injuries on the bodies of both the deceased Nand Lal and Jagarnath will go to show that there could not be any intention of the accused to commit murder of both the deceased. On the basis of such finding, the trial court while accepting the plea of the learned counsel for the accused that the murder of both the deceased has been committed in private defence by the accused, has opined that during the maarpeet, the wife of the accused Nanda, namely, Indrani had sustained injuries on the top of her head. Therefore, seeing the injuries on her/his vital part of the body on any person, the relatives of such person like husband, brother son and sister etc. could have an apprehension in their mind that in case they did not exercise their right of private defence, a grievous injury or death would be the ultimate result. In such circumstances, any person exercising the right of private defence of body has got a right to voluntary cause death.

24. The trial court has further recorded that the nature of injuries on the person of both the deceased Jagarnath and Nand Lal indicated that the accused had not exceeded his right more than what was actually required. Throughout it was not the case of the prosecution during the course of trial that the medical examination report qua the injury on the person of Smt. Indrani, which has been prepared by the same doctor i.e. P.W.-6 Dr. B.K. Singh, who also medically examined the prosecution witnesses i.e. first informant/P.W.-1 Ram/Raj Murat, Smt. Piyari and Smt. Angana, was fabricated. As such, the injury report of Smt. Indrani cannot be doubted. In view of those circumstances, the trial court has expressed its opinion that the accused had every right to exercise their right of private defence of body and they had not exceeded it. The injuries inflicted by the accused were sufficient and not in excess of the right of defence.

25. Then, the trial court has recorded that the defence has satisfactorily explained qua the injuries found on the person of Smt. Piryari and Smt. Agana. Both of them had one injury each. The trial court considering the statements of the accused Nanda, Ram Siromani and Ram Lagan given under Section 313 Cr.P.C. and relying upon

their injuries found on their bodies by D.W.-1 in Jail, has opined that the possibility as stated by the accused that the injuries sustained by both the deceased during the course of Maarpeet resulting in their death, have been caused accidentally and not intentionally in private defence, cannot be ruled out.

26. So far as the injuries sustained by the first informant/P.W.-1 Ram/Raj Murat is concerned, the trial court has recorded that it was stated that he was the aggressor, hence he could have suffered injuries found on his person during the Maarpeet. Such circumstance also support the defence theory of private defence. The trial court has disbelieved testimony of first informant/P.W.-1 Raj/Ram Murat while observing that he has made improvement in the prosecution story. The first information report was not lodged by him as the same appears to have been dictated by the Investigating Officer. Even though P.W.-1 tried to support the prosecution story but he has not explained the injuries on the person of the accused and their family member, namely, Smt. Indrani. Similarly, the trial court has also discarded the testimonies of other prosecution witnesses i.e. P.W.-2, P.W.-3, P.W.-4, P.W.-5, who are alleged to be eye-witnesses of the incident.

27. Relying upon the judgment in the case of State of U.P. VS. Ghanshyam, the trial court has opined that it is clear that the accused did not inflict more injury than what was necessary. Babu Lal (P.W.-5) is simply exaggerating his version are trying to give a colour of atrocity to the accused.

28. On the basis of such finding and observation, the trial court has come to the conclusion that the prosecution version was not at all reliable. The accused had exercised the right of private defence of their bodies and their family member. They were within their rights. They had not exceeded. Therefore, the trial court had found that prosecution has failed to prove its case. The accused therefore, deserve acquittal. Consequently, the trial court has acquitted the accused Nanda, Ram Siromani, Ram Lagan and Ram Janak of the charges levelled against them.

29. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the State has preferred the present Government Appeal against the impugned judgment of acquittal of accused-respondents, namely, Nanda, Ram Siromani, Ram Lagan and Ram Janak by the trial court.

30. Assailing the impugned judgment and order of acquittal, , the learned A.G.A. for the State in the present government appeal, has advanced following submissions:

(i). The first information report (Exhibit-ka/7) lodged on 8th July, 1981 at 04:50 p.m. on the basis of written report given by the first informant/P.W.-1 Ram/Raj Murat on 8th July, 1981 is prompt first information report.

(ii) There is clinching and direct evidence against the accused by way of testimonies of ocular-cum-injured witnesses i.e. P.W.-1 Raj/Ram Murat, P.W.-3 Smt. Piyari Devi and P.W.-4 Smt. Angana Devi, independent eye witnesses i.e. P.W.2 Ram Bahor and P.W.-5 Babu Lal and the same has also been supported by the medical and other material evidence as available on trial court record.

(iii) Since the incident took in broad day light i.e. at 01:00 p.m., all the prosecution witnesses have fully identified

the accused persons while commissioning of the alleged offence and also assigned their role in such offence successfully.

(iv) There is strong motive for the accused-respondents to commit the alleged offence including the heinous murder of both the deceased Nand Lal and Jagarnath, as the accused annoyed with the sump (Nabdan) of the deceased Nand Lal, which used to flow in front of the house of accused Nanda and then turning north heading towards the fields and also there were village parti bandi between both the families.

(iv) Except the minor inconsistencies/contradictions, the testimonies of all the prosecution witnesses i.e. P.W.-1 to P.W.-5 are throughout consistent either in their-examination-in-chief and also in their cross-examinations, which have also been supported by the other prosecution witnesses like Investigating Officer, who conducted the investigation of the case and the Doctor who conducted the post-mortem examinations of the bodies of both the deceased and the Doctor who conducted the medical examinations of the three injured prosecution witnesses.

(v) The site plan and the recovery memos of blood stained earth and plain earth and Gamchha have also supported the prosecution case.

(vi) The defence has failed to establish its theory of private defence. It is not a cross case in which it is alleged by the defence that they have committed the offence in private defence. It has not been established by the accused-respondent that the injuries on the person of the accused and Smt. Indrani have been inflicted by the members of prosecution side in the same incident as alleged by prosecution. It is also pertinent to mention here that with regard to the incident in which such injuries have been sustained by accused, no complaint or first information report was lodged by the accused at the police station concerned.

vii. The medical examinations of accused have not been been conducted through Majroobi Chiththi of police station concerned. Even otherwise, the medical examination reports of accused have been prepared in private capacity after two days of the actual incident.

31. On the basis of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye witnesses, namely, P.W.-1 to P.W.-5 who are consistent throughout in their examination-in-chief and the cross-examinations inspire confidence in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of the deceased Jagarnath and Nand Lal and the same has also been supported by the medical evidence in all material particulars, therefore, trial court has committed gross error in acquitting the accused-respondents. Despite the defence having been failed to establish its case of self-defence and the trial court has recorded its finding that the accused have rightly exercise their right of private defence, the trial court while ignoring the entire evidence produced by the prosecution, has passed the impugned judgment, which suffers from illegality and perversity. As such the same is liable to be set aside and the accused-respondents are liable to be convicted for the offence punishable under Section 302 I.P.C. Hence, the instant Government Appeal filed by the State is liable to be allowed.

32. On the other-hand, learned counsel for the accused-respondents have advanced following counter submissions:

(i). The first information report lodged on 8th July, 1981 at 04:50 p.m. on the

basis of written report of the first informant/P.W.-1 dated 8th July, 1981 is ante time.

(ii) Since the Investigating Officer/P.W.-9 has not indicated the sump (Naabdan) of the deceased Nand Lal in the site plan (exhibit-ka/21), which was being demolished by the accused persons including accused Nanda due to which the alleged incident took place, the genesis of the crime is doubtful.

(iii) Non recovery of crime weapon i.e. knife/lathi/ballam or any other weapon makes the prosecution case doubtful.

(iv). The manner in which the injuries of the accused Nanda, Ram Siromani and Ram Lagan as also the injury of wife of accused Nanda, namely, Indrani have been caused, has not been explained by the prosecution.

(iv). As per the statement of P.W.-6 Dr. B.K. Singh, who medically examined the first informant/P.W.-1 Raj/Ram Murat, P.W.-3 Smt. Ram Piyari and P.W.-4 Smt. Agana as also the wife of accused Nanda, Smt. Indrani, in his cross-examination has stated that the first informant/P.W.-1 has sustained four injuries,whereas P.W.-3 Ram Piyari and P.W.-4 Smt. Angana have sustained one injury each. Such injuries on the person of P.W.-1, P.W.-3 and P.W.-4 have been caused at about 11:00 a.m. on 8th July, 1981. On the other-hand as per the prosecution case, the incident occurred on 8th Juy, 1981 at about 1:00 p.m. On the basis of aforesaid testimony of P.W.-6, it is urged that the time of incident has been changed by the prosecution and has reported that the incident occurred at 01:00 p.m.

(v). The sitting place (Baithaka) of the house of accused Nanda is situated towards north east of the house of deceased Nand Lal and Jagarnath. There was a charani (manger) (fodder eating pot) towards south west. When the deceased Jagarnath tried to demolish the said charani (manger), wife of accused Nanda, namely, Smt. Indrani objected on which the deceased Jagarnath started abusing her. Wife of accused Nanda, namely, Indrani also abused him, as a result whereof the deceased Nand Lal, Jagarnath and the informant/PW..-1 Ram/Raj Murat came with lathi and assaulted Indrani with lathi on her head. When the accused Nanda tried to rescue his wife, they assaulted him also. Similarly, when the accused Ram Lagan and Ram Siromani started rescuing the accused Nanda and his wife Indrani, the deceased Nand Lal, Jagarnath and Ram/Raj Murat (first informant) also assaulted them by lathi. Then the accused Ram Lagan and Ram Siromani wielded lathi and ballam (bhala) in defence, on account of which the deceased Nand Lal, Jagarnath and Ram/Raj Murat (first informant) sustained injuries. During the aforesaid Maarpeet, P.W.-3 Ram Pryari and P.W.-4 Smt. Angana also arrived and sustained injuries. The above maarpeet took place suddenly without any intention to commit any crime in which members of both sides sustained injuries. The injuries on the persons of both the deceased and three injured of prosecution side have been caused by the accused in their private defence without any motive and intention to commit the same. The death of the deceased occurred incidentally in the aforesaid Maarpeet. The accused have not exceeded their right of private defence. It is, therefore, clear that accused had inflicted the injuries on the person of the members of the prosecution side in exercise of the right of self-defence.

On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that as this is a case of weak evidence, the impugned judgment and order of acquittal does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As

such the present Government Appeal filed by the State is liable to be dismissed.

33. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

34. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of evidence on record beyond reasonable doubt?

35. Before entering into the merits of the case set up by the learned counsel for the accused-appellant in criminal appeal, learned counsel for the accused-respondent in government appeal and the learned A.G.A. as also the learned counsel for the first informant in both the appeals qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses as well as the defence witnesses.

36. First Informant/P.W.-1 Raj/Ram Murat stated in his examination-in-chief that his father worked in a coal mine in West Bengal for 18 to 19 years. His mother name was Smt. Piyari (P.W.-3) and the deceased Nand Lal was his maternal father-in-law, who had four daughters including P.W.-3, Piyari, Chamelia, Bela and Harsu. On the asking of the deceased Nand Lal, P.W.-1 and his mother P.W.-3 stayed at the place of the deceased Nand Lal for taking care of him and also his fields for the last 17-18 years. The deceased Nand Lal executed a will deed of three bighas' land in his favour and his younger brother Rajnath. The deceased Jagarnath seemed to be the nephew of the deceased Nand Lal and lived with him.

37. This witness further stated that name of father of accused Nanda was Shiv Nath and other accused, namely, Ram Janak, Ram Shiroman and Ram Lagan were his sons. The house of accused Nanda was 7-8 steps east of his house. Nanda's sitting place(Baithaka) was three to four steps north of his house. The sump of house of the deceased Nand Lal was on the east side. The water from his house turned east leaving two hands west of Nanda's sitting place (Baithaka) and fell into Jagarnath's field through a drain. The said sump had been there ever since house of the deceased Nand Lal was built.

38. This witness further stated that it was after 1 o'clock in the day and he was in his house. Hearing the alarm of the deceased Jagarnath and his maternal father-in-law Nand Lal, he, his mother Piyari and his maternal mother-in-law Angani/Angana, who was mother of the deceased Jagarnath also came out from their house. They saw that the accused Nanda, Ram Siromani, Ram Janak and Ram Lagan were blocking his drain and the deceased Jagarnath were objecting on which the accused pounced to beat him. The accused Ram Janak and Ram Shiromani were having knives in their hands, whereas the accused Nanda and Ram Lagan were armed with lathi. The deceased Jagarnath had been assaulted by accused Ram Janak with knife and Ram Lagan with lathi. The deceased Jagarnath ran away after suffering injuries and fell in the courtyard of his house and died there. Thereafter the accused Nanda, Ram Shiromani, Ramjanak and Ramlagan picked up his maternal grandfather Nand Lal and threw him down. The accused Ram Shiromani attacked him with a knife and Ram Lagan and Nanda

attacked him with sticks. Ram Janak later attacked him with a knife due to which the deceased Nandlal sustained injuries and fell near a Neem tree and died there.

39. This witness again stated that his mother Piyari and Angani ran to rescue the deceased Nandlal, then all the accused started beating them too. The accused Ram Shiromani hit P.W. 1 with a knife and accused Ram Lagan and Nanda hit him with sticks. The accused Nanda hit his mother on the back with a stick and Angani was hit by the accused Ram Janak with a knife. After the incident, P.W.-2 Rambahor and P.W.-5 Babu Lal reached there and saw the entire incident. Blood was spilled on the places where Jagannath and Nandlal fell. After the incident the accused ran towards their house. P.W.-1 was feeling slightly in a fainting state, therefore, it was not possible for him to write a report in that regard in his handwriting. Due to this, a report was written by Swaminath on his dictation. The dead bodies of Jagannath and Nand Lal were brought to the road with the help of the villagers and after crossing the road, he came to Machhilishahar police station, where his statement was recorded by the Investigating Officer.

40. This witness again stated that since his mother Piyari and Angani were crying a lot and were in grief that is why their medical examinations were conducted on the next date of incident i.e. 9th July, 1981 at Primary Health Centre, Machhalishahr.

41. In his cross-examination, P.W.1 stated that the drain is on the land of deceased Jagarnath' and the accused Nanda and his son had no connection with that land. The door of Nanda's house was towards the north and his window was in the west while his sitting place was on the empty land in the east. This witness stated that there had been a drain ever since the house was built. This witness denied that there was neither a drain from the west of Baithaka (sitting place) of accused Nanda nor water ever flowed from there. He stated that in his statement recorded by the Investigating Officer, he categorically stated as to who killed Jagarnath and with what weapon. He also stated that Jagarnath ran away after getting injured and went into the house and died. All four accused had thrown Nandlal on the side of his face.

42. This witness has again denied that they had caused injuries to the wife of the accused Nanda, namely, Indrani, accused Nanda, Ram Siromani. He denied that Indrani sustained injuries on her head. They had no weapon in their hands. He further denied that the deceased Jagarnath and Nandlal went to the doorstep of accused Nanda with sticks and started beating Indrani, when accused Nanda tried to rescue her, they started beating him too. Again this witness denied that when the accused Ram Lagan and Ram Shiromani started rescuing their parents, they were also beaten by them. This witness denied that when the accused Nanda was going to the Police Station to lodge the first information report, the Investigating Officer apprehended him near Jamuhar and after tearing his report, he was sent in the police lock up.

43. This witness stated that it was possible that the accused Nanda may have fallen in the Maarpeet also due to which he sustained injuries. This witness again denied that while they were fighting at the doorstep of accused Nanda, P.W.-3 Piyari and P.W.-4 Angana intervened in the fight and got injured. He also stated that he did know whether P.W.-5 Babulal had initiated any

case against Ram Nath before the incident of murder or not. He also did not know whether the deceased Nandlal or his predecessors were witnesses in any case.

44. P.W.-2 Ram Bahor, who is a star independent witness stated in his examination-in-chief that 13 months back the incident occurred. It was 1 o'clock in the day. Since a man from his community had died, he was going to his house, which was in his village. The house of his community man was west of the house of P.W.-1 Ram Murat. He heard a noise at the door of Jagarnath near the mango tree and went there and saw that Jagarnath was speaking and the accused Ram Lagan, Nanda, Ram Janak and Ram Shiromani were blocking the drain. The drain was flowing over two hands of Nanda's sitting place (Baithaka). The deceased Jagannath was objecting not to do the same on which the accused rushed to hit Jagarnath. The accused Ram Janak hit Jagarnath with a knife and Ram Lagan hit him with a stick. After sustaining injuries, the deceased Jagarnath ran away in his house and he fell in the courtyard and died there. Ram Lagan hit Nandlal with a stick and Ram Shiromani with a knife. When P.W.-1 Raj Murat ran to rescue the deceased Nandlal, he was hit by the accused Nanda with lathi, accused Ram Siromani hit him with lathi (after some time in his statement, this witness stated that Ram Siromani hit him by knife). This witness further stated that when P.W.-3 Piyari ran to rescue his son, the accused Nanda hit her with a stick. Angana was hit by accused Ram Janak with knife. After sustaining injuries, the deceased fell and died near a Neem tree. There was blood spilled over where Nandlal and Jagannath fell and died. Apart from this witness, P.W.5 Babu Lal was also present at the spot.

45. In his cross-examination, this witness stated that Indrani, Ram Shiromani, Nanda and Ram Lagan were not hit by anyone nor they were caused any injuries. He reached the police station at four in the evening. He disclosed to the Investigating Officer the manner in which the deceased Jagarnath and Nandlal died.

46. This witness again stated that the deceased Nandlal had fallen due to injury at the spot. The accused Nanda, his wife and sons were not injured. The exit of the sitting place was on the south side. He further stated that the deceased Jagarnath was hit by the accused for 2-3 minutes due to which he sustained injuries. The deceased Nandlal was also assaulted by the assailants for 2- 3 minutes. P.W.-1 Raj Murat was given 10-15 blows by stick.

47. P.W.-3 Smt. Ram Piyari stated that the deceased Nandlal was her father. She was staying at her father’s house for the last twenty years prior to the incident. It was 01:00 o'clock in the afternoon, when she was in her house at the relevant time. On the alarm of Jagarnath, she came out from her house. Her aunt Angani, her father Nandlal and her son Rajmurat also came out and they saw that accused Nanda, Ram Shiromani and Ram Lagan were blocking the drain (Nali). When the deceased Jagarnath objected, all the accused rushed to hit him. The accused Ram Janak and Ram Shiromani were having knives and accused Nanda and Ram Lagan armed with lathi. The accused Ram Janak hit Jagarnath with a knife and accused Nanda with a stick. The deceased Jagarnath ran away after sustaining injuries and fell in the courtyard, where he died. After hitting Jagarnath, the accused thrashed father of P.W.-3. The accused Ram Shiromani attacked him with a knife, Ram Lagan with a stick and Ram Janak with a knife due to which the deceased Nand Lal fell near the Neem tree and died.

48. This witness further stated that all the four accused set out to hit her son P.W.-1 Raj Murat. Raj Murat was hit by accused Ram Janak and Ram Shiromani with knives and accused Nanda and Ram Lagan with sticks. When P.W.-3 went to rescue her son, the accused hit her on her back with a stick. The accused Ram Janak hit her aunt with a knife. P.W.-5 Babulal and P.W.-2 Rambahor had reached the spot and saw the incident. After fighting, the accused entered their house.

49. In her cross-examination also P.W.-3 supports the prosecution version and she is consistent with the version as stated in her examination-in-chief. She also denied that the deceased Nandlal, Jagarnath and first informant/P.W.-1 Raj Murat went at the doorstep of accused Nanda with lathi and hit Indrani and Nanda on the issue of removing of manger of accused Nanda and when accused Ram Lagan ran to rescue the other accused Ram Shiromani, he was also hit. In their defense they also hit them. This witness also denied that she was not hit by the accused and she and Angana (P.W.-4) had sustained injuries when they were intervened in the Maarpeet to rescue.

50. P.W.-4 Angana, mother of the deceased Jagarnath reiterated the same version in her examination-in-chief as stated by P.W.-1, P.W.-2 and P.W.-3. In her cross-examination, she stated that she disclosed to the Investigating Officer that the accused hit her with knife. She also disclosed that the accused Ram Janak attacked the deceased Nand Lal with knife.

51. P.W.-5 Babu Lal, second star independent eye witness of the prosecution stated in his examination-in-chief that he knew the deceased Nand Lal and Jagarnath. The incident took place 13 months back. At 01:00 o'clock in the day, hearing the alarm of the deceased Jagannath from his house, he reached the spot. He saw that accused Nanda, Ram Janak, Ram Lagan, Ram Shiromani were blocking the drain. When Jagarnath was objecting loudly, P.W.-3 Piyari, P.W.-4 Angana and P.W.-1 Raj Murat also came out of the house and they also objected. Accused Ram Janak hit Jagarnath with knife and Ram Lagan hit him with stick. Jagarnath sustained injuries and ran away towards his house and fell and died there. When the deceased Nandlal bent down to rescue Jagarnath, all four accused caught him and the accused Ram Lagan hit him with lathi, Ram Shiromani with knife. The accused Ram Janak also hit Nand Lal with knife. After hitting Nand Lal, the accused Ram Janak hit P.W.-4 Angana with knife. P.W.-1 Ram/Raj Murat was also chased by the accused and he was hit by accused Ram Shiroman by knife and accused Ram Lagan and Nanda by lathi. When P.W.-3 Piyari ran to rescue, she was also beaten by the accused Nanda by lathi. Beside him, P.W.-2 Ram Bahor also reached at the spot. The deceased Nand Lal fell near the Neem tree.

52. In the cross-examination this witness is consistent with the version as stated in examination-in-chief. He fully supports the prosecution case.

53. Dr. B.K. Singh, Medical Officer has been examined as P.W.-6. He medically examined the injured/ P.W.-3 Ram Piyari on 9th July, 1981 at 11:30 a.m. she was taken by the Constable Kashi Pal. He found one injury on her body. He opined that the injury was simple and was caused by a blunt object such as a lathi.

54. This witness has also examined the injured/P.W.-4 Angana Devi at 12:00

noon on the same day i.e. 9th July, 1981. She was also taken by Constable Kashi Pal. He found one injury on her body. In his opinion, the injury found on the body of Angana was simple and caused by some sharp weapon. It can come from the tip of a knife.

55. This witness also examined the injured/P.W.-1/first informant Raj/Ram Murat, who was taken by Constable Kripa Shanker. He found as many as five injuries on the body of P.W.-1. This witness opined that apart from injury no. 4 of P.W.-1, other injuries were caused by some blunt weapon like a lathi. Injury No. 4 was caused by a sharp edge weapon, which could not come with a knife.

56. This witness stated in his examination in chief that the injuries of the above three injured might have occurred at 1 o'clock on 8th July, 1981.

57. On 10th July, 1981 at 03:00 p.m. this witness also examined wife of the accused Nanda, namely, Smt. Indrani and found following injuries on her person:

"Cracked wound 1.3 cm X 3 cm x on the right side of the head from the right ear. There is swelling along with it, which is 3.8 cm scalp deep till the bone and upwards 2.4 cm around the injury. Pus was present in the injury."

58. Seeing the said injury, P.W.6 advised for its X-ray and the same was kept under observation. P.W.6 opined that the said injury was caused by some blunt object like a lathi. The duration of the said injury was within 2 days.

59. Dr. A.K. Sarin, Orthopaedic Surgeon, who has conducted the post-mortem examinations of both the deceased, namely, Jagarnath and Nand Lal, has been examined as P.W.-7. P.W.-7 found two injuries on the person of the deceased Jagarnath. He opined that the death of the deceased was due to shock and bleeding resulting from injury No. 2. On the person of the deceased Nand Lal, this witness found three injuries and in his opinion, his death was due to shock and excessive bleeding resulting from injury no.3.

60. This witness has further opined that both the deceased might have died on 8th July, 1981 at 01:00 o'clock on the day. Injury no.2 found on the person of the deceased Jagarnath could have been caused by spear, whereas injury no.3 found on the body of the deceased Nand Lal could also have been caused by a spear. Nandlal's injury no. 2 could have been caused by friction with a pebble etc. after falling.

61. Constable Jata Shanker Mishra has been examined as P.W.-8. He stated that he had taken both the corpse of the deceased to the Government Hospital at Jaunpur for post-mortem examinations.

62. P.W.-9 Sub-Inspector Rajendra Singh Chauhan was the investigating officer. He stated in his examination-in-chief that dead bodies of the deceased Jagarnath and Nandlal were brought to the police station. He appointed Panch witnesses and prepared their inquest report. He also prepared photo lash, challan lash, letter to the Chief Medical Officer for post mortem examination. He stated that he has recorded the statements of first informant (P.W.-1), other witnesses, namely, Ram Chandra, Sahdeo and panch witnesses of inquest. On the next day of incident, this witness also recorded the statements of

P.W.-4 Angana, P.W.-3 Ram Pyaari, PW.-2 Ram Bahor and P.W.-5 Babu Lal. He also prepared the site plan.

63. This witness further stated that after preparing the site plan, he collected the blood stained earth and plain earth from the courtyard of Jagarnath's house and prepared their recovery memos in front of the witnesses. This witness further stated that he collected the blood stained earth and plain earth from the west side of sitting place (Baithaka) of the accused Nanda and also prepared its recovery memos. He further stated that he arrested the accused Nanda on 9th July, 1981. On 19th July, 1981, after completing the statutory investigation, he submitted the charge-sheet against the accused persons. On the same day i.e. 19th July, 1981, he also prepared the report for sending the clothes taken from the bodies of the deceased, blood stained earth and plain earth for chemical examination to Agra.

64. In his cross-examination, this witness stated that when he arrested the accused Nanda near Jamuhar, there were injuries on his body. He denied that he had arrested Nanda on 8th July, 1981 at 2-3 o'clock on the day and kept him under arrest. He also denied the factum that at the time of his arrest, accused Nanda had any written report in his hand. He again denied that he tore the written report of accused Nanda and did not lodge the same.

65. This witness further stated that he did not know whether there was any manger (charani) near the house of accused Nanda or not. He denied that there were two mangers (charani) there and he deliberately did not show them in the site plan. He also did not know it any of the two mangers had demolished.

66. This witness again stated that P.W.-5 Babu Lal disclosed him that the accused Nanda and others wanted to block the drain. He also disclosed him that when he reached there, he saw that the accused named in the first information report, namely, Nanda, Ram Janak, Ram Shiromani, Ram Lagan and both the deceased Jagarnath, Nandlal, injured Raj Murat, Mrs. Piyari and Angana were present there. He denied that he had set up a false case and prepared a fabricated map and deliberately concealed the truth and submitted a false charge sheet.

67. P.W.-10 Devi Prasad was the clerk in the office of Chief Medical Officer, Jaunpur. Constable Jagarnath Tiwari has been examined as P.W.-11 and he stated that he deposited the recovered materials like blood stained earth and plain earth, seal mohar in the Sadar Malkhana Jaunpur. Moti Ram, who has been examined as P.W.-12 being the witness of recovery memos prepared qua blood stained earth and plain earth collected by the Investigating Officer. P.W.-13 Head Constable Udai Bhan Pandey was the Moharir of Sadar Malkhana and produced the register before the trial court. Sub-Inspector Amarjeet Singh Chauhan has been examined as P.W.-14. He was the second investigating officer along with first investigating officer P.W.-9.

68. Dr. R.P. Singh, Medical Officer, District Jail, Jaunpur has been examined as D.W.-1. He stated that he medically examined the three accused, namely, Nanda, Ram Lagan and Ram Shiroman in jail. He stated that he found three injuries on the person of accused Nanda. In his opinion, all injuries were simple and were inflicted by some blunt object such as a lathi and such injuries were three days old. This witness found as many as five injuries on the person of Ram Shiroman. D.W.-1 opined that all injuries of accused Ram Shiroman were

simple in nature and could have been caused by some blunt object like lathi. He also opined that at the time of examination, the injuries of accused Ram Shiroman were 5 to 6 days old.

69. This witness also found five injuries on the person of accused Ram Lagan. Similarly, in his opinion, all injuries of Ram Lagan were simple and could have been caused by blunt object such as lathi, which was 5 to 6 days old. He also opined that the injuries found on the bodies of three accused Nanda, Ram Lagan and Ram Shiroman were inflicted on 8th July, 1981 at 11:00 am.

70. Jokhai Singh, village pradhan of village-Bhattadeeh, Police Station-Machhalishahar has been examined as D.W.-2. He stated that P.W.-2 Ram Bahor lived in his village Bhattadeeh. Sant Lal being son-in-law of Ram Bahor also lived with him.

71. From bare reading of the aforesaid facts and circumstances, it is clear that there are two incidents, which are alleged to have taken place on 8th July, 1981 at two different places. The first set up by the prosecution which is alleged to have taken place i.e. at the sump (Nabdan), which used to flow in front of the house of accused Nanda and the second which is set up by the defence i.e. at the manger (charni) of the accused Nanda.

72. The incident which is alleged to have occurred on 8th July, 1981, as per the prosecution/first informant is extracted hereunder:

"घटना घटे लगभग 13 माह हुआ। 1 बजे दिन का समय था। मै अपने घर मे था। जगरनाथ की शोर सुनकर बाहर आया। मेरे नाना नन्दलाल मेरी माँ प्यारी, मेरी नानी अंगनी जो जगन्नाथ की मॉ है, भी बाहर सहन के आये। हम लोगों ने देखा कि नन्दा, राम शिरोमणि राम जनक व राम लगन मेरी नाली पाट रहे थे। जगरनाथ मनाकर रहे थे। मुलजिमान इस पर मरने को लपके। राम जनक, राम शिरोमणि चाकू लिये थे। नन्दा व राम लगन लाठी लिये थे। जगन्नाथ को रामजनक ने चाकू व राम लगन ने लाठी से मारा। जगन्नाथ चोट खाते हुए भागे ये अन्दर अपने घर में आँगन में जाकर गिर गये। जगरनाथ की वहीं मृत्यु हो गयी। नन्दा, राम शिरोमणि, रामजनक व रामलगन ने तब मेरे नाना को उठाकर पटक दिया। रामशिरोमणि ने चाकू से व राम लगन व नन्दा ने लाठी से मारा। राम जनक ने बाद मे चाकू से वार किया। नन्दलाल नीम के पेड़ के पास चोट खाकर गिरे व वही मर गये।

नन्दलाल को बचाने मै, मेरी माँ, प्यारी व अंगनी दौड़ी तो हम लोगों को भी मारने लपके। मुझे रामशिरोमणि ने चाकू व राम लगन व नन्दा लाठी से मारा। मेरी माँ को नन्दा ने पीठ पर लाठी से मारा। अंगना को राम जनक ने चाकू से मारा।

घटना के बाद रामबहोर व बाबू लाल पहुंच गये थे जिन्होने पूरी घटना देखा। जहाँ जगन्नाथ व नन्दलाल गिरे वहाँ खून गिरा था। घटना के बाद मुलजिमान अपने घर की ओर भाग गये। मुझको हल्की सी बेहोशी आ रही थी। इससे रपट हाथ से नही लिख सकता था। इससे स्वामीनाथ को बोलकर रपट लिखाया। जो बोला था वही उन्होने लिखा सुनकर मैने दस्तखत किया था। रपट देखकर कहा कि यही रपट है। इस पर इक्ज क-1 डाला गया। जगन्नाथ व नन्दा की लाशों को गाँव वालों की मदद से सड़क पर लाया। सड़क पर इक्का करके थाना मछलीशहर आया। वहाँ दरोगा जी मौजूद थे।"

73. The incident occurred on the same day i.e. 8th July, 1981 as per the defence is as follows:

"10-11 बजे दिन मेरे बैठका के पश्चिम दक्षिण मेरे मैस की चरनी को जगरनाथ तोड़ रहे है। औरत ने मना किया। जगरनाथ गाली देने लगे। मेरी औरत ने गाली दिया। नन्दलाल, जगरनाथ, राज मूरत लाठी लिये मेरे दरवाजे पर चढ़ आये। मेरे औरत के सर मे लाठी से मारा। मै बचाने लगा तो मुझे भी मारा। राम लगन, रामशिरोमणि बचाने लगे तो उन्हे भी मारा। राम लगन व राम शिरोमणि लाठी व बल्लम से बचाव किया जिससे उनको चोटे आयी। इसी बीच अंगना व प्यारी घुस गयी तो उन्हे चोटे आ गई। रपट लिखाकर थाना जा रहा था तो दारोगा ने मुझे रास्ते मे पकड़ लिया मेरी रपट फाड़ कर फेक दिया। मेरी रपट लिखी नही गयी। मुझे चोट लगा था। मेरा डाक्टरी मुआयना जेल मे हुआ, मेरी औरत को लकवा मार दिया है।"

74. On deeper scrutiny of trial court records including the oral as well as documentary evidence led during the course

of trial, it is apparent that the incident set up by the prosecution has been supported by all the prosecution witnesses i.e. P.W.-1, P.W.-2, P.W.-3, P.W.-4, P.W.-5, P.W.-6, P.W.-7 and P.W.-9 (as per the prosecution, P.W.-1 to P.W.-5 are said to be the eye-witnesses of the incident). The medical examination reports of the injured, namely, P.W.-1, P.W.-3 and P.W.4, the post mortem examination reports of the deceased Jagarnath and Nand Lal, the site plan prepared by the Investigating Officer (P.W.-9) and the recovery memos prepared by him qua blood stained earth and plain earth also support the prosecution case about the said incident.

75. On the other-hand, the incident set up by the defence has been supported by the accused-Nanda, Ram Lagan and Ram Shiroman only. The fourth accused Ram Janak has stated under Section 313 Cr.P.C. that he was not present at the time of incident. Wife of accused Smt. Indrani, who is alleged to have sustained injuries in the said incident has not been produced as defence witness. Except the statements of accused-Nanda, Ram Lagan and Ram Shiroman, no other evidence has been produced by the defence to support the said incident. Even otherwise, all the prosecution witnesses i.e.P.W.-1, P.W.-2, P.W.-3, P.W.-4, P.W.5 and P.W.-9 have specifically stated in their testimonies that no such incident took place in which the members of prosecution were aggressor.

76. However, in the testimonies of P.W.-6 and D.W.-1, seeing the injuries found on the person of Smt. Indrani and accused accused-Nanda, Ram Lagan and Ram Shiroman, it has been stated that the same could have been caused on 8th July, 1981 at 11:00 a.m.

77. In the cross-examination, P.W.-6 Dr. B. K. Singh, who conducted the medical examination of Smt. Indrani on 10th July, 1981 at 03:00 p.m., qua the injury found on her person, has opined as follows:

"यह चोट 8.7.81 के 11 बजे दिन की हो सकती है।"

78. Similarly, in the examination-in-chief D.W.-1 Dr. R.P. Singh on the basis of injuries found on the bodies of accused-Nanda, Ram Lagan and Ram Shiroman, has opined as follows:

"तीनों मजरूबान की चोटे 8-7-81 को 11 बजे दिन की हो सकती है।"

79. P.W.-9, Sub-Inspector Rajendra Singh Chauhan, who has conducted the investigation in his cross-examination, has qua injury sustained by accused Nanda, has stated as under:

"नन्दा मुलजिम को मै जमुहर के पास गिरफ़्तार किया था। जब मैने गिरफ़्तार किया तो उसके शरीर पर चोटे भी थी।"

80. In his cross-examination, P.W.-1/first informant also stated that there was no injury on the body of the accused Nanda. This witness then stated that it was possible that the accused Nanda might have fallen on the ground during the fight (maarpeet) due to which he sustained injury. The relevant extract is reproduced hereunder:

" नन्दा के शरीर पर कोई चोट नहीं थी। हो सकता है पटकी पटका में नन्दा गिर पड़े हो जिससे उनको चोट लग गई हो"

81. It is also pertinent to mention here that the prosecution has also not explained as to how and in what manner, such injury found by P.W.6 on the body of wife of accused Nanda namely, Smt Indrani and further the injuries found on the persons of accused Nanda, Ram Shiroman and Ram Lagan by D.W.-1 have been caused, has not at all been explained by the prosecution. In

the first information report as well as in the testimonies of all the prosecution witnesses particularly P.W.-1, P.W.-2, P.W.-3, P.W.-4 and P.W.-5, the presence or involvement of wife of accused Nanda, namely, Smt. Indrani, who is also mother of other accused, namely, Ram Shiroman, Ram Lagan and Ram Janak has neither been mentioned nor has been explained but when as a matter of fact she sustained injury on her vital part of her body and has been medically examined by P.W.-6 also.

82. Even though, the prosecution as well as the defence have set up their two different incidents, which are alleged to have occurred, as quoted above, but it is also true that the members of both sides have sustained injuries, which have been supported by the medical examination reports, post-mortem examination reports prepared by P.W. 6, P.W.-7 and D.W.-1. It is also not disputed that the injuries found on the bodies of accused-Nanda, Ram Lagan and Ram Shiroman are simple in nature except the injury sustained by wife of accused Nanda, namely, Smt. Indrani, which is said to be grievous and the same could have been caused by blunt object like lathi as is evident from the testimony of P.W.-6. Meaning thereby the weapon used for causing injuries on the persons of accused-Nanda, Ram Lagan and Ram Shiroman and Smt. Indrani was lathi.

83. On the other-hand, the injuries sustained by the deceased Jagarnath and Nand Lal, could have been caused by lathi and knives. The weapon used for causing injuries on the person of first informant/P.W.-1 could be lathi. Similarly, the injury found on the body of Angana (PW.-4) could have been caused by spear. Meaning thereby, that not only the lathi but also the knives have been used in causing injuries on the persons of both the deceased Jagarnath and Nand Lal and both the injured, namely, P.W.-1 Raj Murat and P.W.-4 Smt. Angana.

84. From the perusal of all the evidence oral as well as documentary led during the course of trial and the same have been discussed herein above, it is evident that admittedly, an incident took place on 8th July, 1981 either because of blocking of drain of the deceased Nand Lal by the accused persons or because of destroying of charni (manger) of accused Nanda by the deceased Jagarnath and Nand Lal and before this incident, there was no enmity between the members of prosecution and the defence, therefore, they had no motive or intention to cause such injuries to each other. When both the versions of setting up of their own incidents by the prosecution and the defence have not been fully established, we are of the opinion that there was a fight (Maarpeet) between the members of prosecution and the defence and who was aggressor has not been cropped from the above evidence. We also find that either because of blocking of drain of the deceased Nand Lal or because of destroying of charni (manger) of accused Nanda, Maarpeet (fight) took place in which members of both sides have caused injuries to each other in their private defence.

85. There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would betoward off the danger and to save himself or his property, and so, he would

naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than what is necessary or was justified under the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room, for instance, long after the incident has taken place. That is why, in some judicial decisions it has been observed that the means which a threatened person adopts, of the force which he uses, should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared.

86. The Hon'ble Supreme Court of India in the case of **Jai Deo Vs. State of Punjab** reported in 1963 Cr.L.J. 493 has observed that in exercising the right of private defence, the force which a person defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The use of the force must be stopped as soon as the threat has disappeared. The exercise of the right of private defence must never be vindictive or malicious.

87. The Hon'ble Supeme Court of India in the case of **Darshan Singh Vs. State of Punjab & Another** reported in (2010) 2 SCC 333, has laid down following principles in order to scrutinize the case in respect of the right of private defence:

"(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii). The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

88. Considering the above principle of law laid down by the Hon'ble Apex Court, seeing the injury reports and medical examination reports of the two injured persons and two deceased persons of prosecution side, we find that the accused persons, namely, Nanda, Ram Shiroman, Ram Lagan and Ram Janak have exceeded their right of private defence by causing two injuries to the deceased Jagarnath by lathi and knives as well as by causing three injuries to the other deceased Nand Lal by knives and lathi. They have also exceeded their right of private defence by causing as many as five injuries to the first informant/P.W.-1 Raj Murat/Ram Murat by lathi and knives as also causing one injury of spear to P.W.-4 Smt. Angana.

89. On the other-hand both the deceased Jagarnath and Nand Lal and P.W.-1 Raj Murat/Ram Murat had not exceeded their rights of private defence in causing injuries to the accused persons, namely, Nanda, Ram Lagan and Ram Shiroman, which are simple in nature (as per their medical examination reports) as also to the wife of accused Nanda, namely, Smt. Indrani, by lathi only. It is no doubt true that the injury found on the person of Smt. Indrani was grievous in nature and on her vital part but no complaint or report has been lodged by the defence side. It is also relevant to mention here that from the oral as well as documentary evidence, it is fully established that accused Ram Janak, who denied his presence at the crime scene at the time of incident under Section 313 Cr.P.C., was actively involved in the commission of alleged offence.

90. Since the incident in question occurred on a spur of moment and in the heat of passion upon sudden quarrel as also both the parties have exercised their rights of private defence, even though the defence has exceeded the same, the same would be covered under the 4th Exception to Section 300 I.P.C., which reads as under:

"Exception 4. —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

91. On going through the entire evidence on record, we find that the necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC.

92. The issue relating to quantum of sentence under Section 304 I.P.C. depends on background facts of the case, antecedents of the accused, whether the assault was premeditated and pre-planned or not, etc. There are no straight jacket formulae for the determination of the same in law.

93. In the case of **Genda Singh & Others Vs. State of Uttar Pradesh** reported

in (2008) 11 SCC 791, the Hon'ble Apex Court has held that though the appellants claimed to be exercising of right of private defence, it was exceeded, therefore, the protection for exercising the right of private defence cannot be extended to them. However, appropriate conviction would be under Section 304 Part-I I.P.C. and custodial sentence of 10 years would meet the ends of justice.

94. It would be worthwhile to reproduce paragraph nos. 10 and 11 of the said judgment, which read as under:

"10. "11. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702], State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478], State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault.

The of quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows : (SCC p. 654, para 9)

'9. ... It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.'

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

12. ... A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.

13. Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of danger to the body continues. In Jai Devv. State of Punjab [AIR 1963 SC 612] it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence.

14. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar [(1975) 4 SCC 161 : 1975 SCC (Cri) 454 : AIR 1975 SC 87] . (See also Wassan Singhv. State of Punjab [(1996) 1 SCC 458 : 1996 SCC (Cri) 119]

and Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] .)

15. As noted in Buta Singh v. State of Punjab [(1991) 2 SCC 612 : 1991 SCC (Cri) 494 : AIR 1991 SC 1316] a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him. Where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

16. The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (SeeVidhya Singh v. State of M.P. [(1971) 3 SCC 244 : 1971 SCC (Cri) 469 : AIR 1971 SC 1857]) Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a courtroom, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

17. In the illuminating words of Russell (Russell on Crime, 11th Edn., Vol. I at p. 49):

'... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable.'

18. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and

not as a retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived."

The above position was highlighted inV. Subramani v.State of T.N.[(2005) 10 SCC 358 : 2005 SCC (Cri) 1521] , SCC at pp. 364-68, paras 11-18.

11. Factual scenario as noted above clearly goes to show that though the appellants claimed to be exercising the right of private defence, it was exceeded. That being so, the protection for exercising the right of private defence cannot be extended to the appellants. But the appropriate conviction would be under Section 304 Part I IPC and custodial sentence of 10 years in case of each appellant and fine imposed by the trial court would meet the ends of justice."

95. In view of the discussions and deliberations held above on the evidence led during the course of trial, the laws laid down by the Hon'ble Apex Court as well as the findings recorded by the trial court in acquittal of accused-respondents Nanda, Ram Shiroman, Ram Lagan and Ram Janak, we are of the view that the trial court has not examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents, cannot be sustained. The prosecution has fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The acquittal of the accused-respondents, namely, Nanda, Ram Shiroman, Ram Lagan and Ram Janak, is consequently, reversed.

96. We are of the opinion that the accused-respondents Nanda, Ram Shiroman, Ram Lagan and Ram Janak could be convicted for the offence punishable under Section 302 and 307 I.P.C. However seeing entire evidence led during the course of trial, we are of the view that the accused had no intention or motive to cause death and the incident in question occurred on the spur of moment in their private defence, even though they have exceeded their rights of private defence, they are liable to be convicted under Part-1 of Section 304 I.P.C.

97. Consequently, the accused-respondents Ram Shiroman, Ram Lagan and Ram Janak are convicted for the offence under Part-1 of Section 304 of I.P.C. and sentenced them to undergo six years rigorous imprisonment with fine of Rs. 10,000/- each. Since the accused-respondent Nanda has already expired and the Government Appeal at his behest has already been abated, no further order is required to be passed against him.

98. The Government Appeal filed on behalf of the State is, hereby, partly allowed.

99. There shall be no order as to costs.]

100. The Chief Judicial Magistrate, Jaunpur shall ensure that the accused-respondents, namely, Ram Shiroman, Ram Lagan and Ram Janak are arrested and sent to jail for serving their sentences awarded herein above.

101. Let a copy of this judgment be sent to the Chief Judicial Magistrate,

Jaunpur, henceforth, for necessary compliance.

(2024) 5 ILRA 1066
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 29 of 2020
And
S.C.C. Revision No. 27 of 2020

Jitendra Kumar Rajput ...Revisionist
Versus
Pranveer Singh ...Respondent

Counsel for the Revisionist:
R.K. Mishra

Counsel for the Respondent:
Ashok Kumar, Himanshu Pandey, Prateek Sinha

A. Tenancy Law – Transfer of Property Act, 1882 – Sections 106 &113 – Eviction suit – More than one notice of eviction was issued – Waiver of notice by subsequent notice – Permissibility – Held, if no action has been taken upon the issuance of earlier notice and there is no change of status of lessor and lessee, the earlier notice would be waived off after issuance of latter notice – Any admission made by the learned counsel for the revisionist-defendant based upon first and second notice, would be of no use – Undisputedly, neither any SCC Suit is filed, nor the house is vacated pursuant to first and second notice, therefore, both the notices would be waived of after issuance of third notice. (Para 17 and 21)

B. Tenancy Law – UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 2(2) – Applicability of the Act – Assessment of building – New assessment, cancelling earlier assessment was made on 11.10.1985 – Effect – Held, in case any building is constructed after 26.04.1985, the Act of 1972 would not be applicable and after construction, assessment so made is to be treated first assessment. Apart that, once the municipal record of assessment is available, no oral evidence is required. (Para 17 and 25)

Revision dismissed. (E-1)

List of Cases cited:

1. Avadh Kishore Dass Vs Ram Gopal & ors.; 1979 0 AIR (SC) 861

2. Tayabali Jaferbhai Vs M/s Ashan and Co. & ors.; AIR 1971 SC 102

3. Civil Misc. Writ Petition No. 14421 of 1997; Anish Ahmad Vs Special/Additional District Judge, Saharanpur & ors.decided on 01.05.1997

4. Aziz Alam@Guddu Vs Smt. Malti Vaish: 2017(3) ARC 811

5. Ram Swaroop Rai Vs Smt. Leelawati, (1980) 3 SCC 452

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri R. K. Mishra, learned counsel for the revisionist and Sri Prateek Sinha, learned counsel for the respondent.

2. By means of S.C.C. Revision No. 29 of 2020, revisionist has challenged the impugned judgement and decree dated 20.01.2020 passed by learned Additional District Judge, Court No. 20, Kanpur Nagar in S.C.C. Suit No. 70 of 2017 (Pranveer Singh Vs. Jitendra Kumar Rajpoot).

3. By means of S.C.C. Revision No.27 of 2020, revisionist has challenged the impugned judgement and decree dated 20.01.2020 passed by learned Additional District Judge, Court No. 20, Kanpur Nagar in S.C.C. Suit No. 72 of 2017 (Pranveer Singh Vs. Madhukar Pandya).

4. Since the common question of law and facts are involved in both the revisions, therefore, with the consent of counsel for parties, both the revisions are being decided together by a common judgment.

5. Learned counsel for the revisionists-defendants submitted that revisionists are the tenants of plaintiff-respondent since the year 2000 and paying rent at the rate of 1250/- p.m. including taxes. He has received a notice of eviction dated 16.06.2014 stating therein that the provision of U.P. Act No. 13 of 1972(hereinafter, referred to as, 'Act, 1972') are applicable to the house in question. The revisionists have replied the said notice vide his reply dated 02.07.2014. Revisionists have further received second noticed dated 03.09.2015 for arrears of rent and to vacate the accommodation with the specific averment that Act, 1972 is applicable. Revisionists have also replied the said notice stating therein that rent is being deposited and is paid up to 31.12.2015.

6. Lastly, he received third notice dated 13.05.2017 under Section 106 of Transfer of Property Act, 1882(hereinafter, referred to as 'Act, 1882') and in the said notice a new stand was taken by the respondent-plaintiff that wrongly in the notice dated 16.06.2014 in para no. 6, it was mentioned that the provisions of Act, 1972 are applicable and stated for the first time in the notice dated 13.05.2017 that the provisions of Act, 1972 would not be applicable. The revisionists-defendants submitted their reply dated 29.05.2017. Based upon the aforesaid notices, respondent-plaintiff has filed SCC Suit No. 70 of 2017 & SCC Suit No. 72 of 2017 against the revisionists-defendants respectively seeking a decree of eviction as well as recovery of arrears of rent.

7. He firmly submitted that once the applicability of Act, 1972 is admitted by the respondents-plaintiffs in the notices dated 16.06.2014 and 03.09.2015, it would be treated admission on the part of the respondents-plaintiffs and he cannot take U-turn in the third notice dated 13.05.2017 that Act, 1972 would not be applicable. Therefore, revisionists-defendants are entitled for benefit of Section 20 (4) of Act, 1972, as they are regularly depositing the rent @ Rs. 1250/- per month. In support of his contention, learned counsel for the revisionists has placed reliance of judgement of Hon'ble Apex Court in the case of ***Avadh Kishore Dass Vs. Ram Gopal and Others1979 0 AIR (SC) 861.***

8. He next submitted that first assessment of house in question was made in the year 1979 which is prior to the cut of date i.e. 26th April, 1985, therefore, under the facts of the case Act, 1972 would be applicable. He also pointed out that learned Judge has relied upon the second assessment which was made on 11.10.1985 and has held that Act, 1972 shall not be applicable. Leaned counsel for the revisionists-defendants firmly submitted that once the first assessment has taken place in the year 1979, the Act, 1972 would be applicable.

9. He lastly submitted that once there is admission about the applicability of Act, 1972 in notices dated 16.06.2014 and 03.09.2015 and further, first assessment took place in the year 1979, Act, 1972 would be applicable and there is no scope of adjudication on this point.

10. He next submitted that Suit No. 70 of 2017 & 72 of 2017 have been

instituted by the respondent-plaintiff through power of attorney and it is settled principle of law that power of attorney holder can only depose about the facts which are within his personal knowledge and not about the facts which are not within his knowledge or are within personal knowledge of person, who he represents or about facts that may have transpired much before he entered to scene.

11. Per contra, Sri Prateek Sinha, learned counsel for the respondent-plaintiff vehemently opposed the submission of learned counsel for the revisionist and submitted that illustration of Section 113 of Act, 1882 clearly provides that in case after issuance of first notice, if the house is not vacated and second notice is issued, the first notice is to be treated waived of. He next submitted that this ratio of law has also been affirmed by the Apex Court in the matter of ***Tayabali Jaferbhai Vs. M/s Ashan and Co. andothers: AIR 1971 SC 102*** and by this Court in Civil Misc. Writ Petition No. 14421 of 1997(**Anish Ahmad Vs. Special/Additional District Judge, Saharanpur and others**), decided on 01.05.1997.

12. He next submitted that it is undisputed that pursuant to the notices dated 16.06.2014 and 03.09.2015, no suit has been filed, therefore, the contents of both the notices cannot be treated as admission. He next pointed out that undisputedly the SCC Suit No. 70 of 2017 & 72 of 2017 are based upon the third notice dated 13.05.2017, in which it is clearly stated that Act, 1972 would not be applicable, therefore, contention so raised by learned counsel for the revisionists-defendants is bad in law and is not sustainable.

13. He next submitted that so far as the document about the assessment year issued by Nagar Nigam, Kanpur Nagar is concerned, the document produced before the Court clearly indicates that first assessment was made in the year 1979 and after construction of four new shops the fresh assessment took place on 11.10.1985 which may be taken into consideration for applicability of the Act, 1972.

14. He next submitted that once the municipal tax record is available, no oral evidence is required for first assessment. In support of his contention, he placed reliance on the judgment of this Court in the matter of ***Aziz Alam@Guddu Vs. Smt. Malti Vaish: 2017(3) ARC 811***.

15. Learned counsel for the respondent-plaintiff further submitted that so far as argument of deposition of power of attorney is concerned, it is oral submission and this fact has not been pleaded and is not the part of written statement filed in SCC Suit No. 70 of 2017 & 72 of 2017, therefore, this may not be raised at this stage. Apart from that, learned counsel for the revisionists-defendants has also not pointed out as to what deposition is made by the power of attorney holder beyond his personal knowledge, therefore, argument of learned counsel for the revisionist-defendant may not be accepted.

16. I have considered the rival submissions advances by learned counsel for the parties, perused the record and the judgments relied upon.

17. There are two issue before the Court to decide. The first issue is that in case of issuance of more than one notice and based upon last notice, a suit is instituted, what would be the fate of earlier notice. Second issue before the Court is with regard to municipal assessment made by the

Municipal Corporation of a house at two different stages.

18. Now, coming to first issue i.e. about the status of notices issued from time to time. Section 113 of the Act, 1882 is relevant for this issue, which deals with the waiver of notice to quit. Section 113 of the Act, 1882 is being quoted hereinbelow:

"113. Waiver of notice to quit-- A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations

(a) A the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

19. This issue was before the Hon'ble Apex Court in the matter of Tayabali Jaferbhai(Supra). Relevant paragraphs of the said judgment are being quoted hereinbelow:

"6. In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice.

7. It further appears that the rent was sent by the tenant treating the tenancy as subsisting and not as having come to an end by virtue of the first notice. There is another significant fact which shows that it was the second notice which was considered by the landlord to be the effective notice. It was in the notice sent in October 1957 ,that the landlord, for the first time, raised the ground of personal necessity. In the suit requirement of personal necessity was made one of the main grounds on which eviction was sought. In the first notice which was sent in June 1956 no such requirement or ground had been mentioned. It was not open, therefore to the landlord to say that he did not ,want to rely on the second notice and should be allowed to base his action for eviction only on the first notice containing the ground of the default in payment of arrears of rent. We are satisfied that the suit of the landlord was rightly dismissed though we have sustained its dismissal on different reasoning."

20. Again the very same issue was before this Court in the matter of ***Anish Ahmad(Supra).*** Relevant paragraph of the said judgment are being quoted hereinbelow:

"A landlord can waive the notice as provided under Section 113 of Transfer of Property Act which provides that the notice given under Section 111, Clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. The person claiming that the notice has been waived has to satisfy two essential ingredients (i) the intention of the landlord

was to treat the lease as subsisting, and (ii) he had a knowledge of the fact that this conduct amounts to waiver."

21. From the perusal of the provision of Act, 1882 as well as ratio of law laid down Courts in ***Tayabali Jaferbhai (Supra)*** and ***Anish Ahmad(Supra),*** it is apparently clear that in case lessor gives notice to lessee to give the property leased and lessee remains in possession and thereafter, lessor gives second notice to lessee to quit, the first notice is waived of. The legislation is very much clear on this point. If no action has been taken upon the issuance of earlier notice and there is no change of status of lessor and lessee, the earlier notice would be waived off after issuance of latter notice. Therefore, this Court is of the firm view that any admission made by the learned counsel for the revisionist-defendant based upon first and second notice would be of no use. In the present case, it is undisputed that neither any SCC Suit is filed, nor the house is vacated pursuant to first and second notice, therefore, both the notices would be waived of after issuance of third notice.

22. Now, coming to the judgment relied upon by the learned counsel for the revisionists-defendants in the matter of ***Avadh Kishore Dass(Supra***), which is about the admission. This Court is of the view that there would be no effect of first and second notice for the purpose of admission as the notices would be treated waived off in terms of Section 113 of the Act, 1882 as well as law laid down by the Hon'ble Courts in this regard. Therefore, this judgment is not coming in the rescue of the revisionists-defendants as there is no admission on record made by the respondent-plaintiff and withdrawn later on.

23. Now, coming to the second issue about the assessment. It is defined under Section 2(2) of the Act, 1972. The said Section is being quoted hereinbelow:

"[Except as provided in Sub-section (5) of Section 12 Sub-section (1A) of Section 21, Sub-section (2) of Section 24, Section 24A 24B, 24C, or Sub-section (3) of Section 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed]:

[Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad, and the period of repayment of such loan or advance exceeds the aforesaid period of ten years than the reference in this sub-section to the period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), which ever is shorter]:

[Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference to a period of [forty years] from the date on which its construction is completed.

Explanation I.-For the purposes of this Sub-section,

(a) The construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of a building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said

dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time:

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants.

(b) "construction" includes any new constructions in place of an existing building which has been wholly or substantially demolished;

(c) Where such substantial addition is made to an existing building, that the existing building becomes only a minor part thereof, the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition." "

24. This issue was considered by Hon'ble Apex Court in the matter of ***Ram Swaroop Rai Vs. Smt. Leelawati, (1980) 3 SCC 452***, and the Apex Court has held that in case where tax records are available, oral evidence remains inconsequential for the purpose of first assessment. This Court in the matter of Aziz Alam@Guddu(Supra) has reiterated the the ratio of law laid down by the Hon'ble Apex Court in the matter of ***Ram Swaroop Rai(Supra)***. Relevant Pragraph of ***Aziz Alam@Guddu(Supra)*** are being quoted hereinbelow:

"8. The aforesaid judgment of the Apex Court conclusively holds that in a case where tax records are available, oral evidence remains inconsequential and it is the documentary evidence submitted, as per the provisions of Rent Control Act, 1972, which is relevant for deciding the date of completion of building for the purpose of Rent Control Act. Thus, the oral admission made in the cross examination cannot be looked into by the Court. There remain two house tax assessments on record, one claims to be first assessment of the year 1992 of the entire building and another a house tax assessment of the year 1986 of the shop in dispute. They both are of a date later to 26.04.1985. Even presuming, on basis of the house tax assessment register submitted by the revisionist/tenant of the year 1986, the building was constructed in the year 1986, still the same was constructed after 26.04.1985 and thus is exempted from the application of Rent Control Act, for a period of 40 years.

9. Present suit for eviction admittedly was filed within the said period of 40 years. Hence, conclusion of the court below that the provisions of Rent Control Act, 1972 are not applicable on the property in dispute cannot be faulted with. "

25. From the perusal of the aforesaid Section, it is apparently clear that in case new construction is made to the extent that existing building becomes only a minor part, the whole building including existing part shall be deemed to be constructed on the date of completion of said addition. In the present case, earlier, assessment was made in the year 1979 having a tin shade, road, a gumti, some open land. Later on, two shops, four bed rooms, one kitchen, one store & one portico were constructed and cancelling the earlier assessment, new assessment was made on 11.10.1985 by the municipal authority. From the perusal of Section 2(2), it is also clear that in case any building is constructed after 26.04.1985, Act, 1972 would not be applicable and after construction,

assessment so made is to be treated first assessment and. Apart that, once the municipal record of assessment is available, no oral evidence is required.

26. So far as last issue argued by the learned counsel for the revisionists-defendants about the authority of power of attorney is concerned, the same is having no relevance for the reasons that it was not part of the written statement and being confronted by the Court this fact could not be disputed by learned counsel for the revisionists-defendants.

27. Therefore, under such facts and circumstances of the case, I found no infirmity or illegality in both the impugned judgements and decrees dated 20.01.2020.

28. Revisions lack merit and are accordingly **dismissed**.

29. No order as to costs.

(2024) 5 ILRA 1072
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 38 of 2024

Mahendra Pratap Singh ...Revisionist
Versus
Rama Raman & Ors. ...Respondents

Counsel for the Revisionist:
Ashwani Kumar

Counsel for the Respondent:
Girish Kumar Gupta

A. Tenancy Law – Civil Procedure Code,1908 – O. VI R. 17 – Amendment – Substitution of word 'licence deed' in place of 'tenant' was sought for in written St.ment – Change of counsel or typographical error was made ground for amendment – Permissibility – Admission made in favour of plaintiff, how far can be withdrawn – Held, admission made in favour of plaintiff cannot be withdrawn – It cannot be withdrawn even on the ground of typographical error – Change of counsel cannot be a ground to file amendment application bypassing the rigorous conditions of due diligence. (Para 9, 14 and 18)

Revision dismissed. (E-1)

List of Cases cited:

1. Life Insurance Corporation of India Vs Sanjeev Builders Pvt. Ltd. & anr.; 2022 0 Supreme(SC) 864

2. Ram Niranjan Kajaria & ors.Vs Jugal Kishore Kajaria; (2015) 10 SCC 203

3. Abdul Ahmad Vs Haq Nawaz Ahmad; 2016(8) ADJ 176

4. Civil Misc. Writ Petition No. 12067 of 2012; Rama Nand & ors. Vs Amrit Lal & ors.

5. Panchdeo Narain Srivastava Vs Jyoti Sahay; 1984 Supp SCC 594

6. Hari Shanker and 5 others Vs Bhawati Prasad Mishra; 2014 (0) Supreme (All) 3127

7. Matters under Article 227 No. 5213 of 2013; Shri Firoz Uddin & ors. Vs Shri Anwar Uddin

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashwini Kumar, learned counsel for revisionist and Sri Santosh Kumar Kesarwani, Advocate holding brief of Sri Girish Kumar Gupta, learned counsel for opposite parties.

2. Present revision has been filed seeking following relief:-

"It, is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to stay the further proceeding of S.C.C. Case No. 34 of 2013 (Rama Raman vs. Mahendra Pratap Singh) pending before Additional District Judge, Court No. 14/Special Judge Gangster Act, Varanasi."

3. earned counsel for petitioner submitted that respondents have filed S.C.C. Case No. 34 of 2013 in which revisionist has filed written statement on 05.02.2014 admitting the tenancy. After change of counsel, it was found that documents so annexed alongwith written statement is having a 'license deed', but due to typographical error, it is mentioned as 'tenant'. He next submitted that after change of counsel, amendment application dated 23.03.2022 has been moved under Order VI Rule 17 of CPC for substitution of word, 'licensee' in place of word, 'tenant' which was rejected on the ground that first of all any admission made in written statement cannot be withdrawn. Secondly; change of counsel cannot be a ground to allow amendment application at a very belated stage. Further, condition of due diligence has also not been satisfied. He firmly submitted that Apex Court has categorically held that a liberal view is required to be taken while deciding amendment application. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and another; 2022 0 Supreme(SC) 864***.

4. Sri Santosh Kumar Kesarwani, Advocate holding brief of Sri Girish Kumar Gupta, learned counsel for opposite parties has vehemently opposed the submissions of learned counsel for revisionist and submitted that law is very well settled on this point that once any admission is given in written statement, same cannot be withdrawn. The very similar issue was before Apex Court in the matter of ***Ram Niranjan Kajaria and others vs. Jugal Kishore Kajaria; (2015) 10 Supreme Court Cases 203*** and others in which Apex Court had clearly held that categorical admission made in the pleadings cannot be permitted to be withdrawn by way of amendment application. He further submitted that even in case of typographical error in written statement, admission cannot be withdrawn. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of ***Abdul Ahmad vs. Haq Nawaz Ahmad; 2016(8) ADJ 176***. He also pointed out that so far as change of counsel is concerned, that can also not be a ground at a very belated stage. In support of his contention, he has placed reliance upon the judgment of this Court passed in ***Rama Nand and Ors. vs. Amrit Lal and Ors. (Civil Misc. Writ Petition No. 12067 of 2012).***

5. I have considered rival submissions advanced by counsels for parties and perused the records as well as judgments cited above.

6. Facts of the case about the date of filing of suit, written statement and amendment application are not disputed.

7. Issue before the Court is as to whether admission made in written submissions may be withdrawn due to typographical error pointed by a new counsel i.e. due to change of counsel.

8. Learned counsel for petitioner has placed reliance basically upon paragraph

nos. 25, 26 & 70 of judgment of ***Life Insurance Corporation (Supra)***, which is being quoted below:-

"25. The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defense which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favor of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defense taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. The proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the application for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement. (See South Konkan Distilleries & Anr. v. Prabhakar Gajanan Naik & Ors., (2008) 14 SCC 632)

26. But undoubtedly, every case and every application for amendment has to be tested in the applicable facts and circumstances of the case. As the proposed amendment of the pleadings amounts to only a different or an additional approach to the same facts, this Court has repeatedly laid down the principle that such an amendment would be allowed even after the expiry of statutory period of limitation.

70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(III) The prayer for amendment is to be allowed;

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side.

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side.

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(IV) A prayer for amendment is generally required to be allowed unless:

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration.

(ii) the amendment changes the nature of the suit.

(iii) the prayer for amendment is malafide.

(iv) by the amendment, the other side loses a valid defence.

(V) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(VI) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(VII) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(VIII) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(IX) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(X) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(XI) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi & Ors., 2022 SCC OnLine Del 1897)"

9. From the perusal of afore-quoted judgment, it is clear that in the said judgment, Apex Court has clearly said that admission made in favour of plaintiff cannot be withdrawn, therefore, judgment is not in favour of petitioner rather against him.

10. Learned counsel for respondents has also placed reliance upon the judgment of ***Ram Niranjan Kajaria (Supra)***. Relevant paragraph no. 23 of the said judgment is quoted below:-

"23. We agree with the position in Nagindas Ramdas and as endorsed in Gautam Sarup that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in

Panchdeo Narain Srivastava, does not reflect the correct legal position and it is overruled."

11. Apex Court has expressed view that categorical expression made in pleading cannot be permitted to be withdrawn and overruled the judgment of ***Panchdeo Narain Srivastava v. Jyoti Sahay; 1984 Supp SCC 594***, in which a contrary view is taken.

12. Therefore, in the light of facts of the case as well as law laid down by the Courts, this Court is also of the firm view that once an admission is made in pleadings, same cannot be withdrawn by way of amendment application.

13. So far as typographical error is concerned, learned counsel for respondent has placed reliance upon the judgment of this Court in the matter of ***Abdul Ahmad (Supra***). Relevant paragraph nos. 15 & 20 are quoted below:-

"15. Having perused the above noted material on record, this Court finds that there is clear admission of the petitioner with regard to the landlord-tenant relationship between him and the plaintiff. He has made categorical statement in this regard in paragraph no.9 of the written statement. Though the admission in paragraph no.9 of the written statement has not been withdrawn as the petitioner did not seek any such prayer in the amendment application, however, the averments in paragraph no.15-A which he sought to add in the written statement shows that he wants to plead that there was no landlord-tenant relationship between him and the plaintiff and, therefore, suit at the instance of the plaintiff could not be maintained. This amendment has been sought with further assertion that there was a typographical mistake in the written statement for correction of which, the amendments are necessary.

20. The judgements relied upon by learned counsel for the petitioner are distinguishable in the fact of this cases in asmuch as, in both the cases namely Sushil Kumar Jain (supra) and Ushal Bala Saheb Swami (supra) it is held by the Apex Court that the amendment in the written statement was not for withdrawal of admission rather keeping the amendment intact something more was sought to be added. The contradiction and the confusion in the written statement was sought to be clarified. "

14. From the perusal of same, it is clear that any admission given in written statement cannot be withdrawn on the ground of typographical error.

15. Another issue taken by the revisionist is about change of counsel. This issue was very well considered by this Court in the matter of ***Hari Shanker and 5 others vs. Bhawati Prasad Mishra; reported in 2014 (0) Supreme (All) 3127 and Shri Firoz Uddin and 4 others vs. Shri Anwar Uddin (Matters under Article 227 No. 5213 of 2013)***. Relevant paragraph of the judgment passed in ***Hari Shanker (supra)*** is quoted hereinbelow:-

"14. Supreme Court again in J. Samuel v. Gattu Mahesh, (2012) 2 SCC 300, held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the

representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. In the given facts, there is a clear lack of "due diligen not search out the fact, which is to be amended in written statement. Therefore, the condition of due diligence could not be satisfied. Law is very ce" and the mistake committed certainly does not come within the preview of a typographical error. Similar view was taken in Vidyabai Vs. Padma Latha, (2009) 2 SCC 409, Sushil Kumar Jain Vs. Manoj Kumar, (2009) 14 SCC 38 and Abdul Rehman Vs. Mohd. Ruldu, (2012) 11 SCC 341.

15. The written statement was drafted by an advocate after reading the plaint. After legal advice, it cannot be said that in exercise of "due diligence" the fact sought to be brought in the pleading by way of amendment was not in the knowledge of the defendant. A distinction has to be drawn between 'due diligence' and 'negligence'. The case of the defendants falls in the category of 'negligence' and not 'due diligence'. Trial Court rightly rejected the amendment application, as Proviso to Order VI Rule 17 C.P.C., now castes a rider on the power of the Court in allowing amendment application."

16. Again, similar issue was considered by this Court in the matter of ***Shri Firoz Uddin (supra).*** Relevant paragraph of the said judgment is quoted hereinbelow:-

"20. So far as present case is concerned, there is no dispute on the point that except the engagement of new counsel, nothing has been stated in amendment application even after sincere efforts, they could not search out the fact, which is to be amended in written statement. Therefore, the condition of due diligence could not be satisfied. Law is very much settled that change of counsel cannot be a ground for filing amendment. Therefore, no interference is required in the impugned order dated 11.04.2023."

17. This issue was also considered by this Court in the matter of ***Rama Nand (Supra)***, in which Court has held that change of counsel cannot be a ground to file amendment application. Relevant paragraph of the said judgment is quoted below:-

"Having heard Sri Shiv Nath Singh the facts of this case leaves no room for doubt, that the petitioners who are the defendants were duly represented by a lawyer for the past several years, who consciously made an endorsement on 30.10.2007 that he does not want to file any additional written statement. The evidence was led thereafter and the witnesses were cross-examined. It is after some new lawyer who was engaged at the time of hearing that dawned on the petitioners that a mistake has been committed by not filing an additional written statement. The mistake of the lawyer of the petitioners as alleged, in my opinion, is not a mistake at all. It was a conscious endorsement by the lawyer not to file an additional written statement. Apart from this, the evidence with regard to the plea raised in the amended plaint has been adduced by the defendants. Thus, they cannot plead either mistake on behalf of the lawyer or on their behalf also. The petitioners cannot be permitted to raise a

plea that their lawyer on a wrong advise made the endorsement. If this is condoned, then in every case a litigant will unscrupulously come forward with this plea and get the case reopened on one pretext or the other. The subsequent engagement of a counsel who has a better understanding of law cannot be a ground to plead that the earlier counsel was incompetent, particularly, in this case where an endorsement in writing has been made by the lawyer that he does not wish to file any additional written statement. ”

18. In the light of law laid down by the Courts, change of counsel cannot be a ground to file amendment application bypassing the rigorous conditions of due diligence. In fact, to meet out any mistake, no advantage can be given to litigant due to change of counsel.

19. In present case, facts are undisputed that due to typographical error as well as change of counsel, amendment application under Order VI Rule 17 of CPC has been filed to withdraw the admission earlier made in written submissions, which cannot be permitted in the light of law laid down by the Courts from time to time, therefore, I found no illegal or infirmity in the impugned order.

20. Revision lacks merit, hence **dismissed**.

21. No order as to costs.

(2024) 5 ILRA 1078
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON’BLE NEERAJ TIWARI, J.

S.C.C. Revision no. 76 of 2024

P.N.B Earlier Oriental Bank of Commerce ...Revisionist
Versus
Sanjeevani Shiksha Samiti ...Respondent

Counsel for the Revisionist:
Saurabh Kumar Pandey, Sr. Advocate

Counsel for the Respondent:
Utkarsha Birla

A. Tenancy Law – UP Regulation of Urban Premises Tenancy Act, 2021 – Tenancy was terminated by notice u/s 106 of Transfer of Property Act Act, 1872 – Effect – How far Act of 2021 is applicable to the suit filed in 2008 – Held, suit was filed in the year 2008 and on that date, the Act of 2021 was not in existence, therefore, any provision of Act would not be applicable. (Para 8)

B. Tenancy Law – UP Regulation of Urban Premises Tenancy Act, 2021 – Mesne profit, determination thereof – No mesne profit beyond 7% was claimed under the Act 2021 – Permissibility – By service of notice u/s 106 of Transfer of Property Act, 1882, tenancy was terminated – Effect – Held, in light of notice u/s 106 of Transfer of Property Act, 1882, tenancy is to be terminated, the status of tenant would be trespasser and he cannot take any benefit or advantage of any provision of Act, 2021 – Mesne profit shall be determined based upon market rate prevailing in the area. Provisions of Rent Control Act would not be applicable. (Para 10, 12 and 15)

Revision dismissed. (E-1)

List of Cases cited:

1. St. of Maharashtra & anr. Vs Super Max International Pvt. Ltd. & ors.; (2009) 9 SCC 772

2. Writ A No. 2853 of 2024; Smt. Anguri Devi & ors. Vs Smt. Sampatti Devi & ors. decided on 26.2.2024

3. Atma Ram Properties (P) Ltd. Vs M/s. Federal Motors Pvt. Ltd.; 2005 (2) ARC 936

4. U.O.I.& anr. Vs Smt. Suman Gupta & ors.; 2004 (1) ARC 330

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri P.K. Jain, learned Senior Advocate assisted by Sri Saurabh Kumar Pandey, learned counsel for the revisionist and Sri Atul Dayal, learned Senior Advocate assisted by Mr. Utkarsh Birla, learned counsel for the opposite party.

2. By way of present revision, revisionist is assailing the impugned order dated 27.2.2024 passed in S.C.C. Suit No. 7 of 2008 by the Judge, Small Causes Court/ADJ Court No.7, Ghaziabad.

3. Case was heard on 17.5.2024, Court has passed the following order:-

"1. Heard Sri P.K. Jain, learned Senior Advocate assisted by Sri Saurabh Kumar Pandey, learned counsel for the revisionist and Sri Atul Dayal, learned Senior Advocate assisted by Mr. Utkarsh Birla, learned counsel for the opposite party.

2. Sri P.K. Jain, learned Senior Advocate assisted by Sri Saurabh Kumar Pandey, learned counsel for the revisionists submitted in the present revision impugned order is having two parts; first about the vacation of commercial house in question occupied by the Punjab National Bank Earlier Oriental Bank Of Commerce and second about the decretal amount and enhancement of mesne profit at the rate of 15% per annum.

3. So far first part is concerned, he is ready to vacate the commercial house in question within one year and also pay the monthly rent of Rs. 3,27,000/- for the same period, which is not objected by Mr. Atul Dayal, learned Senior Advocate appearing on behalf of petitioner.

4. So far second part is concerned, he is having no objection to the decretal amount, but he is challenging the enhancement of mesne profit at the rate 15% per annum.

5. Heard learned counsel for both the parties on this issue.

6. Judgement reserved.

7. Put up this case for order on 27.5.2024.

8. Till the delivery of judgment, parties shall maintain status quo as on date."

4. Considering the submission made by learned counsel for the revisionist in aforesaid order dated 17.5.2024, he is granted one year time to vacate the commercial accommodation from today with following condition;

(i) Revisionist is directed to file affidavit within two weeks from today before learned Judge, Small Causes Court/ADJ Court No.7, Ghaziabad to vacate the commercial accommodation in question within the time given by the Court.

(ii) Revisionist is directed to deposit all decretal amount within four weeks from today before learned Judge, Small Causes Court/ADJ Court No.7, Ghaziabad. In case, any amount is already deposited, same shall be adjusted against the decretal amount.

(iii) Revisionist is also directed to pay Rs. 3,27,000/- as monthly rent of commercial accommodation in question per month on month to month basis on or before 7th day of every month till the vacation of house.

(iv) In case of failure of fulfilment of any conditions so imposed by the Court, this order would lost the effect and plaintiff-

respondent is at liberty to proceed against the defendant-revisionist in accordance with law.

5. Accordingly, the revision is **disposed of** so far it relates to vacate the commercial accommodation in question only.

6. Learned Senior Counsel submitted that in the year 2021 by enactment of State Legislation, Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as Act, 2021) came into force, which provides maximum enhancement of mesne profit at the rate of 7% per annum for non residential building, therefore, in all eventuality, mesne profit may not be enhanced beyond 7%. In the present case, it has been enhanced to the tune of 15% per annum. In support of his contention he has placed reliance upon the judgment of Apex Court in the cases of ***State of Maharashtra and another vs. Super Max International Private Limited and others reported in (2009) 9 SCC 772 and Smt. Anguri Devi Since Deceased and 10 others vs. Smt. Sampatti Devi and 10 others*** passed in **Writ-A No. 2853 of 2024** decided on 26.2.2024.

7. Per Contra, Sri Atul Dayal, learned Senior Advocate assisted by Mr. Utkarsh Birla, learned counsel for the opposite party has vehemently opposed and submitted that present impugned order has been passed pursuant to S.C.C. Suit No. 7 of 2008 and at that point of time Act, 2021 was not in force. Even U.P. Act No. 13 of 1972 was also not applicable. He firmly submitted that only way to fix the enhancement of mesne profit is market rate. He has produced the market rate through affidavit before the SCC Court, which was neither denied nor controverted by any affidavit contrary to that and considering the same mesne profit alongwith enhancement of 15% has been fixed. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court in the cases of ***Atma Ram Properties (P) Ltd. Vs. M/s. Federal Motors Pvt. Ltd. reported in 2005 (2) ARC 936 & Union of India and another vs. Smt. Suman Gupta and others reported in 2004 (1) ARC 330.***

8. I have considered the rival submissions advanced by the learned counsel for the parties and perused the judgment relied upon. The submission of learned counsel for the petitioner is that Act, 2021 provides for enhancement of mesne profit only at the rate of 7% in case of non residential accommodation beyond that no enhancement can be made. There is no doubt on the issue that suit was filed in the year 2008 and on that date Act No. 2021 was not in existence, therefore, any provision of Act would not be applicable.

9. Apart that I have also perused the Section 9 of Act, 2021, which provides Revision of Rent. Same is being quoted herein below:-

"8. Rent Payable. The rent payable in respect of a premises shall be the rent agreed to between the landlord and the tenant in accordance with the terms of the tenancy agreement or as revised under Section 9 or determined under Section 10.

9. Revision of Rent.-(1) The revision of rent between the landlord and the tenant shall be in accordance with the terms of the tenancy agreement.

(2) Where, after the commencement of tenancy, the landlord has entered into an agreement in writing with the tenant prior to the commencement of the work and has incurred expenditure for carrying out

improvement, addition or structural alteration in the premises occupied by the tenant, which does not include repairs necessary to be carried out under Section 15, the landlord may increase the rent of the premises by an amount as agreed to between the landlord and the tenant, and such increase in rent shall become effective from one month after the completion of such work.

(3) Subject to any agreement in writing, where the premises have been let out before the commencement of this Act, the rent thereof shall be liable to be revised for a further period of two years from the commencement of this Act, according to the formula indicated below-

(a) where the premises have been let out prior to 15.07.1972, it shall be deemed to have been let out on 15.07.1972;

(b) where the premises have been let out on or after 15.07.1972, the date for revision of rent shall be one year after the date of commencement of tenancy.

The rate of rent payable in above cases shall be liable to be increased at the rate of 5% per annum in case of residential accommodation and 7% per annum in case of non-residential premises, and the rate of increase of rent shall be compounded on an yearly basis. The amount of rent so arrived at shall again be liable to be increased at the aforesaid rates per annum in similar manner up to the commencement of this Act.

Notwithstanding anything mentioned above, if rent of premises had been revised during continuance of tenancy after 15.07.1972, the formula of revision of rent mentioned above shall be applicable from the date of such revision of rent:

Provided that notwithstanding anything mentioned above, the revised rent payable as per formula indicated in aforesaid provision, shall be payable as below from the date of commencement of this Act:

(i) in the first year, half of the rent so computed; and

(ii) in the second year, full amount of rent so computed.

(4) Notwithstanding anything contained in sub-section (1) of Section 3 wherein any premises referred to, has been let out to a tenant, the landlord of such premises shall also be entitled for revision of rent in accordance with provisions of clause (3) and the relevant provisions of this Act shall apply to such cases.

(5) In the case of tenancy entered into before the commencement of this Act the landlord shall, by notice in writing to the tenant, demand the enhanced rate of rent as specified under sub-section (3) and the rate of rent so enhanced shall be payable within 30 days of the service of notice. In such event the tenancy agreement shall be deemed to be amended and enhanced rate of rent shall be the rent payable under Section 8:

Provided that if there was no tenancy agreement before the commencement of this Act, the landlord and the tenant may mutually agree to execute tenancy agreement for enhanced rate of rent failing which the rent authority shall determine the enhanced rent subject to the provisions of Section 10.

(6) No arrears of aforesaid enhanced rent shall be payable or recoverable for the period prior to commencement of this Act."

10. From perusal of the heading of section, it is apparently clear that it deals with revision of rent and has nothing to do with the mesne profit. In the present case, in light of notice under Section 106 of Transfer of Property Act, 1882, tenancy is to be terminated, the status of petitioner would be trespasser and he cannot take any benefit or advantage of any provision of Act, 2021. It

is not the case of payment of rent, but mesne profit, therefore, even in case Act, 2021 is applicable, petitioner is not entitled for benefit of Section 9 of Act, 2021.

11. The similar issue was before this Court in the matter of ***Smt. Suman Gupta (Supra).*** Relevant paragraph of the said judgment is quoted hereinbelow:-

"6. Learned counsel for the applicants relied upon Dwarka Prasad vs. Central Talkies, Collectorganj, Kanpur (AIR 1956 All 187). In that case the defendant was paying Rs.550/- per month as rent. The plaintiff landlord demanded Rs.1500/- per month as rent in the notice and also claimed damages at the rate of Rs.1500/- in the suit. It was held that the damages in the suit should be equal to such amount, which the defendant could have realized as rent of the premises the amount which the landlord can be said to get from the premises in suit would be equal to the maximum permissible rent under the Control of Rent and Eviction Act, and he is not entitled to anything more under the guise of damages on the alleged basis of high offers of rent to him by persons who may not have any chance of getting an allotment made in their favour. This Case is entirely distinguishable. In that case the Rent Control Act was applicable to the building in dispute. In cases where the Rent Act applies the rate of rent is regulated by statute. On termination of tenancy by notice under Section 106 Transfer of Property Act the tenant in such cases still continues to enjoy the protection of the Rent Control Act as a statutory tenant and his tenancy comes to end only after the order of eviction. The measure of damages in such cases is therefore at the rate of rent permissible under the Rent Act in cases where the Rent Control Act does not apply there is no statutory restriction and the measure of damages after termination of tenancy by notice under Section 106 of Transfer of Property Act would be the market rent."

12. This Court has taken view that in case of termination of tenancy by notice under Section 106 of Transfer of Property Act, 1882, enhancement of mesne profit shall be determined on the basis of market rate not on the basis of provision of any statutory provision.

13. The Apex Court has considered the very same issue in the matter of ***Atma Ram (Supra)***. Relevant paragraph of the said judgment are quoted hereinbelow:-

"In Shyam Sharan Vs. Sheoji Bhai & Anr., (1977) 4 SCC 393, this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In Bhagwandas Vs. Mst. Kokabai, AIR 1953 Nagpur 186, the learned Chief Justice of Nagpur High Court held that the rent control order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the rent control order. If the real value of the

property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court."

14. The Apex Court has held that after determination of tenancy, the position of tenant is akin to that of a trespasser and he cannot claim that the measure of damages, should be awarded under the provision of Rent Control Order. In case the real property is higher than the rent earned, amount of compensation for use and occupation of property can be assessed at the higher value.

15. In light of discussion made hereinabove as well as law laid down by the Court, this Court is also of the view that once after service of notice under Section 106 of Transfer of Property Act, 1882, tenancy is terminated, the status of tenant would only be tresspasser and mesne profit shall be determined, based upon market rate prevailing in the area. Provisions of Rent Control Act would not be applicable.

16. In the present case, the facts are entirely same, notice was served, tenancy was terminated and status of petitioner became trespasser. Mesne profit with the enhancement at the rate of 15% per annum is based upon the market rate produced by the plaintiff respondent not controverted or denied by the petitioner-defendant.

17. Therefore, under such facts and circumstances, law laid down by this Court as well as Apex Court, I found no illegality or irregularity in the impugned order.

18. Accordingly, the revision is dismissed, affirming the judgment of trial Court so far it relates to payment mesne profit at the rate of 15%.

(2024) 5 ILRA 1083
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Sale/Trade Tax Revision No. 30 of 2023

Commissioner Commercial Tax U.P.
...Petitioner
Versus
M/S Pan Parag India Ltd. ...Respondent

Counsel for the Petitioner:
Sri Bipin Kumar Pandey, Addl. C.S.C.

Counsel for the Respondent:
Sri Shubham Agarwal

U.P. Value Added Tax Act, 2008 - Section 58 - Double taxation - franchise of a trademark - Issue before the Court was whether the franchise of a trademark constitutes a transfer of the right to use goods, thereby making it subject to VAT ? – In the case license was given by the respondent for the use of his brand name. Said franchise agreement granted only representational right and not an exclusive right to the licensees to sell/manufacture goods. Permission granted by the dealer under the agreement was a non-exclusive right given to the licensees, as it was not to the exclusion of others. *Held:* Franchise agreement in the present case grants a non-exclusive license rather than a transfer of the right to use goods. As such, the transaction does not attract Value Added Tax under the UPVAT Act. Respondent received royalty amounts from various dealers under the franchise agreement, and service tax at a rate of 15% was already paid by the respondent on the amount of royalty received by them from the licensees under the franchise

agreement. If the payments have been subjected to service tax, they cannot be recharacterized as the sale of goods to levy VAT or sales tax. Prevention of double taxation is a fundamental principle of tax law. Constitution of India does not permit overlapping of taxes. Once an activity is taxable as a service, it cannot be taxed as a sale/deemed sale of goods. (Para 27, 28, 29)

Dismissed. (E-5)

List of Cases cited:

1. Commissioner of Sales Tax Vs Duke & Sons Pvt. Ltd. (1999) 112 STC 370

2. S. P. S. Jayam & Co. Vs Registrar, Tamil Nadu Taxation Special Tribunal 2004 SCC OnLine Mad 1018

3. M/s Mc Donalds India Pvt. Ltd. Vs Commissioner of Trade Taxes New Delhi reported in 2017 (5) GSTL 120

4. Malabar Gold Pvt. Ltd. Vs Commercial Tax Officer, Kozhikode & ors. reported in (2013) 63 VST 497

5. Godfrey Phillips India Limited Vs St. of U.P. (2005) 2 SCC 515

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

1. This is a commercial tax revision petition under Section 58 of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the 'UPVAT Act'). The following question of law has been admitted by this Court:

"Whether on the facts and circumstances of the case the Commercial Tax Tribunal was legally justified in deleting the amount of tax which is taxable under schedule 2 part A at serial No. 3 (All intangible goods like copyright, patent, license etc. transfer of right to use goods)."

2. In the instant case, first appellate authority had concluded that the dealer/respondent had sold his brand name/title under the franchise agreement, and since it is to be considered as a sale, therefore, Value Added Tax has to be levied on it.

3. Against the order of the first appellate authority, the dealer/respondent had gone into appeal before the Commercial Tax Tribunal. Relying upon the judgment of Delhi High court in **M/s Mc Donalds India Pvt. Ltd. V. Commissioner of Trade Taxes New Delhi** reported in **2017 (5) GSTL 120**, the Commercial Tax Tribunal held that since the franchise of trademark can be transferred to several persons at the same time, it is merely a license to use the goods and not a transfer of the exclusive right to use the goods, and therefore, no Value Added Tax can be levied on the same. It is this order which is assailed before this Court.

CONTENTIONS OF THE REVISIONIST

4. Mr. Bipin Kumar Panday, learned Standing Counsel appearing on behalf of the revisionist has made the following submissions before this Court:

a Once the copyright has been transferred and royalty amount has been received in lieu of the same, it becomes taxable under the provisions of the Act because entry at Serial No. 3 in Part A of Schedule- II of the Act makes clear that "All intangible goods like co pyright, patent, rep. license etc; transfer of right to use of goods" are taxable.

b. It is further submitted by him that since franchise or trademark falls within the

meaning of transfer of right to use the goods hence Value Added Tax is leviable on it.

c. It is further submitted by him that even if service tax was paid, it does not absolve the liability under the UPVAT Act, as Value Added Tax and Service Tax were separate and distinct taxation regimes before the introduction of the Goods and Services Tax Act, 2017. Further, the term 'sale' as defined under Section 2 (ac) of the UPVAT Act includes a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

d. In support of his contentions, he relies upon the judgment of the Supreme Court in case of **Vikas Sales Corporation V. Commissioner of Commercial Tax** reported in (**1996) 4 SCC 433** wherein it was held that REP license/Exim scrips were goods on the sale of which sales tax can be levied.

e. Further reliance has been placed upon the judgment of Madras High Court in the case of **S. P. S. Jayam and Co. v. Registrar, Tamil Nadu Taxation Special Tribunal** reported in **2004 SCC OnLine Mad 1018** and the judgment of Bombay High Court in **Commissioner of Sales Tax v. Duke & Sons Pvt. Ltd.** reported in (**1999) 112 STC 370**.

CONTENTIONS OF THE RESPONDENT

5. Mr. Shubham Agrawal, learned counsel appearing on behalf of the respondent has argued as follows:

a. The franchise agreement which the respondent dealer had entered into with various parties, only a mere license was given by the respondent for use of his brand name. The said franchise agreement grants only a representational right and not an exclusive right to the licensees to sell/manufacture goods.

b. The permission granted by the dealer under the agreement was a non-exclusive right given to the licensees, as it was not to the exclusion of others. Thus, the license does not constitute a 'transfer of right to use of goods'.

c. He further relies upon the judgment of the Supreme Court in the case of **BSNL V. Union of India** reported in **2006 (3) SCC 1** wherein the Supreme Court propounded a test for the constitution of a transaction as the transfer of right to use the goods.

d. He further submits that service tax at a rate of 15% has already been paid by the respondent on the amount of royalty received by them from the licensees under the franchise agreement. In view of this fact, no intention to evade tax on the part of the respondent can be inferred.

e. Finally, he argues that Service Tax and VAT are mutually exclusive levies and a single consideration cannot be subjected to both the levies. To buttress his argument, he relies upon the judgment of the Hon'ble Supreme Court in case of Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes reported in (2008) 2 SCC 614.

ANALYSIS

6. I have heard the learned counsels appearing for the parties and perused the materials on record.

7. The pivotal issue revolves around whether the franchise of a trademark

constitutes a transfer of the right to use goods, thereby making it subject to VAT.

8. Section 65(47) of the Finance Act, 1994 which is relevant to the instant issue is extracted herein:

"65(47) "franchise" means an agreement by which- (i)Franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(ii) The franchisor provides concepts of business operation to franchisee, including know how, method of operation, managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all know how to franchisee;

(iii) The franchisee is required to pay to the franchisor, directly or indirectly, a fee; and

(iv) The franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person;"

9. Reliance has been placed by the revisionist upon the judgement of the Bombay High Court in **Commissioner of Sales Tax v. Duke & Sons Pvt. Ltd. (supra)** wherein the Bombay High Court held that for transfer of the right to use trademark, it is not necessary to hand over the trademark to the transferee or give control or possession of trademark to him. The Bombay High Court further stated that it can be done merely by authorizing the transferee to use the same in the manner required by the law as has been done in the present case. The right to use trademark can be transferred simultaneously to any number of persons. Relevant paragraph is extracted below:

7. "Trade mark" has been defined in Section 2(1)(v) of the Trade and Merchandise Marks Act, 1958 to mean a mark used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right, either as a proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person. There is a distinction between transfer of right to use a trade mark and assignment of a trade mark. "Assignment" of trade mark is taken to be a sale or transfer of the trade mark by the owner or proprietor thereof to a third party inter vivos. By assignment, the original owner or proprietor of trade mark is divested of his right, title or interest therein. He is not so divested by transfer of right to use the same. Licence to use a trade mark is thus quite distinct and different from assignment. It is not accompanied by transfer of any right or title in the trade mark. The transfer of right to use a trade mark falls under the purview of the 1985 Act and not the assignment thereof. The manner of transfer of the right to use the goods to the transferee would depend upon the nature of the goods. For transfer of right to use a trade mark, permission in writing as required by law may be enough. In case of tangible property, handing over of the property to the transferee may be essential for the use thereof. All that will depend upon the nature of the goods. Take for instance, transfer of right to use machinery. The right to use the machinery cannot be transferred by transferor to the transferee without transfer of control over it. The case before the Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer was a case of transfer of right to

use machinery. It was in that context, the above decision came to be rendered. But the position in case of trade mark is different. For transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of trade mark to him. It can be done merely by authorising the transferee to use the same in the manner required by the law as has been done in the present case. The right to use the trade mark can be transferred simultaneously to any number of persons. The decision of the Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer thus has no application to the transfer of right to use a trade mark."

10. Further, a strong reliance has also been placed by counsel for the revisionist on judgment of Madras High Court in **S. P. S. Jayam and Co. v. Registrar, Tamil Nadu Taxation Special Tribunal (supra).** Relevant paragraphs are extracted herein:

"8. Coming to the facts of the present case, the petitioner/ assessee permitted M/s. Muthu Agencies to use their trademark in the course of trade at the rates specified therein for various items during a particular period. Of course, it retained the liberty to make use of the trademark in the event of the licensor starting to manufacture the products. Equally, it retained the liberty to grant licence to any other individual person or company to use the trademarks. Trademark is the property right and it exclusively belongs to the party who has registered it. Such a right is an intangible or incorporeal goods, which can be merchandised by the registered owners. As pointed out by the Supreme Court, the word "goods" is defined in very wide terms so as to bring in both tangible and intangible objects. General Clauses Act would explain movable property as property of every description except immovable property. Trademark right is intangible goods, which can be subject-matter of transfer. As already pointed out, M/s. Muthu Agencies was granted permission to use the trademark without any restriction whatsoever for a particular period. Consequently, it can only be taken as transfer of a right to use and not a mere right to enjoy. Simply because the assessee retained the right for himself to use the trademark and reserved the right to grant permission to others to use the trademark, it would not take away the character of the transaction as one of transfer of a right to use. That being so, this Court has to only hold that the order of the Tamil Nadu Taxation Special Tribunal, Chennai, confirming the order of the Joint Commissioner-III (SMR), Chepauk, is well in order."

11. In ***Duke & Sons (supra)***, the Court's interpretation highlighted that the right to use a trademark could be granted without transferring the physical control or possession of the trademark itself. This perspective was further validated in ***S.P.S. Jayam (supra)***, wherein the Madras High Court elaborated on the nature of trademarks as intangible goods, capable of being transferred without relinquishing ownership. The Madras High Court's reasoning underscored that such transfers should be viewed as the transfer of the right to use, rather than a mere license for enjoyment. However, these judgments must be re-evaluated in the context of Finance Act, 1994, which introduced specific provisions for the taxation of franchises. The legislative intent behind this Act was to bring clarity and uniformity to the taxation of service-based transactions, which had become increasingly prevalent with the rise

of franchising as a business model. Finance Act, 1994 delineated the boundaries of what constitutes a taxable service in the realm of franchising, thereby superseding earlier judicial interpretations that did not account for this legislative framework.

12. The judgments in ***Duke & Sons (supra)*** and ***S.P.S. Jayam (supra)*** were rendered in a legal landscape where the specific nuances of franchising agreements were not explicitly covered by the prevailing tax laws of the assessment periods that the High Courts in those cases were dealing with. The assessment year under challenge in ***S.P.S. Jayam (supra)*** was 1987-88. The order impugned in ***Duke & Sons (supra)*** dated back to 1989.

13. With the introduction of the Finance Act, 1994, the legal foundation has shifted. The introduction of the said law significantly altered the landscape of how such transactions are to be treated under tax law. The statutory provisions of the Finance Act, 1994 override judicial interpretations that did not consider franchising under a unified tax framework. This means that earlier judgments, such as those in ***Duke & Sons (supra)*** and ***S.P.S. Jayam (supra)*** must now be read in light of the new legislative context. As such, the precedential value of these decisions is diminished.

14. By Finance Act, 1994, the distinction between the transfer of right to use a trademark and its assignment was further nuanced. Licensing agreements, where the franchisee is granted limited rights to use a trademark or business concept, are clearly delineated from outright assignments or sales of trademarks. This distinction is crucial for tax purposes, as it determines the nature and extent of tax liability for the parties involved.

15. In light of the aforesaid, it is pertinent to look at judicial decisions on taxation of franchisees, or licensing agreements, which were rendered after the introduction of the Finance Act, 1994.

16. The Delhi High Court in the case of **Mc Donalds India Pvt. Ltd. V. Commissioner of Trade Tax** reported in **2017 (5) GSTL 120** espoused that commercial transactions primarily revolve around tangible items, with trademarks serving as valuable assets that contribute to the overall value and demand of the products or services. The Court further stated that since an agreement of franchise of trademark grants only a non-exclusive right, it does not constitute a transfer of right to use the goods. Relevant paragraphs are extracted below:

"38. Now, hypothetically, even if we are to agree that the McDonald's system as well as trade marks of the petitioners would fall within the definition of "goods", for it to be taxable within the DVAT and DSTRTUG Act, a transfer of the right to use goods needs to take place; occasioned from the franchise agreements read concurrently with the relevant law. Section 65(47) of the Finance Act 1994 reads as follows:

"(47) 'franchise' means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved. Thus, by definition, the franchise agreement grants only a representational right and not an exclusive right to sell/ manufacture goods. Further, the provisions of the franchise agreements are only to the effect of giving the franchisee the non-exclusive

right to use, for instance, as was reiterated in clause 11(d) of the MLA (of McDonald's) as below :

"Franchise and joint venture partner shall acquire no right to use, or to license the use of, any name, mark or other intellectual property right granted or to be granted herein, except in connection with the operation of the restaurant."

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42. Under trade mark law in India, trade mark use even for advertisement purposes is to be preceded by prior consent of the proprietor and any unauthorized use of the trade mark without such prior permission of the proprietor could lead to an infringement of the trade mark (in India, under section 29 of the Trade Marks Act, 1999). The function of the MLA and other franchise agreements in the case of petitioners and the trade mark licensing agreement (in the case of GSK) was (a) to provide for a strictly limited usage of the marks, i.e., only for advertisement and promotion of the services in the restaurant; (b) to provide for restrictions on usage of such marks, i.e., not for any commercial purposes such as use on merchandise, etc.

43. The grant of a right, in the form of license to use the mark is primarily to be utilized in the licensee's product. In usual cases of licensing, the trade mark owner may not wish to use mark its products or services in an area or region ; it instead would license the mark, to be used by the licensee's products, subject to limitations. The licensee has no right to initiate legal proceedings, in the event of infringement, (i.e., statutory right given to an owner or someone having proprietary rights over the mark, to seek injunction and damages). This is clear from section 28 of the Trade marks Act :

"28. Rights conferred by registration.—(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or service in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject."

The property in the mark always vests with the owner. Furthermore, importantly the use of the mark by the licensee inures to the owner, as the latter's continuous use, in terms of section 48 of the Trade marks Act, which is as follows :

48. Registered users.—(1) Subject to the provisions of section 49, a person other than the registered proprietor of a trade mark may be registered as a registered user thereof in respect of any or all of the goods or services in respect of which the trade mark is registered.

(2) The permitted use of trade mark shall be deemed to be used by the proprietor thereof, and shall be deemed not to be used by a person other than the proprietor, for the purpose of section 47 or for any other purpose for which such use in material under this Act or any other law."

44. Therefore, when a trade vendor, distributor, establishment or anyone else permitted to sell articles or offer services the trade marks (or brand) which belongs to another, it is incorrect to state that the brand or mark, associated with the product, constitutes the sale rather than from sale of the underlying goods or services that are the subject of the trade mark (dishes in a restaurant) themselves. It would be incorrect, therefore, to conclude what is

involved is not the sale of the product, but the intangible property or mark connected with the reputation of the mark, though that reputation guarantees a high demand for the product, from which the seller benefits. Likewise, in the case of distribution, a distribution agent is under an agreement with the manufacturer to sell its goods ; it also possesses the right to advertise the goods and brands of the manufacturer. This implies a licence of the manufacturer's trade mark. In such an event, the distributor need not pay for the right to use the intellectual property under which the goods are sold; he merely pays for obtaining the commercial right to sell the goods he buys from the manufacturer for enabling onward sale.

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47. For a transfer of the right to use goods to be effective, such transfer of right should be one that the transferee can exercise in exclusion of others; which is not the case in the present appeals and petitions, as the franchise agreement only grants a non-exclusive right, retaining the franchisor's right to transfer the composite bunch of services to other parties, apart from it retaining ownership to the same. The ownership in the trade mark, logo, service marks, and brand name is solely vested in appellant and the petitioners and has not been transferred; as is clearly manifested in the various clauses of the franchise agreements. The appellant and the petitioners grant a non-exclusive licence to the franchisees, which can be revoked upon non-compliance of the terms and conditions as stipulated in their franchise arrangement. Clearly, this does not amount to a transfer of the right to use goods."

17. Reference at this juncture can also be made to the judgment of the Hon'ble Supreme Court in BSNL (supra) wherein the Hon'ble Supreme Court laid down the test for a transaction to be constituted as the one for the transfer of right to use the goods:

"97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

18. The Kerala High Court in the case of **Malabar Gold Private Limited v. Commercial Tax Officer, Kozhikode and Others** reported in **(2013) 63 VST 497** wherein the trade mark of the petitioner was transferred to the franchisees for their use and the consideration received was the royalty paid to the petitioner, held that, such a transaction cannot be treated as a "deemed sale". Relevant paragraphs are extracted below:

"61. The issue therefore can be considered in the light of the dictum laid down in Bharat Sanchar Nigam Ltd.'s case [2006] 3 VST 95 (SC); [2006] 145STC 91

(SC); [2006]282 ITR 273 (SC); (2006) 6 RC 276; (2006) 3 SCC 1. Herein, the term "franchise is included in section 65(105)(zze) of the Finance Act. The same is a taxable service and the taxable event is the service rendered by the company. Thus, any service provided or to be provided to a franchisee will come within the purview of the said provision. The meaning of the terms franchise and franchisor under section 65(47) and (48) are also important. Going by the definition of franchise, it is an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved. The terms of the agreement herein will show that Clause II of the Preamble has specifically given under items (i) to (v) the activities to be carried out by the franchisee which are as follows :

"(i) Retailing of gold ornaments.

(ii) Retailing of diamond and other precious stone ornaments.

(iii) Retailing of premium watches.

(iv) Retailing of platinum and other premium fashion accessories.

(v) Any other items introduced by MALABAR GOLD in future."

62. Clause 2 under the heading "products" will show that the franchisee cannot stock, exhibit or sell any products in the authorised showroom during the period of the agreement except the products authorised by Malabar Gold, which may include products manufactured or sourced by Malabar Gold. Therefore, the same will definitely satisfy the meaning of "franchise" as contained in section 65(47) of the Finance Act, 1994. The learned Special Government Pleader for Taxes referred to the agreement herein and said that no service is referred to in the clauses therein. We do not agree, in the light of clauses 3, 4 and 5 of the model agreement as already noticed. Since what is termed as "taxable service" is any service to be provided to a franchisee by a franchisor in relation to a franchise, the terms of the agreement will have to be understood in that context.

63. In the light of the principles stated in para 98 of the judgment in Bharat Sanchar Nigam Ltd.s case [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 282 ITR 273(SC); (2006) 6 RC 276; (2006) 3 SCC 1, the provisions of the agreement, especially clauses (3) and (5) will show that the franchisor retains the right, effective control and possession and it is not a case of transfer of possession to the exclusion of the transferor. We notice that under clause(12) the franchisee has no right to sub-let or sub-lease or in any way sell, transfer, discharge or distribute or delegate or assign the rights under the agreement in favour of any third party, which is also significant. On termination of the agreement also, going by clause 25.3, the franchisee shall forfeit all rights and privileges conferred on them by the agreement and the franchisee will not be entitled to use the trade name or materials of "Malabar Gold". Merely because, going by clause 18, the franchisee is not an agent, it will not get any other exclusive right.

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67. Therefore, we are unable to agree with the view taken by the learned single judge. The view taken in para 14 of the judgment is that the transaction in question is a deemed sale as defined under section 2(x)(iii) of the KVAT Act. The above view was taken by concluding that the trade mark of the appellant is transferred to the franchisees for their use and the consideration received is the royalty paid to the appellant. In para 17, the principles stated in Bharat Sanchar Nigam Ltd.s case

[2006] 3 VST 95 (SC); [2006]145 STC 91 (SC); [2006] 282 ITR 273 (SC); (2006) 6 RC276; (2006) 3 SCC 1 were distinguished on the facts of the said case and it was held that in the said case the court was not dealing with a case involving transfer of intellectual property rights such as trade mark. It was held that there is total transfer of trade mark on payment of royalty which alone will attract the provisions of the KVAT Act. With great respect, we are unable to agree with the same.

68. Accordingly, we allow the appeals reversing the judgment of the learned single judge and hold that the franchise agreement will not attract the provisions of the KVAT Act. No costs."*

19. Commercial transactions primarily revolve around tangible items, with trademarks serving as valuable assets that contribute to the overall value and demand of products or services. However, as highlighted by the Delhi High Court in ***McDonald's (supra)***, since, a franchise agreement grants only a non-exclusive right, it does not constitute a transfer of the right to use goods. As defined by the Finance Act, 1994 "franchise agreements" grant representational rights, not exclusive rights to sell or manufacture goods. The judgment of Kerala High Court in ***Malabar Gold (supra)*** also bears relevance. The Kerala High Court noted that the terms of agreement made it clear that the franchisor retained effective control and possession, preventing a transfer of possession to the franchisee. The Division Bench of Kerala High Court disagreed with the earlier view that the transaction constituted a deemed sale and held that the franchise agreement did not attract provisions of the Kerala Value Added Tax Act, as it involved non-exclusive rights and control retained by the franchiser.

20. Franchise agreements typically grant non-exclusive rights to use trademarks and business systems. Such agreements do not constitute a transfer of the right to use goods in a manner that excludes others, which is a critical criterion for considering a transaction as a deemed sale. The non-exclusive nature of these rights ensures that the franchisor retains control and can license the same rights to multiple franchisees, reinforcing the licensing framework rather than a full transfer.

21. When trademarks are licensed, the licensee's use of the mark is considered the owner's use, maintaining the continuity of the trademarks' reputation and legal protections. This distinction between ownership and licensed use is crucial for determining the scope of rights and the corresponding tax liabilities. For instance, in typical licensing arrangements, the licensee does not acquire the right to initiate infringement proceedings, which remains with the trademark owner. This legal nuance affects the control dynamics and the nature of the transaction, influencing whether the arrangement is taxed as a service (licensing) or as a transfer of goods (sale). The retention of ownership and control by the franchisor or licensor ensures that the transaction remains within the purview of service tax rather than sales tax.

22. The differentiation between licensing and transfer also extends to the method and scope of use. In licensing, the licensor often imposes stringent conditions on the use of the trademark to ensure that the brand's reputation and quality are maintained. These conditions might include guidelines on marketing, product quality, and even operational standards. Failure to comply with these conditions can result in the revocation of the license. This level of

control is indicative of a licensing arrangement rather than a transfer, where the new owner would have the autonomy to use the trademark without such restrictions. In contrast, a transfer or assignment of a trademark involves transferring all rights associated with the trademark to the transferee. This includes the right to use, license, and enforce the trademark. Once transferred, the original owner relinquishes all control and ownership rights over the trademark. This kind of transaction is more straightforward in terms of taxation as it involves a clear transfer of an asset, typically subject to sales tax or capital gains tax depending on the jurisdiction and the specifics of the transaction.

23. Enter the protagonists, the franchisors, and franchisees, each adorned with their roles and responsibilities. The franchisor, akin to the playwright, holds the script of the brand, trademarks, and business model, while the franchisee, like the eager actor, steps onto the stage with dreams of entrepreneurial success. Together, they form a dynamic duo, ready to bring their shared vision to life. As the plot thickens, the script of franchise agreements unfolds, revealing the terms and conditions that will govern the partnership between franchisors and franchisees. Like the lines of a well-crafted drama, these agreements detail the rights and obligations of each party, setting the stage for a performance of mutual benefit and cooperation. Tax authorities, like astute critics, scrutinize each scene, seeking to unravel the true nature of franchise agreements. Yet, amidst the confusion, one question looms large: can franchise agreements be taxed as sales of goods?

24. Franchise agreements have become a ubiquitous feature of modern commerce, facilitating the expansion of businesses across diverse industries and geographies. However, the tax treatment of franchise agreements poses intricate challenges, with implications for both franchisors and franchisees. Transfer of the right to use a trademark does not necessitate the physical handover or control of the trademark. Instead, it can be affected by authorizing the transferee to use the trademark in accordance with the law. This underscores the intangible nature of trademark rights and their transferability without the need for physical possession. Franchise agreements primarily grant a representational right rather than an exclusive right to sell or manufacture goods, thereby categorizing such transactions as services rather than sales of goods. Franchise agreements are fundamentally licensing agreements rather than sales of goods. Licensing involves granting permission to use intellectual property rights, whereas sales of goods involve the transfer of ownership of tangible items. Understanding this distinction is crucial for determining the appropriate tax treatment for franchise agreements.

25. At first glance, franchise agreements may appear analogous to sales of goods, as they involve the transfer of rights and benefits from one party to another in exchange for monetary consideration. However, a deeper examination reveals crucial distinctions that warrant disparate tax treatment. Unlike conventional sales transactions, which involve the transfer of tangible property, franchise agreements primarily entail the licensing of intangible assets, such as trademarks, trade secrets, and proprietary know-how. One of the central aspects of franchise agreements is the grant of intellectual property rights from the franchisor to the franchisee. These rights include trademarks, trade names, logos, and

proprietary business methods. Unlike tangible goods, which can be bought and sold outright, intellectual property rights are licensed for use under specific terms and conditions. Another key factor that distinguishes franchise agreements from sales transactions is their non-exclusive nature. Franchise agreements typically grant franchisees the right to operate a business using the franchisor's brand and system within a defined territory. However, this right is not exclusive, as the franchisor may grant similar rights to other franchisees within the same or overlapping territories. Franchise agreements also entail an ongoing relationship between the franchisor and franchisee, characterized by training, support, and ongoing assistance. Unlike a one-time sale of goods, which concludes once the transaction is complete, franchise agreements involve continuous interaction and collaboration between the parties. The financial aspects of franchise agreements further underscore their distinction from sales transactions. Franchise fees and royalties are payments made by the franchisee to the franchisor in exchange for the right to use the franchisor's brand and system. These payments are not for the purchase of goods but rather for the ongoing support and benefits provided by the franchiser.

26. In conclusion, the taxation of franchise agreements and sales of goods represents a complex and multifaceted issue that defies easy categorization. While both involve commercial transactions, they embody distinct economic realities and legal considerations that necessitate differential tax treatment. By recognizing the unique characteristics of franchise agreements, including the prevalence of intangible assets and the importance of intellectual property, tax authorities can develop nuanced tax policies that promote fairness, efficiency, and compliance. Ultimately, a balanced approach that takes into account the economic substance of franchise transactions and the need to prevent tax arbitrage and avoidance will ensure the integrity and effectiveness of the tax system.

27. In light of the above, I am of the view that the franchise agreement in present case grants a non-exclusive license rather than a transfer of the right to use goods. As such, the transaction does not attract Value Added Tax under the UPVAT Act.

28. The Supreme Court in the case of ***Godfrey Phillips India Limited v. State of Uttar Pradesh*** reported in **(2005) 2 SCC 515** held that the Constitution of India does not permit overlapping of taxes. Once an activity is taxable as a service, it cannot be taxed as sale/deemed sale of goods. Relevant paragraphs of the are extracted below:

"44. The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in Article 246(1) and has been noted in H.M. Seervai's Constitutional Law of India, 4th Edn., Vol. 1 at p. 166 in para 1A.25 where, after commenting on the problems created by the overlapping powers of taxation provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined:

"The lists contained in Schedule VII to the Government of India Act, 1935, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides

only for 'fees' in respect of matters contained in the list but not including fees taken in any court. List I and List II of Schedule VII thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the Government of India Act, 1935. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results."

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46. Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass."

29. It is clear from the factual matrix of the instant case that the respondent herein had received royalty amount from various dealers under the franchise agreement and service tax has been duly paid by it on the same. If these payments have been subjected to service tax, they cannot be recharacterized as the sale of goods to levy VAT or sales tax. The prevention of double taxation is a fundamental principle of tax law. Double taxation occurs when the same income or transaction is taxed more than once by different tax authorities or under different tax regimes. An activity once taxed as a service cannot be taxed again as a sale of goods. This principle is crucial for ensuring fairness in the tax system and avoiding undue tax burdens on taxpayers.

30. I would like to put on record my gratitude for the assistance rendered by Sri Bipin Kumar Pandey, learned Additional Chief Standing Counsel appearing for the revisionist and Sri Shubham Agarwal, learned counsel appearing for the respondent. Furthermore, I would also like to put on record my appreciation for painstaking research and assistance in drafting this judgment by my Research Associate Mr. Aman Deep Sharma and Law Intern Mr. Jaspreet Singh.

31. In light of the aforesaid, I found no reason to interfere with the view taken by the Commercial Tax Tribunal, and accordingly, the instant revision application is dismissed.

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

(2024) 5 ILRA 1095
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No.1614 of 2022

M/S Balaji Coal Traders ...Petitioner
Versus
Commissioner, Commercial Tax, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Pooja Talwar

Counsel for the Respondents:
Mr. Arvind Kumar Mishra,S.C.

A. Uttar Pradesh Goods and Services Tax (UPGST) Act, 2017 - Section 107 - Appeal - Limitation - S. 107 provide Appeals to Appellate Authority. Any person aggrieved

by any order passed under the Act by an adjudicating authority may appeal to Appellate Authority *within three months from* the date on which the said order is communicated to such person. If the appellant is unable to file the appeal within the initial three-month period, they can seek an extension under Section 107(4) of the UPGST Act. This extension allows the appellant an additional period of one month beyond the initial three months to file the appeal. The clock of limitation starts running "*from* the date on which the said order or decision is communicated to such person.

B. General Clauses Act, 1897, S. 9, Commencement and Termination of Time - Section 9 of the GC Act provides that when calculating a time period that starts with the word "from", the day of the event from which the period begins is excluded, and when the period ends with the word "to", the last day of the period is included. According to Section 9 of the GC Act, when calculating the limitation period "from" the date of communication of the order, *the day on which the order is communicated is excluded* - Meaning of the terms "within" and "month" - In the context of S. 107 of the UPGST Act, "*within three months*" means that the appeal can be filed anytime from the date following the communication of the order until the end of the third month. The term "month" in modern statutory contexts refers to a calendar month. A calendar month is defined as the period from a given date in one month to the corresponding date in the following month. (Para 6, 8, 10)

C. Uttar Pradesh Goods and Services Tax (UPGST) Act, 2017, S. 107 - Appeal - Limitation - In the instant case appeal filed u/s 107 of the UPGST Act by the Petitioner was rejected on the ground that the same had been filed one day after the expiry of limitation, by treating 4 months as 120 days. *Held* :- Petitioner received the order in original on 12.07.2022. He filed the appeal on 10.11.2022. Three-month period would have begun on 13.07.2022, and expired on 12.10.2022, and the extended period would have expired on 12.11.2022. In reality, the appeal of the petitioner was filed within time on 10.11.2022. Impugned order was quashed. Court directed the first appellate authority to hear the appeal on merits and decide the same expeditiously. (Paras 17, 18)

Allowed. (E-5)

List of Cases cited:

State of Himachal Pradesh & anr. Vs. Himachal Techno Engineers & anr., reported in (2010) 12 SCC 210

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

1. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order dated April 19, 2022 passed by the Assistant Commissioner, State Tax, Sector -7, Agra (hereinafter referred to as the 'Respondent No. 2'), order dated July 12, 2022 passed by the Assistant Commissioner, State Tax, Sector – 5, Agra (hereinafter referred to as the 'Respondent No. 3'), and the order dated November 24, 2022 passed by the first appellate authority. Vide order dated November 24, 2022, the appeal filed by the Petitioner was dismissed as time barred.

2. Facts of the instant case are briefly delineated below:

(a) Petitioner was granted registration certificate under the U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as the UPGST Act').

(b) The aforesaid registration of the petitioner was cancelled by the Respondent No. 2 vide impugned order dated April 19, 2022.

(c) Thereafter, the Petitioner had filed an application for revocation of the

cancellation of registration before the Respondent No. 3 which was rejected vide impugned order dated July 12, 2022.

(d) Aggrieved by the impugned order dated July 12, 2022 the Petitioner had filed an appeal under Section 107 of the UPGST Act. The first appellate authority vide order dated November 24, 2022 dismissed the said appeal as time barred. Relevant portions of the impugned order dated November 24, 2022 are extracted herein below:

"अपीलार्थी द्वारा दिनांक 12.07.22 को आदेश की प्राप्ति स्वीकार करते हुए दिनांक 10.11.2022 को अपील योजित की गयी है। उ० प्र० जी०एस०टी० एंव सी०जी०एस०टी० की धारा 107(1) के अन्तर्गत आदेश तामीली के 03 माह (90 दिन) के अन्तर्गत प्रथम अपील योजित करने की व्यवस्था है तथा धारा 107(4) के अन्तर्गत 01 माह के विलम्ब को क्षमा करने का अधिकार प्रथम अपीलीय अधिकारी को दिया गया है, इस प्रकार 04 महा (120 दिन) के भीतर तक अपील प्रस्तुत की जा सकती है, जबकि प्रश्नगत अपील निर्धारित समय(विलम्ब क्षमा सहित) से लगभग 01 दिन बाद दाखिल की गयी है। इस प्रकार अधिनियम के अंतर्गत निर्धारित समय के बाद अपील दायर की गयी है। उक्त कमी के बिन्दु पर अपीलकर्ता ने बताया कि कोयला व्यापारी संघ को जी०एस०टी० में परेशानी का सामना करना पड रहा है, जिससे उ०प्र० प्रदूषण बोर्ड को भी अवगत कराया गया है, परन्तु मामला अभी लंबित होने कारण वे समय पर अपील दाखिल नहीं कर सके थे।...

***

...प्रमाणित है कि उ०प्र० जी०एस०टी० एंव सी०जी०एस०टी० की धारा 107(1) तथा 107(4) के अनुसार प्राविधानित समय सीमा में अपील दायर नही की गयी है। जहां तक विलम्ब क्षमा का प्रश्न है, माननीय सर्वोच्च न्यायालय द्वारा मै० सिम्प्लैक्स इम्फ्रास्ट्रक्चर लि० बनाम यूनियन ऑफ इण्डिया (सिविल अपील सं० 11866/2018) (स्पेशल लीव पिटीशन नं० 17521/2017) जो कि आर्विटेशन एण्ड कॉनसिलिएशन एक्ट से सम्बन्धित था, में स्पष्ट निर्णय दिया गया है कि उक्त एक्ट के Express provisias को देखते हुए विलम्ब क्षमा नहीं किया जा सकता है। उक्त एक्ट के प्राविधानों के अनुरूप सी०जी०एस०टी०/उ०प्र०जी०एस०टी० एक्ट की धारा 107(1) के अनुसार अपील आदेश प्राप्ति के 03 माह के अन्दर दाखिल की जानी चाहिये तथा धारा 107(4) के अनुसार अपील प्राधिकारी को यह समाधान हो जाता है कि अपीलकर्ता 03 माह की पूर्वोक्त अवधि के भीतर अपील करने के पर्याप्त कारणो से निवारित किया गया था तो वह उसे 01 माह की अवधि के भीतर प्रस्तुत करना अनुज्ञात करेगा। उक्त से यह स्पष्ट है कि नियत अवधि 03 माह के आगे अधिकतम 01 माह का अतिरिक्त समय का Extention दिये जाने का ही Statutory mandate है। उक्त न्याय निर्णय एंव एक्ट के प्राविधानों के आलोक में अपील कालबाधित होने के कारण ग्राह नहीं है तथा अस्वीकार किये जाने योग्य है।"

3. I have heard the learned counsel appearing for the parties and perused the material on record.

4. In the instant writ petition, the primary issue that lies for the consideration of this Court is that "Whether the appeal filed by the Petitioner under Section 107 of the UPGST Act was within the statutory time limit?"

5. I have reproduced the relevant sub sections of Section 107 of the UPGST Act herein for ease of reference:

***107. Appeals to Appellate Authority**. — (1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act, 2017 by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.*

***

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month."

6. Since the clock of limitation starts running "from the date on which the

said order or decision is communicated to such person" it would be prudent to refer to Section 9 of the General Clauses Act, 1897 (hereinafter referred to as the 'GC Act') which provides as follows:

"9. Commencement and termination of time. *— (1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".*

(2) This section applies also to all [Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

7. The phrase "from the date on which the said decision or order is communicated to such person" is crucial as it marks the starting point of the limitation period for filling an appeal. The legislative intent behind this provision is to ensure that the aggrieved party has a clear and fair understanding of the decision or order before the clock starts ticking for the appeal period.

8. Section 9 of the GC Act provides guidance on how to compute periods of time specified in statutes. Specifically, it indicates that when calculating a time period that starts with the word "from", the day of the event from which the period begins is excluded, and when the period ends with word "to", the last day of the period is included. According to Section 9 of the GC Act, when calculating the limitation period "from" the date of communication of the order, the day on which the order is communicated is excluded. This ensures that the appellant has a full three months to prepare and file the appeal. For example, if an order is communicated to a taxpayer on January 1, the period of three months will start from January 2.

9. It is also crucial to understand the meaning of the individual terms "within" and "month" as used in legal parlance and specifically within the framework of the UPGST Act.

10. The term "within" in legal terminology typically denotes the inclusion of the entire period specified, up until the last possible moment of the specified time frame. When a statue prescribes an action to be taken "within" a certain period, it generally means that the action can be performed any time from the beginning of the period until the end of the last day of the period. For instance, if a law states that an appeal must be filed "within three months", it implies that the appeal can be filed at any point during the three-month period, right up until the end of the last day of the three-month period. This interpretation ensures that the party obligated to take action has the full benefit of the entire period specified by the statute. In the context of Section 107 of the UPGST Act, "within three months" means that the appeal can be filed anytime from the date following the communication of the order until the end of the third month, ensuring that the appellant has the maximum possible time to prepare and file their appeal.

11. The term "month" is a fundamental unit of time in statutory interpretation, particularly in the context of legal deadlines and limitation periods. The term "month" can be interpreted in various ways, but in modern statutory contexts, it

primarily refers to a calendar month. A calendar month is defined as the period from a given date in one month to the corresponding date in the following month. For example, a period of one calendar month from January 15 would end on February 14 and the next month in this context would begin from February 15. With the standardization of the Gregorian calendar, a month is commonly understood to mean a calendar month. This uniformity aids in consistent statutory interpretation and application, ensuring that legal deadlines are clear and predictable.

12. Thus, while calculating the three-month period for filing an appeal, the starting point is the day following the date of communication of the order. For example, if an order is communicated on January 1, the three-month period begins on January 2 and ends on April 1:

Communication Date	January 1, 2024
Limitation Begins From	January 2, 2024
Calculation of Three Months	January 2, 2024 to February 1, 2024 February 2, 2024 to March 1, 2024 March 2, 2024 to April 1, 2024
Limitation Ends On	April 1, 2024

13. If the appellant is unable to file the appeal within the initial three-month period, they can seek an extension under Section 107(4) of the UPGST Act. This extension allows the appellant an additional period of one month beyond the initial three months to file the appeal. To calculate the extension period under Section 107(4) of the UPGST Act, the following steps are involved:

1. Determine Initial Period End Date: Identify the last date of the initial three-month

period.

2. Add One Month: Add one calendar month to the initial period end date to determine the extended deadline for filing the appeal.

Taking the earlier example, in which, the limitation period ended on April 1, 2024, the extended period for filling an appeal would end on May 1, 2024. It is important to point out here that the extended period would start running from the next day after the expiry of the originally prescribed limitation period.

14. In this regard, reference can be made to the judgment of the Hon'ble Supreme Court in **State of Himachal Pradesh and Another v. Himachal Techno Engineers and Another**. reported in **(2010) 12 SCC 210**. The Hon'ble Supreme Court in the aforesaid case explained the calculation of the period of a "month" as follows:

"17. In Dodds v. Walker [(1981) 1 WLR 1027 : (1981) 2 All ER 609 (HL)] the House of Lords held that in calculating the period of a month or a specified number of months that had elapsed after the occurrence of a specified event, such as the giving of a notice, the general rule is that the period ends on the corresponding date in the appropriate subsequent month irrespective of whether some months are longer than others. To the same effect is the decision of this Court in Bibi Salma Khatoon v. State of Bihar [(2001) 7 SCC 197]

***18**. Therefore when the period prescribed is three months (as contrasted from 90 days) from a specified date, the said period would expire in the third month on*

the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.

Re: Question (iii)

19. As the award was received by the Executive Engineer on 12-11-2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to Section 12(1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897. Consequently, the three months should be calculated from 13-11-2007 and would expire on 12-2-2008. Thirty days from 12-2-2008 under the proviso should be calculated from 13-2-2008 and, having regard to the number of days in February, would expire on 13-3-2008. Therefore the petition filed on 11-3-2008 was well in time and was not barred by limitation."

15. To qualify for an extension under Section 107(4) of the UPGST Act, the appellant must demonstrate sufficient cause for not presenting the appeal within the initial three-month period. Sufficient cause refers to circumstances beyond the control of the appellant that prevented them from filling the appeal within the stipulated time frame. The appellate authority may consider following factors when assessing whether sufficient cause has been demonstrated:

Nature of Circumstances: The severity and impact of the circumstances preventing the appellant from filling the appeal.

Evidence Presented: The quality and credibility of the evidence presented by the appellant to support their claim of sufficient cause.

Timeliness of Request: Whether the appellant promptly sought an extension after encountering the circumstances preventing them from filing the appeal within the initial period.

16. Limitation provisions in the UPGST Act set clear timelines for various actions, such as filing returns, making payments, or initiating appeal. By imposing time limits on actions, limitation provisions discourage delay and procrastination. Taxpayers are incentivized to fulfil their obligations promptly, which contributes to the smooth functioning of the tax administration system. Limitation provisions ensure equal treatment of taxpayers by establishing uniform deadlines for compliance. This prevents unfair advantages for non-compliant taxpayers and promotes a level playing field in the taxation process.

17. Counsel appearing on behalf of the Petitioner submitted that the appeal filed under Section 107 of the UPGST Act by the Petitioner was rejected on the ground that the same had been filed one day after the expiry of limitation and by treating 4 months as 120 days. She humbly submits that the authorities below had erred in not reading the provision correctly, and in reality, the appeal of the petitioner had been filed within time on November 10, 2022.

18. It is evident that that the petitioner received the order in original on July 12, 2022 and filed the appeal on November 10, 2022. In light of the same, three months period would have begun on July 13, 2022 and expired on October 12, 2022 and the extended period would have expired on November 12, 2022. In light of the same, it appears that the calculation done by the authorities below is incorrect which warrants the exercise of writ jurisdiction.

19. In the realm of administrative law, the writ jurisdiction of superior courts

serves as a powerful tool for ensuring justice, fairness, and adherence to the rule of law. One of the key grounds for invoking writ jurisdiction is the presence of factual errors or errors apparent on the face of the record. This allows aggrieved parties to seek judicial intervention when administrative authorities have committed errors that are evident from the records of the case. In the context of taxation and administrative adjudication, the exercise of writ jurisdiction becomes particularly relevant when there are discrepancies in the calculation of statutory timelines, as exemplified in the instant case. The presence of errors apparent on record provides a valid ground for the exercise of writ jurisdiction by the courts. When administrative authorities commit mistakes that are evident from the records of the case, aggrieved parties have the right to seek judicial intervention to rectify such errors and ensure justice.

20. Accordingly, let there be a writ of certiorari issued against the order dated November 24, 2022 passed by the first appellate authority. The said order is quashed and set aside. This Court directs the first appellate authority to allow the delay in filing the appeal and thereafter hear the appeal on merits and decide the same expeditiously, preferably within a period of two months from the date of production of a certified copy of this order before it.

21. With the aforesaid directions, this writ application is disposed of. There shall be no order as to the costs.

(Shekhar B. Saraf, J.)

EPILOGUE

22. Chanakya, also known as Kautilya or Vishnugupta, was a renowned ancient Indian philosopher, economist, and statesman who authored the Arthashastra, a treatise on statecraft, economics, and governance. In the Arthashastra, Chanakya emphasized the importance of dharma, or righteous conduct, in governance and taxation. According to Chanakya, taxation should be guided by dharma, ensuring that it is fair, equitable, and beneficial to the welfare of the State and its subjects. In New India, the principles espoused in Chanakya's Arthashastra remain relevant for promoting ethical governance and sustainable development. Taxation is not merely a fiscal tool but a means of advancing social justice, economic prosperity, and environmental sustainability. Therefore, compliance with tax obligations is crucial for revenue generation, which, in turn, funds essential public services and infrastructure development.

23. In the evolving landscape of taxation in New India, fostering a culture of compliance has emerged as a cornerstone for achieving economic growth, stability, and social development. Embracing compliance culture entails adhering to tax laws, regulations, and deadlines in a proactive and transparent manner. Within this framework, the role of limitation provisions cannot be understated. These provisions set clear boundaries and timelines for taxpayers and tax authorities, ensuring accountability, fairness, and efficiency in the tax system.

24. A robust compliance culture stimulates economic development by fostering an environment of trust, certainty, and predictability. When taxpayers comply with tax laws and regulations, it enhances investor confidence, attracts foreign investments, and promotes entrepreneurship and innovation. Compliance also ensures a level playing field for businesses, and

prevents unfair advantages to non-complying entities and encourages healthy competition. Limitation provisions serve as guardrails within the tax framework, preventing arbitrary or prolonged disputes that could disrupt economic activities. By imposing time limits on legal actions, limitation provisions facilitate the timely resolution of tax matters, reducing uncertainty and promoting business continuity. Strict adherence to limitation periods ensures that tax disputes do not linger indefinitely, providing clarity and stability for taxpayers and investors alike.

(2024) 5 ILRA 1102
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 64 of 2024

Dr. Bhawana ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Shivang Tiwari, Apporva Tewari, Vimalesh Kumar Singh

Counsel for the Respondent:
C.S.C.

(A) Service Law - The Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 - Special Appeal - Appointment to Public Post - Medical Officer in Community Health Center (Ayurvedic and Unani) - unfair treatment or unfair policy - differential treatment for grant of study leave - no rational and intelligible criteria for treating the two classes differently. (Para - 39)

(B) Word and Phrases - Sub-rule (2) of Subsidiary Rule 146-A - 'ordinarily' - itself is indicative that in given circumstances, may be extraordinary circumstances, such leave can be granted to a government servant who has put in less than five years of service - Present facts constitute extraordinary circumstances. (Para - 24,32)

Appellant/Petitioner took an entrance exam for a PG course - applied for Medical Officer post before knowing PG course result - selected as a Medical Officer - with a 2-year probation - Joined PG course - Completed half of PG course - Joined as Medical Officer - Applied for 12 months study leave - to complete remaining half of PG course (16-18 months) - Leave application was rejected - citing no provision for study leave for a probationer with less than 4 months of service - Rejection referenced Rules 81-B(4), 84, 146(2), 157-A(4), and Financial Handbook Vol. 2 Part-II - Appellant challenged rejection by filing writ petition - dismissed by Single Judge - rejection was unfair and discriminatory -hence appeal. **(Para -7,27,28)**

HELD: - Appellant's appointment as Medical Officer valid. Eligibility criteria and selection process were properly followed, and appellant was eligible for appointment despite participating in PG course examination. Both groups consist of doctors (P.M.H.S. and Ayurvedic Services), and there should be no discrimination. State can't have different standards for similar situations. Discrimination unacceptable. Not only was study leave permissible, but it was also a fitting case for granting study leave. **(Para - 35,40)**

Writ Petition & Special Appeal allowed. (E-7)

List of Cases cited:

Krishna Kant Pandey Vs St. of Uttarakhand & ors., (2015) 6 SERVLR 85

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Om Prakash Shukla, J.)

1. Rejoinder affidavit filed today, copy of which has been served to learned

Standing Counsel much earlier, is taken on record.

2. Heard Shri Apoorva Tewari along with Shri Shivang Tiwari, learned counsel for the appellant and Shri V.P. Nag, learned Standing Counsel for the State.

3. This is a Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 challenging the judgment and order dated 19.03.2024 passed by the writ Court in Writ - A No. 2075 of 2024 by which writ petition of the appellant/petitioner has been dismissed.

4. In the aforesaid writ petition the following reliefs had been sought:-

"a) issue a writ, order or direction in the nature of certiorari to quash orders dated 30.01.2024, passed by the Director, Ayurvedic services, Uttar Pradesh, Lucknow, as contained in Annexure no. 1 to the writ petition;

b) issue a writ, order or direction in the nature of mandamus commanding the respondents to grant the petitioner a study leave of 12 (twelve) months in accordance with the provisions laid down in the Financial hand book;

c) Issue such other orders, which this Hon'ble Court may deem just and proper in favour of the petitioners; and

d) allow the petition with costs."

5. The facts of the case in brief are that on 18.09.2021 an examination was held for admission to P.G. Course, namely, M. D.- Ayurveda Kayachikitsa, in which, the appellant being eligible participated. It was a three years course. Before the result of the said examination could be declared an Advertisement was issued on 23.11.2021 for recruitment to the post of Medical Officer, Community Health Center (Ayurvedic and Unani) in the services under the State of Uttar Pradesh. Written test was held on 31.07.2022. The appellant/petitioner qualified the same. She was called for interview which was held on 15.12.2022. The result of the selection was declared on 11.01.2023 and the petitioner was one of the successful candidates. Accordingly, an appointment letter was issued to her on 01.09.2023. The appointment was on probation of two years as Medical Officer in the Pay-scale of Rs.15600-39100 Grade Pay- 5400/- (Matrix Level - 10). The appellant/petitioner joined her service on the said post on 30.09.2023.

6. In the interregnum, the result of the entrance test to the P.G. Course referred above was declared and appellant/petitioner was admitted to the said course. She took admission on 01.03.2022 i.e. immediately after issuance of Advertisement i.e. 23.11.2021 and possibly after having applied for recruitment to the post of Medical Officer, Ayurveda.

7. By the time, she joined on 30.09.2023 she completed almost one and half years study in the P.G. Course and 16 months study remained, as, informed by Shri Apoorva Tewari, learned counsel for the appellant. Accordingly, the appellant/petitioner applied for leave on 30.11.2023, however, the said application was rejected on 30.01.2024, meaning thereby, in view of this rejection the appellant/petitioner could not complete P.G. Course. Consequently, she challenged the said decision by filing the aforesaid writ petition out of which this special appeal arise. The rejection order is on record and the only reason assigned for rejecting the leave prayed for by the appellant/petitioner is that there is no such provision for grant of

study leave to a probationer, especially as, the appellant/ petitioner had put in less than four months of service. Reference was made in this regard to Rule 81-B(4) and 84 of the Financial Handbook Vol. 2 Part-II and subsidiary Rule 146(2) as also Rules 81-B of Financial Handbook Vol. 2 Part- II to IV Chapter- 10 and Subsidiary Rule 157-A (4). The learned Single Judge has dismissed the writ petition with reference to the Rules referred in the order impugned before it as also Rule 84.

8. Learned counsel for the appellant in order to assail the judgment of the writ Court and the order impugned before it has invited our attention to subsidiary Rule 104(b) which relates to grant of leave to probationers as also to the Rules made under Rule 104(b) i.e. Rule 170. He has also invited out attention to subsidiary Rule 146-A and use of the word 'ordinarily' therein in the context of probationers. According to him, this itself indicative of the fact that it does not exclude or preclude the grant of leave including the Study Leave to probationers also of course in exceptional circumstances, such as, the one existing in the case at hand wherein the appellant/petitioner has completed half the course and midway had to join her services on the post of Medical Officer, Ayurveda in State of Uttar Pradesh. He also submits that higher qualification which she will acquire consequence to such study leave being granted will ultimately benefit the public at large, as, she would be better equipped and qualified to render of her services in Medical Department of the State. Moreover, he has referred to the discrimination being practiced by the State of U.P. in this regard by extending the joining time of freshly recruited Doctors of Provincial Medical Health Services (P.M.H.S.) vide order dated 14.03.2024. The submission in this regard is that the Doctors of the Ayurvedic Services and P.M.H.S. are similarly situated as far as Study Leave and an application for Fundamental and Subsidiary Rules contained in the Financial Handbook referred hereinabove are concerned. A person who does not even join the service he is being given extension up to three years to complete the P.G. Course that too without any bond in the case of those recruited to the P.M.H.S., but, in a case, such as, the appellant/petitioner who has in fairness after taking leave from the Institution where she was pursuing her P.G. Course and was half way through, has joined the services and thereafter, duly applied for grant of leave but the same has been rejected on the mistaken ground that there is no provision under which the probationer, especially one who had barely put in a few months of service, could be granted such leave. The submission is that this reasoning can not be justified in view of the Rule position and in view of the Government Order dated 14.03.2024 when the State extends the joining of persons who have not even joined the service to facilitate completion of their study. He also says that in the fact the appellant/petitioner is ready to give a personal bond that after completing her P.G. Course she will join her services and serve the public in the State of U.P. as per the terms and conditions of her service.

9. Learned Standing Counsel on the other hand has tried to persuade the Court that the Government Order dated 14.03.2024 has no application because they have been given the benefit before joining the services and therefore, such recruits to the P.M.H.S. are differently placed than the appellant/petitioner who has already joined but has put in less than four months of service. He has also invited our attention to subsidiary Rule 146-A to contend that such leave is not admissible. He has also referred

Fundamental Rule 67 and 84 to contend that leave is not a matter of right and it is the discretion of the Authority to refuse or revoke leave of any description and this right is reserved to the Authority empowered to grant it. The U.P. Fundamental Rule 84, according to him, clearly mentions that the leave may by granted to Government servants, on such terms as the Governor may be rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account. According to him, subsidiary Rule 164- A (2) does not permit grant of Study Leave to a Government Servant of less than five years service in a routine manner. He also refers to subsidiary Rule 170 in support of his contention. As regards subsidiary Rule 157 regarding extraordinary leave the submission is that it is a separate leave and was not applied by the appellant/petitioner. Extraordinary Leave can not be granted for study purposes. It is also his submission that the appellant/petitioner was aware of the fact that she had applied for being recruited to the post of Medical Officer, Ayurved on 23.11.2021 itself and therefore, she would have desisted from taking admission to the P.G. Course subsequently on 01.03.2022. Knowingly having done so, she has to face the consequence and she has to be treated in terms of the Rules applicable and not merely on the asking of the appellant/petitioner.

10. Referring to the Government Order dated 14.03.2024 and discrimination alleged by the appellant/petitioner we had passed an order on 03.04.2024 which reads as under:-

"1. Let the opposite parties file affidavit specifically addressing the issue as to how the claim of the petitioner for study leave could have been rejected by the Director, Ayurvedic Services vide order dated 30.01.2024 on the ground that there is no provision for grant of such leave to probationers whereas even as per the impugned judgment passed by the Writ Court, Subsidiary Rule 146A(2) provides study leave should not ordinarily be granted to Government Servant of less than five years' service or to Government Servants within three years of the date at which they have the option of retiring, meaning thereby in exceptional circumstances it can be granted. This can be the only understanding of said provision in view of the use of word 'ordinarily' and also as in the context of doctors of PMHS and doctors of Dental Service, Government Order dated 14.03.2024 has been passed, which permits extension of joining of such persons, who have been selected for appointment as Medical Officer in PMHS for a period of six months and even beyond the date till three years with the permission of department, whereas the case of the petitioner is better placed in the sense that she has very fairly joined the service after seeking leave from the Institution where she was pursuing the P.G. Course and has then applied for study leave. How double standards can be adopted in respect of apparently similarly placed candidates/Government Servants albeit appointed or proposed to be appointed in different services, but under the same employer, i.e. the State Government and in any event if the study leave is not permissible why on the same principle extraordinary leave cannot be granted, especially in view of S.R. 157A(IV) of the Subsidiary Rules made under the Financial Handbook.

2. List this case on 18.04.2024 as fresh.

3. In the meantime, the appellant may move an application before the

Institution where she was pursuing her P.G. Course seeking indulgence for providing further leave, if it is otherwise permissible."

11. In response to which a counter affidavit has been filed by the State. We have gone through the counter affidavit and we do not find any rational and intelligible criteria mentioned therein for differentiating the Doctors who have been recruited for joining as Medical Officers in the Provincial Medical Health Services and such as the appellant/petitioner who, after such recruitment as Medical Officer Community Health Center (Ayurvedic and Unani) has already joined the service, for the purposes of grant of study leave.

12. The Government Order dated 14.03.2024 extends the joining of such recruits in the P.H.M.S. up to three years to enable such recruits to the Provincial Medical Health Service to complete their study/course or to acquire a specialization to which they have already been admitted, meaning thereby, even though, they have been recruited they have not joined the service and the services of such Doctors would not be available to the Public and the State Government for different periods up to three years depending upon the facts of each case because they will be pursuing their courses of study but the request of the appellant for study leave has been rejeted on the ground that Rules do not permit the same. The appellant is no way differently situated.

13. In the case of the appellant/petitioner, she in all fairness joined on 30.09.2023 and thereafter applied for study leave. No doubt, she is a probationer and she has put in less than four months of service, but, she is better placed than those recruits in P.M.H.S. who have not even joined the service. Moreover, the extension of joining of such recruits to P.M.H.S. has been done without asking for any bond from them, meaning thereby, it is quite a possibility that some of the them after completing their P.G. or whatever courses they are pursuing, may not join, but, no security has been taken in this regard by the State from them. This is apparently discriminatory so far as appellant/petitioner is concerned. Moreover, learned Standing Counsel, on being asked to show which rule permits the benefit granted to recruits of P.M.H.S. Cadre as discussed above, he could not show any Rules but contended that they had not yet joined the service, whereas, the petitioner had already joined the service, therefore, they stand on a different footing. Such a contention can hardly be accepted as this can not form any rational basis for differential treatment for the purpose of grant of study leave/ or extension of joining, for completing the course to which both of such category have already been admitted.

14. Now, we come to the Rule position. Rule 84 of the Fundamental Rules reads as under:-

"84. Leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account."

15. The Study Leave Rules as contained in the Subsidiary Rules have been made by the Government under this Fundamental Rule 84.

16. Fundamental Rule 104 reads as under:-

"104. During their period of probation or apprenticeship, probationers

and apprentices are entitled to leave as follows:

(a) if appointed under contract in the United Kingdom with a view to permanent service in India, or if appointed in the United Kingdom posts created temporarily with the prospect, more or less definite, of becoming permanent:

(i) to such leave as is prescribed in their contracts, or, when no such prescription is made;

(ii) (1) when the period of probation is not less than three years, to the same leave which would be admissible if they held permanent posts; or

(2) when the period of probation is less than three years, to leave on average pay up to one eleventh of the period spent on duty, to which may be added, on medical certificate, leave on half average pay; provided that the total leave granted under this clause shall not exceed three months reckoned in terms of leave on average pay; and

(b) If appointed otherwise, to such leave as is admissible under rules framed by the Government on this behalf.

17. Fundamental Rule 104 provides that during their period of probation or apprenticeship, probationers and apprentices are entitled to leave as mentioned therein. Now, Clause (a) thereof deals with those appointed under the contract in the United Kingdom with which we are not concerned, but, Clause (b) thereof which applies to this case, goes on to state that if appointed otherwise i.e. otherwise then what is mentioned in Clause (a), a probationer would be entitled to such leave as is admissible under rules framed by the Government on this behalf.

18. Now, there are Rules which have been made under FR 104- (b). These rules are contained in Chapter XVII. We are concerned with Chapter XVII of the Subsidiary Rules. For the case at hand it is Subsidiary Rule 170 which is relevant and it reads as under:-

"170. Leave may be granted to a probationer if it is admissible under the leave rules which would be applicable to him if he held his post substantively otherwise than on probation."

19. Now, in this very context we may refer to Subsidiary Rule 146-A contained in Chapter XI-A and has been made by the Governor under Rule 84 of the Fundamental Rules under the heading 'Study Leave Rules'. Rule 146- A reads as under:-

"146-A. The following rules have been been made by the Governor to regulate the grant of additional leave to Government servants for the study of scientific, technical or similar problems, or in order to undertake special courses of instruction. These rules relate to study leave only. *They are not intended to meet the case of Government servants deputed to other countries at the instance of the Government, either for the performance of special duties imposed on them or for the investigation of specific problems connected with their technical duties. Such cases will continue to be dealt with on their merits under the provisions of Rules 50 and 51 of the Uttar Pradesh Fundamental Rules.* ***These rules apply to the Public Health and Medical Research Departments, the Civil Veterinary Department, the Agricultural Department, the Education Department, the Public Works Department and the Forest Department (except in respect of Continental tours, to which special rules apply). The rules may be extended by the***

Government to any Government servant not belonging to any of the departments mentioned above in whose case they may be of opinion that leave should be granted in the public interests to pursue a special course of study or investigation of a scientific or technical nature."

20. Fundamental Rule 67 is also relevant and it reads as under:-

"67. Leave cannot be claimed as of right, when the exigencies of the Public service so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it."

21. Fundamental Rule 67 clearly means that if exigencies of Public service so require any prayer for leave can be refused and can not be claimed as a matter of right and discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it. Now, discretion obviously has to be exercised keeping in mind the object and intent of the Rules and also in a reasonable manner. Discretion can not be exercised unfairly and unreasonable merely on whims or fancies, clearly not to discriminate or in a manner which may result in discrimination.

22. Now, we come to Fundamental Rule 84 which provides that leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account. Fundamental Rule 84 permits grant of leave for study whether scientific, technical or of any other nature referred therein subject of course to the terms as the Governor may be rule or order prescribe.

23. Now, Subsidiary Rule 146-A has been framed under Fundamental Rule 84. We have already quoted it above. It is under the heading 'Study Leave Rules'. The said rule applies only to Government servants which the appellant/petitioner before us is. The said rule has been made by the Governor to regulate the grant of additional leave to Government servant for the study of scientific, technical or similar problems, or in order to undertake special courses of instructions. These rules relate to study leave only. From a reading of the said Rule it is clear that these rules are in addition to other Rules admissible to Government servants including the extraordinary leave under Subsidiary Rule 157. The rule specifically states that they apply to the Public Health and Medical Research Departments, the Civil Veterinary Departments and other departments, therefore, the rule clearly envisages situation where the Officers and employees of such departments may require study further in addition to the educational qualifications already acquired by them and therefore, the Rule caters to such situation. In fact, the rule further goes on to state that the rule may be extended by the Government to any Government servant not belonging to any of the departments mentioned therein in whose case they may be of opinion that leave should be granted in the public interest to pursue a special course of study or investigation of a scientific or technical nature, therefore, there is an element of public interest implicit in the grant of such study leave and Subsidiary Rule made by the Governor itself recognizes it and extend the same even to those departments which are not specifically mentioned under Subsidiary Rule 146-A, subject of course to there being public interest involved.

24. Thereafter, Sub-rule (2) of Subsidiary Rule 146-A, inter alia, provides

that study leave should not **ordinarily** be granted to Government servant of less than five years' of service or to government servant within three years of the date at which they have the option of retiring. The use of the word '**ordinarily**' itself is indicative that in given circumstances, may be extraordinary circumstances, such leave can be granted to a Government servant who has put in less than five years of service.

25. Fundamental Rules were framed prior to independence, therefore, the reference therein to Public Health and Medical Departments has to be understood accordingly in the light of the departmental structure existing in the State of U.P. at present and the Rules have to be applied accordingly to corresponding departments including Medical and Health Departments such Ayurveda and Unani Medicine and it is not the case of the opposite parties that the position is otherwise.

26. From the Rules discussed above the ground for rejection of leave requested by the appellant is that there is no provision, can not be sustained as, apparently there is a provision in the said Rules even if hedged with conditions whether these conditions are satisfied in the case of the appellant is to be considered.

27. Now, against this backdrop, we consider the case of the appellant/petitioner. We find that it is not a case where she has joined service barely two three months earlier and thereafter has applied for admission to the P.G. course i.e. after joining, though, the Rules do not specifically debar such an option also, but, it is a case where on 18.09.2021 itself she had appeared in an entrance examination for admission to a P.G. Course as referred above, but, before the result could be declared the advertisement was issued inviting applications for recruitment to the post of Medical Officer, Ayurveda. Obviously, she being eligible applied for the same and ultimately qualified. In the interregnum, the result of the entrance examination for admission to P.G. Course was declared before the written test for recruitment was held and she joined the P.G. Course on 01.03.2022. Ultimately, on being successful and the result of recruitment having been declared, after taking due leave from her educational institution, she joined her service as Medical Officer, Ayurveda on 30.09.2023 and then applied for grant of study leave on 30.11.2023.

28. Now, the situation is that she has completed half of the Course and only half remains to be completed, which, according to the learned counsel for the appellant/petitioner, would take another 16 to 18 months, however, she had applied for study leave of 12 months.

29. In this very context, of course he has submitted that she is better placed than those who have not even joined the P.M.H.S. but their joining has been extended for the same purpose and has pleaded discrimination.

30. Now, the term 'ordinarily' used in Subsidiary Rule 146-A(2) would include an extraordinary circumstance as mentioned hereinabove, as, she was already pursuing a P.G. Course prior to selection for the post of Medical Officer and was halfway through on the date of her joining, especially as, ultimately, the higher qualification which she wants to acquire and is in fact in the process of acquiring, the same will ultimately benefit her services which are to be rendered to the public at large as a

Government Servant, therefore, the element of public interest is also satisfied.

31. We are, therefore, not satisfied with the stand of the State Government that the Subsidiary Rule 146-A does not contain any provision for grant of study leave to a person who is a Government servant and who has put in less than five years of service or for that matter who has put in less than four months of service. No such period of less than four months of service is mentioned in the said rules nor any such rule has been pointed out.

32. We are of the considered opinion that use of the word 'ordinarily' in the said Rule permits the grant of study leave in extraordinary circumstances (not ordinarily or in a routine manner) and we are also of the opinion that facts before us constitute extraordinary circumstances as already discussed hereinabove, more-so because the appellant must have deposited fee etc. and incurred other expenses for the said Course , all of which will go waste.

33. We may in this very context refer to Subsidiary Rule 170 which has been made under Fundamental Rule 104(b) and says that leave may be granted to a probationer if it is admissible under the leave Rules which would be applicable to him **if he held his post substantively otherwise than on probation**, meaning thereby, if the probationer was substantively appointed on a post after completed of probation and would be entitled to certain leaves, then, those leaves would also be admissible to a probationer. This rule also does not come in the way of the appellant/petitioner in the grant of study leave in the factual circumstances as already noticed hereinabove, rather it supports her case.

34. No doubt, Rule 67 is there, but, then, the State Government has not rejected the leave application with reference to any Public exigency nor with reference to Fundamental Rule 67, in fact, rejection is on the ground that it is impermissible, there being no such provision for a probationer, which is factually and legally incorrect as already discussed.

35. Moreover, the State can not blow hot and cold in the same vein. If there is no such provision for a probationer where is such provision for a new recruit who is yet to join service who have been given this benefit by Government Order dated 14.03.2024. To say that the latter have not joined service as yet, therefore, Fundamental Rules/ Subsidiary Rules do not apply to them, they form a different class vis-a-vis the appellant who has already joined service, is an argument made only to be rejected. It is accordingly rejected as being discriminatory and arbitrary. Once, it has extended the joining of new recruits to the P.M.H.S. who have not even joined the service, that too, up to a period of three years, then, it cannot say that in the case of the appellant-petitioner, who is the only person seeking such leave after having joined, albeit in the Ayurvedic Services, she is not entitled to similar benefit, especially as, she claims leave for only 12 or 18 months as the case may be. Both the classes consist of Doctors, one of P.M.H.S. Service, the other of Ayurvedic Service and there can be no discrimination in this regard. Rule 67 can not be pressed into service in the case of the appellant-petitioner while giving a go by to it while issuing the order dated 14.03.2024 in respect of new recruits, who are yet to join the P.M.H.S. Service.

36. We are convinced that any differential treatment to the

appellant/petitioner as has been metted out to her by the order which was impugned before the Writ Court, would be a clear case of discrimination, which the Constitution abhors in letter and spirit.

37. The reasons in the order, which were impugned before the writ Court, are not sustainable in view of the above discussion. The learned Writ Court has also lost sight of the rule position and the extraordinary situation as discussed hereinabove.

38. As regards the reliance placed by Shri V. P. Nag, learned Standing Counsel upon a judgment of Uttarakhand High Court reported in ***(2015) 6 SERVLR 85; Krishna Kant Pandey Vs. State of Uttrakhan and Ors.***, there was no case of discrimination in the said case, as has been set up by the appellant/petitioner herein, successfully. Moreover, that was a case, where the petitioners before Uttarakhand High Court had not joined hence the Court held that they had no right under Fundamental Rule 170, but, here in this case, similarly placed persons who have not joined PMHS, have been granted the benefit by the State of U.P. vide Government Order dated 14.03.2024, therefore, the said judgment does not apply here.

39. At this stage, Shri V. P. Nag, learned Standing Counsel submits that the order of rejection of the leave in respect of the appellant/petitioner is dated 13.01.2024, whereas, the benefit granted to the new recruits of P.M.H.S. is by subsequent Government Order dated 14.03.2024. This hardly improves the situation. This has nothing to do with the point of time when the claim of the appellant/petitioner was rejected and the date on which the request of new recruits to P.M.H.S. was acceded. It is a case of unfair treatment or unfair policy. It is a clear case of differential treatment for grant of study leave. There can be no rational and intelligible criteria for treating the two classes differently.

40. We do not consider the plea of the appellant- petitioner that extraordinary leave would also be admissible, as, we are of the considered opinion that not only it was permissible to grant study leave to the appellant,this was a fit case where study leave should have been granted.

41. For all these reasons, we set aside the judgment of Writ Court as also the order impugned before it.

42. The Director, Ayurvedic Services is directed to issue necessary orders afresh in the light of what has been discussed hereinabove within a period of three weeks from the date a certified copy of this order is submitted. The appellant is also permitted to move a fresh application, if required.

43. Accordingly, the Special Appeal as also the writ petition is **allowed**.

(2024) 5 ILRA 1111
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 229 of 2019

Rambha Singh ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Appellant:

Gyanendra Kumar Singh, Radha Kant Ojha (Senior Adv.)

Counsel for the Opp. Parties:
C.S.C., Parmatma Nand Ojha, Sanjay Chaturvedi, Satendra Tirpathi

(A) Service Law - Validity of appointment of Headmaster in a recognized Basic School - U.P. Basic Education Act, 1972 - The Uttar Pradesh Recognised Basic Schools (Junior High School) (Recruitment and Condition of Service of Teacher) Rules, 1978 - Rule 7(2) - Minority and Non-Aided Junior High School- The Constitution of India - Article 14 and 16 - Recruitment process initiated without resolution of Committee of Management - Favouritism and bias in recruitment - Cancellation of appointment -Principles of natural justice - Relative of appointing authority.

Challenge to the appointment of appellant as Headmaster of Gautam Purva Madhyamik Vidyalaya & subsequent cancellation of her appointment by the District Basic Education Officer - Single Judge dismissed writ petition – ground - recruitment process was not transparent and fair- District Basic Education Officer's decision to cancel the approval of the petitioner's appointment justified due to the irregularities in the recruitment process. (Para - 1 to 6), 15

HELD: - Recruitment process must be initiated with a resolution passed by the managing committee & must be fair, transparent, and free from favouritism and bias. Appointing authority must follow the principles of natural justice while making administrative decisions. Appeal does not require any interference, as the recruitment process was invalid and not transparent.(Para - 15)

Special Appeal dismissed. (E-7)

List of Cases cited:

Sister Meera Vs St. of U.P. & ors., (2013) 10 ADJ 310

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

1. This intra court appeal is directed against judgment and order dated 7.12.2018, passed by the learned Single Judge in Writ-A No. 12781 of 2018; whereby the challenge laid to the order of District Basic Education Officer, Ballia, dated 19th May, 2018, is rejected.

2. Admitted facts, as are noticed by the learned Single Judge, are that the post of Headmaster in Gautam Purva Madhyamik Vidyalaya, Basti Mundera, District Ballia (hereinafter referred to as the 'Institution') fell vacant on 30th June, 2014 due to retirement of the earlier Headmaster. The Institution is recognized under the provisions of U.P. Basic Education Act, 1972 and is receiving financial aid from the State. The Manager of the Institution, namely Sanjay Singh resigned on 24th April, 2015 and the Deputy Manager, Hridya Nand Singh assumed charge of the office of Manager of the Committee of Management pursuant to resolution of Committee of Management, dated 31st May, 2015. Papers for attestation of signatures of Hridya Nand Singh as Manager were sent to District Basic Education Officer, who approved his signatures on 6.6.2015. Even before attestation of his signatures/recognition as the Manager of the Institution, Hridya Nand Singh initiated the process for appointment to the post of Headmaster by seeking permission to advertise the post vide his letter dated 1st June, 2015. On the very day when signatures of Hridya Nand Singh were attested i.e. 6th June, 2015 the District Basic Education Officer also granted him permission to fill up the post of Headmaster. On the very next day i.e. 7th June, 2015, the vacancy was advertised in two Daily Newspapers namely 'Swatantra Chetna' and 'Anchalik Swar'. The selection proceedings were undertaken by the Committee of Management and

ultimately the writ petitioner came to be selected and appointed as Headmistress on 26th June, 2015. Papers were sent for grant of approval to District Basic Education Officer, who approved the selection on 29th June, 2015. The petitioner claims to have assumed the charge on the office of Headmistress on 10th July, 2015.

3. Selection and appointment of petitioner was challenged by one Madhubala Singh, by filing Writ Petition No. 41678 of 2015, who claimed that she was not allowed to participate in the selection though she was eligible and had duly applied pursuant to the advertisement in question. Another candidate, namely Ashutosh Prasad Singh also challenged the selection and appointment of petitioner by filing Writ Petition No. 61437 of 2015 on grounds similar to Madhubala Singh. The appointment of petitioner was directed to abide by the outcome of the writ petitions. It transpires that the District Basic Education Officer called for an explanation from the managing committee on various aspects relating to appointment offered to petitioner vide notice dated 29th April, 2017. The committee of management responded to the show cause notice vide its reply dated 2nd May, 2017. It is thereafter that the District Basic Education Officer has passed the order dated 3rd May, 2017. The order records that:

(i) Even before the signatures of the Manager were attested, he had initiated the process of recruitment, which was impermissible;

(ii) Proper notice has not been given to the candidates before making appointment so as to extend undue favour to limited persons;

(iii) Educational qualification and age for appointment have not been specified in the advertisement;

(iv) Although, seven persons are said to have applied, but it is not clarified as to how their applications were received;

(v) The order also records that though notice has been sent to the Institution on 29.4.2017 calling for reply by 2nd May, 2017, but till 5.00 pm on 3.5.2017, no explanation was received in the office of District Basic Education Officer, Ballia from the petitioner.

4. The order of District Basic Education Officer, dated 3rd May, 2017, came to be challenged in Writ Petition No. 25292 of 2017 wherein an interim relief was granted to the petitioner. This interim order was challenged in Special appeal filed by Ashutosh Prasad Singh being Special Appeal No. 372 of 2017. The special appeal came to be disposed of on 31st July, 2017 vide following orders:-

"We have heard learned counsel for the parties and examined the records of the writ petitions as well as this special appeal.

We are in agreement with the contention raised on behalf of Smt. Rambha Singh that once the selection has been approved and she had joined and was actually working any order of cancellation of approval granted earlier must have preceded an opportunity to the teacher concerned. Any order passed without following such procedure would be in violation of principles of natural justice and and therefore legally not sustainable.

We are of the opinion that the order passed by Basic Shiksha Adhikari dated 3.5.2017 can not be sustained being in violation of principles of natural justice whatever may be the basis for passing such an order. Smt. Rambha Singh was at least entitled to be informed of the grounds on which it was proposed to cancel the approval and to have her say in the matter.

This leads the court to issue as to what should be the next step once the order is found to be in violation of principles of natural justice. In our opinion having regard to the allegations made and the enquiry report received qua Smt. Rambha Singh being a relative of Sri Rakesh Singh, BSA as well as in respect of the mode and manner of the selection of Smt. Rambha Singh being illegal as contended before us by the counsel for the appellant, we are of the opinion that the interest of substantial justice would be served by requiring the Basic Shiksha Adhikari to pass a fresh order in the matter of selection and appointment of Smt. Rambha Singh after affording opportunity of hearing to the Committee of Management of the institution, Smt. Rambha Singh and after examining the original records as may be available in the office of Basic Shiksha Adhikari or may made available qua the selection in question. The appellants are also at liberty to file their representation disclosing the grounds on which they propose to challenge the selection within two weeks from today along with certified copy of this order. The Basic Shiksha Adhikari shall complete the exercise as indicated above within four weeks thereafter by means of a reasoned and speaking order.

We are not expressing any opinion on any of the issues which have been raised by the parties inasmuch all such issues needs examination of records and a finding of fact is to be returned. It is for this purpose that the matter is being asked to be examined by the Basic Shiksha Adhikari.

The writ petitions i.e. Writ-A Nos.25292 of 2017, 61437 of 2015 and Writ-A No. 41687 of 2015 and the special appeal stand disposed of. All consequential actions shall be taken accordingly."

5. Pursuant to the directions issued in Special Appeal No. 372 of 2017, the District Basic Education Officer, Ballia, has reiterated the previous order cancelling the approval granted to the appointment of the petitioner vide his order dated 20.8.2017. This order records that even before signatures were attested of the then Manager, Hridya Nand Singh, he had initiated the process of appointment by asking for permission from the District Basic Education Officer, which was impermissible.

6. A subsequent meeting has been called of the General Body of the Institution in which appointment of petitioner as Headmistress has been held invalid. The District Basic Education Officer, therefore, concluded that appointment of petitioner has not been made in accordance with law.

7. It transpires that the order of the District Basic Education Officer was challenged in Writ Petition No. 10596 of 2018. Contesting parties appeared in the writ petition and the District Basic Education Officer was permitted to revisit the matter after affording an opportunity of hearing to the parties. It is thereafter that an order has been passed by the District Basic Education Officer on 19th May, 2018. It is this order which was under challenge in the writ petition and has been sustained by the learned Single Judge, while dismissing the writ petition. Learned Single Judge has concluded that the advertisement pursuant to which the petitioner has been appointed was not in accordance with the Rule 7(2) of the Uttar Pradesh Recognised Basic Schools (Junior High School)(Recruitment and Condition of Service of Teacher) Rules, 1978. Learned Single Judge has also found the appointment of the petitioner to be a result of favouritism and consequently denial of equality of opportunity under Article 14 and 16 of the Constitution of

India. In para 34, the learned Single Judge has observed as under:-

"34. The manner in which the then Manager had proceeded to advertise the post and make selection clearly establishes that the whole exercise was carried out in a predetermined and bias manner to appoint the petitioner on the post of Headmistress. The then Committee of Management sent the signatures for approval to the BSA only on 02.06.2015 but before that, a request for carrying out the advertisement for filling up the post of Headmaster/Headmistress was sent. The approval was granted on 06.06.2015. The advertisement was sent for publication before that and it was published on 06.06.2015 in two newspapers. It has also come on records that the petitioner happens to be relative of Rakesh Singh which is the clear finding in the punishment order dated 29.05.2017 of Shri Rakesh Singh. This Court, therefore, cannot and should not come in the way when the corrective steps have been taken for declaring the appointment of the petitioner as invalid and not in accordance with law. The appointment of the petitioner is tainted and against the statutory Rules and the allegation of bias of the then BSA is also not without substance. The petitioner is holding a public office, but her appointment is tainted and, therefore, this Court does not find any illegality or irregularity in the impugned order whereby the petitioner's appointment has been held to be invalid."

8 Challenging the judgment of learned Single Judge, Sri R.K. Ojha, learned Senior Counsel submits that the process of recruitment was held in a fair and transparent manner; the advertisement was already made and mere non-specification of qualification or age of recruitment cannot be a ground to question it in view of the judgment of this Court in Sister Meera Vs. State of U.P. and others, (2013) 10 ADJ 310; petitioner is not in the prohibited degree of relationship with the District Basic Education Officer Rakesh Singh and merely because she may have been distantly related can be no ground to invalidate her appointment. Learned Senior Counsel submits that since appellant has already been appointed and has worked for several years, as such, there is no reason to interfere with her appointment, particularly when she possesses requisite qualification for the post and procedure for appointment has otherwise been complied with.

9. Sri P.N. Ojha as well as Sri J.P. Singh, learned counsel for the respondents on the other hand submits that the entire process of recruitment lacked fairness and transparency and was at best a farce. It is further stated that the manner in which appointment was made clearly showed that its object was to extend undue favour to the petitioner and once learned Single Judge has found substance in the reasons assigned by the District Basic Education Officer for cancellation of appointment no interference in its be made. Learned State Counsel has also adopted the submissions made by Sri P.N. Ojha as well as Sri J.P. Singh.

10. We have heard learned counsel for the parties and have carefully perused the materials on record. It is not in dispute that the post of Headmaster in the Institution fell vacant on 30th June, 2014 due to superannuation of the earlier Headmaster. It transpires that the elected Manager of the Institution Sri Sanjay Singh resigned on 24th April, 2015. Hridya Nand Singh was allowed to work as Manager for the remaining term by the Managing Committee vide its resolution dated 31st May, 2015.

Signatures of Deputy Manager Hridya Nand Singh admittedly came to be recognized on 6th June, 2015. It is even before signatures of the Deputy Manager were attested as the Manager of the Institution that the process of recruitment was initiated by seeking permission to advertise the post.

11. The resolution of the Managing Committee of Institution authorising Hridya Nand Singh to function as Manager came to be approved only on 6th June, 2015. It is even before it that Hridya Nand Singh made a request for grant of permission to make appointment on the post of Headmaster. The District Basic Education Officer Rakesh Singh granted this permission on the 6th June, 2015 itself. The advertisement was also published in two newspapers on 7th June, 2015. From the manner in which the process of recruitment has commenced even before the signature of Manager was attested prima facie indicates haste on part of the authorities in commencing the recruitment process. Although educational authority has doubted legality of appointment on the ground that advertisement did not specify the age and qualification for recruitment, but even if this issue is kept aside, as we find substance in the argument of Sri Ojha that non-specification of age and qualification may not be fatal to the cause of the petitioner in view of the law laid down by this Court in Sister Meera Vs. State of U.P. and others, 2013 (10) ADJ 310, yet there are other glaring facts which requires consideration in the matter.

12. Soon after the appointment was offered to the writ petitioner two petitions came to be filed before the High Court by Ashutosh Prasad Singh and Madhubala Singh, who stated that their applications for appointment have been arbitrarily overlooked. Records of the appeal would go to show that Ashutosh Prasad Singh and Madhubala Singh have informed the District Basic Education Officer that they had made application for appointment to the post of Headmaster and had also attempted to appear before the selection committee but they were not permitted to do so. They were informed that the date of interview has been altered. Later on they came to know that the petitioner has been appointed. Complaint was made by these two persons before the concerned authorities by sending representation. There are written letters on record sent by Hridya Nand Singh in his capacity as Manager, dated 25.6.2015 stating that letter by registered post are received from the aforesaid two persons namely Ashutosh Prasad Singh and Madhubala Singh containing their educational and training qualification. They were informed that the purpose of sending their letter is not clear therefore these letters are being returned. The letters sent to both these persons are on identical terms and are extracted hereinafter:-

"कार्यालय- प्रबन्धक, गौतम पूर्व माध्यमिक विद्यालय बस्ती मुड़ेरा-रसड़ा, बलिया

श्री आशुतोष सिंह
पुत्र श्री सरना
पो० हाजीपुर
जनपद गाजीपुर,

विद्यालय में आपके नाम का एक रजिस्टर्ड डाक लिफाफा प्राप्त हुआ है जिसमें आपके नाम का शैक्षिक एवं प्रशिक्षण योग्यता भरा गया है। शैक्षिक एवं प्रशिक्षण योग्यता विद्यालय को किस आशय/उद्देश्य हेतु प्रेषित किया गया का कोई उल्लेख नहीं होने के कारण रजिस्टर्ड डाक लिफाफा के माध्यम से प्रेषित शैक्षिक एवं प्रशिक्षण योग्यता औचित्यहीन है।

अतः आप द्वारा प्रेषित शैक्षिक एवं प्रशिक्षण योग्यता मूल रूप से व किया जाता है।

ह० हृदयानन्द सिंह
प्रबन्धक
गौतम पूर्व माध्यमिक विद्यालय बस्ती
मुड़ेरा एवं रसड़ा बलिया

बस्ती मुड़ेरा बलिया
दिनांक 25-6-2015

13. The Manager of the Institution has also sent a representation to the District Basic Education Officer on 11.5.2018 stating that no resolution was ever passed by the managing committee to initiate the process of recruitment; applications sent by Smt. Madhubala Singh and Ashutosh Prasad Singh are available on record, but their educational certificates are not available in the office; quality point marks of other applicants namely Ajay Kumar Singh and Vandana Mishra are higher than that of petitioner but educational certificates of these persons are also not available. Maximum marks at the interview had been given to the petitioner; all other candidates, who secured higher quality marks have been shown absent; the manager has also specified that permission for initiating the recruitment as well as approval of petitioner's appointment has been granted by District Basic Education Officer Rakesh Singh. His father-in-law is Rajendra Singh. Brother of Rajendra Singh is Ravindra, who is married in village Rohana. Petitioner's husband is Dharmendra Pratap Singh. Real sister of Dharmendra Pratap Singh (husband of writ petitioner) is married to Ravindra, who is the real brother of father-in-law of Rakesh Singh.

14. Learned Single Judge has noticed the fact that disciplinary inquiry was initiated against the then District Basic Education Officer Rakesh Singh and Charge No. 5 relating to appointment being offered to his relatives, including the present petitioner, has been proved. Punishment order has also been passed against Rakesh Singh on 29.5.2017.

15. In the facts of the case, we find that the process of recruitment has been initiated in undue hot haste without any resolution passed by the managing committee for initiating the process of recruitment on the post of Headmaster. Admittedly the appointing authority is the committee of management and in the absence of its authorisation the process of recruitment would be without authority of law. The process was otherwise initiated by the Deputy Manager, even before his signatures were formally attested as Manager. The recruitment process does not appear to be fair and transparent, inasmuch as, all persons with higher quality point marks are shown absent and two of the candidates, who had applied for appointment, have not been permitted to take part in the recruitment. Allegation of favouritism otherwise surfaces against the then District Basic Education Officer. Even if we accept the contention of the petitioner that the advertisement for appointment was valid notwithstanding the fact the qualification and age are not specified, yet we find that the recruitment process cannot be said to be wholly transparent. In such circumstances, the decision of the District Basic Education Officer to cancel the approval of petitioner's appointment and dismissal of the writ petition by the learned Single Judge would not require any interference in the present appeal.

16. The appeal consequently fails and is dismissed.

(2024) 5 ILRA 1117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2024

BEFORE

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

Writ-A No.6402 of 2024

Sehrun Nisha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.B. Singh

Counsel for the Respondent:
C.S.C.

(A) Service Law - Gratuity - Entitlement to - Gratuity is payable based on completed years of service, not age of retirement - premature retirement does not disentitle a teacher to gratuity - 'treading the beaten path' - utter lack of application of mind and non-understanding of principle. (Para - 7)

Petitioner (teacher) opted for voluntary retirement at the age of 57 years - District Minority Welfare Officer rejected petitioner's claim to gratuity - citing that - gratuity payable only to those who opt to retire at the age of 60 years or die before attaining that age - decision challenged - ground - entitled to gratuity based on their completed years of service. (Para - 1)

HELD: - Petitioner entitled to gratuity despite retiring at 57 years. The District Minority Welfare Officer's interpretation of the rules was flawed. Directed respondents to sanction and calculate gratuity to the petitioner taking into account the total number of completed years of service rendered by him before prematurely retiring within a specified timeframe. Impugned order quashed. (Para - 10)

Writ Petition Allowed. (E-7)

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

1. This writ petition is directed against the order dated 02.12.2023 passed by the District Minority Welfare Officer, Prayagraj, rejecting the petitioner's claim to gratuity on the ground that the petitioner has sought voluntary retirement at the age of fifty-seven years, whereas gratuity is payable only to those who opt to retire at the age of sixty years (as distinguished from those who opt to retire at the age of sixty-two years) and also in cases of teachers, who die before attaining the age of sixty years.

2. It is submitted that according to paragraph no. 4(1) of the Government Order dated 14.12.2011, it is provided that like civil service, governed by Article 474 of the Civil Service Regulations, those who do not complete ten years of qualifying service, are not entitled to pension but if they opt to retire at the age of sixty years, they are entitled to gratuity under the rules framed for the teachers serving in the aided Intermediate Colleges.

3. On 26.04.2024, this Court passed the following order:

"The petitioner opted for voluntary retirement at the age of 57 and has been denied his gratuity by the District Minority Welfare Officer on ground that since he had not filled up the option to retire at 60, which is the entitling age to receive gratuity, or 62 years, which disentitles, the petitioner is not entitled to gratuity.

Prima facie the reasoning is absolutely flawed.

Mr. J. N. Maurya, learned Chief Standing Counsel states at this juncture that one opportunity be provided to the District Minority Welfare Officer, Prayagraj to reconsider the matter.

A week's time is granted for the purpose.

Adjourned to 07.05.2024 as fresh. "

4. An opportunity was provided to the District Minority Welfare Officer, Prayagraj to re-consider the matter. The District Minority Welfare Officer, Prayagraj has skirted the opportunity granted to him by this Court. He has issued a memo dated 03.05.2024, where the stand taken is that gratuity is payable only to such teachers of the aided Intermediate Institutions, who opt to retire at the age of sixty years. He has referred to an objection in this regard raised by the Joint Director (Pension) Prayagraj Division, Prayagraj vide his memo dated

09.09.2020 annexed as Annexure no. 3 to his memo dated 03.05.2024, where it is observed:

"श्री मो० अबुल कलाम स्वैच्छिक सेवानिवृत्त प्रधानाचार्य मदरस्सा हिदायतुल दोंदीपुर प्रयागराज के प्रकरण का परीक्षण किया गया जिसमें उन्होंने यह कमी इंगित की है कि मो० अबुल कलाम की जन्म तिथि 15.08.1962 के आधार पर अस्वस्थता के कारणवश 57 वर्ष 4 माह 16 दिन की आयु पर स्वैच्छिक सेवानिवृत्त हुए है। पेंशन प्रपत्र भाग-5 में सेवानिवृत्तिक ग्रेच्युटी का आगमन करते हुए प्रस्तावित किया गया है। संगत/प्रचलित शासनादेशों की प्राविधानित व्यवस्था के अनुरूप 60/62 वर्ष की अधिवर्षता आयु पर सेवानिवृत्त होने वाले शिक्षकों को 58/60 वर्ष की अधिवर्षता पर सेवानिवृत्त होने वाले विकल्पधारी शिक्षक को ही उपादान (ग्रेच्युटी) अनुमन्य है। श्री कलाम उक्त शर्त / प्रतिबन्ध से आच्छादित नहीं है, जिसके कारण उपादान (ग्रेच्युटी) की अनुमन्यता का शासनादेशिक आधार/औचित्य स्पष्ट नहीं है। अतः 60 वर्ष की अधिवर्षता आयु पर सेवानिवृत्त होने वाले शिक्षकों को 58 वर्ष पर विकल्प चयन करने वाले विकल्पधारी शिक्षकों तथा 62 वर्ष की अधिवर्षता आयु वाले शिक्षकों को 60 वर्ष पर विकल्प चयन करने वाले विकल्पधारी शिक्षकों को ही उपादान की सुविधा संगत/प्रचलित शासनादेशों में अनुमन्य है। इसके अतिरिक्त अन्य आयु वर्ष पर सहायता प्राप्त शिक्षण संस्थान से स्वैच्छिक सेवानिवृत्त अध्यापकों को उपादान (ग्रेच्युटी) अनुमन्यता विषयक शासनादेश कार्यालय में अद्यतन उपलब्ध नहीं है। पेंशन निदेशालय के पत्र में संगत शासनादेश की प्रति सहित प्रकरण उपलब्ध कराने का उल्लेख किया गया है जिससे प्रकरण परीक्षणोपरांत निस्तारण किया जा सके।"

5. It is on the basis of the aforesaid note put up by the Joint Director (Pension), Prayagraj Division, Prayagraj that the District Minority Welfare Officer, Prayagraj has refused to re-consider his stand that gratuity may be payable to the petitioner though he has prematurely elected to retire at the age of 57 years 4 months and 16 days. For one he may clarify that the age of a retiring employee is never to be reckoned in terms of days and months. It is to be reckoned in terms of the completed age. Thus, so long as an employee does not turn fifty-eight, he is to be regarded as fifty-seven years old. The petitioner, therefore, is an employee, who has chosen to retire at the age of fifty-seven years. prematurely.

6. The Government Orders, under reference or rules, which these orders reflect or amplify, give effect to a scheme wherein a teacher, who serves for an extended tenure up to sixty-two years is deprived of his gratuity to which he would be entitled, if he were to retire at the conventional age of sixty years. He looses gratuity because he serves for two years more beyond the conventional years.

7. Here is a case, where the petitioner has chosen to retire at the age of fifty-seven years, prematurely. The option to retire at the age of sixty years is to be understood in contra-distinction to the option to retire at the unconventional and the higher age of sixty-two; it is not to be understood as an option vesting a teacher with a right to receive gratuity only if he elects to retire at sixty. Retirement at sixty years is not an entitling fact, which leads the employee to acquire a right to receive gratuity, which he otherwise does not have. An employee gets his right to gratuity according to the number of the years that he serves. Rather, if he chooses to serve, as already said, beyond the conventional age of sixty years, he is divested of that right for the extra remuneration of two years in regular service that he receives. The interpretation, based on the relevant Government Orders by the Joint Director (Pension), Prayagraj Division, Prayagraj and the District Minority Welfare Officer, Prayagraj, is the product of what is conventionally called 'treading the beaten path', which shows utter lack of application of mind and non-understanding of principle.

8. In future, the Additional Chief Secretary (Secondary Education), U.P., Lucknow will bear these remarks of ours in mind and pass appropriate orders so that these kind of perverse interpretations are not placed by the officials functioning in the Department of Secondary Education to the prejudice of teachers vis-a-vis their valuable right to receive gratuity to which they are otherwise entitled.

9. The Joint Director (Pension), Prayagraj Division, Prayagraj and the District Minority Welfare Officer, Prayagraj shall also take note of this order and will not repeat this kind of interpretation in future, if

a similar set of rights were to arise for consideration.

10. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 02.12.2023, passed by the District Minority Welfare Officer, Prayagraj, is hereby quashed. A mandamus is issued to the respondents to sanction and calculate gratuity to the petitioner, of course, taking into account the total number of completed years of service rendered by him before prematurely retiring. The reckoning of the petitioner's entitlement to gratuity shall be done within a period of fifteen days hence and gratuity determined shall be paid to the petitioner within next fifteen days thereafter.

12. There shall be no order as to costs.

13. Let this order be communicated to the Additional Chief Secretary (Secondary Education), U.P., Lucknow through the Civil Judge (Senior Division), Lucknow, the Joint Director (Pension), Prayagraj Division, Prayagraj and the District Minority Welfare Officer, Prayagraj through the Civil Judge (Senior Division), Allahabad by the Registrar (Compliance) **within 48 hours**.

(2024) 5 ILRA 1120
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2024

BEFORE

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

Writ-A No. 15485 of 2023

Aman Pathak ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Rajesh Kumar Yadav

Counsel for the Opp. Parties:
C.S.C., Ravindra Singh

(A) Service Law - Claim for compassionate appointment - The U.P. Cooperative Cane Service Regulations, 1975 - The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - existence of small agricultural holdings does not necessarily mean that the family has a steady income - Objectivity in administrative decision making - Administrative decisions should be made objectively, without being influenced by judicial commands or motivated by malice - Administrators must not panic or retaliate when faced with a judicial command asking them to perform their duties.(Para - 12,14)

(C) Service Law - Comparative income assessment/Relevant factors for compassionate appointment (i) Income of the deceased at the time of death (ii) Family's income after demise from various sources (iii) Terminal benefits (iv) Liabilities (v) Age, dependency, and marital status of family members (vi) Income from other sources - authorities should prioritize the financial condition of the deceased's family at the time of their death as the primary consideration. (Para -9 ,10)

Petitioner's father was a Stock Clerk in the Establishment - passed away - minor - applied for compassionate appointment - after attaining majority - State Authority rejected petitioner's claim for compassionate appointment - District Cane Officer also rejected petitioner's claim. (Para - 1 to 5)

HELD: - State Authority and District Cane Officer rejected petitioner's claim for compassionate appointment due to incomplete and inaccurate information. Decision was based on the petitioner's delay due to his minority status and the financial crisis his family faced after his father's death. Order quashed - Remitted to State Authority to decide afresh.(Para - 8,13,15)

Writ Petition Allowed. (E-7)

List of Cases cited:

St. of W.B. Vs Debabrata Tiwari & ors., 2023 SCC OnLine SC 219

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

1. This writ petition is directed against the order dated 30.09.2023 passed by the District Cane Officer, District Sambhal and the resolution dated 25.09.2023 issued by the State Cane Service Authority (for short, 'the State Authority'), rejecting the petitioner's claim for compassionate appointment.

2. The petitioner's father was a Stock Clerk in the Establishment of the District Cane Officer, Chandausi, District Sambhal. He passed away in harness on 13.11.2011. The deceased was survived by his widow, a son and three daughters. It appears that the petitioner at the time of his father's demise was a minor. He moved an application, seeking compassionate appointment on 10.11.2020, after attaining the age of majority. On 11.01.2021, the District Cane Officer, Sambhal demanded some documents, which the petitioner provided on 25.10.2021. On 21.11.2021, the petitioner submitted some other documents to the District Cane Officer for the consideration of his claim. The petitioner claimed inaction on the respondents' part to consider his case for compassionate appointment and said that despite his requests to the respondents to pass necessary orders, no orders were made. Very recently, again it is pleaded that the petitioner made applications dated 21.02.2023 and 17.07.2023 before the District Cane Officer, urging his claim for a consideration for compassionate appointment, but to no avail. It is pleaded that the only source of livelihood for the petitioner and his father's family was the deceased's salary. After his demise on 13.11.2011, neither compassionate appointment has been offered by the District Cane Officer to the petitioner nor post retiral dues released in his favour. He is on the verge of starvation. The respondents are sitting tight over the matter. It is on these pleadings that the petitioner initially sought a writ, order or direction in the nature of mandamus directing the Cane Commissioner, Lucknow, the District Cane Officer, District Sambhal to pass appropriate orders on the petitioner's application for compassionate appointment. This Court vide order dated 15.09.2023 issued a show cause notice to the respondents in terms of the following orders:

"The petitioner's father, who was a Stock Clerk in the office of the District Cane Officer, Chandausi, died in harness on 13.08.2011. The petitioner was a minor at the time of his father's demise. He applied for compassionate appointment on 10.11.2020.

Let the District Cane Officer, District-Sambhal file his personal affidavit within ten days showing cause why the petitioner's claim for compassionate appointment has not been considered so far.

Lay this writ petition as fresh on ***03.10.2023.***

Let this order be communicated to the District Cane Officer, District-Sambhal by the Registrar (Compliance) by Monday i.e. 18.09.2023."

3. A counter affidavit was filed on behalf of respondent No.3 on 03.10.2023. Since it was not on record on that day, the matter was adjourned to 11.10.2023. A perusal of the counter affidavit shows that the State Authority has passed a resolution dated 25.09.2023, rejecting the petitioner's

claim for compassionate appointment. This Court, accordingly, permitted the petitioner on 11.10.2023 to move an application, seeking to amend the writ petition and challenge the order dated 25.09.2023. An application for the purpose was moved in Court on 20.11.2023, which was taken on record and allowed by an order of the said date. A supplementary affidavit was then filed by the petitioner, in answer to which, a supplementary counter affidavit was filed in Court. The parties having exchanged affidavits, when the matter came up on 11.12.2023, it was admitted to hearing, which proceeded forthwith and concluded. Judgment was reserved.

4. Heard Mr. Rajesh Kumar Yadav, learned Counsel for the petitioner, Ms. Jhanvi Singh, Advocate holding brief of Mr. Ravindra Singh, learned Counsel appearing on behalf of the District Cane Officer, Sambhal and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the State respondents.

5. A perusal of the impugned order dated 25.09.2023 passed by the State Authority shows that the petitioner at the time of his father's demise was aged about 9 years. It is remarked that the application moved on behalf of the petitioner for compassionate appointment was forwarded by the District Cane Officer, Sambhal to the State Authority vide a memo No. 767/ Shee dated 20.07.2021. It is recorded by the State Authority that the case is being considered under the U.P. Cooperative Cane Service Regulations, 1975 (for short, 'the Regulations of 1975') by the Committee appointed for the purpose, which has resolved in terms that the Uttar Pradesh Recruitment of Dependents of. Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974') have been enforced for the purpose of providing immediate succour to the dependent family of a deceased government servant. In this case, Sanjay Pathak died on 13.08.2011 and the family have managed to live through it normally for ten years. At the time of his demise, the deceased's dependent was his widow, who could have applied for compassionate appointment in order to provide for the family immediately, but no such application was made on her behalf.

6. The Committee inferred that the widow not applying showed that after Sanjay Pathak's demise, the family faced no immediate financial crisis. Now, ten years after his demise, his son has applied solely for the purpose of securing employment. It is also remarked in the order that his widow, promptly after Pathak's death, did not make an application that her son is a minor and that his application may be considered as soon as he attains majority. The Committee also found that after the employee passed away, the fact that his dependent family members did not claim compassionate appointment and did so after a lapse of about 10 years in order to secure employment, shows that the case was one that did not fit into the requirement of a valid compassionate appointment claim under the Regulations of 1975 and the Rules of 1974.

7. It is also observed by the Committee that the District Cane Officer, Sambhal had evaluated the financial circumstances of the deceased's family. He found upon inquiry, which he has submitted in the form of a report, that the deceased's wife was employed as an Anganwadi Karyakatri. She has established the Anganwadi Kendra in her own house together with the other family members of the late Sanjay Pathak. It was also reported

that the deceased's wife, Smt. Sudha Pathak and his son, Aman Pathak, hold an area of 0.498 hectares and 0.405 hectares, respectively of agricultural land, situate in Village Bahat Karan and Gavan, Tehsil Gunnaur, District Sambhal. It is observed by the Committee that the fact that the deceased's wife is employed as an Anganwadi Karyakatri, his heirs holding agricultural land and the fact that the deceased's family have been leading life normally for 12 years since he passed away, shows that it was not a case, where the claim for compassionate appointment ought to be accepted. It is on the basis of the said reasoning of the Committee that the State Authority rejected the petitioner's claim. The rejection was formally communicated to the petitioner through the order dated 30.09.2023 passed by the District Cane Officer, Sambhal. Both these orders are impugned in this petition.

8. Upon carefully hearing learned Counsel for the parties and perusing the record, this Court finds that the respondents have not considered all relevant factors to judge the petitioner's claim for compassionate appointment. They might have broadly examined the claim on some relevant parameters, but left out of consideration equally important relevant material, which if considered, might have led them to a contrary conclusion. The fact that the deceased's widow did not apply immediately for compassionate appointment is relevant; the fact that she is employed as an Anganwadi Karyakatri, has a house of her own for the family, where she runs the Anganwadi Centre are all relevant. It is also relevant that the dependents of the deceased, including his widow and the petitioner, have some agricultural holding. If from this relevant information a plausible inference has been drawn, is quite another matter. If a plausible inference has been drawn, it is not for this Court to say if there is an equally plausible view which the Court would take and then substitute it for the respondents' opinion. That is beyond the province of a wednessbury review. At the same time, if perverse conclusions have been drawn from the material considered, though the material is relevant, this Court would have justification to interfere.

9. So far as the question of leaving out of consideration relevant material bearing on the issue of the petitioner's entitlement to seek compassionate appointment, it must be remarked that it nowhere figures, what was the death-cum-retirement benefits that the family received upon death of the employee. It has not been considered at all what are the investments of the family that yield income. It has also not been considered what are the liabilities of the family to be met. It has figured that two of the deceased's daughters are married, but one is still unmarried. These are matters that are relevant, but omitted from consideration altogether by the State Authority and their Committee, who have examined the petitioner's claim. The State Authority has much depended on the fact that the family have managed to survive for a period of 12 years and leading a normal life. It is true that the family have not landed in an orphanage, but between the family becoming a causality of the civilization on account of the breadwinner's untimely death and a sufficiently prosperous or normal life is the twilight zone, where they could be seen struggling to make end's meet. It is for this reason that in **State of W.B. v. Debabrata Tiwari and others, 2023 SCC OnLine SC 219**, it was held:

"32. On consideration of the aforesaid decisions of this Court, the following principles emerge:

i. That a provision for compassionate appointment makes a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions and must be resorted to only in order to achieve the stated objectives, i.e., to enable the family of the deceased to get over the sudden financial crisis.

ii. Appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis.

iii. Compassionate appointment is not a vested right which can be exercised at any time in future. Compassionate employment cannot be claimed or offered after a lapse of time and after the crisis is over.

iv. That compassionate appointment should be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.

v. In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family, its liabilities, the terminal benefits if any, received by the family, the age, dependency and marital status of its members, together with the income from any other source.

34. As noted above, the sine qua non for entertaining a claim for compassionate appointment is that the family of the deceased employee would be unable to make two ends meet without one of the dependants of the deceased employee being employed on compassionate grounds. The financial condition of the family of the deceased, at the time of the death of the deceased, is the primary consideration that ought to guide the authorities' decision in the matter."

(emphasis by Court)

10. The position of the law that then appears is that what has to be compared is the income of the deceased at the time of his death and the family's income after his demise from various sources. This would be a safe index to assess, if indeed the family have been plunged into a crisis or they still have a reasonably normal life to lead, which is not ridden by financial crisis. It must be remarked that the State Authority and their Committee have singularly omitted to consider this very relevant material as to what was the deceased's income, when he passed away and the family's income when the District Cane Officer Officer appraised their circumstances.

11. The deceased's widow is no doubt employed as an Anganwadi Karyakatri, but that does not mean that the family are not financially struggling. An Anganwadi Karyakatri is not a government employment. It is pleaded in paragraph No.6 of the supplementary affidavit that the engagement as an Anganwadi Karyakatri is a contractual job, for which no salary is paid. The petitioner's mother receives an honourarium in the sum of Rs.3250/- - 6500/- per month. It must the remarked that a contractual employment that offers the sum of money that the petitioner alleges is hardly any reckonable financial resource to guarantee a subsistence level of income for the family. The fact that the petitioner's mother receives an honourarium for her engagement as an Anganwadi Karyakatri in the sum of Rs.3250/- - 6500/- per month, has

not been denied in any of the two counter affidavits filed on behalf of the respondents. Therefore, the fact asserted in paragraph No.6 of the supplementary affidavit has to be accepted as correct. In fact, in the supplementary counter affidavit, contents of paragraph No.6 about the fact of what the nature of engagement of an Anganwadi Karyakatri is and what remuneration is received, has not at all been denied or pleaded to by the respondents.

12. Another factor that has been taken into consideration by the respondents is the existence of agricultural holdings. Now, the agricultural holdings that have been found with the petitioner and his mother, are not lavish in size or big enough to support a steady income. The impugned order records that the holdings are situate in two different villages, one in Village Bahat Karan and the other in Gavan. The petitioner's mother has a total of 0.498 hectares whereas the petitioner has a holding of 0.409 hectares. The Khatauni, that have been annexed with the counter affidavit at pages 29, 30, 31, 32, 33 and 34, would show that the holdings are joint with other co-sharers. The District Cane Officer, Sambhal has not made any endeavour to ascertain what is the yield from these small holdings to the petitioner or his mother, that is to say, the deceased's dependent family. By the bare existence of an agricultural holding with the petitioner and his mother of the sizes noticed in two different villages, there cannot be a plausible inference drawn that it yields reckonable income to the petitioner or the family, whom the deceased has left behind. To do that, the District Cane Officer has to undertake further inquiries and make a report on the annual yield from these holdings to the petitioner and his mother.

13. So far as the delay in making the application for compassionate appointment is concerned, it is obvious that the petitioner was a 9 years old boy, when his father passed away. He cannot be blamed for making the application 9 years after his demise. He apparently made the necessary application as soon as he attained majority. There is always adequate provision to consider the case of minors, while exercising the power to condone delay, in a deserving case by the Appointing Authority, where the delay is more than five years. The power of condonation may be exercised by a higher Authority and in this case, there could be no higher Authority than the State Authority itself. The State Authority seems to have gone by the fact that the petitioner's widow ought to have applied. They have not inquired into her educational qualifications, if at all she would be eligible to seek employment in their establishment, even on a Class-IV post. A contractual engagement as an Anganwadi Karyakatri is on the basis of very different qualifications, from which no inference can ipso facto be drawn that she too could have applied upon her husband's demise for compassionate employment. The respondents ought to have probed the issue and sought information from the petitioner's mother about reasons why she did not choose to apply for compassionate appointment before they reached the conclusion that the widow not having made a prompt application, the inescapable inference is that there was no financial crisis for the family. We do not approve of the reasoning that the State Authority have adopted to deal with the petitioner's case. They ought to have done much more than what they have done, while passing the impugned order dated 25.09.2023.

14. This Court must remark that the petitioner made his application for compassionate appointment on 10.11.2020 and on the own showing of the State

Authority, the application was received by them from the District Cane Officer, Sambhal on 20.07.2021. The impugned order was passed on 25.09.2023. This order came to be passed after we had passed orders on 15.09.2023, asking the respondents to show cause in terms indicated in that order, which we have quoted hereinabove in extenso. In administrative decision making, this Court cannot lose sight of the fact that the primary decision maker, the Administrator, sometimes loses his objectivity, the moment he is visited with a judicial command to do his duty. Either he is panicked into acting erratically and taking a wrong decision or turns malicious and motivated to teach the man, who has brought a writ to him of any kind. Administrators must not panic or retaliate when faced with a judicial command, asking them to perform their duties. Sadly, they often do. Here, the Court thinks that the very nonchalant and halfhearted appraisal of the petitioner's claim, which the State Authority have done by the order impugned dated 25.09.2023, could be the result of either of the two possibilities that we have indicated above. We are sure that in the sequence of things, it is the result of one of the two; which one, would be best known to the State Cadre Authority themselves. We do not wish to probe into it, but caution the State Authority in this regard.

15. In the result, this petition succeeds and is **allowed**. The impugned order dated 25.09.2023 passed by the State Authority and the order dated 30.09.2023 passed by the District Cane Officer, Sambhal are hereby **quashed.** The petitioner's application for compassionate appointment stands remitted to the State Authority, which they shall now decide strictly in accordance with law, within a period of one month, from the date of receipt of this judgment, bearing in mind our remarks.

16. Costs easy.

17. Let a copy of this judgment be communicated to the District Cane Officer, District Sambhal and the Adhyaksha, Rajya Ganna Pradhikaran, Uttar Pradesh by the Registrar (Compliance).

(2024) 5 ILRA 1126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2024

BEFORE

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

Writ-A No. 17262 of 2023

Yasmeen Talat Usmani ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Bhagwan Dutt Pandey

Counsel for the Opp. Parties:
C.S.C., Abhishek Srivastava

(A) Service law - Widow's claim for refund of deducted gratuity amount from her deceased husband's employment benefits - The Payment of Gratuity Act, 1972 - Section 4(6)(a) - Payment of gratuity - gratuity of an employee may be forfeited to the extent of damage or loss caused to the employer, if his services have been terminated for any act, willful omission or negligence, causing any damage or loss to or destruction of the employer's property - employer cannot recover alleged embezzlement amount from gratuity without following due process - Departmental proceedings or judicial proceedings pending against an employee abate upon their death - No recovery can

be made from death-cum-retirement dues without fixing liability during employee's lifetime.(Para - 9,17,18)

Deceased employee was accused of embezzlement - no departmental inquiry or liability determination during his lifetime - No charge-sheet filed - police submitted a final report after his death - Corporation deducted amount from gratuity payable to widow, citing alleged embezzlement. (Para - 1 to 10)

HELD: - It was not open to the respondents to recover the sum of Rs.5,62,745/- from the gratuity payable to the petitioner on account of death-cum-retirement benefits due to the petitioner's husband and now receivable by her. Directing the respondents to refund the deducted amount of Rs. 5,62,745/- with interest. (Para – 21,22)

Writ Petition Allowed. (E-7)

List of Cases cited:

1. Bankey Bihari Chauhan Vs St. of U.P. & ors., 2015(3) ADJ 305 (DB)

2. Union Bank of India & ors. Vs C.G. Ajay Babu & anr., (2018) 9 SCC 529

3. Jaswant Singh Gill Vs Bharat Coking Coal Ltd., (2007) 1 SCC 663: (2007) 1 SCC (L&S) 584

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

1. This writ petition has been instituted by the widow of a deceased employee of the Uttar Pradesh Power Corporation Limited, Lucknow (for short, 'the Corporation'), praying that a mandamus be issued directing the respondents to refund the deducted sum of Rs.5,62,745/- out of the gratuity payable to her for her deceased husband's services, along with interest at the admissible rate.

2. The petitioner's husband was a Patrolman, a Class-IV employee, appointed against a regular vacancy on 01.04.1976, after following the procedure prescribed. He was promoted to the post of a Technician Grade-II (for short, 'TG-II') in the office of the Executive Engineer, Pashchimanchal Vidyut Vitran Nigam Limited, Bulandshahr. In the year 2007, the petitioner's husband was TG-II In-charge in the Division of the Executive Engineer and while still in harness, he passed away on 24.07.2007. The respondents say that some receipt book was issued to the deceased employee for the purpose of ensuring collection of revenue from consumers. The deceased employee, after collecting the dues of the Pashchimanchal Vidyut Vitran Nigam Limited (for short, 'the Distribution Corporation') from consumers, deposited it in the Distribution Corporation's account. Later on, the Executive Engineer issued a letter dated 17.05.2007 to the petitioner's husband, directing him to submit his explanation and return the receipt books, and something called an RR Statement etc. The details of receipt books, with their number and date of issue, were given in the letter issued to the deceased employee. The petitioner's husband deposited the revenue receipt books on 17.05.2007. The Executive Engineer proceeded to issue a letter dated 22.05.2007 to the deceased employee, informing him that a total sum of Rs.6,65,985/- was recovered by him on the basis of receipts available from consumers, but a sum of Rs.1,26,576/- alone was deposited in the Distribution Corporation's account. The balance sum of Rs.5,40,467/- be deposited, failing which penal action would be taken against him.

3. The allegation levelled against the deceased employee was that some receipt books for revenue collection were issued to the employee to facilitate collection on behalf of the Distribution Corporation, but when the receipt books

were returned, the discrepancy, as aforesaid, in the sum of money collected in revenue from consumers and that deposited, was detected. On these allegations, the Assistant Accounts Officer got an FIR lodged against the deceased employee on 31.05.2007. On the selfsame allegations, the deceased employee was placed under suspension vide order dated 01.06.2007. Surprisingly, the order of suspension does not say if it is passed pending or in contemplation of inquiry or pending criminal investigation, though it says that the employee is being placed under suspension finding him prima facie guilty of embezzling a sum of Rs.5,40,467/-.

4. It is the petitioner's case that the allegation against the petitioner's husband, about non-deposit of the entire revenue collected from consumers, is baseless and he did not commit any embezzlement of the Distribution Corporation's moneys. It is averred that no inquiry in this regard was conducted or the liability determined in any departmental proceedings against the deceased employee. It was only an allegation and nothing more. The FIR, that was registered against the petitioner's husband, did not lead to any charge-sheet being filed against him in Court. He died on 24.07.2007, and the Investigating Officer submitted a Final Report on 02.06.2009. It was accepted by the Court on the same day. It must be remarked that the Final Report was submitted as the accused was dead and no proceedings could be taken.

5. On 27.06.2007, the Superintending Engineer wrote a letter to the Executive Officer saying that the sum of Rs.5,40,467/-, which appears prima facie embezzled by the employee, be recovered from the petitioner's husband and departmental proceedings initiated against him. Apparently, by that time, the employee was already dead, a fact of which the Superintending Engineer does not appear to have been aware. It is averred that the letter dated 27.06.2007 from the Superintending Engineer shows that, until the petitioner's husband's demise on 24.07.2007, no departmental proceedings had ever been initiated against him. The further case of the petitioner is that no charge-sheet was issued to the employee during his lifetime, or any action taken against him in accordance with law to recover the sum of money that was alleged to have been embezzled by him. On 07.10.2009, the Executive Engineer wrote a letter to the Panel Lawyer, representing the respondents, seeking his advice in the matter. The letter said that the petitioner's husband had caused a loss of Rs.5,63,000/-, but no liability had been fixed and the Police had submitted a Final Report. The learned Panel Lawyer gave opinion that the sum of money aforesaid can be recovered from the funds payable to the deceased employee's heirs.

6. The petitioner made a number of applications, seeking payment of death-cum-retirement benefits, including family pension and gratuity, but none were paid for a long time. One of these representations dated 23.06.2010 is annexed to the writ petition. A letter dated 27.09.2010 was written by the Executive Engineer, Electricity Distribution Division-II, Distribution Corporation to the Superintending Engineer, Electricity Distribution Division-I, Bulandshahr, saying that there are no outstandings against the petitioner, except the sum of Rs.5,62,745/-, on account of revenue collected from the consumers, but not deposited by the deceased employee. An entry to that effect had been made in his pension papers with a request that after

deducting the said sum of money from the gratuity payable to the petitioner, the necessary papers be made available to the Executive Engineer.

7. In furtherance of the letter dated 27.09.2010, the petitioner's family pension and all other dues were sanctioned and paid, but the sum of Rs.5,62,745/- was deducted from the gratuity payable to her on account of her husband's services illegally. The total sum of gratuity payable was a sum of Rs.8,33,052/-, from which the deduction was illegally made.

8. The petitioner, being aggrieved by the aforesaid illegal deduction, made a representation dated 28.10.2010 to the Executive Engineer, Electricity Distribution Division-II, Bulandshahr, demanding payment of the sum of Rs.5,62,745/-, illegally deducted from the gratuity payable. It is the petitioner's case that since no liability had been fixed while the deceased was alive and no inquiry held during his lifetime, determining the liability, the respondents have no right to deduct the sum of money from the gratuity payable to the petitioner, merely on the basis of an allegation. It is specifically pleaded that neither departmental proceedings were initiated against the petitioner's husband, nor any inquiry conducted nor a show cause notice issued in this regard to the petitioner's husband, after he was placed under suspension. It is averred that without conducting disciplinary proceedings, affording due opportunity to the deceased employee while alive, no deduction can be made from his gratuity. The deduction is castigated as illegal. The fact of embezzlement is denied by the petitioner, who claims refund of the sum of money deducted from the gratuity paid to her on account of her husband's services.

9. It is also averred that the deceased employee was never terminated or removed from service during his lifetime and for the said reason, no deduction could be made from his gratuity in violation of Section 4(6) of the Payment of Gratuity Act, 1972 (for short, 'the Act of 1972'). There is also reliance placed on a Board Order dated 10.03.1997, an order of the former State Electricity Board, said to be still in force, which prohibits recovery from the death-cum-retirement dues of a deceased employee, where the liability has not been fixed during his lifetime after issue of a show cause. Attention of the Court is also invited to the otherwise very obvious proposition of law, which the aforesaid Board Order incorporates that upon the death of an employee, departmental proceedings or judicial proceedings pending against him would abate.

10. A notice of motion was issued in the case on 18.10.2023 and a counter affidavit filed in Court on behalf of respondent No.4 on 28.11.2023. Respondent No.2, represented by Mr. Raj Kumar Mishra, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel, made a statement that they waive their right to file a counter affidavit as they were proforma parties. A rejoinder affidavit was also filed. When the matter came up before the Court on 13.12.2023, the parties having exchanged affidavits, it was admitted to hearing, which proceeded forthwith and concluded on that day. Judgment was reserved.

11. Heard Mr. Bhagwan Dutt Pandey, learned Counsel for the petitioner, Mr. Ridham Gupta, Advocate holding brief of Mr. Kaushalendra Nath Singh, learned Counsel appearing on behalf of the Distribution Corporation, Mr. Raj Kumar

Mishra, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel appearing on behalf of the Corporation and Ms. Amrita Singh, learned Additional Chief Standing Counsel appearing on behalf of the State.

12. This Court having heard learned Counsel for the parties finds that for a fact it is not disputed that during his lifetime, the petitioner's husband was not found guilty on any charge of embezzlement, either in departmental proceedings or by a Court of law. There is no material on record to show that except for the respondents' stand that he had not accounted for a sum of Rs.5,40,467/- that he had collected in revenue from consumers, an order was ever made by any competent officer of the Distribution Corporation, holding the petitioner's husband liable for the aforesaid sum of money. This could have been done during the petitioner's husband's lifetime in more than one ways. This liability could have been determined in consequence of disciplinary proceedings taken against the petitioner's husband, where the Disciplinary Authority could have held him liable for the aforesaid loss caused to the Distribution Corporation. In addition, there could be some basis for the Distribution Corporation to recover from the petitioner's husband's death-cum-retirement benefits, if he had been held guilty of embezzling the sum of money in question by a Court of competent criminal jurisdiction after trial. There was still this possibility of holding the petitioner's husband liable during his lifetime, in some kind of a summary proceeding by issuing a show cause notice to the employee and asking him to demonstrate why the sum of money in question be not recovered from him. In that case, after due opportunity, an order directing recovery passed against the petitioner's husband, could then be made the basis of recovery from the death-cum-retirement benefits due to the deceased's employee in the petitioner's hands.

13. A perusal of the stand taken in the counter affidavit does not show that any such course of action was taken by the Distribution Corporation during the lifetime of the petitioner's husband. No order passed after hearing the petitioner's husband, fixing liability against him, is in existence. If there were such an order indeed, it would have been annexed to the counter affidavit. In the absence of a determination of liability for the petitioner's husband made during his lifetime by some method acknowledged in law, it does not appear to be at all permissible to recover from his widow, in whose hands the deceased employee's death-cum-retirement benefits have come.

14. The second point, on which parties have been much at issue, is a letter written by the petitioner to the Executive Engineer, Electricity Distribution Division-II of the Distribution Corporation at Bulandshahr, where she has said that she assures the Engineer that if the Corporation pays the death-cum-retirement benefits due to her on account of her husband's services, she is ready to deposit, after receipt of her dues, any outstandings against her husband, payable to the Distribution Corporation in accordance with rules. Now, this application was apparently made by the petitioner when the death-cum-retirement benefits due to her husband, were all withheld. Apart from the fact that the concession may be a desperate attempt to secure some of her deceased husband's dues to bail herself and the family out of financial difficulties, the application does not authorize any deduction to be made. It says that once the Distribution Corporation pays all death-cum-retirement

benefits due to her husband, she assures that she would pay the Distribution Corporation any outstandings against her husband in accordance with rules. This was never an acknowledgment of any liability or an authorization by the petitioner to the Distribution Corporation to deduct unilaterally a mere claim of theirs from the petitioner's husband's gratuity.

15. It is to be noticed that the petitioner's husband's liability to pay the sum of money in question on account of revenue receipts illegally retained by him, has never been adjudicated or determined by any Authority or Forum and held payable by the deceased to the Distribution Corporation. It is no more than an allegation. It is not possible to prove it now anyway once the deceased employee has left the mortal world. There is no firm basis to accept the Distribution Corporation's case that in fact the deceased owed a sum of Rs.5,62,745/- to the Distribution Corporation on account of illegally retained revenues that he had collected. The case has never travelled beyond an allegation to ripen into a determination by any competent Authority or Forum while the deceased was still around.

16. The third issue, that has been mooted by parties, is, if at all it is open to the Distribution Corporation to recover the sum of money that they claim as embezzled by the deceased from gratuity payable to the petitioner on account of the deceased's services. In this connection, reference may be made to the Act of 1972, where Section 4 is relevant. Sub-Sections (1) and (6) of Section 4 of the Act of 1972 provide:

"4. Payment of gratuity.—(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.—For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(6) Notwithstanding anything contained in sub-section (1),—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

17. A perusal of Clause (a) of sub-Section (6) of Section 4 would show that gratuity of an employee may be forfeited to the extent of damage or loss caused to the employer, if his services have been terminated for any act, willful omission or negligence, causing any damage or loss to or destruction of the employer's property. It may be wholly or partially forfeited, if the employee's services have been terminated for his riotous or disorderly conduct or any other act of violence on his part. It can also be forfeited in whole or in part, if the employee's services have been terminated for an act which constitutes an offence involving moral turpitude, provided such offence is committed in the course of his employment. This is more or less the phraseology of sub-Section (6) and its clauses to limit and define situations where gratuity payable to an employee may be forfeited, fully or in part. Else, the entitlement to receive gratuity is sacrosanct. Sub-Section (5) of Section 4 of the Act of 1972 does provide that the employee has the right to receive gratuity on better terms under an award or agreement or contract with the employer, that is to say, better than those provided under the Act of 1972. In case of employment under a State or State Corporation, there could be rules governing gratuity, that may offer better terms, or whatever that be. No such rules have been brought to the Court's notice on behalf of the respondents, which may entitle the employer to forfeit a part of the gratuity for loss caused to them merely for their saying. This the Court observes, because we have held elsewhere that no determination of liability against the petitioner's husband was ever made in any proceedings, known to law while he was alive.

18. If one were to go by the mandate of Section 4(6), which this Court thinks would apply in the present case, the deduction being made from gratuity, the right to forfeit gratuity or a part thereof, postulates the essential fact of termination of the employee's services for any act or omission envisaged under Section 4(6). The petitioner's husband was admittedly never terminated from service while alive. Not even a charge-sheet relating to disciplinary proceedings was issued to him, though he was placed under suspension in contemplation of inquiry. Departmental proceedings had to go a long way and end in termination of service in order to attract Clause (a) of sub-Section (6) of Section 4, where the charge of causing loss to the Corporation on account of embezzlement alleged, was held proved. If the petitioner's husband had been charge-sheeted by the Police and convicted on a charge of criminal breach of trust, it would have attracted Section 4(6)(b)(ii) of the Act of 1972 to authorize a partial or wholesome forfeiture of gratuity payable to the deceased in the petitioner's hands. This contingency also never came about, because the FIR, alleging embezzlement, lodged by the respondents, resulted in a Final Report as the deceased passed away. In these circumstances, this Court does not think that it was at all open to the respondents to recover any sum of money from the deceased's gratuity payable to the petitioner.

19. In this connection, reference may be made to a Bench decision of this Court in **Bankey Bihari Chauhan v. State of U.P. and others, 2015(3) ADJ 305 (DB)**.

The facts in **Bankey Bihari Chauhan** *(supra)* show that disciplinary proceedings were initiated against a bus conductor of the State Road Transport Corporation and a charge-sheet issued to him. His reply was not found satisfactory and a show cause notice followed. After considering the employee's reply, the Disciplinary Authority found him negligent in the performance of his duties, which had resulted in financial loss to the State Road Transport Corporation in the sum of Rs.2,19,846/-. The State Road Transport Corporation passed an order to recover it from the gratuity payable to the employee. It was in the context of the aforesaid facts that their Lordships of the Division Bench held:

"7. In the decision of the Supreme Court in Jaswant Singh Gill v. Bharat Coking Coal Limited, (2007) 1 SCC 663, it has been held that termination of services for any of the causes enumerated in sub-section (6) of Section 4 of the Act is imperative before the gratuity can be forfeited. The same principle has been followed in a more recent decision of the Supreme Court in State of Jharkhand v. Jitendra Kumar Srivastava, 2013(2) ESC 554 (SC).

8. In the present case, it is not in dispute that the services of the appellant were never terminated. The appellant continued to be in service and retired on attaining the age of superannuation. In the circumstances, the basic pre-condition for the forfeiture of gratuity under Section 4 (6) of the Act was not fulfilled. We may also note that Regulation 63 of the Regulations provides for penalties and clause (4) thereof provides for the recovery from pay or deposit at the credit of an employee of the whole or part of a pecuniary loss caused to the Corporation by negligence or breach of an order. The Regulations must necessarily be harmonized with the provisions of the Act and cannot override the express statutory provision. In any event, it is clear that even Regulation 63 contains no such provision of recovery from gratuity. In these circumstances, we are of the view that the action for recovery from gratuity was contrary to law and in the teeth of the express provision of the Act....."

20. Reference in this connection may also be made to the decision of the Supreme Court in **Union Bank of India and others v. C.G. Ajay Babu and another, (2018) 9 SCC 529.** In **C.G. Ajay Babu** (supra), it was held:

"15. Under sub-section (6)(a), also the gratuity can be forfeited only to the extent of damage or loss caused to the Bank. In case, the termination of the employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, the loss can be recovered from the gratuity by way of forfeiture. Whereas under clause (b) of sub-section (6), the forfeiture of gratuity, either wholly or partially, is permissible under two situations: (i) in case the termination of an employee is on account of riotous or disorderly conduct or any other act of violence on his part, (ii) if the termination is for any act which constitutes an offence involving moral turpitude and the offence is committed by the employee in the course of his employment. Thus, clause (a) and clause (b) of sub-section (6) of Section 4 of the Act operate in different fields and in different circumstances. Under clause (a), the forfeiture is to the extent of damage or loss caused on account of the misconduct of the employee whereas under clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. Clause (b) operates either when the termination is on account of: (i) riotous, or

(ii) disorderly, or (iii) any other act of violence on the part of the employee, and under clause (ii) of sub-section (6)(b) when the termination is on account of any act which constitutes an offence involving moral turpitude committed during the course of employment.

17. Though the learned counsel for the appellant Bank has contended that the conduct of the respondent employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart from the disciplinary proceedings initiated by the appellant Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.

18. In Jaswant Singh Gill v. Bharat Coking Coal Ltd. [Jaswant Singh Gill v. Bharat Coking Coal Ltd., (2007) 1 SCC 663 : (2007) 1 SCC (L&S) 584] , it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-section (6)(b)(ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted. To quote para 13: (SCC p. 670)

"13. The Act provides for a close-knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non obstante clause vis-à-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, wilful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damage or loss caused to Respondent 1 was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied."

19. In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude.

Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20-4-2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.

20. That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per Jaswant Singh Gill [Jaswant Singh Gill v. Bharat Coking Coal Ltd., (2007) 1 SCC 663 : (2007) 1 SCC (L&S) 584] . Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity."

21. In view of whatever has been held by this Court and the position of the law authoritatively settled, we hold that it was not open to the respondents to recover the sum of Rs.5,62,745/- from the gratuity payable to the petitioner on account of death-cum-retirement benefits due to the petitioner's husband and now receivable by her.

22. In the result, this writ petition succeeds and is **allowed**. A *mandamus* is issued to respondent Nos.2, 3, 4 and 5 to ensure amongst themselves immediate refund of the sum of Rs.5,62,745/- to the petitioner in account within a month of the date of receipt of a copy of this order. The said sum of money will carry simple interest at the rate of 6% per annum, reckoned from the month after death of the petitioner's husband, until realization. In the event, the said sum of money is not remitted in account to the petitioner within a month of receipt of a copy of this order by the respondents, it will carry simple interest at the rate of of 9% per annum beyond the period of one month as aforesaid, until realization.

23. There shall be no order as to costs.

24. Let a copy of this order be communicated to the Chairman, U.P. Power Corporation Limited, Shakti Bhawan, 14 Ashok Marg, Lucknow, the Deputy General Manager, Electricity Distribution Circle, Western Area, Pashchimanchal Vidyut Vitran Nigam Limited, Railway Road, Bulandshahr, the Executive Engineer, Electricity Urban Distribution Division, Pashchimanchal Vidyut Vitran Nigam Limited, Railway Road, Bulandshahr and the Superintending Engineer, Electricity Distribution Circle-1, Pashchimanchal Vidyut Vitran Nigam Limited, Railway Road, Bulandshahr by the Registrar (Compliance).

(2024) 5 ILRA 1135
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2024

BEFORE

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

Writ-A No.17724 of 2023

Rachit ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Prabhakar Awasthi, Mr. Suresh Singh

Counsel for the Respondent:
Mr. Ashok Trivedi, Ms. Annapurna Singh 'Chandel'

(A) Service Law - Scheme for Compassionate Appointment or Payment

of Ex-Gratia Financial Relief to Dependents of Deceased Employees on Compassionate Grounds - scheme for compassionate appointment applies to dependent family members of permanent employees who die while in service, regardless of age - upper age limit of 55 years applies only to cases of retirement on medical grounds due to incapacitation - Bank should not reject the claim solely because the family received benefits under various welfare schemes.(Para - 11,15)

Petitioner's father died in harness in 2016 – minor - attained majority - applied for compassionate appointment in 2021 - delayed due to his minority - Bank rejected claim - citing petitioner's father's age at the time of death (57 years) - delay in application.(Para - 1 to 4)

HELD: - Bank's decision was based on a misreading of the scheme. Scheme does not prescribe an upper age limit for death in harness cases. Petitioner's claim is not time-barred. MD & CEO of the Bank should consider it.(Para - 10,15)

Writ Petition Allowed. (E-7)

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

The petitioner has applied for a *mandamus* to consider his case for compassionate appointment on account of his father's death in harness while in the employ of the respondent-Bank of Baroda.

2. The petitioner's father joined service of the Bank of Baroda, Khaga, Fatehpur Region, Fatehpur1 as a Peon on 09.10.1984. He was promoted from a Class IV post to a Class III post with the Bank. He was working as a Cashier in the year 2016. The petitioner's father died in harness on 21.02.2016. He left behind him a family of three - his widow, Smt. Gyanmati Devi and two sons, the petitioner, Rachit and his younger brother, Sachin.

3. It is the petitioner's case that his mother, being the only surviving adult in the family, moved an application on 10.01.2017 to the Branch Manager of the Bank, indicating that her elder son was 14 years old, and the younger, 11. It was also said that the family have been destituted and in the event, the petitioner's sons be regarded ineligible on account of their minority, their right to be considered must be postponed until a later date. The application desperately says in the end that either the petitioner's mother's candidature be considered or consideration of the petitioner's right be postponed, keeping it intact.

4. During the interregnum, nothing happened. The petitioner passed his High School Examination in the year 2020 and the Intermediate Examination in the year 2022. He earned his Bachelor of Science Degree from the Professor Rajendra Singh (Rajju Bhaiya) University, Prayagraj in the examination of 2022-23. The petitioner, after attaining majority, contacted the Branch Office of the Bank to gather progress about the consideration of his claim. The Branch Office advised the petitioner to move an application in the proforma prescribed for claiming compassionate appointment. The petitioner moved an application in the appropriate proforma on 20.01.2021. The petitioner's application in the proper proforma along with the checklist was forwarded on 02.03.2021. Despite submission of the application on 20.01.2021 along with the checklist separately and a 'No Objection' by the other family members, the claim has not been considered by the Bank, and therefore, the petitioner, being a member of the deceased's family, who say that they have not been able to tide over the resultant economic crisis, has prayed that

this Court may issue a mandamus, directing the respondents to consider his claim.

5. A counter affidavit has been filed on behalf of the Bank, after a notice of motion was issued.

6. In the brief facts, it is averred that a sum of ₹17,09,549 has been paid in all towards terminal benefits to the deceased's widow, Smt. Gyanmati Devi. The widow is also being paid family pension in the sum of ₹17,332 per month. It is not denied that when the deceased Shyam Lal passed away, the scheme dated 18.02.2016 for compassionate appointment or payment of ex gratia or financial relief was in force. It is pleaded that in order to seek compassionate appointment, the applicant must have completed 18 years of age. It is also the respondents' case that for entitlement to compassionate appointment or ex gratia financial relief to the dependant of a deceased employee, the deceased should not have crossed the age of 55 years at the time of his demise in harness. Since in the present case, the deceased was aged 57 years, the benefit of compassionate scheme or ex gratia financial scheme is not available to his dependants.

7. The petitioner's mother moved an application on 01.02.2021, saying that earlier the date of birth disclosed for the petitioner in her deceased husband's service record as 24.12.2003 is incorrect and the correct date of birth of the petitioner is 24.12.2002. It has been castigated by the respondents as a suppression of fact. It is also asserted as a suppression of fact that the petitioner's mother, on three earlier occasions, had moved applications seeking compassionate appointment, all of which were declined on 31.03.2017, 10.04.2017 and 13.03.2018. It is pleaded in paragraph No. 21 that when the deceased's widow applied for compassionate appointment for her son on earlier occasions, she was advised that it is not permissible for him to be appointed, inasmuch as on 21.02.2016, he was aged 12 years, 1 month and 27 days and by time he attained the age of 17 years, the period of five years would have already expired.

8. A rejoinder affidavit was filed on behalf of the petitioner. The parties having exchanged affidavits, the writ petition was heard finally on 19.12.2023. Judgment was reserved.

9. Heard Mr. Prabhakar Awasthi along with Mr. Suresh Singh, learned Counsel for the petitioner, Mr. Ashok Trivedi, learned Counsel appearing for respondents Nos. 2, 3 and 4, and Mr. Satish Chandra Singh, Advocate holding brief of Ms. Annapurna Singh Chandel, learned Counsel appearing on behalf of respondent No. 1.

10. Upon hearing learned Counsel for parties, what this Court finds is that respondents have not been very fair in considering the petitioner's claim for compassionate appointment under the scheme that was in vogue. The plea taken that since the petitioner's father died at the age of 57 years, the petitioner is not eligible under the scheme, is a patent misreading of the scheme. The scheme for compassionate appointment, called the Scheme for Compassionate Appointment or Payment of Ex-Gratia Financial Relief to Dependants of Deceased Employees on Compassionate Grounds2, is annexed as Annexure CA-3 to the counter affidavit filed on behalf of respondents Nos. 2 and 3. It is annexed to a circular letter of the Bank addressed to all branches and offices of theirs. A perusal of

Paragraph No. 1 of the Scheme, that speaks about coverage, reads :

1.1 To a dependent family member of a permanent employee of the Bank who

a) Dies while in service (including death by suicide)

b) is retired on medical grounds due to incapacitation before reaching the age of 55 years

Incapacitation is to be certified by a duly appointed Medical Board in a Government Medical College/Government District Head Quarters Hospitals/Panel of Doctors nominated by the Bank for the purpose).

1.2 For the purpose of the Scheme "employee" would mean and include only a confirmed regular employee who was serving full time or part time on scale wages, at the time of death OR retirement on medical grounds, before reaching age of 55 years and does not include any one engaged on contract/temporary/casual or any person who is paid on commission basis.

11. Upon a reading of paragraphs Nos. 1.1 and 1.2 together, particularly with reference to Clauses (a) and (b) of Paragraph 1.1, it is evident that a dependant family member of a permanent employee of the Bank is one defined with reference to a permanent employee, who dies while in service, including a person who dies by suicide. Clause (b) of paragraph 1.1 says that a dependant family member could be one in relation to a person who has retired on medical grounds due to incapacitation before reaching the age of 55 years. Likewise, the word “or” used in Paragraph 1.2 of the scheme makes it evident that the upper age limit for the employee in order to entitle his dependant family members under the Scheme, is prescribed in the contingency where the employee is retired on medical grounds due to incapacitation. It does not apply to a case of death in harness. To the clear understanding of this Court, death in harness has nothing to do with the age of the employee, who dies while still in the Bank’s service. If this is the criteria by which the petitioner’s claim has been judged by the respondents, we have no hesitation in saying that it has been misjudged by a manifestly illegal understanding of their own scheme by the Bank. So far as the other contention is concerned, that the petitioner was a minor and by the time he turned 17, the maximum permissible period of limitation of five years would be over is, again, based on a misreading of paragraph No. 8 of the scheme. Paragraph No. 8 of the Scheme reads :

8. **TIME LIMIT FOR CONSIDERING APPLICATIONS:**

8.1 Request for appointment should be received by the Bank within one year from the date of death of the employee

8.2 Application for employment under the Scheme from eligible dependents can normally be considered upto five years from the date of death or retirement on medical grounds and decision to be taken on merits of each case.

8.3 However, Bank can consider request for compassionate appointment even when the death or retirement on medical grounds of the employee took place long back, even five years ago (in cases where the dependant's eligibility is not there immediately). however, in any case, not before 05.08.2014 as the scheme is applicable from 05.08.2014 onwards While considering such belated requests, it should, however be kept in view that the concept of compassionate appointment is largely related to the need for immediate assistance

to the family of the employee in order to relieve it from economic distress. The very fact that the family has been able to manage somehow all these years should normally be taken as adequate proof that the family had some dependable means of subsistence Therefore. examination of such cases would call for a great deal of circumspection. The decision to make appointment on compassionate grounds in such cases (cases of death / medical retirement which occurred more than 5 years back) will therefore, be taken only at the level of MD & CEO

12. A reading of sub-para (3) of Paragraph No. 8 of the Scheme shows that the usual period for consideration is up to five years from the date of death. However, the concluding words of Paragraph No. 8.3 would show that consideration beyond five years is also possible, but that decision has to be taken by the Managing Director and Chief Executive Officer3 of the Bank. It is said in Paragraph No. 8.3 that if the family have been able to survive for a period of five years, it would normally be taken as adequate proof that the family has some dependable means for sustenance. It is for this reason that cases beyond the period five years have to be dealt with a great deal of circumspection. The decision to consider beyond five years has to be taken by the MD & CEO of the Bank. The fact that the decision to consider beyond five years can be taken, whoever might be the officer competent, the Bank cannot take a stand that beyond five years, no consideration is permissible.

13. Then, there are some general rules applicable for evaluating cases for compassionate appointment. These provisions are carried in paragraph No. 16 of the Scheme. Paragraph No. 16 reads :

16. GENERAL:

16.1 Appointment made on grounds of compassion to be done in such a way that persons appointed to the post oo have the essential educational anc technical qualifications and experience required for the post consistent with the requirement of maintenance of efficiency of administration.

16.2 It is not the intention to restrict employment of a family member of the deceased or medically retired sub-staff employee to an erstwhile sub-staff post only As such, a family member of such erstwhile sub-staff employee can be appointed to a clerical post for which he/she is educationally qualified, provided a vacancy in clerical post exists for this purpose.

16.3 An application for compassionate appointment shall, however not be rejected merely on the ground that the family of the employee has received the benefits due the benefits under the various welfare schemes. While considering a request for appointment on compassionate grounds, a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family, etc.

16.4 Compassionate appointment shall be made available to the person concerned if there is a vacancy meant for compassionate appointment and he or she is found eligible and suitable under the scheme.

16.5 Requests for compassionate appointment consequent on death or retirement on medical grounds of erstwhile sub-staff may be considered with greater sympathy by applying relaxed standards depending on the facts and circumstances of the case.

16.6 Compassionate appointment will have precedence over absorption of surplus employees and regularization of temporary employees.

14. The stand in the counter affidavit to the effect that a lump sum of ₹17,09,549 have been paid to the widow and she is being paid a family pension in the sum of ₹17,332 is not enough to infer that the family are not living in penurious circumstances and their means are sufficient to sustain themselves in life. The deceased was a Class III employee and a sum of rupees seventeen lacs and odd is not such a princely sum in these hard days that the same can serve as an assurance about sustenance for the family. The pension too is a meagre sum. What has to be borne in mind is the fact that the deceased has two sons and a widow. While the pension paid to her and the lump sum payment may barely serve the widow's purpose to keep her body and soul together, it may not really serve the family to provide for their basic needs. The needs here would be the sons' education. The petitioner's younger brother is three years younger to him age. He might still be requiring funds to study. The family could be in need of other things, like roof and shelter, about which, there has been no inquiry. There is no inquiry disclosed about alternate sources of income.

15. Paragraph 16.3 of the Scheme says that a claim for compassionate appointment cannot be rejected on the ground that the family of the deceased have received benefits due to various welfare schemes. There has to be a balanced and objective assessment of the family's financial condition, taking into account their assets and liabilities, which would, of course, include benefits received from the Bank and other relevant factors, such as the presence of an earning member, size of the family. As we have remarked, the needs of the family like money for provision of roof and shelter and education of children, is very relevant. Unfortunately, the counter affidavit shows a very nonchalant approach that the Bank have adopted in resisting the petitioner's claim. They have not passed any orders on his claim as yet, as no order is annexed. It is possibly so, because the Bank have taken the claim to be time-barred. Even that order has not been passed. We have already held that the claim is not irredeemably time-barred and can be considered by the appropriate officials of the Bank, which, in this case, may be the MD & CEO of the Bank. This Court thinks that if the petitioner's claim on account of it being belated beyond five years is required by the Scheme to be considered by the MD & CEO of the Bank, he ought to consider it, bearing in mind the guidance in this judgment.

16. In the result, this petition succeeds and stands allowed. A mandamus is issued to the Assistant General Manager, Bank of Baroda, Regional Office, Fatehpur, the Regional Head, Bank of Baroda, Fatehpur Region, Fatehpur and the Senior Branch Manager, Bank of Baroda, Branch Khaga, District Fatehpur to ensure, amongst themselves, that the MD & CEO of the Bank is immediately apprised of the petitioner's claim, which shall be submitted to him and the claim decided by the MD & CEO of the Bank within one month from the date of receipt of a copy of this order by him through any of the respondents Nos. 2, 3 and 4, to all of whom this order shall be communicated. After the necessary decision is taken by the MD & CEO, the Assistant General Manager, Bank of Baroda, Regional Office, Fatehpur shall ensure that that orders of the MD & CEO are communicated to the petitioner within fifteen days of the MD &

CEO recording his decision on the petitioner's claim.

17. There shall be no order as to costs.

18. The Registrar (Compliance) is directed to communicate this order to the Assistant General Manager, Bank of Baroda, Regional Office, Fatehpur, the Regional Head, Bank of Baroda, Fatehpur Region, Fatehpur and the Senior Branch Manager, Bank of Baroda, Branch Khaga, District Fatehpur.

(2024) 5 ILRA 1141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2024

BEFORE

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

Writ-A No. 18432 of 2023

Sandeep Kumar Pathak ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Akhilesh Chandra Srivastava, Sr. Advocate

Counsel for the Respondent:
C.S.C.

(A) Service Law - Disciplinary case against an employee - Inquiry officer did not conduct a proper inquiry – no evidence led by establishment to prove charges against petitioner - instead merely juxtaposing the charges and the employee's defense - establishment failed to prove the charges through evidence, both documentary and oral - inquiry officer assumed the charges to be true without requiring the establishment to prove them - In a disciplinary case involving a major penalty, the Establishment must prove the charges by leading both documentary and oral evidence in a formally convened inquiry and cannot assume the charges to be true without evidence.(Para - 7, 8, 13,21,23)

HELD: - Impugned orders are vitiated and must be quashed. Proceedings must be taken again from the stage of the charge-sheet if the respondents desire to pursue them. Orders the reinstatement of the petitioner in service immediately. Directs the payment of current salary to the petitioner regularly. If respondents pursue fresh proceedings, the issue of arrears will be decided based on the outcome of those proceedings. If respondents do not pursue fresh proceedings, the petitioner will be entitled to 50% of the arrears of their emoluments for the period they were out of service.(Para – 23 to 25)

Writ Petition Allowed. (E-7)

List of Cases cited:

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

2. Roop Singh Negi Vs Punj. National Bank & ors., (2009) 2 SCC 570

3. St. of Uttaranchal & ors. Vs Kharak Singh, (2008) 8 SCC 236

4. St. of U.P. & anr. Vs Kishori Lal an anr., 2018 (9) ADJ 397 (DB)(LB)

5. Smt. Karuna Jaiswal Vs St. of U.P., 2018 (9) ADJ 107 (DB)(LB)

6. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB)(LB)

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

1. his writ petition is directed against an order of the Cane Commissioner, U.P., Lucknow dated 16.06.2023, dismissing the petitioner, a Junior Clerk from service after disciplinary proceedings. Also impugned is an appellate order of the State Government dated 18.09.2023 affirming the Disciplinary Authority.

2. The facts, giving rise to this writ petition, are that the petitioner's father Bhanu Dutt Pathak was employed as a Cane Supervisor with the Sugarcane Department of the State. He died in harness. The petitioner applied for compassionate appointment, and after consideration of his candidature, was appointed a Junior Clerk by the Deputy Cane Commissioner, Eastern Region, Gorakhpur, vide his order of the 13th March, 2008. The petitioner joined service immediately and has been rendering it, as he says, steadfastly. The petitioner also asserts that his work and conduct has been satisfactory and no occasion arose for anyone to complain against, either his work or conduct.

3. On 09.01.2022, the Chief Development Officer, Basti issued a communication to the Heads of different departments of the District for sparing two Clerks/Computer Assistant on 10.01.2022 for their presence at, something described by the petitioner, as Integrated Command and Control Centre, Vikas Bhawan, Basti (for short, the 'ICCC'), in deference to the directions issued by the District Magistrate for the purpose of effective instruction in vaccination details pertaining to the CoViD-19 Omicron Variant. The Senior Cane Development Inspector, by an order dated 10.01.2022, directed the petitioner to be present at the ICCC, Vikas Bhawan. In compliance, the petitioner reported at the ICCC, Vikas Bhawan and discharged all assigned work to him until 26.03.2022. On 26.03.2022, the Chief Development Officer, Basti passed an order to the effect that for the present CoViD-19 was almost not there and proceeded to relieve all the employees attached at the ICCC, Vikas Bhawan for resuming their normal duties. Upon being relieved, the petitioner submitted his joining report before the Senior Cane Development Inspector on 28.03.2022. On 28.03.2022 itself, the Senior Cane Development Inspector also issued orders to the petitioner allocating him work. The petitioner continued to discharge his duties and it was business as usual.

4. On the 5th of April, 2022, the petitioner fell ill. An intimation of the fact was given by the petitioner by an application dated 06.04.2022. The application aforesaid was also accompanied by his medical report and prescription. The petitioner, however, did not regain health immediately and remained under constant medical treatment. In support of the fact, he has placed on record his medical reports and prescriptions of successive dates between 20.04.2022 to 20.06.2022.

5. On 06.05.2022, departmental proceedings were instituted against the petitioner and the District Cane Officer, Gonda was appointed the Inquiry Officer. The aforesaid order was followed by a departmental charge-sheet. Pending the aforesaid proceedings, the Cane Commissioner proceeded to pass an order dated 07.12.2022, placing the petitioner under suspension pending inquiry. The petitioner was in the first instance issued a charge-sheet dated 15.06.2022, carrying four charges. Subsequently, another charge-sheet was issued on 22.06.2022 carrying two charges. The petitioner submitted a composite reply to the two charge-sheets dated 15.06.2022 and 22.12.2022, on 11.01.2023, denying the charges and raising pleas in defence. While submitting his reply to the charge-sheets, the petitioner requested for an oral hearing. On 13.01.2023, the Inquiry Officer issued a notice fixing 20.01.2023 as the date of hearing. However, information of the aforesaid date was sent to the petitioner on 20.01.2023, which was the

date fixed. It is on this account that the petitioner was not able to participate in the scheduled hearing on 20.01.2023.

6. The petitioner made an application dated 20.01.2023 seeking adjournments of the inquiry proceedings. The petitioner's request was accepted and the inquiry adjourned to 25.01.2023. On 25.01.2023, the petitioner appeared before the Inquiry Officer.

7. It is averred in paragraph no. 23 that the Inquiry Officer did not hold any kind of inquiry on the said date. No evidence of any kind was led by the Establishment to prove the charges against the petitioner. No oral testimony was given to prove any of the documents sought to be relied upon against the petitioner. In paragraph no. 24, it is averred that the Inquiry Officer on 25.01.2023 put certain questions to the petitioner and required him to answer the same. And that was all.

8. The Inquiry Officer, without holding an inquiry in accordance with salutary principles in a matter, where a major penalty may be imposed, proceeded to hold all the six charges proved by his report dated 03.02.2023. On 15.03.2023, the Cane Commissioner issued a notice to the petitioner along with a copy of the inquiry report, granting him time to file his objections. On 22.04.2022, the petitioner filed his objections to the inquiry report and also requested a de novo inquiry through an unbiased Inquiry Officer. No action whatsoever was taken on the basis of the petitioner's reply to the second show cause. Instead, the Commissioner issued a notice dated 26.05.2023 scheduling 08.06.2023 as the date for personally hearing the petitioner. Upon receipt of the said notice, the petitioner filed a further representation dated 30.05.2023. However, no action was taken on the petitioner's representation last mentioned. On 16.06.2023, the Commissioner proceeded to pass the impugned order dismissing the petitioner from service. The petitioner challenged the order passed by the Cane Commissioner, his Disciplinary Authority by filing an appeal to the State Government on 06.07.2023. The appeal lay dormant with the State Government.

9. Accordingly, the petitioner moved this Court by means of Writ-A No. 1279 of 2023, seeking a direction to the State Government to decide the appeal. The writ petition filed by the petitioner was disposed of vide order dated 17.08.2023, ordering the Principal Secretary, Department of Sugar Industries and Cane Development, Government of U.P., acting for the State Government, to decide the petitioner's pending appeal by a reasoned and speaking order within a month and communicate the result to the petitioner within a week of recording the order made.

10. In compliance with the orders of this Court dated 17.08.2023, the State Government rejected the petitioner's appeal vide order dated 18.09.2023. Aggrieved by the orders dated 16.06.2023 and 18.09.2023, the petitioner has instituted this petition under Article 226 of the Constitution.

11. A notice of motion was issued on 08.11.2023 and a counter affidavit filed on behalf of respondent nos. 2, 3 and 4 on 05.12.2023. Learned Counsel for the petitioner waived his opportunity to file a rejoinder. Parties having exchanged affidavits, this petition was admitted to hearing, which proceeded forthwith. Judgment was reserved.

12. Heard Mr. Akhilesh Chandra Srivastava, learned Counsel for the petitioner and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

13. In answering the case of the petitioner that no evidence, oral or documentary was produced by the Establishment to prove the charges, no inquiry was held worth the name and that the Inquiry officer did nothing more than interrogate the petitioner as pleaded in paragraph nos. 23 and 24 of the writ petition, the respondents have pleaded in paragraph no. 14 of the counter affidavit as follows:

"14. That the contents of paragraph nos. 20, 21, 22, 23, and 24 of the writ petition are not admitted in the manner stated hence denied, in reply thereto, it is submitted that enquiry officer, District Cane Officer, Gonda vide his letter dated 13.01.2023 fixed the date for personal/oral hearing of the petitioner on 20.01.2023 and directed the petitioner to be present on the date fixed but petitioner did not come on the date fixed for oral hearing on 20.1.2023 rather vide his letter dated 20.01.2023 which was received in the office on 23.01.2023 informed that he got the information of the oral hearing on 20.01.2023 at 11.00 A.M. and in such situation it is not possible for him to reach on the fixed date so he may be granted a week time. Petitioner was again directed to be present for oral hearing on 25.01.2023 vide letter dated 20.01.2023. Petitioner was present on the date fixed for oral hearing on 25.01.2023 and replied in writing to the questions asked that, "he has to say nothing except his reply dated 12.01.2023". True copy of the letters dated 13.01.2023 and 20.01.2023 are being collectively annexed herewith and marked as Annexure CA-9 to this counter affidavit."

14. The six charges against the petitioner, four carried in the charge-sheet dated 15.06.2022, read thus:

"आरोप संख्या-1

आरोप है कि ज्येष्ठ गन्ना विकास निरीक्षक बस्ती के पत्र संख्या 467-68 दिनांक 21.03.2022, जो जिला गन्ना अधिकारी, बस्ती को सम्बोधित तथा अपर गन्ना आयुक्त (प्रशासन) को पृष्ठांकित है, में आपको आई.सी.सी.सी. विकास भवन सभागार में कोविड-19 (वैरियन्ट ओमीक्रोन) के प्रभावी रोकथाम हेतु वैक्सिनेशन सम्बन्धी कार्य समाप्त हो जाने तथा विधान सभा सामान्य निर्वाचन-2022 सम्पन्न हो जाने के उपरान्त भी आप गन्ना विकास परिषद, बस्ती के कार्यालय में उपस्थित नहीं हुए तथा परिषद कार्यालय में अनुरक्षित उपस्थित पंजिका पर अपना हस्ताक्षर भी नहीं किया।

आरोप संख्या-2

आरोप है कि अपर गन्ना आयुक्त प्रशासन कार्यालय आयुक्त, गन्ना एवं चीनी, उ.प्र. लखनऊ के आदेश संख्या 160/सो/1974/स्था./लिपिक/दिनांक 11.04.2022 द्वारा आपको गन्ना विकास परिषद बस्ती से स्वतः कार्यमुक्त करते हुए कन्ट्रोल रूम टोल फ्री, मुख्यालय से आबद्ध किया गया। उक्त आदेश के क्रम में ज्येष्ठ गन्ना विकास निरीक्षक, बस्ती के पत्र संख्याः13/सी, दिनांक 11.04.2022 द्वारा आपको नव तैनाती/आबद्धीकरण स्थान पर योगदान करने हेतु निर्देशित किया गया। ज्येष्ठ गन्ना विकास निरीक्षक बस्ती द्वारा आपको व्हाट्सएप मोबाइल पर वार्ता कर बस्ती स्थित स्थानीय आवास पर नोटिस चस्पा तथा स्थायी पते पर पंजीकृत डाक के माध्यम से दिनांक 05.04.2022 से उपर्युक्त आदेश के तत्काल अनुपालन हेतु आपको संसूचित किया गया, परन्तु आपने आदेश का पालन नहीं किया। पर्याप्त समय व्यतीत हो जाने के उपरान्त आप द्वारा दिनांक 18.04.2022 को डाक के माध्यम से दिनांक 05.04.2022 से ज्येष्ठ गन्ना विकास निरीक्षक को अचानक तबियत खराब होने का चिकित्सा अवकाश का प्रार्थना पत्र पूर्ण स्वस्थ होने तक प्रेषित किया गया। स्वास्थ खराब होने की सूचना आपको ज्येष्ठ गन्ना विकास निरीक्षक को मोबाइल अथवा अन्य सम्पर्क सूत्र द्वारा देनी चाहिए थी, परन्तु आप द्वारा ऐसा नहीं किया गया। आपने प्रार्थना पत्र में दिनांक 05.04.2022 से स्वास्थ खराब होने की सूचना पंजीकृत पत्र दिनांक 18.04.2022 को प्रेषित की गयी, जो काफी विलम्ब से दी गयी है।

आरोप संख्या-3

ज्येष्ठ गन्ना विकास निरीक्षक, बस्ती द्वारा दिनांक 31.03.2022 को परिषद कार्यालय का निरीक्षण करने के दौरान पूर्वान्ह 10.20 बजे आप अनुपस्थित पाये गये। उक्त तिथि को आप

अपरान्ह 02.00 बजे आकर उपस्थित पंजिका पर पूर्वान्ह 10.25 का समय अंकित कर मनमाने ढंग से हस्ताक्षर बनाया गया। इसके पूर्व भी ज्येष्ठ गन्ना विकास निरीक्षक, बस्ती के द्वारा लिखित व मौखिक रूप से दिये गये निर्देशों के उपरान्त भी आप कार्यालय समय से न आने तथा उपस्थिति पंजिका पर मनमाने ढंग से हस्ताक्षर करने के सम्बन्ध में आपसे स्पष्टीकरण की मांग की गयी, परन्तु आप द्वारा अपने कार्य प्रणाली में कोई सुधार नहीं लाया गया।

आरोप संख्याः-4 उत्तर प्रदेश सरकारी आचरण नियमावली 1956 का उल्लंघन करना।

आपके उपर्युक्त कृत्यों से विभागीय शुचिता खण्डित हुई तथा आम जनमानस में विभाग की छवि खराब हुई। इस प्रकार आप विभागीय नियमों/निर्देशों की अवहेलना करने, अपने कृत्यों/दायित्वों का मखौल उड़ाने अपने पदीय कर्तव्यों का पालन न करने का आरोप है।"

15. Likewise, in the supplementary charge-sheet dated 22.12.2022, the following two charges figure thus:

"आरोप संख्या-1

जांच अधिकारी/जिला गन्ना अधिकारी, गोण्डा के स्तर से निर्गत आरोप पत्र को अनेकों बार आपके स्थानीय/स्थायी आवास पर प्राप्त कराये जाने, व्हाट्सएप पर सूचित किये जाने, स्थानीय एवं स्थायी आवास पर पंजीकृत डाक से प्रेषित किये जाने, आपके आवास पर आरोप पत्र को चस्पा कर संसूचित किये जाने के बावजूद भी आप द्वारा आरोप पत्र प्राप्त नहीं कर आदेश की अवहेलना करते हुए जाबूझकर राजकीय कार्य को बाधित करने, स्वास्थ परीक्षण हेतु मुख्य चिकित्सा अधिकारी, बस्ती के समक्ष उपस्थित होने हेतु निर्गत पत्र को प्राप्त नहीं करने का आरोप अपचारी कार्मिक पर है।

आरोप संख्या-2

अपचारी कार्मिक पर जिला गन्ना अधिकारी, बस्ती के पत्र संख्याः1402/स्था., दिनांक 23.08.2022 द्वारा प्रदत्त सूचना के अनुसार ऊंचे रसूख के बल पर विगत कई वर्षों से कार्यालय में मनमाने ढंग से उपस्थित रहने व विभागीय कार्य न करने, कई बार मौखिक एवं लिखित रूप से नियमानुसार विभागीय कार्य करने हेतु सचेत किये जाने के उपरान्त भी अपनी आदत में कोई सुधार न करते हुए कार्यालय समय से न आने, उपस्थिति पंजिका पर जबरदस्ती हस्ताक्षर कर चले जाने, सरकारी सेवा नियमों का पालन नहीं करने एवं उच्चाधिकारियों के आदेशों का उल्लंघन करने, साजिशन एवं प्रतिशोधवश अपने व्यक्तिगत मोबाइल नं. 7007064009 का उपयोग कर छद्म व्यक्ति के नाम से आई.जी.आर.एस. करके विभाग की छवि धूमिल किये जाने एवं कर्मचारी आचरण नियमावली 1956 के विरूद्ध कार्य करने का आरोप है।"

16. A perusal of the charges shows that the first charge is about presence of the petitioner in the ICCC, Vikas Bhawan during the Covid control programme and the ensuing Assembly elections, which the petitioner says he attended and the respondents charged him with unauthorized absence. The second charge is about the petitioner being attached to the headquarters and it says that the petitioner was conveyed the orders by the Senior Cane Development Inspector vide his memo dated 11.04.2022. It says that the Senior Cane Development Inspector conveyed the petitioner the order of his attachment to headquarters on a Whatsapp call and via a mobile phone call, besides conveying it through registered post. The charges that the petitioner did not comply with the order and join headquarters, where he was attached by citing ill-health. The third charge is about the petitioner's absence from the Board office during inspection done by the Senior Cane Development Inspector on 31.03.2022, and later on, the petitioner came back to the office and signed the attendance register at 2 O'Clock. The charge is one about not attending the office on time and petitioner having his way with signing the attendance register. In the supplementary charge-sheet, the charge is about not acknowledging service of a copy of the charge-sheet at his local address and despite being called by the District Cane Officer over Whatsapp, the petitioner deliberately avoided receiving a copy of the charge-sheet. The second charge in the supplementary charge-sheet is about his indifferent presence in the office and not undertaking departmental duties despite being warned in writing and orally in this regard. It is also said that in the last charge that there is no improvement in the

petitioner's ways of nonchalance towards official duties. Part of the last charge is also an allegation regarding forcibly signing the attendance register.

17. Upon hearing the learned Counsel for parties and perusing the charges, this Court is of opinion that nature of the charges are such that it would be imperative to prove them for the Establishment not just by producing documents, but examining witnesses. Even otherwise, in a case involving the imposition of a major penalty, the salutary principle is that the Establishment must prove the charge before the Inquiry Officer in a duly constituted inquiry by producing evidence through a Presenting Officer. The Inquiry Officer must distance himself from the Establishment, which he otherwise serves and act as an impartial arbiter. He must not believe or think that the charges in the charge-sheet are proof of themselves. Instead, he must know that it is the burden of the Establishment, the employer, who brings the charges to prove them in the first instance by producing documentary evidence and examining witnesses. After this burden is discharged through the agency of a Presenting Officer, producing documentary and oral evidence, the chargesheeted employee has a right to cross-examine the Establishment's witnesses. Once the Establishment have gone through with their evidence, the Inquiry Officer must give opportunity to the chargesheeted employee to lead his defence evidence, which can again be both documentary and oral, that is to say, witnesses.

18. A perusal of the inquiry report shows that all that the Inquiry Officer has done is to juxtapose the charges and the petitioner's defence in his reply and then gleaning through idle papers on record, recording findings on each of the charges. There has been no evidence led before the Inquiry Officer, at a duly constituted inquiry, by the Establishment, to prove their case. The oral inquiry of which the Inquiry Officer speaks was no more than an interrogation of the petitioner with the Inquiry Officer putting him questions with reference to the charges. An Inquiry officer may question the delinquent at an appropriate stage, but if this is the only exercise done in an inquiry, it is, in fact, no inquiry in the eyes of law, on the basis of a major penalty may be imposed. If the Inquiry Officer, placing the charge-sheet and the delinquent's reply together, puts questions in the inquiry to the delinquent and does nothing more, it shows that the fundamental principle of a fair inquiry is breached. It shows that the Inquiry Officer assumes the charges to be correct and requires the delinquent or the chargesheeted employee to come up with a defence that may dispel the charges. This cannot be the procedure to be adopted in formal proceedings of a departmental inquiry, involving the possible imposition of a major penalty, as the case here. Here, the Inquiry Officer has indeed done nothing to require the Establishment to prove the charges. He has held the charges proved because he has assumed them to be true.

19. The nature of the charges here, for instance about the petitioner forcibly signing the attendance register, is something which cannot be held proved because an officer has complained in this regard against the petitioner. If the charge is to be proved on a written complaint of the officer, who saw the petitioner forcibly or deviously mark his attendance creating false record, the fundamentals of a fair inquiry would require that the author of the complaint must be examined as a witnesses before the

Inquiry Officer and made available to the delinquent for cross-examination. If this charge is based on the oral evidence of other employees or officers reporting the petitioner forcibly marking his attendance, the employees ought to have been produced as witnesses before the Inquiry Officer through a Presenting Officer and the employee given an opportunity to cross-examine them.

20. Likewise, the charge about absconding from the ICCC meeting unauthorizedly, which the petitioner utterly denies and says that he was throughout present, also requires proof through the testimony of some witness; not just the written reports made by one or the other officer.

21. The principle that the Establishment have to prove the charge in the first instance in a matter involving the imposition of a major penalty by leading both documentary and oral evidence before an inquiry formally convened, is well established, going by the holding of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570, State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236** and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal an another, 2018 (9) ADJ 397 (DB)(LB), Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB)(LB) and State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB)**

22. A perusal of the Inquiry Officer's report, the Disciplinary Authority's order and the Appellate Authority's order as well, shows that all singularly fall foul of the principle that requires the Establishment to prove the charges by producing evidence, both documentary and oral. The Inquiry Officer has committed a breach of this principle himself by hardly holding an inquiry worth the name and the Disciplinary Authority and the Appellate Authority have committed a grave error of law in not noticing this fundamental flaw in the inquiry conducted by the Inquiry Officer. Even if this point was not raised by the delinquent, who is a layman, this fundamental principle governing a departmental inquiry where a major penalty may be imposed ought to have been in the Disciplinary Authority and the Appellate Authority's ken, who would know the procedure to hold an inquiry, involving a major penalty, much more than the petitioner.

23. In the circumstances, this Court is of opinion that the impugned orders are vitiated, as also the inquiry report. The result would be that proceedings would have to be taken again, if the respondents desire to pursue them from the stage of the charge-sheet. Everything beyond the charge-sheet has to be nullified.

24. In the result, this petition **succeeds** and is **allowed**. The impugned orders dated 16.06.203 passed by the Commissioner, Department of Sugar Industries and Cane Development, U.P., Lucknow and the appellate order dated 18.09.2023 passed by the State Government acting through the Principal Secretary, Department of Sugar Industries and Cane Development, U.P., Lucknow are hereby **quashed.** The petitioner is ordered to be reinstated in service **forthwith** and paid his current salary regularly.

25. The question of arrears would depend upon the respondents election to

pursue fresh proceedings against the petitioner. If the respondents elect to pursue fresh proceedings, the issue of arrears would be for the respondents to decide dependent upon the event in fresh proceedings to be taken. If however, the respondents do not elect to pursue fresh proceedings, the petitioner would be entitled to 50% of the arrears of his emoluments for the period that he has remained out of service. If fresh proceedings are pursued by the respondents, it goes without saying that these would be concluded expeditiously with which the petitioner shall cooperate.

26. There shall be no order as to costs.

(2024) 5 ILRA 1148
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

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

Writ-A No. 19131 of 2023

Prem Chand ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Abhishe Pandey

Counsel for the Opp. Parties:
C.S.C., Rajiv Sharma

(A) Constitution Of India - Article 226 - Scope of - does not apply to private registered societies - which are not governed by any statute or subject to State control – Maintainability - The Uttar Pradesh Khadi and Village Industries Board Act, 1960 - The Uttar Pradesh Co-operative. Societies Act, 1965 - U.P. Co-operative Societies Employees Service Regulations, 1975 - writ petition is not maintainable against a private registered society (like Kshetriya Shri Gandhi Ashram) which is not an instrumentality of the State and does not discharge any public functions, in respect of employment matters governed by its own rules and regulations (such Khadi Ashram Seva Niyamawali) - Article 12 – State or Authority. (Para - 12 to 15)

Petitioner, a Supervisor at Kshetriya Shri Gandhi Ashram - transferred after filing a complaint against Ashram - for alleged forgery and misuse of funds - inquiry was conducted, and bank accounts were frozen - petitioner faced threats - eventually dismissed without an inquiry - asked to vacate official quarters - preliminary objection - writ petition not maintainable - Khadi Ashram Seva Niyamawali not a set of statutory rules that can be enforced by a writ petition. (Para -1 to 8)

HELD: - Preliminary objection raised by respondents upheld. No violation of a public duty or public obligation cast upon Kshetriya Shri Gandhi Ashram. Writ petition not maintainable against a private registered society (Kshetriya Shri Gandhi Ashram), which is not an instrumentality of the State and does not discharge any public functions. (Para - 16)

Writ Petition Dismissed as not maintainable. (E-7)

List of Cases cited:

1. U.P. St. Cooperative Land Development Bank Ltd. Vs Chandra Bhan Dubey & ors., (1999) 1 SCC 741

2. Vijay Bihari Srivastava Vs U.P. Postal Primary Co-operative Bank Ltd., 2002 (5) AWC 308

3. Air India Statutory Corpn. Vs United Labour Union, (1997) 9 SCC 377: 1997 SCC (L&S) 1344

4. LIC Vs Escorts Ltd., (1986) 1 SCC 264

5. M.C. Mehta Vs U.O.I., (1987) 1 SCC 395: 1987 SCC (L&S) 37

6. S.S. Rana Vs Registrar, Coop. Societies & anr., (2006) 11 SCC 634

7. Suresh Ram Vs St. of U.P., 2005 SCC OnLine All 727

8. Ram Bachan Singh Vs C.E.O. Khadi Gramodyog & ors., Writ-A No.52811 of 2012

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

1. his writ petition is directed against an order dated 16.09.2023 passed by the Secretary, Kshetriya Shri Gandhi Ashram, Meerut and a further order dated 25.09.2023 passed by the Secretary aforesaid, requiring the petitioner to vacate his official quarters.

2. The petitioner was employed as a Supervisor in the Kshetriya Shri Gandhi Ashram, Garh Road, Meerut and transferred to Shri Gandhi Ashram, Khadi Bhandar, Baraut, District Baghpat vide order dated 04.09.2023, passed by the Secretary, Kshetriya Shri Gandhi Ashram, Meerut. The petitioner says that he was also the elected Secretary of the Kshetriya Shri Gandhi Ashram Employees Union, Meerut. It is averred that the petitioner moved a complaint dated 08.09.2023 before the Branch Manager of the Union Bank and the Canara Bank, where accounts of the Kshetriya Shri Gandhi Ashram, Meerut are maintained, about execution of a forged sale deed on behalf of the Kshetriya Shri Gandhi Ashram, Meerut in favour of one Ranuka Ashiyana Private Limited, besides misuse of funds by the Kshetriya Shri Gandhi Ashram, Meerut. An inquiry was conducted into the complaint and operation of the Bank Accounts of the Kshetriya Shri Gandhi Ashram, Meerut was stopped. The petitioner was threatened by the Secretary of the Kshetriya Shri Gandhi Ashram, Meerut to withdraw his complaint, upon pain of facing dire consequences.

3. It is the petitioner's case that bickering arising out of the said complaints that the petitioner had made, led the Secretary of the Kshetriya Shri Gandhi Ashram, Meerut to pass the order impugned dated 16.09.2023, dismissing the petitioner from service, without holding any inquiry. It is said that the order is absolutely bad in the eye of law as it was passed without affording opportunity of hearing. By the other order impugned dated 25.09.2023, the petitioner has been asked to handover possession of the house allotted to him as an employee of the Kshetriya Shri Gandhi Ashram, Meerut. Both these orders have been impugned by the petitioner by means of the present writ petition.

4. When the matter came up for admission before this Court on 22.11.2023, this Court passed the following order:

"Learned Counsel for the petitioner will indicate the organizational set up to show how a writ petition is maintainable against Shri Gandhi Ashram, Meerut, which appears to be a private registered society.

Lay as fresh again on 06.12.2023."

5. On 13.12.2023, this petition was heard on the question of maintainability, where learned Counsel for respondent Nos.2 and 3 was also heard. Orders were reserved.

6. Heard Mr. Abhishek Pandey, learned Counsel for the petitioner and Mr. Rajiv Sharma, learned Counsel appearing for respondent Nos.2 and 3.

7. The petitioner has relied upon the provisions of the Uttar Pradesh Khadi and Village Industries Board Act, 1960 (for short, 'the Act of 1960') to submit that the respondent, Kshetriya Shri Gandhi Ashram, Meerut, discharges statutory duties of a public character, and, therefore, the present writ petition is maintainable.

8. Mr. Rajiv Sharma, learned Counsel for respondent Nos.2 and 3, on the other hand, submits that the Kshetriya Shri Gandhi Ashram is a registered society under the Societies Registration Act, 1860. It is neither an instrumentality of the State nor in the exercise of whatever duties it performs, does it discharge any kind public functions. The provisions of the Act of 1960 do not apply. It is also submitted that the Khadi Ashram Sewa Niyamawali is not at all statutory in character and are service rules framed by the private registered society for its employees. Even if there is violation of the Sewa Niyamawali or principles of natural justice, a writ petition would not lie against a private registered society, unless the society is discharging functions essentially of a public character or there is any violation of a statute.

9. Learned Counsel for the petitioner, in support of his contention, has placed reliance upon the holding of the Supreme Court in **U.P. State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey and others, (1999) 1 SCC 741**, besides the Full Bench of our own Court in **Vijay Bihari Srivastava v. U.P. Postal Primary Co-operative Bank Ltd., 2002 (5) AWC 308.**

10. No doubt, in **Chandra Bhan Dubey** *(supra),* the Supreme Court does seem to obliterate the divide between public duties and private duties or public functions and private functions for the purpose of maintainability of a writ petition under Article 226 of the Constitution and greatly expanded the scope of the High Court's writ, where it has been held:

"25. In Air India Statutory Corpn. v. United Labour Union [(1997) 9 SCC 377 : 1997 SCC (L&S) 1344] this Court speaking through a Bench of three Judges said: (SCC pp. 435-36, para 60)

"60. The public law remedy given by Article 226 of the Constitution is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and 'for any other purpose'. The distinction between public law and private law remedy by judicial adjudication gradually marginalised and became obliterated. In LIC v. Escorts Ltd. [(1986) 1 SCC 264] (SCC at p. 344), this Court in para 102 had pointed out that the difficulty will lie in demarcating the frontiers between the public law domain and the private law field. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the question and the host of other relevant circumstances. Therein, the question was whether the management of LIC should record reasons for accepting the purchase of the shares? It was in that fact-situation that this Court held that there was no need to state reasons when the management of the shareholders by resolution reached the decision. This Court equally pointed out in other cases that when the State's power as economic power and economic entrepreneur and allocator of economic benefits is subject to the limitations of fundamental rights, a private corporation under the functional control of the State engaged in an activity hazardous to the health and safety of the community, is imbued with public interest which the State ultimately proposes to regulate exclusively on its industrial policy. It would also be subject to the same limitations as held in M.C. Mehta v. Union of India [(1987) 1 SCC 395 : 1987 SCC (L&S) 37]."

11. However, what cannot be lost sight of is the fact that the observations of

their Lordships, for the maintainability of a writ petition against any person or authority, irrespective of whether the action arose under the public law or private law, were made in the context of the Uttar Pradesh Cooperative Land Development Bank, an entity not only governed by the provisions of the Uttar Pradesh Co-operative. Societies Act, 1965 (for short, 'the Act of 1965'), that deeply regulates the functions of a Cooperative Society, but further that Cooperative Societies, like the Bank under reference, was subject to statutory control by the State Government. The State Government constituted the Uttar Pradesh Cooperative Institutional Service Board. The Service Board, with the approval of the Governor, framed regulations, called U.P. Co-operative Societies Employees Service Regulations, 1975. The Board, last mentioned, and the Regulations of 1975 would closely protect many of the rights of employees of Cooperative Societies like the appellant Bank in Chandra Bhan Dubey. It was in this context that it was remarked in paragraph No.25 of the report that the State Government had control on the appellant, that was all pervasive and their employees had statutory protection.

12. The other wider remarks of their Lordships are to be understood in the context of the establishment, structure, statutory regulation and government control, in case of a Cooperative Society, functioning under the Act of 1965. The case of a society, like Shri Gandhi Ashram, is very different. It is no more than a registered society, registered under the Societies Registration Act, 1860. The Kshetriya Shri Gandhi Ashram, Meerut is a regional body. Its parent body is the Shri Gandhi Ashram, Lucknow. There is no statute, regulating the functioning of the society, or providing the State and its Officers, control over their affairs. In a later decision, the Supreme Court, considering the ratio in **Chandra Bhan Dubey** regarding the maintainability of a writ petition against a Cooperative Society, held in **S.S. Rana v. Registrar, Coop. Societies and another, (2006) 11 SCC 634**:

"16. Our attention has also been drawn to U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey [(1999) 1 SCC 741 : 1999 SCC (L&S) 389] wherein the writ petition was held to be maintainable principally on the ground that it had been created under an Act. Reliance has also been placed upon Ram Sahan Rai v. Sachiv Samanaya Prabandhak [(2001) 3 SCC 323 : 2001 SCC (L&S) 584] wherein again the appellant thus was recruited in a society constituted under the U.P. Cooperative Land Development Bank Act, 1964 and this Court, having examined different provisions of rules, bye-laws and regulations, was of the firm opinion that the State Government exercised all-pervasive control over the Bank and moreover its employees were governed by statutory rules, prescribing an entire gamut of procedure of initiation of disciplinary proceedings by framing a set of charges culminating in inflicting of appropriate punishment, after complying with the requirements of giving a show-cause and an opportunity of hearing to the delinquent.

18. We may notice in some decisions, some High Courts have held wherein that a writ petition would be maintainable against a society if it is demonstrated that any mandatory provision of the Act or the Rules framed thereunder, have been violated by it. (See Bholanath Roy v. State of W.B. [(1996) 1 Cal LJ 502]).

19. The Society has not been created under any statute. It has not been shown before that in terminating the services of the

appellant, the respondent has violated any mandatory provisions of the Act or the Rules framed thereunder. In fact, in the writ petition no such case was made out.

13. The Full Bench of this Court in **Vijay Bihari Srivastava** (supra) has observed:

"35. In the light of foregoing discussions, we answer question as to whether a writ petition in the nature of certiorari will lie against a Co-operative Society or it comes within the meaning of the words other Authority occurring in Article 226 of the Constitution, as follows: the writ petition in the nature of certiorari will lie against a Co-operative Society only when such Society has ingredient of an authority within the meaning of Article 226 of the Constitution and not otherwise. The following guidelines are culled out from the various decisions of the Supreme Court, referred to above:

1. The constitution of the Managing Body/ committee constitutes the functionaries of the governed, 2. There is an existence of deep and pervasive control of the management and policies of the co-operative Society by the Government, 3. The function of the Co-operative Society is of public importance and closely related to the governmental functions, 4. The financial control is by the Government or it provides financial and controlling its affairs, 5. The violation of statutory rules applicable to the Society in regard to the service matters of its employees, and 6. Statutory violations or non-compliance of it by an authority under the Act.

36. It is made clear that there is no straight jacket formula to point out as to when a Co-operative society is an authority but it has to be considered in the light of various factors enumerated in the decisions of the Supreme Court."

14. The question, whether by its constitution, the Shri Gandhi Ashram is a society or body that is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution in the matter of service causes of its employees, was examined by this Court in **Suresh Ram v. State of U.P., 2005 SCC OnLine All 727**, where it was held:

"4. A preliminary objection has been raised by Sri Rajeev Sharma, learned Counsel for the respondents that the writ petition is not maintainable as Shri Gandhi Ashram Khadi Bhandar has been held not to be a State by a Division Bench of this Court in Writ Petition No. 3842 of 1990 (Ram Jokhan Singh v. Union of India) connected with Writ Petition No. 8639 of 1990 (Dhirendra Brahmchari v. Union of India). He has also placed reliance upon the judgments passed by His Lordship Hon'ble Mr. Justice Sunil Ambwani in Writ Petition Nos. 51147 of 2003 (Chhabi Lal v. Union of India) and 40101 of 2002 (Santosh Kumar Rastogi v. President, Khadi Gram Udyog Sangh, Allahabad) as well as on the judgment passed by his Lordship Hon'ble Mr. Justice S.K. Singh in Writ Petition No. 11302 of 2003 (Ram Nagina Singh v. U.P. Khadi Evam Gram Udyog Board, Lucknow).

5. The preliminary objection in those cases was accepted after hearing the learned Counsel for the parties at length and it was held that Shri Gandhi Ashram Khadi Bhandar is not a State within the meaning of Article 12 of the Constitution.

6. The respondents have raised a preliminary objection that in view of the decision of the Hon'ble Supreme Court rendered in The General Manager Kisan

Sahkari Chini Mills Ltd. v. Satrughan Nishad, [(2003) 8 SCC 639.] there is no foundation laid in the writ petition as to how the respondent-Kisan Sewa Sahkari Samiti Ltd., Kharkhaunda No. 2, district Meerut is an instrumentality of the State as has been held in Ajay Hasia v. Khalid Mujib Sehravardi, [(1981) 1 SCC 722.] and Ramana Dayaram Shetty v. International Airport Authority of India. [(1979) 3 SCC 489.] In the aforesaid case of International Airport Authority of India (supra), the following principles have been laid down which may be a pointer as to whether a co-operative society is a State or other authority within the meaning of Article 12 of the Constitution or not.

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (S.C.C. p. 507, para 14)

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (S.C.C. p. 508, para 15)

(3) It may also be a relevant factor ……. whether the corporation enjoys monopoly status which is State-conferred or State-protected. (S.C.C. p. 508, para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (S.C.C. p. 508, para 15)

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (S.C.C. p. 509, para 16)

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (S.C.C. p. 510, para 18)

7. If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12."

8. In this case no foundation has been laid down as to how the respondent is State or other authority within the meaning of Article 12 of the Constitution.

9. The writ petition is not maintainable in view of the decision rendered in General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur v. Satrughan Nishad, [(2003) 8 SCC 639.] as the respondent-Mills is not instrumentality or agency of the State Government within the meaning of Article 12 of the Constitution.

10. In the facts and circumstances of the case, I am of the opinion that the petitioner is not State within the meaning of Article 12 of the Constitution."

15. To like effect is the unreported decision in **Ram Bachan Singh v. Chief Executive Officer Khadi Gramodyog & Others, Writ-A No.52811 of 2012**, decided on 09.10.2012, where it has been observed:

"Petitioner is an employee of Sri Gandhi Ashram Ratanpura, Mau Camp Office Jangipur, Ghazipur. When the matter has been taken up, preliminary objection has been raised by Sri Rajeev Sharma, Advocate that present writ petition is not at all maintainable. This Court in Civil Misc. Writ Petition No. 40101 of 2002 Santosh Kumar Rastogi Versus President Khadi Gramodyog Sangh Allahabad and others has clearly taken the view that it is a society registered under Societies Registration Act, 1860, and

he is not an employee of the U.P. Khadi Gramodyog Board, and the provisions of U.P. Khadi and Village Industries Board Act 1960 are not applicable to the petitioner. The Khadi Ashram Seva Niyamawali is not a set of statutory rules which can be enforced by a writ petition. In view of this once services of petitioner are governed by Khadi Ashram Seva Niyamawali, writ petition is not maintainable and petitioner has been transferred by his employer, then this Court refuses to interfere with the same."

16. Upon a perusal of the writ petition, this Court does not find that there is any such violation of a public duty or public obligation, cast upon the Kshetriya Shri Gandhi Ashram, Meerut, as may make it amenable to the writ jurisdiction of this Court under Article 226 of the Constitution.

17. In the result, this petition fails and is **dismissed**.

18. There shall be no order as to costs.

(2024) 5 ILRA 1154
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2024

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 20215 of 2019

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

Counsel for the Petitioner:
Sri Ashish Kumar, Sri Bharat Pratap Singh, Sri Gaurav Singh, Sri Prem Narayan Tiwari, Sri Vijay Gautam (Sr. Advocate), Sri Saurabh Singh, Sri Kripa Shankar Singh (Sr. Advocate)

Counsel for the Respondent:
C.S.C.

(A) Service Law - U.P. Government Servant (Disciplinary & Appeal), Rules, 1999 - Rules 3 - compulsory retiring - U.P. Financial Handbook Part II-IV - Fundamental Rules 56(c) - Uttar Pradesh Police Officer Subordinate Rank (Punishment & Appeal), Rules 1991 - Rule 14(2) - order of compulsory retirement is not to be passed as short cut to avoid departmental enquiry - order is to be passed after having due regard to the entire service record of the officer - an order has to be tested on the touchstone that no reasonable person would form requisite opinion on the given material - order should not smack of perversity or based on no material or prima facie malafide . (Para - 24)

(B) Service Law - Principles regarding the Order of Compulsory retirement in public interest - (i) Compulsory retirement is not a punishment and implies no stigma or misbehavior. (ii) The government must form the opinion that compulsory retirement is in the public interest, based on subjective satisfaction. (iii) Principles of natural justice do not apply, but judicial scrutiny is allowed if the order is: - Mala fide - Based on no evidence - Arbitrary (no reasonable person would form the same opinion) (iv) The government must consider the entire service record, emphasizing later years, including both favorable and adverse entries. (v) An order cannot be quashed solely because uncommunicated adverse remarks were considered; interference is only permissible on grounds mentioned in (iii). (Para -23)

State government order - compulsory retirement order - punishment awarded to petitioner – cast stigma - quashing of - which awarded petitioner a major penalty of two increments for 5 years with temporary effect and a minor penalty of censure under Rules - also challenges order passed by Director General of Police – non speaking order - Only punishment order and censure entry mentioned - Screening Committee considered no subjective satisfaction -

Respondent did not consider petitioner's service record or appreciation letters - No finding that petitioner's continued public service is not in public interest. (Para - 2, 11 ,26)

HELD: - Order of compulsory retirement quashed due to lack of subjective satisfaction and failure to consider individual cases and service records. Order casts stigma and amounts to double punishment. Liberty granted to petitioner to file representation/appeal against previous punishment orders. compulsory retirement order was unlawful and directed the respondents to reinstate the petitioner with full benefits.(Para - 27,28)

Writ Petition partly allowed. (E-7)

List of Cases cited:

1. Mahesh Chand Agarwal Vs St. of U.P. & ors., Writ-A No. 1888 of 2005

2. Brijesh Kumar Vs St. of U.P. & ors., Special Appeal (Defective) No. 496 of 2018

3. Ghanshyam Mishra Vs St. of U.P. & ors., Writ-A No. 45254 of 2017

4. St. of Orissa Vs Ram Chandra Das, (1996) 5 SCC 331

5. St. of Guj. Vs Umedbhai M. Patel, (2001) 3 SCC 314

6. Pyare Mohan Lal Vs St. of Jharkh. & Ors. (2010) 10 SCC 693

7. Rajasthan SRTC Vs Babulal Jangir, (2013) 10 SCC 551

8. St. of Guj. Vs Umedbhai M Patel, (2001) 3 SCC 314

9. Alld. Bank Officer Assoc. Vs Alld. Bank & ors., AIR 1996 SC (2030)

10. Nand Kishore Verma Vs St. of Jharkh. & ors., AIR 2012 SCW 1791

11. Rizvan Ahmad Vs St. of U.P. & ors., Special Appeal (Defective) No. 24 of 2018

12. St. of U.P. Vs Lalsa Ram, (2001) 3 SCC 383

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Kripa Shankar Singh, learned Senior Counsel assisted by Sri Saurabh Singh, learned counsel for the petitioner and Sri Vijay Shankar Prasad, learned Additional Chief Standing Counsel for respondents.

2. The present writ petition has been filed by the petitioner, with a prayer to quash the order dated 7.11.2019 passed by the State Government, compulsory retiring the petitioner and also quash the order dated 22.10.2019, by which the petitioner was awarded major penalty, i.e., stoppage of two increments for 5 years with temporary effect and one minor penalty of censure in terms of Rules 3 of U.P. Government Servant (Disciplinary & Appeal), Rules, 1999 (hereinafter referred to as "Rules of 1999"). The petitioner has further challenged the order dated 20.9.2018 passed by the Director General of Police, by which the penalty of censure has been imposed upon the petitioner under Rule 3 of aforesaid Rules of 1999 as well as appellate order dated 1.5.2019.

3. The facts as stated by the petitioner in the writ petition are that the petitioner was directly recruited in the year 1998 on the post of Sub-Inspector of Police. During the course of duty in an encounter with Munna Bajrangi gang, the petitioner received five AK-47 bullet injuries. After recovering from the said injuries the petitioner was granted promotion to the post of Inspector in 2001 and he was also awarded with Presidential Medal.

4. The petitioner was subsequently promoted as Deputy Superintendent of

Police on 11.7.2016 and was posted at Zamania District Ghazipur on 18.7.2016. He was suspended on 15.11.2016 on the basis of some enquiry conducted by Shri Anil Kumar Singh, Additional Superintendent of Police (Rural) Ghazipur. However, the said suspension was revoked on 3.1.2017. Thereafter he was served a charge-sheet dated 9.9.2017. In the said charge-sheet, following charges were levelled against the petitioner :-

"यह कि वर्ष 2016 में आप द्वारा क्षेत्राधिकारी जमानिया, जनपद गाजीपुर के पद पर कार्यभार ग्रहण करते ही जनपद के सभी थानों से मानक के विपरीत जाकर दो-दो आरक्षी अपने हमराही बुला लिये गये और जनपदीय पुलिस बल कम होने के बाद भी बिना उच्चाधिकारियों के संज्ञान में लाये 12 पुलिस कर्मियों को अपने साथ ड्यूटी में लगा लिया गया। आपके द्वारा क्षेत्र में भ्रमण करने के समय सरकारी गाड़ी का उपयोग न कर, प्राइवेट वाहन (स्कार्पियो) का प्रयोग किया गया है तथा पीछे के वाहन में 12-13 हमराही बैठाकर चल रहे थे। कई जमीनी विवाद के प्रकरणों में अनावश्यक हस्तक्षेप कर एकपक्षीय कार्यवाही का प्रयास किया जाना परिलक्षित हुआ है। श्रीमती माया सिंह, पूर्व जिला पंचायत सदस्य एवं हिन्दू पी.जी. कॉलेज, छात्रसंघ की पूर्व अध्यक्ष का आवास खाली कराने के सम्बन्ध में गाली-गलौज करने एवं उनके घर पर जाकर अनावश्यक दबाव बनाने आदि के संबंध में राजकीय कर्तव्यपालन के प्रति की गई घोर लापरवाही, उदासीनता एवं अकर्मण्यता/स्वेच्छाचारिता बरतने के आरोप में आपको दोषी पाया गया है।"

5. The petitioner submitted his reply to the said charge- sheet on 11.1.2018. The Enquiry Officer, i.e., Deputy Inspector General of Police, Azamgarh Zone, Azamgarh submitted his enquiry report on 5.7.2018. It is mentioned in paragraph 10 of the writ petition that the Enquiry Officer, while recording its finding in paragraph 9 of the enquiry report, has not at all considered the evidence adduced by the petitioner. The enquiry report dated 5.7.2018 was served upon the petitioner on 27.11.2018, directing him to submit his reply, which was submitted by the petitioner on 5.2.2019. The respondent no. 1 by an order dated 22.10.2019, imposed penalties, i.e., stoppage of two increments for 5 years with temporary effect along with censure entry.

6. It is further stated in the writ petition that in the preliminary enquiry conducted by Shri Keshav Chandra Goswami, ASP, City, Ghazipur, it was held that no charge has been proved against the petitioner. However, inspite of the same without any basis or disagreeing with the preliminary report dated 31.12.2016, the said enquiry report dated 31.12.2016 was forwarded to two officers, i.e., Sri Kamlesh Dixit, ASP and Dr. Anil Kumar Pandey, ASP who were of the equivalent rank i.e., ASP, for reviewing the report dated 31.12.2016. There is no provision for reviewing the preliminary enquiry report under the law. It is important to point out here that both the officers namely Sri Kamlesh Dixit and Dr. Anil Kumar Pandey did not make any enquiry independently rather reviewed the report submitted by Shri Keshav Chandra Goswami dated 31.12.2016 and formed their opinion. The said preliminary enquiry conducted by Shri Keshav Chandra Goswami, A.S.P., City, Ghazipur has not been considered. It is stated that the petitioner has been awarded double punishment i.e. stoppage of increments and censure entry for one and same charge.

7. By an order dated 20.9.2018, the petitioner was granted censure entry under Rule 3(1) of Rules of 1999. It is further stated that for awarding the said censure entry, no reason has been recorded by the Disciplinary Authority and there was no material before him or before the authority, conducting the preliminary enquiry for awarding punishment of censure entry.

8. It is further stated that the petitioner was awarded appreciation letter dated 12.11.2015 by the Senior

Superintendent of Police regarding successfully organizing the event during visit of Shri Rajnath Singh, the then Home Minister.

9. The appeal filed by the petitioner against the said censure entry has been rejected by order dated 01.05.2019 by a non-speaking order. It is further stated that while passing the order dated 7.11.2019. whereby the petitioner has been compulsory retired, censure entry of 2017, which was imposed by order dated 2.11.2017 was also considered. However, the said order was never communicated to the petitioner. It is further stated that while passing the order of compulsory retirement, the respondent no.1 has considered the three orders, i.e.

(I) censure entry awarded on 2.11.2017;

(II) censure entry awarded on 20.9.2018; and

(III) the order dated 22.10.2019, by which the censure entry and stoppage of two increments for 5 years was imposed.

The petitioner in paragraph 38 of the writ petition has stated that since 1999 till 2019, all the entries in service-record are outstanding. Based on the aforesaid outstanding entries, it is stated that the petitioner is not a deadwood.

10. It is further stated in the writ petition that as per Fundamental Rules 56, before compulsory retiring a government servant, an opinion has to be framed by the concerned authority that it is in public interest to retire a person, after considering his entire service record. In the impugned order, there is no mention about consideration of service record of the petitioner and only three orders of punishment has been considered.

11. The petitioner also filed two supplementary affidavits dated 12.12.2019 & 16.3.2021. In 1st supplementary affidavit, it is stated that the compulsory retirement of the petitioner is against the provisions of Fundamental Rules 56(c) of U.P. Financial Handbook Part II-IV, as it has been passed without following the provisions contained under the said rules. It is further stated that the Screening Committee has not been properly constituted as per the provisions contained in the Government Orders dated 26.10.1985, 6.7.2017. 8.9.2017. 21.6.2019 & 1.7.2019. It is further stated in the supplementary affidavit that since the compulsory retirement order refers to the punishment awarded to the petitioner, as such, the said order cast stigma upon the petitioner, and as such, the order being passed without notice and opportunity to the petitioner, is bad in the eyes of law and is liable to be quashed. It is further stated that without considering the annual confidential report/character role of the petitioner, the impugned order has been passed and while passing the said order, efficiency of the petitioner has not been considered.

12. In 2nd supplementary affidavit, it is stated that the Screening Committee has fixed the criteria for retiring a person compulsory who has attained the age of 50 years and who have been charged three or more than three minor penalties and other penalties. It is further stated that the Screening Committee has considered the censure entry awarded on 22.10.2019, which was awarded just a week earlier before meeting of the Screening Committee. The Screening Committee has not considered last 10 years annual confidential report in the service record of the petitioner. The petitioner in 2nd supplementary affidavit has also made averment regarding the communication of the approval of U.P.

Public Service Commission for award of punishment and with the said averment he has stated that the commission was not informed properly and was infact forced to approve the punishment awarded to the petitioner by order dated 22.10.2019.

13. A counter affidavit has been filed on behalf of respondent by Shri Rajdhari Saroj, Deputy Superintendent of Police, Police Head Quarter, Prayagraj. In the counter affidavit it is stated that as per the Government Order dated 26.10.1985, any government servant who has completed 50 years of his age, may be retired by the Appointing Authority by giving 3 months notice without assigning any reason. The Screening Committee, as per the government order dated 26.10.1985 has considered the service record of the petitioner and in pursuance of the punishment order passed time to time on 1.11.2019, the Screening Committee recommended for compulsory retirement of the petitioner.

14. It is further stated in the counter affidavit that no representation has been moved by the petitioner against the punishment order dated 22.10.2019. So far as censure entry of 20.9.2018 is concerned, the appeal against the said censure entry has been rejected. In supplementary counter affidavit it is stated that in the government order dated 26.10.1985. exclusive guidelines and provisions had been made for the Screening Committee to examine and assesse the entire service record and formed opinion objectively as to whether an employee is fit to be retained in service or not and subsequently various government orders have also been issued being government orders dated 6.2.1989, 21.5.1998. 23.9.2000, 25.1.2007 & 6.7.2017.

15. It is further stated that the Screening Committee has scrutinized the entire service record of the petitioner and other employee. The petitioner was awarded 4 punishments under Rule 14(2) of Uttar Pradesh Police Officer Subordinate Rank (Punishment & Appeal), Rules 1991. The Screening Committee has submitted its report on 1.11.2019, wherein it has recommended that the petitioner should not be continued in service in public interest and he has been compulsory retired. In pursuance of the recommendation of the Screening Committee, an office-memorandum dated 7.11.2019 under Uttar Pradesh Fundamental Rules 56-C of Financial Handbook Vol. 2 (Part-II-IV) was issued. Since the services of the petitioner was not found satisfactory by the Screening Committee, therefore, the Screening Committee recommended that the petitioner should not be continued in service in public interest and he should be compulsory retired.

16. It is further stated that the order of compulsory retirement is not an punishment. Copy of the report of Screening Committee has also been annexed as annexure-1 to the supplementary counter affidavit. The said report of Screening Committee, in description, there is reference of punishment order dated 20.10.2019 and censure entries dated 2.11.2017 & 20.9.2018 and in recommendation column, the details of punishment and censure entry has been mentioned. The Screening Committee has recommended that to maintain the efficiency in State Police Service, the recommendation for compulsory retirement has been passed. In recommendation of the Screening Committee, it is nowhere mentioned the compulsory retirement is in public interest.

17. Heard learned counsel for the petitioner and learned Standing Counsel for

the respondents. With the consent of learned counsel for the parties the present writ petition is being disposed of at the stage of admission.

18. Learned counsel for the petitioner has argued that the order of compulsory retirement has been passed only on the basis of punishment order dated 22.10.2019 and two censure entries dated 2.11.2017 & 20.9.2018, whereas the service record of the petitioner from 2009 to 2019 is outstanding and this fact has not been denied by the respondents in their counter affidavit. The report of Screening Committee filed along with supplementary counter affidavit, clearly demonstrate that only consideration before the Screening Committee was order dated 22.10.2019. 2.11.2017 & 20.9.2018. The service record of the petitioner and other appreciation in performance of the petitioner has not at all been considered by the Screening Committee.

19. The petitioner for the said proposition has relied upon a judgment rendered by Lucknow Bench of this Court in ***Writ-A No. 1888 of 2005 (S/B) (Mahesh Chand Agarwal Vs. State of U.P. & others)*** decided on 27.03.2006. In the aforesaid judgment, the Division Bench of this Court has held as under:

"While considering the case of a public servant it is not only the Character Roll which would be relevant either for retaining the officer or public servant in service or for screening him out, but such consideration would also go to the other materials in the service record namely; e.g. appreciation letters or certificates of commendable work by higher or superior authorities or to say of the competent authority of if there is material which though does not find mention in the Character Roll entry but either appreciates or deprecates the work and conduct of the public servant or shows his or her shortcomings or in any other way reflects his or her character, integrity and reputation. All such material cannot be lost sight by the Screening Committee and has to be considered while making an assessment. Thus, relying only upon the award of marks as against the annual remarks on the basis of criteria of promotion strictly on the basis of 'merit cannot be supported to, under the aforesaid provision."

20. For the proposition that once the order of compulsory retirement contain the details of punishment awarded earlier, it cast stigma and for this, the learned counsel for the petitioner has relied upon a judgment of this Court dated 7.8.2018 in ***Special Appeal (Defective) No. 496 of 2018 (Brijesh Kumar Vs. State of U.P. & others).***

21. Coordinate Bench of this Court in ***Writ-A No. 45254 of 2017 (Ghanshyam Mishra Vs. State of U.P. & others)*** decided on 09.05.2019 has considered the law, pertaining to the compulsory retirement . The relevant portion of the aforesaid judgement reads as follows:

"In the ultimate analysis, the Court must be satisfied that the formation of opinion is neither whimsical nor arbitrary but in fact based purely upon an objective assessment of the suitability of the employee. It is to be remembered that Courts will not interfere merely because another view could possibly be taken. After all the exercise of power to compulsorily retire is an outcome of the subjective satisfaction so arrived at. It would however, be justified in posing to

itself the question whether a reasonable and prudent person would have arrived at the same conclusion as the employer upon an assessment of the entire record.

Often orders of compulsorily retirement are assailed on the ground that they came to be made in order to obviate the requirement to prove allegations of misconduct levelled against an employee. Such a challenge is raised often where the power of compulsorily retirement is exercised either during the pendency of disciplinary proceedings or before a punishment is ultimately inflicted. A challenge on these lines may also be raised whether though a decision to initiate disciplinary proceedings is taken, an enquiry need not have commenced. In such situations the Courts are called upon to consider whether the power of compulsorily retirement was in fact invoked as a ruse and veils the true intent of the employer to avoid the necessity of holding a departmental enquiry. These issues very often call upon the Court to consider whether the misdemeanor alleged and yet to be proven or acted upon formed the motive or foundation of the order of compulsorily retirement.

Reiterating the settled legal position of the power to compulsorily retire and the obligation of the employer to scan the entire service record of a government servant, the Supreme Court in ***Punjab State Power Corporation*** *held thus:-*

"14. In ***State of Orissa v. Ram Chandra Das****: (1996) 5 SCC 331 a three-Judge Bench has emphatically held that object behind compulsory retirement is public interest and, therefore, even if an employee has been subsequently promoted, the previous entries do not melt into insignificance. To quote:*

7...Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension.

15. The aforesaid dictum has been approved and followed in ***State of Gujarat v. Umedbhai M. Patel****: (2001) 3 SCC 314, wherein emphasis has been laid on the factum that entire service record of the government servant is to be examined. Same principle has also been followed in another three-Judge Bench decision in* ***Pyare Mohan Lal v. State of Jharkhand and Ors.*** *(2010) 10 SCC 693. Slightly recently, a Division Bench in* ***Rajasthan SRTC v. Babulal Jangir*** *(2013) 10 SCC 551, after discussing number of authorities, has held thus:*

22. It clearly follows from the above that the clarification given by a two-Judge Bench judgment in Badrinath v. State of Tamil Nadu is not correct and the observations of this Court in State of Punjab v. Gurdas Singh: (1998) 4 SCC 92 to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

23. The principle of law which is clarified and stands crystallised after the judgment in Pyare Mohan Lal v. State of Jharkhand is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this "washed-off theory" will have no application when the case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration the earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time, the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant."

Dealing with a case where an order of compulsorily retirement comes to be made during the pendency of disciplinary proceedings, the Supreme Court in ***State of U.P. And another Vs. Abhai Kishore Masta*** *made the following pertinent observations:*

"7. So far as the order of compulsory retirement under Fundamental Rule 56-J is concerned, we are of the opinion that the principle enunciated by the High Court in J.N. Bajpai and followed in the Judgment under appeal is unsustainable in law. It cannot be said as a matter of law nor can it be stated as invariable rule, that any and every order of compulsory retirement made under Fundamental Rule 56-J (or other provision corresponding thereto) during the pendency of disciplinary proceedings is necessarily penal. It may be or it may not be. It is a matter to be decided on a verification of the relevant record or the material on which the order is based.

8. In the State of Uttar Pradesh v. Madan Mohan Nagar (1967)IILLJ63SC it has been held by a Constitution Bench that the test to be applied in such matters is "does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsory?" It was observed that if the charge or imputation against the officer is made the condition of the exercise of the power it must be held to be by way of punishment-otherwise not. In other words if it is found that the authority has adopted an easier course of retiring the employee under Rule 56-J instead of proceeding with and concluding the enquiry or where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the levelling of the charges, as the case may be, it would be a case for holding it to be penal. But there may also be a case where the order of compulsory retirement is not really or mainly based upon the charges or the pendency of disciplinary enquiry. As a matter of fact, in many cases, it may happen that the authority competent to retire compulsorily under Rule 56-J and authority competent to impose the punishment in the disciplinary enquiry are different. It may also be that the charges communicated or the pendency of the disciplinary enquiry is only one of the several circumstances taken into consideration. In such cases it cannot

be said that merely because the order of compulsory retirement is made after the charges are communicated or during the pendency of disciplinary enquiry, it is penal in nature.

9. It is true that merely because the order of compulsory retirement is couched in innocuous language without making imputations against the government servant, the Court need not conclude that it is not penal in nature. In appropriate cases the Court can lift the veil to find out whether, in truth, the order is penal in nature vide Ram Ekbal Sharma v. State of Bihar."

It ultimately held:-

12. We are, therefore, of the opinion that the High Court was in error in holding that merely because the order of compulsory retirement was passed during the pendency of a disciplinary enquiry, it must be necessarily deemed to be penal in nature, is unsustainable in law. The Judgment of the High Court is accordingly set aside and the matter is remitted to the High Court to determine, in the light of the observations made herein, whether the order of compulsory retirement is, in truth, penal in nature? There shall be no order as to costs."

Dealing with the decision rendered by a learned Judge of the Court in ***Mukesh Bhatnagar*** *and upon which great emphasis was laid by Sri Mishra, this Court finds itself unable to either adopt or subscribe to the proposition as broadly formulated by the learned Judge in that decision. In Mukesh Bhatnagar, the learned Judge noticing the fact that two disciplinary proceedings were pending prior to the order of compulsorily retirement being passed proceeded to observe that compulsorily retirement must not be imposed as a punitive measure and as a short cut to avoid a departmental enquiry when such course is more desirable. While noting thus, the learned Judge sought to draw sustenance from the principles as formulated by the Supreme Court in* ***State of Gujarat Vs. Umedbhai M Patel*** *reported in (2001) 3 SCC 314. Firstly, no such absolute proposition was culled out or propounded in* ***Umedhai M. Patel****. Secondly and with due respect to the learned Judge, this Court finds itself unable to tread this path bearing in mind the principles as enunciated by the Supreme Court in* ***State of U.P****. As was observed there, the Supreme Court held that it cannot be said as a matter of law or as an invariable rule that an order of compulsorily retirement made during the pendency of disciplinary proceedings is necessarily penal. It held that whether it was penal or not would be a matter to be decided on verification of the relevant record. The position was then further elaborated with the Court observing that only in a case where it is found that the main reason for compulsorily retiring the employee was the charge which formed the subject matter of the disciplinary proceedings could it be said to be penal. It held that even in a case where the pendency of disciplinary proceedings is only one of several circumstances which are taken into consideration by the employer, in such a situation it could not be said that the order of compulsorily retirement was penal in nature. The above exposition is necessitated only in light of the great emphasis laid by Sri Mishra upon the decision in* ***Mukesh Bhatnagar****. However the above observations are not to be construed as an expression of any opinion on the correctness of the ultimate conclusion arrived at by the learned Judge in that matter. Ultimately it would be for this Court to consider whether in the facts of the present case, the order of compulsory retirement was based solely upon the pendency of disciplinary proceedings against the petitioner or whether it was founded upon other relevant considerations.*

In the present case as this Court reads the reasons recorded by the Screening Committee while recommending the compulsory retirement of the petitioner, it does not find that the same was based solely upon the charges which formed the subject matter of the disciplinary proceedings. The Screening Committee while framing its recommendations has taken into consideration the annual confidential entries, disciplinary proceedings, orders of punishment, reports of the Vigilance Department cumulatively. At least that is what the recommendation recites and records. No other material was relied upon to establish that the ultimate conclusion recorded by the Screening Committee hinged and rested solely on the departmental enquiries stated to be pending. The fact that this opinion was formed without the Screening Committee taking into consideration the fact that the petitioner stood exonerated of all the charges levelled against him by the Enquiry Officer and its ultimate impact on the order of compulsorily retirement itself is an aspect which is left over to be considered in the subsequent passages of this decision. The Court in the facts of this case finds itself, therefore, unable to hold that the order of compulsorily retirement was penal in character. The record as prepared by the Screening Committee does not establish that the recommendation came to be formulated solely on the basis of the enquiry proceedings which were stated to be pending.

22. The counsel for the petitioner has also relied upon the case of ***Allahabad Bank Officer Association Vs. Allahabad Bank and others reported in AIR 1996 SC (2030)*** for the proposition that once the order of compulsory retirement cast stigma, it is not sustainable. The relevant paragraph is as follows :-

"The above discussion of case law makes it clear that if the order of compulsory retirement casts a stigma on the Government servant in the sense that it contains a statement casting aspersion on his conduct or character, then the court will treat that order as an order of punishment, attracting provisions of Article 311(2) of the Constitution. The reason is that as a charge or imputation is made the condition for passing the order the court would infer therefrom that the real intention of the Government was to punish the Government servant on the basis of that charge or imputation and not to exercise the power of compulsory retirement. But mere reference to the rule, even if it mentions grounds for compulsory retirement, cannot be regarded as sufficient for treating the order of compulsory retirement as an order of punishment. In such a case, the order can be said to have been passed in terms of the rule and, therefore, a different intention cannot be inferred. So also, if the statement in the order refers only to the assessment of his work and does not at the same time cast an aspersion on the conduct or character of the Government servant, then it will not be proper to hold that the order of compulsory retirement is in reality an order of punishment. Whether the statement in the order is stigmatic or not will have to be judged by adopting the test of how a reasonable person would read or understand it."

23. The learned counsel for the petitioner has further relied upon a judgment, reported in ***AIR 2012 SCW 1791 (Nand Kishore Verma Vs. State of Jharkhand & others***) in which it is held that :-

"Keeping this object in view, the contention of the appellant has to be appreciated on the basis of the settled law on the subject of Compulsory retirement. In Baikuntha Nath Das v. Chief District Medical Officer, (1992) 2 SCC 299, three Judge Bench of this Court has laid down the principles regarding the Order of Compulsory retirement in public interest:

34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary -- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -- of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

24. The learned counsel for the petitioner has also relied upon a judgment of this Court in **Special Appeal (Defective) No. 24 of 2018 (Rizvan Ahmad Vs. State of U.P. & others**) in which it is held that :-

"14. Before we delve into the rival submissions raised at the bar we must deal with the contention canvassed by learned Standing Counsel that the committee had recorded its subjective satisfaction and once subjective satisfaction has been recorded the Court should not interfere. We may hasten to add the concept of subjective satisfaction does not necessarily mean that there can be no material and the competent authority can take a flight in fancy. Subjective satisfaction cannot be done in a manner which a prudent man can never conceive. Satisfaction like discretion has to be based on proper consideration and weighment of material. In our considered opinion subjective satisfaction cannot be scanned as if one is sitting in an appeal, but it must meet the requirement of appreciation expected of a prudent man and the appreciation should be relevant and germane to the purpose apropos to its context. It cannot be conceived for a moment that the subjective satisfaction would take away the order from

the purview of judicial scrutiny solely on the basis that the Committee has been subjectively satisfied.

15. In the case of State of Gujrat Vs. Umedbhai M. Patel (2001) 3 SCC 314, the Hon'ble Supreme Court held:

The law relating to compulsory retirement has now crystallized into definite principles, which could be broadly summarised thus:

"(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off deach wood, but the order of compulsory retirement can be passed

after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

16. In the case of ***State of U.P. Vs. Lalsa Ram (2001) 3 SCC 383*** *the Apex Court in para-15 of the judgment held as under:*

"15. Incidentally, the five guiding principles as laid down in Baikuntha Nath's case (supra) by this Court stands accepted in another three-Judges Bench's judgment of this Court in Posts and Telegraphs Board v. CSN Murthy wherein this Court observed that whether the conduct of the employee is such as to justify a conclusion of compulsory retirement but the same is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement, the courts have no authority or jurisdiction to interfere with the exercise of power if arrived at bona fide on the basis of the material available on record: Usurpation of authority is not only unwarranted but contrary to all norms of service jurisprudence."

17. From the aforesaid enunciations of law there remains no iota of doubt that the order of compulsory retirement is not to be passed as short cut to avoid departmental enquiry and that order is to be passed after having due regard to the entire service record of the officer. It is also follows that an order has to be tested on the touchstone that no reasonable person would form requisite opinion on the given material. To elucidate, the order should not smack of perversity or based on no material or prima facie malafide."

25. A perusal of the report of the Screening Committee dated 31.3.2019 (annexed by the respondent as annexure-1 to the supplementary counter affidavit dated 07.02.2020), it is evident that the case of the petitioner has been considered and the said report is as under.

4. रतन	30.12.1967	आदेश दिनांक	1. वर्ष 2016 में क्षेत्राधिकारी

कुमार यादव		22.10.2019 द्वारा परिनिन्दा एवं 02 वेतनवृद्धि अस्थायी रूप से 05 वर्ष के लिये रोकी गयी। परिनिन्दा दि० 02.11.2017 एवं 20.09.2018 03 लघु दण्ड, 01 अर्थदण्ड	जमानियां, जनपद गाजीपुर में तैनाती के दौरान सभी थानों से मानक से विपरीत 02-02 आरक्षी अपने हमराही के रूप में बुला लेने और जनपदीय पुलिस बल कम होने के बाद भी बिना उच्चाधिकारियों के संज्ञान में लाये 12 पुलिस कर्मियों को अपने साथ ड्यूटी में लगाने, क्षेत्र के भ्रमण के समय सरकारी गाड़ी का उपयोग न कर प्राईवेट वाहन का प्रयोग करने, पीछे के वाहन में 12-13 हमराही बैठाकर चलने, कई जमीनी विवादों के प्रकरणों में अनावश्यक हस्तक्षेप करके 01 पक्षीय कार्यवाही का प्रयास करने तथा श्रीमती माया सिंह, पूर्व सदस्य जिला पंचायत तचा हिन्दू पी०जी० कालेज छात्र संघ की पूर्व अध्यक्ष का आवास खाली कराये जाने के संबंध में गाली गलौज करने तथा उनके घर जाकर अनावश्यक दबाव				बनाने के सबंध में जांचोपरान्त दोषी पाते हुए शासन के आदेश दिनांक 22.10.2019 द्वारा परिनिन्दा एवं 02 वेतन वृद्धि 05 वर्ष के लिये अस्थायी तौर पर रोके जाने का दण्ड दिया गया। 02 वर्ष 2017 में प्रभारी निरीक्षक कैण्ट के पद पर तैनाती के पश्चात दिनांक 01.03.2016 को स्थानान्तरण के उपरान्त अपने पास 01 साइकिल, 02 अदद बुलेटप्रूफ जाकेट तथा 01 अदद ब्लाक पिस्टल मय मैगजीन व कारतूस थाना कैण्ट वाराणसी से प्राप्त किया गया तथा उसे दिनांक 28.03.2016 को थाना कैण्ट में जमा कराया गया था। इसके अतिरिक्ति थाना चेतगंज में तैनाती के दौरान 01 अदद वयरलेस हेण्डसेट, सीसीआर/डीसी आर/थाना कैण्ट में जमा नहीं कराये गये। व्यक्तिगत सुरक्षा हेतु पुलिस

			लाईन वाराणसी के शस्त्रागार से 01 अदद एके 47 प्राप्त किया गया। स्थानान्तरण के पश्चात इनके सरकारी सामानों को संबंधित स्थानों पर जमा नहीं कराया गया। पूर्व में प्राप्त एके-47 पुलिस लाईन में बिना किसी सक्षम अधिकारी के अनुमति/आदेश के मानमाने तरीके से अरमरी में जमा किया गया, उसके स्थान पर 01 अदद मशीनगन (एम०पी०-5) बिना किसी अनुमति/आदेश के प्राप्त कर लिया गया, जिसे इनके द्वारा जमा नहीं कराया गया। प्रकरण में जॉचोरपरान्त दोषी पाये जाने पर पुलिस महानिदेशक, उत्तर प्रदेश द्वारा दिनांक 02.11.2017 को परिनिन्दा प्रदान की गयी। 3. वर्ष 2015 में जनपद वाराणसी में प्रभारी निरीक्षक कैण्ट के पद पर तैनाती के दौरान दिनांक 01.11.2015
			को मा० गृह मन्त्री, भारत सरकार के जनपद आगमन पर उपयुक्त सुरक्षा व्यवस्था सुनिश्चित न कराये जाने के दृष्टिगत प्रकरण की जांचोपरान्त दिनाक 20.09.2018 को अपर पुलिस महानिदेशक द्वारा परिनिन्दा का दण्ड प्रदान किया गया।

26. A perusal of aforesaid report clearly established that only punishment order and censure entry has been mentioned in the report, which has been considered by the Screening Committee. There is no subjective satisfaction recorded by the Screening Committee. The entire service record of the petitioner and various appreciation letter has not at all been considered by the respondent, while passing the impugned order. No finding has been recorded by the Screening Committee that the continuation of the petitioner in public service is not in interest of the public. Only fact recorded by the Screening Committee is as under:

"इस प्रकार सरकारी सेवाओं में दक्षता सुनिश्चित करने के लिए प्रान्तीय पुलिस सेवा के अपर पुलिस अधीक्षक/पुलिस उपाधीक्षक स्तर के अधिकारियों की अनिवार्य सेवानिवृत्ति हेतु गठित स्क्रीनिंग कमेटी सम्यक् विचारोपरान्त सर्वश्री अरूण कुमार, विनोद कुमार राना, नरेन्द्र सिंह राना, रतन कुमार यादव, तेजवीर सिंह यादव, संतोष कुमार सिंह व तनवीर अहमद खाँ पुलिस उपाधीक्षकगण को उपयुक्त पाते हुए अनिवार्य सेवानिवृत्त किये जाने की संस्तुति करती है।"

27. Thus, it is clear that the Screening Committee has not recorded any subjective satisfaction and in vague term has recorded the findings that the petitioner is fit for compulsory retirement and that too

without considering individual cases of the government servant. The report further established that the service record has not at all been considered by the respondent while passing the impugned order of compulsory retirement. The order dated 07.11.2019 further contain the detail of punishment orders dated 22.10.2019, 02.11.2017 and 20.9.2018. Thus, the order dated 7.11.2019 cast stigma and also amount double punishment. As such, the order dated 7.11.2019 passed by the respondent no. 1 is not sustainable being contrary to law and is hereby quashed. So far as the orders dated 22.10.2019, 02.09.2018 and 02.11.2017 awarding punishment to the petitioner is concerned, he is granted liberty to file representation/appeal against the said order in accordance with the relevant rules.

28. In this view of the matter respondents are directed to pass orders for joining of the petiitoner within three weeks from today. Respondents are further directed to provide all the consequential benefits to the petitioner including arrears of salary, seniority and other benefits in this regard within a period of 6 weeks from today.

29. The writ petition is partly allowed.

30. No order as to costs.

31. Registrar (Compliance) is directed to communicate copy of this order to respondent no.1-Additional Chief Secretary, Ministry of Home, U.P. Secretariat, Lucknow within 24 hours.

(2024) 5 ILRA 1168
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-A No. 20794 of 2022
Connected with
Writ-A No. 17984 of 2023

Prof. Vijaishri Tiwari ...Petitioner
Versus
U.O.I. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Sri G.K. Singh, Sr. Adv., Sri Hritudhwaj Pratap Sahi

Counsel for the Opp. Parties:
Sri Shailendra, Sr. Adv., Sri Rohan Gupta, Sri Anil Kumar Rai

(A) Service Law - Invalidation of Selection Process for Registrar Position at IIIT - The Indian Institutes of Information Technology Act, 2014 - Section 32 - appointments, Section 44 - validity of acts, Section 46 - directions from the Central Government - violation of due process of selection - Fairness in any selection process is an utmost necessity - Deviations from prescribed procedures can render the process void - Candidates should not influence the selection process - decision to declare a selection process void can be upheld if based on legally sustainable reasons.(Para – 46 , 50 to 53)

IIIT initiated a selection process for the Registrar position - Petitioner (Acting Registrar) applied for the position - Selection committee had 2 extra unapproved members - Written test was introduced without approval - Petitioner's application was not submitted through proper channel - Selection process was declared void due to deviations - Fresh recruitment process was initiated - petitioner, as a candidate and Acting Registrar, had influenced the selection process - Petitioner challenged the decision. (Para - 36 to 43)

HELD: - Selection process was invalid due to procedural irregularities and the decision to declare it void was justified. Challenge to fresh recruitment process has no basis. No

ground to interfere with a decision to declare earlier process being void. (Para – 52 to 55)

Both Writ Petitions Dismissed. (E-7)

List of Cases cited:

1. Kuntesh Gupta Vs Management of Hindu Kanya Mahavidyalaya Sitapur & ors., AIR 1987 SC 2186

2. K.S.E. Board Vs H.C.C. Ltd. & ors., 2006 (12) SCC 500

3. Dr. Mohd. Suhail Vs Chancellor, University of Alld. & ors., 1994(2) UPLBEC 787

4. Prabhu Narain Singh Vs Deputy Director of Education, Varanasi, 1977 (3) ALR 391

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

1. Petitioner before this Court is holding the post of Professor in Respondent-Institute, i.e., Indian Institute of Information Technology, Allahabad (*hereinafter referred to as "IIIT, Allahabad"*) and was handed over charge to the post of Registrar (Acting) of Institute on 01.12.2022 due to unfortunate demise of earlier Acting Registrar, Professor Shirshu Verma.

2. In order to appoint a permanent Registrar, the Institute has issued Advertisement dated 27.07.2021 advertising one post of Registrar and one post of Deputy Registrar. "General Instructions" for candidates, being relevant as mentioned in the advertisement, are reproduced hereinafter:

"GENERAL INSTRUCTIONS TO THE CANDIDATES

1. Preference will be given to 'Persons with Disabilities', even where reservation is not marked in the table given on 1st page of this advertisement, if suitable PwDs are available.

2. ***(a) The Institute reserves its right to place a reasonable limit by putting a certain criteria on the total number of candidates to be called for written test/presentation/seminar/Interview.***

(b) Merely fulfillment of qualifications does not entitle a candidate to be called for written test/presentation/ seminar/Interview.

(c) The Institute reserves the right not to fill up the posts, cancel the Advt. in whole or in part without assigning any reason and its decision in this regard shall be final.

3. (a) The SC/ST and OBCS-NCL are required to attach a copy of the Caste Certificate with the application in the format prescribed by the Govt. of India.

(b) The Institute follows the reservation norms as per GOI rules for SC/ST/OBC and PwDs. Central Govt. approved list of SC, ST and OBC categories as applicable at IIIT Allahabad.

4. Candidates must ensure before applying that they are eligible according to the criteria stipulated in the advertisement. If the candidate is found ineligible at any stage of recruitment process, he/she will be disqualified and their candidature will be cancelled. Hiding of Information or submitting false Information will lead to cancellation of candidature at any stage of recruitment. The Institute reserves the right to reject any application without assigning any reason whatsoever.

5. Candidates desirous of applying for more than one post should submit separate application for each post along with requisite application fees.

6. The Institute reserves the right to assign/transfer the selected candidates to any section/department within the Institute and appointments will be offered accordingly.

7. (a) The Institute reserves the right to relax any of the qualifications/ experience in exceptional cases.

(b) Higher initial basic pay may be given to exceptionally qualified and deserving candidate(s).

(c) Requirement of experience is relaxable at the discretion of the competent authority in the cases of SCs/STs.

8. The date of determining the eligibility of all candidates in every respect shall be the normal closing date of Advt.

9. The selection process will consist of:

(i) Presentation/Seminar & Interview for Sl. No. 1

(ii) Written Test/Presentation/Seminar and Interview for Sl. Nos. 2

10. Those candidates who will be shortlisted for the Interview will be paid to & fro journey fare by direct shortest route on submission of tickets in original as under:

Group-A posts at Sl. Nos. 1 AC-II (Rajdhani Exp. Also)/Chair car in Shatabdi Exp.

Group-A posts at Sl. Nos. 2 AC-III (Ra)dhanl Exp. Also) / Chair car in Shatabdi Exp.

11. (a) The applicants shall be required to pay following application fee through the options of net banking and debit/credit cards, etc. In addition to application fee, the banks will also charge transaction fee + service tax if any.

Group-A posts at SL Nos. 1 to 2- Rs. 1000/-

(b) The fee once paid will not be refunded or re-adjusted under any circumstances.

(c) No other mode of payment will be accepted except online payment; and such applications will be relented forthright and the payment made shall stand forfeited.

12 (a) Institute will not be responsible for any postal delay.

(b) Interim correspondence will not be entertained or replied to.

(c) Any attempt to influence will lead to disqualification of candidature.

13. (a) The candidates are required to apply ONLINE only from 10:00 a.m. on 04.08.2021 to 24.09.2021 up to the midnight of 23:59 hrs. The applications sent in hard copies shall not be entertained in any case.

(b) For submission of application through online mode, please visit Institute's website:

https://recruitment.iiita.ac.in/nonteachinglob/.

(c) The print out of completed application along with all relevant supporting documents duly self attested must reach the Institute on or before 30.09.2021 through Speed Post or Registered Post

(d) Incomplete application or without relevant supporting enclosures or if received after dosing date, i.e. 30.09.2021, will be summarily rejected and no further query will be entertained.

(e) Person serving In Govt./ Semi-Govt. / PSUs should also apply online and send the print out of completed application form along with all relevant supporting documents and transaction slip with date, duly self attested, THROUGH PROPER CHANNEL However, they may produce the NOC from their organizations at the time of Interview with an unambiguous certificate that (i) no vigilance case is pending/being contemplated against him/her, (ii) the applicant will be relived within one month of receipt of appointment offer, if he/she is selected. List of Major/Minor penalties, if

any, imposed during the last 10 years may be asked to submit at any time. Such persons are also advised to send an advance copy of their application, if applicable.

(f) The envelope containing complete application should be superscribed as "Application for the post of ……." and must be sent to Joint Registrar (Estt.), Establishment Section, Administration Building, IIIT Allahabad-211015 (U.P.) INDIA.

14. In case of any dispute/ambiguity that may occur in the process of selection, decision of the Director, IIIT Allahabad, shall be final.

15. Any legal proceedings in respect of any matter of claim or dispute arising out of this advertisement and/or an application in response thereto can be Instituted only in Prayagraj and courts/tribunals/forums at Prayagraj only shall have sole and exclusive jurisdiction to try and such cause/dispute."

3. For the purpose of present case Instruction No. 2 (a), (b), (c) and 9 are more relevant, therefore, the same are again reproduced hereinafter:

"2. (a) The Institute reserves its right to place a reasonable limit by putting a certain criteria on the total number of candidates to be called for written test/presentation/seminar/Interview.

(b) Merely fulfillment of qualifications does not entitle a candidate to be called for written test/presentation/ seminar/Interview.

(c) The Institute reserves the right not to fill up the posts, cancel the Advt. in whole or in part without assigning any reason and its decision in this regard shall be final."

"9. The selection process will consist of:

(i) Presentation/Seminar & Interview for Sl. No. 1

(ii) Written Test/Presentation/Seminar and Interview for Sl. Nos. 2"

4. As referred above, selection process for post of Serial No. 1, i.e., Registrar was consist of Presentation/ Seminar and Interview, whereas selection process for the post of Deputy Registrar was consist of Written Test/ Presentation/ Seminar and Interview.

5. In pursuance of aforesaid advertisement petitioner applied for the post of Registrar. The Institute appointed a Screening Committee for screening applications and for further selection process by a note dated 20.09.2021 which consists of Chairman and Members and the note in its entirety is reproduced hereinafter:

"INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD
Establishment Section
September 20, 2021
NOTE

The Institute has advertised the posts of Registrar as per Advt. No. Estt/OpenRecruit/Reg- 02/2021 dated July 27, 2021 for IIIT Allahabad. As per our discussion, the following Committee may kindly be approved for screening the applications for further selection process:

1. Professor Rajiv Tripathi, Director, MNNIT, Ald : Chairman

2. Prof. N.K. Shukla, Registrar, AU, Ald. : Member

3. Prof. H. Kar, ECED, MNNIT Ald : Member

4. Prof. A.K. Sachan, CED, MNNIT Ald : Member

Submitted for approval please.

Kindly also approve the sitting charges and other convenience charges as applicable."

6. A Selection Committee for the post of Registrar was constituted by a communication dated 26.10.2021 consisting of a Chairman and six Members. For reference the same is reproduced hereinafter:

"INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD

Office of Establishment Section

October 26, 2021

The Director
IIIT Allahabad

Subject: Constitution of Selection Committee for the post of Registrar

Sir.

Currently, we are in the process of selections for the post of Registrar in the institute. The interview date for the Registrar is scheduled on 12th November 2021. The following members for the Selection Committee is proposed for your kind approval

1. Prof. P. Nagabhushan, Director : Chairperson

2. Prof. K. Sethupathi, IIT Madras : Member

3. Prof. DVLN Somayajulu, Director, IIT Kurnool : Member

4.Shri S. Goverdhan Rao, Registrar, NIT Warangal : Member

5. Prof. R.C. Hansdah, IISc Bangalore : Member

6. Prof. S.A. Ansari, Ex Professor, Monirba : Member

7. Prof. Shekhar Verma, Dean HA, IIIITA : Member

Kindly also approve the sitting charges, local hospitality and to & fro fare by train/flight (other than Air India, in case non-availability)"

7. The Screening Committee screened 52 candidates out of total 66 candidates. Thereafter Presentation Committee for the post of Registrar of Institute was constituted by a communication dated 09.11.2021 consisting of a Chairman and two Members. The said communication in its entirety is reproduced hereinafter:

"INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD

November 9, 2021

The Director
IIIT Allahabad

Subject: Approval of the Presentation Committee for the post of Registrar, IIIT Allahabad

Sir:

As per your direction, the following committee is proposed to conduct the presentation on 10th and 11th November 2021 for the post of Registrar, against the Advt No.Esstt./OpenRecruit/Reg- 02/2021 dated July 27, 2021.

1. Prof. Rajeev Tripathi, Director, MNNIT Allahabad : Chairman

2. Prof. A.K. Sachan, MNNIT, Allahabad : Member

3. Dr. Sarvesh K Tiwari, Registrar, MNNIT, Allahabad : Member

The above committee will also evaluate the case study analyzed by the candidates and take into account while assessing the overall performance in the presentation.

Submitted for your kind approval of the above committee please.

Also, please approve the sitting charges for the expert members, transport

and hospitality for conducting the presentation on both days.

Thanking you,"

8. In furtherance of above communication petitioner and others were called for presentation for the post of Registrar. For reference call letter for said purpose issued to present petitioner is reproduced hereinafter:

"Prof. Vijaishri Tewari
2-Elgin Road, Civil Lines
Prayagraj (Allahabad), Uttar Pradesh-211001
Email: vijayshri@iita.ac.in
Mob: +91-9415214707
Subject: Call Letter for Presentation for the post of Registrar at IIIT Allahabad

Dear Madam:

With reference to your application for the post of Registrar, you are required to appear for presentation before the designated committee as per below mentioned schedule:

Date: 10th November 2021
Time: 9:30 AM
Venue: Board Room, IIIT Allahabad Campus

You may deliver your 10 minutes presentation in 7-8 PPTs on one of the below mentioned topics:

• Institutional Development
• Self-sustaining, resource generation and funding
• NIRF Ranking
• General Govt Rules and Disciplinary proceedings

The PPT may have to be sent in advance, latest by 8th November 2021 to: neeraj@iiita.ac.in

Those who qualify in the presentation will be called for the Interview on 12th November 2021 marting from 9:30 AM onwards. The list of short listed candidates will be floated on the IIIT Website as well as on the Notice Board of the IIIT-A Allahabad. No separate individual Information will be provided. All are requested to watch the website and come prepared to stay for extra days to attend the interview on 12th November 2021 subject to qualifying the presentation.

Please note that TA will be paid to only those candidates who will qualify for the Interview on the submission of bills.

Visitors' Hostel accommodation may be provided by the IIIT Allahabad campus subject to availability. You may contact to Mr Deep Narain Das (Caretaker), regarding availability for lodging etc. ***His contact No.: 0532-292 2369, 2382 and email is: dndas@iiita.ac.in*** *(Food expenses have to be borne by you only).*

Please bring with you all original certificate(s), mark Sheet(s), caste certificate, testimonials and other relevant papers (e.g., experience certificate(s) mentioning the date of joining and date of leaving). Also, in case you have not submitted photocopies of your educational and experience documents, please bring a set of self attested photocopies of relevant documents that you have mentioned in the application form.

In case you are an employee of a Govt/Semi-Govt/Institute and your application has not been forwarded through proper channel, please provide a ***"NO OBJECTION CERTIFICATE"*** *from your present employer, otherwise you will not be permitted to appear for presentation/Interview.*

For any query/correspondence, you may contact to Shri Neeraj Srivastava (0532-292 2550); email: neeraj@iiita.ac.in

Yours Sincerely,
Pavan Kumar Saini
Joint Registrar"

9. Petitioner and other candidates appeared for presentation on 10.11.2021 as well as on 11.11.2021.

10. Above referred Selection Committee was supposedly constituted in terms of Clause 9(5) of Statutes of Indian Institutes of Information Technology and for reference Clause 9 in its entirety is also reproduced hereinafter:

"9. Appointments. (1) All faculty posts at the Institute shall be filled by an open advertisement in accordance with the procedures of the Government of India and all other positions shall be filled as per the recruitment rules of the institute approved by the Board and all services rendered by Group D level shall be made by outsourcing or contract.

](2) The probation of new recruits, other than Assistant Professor, shall be for a period of one year and for new recruit Assistant Professor shall be of two years.

(3) The Institute shall make necessary provisions for the reservation of posts as laid down by the Central Government.

(4) The Selection Committee in case of Professors shall consist of the following members, namely:-

(i) The Director; Chairperson

(ii) One nominee of the Visitor; Member

(iii) Two experts from the panel of experts a priori approved by the Board; Members

(iv) One expert nominated by the Senate from the panel of Senate experts; Member

Note: One Scheduled Castes or Scheduled Tribes member shall be nominated by the Board, if none of other members belong to the Scheduled Castes or Scheduled Tribes category.

(5) The Selection Committee in the case of the post of Associate Professor including on- contract, Librarian, Deputy Librarian, Assistant Librarian, Registrar, Deputy Registrar, Assistant Registrar, Institute Engineer, Sports Officer, Assistant Sports Officer, Chief Medical Officer, Medical Officer, Accounts Officer, Audit Officer, Estate Officer shall be as under:-

(i) The Director-Chairperson;

(ii) Two experts nominated by the Board - Members;

(iii) One expert nominated by the senate - Member,

(iv) The Head of the Department or Centre or School or Unit concerned, if the post for which selection is being made is lower in status than that occupied by the Head of the Department or Centre or School or Unit, or, the Chairperson, Senate Library Committee of the Institute, for the posts of Librarian, Deputy Librarian and Assistant Librarian, or an administrative or sports or medical or engineering or accounts or audit or estate expert of appropriate level to be nominated by the Board for the post of Registrar or Sports Officer or Chief Medical Officer or Institute Engineer or Accounts Officer or Audit Officer or Estate Officer.

(v) Registrar, for the post of Deputy Registrar and Assistant Registrar or Sports Officer for the post of Assistant Sports Officer or Chief Medical Officer for the post of Medical Officer.

Note: One Scheduled Castes or Scheduled Tribes member needs to be nominated by the Board, if none of other members belong to Scheduled Castes or Scheduled Tribes category.

(6) The Selection Committee for all other posts shall be as under:-

(i) The Director or his nominee appropriate to the post - Chairperson;

(ii) One nominee of the Board-Member,

(iii) One expert nominated by the Board from list of Board experts-Member,

(iv) One expert nominated by the senate from list of Senate expert - Member,

(v) Head of the Department or Centre or Discipline or School or Unit concerned in case of posts not covered in any Department or Centre or Discipline or School or Unit, the authority to which the incumbent of the said post reports shall be included as Member.

Note: One Scheduled Castes or Scheduled Tribes member shall be nominated by the Board, if none of other members belong to Scheduled Castes or Scheduled Tribes category.

(7) The list of experts nominated by the Board and the list of experts nominated by the Senate shall be a priori approved by the Board and Senate, respectively

(8) For a Department or Centre or School, there shall be one list each of the Board and the Senate experts

Provided that if the Department or Centre or School is mandated by the Board to have faculty members from different disciplines, then there shall be one list each of Board and Senate experts for each discipline, and candidates from a discipline shall have experts from that discipline.

(9) The Director may constitute a suitable Screening Committee to consider all applications received by the Institute for filling of posts and the Screening Committee shall recommend candidates fulfilling the eligibility criterion, along with the relaxations granted by the Board, for the consideration of the Selection Committee.

Provided that a detailed summary of all applications received by the Institute shall be made by the screening committee and presented by it before the selection committee for its acceptance or rejection or modification,

Provided further that the screening committee shall assign specific reason of each application:

Provided also that the selection committee may consider the candidature of an applicant that was not recommended by the screening committee, after recording the reasons for doing so.

(10) All appointments made by the Institute on regular or contractual or temporary positions shall be reported to the Board at its next meeting."

11. As referred in Clause 9(5) of Statutes the Selection Committee for the post of Registrar consists of a Chairman and four Members and, therefore, constitution of Selection Committee constituted on 26.10.2021, wherein instead of a Chairman and four Members its constitution was a Chairman and six Members, on face of it was not exactly in terms of Clause 9(5) of Statutes.

12. In reference to above paragraphs No. 35, 36 and 37 of counter affidavit filed in Writ-A No. 20794 of 2022 are relevant and the same are reproduced hereinafter:

"35. That, it is necessary to mention here that from the aforesaid constitution of the Selection Committee, it could be verified that out of 7 members, three members were not approved by the Board of Governors/Senate, they are Prof. DVLN, Somayajulu Director of IIIT Kurnool, Shri S. Goverdhan Rao, Registrar, NIT Warangal (Member), Prof. Shekhar Verma, Dean HA,

IIIT A (Member). The clause 9(7) provides that the list of experts nominated by the Board and the list of experts nominated by the Senate shall be a priori approved by the Board and Senate, respectively.

In view of aforesaid, inclusion of alleged other mentioned members, the Selection Committee becomes completely illegal and acts without jurisdiction.

A copy of the list of the experts nominated by the Board and by the Senate is being filed herewith andmarked as Annexure No. 9 to this affidavit.

36. That, in order to give the reasons why aforesaid persons were not eligible to become the members, it may be noted that as per the Statute 9(5), the First member is Director i.e. Chairperson, Second-two expert Members Prof. K. Sethupathi, IIT, Madras, R.C. Hansdah also under SC/ST (nominated by the Board) and third member nominated by the Senate Professor S.A Ansari, Ex-Professor MONIRBA Allahabad for which there is no dispute. In the fourth category Head of the department or center or school or unit, the Member referred for Selection Committee Prof. Shekhar Verma in this category, the name given is neither qualified/eligible nor approved by the Board of Governors. Fifth member was vacant as Registrar herself was candidate.

37 That other than the above, Prof. DVLN, Somayajulu Director IIIT, Kurnool, was neither member nor nominated by the Board of Governors and illegally participated. Sri S. Governdhan Rao Registrar, NIT, Warangal, was neither member nor approved by the Board of Governors in any category and illegally participated. From the aforesaid it is clear that 02 members were outsider and neither approved nor authorized by the Board of Governors. Further so far as member in reference to category 04 is concerned, 4th member Prof. Shekhar Verma was neither eligible nor approved by the Board of Governors."

13. In pursuance of call letter for presentation number of candidates appeared on 10.11.2021 and 11.11.2021 and a tabulation chart was prepared giving marks out of 50 under two different criteria, i.e., (a) case study marks (out of 25), (b) presentation marks (out of 25) and (c) total marks obtained (out of 50).

14. At this stage, it would be relevant to mention that according to petitioner the two criteria stipulated, i.e., "Case Study" and "Presentation" was in terms of advertisement issued for the post of Registrar. As earlier referred, as per Clause 9 of General Instructions to candidates, the selection process for the post of Registrar would consists of Presentation/Seminar and Interview whereas it is the case of Institute that under criteria "Case Study" it was a written examination for maximum marks of 25, which was not included in selection process for the post of Registrar though it was included for selection process to the post of Deputy Registrar. The Court will consider later on the effect of Clause 2 of General Instructions which provides that Institute reserves its right to place a reasonable limit by putting a certain criteria on the total number of candidates to be called for written test/ presentation/ seminar/ interview and as such the Court will also consider effect of written test being included in selection process for the post of Registrar.

15. The Presentation Committee of a Chairman and two Members drawn minutes for selection on the post of Registrar as per candidates appeared before said Committee on 10.11.2011 and 11.11.2021 and on basis of total marks obtained (Case Study and Presentation) it recommends

names of seven candidates as qualified for post of Registrar for Interview. The said minutes of meeting dated 11.11.2021 is reproduced hereinafter:

"INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD
ESTABLISHMENT SECTION

Ref. No. IIITA/Estt./2021/.3.5.3
Date: November 11, 2021

MINUTES OF THE MEETING OF PRESENTATION COMMITTEE FOR THE POST OF REGISTRAR (01-UR POSITION) IN THE PAY MATRIX LEVEL-14 AS PER 7th CPC HELD ON 10.11.2021 & 11.11.2021 IN THE BOARD ROOM OF INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD, AGAINST THE ADVT. NO Estt/OpenRecruit/Reg-02/2021 DATED JULY 27, 2021,

Following Presentation Committee Members were Present:

Prof. Rajeev Tripathi, Director, MNNIT Allahabad : The Chairman

Prof A K Sachan CED, MNNIT Allahabad : Member

Dr Sarvesh Kr. Trwani, Registrar, MNNIT Allahabad : Member

A total of 66 (nos) of applications were received for the said position. After scrutiny of all the applications, 52 Candidates were provisionally shortlisted and called for the presentation held on 10.11.2021 & 11.11.2021 at the Board Room IIIT Allahabad, 14 nos of candidates out of 25 were appeared in the presentation on 10.11.2021 & 10 nos of candidates out of 27 were appeared in the presentation on 11.11.2021 at the Board Room, IIIT Allahabad. A total of 24 candidates have appeared in presentation and solving case studies in both days.

The Presentation Committee tabulated the marks obtained in Presentation including Case Studies. On the basis of marks obtained, the presentation committee recommends the following candidates as qualified to be called for the interview for the post of Registrar in the pay matrix level-14 as per 7th CPC:

1. Prof Vijaishri Tewari
2. Shri Pranab Kumar Sarkar
3. Dr. Shyam Narayan
4. Dr. Brajraj Singh
5. Dr. Ajit Singh
6. Shri Krishan Kumar Tiwari
7. Dr. Atul Kumar Sharan"

16. At this stage it would be relevant to mention that it was the submission of Institute that Presentation Committee has to forward names of all candidates appeared before said Committee as it would be obligation of Selection Committee to call the candidates for interview though it has not been denied that above referred names of seven candidates were on basis of merit.

17. At this stage it would also be relevant to note submission of Institute that by putting name of petitioner at Serial No. 1 a favour was given to her but it has no substance from below referred tabulation of marks dated 10.11.2021 and 11.11.2021 wherein names of top seven candidates are mentioned in serial and petitioner at Serial No. 5 obtained higher marks alongwith some other candidates was the first candidate qualified in said seven candidates. For reference said charts dated 10.11.2021 and 11.11.2021 are reproduced hereinafter:

Date: 10.11.2021
List of Candidates called for presentation on 10th November 2021 at 9:30 AM onwards

for the post of Registrar against the Advt. No. Estt/OpenRecruit/Reg-02/2021 dated July 27, 2021

S. N	Application ID	Name of Candidate	Case Study Marks (Out of 25)	Presentation Marks (Out of 25)	Total Marks Obtained (Out of 50)
1.	733018 381007	Kailash Bansal	15	14	29
2.	733030 481002	Ganesh Prasad M S	15	12	27
3.	733080 481007	Col Dr Mainpal Singh	17	14	31
4.	733003 481002	Mahesh Kumar	17	13	30
5.	733023 481004	Vijaishri Tewari	19	22	41
6.	733028 481009	Prateek Sahai	12	12	24
7.	733089 481007	Pranab Kumar Sarkar	20	18	38
8.	733050 581005	SI Harikumar	16	15	31
9.	733085 581004	Shyam Narayan	21	18	39
10.	733097 581007	Pankaj Saxena	16	14	30
11.	733031 681005	Ashok Kumar Kanojia	14	12	26
12.	733003 681004	Maneesh Sharma	16	16	32
13.	733045 781002	Brajraj Singh	20	21	41
14.	733014 381003	Omkar Singh	17	14	31

Date: 11.11.2021

List of Candidates called for presentation on 11th November 2021 at 9:30 AM onwards

for the post of Registrar against the Advt. No. Estt/OpenRecruit/Reg-02/2021

dated July 27, 2021

S. N	Application ID	Name of Candidate	Case Study Marks (Out of 25)	Presentation Marks (Out of 25)	Total Marks Obtained (Out of 50)
1.	7330009810 04	Jagat Singh Rana	15	14	29
2.	7330519810 01	Nilesh Bipinchandra Chaudhari	12	13	25
3.	7330159810 01	Paramjit Singh Gothra	12	15	27
4.	7330379810 05	Ajit Singh	20	20	40
5.	7330970910 03	Satyendu Mohan Srivastava	17	13	30
6.	7330580910 09	Krishan Kumar Tiwari	20	21	41
7.	7330251910 04	Dara Singh Vohra	14	14	28
8.	7330481910 09	Pawan Kumar Dube	17	13	30
9.	7330502910 03	Desh Deepak Sharma	13	13	26
10.	7330483810 01	Dr. Atul Kumar Sharan	19	22	41

18. It would be relevant to mention Clause 9(9) of Statutes which refers that Screening Committee will consider all applications received by the Institute for filling of posts and the Screening Committee shall recommend candidates fulfilling the eligibility criterion, alongwith the relaxations granted by Board for consideration of Selection Committee.

19. There are rival submissions on the issue that Screening Committee has violated the above referred procedure by submitting names of only seven candidates selected for interview and though out come of consideration of all candidates might be same but procedure prescribed has not been followed in its entirety and that there is no adverse effect on candidates whose names were not forwarded for interview by Screening Committee to Selection Committee. The other details such as, total number of applications received, number of candidates left after scrutinization and out of 52 candidates only 24 appeared in presentation and case study and details of marks obtained by all 24 candidates were also referred to Selection Committee.

20. The Selection Committee considered names of seven candidates recommended by Screening Committee for post of Registrar and unanimously resolved in 7th CPC held on 12.11.2021 to appoint petitioner on the post of Registrar. Sri Krishna Kumar Tiwari was put under waiting list. Details of criteria adopted or marks obtained in interview are not on record, therefore, Court is not aware how petitioner was finally selected since few candidates including petitioner got same marks in presentation. The minutes of meeting of Selection Committee for the post of Registrar dated 12.11.2021 is reproduced in its entirety hereinafter:

"INDIAN INSTITUTE OF I INFORMATION TECHNOLOGY ALLAHABAD ESTABLISHMENT SECTION

Ref. No. IIITA/Estt/2021/
Date: November 12, 2021

MINUTES OF THE MEETING OF SELECTION COMMITTEE FOR THE POST OF REGISTRAR (01-UR POSITION) IN THE PAY MATRIX LEVEL-14 AS PER 7 CPC HELD ON 12.11 2021 IN THE CONFERENCE ROOM, SECOND FLOOR, ADMIN EXT I OF INDIAN INSTITUTE OF INFORMATION TECHNOLOGY ALLAHABAD, AGAINST THE ADVT. NO. Estt/OpenRecruit/Reg-02/2021 DATED JULY 27, 2021

Following Selection Committee Members were Present:

Prof. P. Nagabhushan, Director : The Chairman

Prof. K. Sethupathi, IIT Madras : Member

Prof. DVLN Somayajulu, Director, IIIT Kurnool : Member

Prof. R.C. Hansdah, IISc Bangalore : Member

Prof. S.A. Ansari, Ex Professor, Monirba, Alld.: Member

Prof. Shekhar Verma, Dean HA, IIITA : Member

Shri S. Goverdhan Rao. Registrar, NIT Warangal : Member

A total of 66 (nos.) of applications were received for the said position. After scrutiny of all the applications, 52 candidates were provisionally shortlisted and called for the presentation held on 10.11.2021 & 11.11.2021 at the Board Room, IIIT Allahabad. 14 nos, of candidates out of 25 appeared in the presentation on 10.11.2021 10 nos of candidates out of 27 appeared in the presentation on 11 11.2021 at the Board Room, IIIT Allahabad. A total of 24 candidates have appeared in presentation and solving case studies on both days

Presentation Committee tabulated the marks obtained in Presentation Including Case Studies. On the basis of marks obtained, the presentation committee recommended the following candidates as qualified to be called for the Interview on 12.11.2021 at IIIT Allahabad:

1. Prof Vijaishri Tewari
2. Shri Pranab Kumar Sarkar
3. Dr. Shyam Narayan
4. Dr. Brajraj Singh
5. Dr. Ajit Singh
6. Shri Krishan Kumar Tiwari
7. Dr. Atul Kumar Sharan

The following 07 candidates appeared in the Interview for the post of Registrar held on 12.11.2021 at reference Room, Second Floor, Admin Ext.-I, IIIT Allahabad

1. Prof Vijaishri Tewari
2. Shri Pranab Kumar Sarkar
3. Dr. Shyam Narayan
4. Dr. Brajraj Singh
5. Dr. Ajit Singh
6. Shri Krishan Kumar Tiwari

7. Dr. Atul Kumar Sharan

On the basis of performance in the interview held on 12.11.2021 recommends the following candidate for the post of Registrar in the pay matrix level-14 as per 7th CPC

1. Prof. Vijayshri Tiwari UR Category

Waiting List

1. Shri Krishan Kumar Tiwari

Additional conditions stipulated by the selection committee, if any.

1. The performance may be reviewed by the BoG of IIIT-A to the end of the first year.

2. The Honorable BoG may consider to allow Prof. Vijayshri Tiwari to be associated with her academic dept in adjunct capacity."

21. Learned counsel for rival parties have also referred the additional condition stipulated by Selection Committee so far as petitioner is concerned, as referred above, that it was recommended that Hon'ble Board of Governors may consider to allow petitioner to be associated with her academic department in adjunct capacity.

22. It is the case of Respondent-Institute that aforesaid recommendation was stranger to procedure and petitioner being officiating Registrar has influenced the entire exercise of selection in one or other way whereas it is the case of petitioner that entire process was fair, there was no influence of petitioner and above condition was only a recommendation and it was upto BoG to act upon or not.

23. In continuation of above recommendation the 20th Meeting of Board of Governors took place on 11.01.2022 wherein petitioner being Acting Registrar has also participated. Agenda No. 20.16 was to consider and approve the Selection Committee's report for vacancies in Administrative Cadre for the post of Registrar and Deputy Registrar and sealed cover envelop was opened and BoG after due deliberation approved recommendation of Selection Committee to appoint petitioner on the post of Registrar and on the point that petitioner to be associated with her academic department in adjunct capacity was not discussed and dropped. The said minutes of meeting with regard to Agenda No. 20.16 is reproduced in its entirety hereinafter:

"20.16 To consider and approve the Selection Committee Report for Vacancies in Administrative Cadre for the post of Registrar and Deputy Registrar

Comments of Technical Section, MoE: The Board is the appointing authority for the post of Registrar and Dy. Registrar. The report of the Selection Committee will be placed on table in a sealed envelope. Board may deliberate and take decision as per RPN rules-2016. Silent features of these posts as per RPN-2016, are as under.-

The GP for Registrar and Dy. Registrar will be Rs. 10,000/- and Rs.7600/- (as per 6th CPC). General age limit for Gp.-A with GP. Rs.7600/- and above - 55 years. The post of the Registrar should be filled only through Contract appointment and for a period of 3 years only. However, when a person from outside is recruited, his/her appointment may be for a period of 3 years initially and on satisfactory completion of the term of service as determined by a committee duly constituted by the Board, the services may be extended for another term of 2 years only. The total term shall not exceed five years

Resolution:

Prof. Vijaishri Tewari, Registrar (Acting) was requested to leave the meeting

for this particular Agenda as she was also one of the applicants for the post of Registrar. Dr. Pavan Kumar Saini, Joint Registrar was requested to join the meeting to clarify the doubts of the members regarding this Agenda Item.

The sealed envelope was opened before the members by the Director, IIIT-Allahabad who was the Chairman of the Selection Committee. After due deliberations on various issues, the BoG approved the recommendations of the Selection Committee for the post of Registrar Prof. Vijaishri Tewari and for the post of Deputy Registrar - Sh. Santosh Mahobia, However, the point that Prof. Vijaishri Tewari to be associated with her academic department in adjunct capacity was not discussed in the meeting hence it is being dropped."

24. Sri G.K. Singh, learned Senior Advocate appearing for petitioner has pointed out that before consideration of Selection Committee's report petitioner being a candidate to it was requested to leave the meeting and only thereafter envelop was opened and, therefore, there was no influence of petitioner in the process and other issue of petitioner with regard to her association with academic department in adjunct capacity was not discussed and dropped.

25. Learned Senior Advocate for petitioner also submitted that entire procedure, as referred above, was fairly conducted without any influence of petitioner and no complaint whatsoever was made by any candidate participated in selection process. Flaw, if any, in constitution of Selection Committee where two additional Members were appointed, has no adverse effect and since entire selection process was unanimous, therefore, it may be an irregularity but not an illegality. After aforesaid approval the only process left was to issue an appointment letter to petitioner, however, it appears that since a Model Code of Conduct was enforced, appointment letter was not issued immediately.

26. A controversy commenced with regard to selection of post of Registrar and approval of name of petitioner for said post when a complaint was made on 07.01.2022 by a completely outsider. The complaint was forwarded by the Office of Ministry of Education, Department of Higher Education, Government of India, New Delhi. The contents of complaint is reproduced hereinafter in its entirety:

"Dear Sir,

We are writing this letter to disclose the following dishonest activities of Director, IIIT Allahabad, Dr P Nagabhushan:

1. Dr Vijaishri Tiwari who is daughter of Mr Pramod Tiwari, Ex Member of Parliament (Rajya Sabha) of Congress Party, is recently appointed as Professor in IIIT Allahabad in the month of March 2021. Dr Vijaishri Tiwari is still on probation.

2. On 27 July 2021, IIIT Allahabad advertised the post of Registrar, for which last date of application was 30th September 2021. Dr Vijayshri Tiwari applied for this post also. Although, she was on the probation till March 2022. Without completing the probation, an employee cannot be given NOC for applying another post. Hence, she cannot be provided NOC for applying any post during probation. But, without following the rules and regulation, Director IIIT Allahabad gave her NOC.

3. It is clear rule of that any deputation or leave cannot be given for lower grade-pay position. She is working as

Professor, whose grade pay is 10,500/-, while grade pay of Registrar is Rs 10,000/-.Hence, Director, IIIT Allahabad has violated the rule in providing NOC to Dr Vijaishri Tiwari for the post of Registrar.

4. Department of personnel and Training, though his etter 17th June 2010 has clarified at point no 3.3 that: "A person in a higher Grade Pay/scale of pay shall not be appointed on deputation to a post in lower Grade Pay/scale of pay.."

5. According to the clause no. 11 of the First Statutes of IIIT Allahabad; "The matters which are not covered by above rules shall be dealt with in terms of Central Civil Services Rules."

6. Hence, Director of IIIT Allahabad has violated the IIIT Statutes, Central Civil Services Rules and Probation rules for providing NOC to Dr Vijaishri Tiwari.

7. There were more than 40 applications for the post of Registrar. Many of them are already working as Registrar in reputed organizations like IIT Kanpur, High Court, IITs and esteemed organizations.

8. Director IIIT Allahabad has violated the rules only to select Dr Vijayshri Tiwari as he is in the influence of her father Mr Pramod Tiwari, Ex Member of Parliament of Congress Party.

9. Director IIIT Allahabad, has already dishonestly appointed her as Professor without following the roster and disobeying the ***"Central Educational Institutions (RESERVATION IN TEACHERS' CADRE) Act, 2019"****. It is essential to mention here that MHRD vide its letters Dated 25.1.2000, 17.5.2000, 22.3.2001, 10.11.2003, 6.12.2006 sanctioned 02,01,05,07 and 03 posts of Professors respectively to IIIT Allahabad. Hence, there are total 18 sanctioned posts of Professors, out of which only 9 posts of professors are for general category. After commencement of CEI Act 2019, as per the instruction of ministry, IIIT Allahabad prepared the roster on 21" November 2019 with the signature of Director and Registrar and sent to ministry, according to which out of 9 unreserved posts of professors, 7 posts are filled and 2 posts are vacant.*

10. In March 2021, Director IIIT Allahabad knowingly changed the roster and appointed 7 Professors of General Category, while there was only two vacant positions of Professor in general category. Hence, Director IIIT Allahabad disobeyed the CEI Act-2019 of Parliament only to select Dr Vijayshri Tiwari as Professor. It is not known that why ministry could not notice these violations. Secretary or Additional secretary level officer or his representative attends the meetings of BOG, while approving the appointments done by the CFTI's.

11. Previously, on 4th December 2017, Director Dr Nahabhushan had given the charge of Registrar for one year to a temporary Teacher, Mr Channappa B Akki. Several financial irregularities were done in that period.

Hence, considering the above facts, it is requested that selection process on the post of Registrar should be stopped and Ministry should constitute an independent enquiry against Director, IIIT Allahabad for his unfair acts in selection process of Registrar and other positions.

It is also requested to the Board of Governors of IIIT Allahabad should not give approval on the selection of Registrar in the coming meeting of BOG scheduled Dated 11th January 2022, till the outcome of enquiry."

27. The Institute has taken cognizance of above referred complaint as referred by Ministry of Education, Union of India, and constituted a four Members Committee who submitted its report dated

01.02.2022 whereby all allegations raised in complaint were rejected and for reference the same in its entirety is reproduced hereinafter:

"Hon'ble Director IIITA constituted this committee to examine and prepare the point wise reply to the letter received from Ministry of Education (MoE) regarding the alleged complaints received from one Mr Om Prakash Pandey through email Dated 7th January 2022 with subject: "Regarding illegal and unfair Selection process adopted by Director, IIIT Allahabad in the selection of Registrar, IIIT Allahabad to appoint Dr Vijaishri Tiwari (Daughter of Ex Member of Parliament of Congress Party, Mr Pramod Tiwari) on the post of Registrar"

The committee suggests the following:

1. Response to Q.1: The statements mentioned in point 1, are matter of fact and hence, needs no explanation. It doesn't carry any interpretation towards the allegation made by the complainant

2. Response to Q.2: The selection of Registrar of IIIT Allahabad has been questioned by the complainant primarily on the ground that Dr. Vijayshri Tiwari was given no objection certificate for applying against the aforesaid post illegally by the Director of the institute. It is alleged by the complainant that Dr. Tiwari was appointed as a Professor in IIIT, Allahabad in the month of March. 2021 and she continues to be on probation. According to the complainant a probationer could not have been given no objection certificate for applying against another post by the Director as per the Rules and therefore the no objection certificate granted to her by the Director, IIIT, Allahabad is illegal and consequently her selection as Registrar is also illegal.

The aforesaid allegation made by the complainant is totally misconceived. In as much as under the Rules Dr. Vijayshri Tiwari since was employed in the same establishment, was neither required to submit a no objection certificate nor was she given any no objection certificate by the Director. A no objection certificate is required to be submitted by a candidate only when he/she applies for a post which is in an establishment other than the one in which he/she is working. The object of having a no objection certificate from the employer is only to see that an employee does not leave the establishment in which he /she is working without the consent/knowledge of his employer. In the present case, Dr. Tiwari is currently working as a Professor in the same establishment and therefore she was not required to furnish any no objection certificate with her application

3. Response to Q.3, Q.4, Q.5 and Q.6

It is also alleged by the complainant that Dr. Tiwari could not be sent on deputation or leave cannot be given to her for joining a post which is there in the lower grade. According to him, she being a Professor could not be allowed to join the post of Registrar, which is a post of lower grade. The complainant is not right in saying that in as much as the post of Professor and the post of Registrar of the institute are of the same level. The pay level of Registrar and Professor is equal i.e. Pay level 14 and Pay Level 14A for academic staff respectively. In fact a majority of University employs the Senior Professor as Registrar In-Charge in case of unavailability of a full time Registrar. It is because of the fact that both the position are of similar pay level. Secondly Dr. Tiwari is not going to the post of Registrar on deputation. From the aforesaid it is therefore clear that there is no illegality or

irregularity in the selection of Dr. Vijayshri Tiwari at all.

4. Response to Q.7, Q.8: The facts need correction and the number of applications has no correlation with the said complaints. The logic and rational behind the said allegation is apparently misleading and highly prejudice.

5. Response to Q.9 and Q. 10: The statements in the above said point is misleading and erroneous. The detailed explanations for similar communications were provided to your good office earlier. The reply was also placed before Hon'ble BoG of the institute and after the satisfaction and approval of the members and Chairman of the BoG the same roster was implemented against which the appointments were carried out.

6. Response to Q. 11: The said engagement of Prof. Akki in the post of Registrar In charge is a well know fact, however, the allegation of corruption is a false and misleading statement as it doesn't have any evidence whatsoever to justify the alleged complaint.

Endorsing considering that-

1) The statements made in this report are factually verified and found to be true by the Dean (IITA) with respect to its legal merit vis-a-vis the service rules of IIIT A.

2)The marked portion may be so verified."

28. Thereafter Ministry of Education again send letter dated 10.03.2022, which is not on record, requiring Institute to justify the appointment of petitioner. The Institute took cognizance of said letter also and constituted a four Members Committee who again considered material and submitted report dated 01.04.2022 and again all allegations were denied. Report dated 01.04.2022 is also reproduced hereinafter:

"Committee's Report on MOE's Letter

This is in reference to the letter received from the Ministry of Education (MoE) with the latter F. No. 46-12/2016-TS-1, dated 10th March 2022, with the subject "Selection of Registrar at IIIT Allahabad".

As per the direction communicated by the Office of the MoE, the pointwise reply is as follows:

1. Dr. Vijayshri Tiwari has applied for the post of Registrar as per the Advertisement dated July 27, 2021. Dr. Tiwari was under probation on the post of Professor from 23.03.2021 to 22.03.2022. Dr. Tiwari is working in the same establishment while applying for the post of Registrar and therefore she was not required to furnish any no- objection certificate with her application.

II. The post of Professor and the post of Registrar of the institute are of the same pay level. The pay level of Registrar and Professor is equal i.e. Pay level 14 and Pay Level 14A for academic staff respectively. In fact, a majority of Universities employ the Senior Professor as Registrar In-Charge in case of unavailability of a full-time Registrar. It is because of the fact that both the positions are of similar pay levels.

III. The eligibilities for the post of the Registrar advertised on July 27, 2021, were taken from the RPN-2016 only (copy of the Advertisement and extract of the RPN-2016 enclosed for your reference). Please also refer to the enclosed page 6 of the RPN-2016. Later as per the decision taken in the 4th Council Meeting held on 16th October 2019 vide Agenda Item No. 4.14 (Copy enclosed) uniform contract period of 5 years

for the post of Registrar in CF-IIITs was approved. Accordingly, the tenure UPTO 05 years was advertised.

IV. Institute follows the decision of IIIT Council, however, in the present case it was general advice of the council. IIIT Allahabad has advertised for the post of Registrar earlier too following the decision of the 4th IIT Council Meeting. Due to the NFS (no one found suitable) scenario, it has issued a fresh advertisement on July 27, 2021. Since the direction by the IIIT council was advisory in nature, the matter was discussed in BOG before bringing up the advertisement.

V IIIT Allahabad maintains the roster as per the norms laid by GoI. The detailed explanations for similar communication were provided to your good office earlier too. The reply was also placed before the Hon'ble BoG of the institute and after the satisfaction and approval of the members and Chairman of the BoG the same roster was implemented against which the appointments were carried out. A copy of the reservation roster followed up at IIIT Allahabad is attached.

VI. This is to put it on record that no caveat has been filed for the said advertisement.

VII. The constitution of the selection committee as per the Act and Approved Selection Committee for Registrar post is enclosed. The member in the list of the Selection Committee was approved by the Director. The relevant list of BoG and Senate Nominees approved by the BOG for teaching and non-teaching positions is also enclosed for your reference. The same procedure, was also followed earlier when the position was advertised."

29. In pursuance of above referred reports of committees the Ministry of Education by a communication dated 07.04.2022 addressed to Director of Institute has again raised some queries and sought pointwise reply from Institute. For reference said letter is reproduced hereinafter:

"F. No. 45-12/2016-TS.1
Government of India
Ministry of Education
Department of Higher Education
Technical Section – 1
*****

Shastri Bhawan, New Delhi
Dated: 7th April, 2022

To,
Prof. R S Verma,
Director, MNNIT Allahabad and
Director In-charge, IIIT Allahabad
Email: director@mnnit.ac.in

Subject: Selection of Registrar at IIIT Allahabad-reg.

Sir,

I am directed to refer to this Ministry's letter of even number dated 20.01.2022 & 16.03.2022 and email dated 01.04.2022 of Prof. P. Nagabhushan, Ex-Director, IT Allahabad forwarding therewith reply of the Institute on the complaints of irregularity in selection to the post of Registrar in IIIT Allahabad. The comments of the Institute have been examined in the Ministry and following observations have been found:

(i) A copy of appointment letter/offer of appointment/contract of service in the post of Professor may be provided.

(ii) Whether Prof. Vijayshri Tewari applied for the post of Registrar through proper channel? If yes, a copy of the forwarding letter/endorsement may be provided.

(iii) When was Prof. Tewari promoted to the post of Professor and a copy of the Roster placing her in proper place at

the time of promotion and number of vacancies prevailing at that time in each category,

(iv) Whether constitution of the Selection Committee for the post of Registrar is in accordance with the provisions given in the Statutes of IIIT Allahabad. I yes, approval/Minutes of the BoG may be provided. Also, names of the members against each category of nomination as per provision in the Statutes of IT Allahabad may be provided.

2. It is requested to furnish point-wise reply on the above observation to this Ministry immediately.

Yours faithfully,

Enclosure: As above.

Prashant Agarwal
Director (IITs)"

30. In aforesaid circumstances petitioner approached this Court by way of filing Writ-A No. 16967 of 2022 with a prayer to issue appointment letter in pursuance of process undertaken and approval of appointment of petitioner on the post of Registrar. During hearing impugned minutes of 21st Board of Governors Special Meeting dated 02.11.2022 signed by its Members on 09.11.2022 was placed on record wherein resolution adopted on Agenda Item 21.02 was referred whereby report by Fact Finding Committee, as constituted by Chairman, Board of Governors was considered and Board resolved as follows:

"(I) Accept the recommendations presented through the two reports submitted by the Fact Finding Committee,

(II) Accept that the selection process for Registrar and Deputy Registrar IIIT Allahabad was flawed.

(III)Further the members of the Board of Governors agreed that the Director shall start the process of setting up a new advertisement for the selection of the Registrar and Deputy Registrar of IIIT Allahabad following norms laid down by the IIITA Statutes and the IIIT Council.

(IV) The institute should proactively try to resolve the issues and resentments among the stakeholder's about the functioning of the Acting Registrar."

31. The two Members Committee's reports dated 01.10.2022 on appointment of Registrar, IIIT Allahabad and 17.10.2022 allegations against the Professor-in-Charge, Registrar, IIIT Allahabad are reproduced hereinafter:

"Report on the Appointment of the Registrar. IIIT Allahabad

Date 01.10.2022

The following fact-finding committee was constituted by the Chairperson, Board of Governors. IIIT Allahabad to look into the matter against appointment of Registrar IIIT Allahabad received through Ministry against the Professor-in-Charge. Registrar IIIT Allahabad.

1) Prof Vinod K Singh (Chairman)
Professor of Chemistry. IIT Kanpur
Former Director, IISER Bhopal

2) Prof Manindra Agrawal (Member)
Professor of Computer Science & Engineering
Former Dy Director, IIT Kanpur

Dr P.K. Saini, Joint Registrar. Estt, IIIT Allahabad was asked to provide the relevant documents held by the Institute related to the recruitment process.

The Committee had a meeting at the campus of MNNIT on 21 September 2022 to examine the papers given by the institute and meet the concerned people as part of the enquiry.

The committee was also asked to conduct separate fact-finding enquiries related to the administrative complaints received against the acting Registrar of the Institute This report shall be submitted independently.

Documents examined

• The relevant extract of the provisions of Statutes for appointment of Registrar is enclosed (Annexure-1)

• The minutes of the IIIT Council. F. No. 77-3/2019-TS I dated 30 October 2019 specify that the Professors may not be appointed as Registrars (Annexure-II).

• The advertisement dated 27 July 2021 (Annexure-III)

• The constitution of the selection committee by the Director (Annexure-IV)

• Call letter sent to candidates (one model letter enclosed as Annexure-V)

• The selection committee report dated 12" November 2021 (Annexure-VI)

• The minutes of the BoG meeting held on 11 January 2022 (Annexure-VII)

• MoE Letters: dated 16.03.2022 (Annexure-VIII): 22.09.2022 (Annexure-IX)

• Application for the post of registrar (Annexure-X)

• Other Miscellaneous complaints sent by MoE and provided by the Institute

Findings of the enquiry

1) The post of a registrar is a statutory position for a period of five years to be filled in accordance with the provisions of the Statutes of the Institute. Therefore, the Statutory provisions laid down for this purpose are very sacrosanct and cannot be tweaked by individual officials or Board unless amended by the approved process.

2) As per the Statule No: 5. (ii) and (iv), the selection committee for the Registrar should consist of the Director (chairperson), two experts nominated by the Board, one expert nominated by the senate, one administrative expert nominated by the Board and one SC/ST member nominated by the Board if none of the other members belongs in this category.

A perusal of documents revealed that there were six members on the selection committee of which two members. Prof DVLN Somayajulu and Shri S. Goverdhan Rao were without any approval of the Board. This deviation was made by the then Director in constituting a committee suo moto without obtaining the approval of two expert nominees from the Board of Governors in derogation of the Statutes rendering the entire selection process null and void which is done without powers and usurping the powers of the Board.

3) The Council of IITs categorically resolved that the candidates for Registrar with experience as Professor shall not be preferred. However the advertisement did not carry any condition to that extent totally ignoring the guidelines of the Council of IIITs. which is the competent Authority.

4) Out of 68 received applications, 52 were found to be eligible These eligible candidates were called for presentation before the selection committee on 10 and 11 November 2021 A total of 24 candidates appeared for the presentation.

It was noticed that a written test in the form of a case study was done just before the interview although there was no mention of this in the call letter dated 25 October 2021 sent to the candidates. The inclusion of the additional process without making explicit provisions for the witten test in the call lottor reaufta premeditated unfair practice. Further there are hardly any instances of conducting a written test for the selection of candidates at level 14 which would cast doubls in the minds of the candidates and could result in seeking judicial interventions, by the unsuccessful aspirants once the results are announced.

5) Based on the marks in the written test and presentation, 7 candidates were interviewed on 12 November 2021 Prof Vijaishri Tewan, the Acting Registrar of IIIT Allahabad was recommended for the post. The committee also recommended her as an adjunct faculty in her academic department.

6) Prof Vijayshri Tewari was appointed Professor on 23 March 2021 After a year of probation, she was confirmed on 23rd March 2022. She applied for the position of registrar on 29th September 2021 The documents indicated that the application was not made through a proper channel.

It is a violation of the rule for a Government employee not to apply for a post through the proper channel. It is surprising to note that the institute accepted her application The offer letter of Professor does not indicate barring her for applying any position under probation. On that count, we cannot hold her guilty for applying under probation. However she should have provided vigilance certificate it is also the administrative lapse on behalf of the then Director to interview a person and recommend to Board for the appointment without having vigilance clearance.

Summary

The findings of inquiry render the entire Selection process null and void. The committee recommends that the selection committee report should be quashed and a new advertisement should be released for the selection of the Registrar of IT Allahabad following norms laid down by the Statutes and the Council."

"Report on the Allegations against the Professor-in-Charge, Registrar, IIT Allahabad

The following fact-finding committee was constituted by the Chairperson, BoG. IIIT Allahabad, to look into various charges against the Professor-in-Charge, Registrar, IIIT Allahabad.

Prof Vinod K Singh (Chairman)

Professor of Chemistry, IIT Kanpur

Former Director, IISER Bhopal

Prof Manindra Agrawal (Member)

Professor of Computer Science & Engineering

Former Dy Director, IIT Kanpur

Dr PK. Saini, Joint Registrar, Estt, IIIT Allahabad, was asked to provide the relevant documents held by the Institüte related to the administrative complaint

Terms of the reference of the fact-finding committee

To look into the various charges/complaints received through the Ministry against the Professor-in-Charge. Registrar, IIIT Allahabad (Annexure 1)

Introduction

The Indian Institute of Information Technology Allahabad (IIIT-A) was established in 1999 as a centre of excellence in Information Technology (IT) and allied areas. The institute was conferred the "Deemed University status by the Government of India in the year 2000. It was declared an "Institute of National Importance" by the Act of the Parliament, Govt. of India, in 2014.

The campus (100 acres) is a fully residential one. The institute has four academic departments: Information Technology, Electronics and Communication Engineering, Applied Sciences, and Management Sciences. There are 2036 students (UG & PG), 78 faculty members, and 75 non-teaching staff, including 14 officers.

The committee members received a letter (Annexure 1) from the Director, MNNIT, who is having charge of the Director, IIIT Allahabad, on 14th September

to look into the matter regarding allegations against the acting Registrar of the Institute.

The Visit of the Fact-Finding Committee

The Committee met on the campus of MNNIT on 21 September 2022 from 12:30 PM-7 PM. It interacted with some of the institute functionaries, faculty, non-teaching and contractual staff. In addition, the members of the Committee also met PIC, Registrar The modalities of the interactions were:

• The Committee made a conscious effort to restrict itself to get the people's opinion for their respective impression on the professional attributes of the PIC, Registrar People were chosen to interact randomly.

• Committee also decided not to divulge individual names of those who opined on the performance of the PIC, Registrar. This modality was adopted to bring in confidence and trust while the people expressed their opinions freely and openly to the Committee.

Report of the Committee

The committee individually interacted with some of the institute functionaries, a few faculty members and non-teaching & contractual staff. Nearly all of them had some allegations against the PIC. Registrar It appeared to us that most people were unhappy with the functioning of the PIC. Registrar. We summarize here some of the common allegations:

• The PIC. Registrar does not spend enough time on campus. Some mentioned that she spends only 7-8 hours a week in the institute.

• She is not well versed with rules and regulations.

• Due to above reasons, she relies on a small coterie for decision-making.

• There has been corruption in the Institute's security, where money is collected from each of the security guards by the supervisor of the current service provider. Despite written complaints to the Registrar, nothing happened

The Registrar denied most of the allegations. She mentioned that she had to take leave due to her health issue.

Conclusions

While it is difficult to substantiate some allegations against PIC, Registrar, it is clear that she does not spend sufficient time towards discharging her responsibilities. As a result, she is unable to resolve issues proactively, causing resentment and disappointment in many in the institute.

During the course of its investigations, the Committee observed some additional issues that need to be addressed. In the interest of the institute, the Committee wishes to give some suggestions regarding these:

1. The faculty strength in the institute is 78. Out of this, more than 40 faculty are involved in administration. We feel that the top should not be so heavy. There is no need for associate Deans, and there are too many Deans in such a small institute.

2. There is a house marked for the Registrar on the campus, but no one lives there. This is a waste of taxpayers' money. Since it is a residential campus, all the people should live on the campus. This is particularly true for the institute functionaries."

32. In aforesaid circumstances, petitioner withdrew Writ-A No. 16967 of 2022 and it was dismissed with liberty to challenge impugned resolution dated 09.11.2022 and in pursuance of above liberty petitioner filed Writ-A No. 20794 of 2022 with following prayers:

"i. a writ, order or direction in the nature of certiorari quashing the impugned resolution dated 9.11.2022 (Annexure no.20 to this writ petition) passed by Board of Governors.

ii. a writ, order or direction in the nature of mandamus commanding the respondents to conclude the selection process in terms of the resolution passed by the Board of Governors dated 11.1.2022 and forthwith issue a formal appointment letter in favour of the petitioner for the post of Registrar in the respondent - institute.

iii. any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case to meet the ends of justice.

iv. award cost of the petition to the petitioner."

33. During pendency of above referred writ petition a fresh advertisement was published by Institute for selection to the post of Registrar on 05.10.2023 which was assailed by petitioner in connected Writ-A No. 17984 of 2023. During argument it was pointed out by learned Senior Advocate appearing for Institute that in pursuance of fresh advertisement Selection Committee has recommended name for appointment to the post of Registrar, however, due to present Model Code of Conduct, further proceedings for appointment of new Registrar is not concluded. On a specific query of this Court, learned Senior Advocate appearing for petitioner has stated that petitioner has not participated in subsequent process as she was before this Court.

34. Petitioner is represented by Sri G.K. Singh, learned Senior Advocate assisted by Sri Hritudhwaj Pratap Sahi, Advocate and Respondent-Institute is represented by Sri Shailendra, learned Senior Advocate assisted by Sri Rohan Gupta, Advocate.

35. Both learned Senior Advocates have argued vehemently and referred various documents and interpreted the same differently according to their case and have also placed various judgments.

36. In brief, arguments raised by learned Senior Advocate for petitioner and as also referred in written submission, are mentioned hereinafter:

(i) The impugned action on the part of Institute suffers from lack of jurisdiction inasmuch as Institute has reviewed its earlier resolution of 11.01.2022, which was confirmed by way of circulation dated 28/29.01.2022, by impugned resolution which is impermissible in eyes of law as no power of review under any statute or provision of law is vested with Institute. The said proposition of law is supported by paragraph 11 of judgement of Apex Court in ***Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya Sitapur and others, AIR 1987 SC 2186****.*

(ii) Reliance on ex parte reports dated 01.10.2022 and 17.10.2022 by Institute is also impermissible as said action is in violation of principles of natural justice for the reason that petitioner was neither served with reports nor was she was heard by Committee formulating reports. Even otherwise before passing of impugned resolution petitioner was never heard and on contrary stigma was cast upon her without hearing her version.

(iii) In so far as findings in the ex parte reports dated 01.10.2022 and 17.10.2022 are concerned, the same have been categorically rebutted in paragraphs 42 to 56 of Writ-A No. 20794 of 2022. For reference relevant paragraphs No. 42, 43,

45, 46, 48, 49, 50, 51, 53, 54 and 56 are reproduced hereinafter:

"42. That in so far as the first ground is concerned it is submitted that vide order dated 26.10.2021, the then Director constituted the selection committee for the post of Registrar in terms of Statute - 5 of the Statutes of IIIT. Bare perusal of the constitution of the selection committee annexed as Annexure no.3 to this writ petition would indicate that the persons named at Serial Nos. 3 & 4 of the said selection committee were over and above statutory mandate required under Statute-5, which provides for constitution of a selection committee. Apart from the abovementioned two members, the rest of the members of the selection committee are strictly in accordance with Statute-5 of the Ist Statutes.

43. That inclusion of the abovementioned two persons would have no bearing on the issue at hand in as much as all the 7 members had unanimously decided in favour of the petitioner therefore even if the recommendation of the abovementioned two persons is not taken into consideration then too the petitioner would be selected by the rest of the members of the selection committee, as their decision also were same as the decision of the abovementioned two persons."

"45. That it is further submitted that Section 44 of the 2014 Act specifically provides that no Act of the Council or any institute, Board or Senate or any other body set up under this Act or the Statutes, shall be invalid merely by reason of any vacancy in or defect in the constitution thereof or any irregularity in its procedure not effecting the merit of the case and any defect in the selection, nomination or appointment of a person acting as a member thereof, meaning thereby that the selection committee constituted on 26.10.2021 would not be put to question since it does not affect the merits of the case as the members who were there in the selection committee as per the Statute had unanimously decided in favour of the petitioner therefore even if the two persons namely Professor DVLN Somayajulu and Sri S. Goverdhan Rao were removed or their recommendations were not considered then too the outcome would have been the same i.e. the petitioner would be selected.

46. That in so far as the second ground is concerned it is submitted that the respondents have wrongly interpreted the resolution of the council of the IIITs in as much as the council had resolved at Item no. 4.14 that normally a Professor may not be appointed as a Registrar, as the same resulted in loss of academics, which clearly goes on to show that the council had nowhere put an embargo or restricted the appointment of Professor as Registrar. The council had merely advised that normally they should not be considered."

"48. That it is further apposite to mention over here that there is no embargo in the RPN norms which have been annexed along with the advertisement, restricting the appointment of Professors as Registrars, therefore once there is no such embargo in the RPN norms then in that case the petitioner was very much eligible and qualified to be appointed as a Registrar. Even otherwise no such amendment has been brought about in the Ist Statutes of IIIT, Allahabad regarding the restriction of appointment of a Professor as Registrar, therefore in the absence of same the reasoning given by the fact finding committee is totally misplaced.

49. That in so far as third ground is concerned it is submitted that the general instructions which have been issued to the candidates in the advertisement specifically provide in Clause-9 that the selection process for the post of Registrar will consist

of presentation / seminar and interview. In view of the above condition the presentation was conducted wherein a case study was given to the candidates to analyze and present the same before the presentation committee, therefore it is amply clear that there was no separate written examination conducted as has been alleged in the exparte reports submitted by the fact finding committee.

50. That it is also apposite to mention over here that the general instructions issued to the candidates in the advertisement specifically provides in Clause 2(a) that the institute reserves its right to place reasonable limits by putting a certain criteria on the total number of candidates to be called for written test / presentation / seminar / interview, meaning thereby that the modalities adopted by the respondent institute for conducting the selection proceedings is just, fair and in accordance with the advertisement.

51. That even otherwise none of the candidates who had applied nor any of the prospective applicants have objected to the fairness of the selection proceedings. It is also apposite to mention over here that nobody has comeforward objecting to any of the stages of the selection process therefore in the absence of the same it is amply clear that the selection proceedings had been conducted in a fair manner which did not cause any prejudice to any person concerned. It is further submitted that the minutes of the 20th Board of Governors dated 11.1.2022 have never been put to challenge by any body before any competent court or authority under law, therefore the same has attained finality."

"53. That in so far as the last ground is concerned it is submitted that a completely vague reasoning has been given that the appointment of the petitioner was not made through a proper channel, in as much as the respondents have failed to indicate as to why the application of the petitioner had not been made through a proper channel. The petitioner had strictly applied in terms of the advertisement through online mode, therefore it cannot be said that the petitioner had not applied via the appropriate channel.

54. That another surprising fact which demolishes the case of the respondents is that Professor Manindra Agarwal who was a member of the fact finding committee constituted on 1st September, 2022 was also one of the members of Board of Governors which had passed the resolution dated 11.1.2022, approving the selection of the petitioner on the post of Registrar, therefore it is amply clear that Professor Agarwal has conveniently altered his stand. It is also apposite to mention over here that if Professor Agarwal was not in agreement with the selection proceedings, then he ought to have objected to the same when the 20th meeting of the Board of Governors was held."

"56. That it is the prerogative of the employer to cancel 1 the selection proceedings and a selected candidate does not have any right to question the same, however at the same time it is also well settled that while doing so that employer cannot be allowed to act arbitrarily, which has been done in the facts and circumstances of the present case for the reason that the Board of Governors had passed a resolution, approving the selection of the petitioner in the month of January, 2022 itself and no action was taken by the respondent institute till the time the petitioner had approached this Hon'ble Court by filing Writ-A No. 16967 of 2022, which clearly goes on to show that the impugned actions by the respondents are a malafide exercise of power."

(iv) Learned Senior Advocate further relied upon judgement of Apex Court in **Kerala State Electricity Board Vs. Hindustan Construction Company Limited and others, 2006 (12) SCC 500**, wherein it has been specifically held that minutes of a meeting are recorded to safeguard against future dispute as to what had taken place thereat and they are record of the fact that a meeting was held and decision taken therein. It was further held that said minutes as placed before next meeting for what is generally known as 'confirmation' though they are placed for verification and not for confirmation. The reasoning given by Apex Court for above conclusion was that there was no question of any conformation of a decision already taken for once a decision taken does not require any confirmation and it is only placed in the next meeting to see whether the decision taken at earlier meeting was properly recorded or not. The said proposition of law is being relied upon by petitioner as respondents are alleging that resolution passed by Board of Governors on 11.01.2022 was never confirmed in subsequent meetings, therefore it cannot be said that appointment of petitioner had been conclusively approved by Board of Governors.

(v) In so far as contention of Institute that Selection Committee was irregularly constituted as two extra Members had participated is also liable to be rejected for the reasons that as per Section 44 of The Indian Institutes of Information Technology Act, 2014 no act of Council or any Institute, Board or Senate or any other body set up under the Act or Statutes would be invalid merely due to any vacancy or defect in its constitution, any irregularity in its procedure not affecting the merit of the case or any defect in selection, nomination or appointment of a person acting as a member thereof. The Selection Committee in instant case is a body set up under the Act and Statutes therefore any irregularity in its constitution would be of no consequence that too in the wake of fact that due to such irregularity there is no change in merits of case, as it was unanimous decision of Committee to appoint petitioner. Pari materia provision of the State Universities Act was up for consideration in **Dr. Mohd. Suhail Vs. Chancellor, University of Allahabad and others, 1994(2) UPLBEC 787**, wherein Court in paragraph 10 (referred below) has upheld the aforesaid proposition of law:

"10. A perusal of the aforesaid provisions of Section 66 of the Act read with Section 99 & 99-A of the Code would indicate that these provisions have an overriding effect after a selection has been made by the Selection Committee or a decree has been made by the trial court. This Section 66 of the Act is akin to a proviso to the procedure for selection. This Indicates that no proceeding of any Committee of the University including the Selection Committee shall be invalid merely by reason of any Irregularity In the constitution of the Selection Committee or any vacancy and even if there was any irregularity In the constitution of the Selection Committee because some body participated in the selection of the candidates who could not have participated. But this irregularity need not affect the merits of the case. This provision has been engrafted with a view to do complete justice with the result of the Selection Committee."

(vi) Learned Senior Advocate for petitioner further placed reliance upon judgement of this Court in **Prabhu Narain Singh Vs. Deputy Director of Education, Varanasi, 1977 (3) ALR 391**, wherein Court has held that if a person has been

selected by a Selection Committee which has been subsequently approved by appropriate authority then Appointing Authority is bound to appoint said selected candidate and issue a letter of appointment in his / her favour. In the facts of present case petitioner was selected by Selection Committee and her selection was approved by Board of Governors in its meeting dated 11.01.2022, therefore, Institute was bound to issue an appointment letter in favour of petitioner.

(vii) The Institute has further failed to take into consideration earlier inquiry reports submitted by Institute itself on 01.02.2022, 01.02.2022 and 01.04.2022, approving selection process pursuant to which petitioner has been appointed, therefore impugned resolution as well as advertisement are illegal in the eyes of law.

(viii) None of the candidates nor any prospective candidate has filed any complaint regarding selection process nor have they challenged selection of petitioner, therefore solely on basis of a complaint of a complete rank outsider, respondent - Institute could not have proceeded to pass order impugned and issue consequential advertisement.

(ix) Clause 2(a) of advertisement provides that Institute has right to place reasonable limits by putting a certain criteria on total number of candidates to be called for written test / presentation / seminar / interview.

(x) In so far as contention of Institute that petitioner was present in meeting of Board of Governors in capacity of a Secretary at the time when Board of Governors was considering candidature of petitioner is concerned, it is submitted that petitioner was not present in meeting as she was asked to leave said meeting which is evident from minutes of meeting dated 11.01.2022 itself.

(xi) Even otherwise it is no more res integra that nobody is to be allowed to take advantage of their own wrong inasmuch as it was the respondent - Institute which constituted Selection Committee, therefore, they were estopped from raising objections against its constitution.

37. Per contra, learned Senior Advocate appearing for Institute has vehemently opposed above submissions and arguments raised before this Court as well as in written submission, are mentioned hereinafter:

(i) Present process of selection become void due to illegal constitution of Sub-committee namely 'Presentation Committee' which has also evaluated Case Study (Written Examination) and further due to formation of illegal Selection Committee being contrary to relevant statute.

(ii) In reference to Selection Committee as constituted on 26.10.2021 learned Senior Advocate has submitted that in said Selection Committee out of 07 members 03 members were invalid being not approved by Board of Governors or Senate and so far as experts nominated by Board and list of experts nominated by Senate is concerned that shall be prior approved by Board of Governor and Senate respectively. To that extent Selection Committee itself was illegal. Some of the Members participating in Selection Committee were having no jurisdiction.

(iii) Learned Senior Advocate submitted that petitioner in paragraph no. 17 of rejoinder affidavit has admitted that Prof. Shekhar Verma was not an expert but relied upon principle that since he is Member of Board of Governors being nominated by Senate, therefore his inclusion in Committee is correct, but the fact is that there is a

difference between "Member of Board of Governors" and "Experts nominated by Board". It is settled that these persons were neither in list of experts nominated and approved nor in list of experts declared by and approved by Senate and BoG.

(iv) Constitution of Presentation Committee who has evaluated Case Study (written examination) was illegal as there is no provision in Statute and there is no reference in advertisement too, so constitution of said committee was absolutely illegal. Same was the issue in regard to written examination of Case Study, same was also not part of either Statute or advertisement, separate to jurisdiction of Selection Committee.

(v) Learned Senior Advocate also pointed out that Chairman of Selection Committee, i.e., the then Director, Prof P Nagabhushan influenced Selection Committee in favour of petitioner. The fact could be verified from opening remarks of Director, Chairman of Selection Committee in selection itself that he wants a local candidate and also referred that he did not desire candidates who are touching 59 years, however, there is no such instruction/requirement in Statute or in advertisement. It appears that it was just to accommodate petitioner at serial no. 1 and out someone who touching 59 years, may be better candidate and further he desires a local candidate, as a matter of fact which comes in favour of the petitioner because only petitioner was a local candidate, although there is no relevance but definitely requires to be seen that working of petitioner was also apprised by Chairman in Selection Committee for reasons best known to him.

(vi) Learned Senior Advocate referred para 15 of supplementary affidavit. Apart from the fact that there are series of averments and contents where it could be verified that throughout the selection proceeding petitioner was part of selection proceedings during matter is pending before Board of Governors and she also took decision as to which issue is to be dropped or at which stage proceedings is to be concluded. When she was present in meeting through Video Conferencing, she was asked to mute the video but she continued even after she muted and was in access to decision of Committee as there were two login accesses in her favour, as she was enjoying the meeting by two logins one as Registrar (Acting) and other as Secretary BoG. Further, averments filed in counter affidavit are series of transactions which petitioner was operating till the matter was to be concluded in Board of Governors. Further, when there was specific mention that she could not participate in meeting by Additional Secretary, MoE, Sri Rakesh Ranjan vide letter dated 27.01.2022 even then she continued to handle the matter.

(vii) Learned Senior Advocate seriously objected conduct of petitioner in filing writ petition (earlier one) when she was already working as Registrar (Acting) and custodian of entire records, she filed the documents in earlier writ petition which are not in access of other authorities of IIIT, Allahabad. Proceeding of Selection Committee was never to the public, particularly the candidates in Selection Committee. Petitioner filed writ petition with confidence that Selection Committee finalizing the issue which were never published or any notification was made and challenge the same by way of earlier writ petition without disclosing the fact that result was never communicated to any candidate. It is the case of misuse of her position as Registrar (Acting).

(viii) Learned Senior Advocate also referred that the petitioner has claimed herself the BoG finalized the issue on 11.01.2022 but she was also indulge in

getting objection, accepting suggestions and then without placing the same before Board of Governors, with amendments, claimed that resolution has already passed on 11.01.2022 although suggestions were from 14.01.2022 onwards. The issue in reference to "amendment suggested" could be approved by circulation, as it was case of fresh consideration on account of amendment suggested. To that extent there is no occasion of claiming approval dated 11.01.2022 that too when petitioner herself was a candidate and was also functioning as Registrar (Acting).

(ix) The Screening Committee screened in 52 candidates out of 66 applications received. Out of which only 24 candidates appeared for presentation and written test (Case Study). There was an apparent illegality that out of 24 candidates only 7 candidates were allowed to appear before Selection Committee for interview that too by a process which was not provided in Statutes. Once it is assumed that if there were no Presentation Committee then there was a probability that at least 24 candidates would have been present before statutory Selection Committee for presentation and interview.

(x) In all fairness, petitioner was not required to involve in procedure either from outside or inside. Apart from the fact that there was another misrepresentation where Presentation Committee took presentation and evaluated written exam (Case Study) and prepared list of 07 candidates and names were sent before Selection Committee without providing their marks. Although their marks were mentioned in results issued by Presentation Committee, the way list was produced by Selection Committee is apparent from record there was 04 persons having equal marks but petitioner was shown at serial no 1 "mentioning in order of merits". This was clearly misrepresentation showing petitioner the best candidate by way of misrepresentation. There were all possibility that has played in favour of petitioner for given her selection on the post.

(xi) In the present case 02 inquiry committees were constituted. One by Chairman of Board of Governors i.e. two Members Committee consisting of Prof. Manindra Agarwal, IIT, Kanpur (Padamshree) and Prof. Vinod Kumar Singh, IIT. Kanpur (Padamshree) and another Enquiry Committee of Prof. Anil Sahasrabudhe was constituted by Ministry of Education, Govt. of India. In both inquiries persons involved having great reputation and having nothing to do with any particular party, both these committees have found illegality in procedure adopted by Selection Committee.

(xii) Apart from the fact that this fact could be verified that neither report of Committee dated 01.10.2022 nor second report dated 14.01.2023 at any stage challenged by petitioner, therefore, any consequential order passed relying upon same cannot be challenged at this stage.

DISCUSSION

38. The Institute in question was established under the Indian Institutes of Information Technology Act, 2014 (hereinafter referred to as "Act, 2014") [See Schedule of Section 4(1)]. Section 32 of Act, 2014 is for 'Appointments', which is reproduced hereinafter:

"32. All appointments of the staff of every Institute, except that of the Director, shall be made in accordance with the procedure laid down in the Statutes, by–

(a) the Board, if the appointment is made on the academic staff in the post of Assistant Professor or if the appointment is made on the non-academic staff in every

cadre the maximum of the pay scale for which exceeds prevalent grade pay scale for Group A Officers;

(b) the Director, in any other case."

39. It has already referred that a detailed procedure of 'Appointments' is provided under Clause 9 of Statutes of Indian Institute of Information Technology. It has also been observed earlier that for appointment of 'Registrar' the Selection Committee (See Clause 9(5) of Statutes) should consists of Director (Chairperson) and four Members (two experts nominated by Board, one expert nominated by Senate and one more Member nominated in terms of Clause 9(5)(iv) of Statutes). Therefore, in the case in hand, the Selection Committee constituted of a Chairperson and six Members, as such, two persons were additionally included.

40. Learned Senior Advocate for petitioner has referred Section 44 of Act, 2014 that no act of Board or body set up under the Act and Statutes shall be invalid merely by reason of any vacancy in or defect in constitution thereof or any irregularity in its procedure not affecting the merits of the case, whereas per contra, learned Senior Advocate appearing for Institute submitted that it was not mere irregularity but illegality which goes to the root of procedure and vitiates entire procedure for appointment of Registrar and he referred Section 32 of Act, 2014 that all appointments shall be made in accordance with procedure laid down in the Statutes. There is not much argument that there was mala fide behind extension of number of Members of Selection Committee but there is no reason why deviation was made.

41. Learned Senior Advocate for Institute has submitted that petitioner despite a candidate for Registrar has not only tried to make influence but also tried to expedite process of approval of resolution of BoG in issuance of appointment letter. Learned Senior Advocate has referred an e-mail dated 14.01.2022 send by petitioner under capacity of Secretary, BoG, IIIT-A, whereby minutes of 20th Meeting of Board of Governors be confirmed through circulation as well as she was in possession of documents, which were not available in public domain, but she brought them in public domain.

42. As referred earlier, the advertisement does not provide any process of written test but Screening / Presentation Committee has adopted a different procedure of written test without any prior or post approval. According to learned Senior Advocate for petitioner General Instructions were provided in advertisement which includes written test also, however, said argument is contrary to Item No. 9 of advertisement where it is provided in specific term that for Registrar (Sl. No. 1) process will consist of Presentation/ Seminar and Interview and for Deputy Registrar, selection process will consist of Written Test/ Presentation / Seminar and Interview, therefore, there was clear distinction. No substantial argument was raised on behalf of petitioner to support the process so far as inclusion of written examination is concerned.

43. The argument that report on appointment of Registrar, IIIT Allahabad dated 01.10.2022 does not take note of earlier report, has no legal basis since the Inquiry Committee has specifically considered specific query raised by Ministry of Education (Department of Higher Education) dated 07.04.2022. Section 46 of Act, 2014 further provides that "the Institute

shall carry out such directions as may be issued to it from time to time by the Central Government for efficient administration of this Act", therefore, there is no illegality in conducting fresh inquiry on basis of communication and direction or query raised by Ministry of Education.

44. The findings of inquiry report of two Members Committee dated 01.10.2022 would be summarized in following manner:-

(a) Deviation made by the then Director consisting six Members in Selection Committee i.e. 2 members were additionally included suo moto, without any approval from BoG, being contrary to statute, rendered entire selection process null and void.

(b) A written test in the form of a Case Study was done just before the interview though it was not part of call letter. Inclusion of additional process resulted in a premeditated unfair practice.

(c) Application of petitioner was not made through a proper channel. Committee has also wrongly recommended her as an adjunct faculty in her academic department.

45. So far as above referred clause (c) is concerned, Court is of view that it does not have legal basis since recommendation of adjunct faculty was dropped by BoG as well as after process is concluded appointment of petitioner could not be found fit irregular only on ground that it was not through proper channel.

46. The Court finds that Clauses (a) and (b) are violation of due process of selection and as discussed above, learned Senior Advocate for petitioner has failed to satisfy the Court on basis of any material that process prescribed in selection was not violated. No justification was brought on record to satisfy any reason for such deviation.

47. The Court does not find much substance that petitioner has tried to influence the process, though she may be more zealous to complete the process expeditiously and a reason for that may be that her name was approved for appointment, which ought to have been avoided. A selection process not only should remain fair but a single instance of influence should be avoided. There is substance in the argument of learned Senior Advocate for Institute that many documents which were not in public domain but they were brought in public domain by petitioner.

48. The Court is of the considered opinion that though petitioner's name was approved by BoG for appointment on post of Registrar but it would complete only when appointment letter was issued and in present case admittedly no appointment letter was issued, therefore, she was not required to be heard.

49. The Court has also taken note that during pendency of this writ petition, fresh recruitment process has substantially progressed and petitioner on her own will has opted not to participate in the fresh recruitment though there was no interim order in present case as well as in other writ where fresh process was challenged.

CONCLUSION

50. Fairness in any selection process is an utmost necessity and when it is of a single post of Registrar of a prestigious Institute, it became more imperative to keep entire process unblamable, unbiased, unblemished and strictly in accordance with prescribed procedure and on scrutiny if it

was found that contrary to above the process became blameable or biased or blemished or prescribed process was not strictly followed, the entire process could be declared void, irrespective of it's stage.

51. In present case as referred above, a two Members Committee reviewed entire process and found that not only there was deviation in constitution of Selection Committee by including two extra Members without any prior permission or any express reason but written examination was also introduced though it was neither provided in advertisement nor in the call letter rather it was only provided for selection of Deputy Registrar. Such deviation from process also remained without prior permission or any express reason. Details of interview being deciding factor as four candidate including petitioner got equal marks in written test and presentation, was not on record which shows that process was opaque and not transparent. There is no challenge to findings of Committees.

52. Above all, the Petitioner a candidate for post of Registrar was running the show being Acting Registrar and being aware of all internal process, she remained in a position to influence the process directly or indirectly. At least in final stage she definitely tried to expedite the process when she became aware that her name was approved in the meeting of Board of Governors. She ought to have remained disassociated with the process to keep it pure but her acts are also a reason that entire process of selection became unfair and it was rightly declared void by Board of Governors and their decision as discussed above being based on legally sustainable reasons does not warrant any interference.

53. The challenge to it at behest of the petitioner thus failed on various ground. Firstly, being a candidate she has no indefeasible right of appointment; secondly on a direction of Central Government, the Institute was under a legal obligation to scrutinise the process and reply to queries raised; thirdly a two Members Committee on a detailed inquiry found above referred deviations which could not be cured as they goes to the root of process being contrary to procedure prescribed under statute and thus entire process became illegal as well as earlier inquiries were only an eye wash; fourthly earlier process was not concluded as no appointment letter was issued thus the petitioner was not required to be heard; and, fifthly the petitioner being a candidate for the post of Registrar failed to keep her away (directly or indirectly) from selection process, no matter that she was an Acting Registrar.

54. During pendency of present writ petitions a fresh process (under challenge also) of appointment of Registrar is reached to its near conclusion and petitioner on her on will has not participated in it, therefore at this belated stage Court cannot pass an order to allow her to participate in present process, however the Institute will have liberty to allow petitioner.

55. The challenge to fresh recruitment process has no basis since this Court is of considered opinion that there is no ground to interfere with a decision to declare earlier process being void.

56. The outcome of above discussion is that both writ petitions fail and are accordingly dismissed.

(2024) 5 ILRA 1201
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-C No. 3049 of 2024

Ramavtar Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Samarath Singh

Counsel for the Opp. Parties:
Bhupendra Kumar Tripathi, C.S.C.

Civil Law - Constitution of India1950 - Art. 226 - Writ Petition - Alternative Remedy - U.P. Revenue Code, 2006 - Section 24 - Disputes regarding Boundaries - Revision before Board of Revenue u/s 210 - Impugned order passed by Commissioner in appeal u/s 24(4) of the U.P. Revenue Code - Availability of an effective alternative statutory remedy of revision u/s 210 before the Board of Revenue - Writ petition dismissed on ground of alternative remedy (Paras 10, 14)

Dismissed. (E-5)

List of Cases cited:

1. Jhinka Devi Vs State of U.P. & ors., Writ-C No. 25616 of 2021.

2. Sant Lal Gupta Vs Modern Corporation Group Housing Society Ltd., 2010 (13) SCC 334.

3. C.P. Upadhyay Vs Chairman and M.D. Power Grid & ors., 2017 (121) ALR 69

4. PHR Invent Educational Society Vs UCO Bank & ors., Civil Appeal No. Nil of 2024 (arising out of SLP (C) No. 8867 of 2022).

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

1. Heard Shri Avanees Kumar Rai under the authority of Samarth Singh, learned counsel for the petitioner, Shri Abhishek Shukla, learned Addl. Chief Standing Counsel for the State-respondent and Shri Bhupendra Kumar Tripathi, learned counsel for respondent No. 2.

2. Considering the nature of the order that is proposed to be passed, the service of notice upon private respondent Nos. 3 to 12 is being dispensed with.

3. The writ petition arises out of proceedings under Section 24 (4) of the U.P. Revenue Code, 2006 and is directed against the order dated 30.11.2023 passed in appeal No. 257 of 2022 by the Commissioner (Administration) Varanasi Division, Varanasi in exercise of powers under Section 24 of the U.P. Revenue Code, 2006 whereby and whereunder the appeal has been dismissed upholding the order dated 4.2.2022 passed by the Sub Divisional Magistrate, Tehsil Chakiya, District Chandauli under Section 24 of the U.P. Revenue Code, 2006.

4. Shri Abhishek Shukla, learned Addl. Chief Standing Counsel at the very out set submits that the order impugned passed by the learned Commissioner in appeal under Section 24 (4) of the U.P. Revenue Code, 2006 has been made subject to the provisions of Section 210 of the U.P. Revenue Code, 2006 and finality to the order passed under Section 210 has been attached. He submits that the issue has already been considered by a co-ordinate Bench of this Court in Writ-C No. 25616 of 2021 (Jhinka Devi versus State of U.P. and 4 others). In paras 48 & 49 of the aforesaid decision, the Court has held as under:-

48. *The mere fact that there is no further appeal against the order passed by*

the Commissioner in an appeal under sub-section (4) of Section 24 would not be held to create a bar in invocation of the revisional jurisdiction of the Board of Revenue under section 210 of the Code. The jurisdiction conferred on the Board under Section 210 to revise the orders passed by the subordinate revenue courts would not be dependent on a motion being made by a party to the case inasmuch as the section confers power upon the Board to exercise revisional jurisdiction independent of any such motion having been made. The fact that a right of appeal is not given to the party concerned would therefore not be held to affect the jurisdiction vested in the Board under Section 210.

***49**. The provision under sub-section (4) of Section 24, as it existed, prior to the amending Act of 2019, that "the order of the Commissioner shall be final" would therefore be held to mean no more than that the order passed in appeal under sub-section (4) would not be subject to any second appeal. The provision with regard to finality attached to the order of the Commissioner under sub-section (4) would not in any manner be held to limit or control the revisional jurisdiction conferred upon the Board under Section 210.*

5. It is, thus, submitted that in the wake of availability of alternate remedy, the writ petition may not be entertained and the petitioner be relegated to the statutory alternate remedy available.

6. The submissions of Shri Abhishek Shukla, learned Addl. Chief Standing Counsel have been refuted by learned counsel for the petitioner by submitting that the alternate remedy as stated by the learned Addl. Chief Standing Counsel may not be treated to be an absolute bar inasmuch as the power of this Court under Article 226 of the Constitution of India cannot be curtailed in view of the patent illegality committed by the Appellate Authority while passing the impugned order in exercise of powers under Section 24 (4) of the U.P. Revenue Code, 2006. He has invited the attention of this Court to the impugned order dated 30.11.2023 to demonstrate that no reasons whatsoever have been stated for rejecting the appeal preferred by the petitioner against the order dated 4.2.2022 passed under Section 24 of the Code. He submits that the Appellate Authority has merely stated that the order dated 4.2.2022 was a reasoned order passed in accordance with law, which was not liable to be interfered in appeal and accordingly, proceed to reject the appeal.

7. In order to buttress his submissions, learned counsel for the petitioner has relied upon a decision of the Apex Court in the case of ***Sant Lal Gupta versus Modern, Corporation Group Housing Society Ltd***., reported in ***2010 (13) SCC 334***, in which, in paragraph 27 it has been laid down as under:-

"27. It is settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. IT is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the

Court and also as an essential requisite of the principles of natural justice.

3..... The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of the matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind."

The reasons is that the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons rendered an order indefensible/unsustainable particular when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know any his application has been rejected."

8. Further reliance has been placed upon a decision of a co-ordinate Bench of this Court in the case of ***C.P. Upadhyay versus Chairman and M.D. Power Grid and others*** reported in ***2017 (121) ALR 69*** to submit that reasons are the soul of an order and in its absence such order is rendered lifeless. In the said case, the co-ordinate Bench after considering various decisions of the Apex Court that the appellate order assailed therein did not contain the reasons and having found that the order of the Appellate Authority did not stand the test of judicial scrutiny, set aside the order and remitted back the matter to the Appellate Authority for consideration of the petitioner's appeal, strictly in accordance with law, keeping in view the legal parameters settled for the purpose, some of which were referred to in the order.

9. Learned counsel for the petitioner has vehemently argued that the order of the Appellate Authority does not contain any reasons and as such, is liable to be set aside and the matter be remitted back for consideration afresh.

10. Having heard the learned counsels for the parties and having perused the record as also the decisions cited at bar and agreeing with the proposition of law laid down therein, this Court is faced with the issue as to entertain the writ petition in the wake of existence of a statutory remedy to assail the orders impugned. Further, the Court finds that the writ petition in the case cited was entertained as the orders impugned therein had attained finality and there was no statutory remedy available. The position in the case at hand is different. The petitioner has an alternate statutory remedy to assail the order of the Appellate Authority in revision.

11. Recently the Apex Court in the case of ***PHR Invent Educational Society versus UCO Bank and others, Civil Appeal No. Nil of 2024 (arising out of SLP (c) No. 8867 of 2022)*** decided on 10th April, 2024, after considering various judgments in Para 29 carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them being:-

"i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

ii) it has acted in defiance of the fundamental principles of judicial procedure;

iii) it has resorted to invoke the provisions which are repealed; and

iv) when an order has been passed in total violation of the principles of nature justice."

12. In Para 30 of the aforesaid judgment, the Apex Court has however clarified that the High Court will not entertain a petition under Article 226 of the Constitution of India, if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. Paragraph 30 of the aforesaid decision is quoted hereunder:-

"30. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance."

13. In the opinion of the Court, the present case does not fall in any of the exceptions as carved out by the Apex Court in Paragraph 29. Observation made in Para 30, however, is binding.

14. In view of the above, since the petitioner has an effective alternate remedy of assailing the order dated 30.11.2023 passed in Appeal No. 257 of 2022 under Section 24 (4) of the U.P. Revenue Code, 2006, the Court is not inclined to entertain the writ petition. It is accordingly ***dismissed*** on the ground of alternate remedy .

(2024) 5 ILRA 1204
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 23.05.2024

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-C No. 4268 of 1984

Asharfi Lal ...Petitioner
Versus
Iii A.D.J. & Ors. ...Opp. Parties

Counsel for the Petitioner:
L.K. Davey, Bhanu Bhushan Jauhari, R.C. Shukla, Rishi Bhushan Jauhari

Counsel for the Opp. Parties:
S.C.

A. Civil Law - Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 - Section 5(3)(b) - No Distinction between Minor and Major Family Members for Additional Land Entitlement - A tenure holder with up to five family members can retain 7.30 hectares of irrigated land - In addition, for each family member exceeding five, and for each adult son, the tenure holder can retain two additional hectares of irrigated land, subject to a maximum of six hectares - Section 5(3)(b) does not differentiate between major and minor members of the family - term "family," as defined in Section 3(7), includes the tenure holder's spouse, minor sons, and minor daughters - Therefore, even if a family member is a minor, they are entitled to two additional hectares of land if the family size exceeds five (Paras 16, 17).

B. Civil Law - Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, Section 10(2) - The number of family members is to be considered on the date of the notice under Section 10(2) of the Act, 1960, and not on the date of the introduction of the amending Act (Para 19).

Allowed. (E-5)

List of Cases cited:

1. Brij Narain Tewari Vs St. of U. P. & ors., 1979 (5) ALR 451

2. Ram Chandra Vs St. of U.P. & ors., 2020 (4) ADJ 535 (LB).

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

1. Heard Sri B.B. Jauhari, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner by means of the present writ petition has assailed the order dated 23.11.1983 passed by the Prescribed Authority (Ceiling), Tehsil Puwaya, District Shahjahanpur by which he has declared 4.63 acre surplus land held by the petitioner, and also the order dated 16.01.1984 passed by the Additional District Judge, Shahjahanpur dismissing the Misc. Civil Appeal No.141 of 1983 preferred by the petitioner under Section 13 of The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the 'Act, 1960).

3. The facts, in brief, are that the petitioner was issued a notice on **02.06.1983** under Section 10 (2) of the Act, 1960 on the ground that the petitioner had **22.65** acres of irrigation land whereas, under the Act 1960, he could retain only **18.02-acre** land, thus, the petitioner was having 4.63-acre excess land, therefore, why the excess land of **4.63 acres** held by the petitioner be not declared as surplus land.

4. The petitioner submitted a reply contending inter-alia that the notice was issued to the petitioner under Section 10 (2) of the Act, 1960 on **02.06.1983**, and on the date of the notice, the family of the petitioner consisted of the petitioner, namely, Asharfi Lal, his wife, three daughters and two sons. His further case was that his one daughter was married on the date of notice, therefore, after excluding the married daughter, there are six family members still in the family of the petitioner, therefore, in view of Section 5 (3) (b) of the Act, 1960, the petitioner is entitled to retain two hectares extra land. Thus, the petitioner has no excess land.

5. The Ceiling Authority repelled the aforesaid contention by holding that the family members of the tenure holder shall be considered on the date of introduction of the amending act i.e. 08.06.1973 and not on the date of the notice under Section 10(2) of the Act, 1960, and since in the present case, one son and daughter of the petitioner were born in the year 1975 and 1979 respectively after coming into force the amending act, therefore, on the date of amending act, there were only four family members in the family of the petitioner, therefore, the petitioner had 4.63 acres excess land. Besides the above, the other issues framed by the Prescribed Authority were decided against the petitioner.

6. The petitioner preferred an appeal under Section 13 of the Act, 1960 challenging the order of the Prescribed Authority. The appellate authority noted that the only contention advanced by the petitioner was whether the family members of the tenure holders as provided in Section 3 (7) of the Act, 1960 shall be considered on the date of introduction of amending act or the date of issuance of the notice.

7. The appellate authority after considering the scheme of the Act held that if Section 5(3) (b) of the Act is read along with Section 5(1) of the Act, 1960, it is manifest that the family member of the tenure holder is to be seen on the date of

introduction of the amending act i.e. 08.06.1973, and since in the case in hand, the petitioner on the date of introduction of the amending act had only four family members as one daughter and son were born to the petitioner after the introduction of the amending act, therefore, the petitioner is not entitled to the benefit of Section 5(3) (b) of the Act, 1960. Accordingly, the appellate authority did not find any merit in the submission of the petitioner and rejected the appeal.

8. Challenging the aforesaid orders, learned counsel for the petitioner has contended that it is not in dispute in the present case that the notice under Section 10(2) of the Act, 1960 had been issued on **02.06.1983**. It is also not in dispute that one son and one daughter of the petitioner were born in the year 1975 and 1979 respectively i.e. before the issuance of notice under Section 10(2) of the Act, 1960. It is submitted that on the date of issuance of notice, there are six family members in the family of the petitioner, and thus, the petitioner is entitled to the benefit of Section 5(3) (b) of the Act, 1960, therefore, he is entitled to retain two hectares extra land besides the land which a tenure holder can retain after incorporation of amending act.

9. It is contended that the appellate authority has taken an erroneous view in the matter in concluding that the date of introduction of the amending act is the cut-off date on which the family members in the family of the tenure holder are to be counted. He submits that if family members exceed five and a family member is minor, even then the benefit of retention of two hectares of extra land cannot be denied to the petitioner inasmuch as the Act does not specify that only a major family member if the number of family members exceeds five is entitled to retain **two-hectare** extra land besides the land which he is entitled to retain under the Act. In support of his argument, he has placed reliance upon the judgement of this Court in the cases of ***Brij Narain Tewari Vs. State of Uttar Pradesh and others 1979 (5) ALR 451 & Ram Chandra Vs. State of U.P. and Others 2020 (4) ADJ 535 (LB).***

10. Per contra, learned Standing Counsel submits that the number of family members on the date of introduction of the amending act shall be taken into consideration to determine the family members and not the date of issuance of notice. It is submitted that in such view of the fact, the Appellate Authority has rightly rejected the appeal of the petitioner, and since the finding returned by the appellate authority is based upon proper appreciation of law, therefore, this Court may not exercise its power under Article 226 of the Constitution of India to interfere with the order passed by the appellate authority as well as prescribed authority.

11. I have considered the rival submissions advanced by learned counsel for the parties.

12. The facts as emanates from the record are that the petitioner was issued a notice under Section 10(2) of the Act, 1960 on **02.06.1983** calling upon him to show cause as to why **4.6 acres** of land be not declared as surplus as his total holding is **22.65 acre**, out of which he can retain only **18.02 acres** irrigation land.

13. The petitioner submitted a reply to the said notice. In the reply, it is stated by the petitioner that on the date of issuance of notice under Section 10 (2) of the Act, 1960, there were six members in the family of the petitioner, therefore, in view of the

definition of "family" provided in Section 3 (7) of the Act read with Section 5 (3) (b) of the Act, 1960, the petitioner is entitled to retain **two hectares** extra land.

14. The Prescribed Authority did not find any merit in the submission of the petitioner and declared **4.06 acres of** land as surplus land. The appeal preferred by the petitioner was also dismissed by the appellate authority holding that the number of family members to avail benefit of Section 5(3) (b) of the Act, 1960 is to be seen on the date of introduction of the amending act and not on the date of issuance of notice.

15. The first question which arises for consideration in the present case is whether the Act lays any distinction between the minor and major while extending the benefit of Section 5(3) (b) of the Act, 1960 entitling a tenure holder to retain **two hectares** extra land if the family members of the tenure holder exceeds five in numbers. In this respect, it would be relevant to reproduce Section 5 (3) (b) of the Act, 1960 which reads as under:-.

"[subject to the provisions of sub-section (4), (5), (6) and (7)] the ceiling area for purposes of sub-section (1) shall be –

(b) in the case of a tenure-holder having family of more than five members, 7.30 hectares of irrigated land (including land held by other members of his family), besides, each of the members exceeding five and for each of his adult sons who are not themselves tenure-holders or who hold less than two hectares of irrigated land, two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two hectares, subject to a maximum of six hectares of such additional land;

Explanation. - The expression 'adult son' in clauses (a) and (b) includes an adult son who is dead and has left surviving behind him minor sons or minor daughters (other than married daughters) who are not themselves tenure-holders or who hold land less than two hectares of irrigated land."

16. A reading of Section 5 (3) (b) of the Act, 1960 discloses that a tenure holder up to five members can retain 7.30 hectares of irrigated land. The aforesaid Section further specifies that besides the above, each of the members exceeding five and for each of his adult sons who are not themselves tenure holders or who hold less than two hectares of irrigated land, the tenure holder can retain two additional hectares of irrigated land subject to maximum six hectares of land. Reading of Section 5 (3) (b) of the Act, 1960 does not suggest that it differentiates or contemplates any distinction between the major and minor members of the family. The term 'family' has been defined in Section 3 (7) of the Act, 1960 which reads as under:

"family" in relation to a tenure-holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters)."

17. In such view of the fact, even if a member of the family is minor, he is entitled to retain two hectares of additional land, if the family member of a tenure holder exceeds five. The aforesaid view is supported by a Coordinate Bench of this Court in the case of ***Brij Narain Tewari (supra)***. The relevant extract of the said judgement of ***Brij Narain Tewari (supra)*** is reproduced herein-below:-

"The aforesaid provision clearly shows that if there are major sons in the family of a tenure holder, the tenure holder is entitled for additional land provided the major sons are themselves not tenure holders. Similarly, it also provides that even if there are no major sons, if the strength of members of the family is more than 5 then the tenure holder is entitled for additional land of two hectares for each member of the family. It is not in dispute in the present case that the string the of members of the family of the petitioner was eight after excluding the two major sons who were themselves held to be the tenure holders by the appellate authority. If strength of the members of the family was eight, it cannot be disputed that the petitioner was entitled for additional land of six hectares. The Prescribed Authority rightly granted this additional land, but the appellate authority erroneously upset that order. The reason for refusing to grant six hectares of land by the appellate authority is manifestly erroneous. Once it was established that the daughters aged three and five years were members of the family, it was not at all necessary to establish that they were not married. It is really very strange that the daughters of three and five years of age cannot be presumed to be unmarried. The State did not set up any such case, that they were married. The presumption drawn by the appellate authority that in the absence of evidence to establish that the two daughters were not married they have to be presumed to be married is wholly erroneous. Neither under the Hindu Law nor under the Child Marriage Restraint Act is permissible to marry a daughter of three to five years old. If anybody would have claimed that they were married, the burden lay upon him to establish that fact. When State of U. P. did not dispute this fact nor did it lead any evidence to that effect, the appellate authority was not right to draw such an inference.

The result, is, that this writ petition is allowed and both the judgments of the appellate authority (IV Additional District Judge, Deoria) dated 26-7-1975 and 2-2-1976, so far as they relate to the additional six hectares land, are hereby quashed. The Prescribed Authority is directed to recalculate to the surplus area after granting six hectares a land in addition as granted by the Prescribed Authority on account of the additional members of the family of the petitioner. In these circumstances of the case, the parties shall bear their own costs. The stay order shall stand discharged.

18. Now, coming to the question whether the family members are to be seen on the date of introduction of the amending act in the Ceiling Act or on the date of issuance of notice, the aforesaid question has also been answered by the Coordinate Bench of this Court in the case of **Ram Chandra (supra).** Paragraphs nos. 38, 39 & 40 of the judgement of **Ram Chandra (supra)** are reproduced herein-below:-

38. A careful perusal of the aforesaid provision clearly shows that if the member in the family exceeds five, the tenure holder is entitled for additional land provided that none of such member is a tenure holder in his/her own right. Similarly, it also provides that even if there are no adult sons, but if the strength of the members of the family is more than five, then the tenure holder is entitled to additional land of 2 hectares for each member of the family subject to a maximum of 6 hectares of additional land. It is not in dispute in the present case that the strength of family members of the petitioner was Eight at the time when notice was issued to him on

2.11.2000. The petitioner brought on record the High School pass Certificates of his three daughters and three sons. However, the Prescribed Authority and the Appellate Authority refused to grant benefit of additional land for each member of the family in addition to the five members as the petitioner did not produce relevant extract of the Family Register and on 8.6.1973 none of the petitioner's children was born. The logic applied by the Prescribed Authority and the Appellate Authority is incomprehensible. According to the respondents, the date of determination of family members has been taken as 8th June 1973, but the date of determination of ceiling area has been taken as the date when the Prescribed Authority was deciding the case.

39. In my considered opinion even though the petitioner's family consisted of only two members i.e. himself and his wife on 8th June 1973, at the time of issuance of notice under Section 9, on 2.11.2000, all of his six children had been born. Three of his daughters were married but there were at least three sons who were living with him. None of them has been shown to be an independent tenure holder having more than 2 hectares of land by the State respondents, in their Counter-affidavit. For the purpose of determination of ceiling area the petitioner was entitled to 2 additional hectares for at least one of his sons namely Shyam Srivastava who was major at the time.

40. Though this Court is not convinced with the argument of the learned counsel for the petitioner regarding the applicability of the cut-off date of 8.6.1973 for determining ceiling area on the basis of Section 29 of the Act and holds that the petitioner was independent tenure holder of eight plots of land ad-measuring 8.546 hectares in villages Magrapur and Baddupur in Tehsil Shahbad District Hardoi which in irrigated terms came out to be 7.968 hectares; the failure of the learned Court below to take into account the number of members of the petitioner's family while determining the permissible limit of land to be left with the petitioner cannot be countenanced.

19. In such view of the fact, the reason assigned by the appellate authority that the number of family members is to be seen on the date of introduction of the amending act and not on the date of notice under Section 10 (2) of the Act, 1960 is erroneous and cannot be sustained in law, and is accordingly set aside.

20. Thus, for the reasons given above, the order dated 23.11.1983 passed by the Prescribed Authority (Ceiling), Tehsil Puwaya, District Shahjahanpur and the order dated 16.01.1984 passed by the Additional District Judge, Shahjahanpur are hereby set aside.

21. Consequently, the writ petition is ***allowed*** with no order as to costs.

(2024) 5 ILRA 1209
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 18388 of 2024

Kasturi Devi Sheetalaya Pvt. Ltd. & Anr. ...Petitioners

Versus

The Presiding Officer Debt Recovery Tribunal & Anr. ...Opp. Parties

Counsel for the Petitioners:

Ashok Pandey, Srestha Pandey

Counsel for the Opp. Parties:
Eshita Sand

A. Civil Law - SARFAESI Act, 2002 - Section 18 - Appeal to Appellate Tribunal - Scope – Any order made by the Debt Recovery Tribunal (DRT) on a miscellaneous application under Section 17 of the SARFAESI Act, 2002, is appealable under Section 18 - Section 17 does not impose a condition that the order must be final - The term "order" includes interlocutory orders, such as those rejecting a miscellaneous application - The Act authorizes the Tribunal to adjudicate miscellaneous applications, and any order passed on such an application, even if interlocutory, is considered an order under Section 17 and is amenable to appeal. (Para 9, 10)

B. SARFAESI Act, 2002 - Section 18 - Order passed on Miscellaneous Application - If a borrower moves an application asserting that an earlier securitization application was filed but, since the bank withdrew its proceedings and subsequently issued a fresh notice, the court fee already paid should be adjusted, such an application qualifies as a miscellaneous application - An objection raised by the Registrar of the Tribunal regarding the maintainability of the securitization application, and any order passed by the DRT on such a miscellaneous application, is considered an order under Section 17 of the SARFAESI Act, 2002, and is amenable to appeal - An order regarding court fees is appealable before the Appellate Tribunal under Section 18 of the Act. (Para 8, 10)

C. Civil Law - Constitution of India, 1950 - Art. 226 - A writ petition against an order passed by the Debt Recovery Tribunal (DRT) on a miscellaneous application is not maintainable due to the availability of an alternative remedy u/ s 18 of SARFAESI Act, 2002 (Para 11)

Dismissed. (E-5)

List of Cases cited:

1. PHR Invent Educational Society Vs UCO Bank & ors. (Civil Appeal No.- 4845 of 2024) dt 10.04.2024

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

1. Heard Sri Ashok Pandey, learned counsel for the petitioners and Sri Alok Rai and Ms. Eshita Sand, learned counsel for the contesting respondent bank.

2. The petitioners have invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution, seeking challenge to the order passed by the Debt Recovery Tribunal upon a miscellaneous application bearing No.- 40 of 2024 (Kasturi Devi Sheetalaya Pvt. Ltd. v. Bank of India) arising out of Securitization Application No.- 461 of 2022.

3. A preliminary objection has been raised by learned counsel for the contesting respondent- bank that the petitioner has an alternative efficacious remedy to prefer an appeal before the Debt Recovery Appellate Tribunal under Section 18 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act, 2002') and this Court, therefore, may not interfere invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution.

4. Learned counsel for the respondent has further relied upon a recent judgment of Supreme Court in the case of **PHR Invent Educational Society v. UCO Bank and others** (Civil Appeal No.- 4845 of 2024) decided on 10th April, 2024 in which Supreme Court has held that the High Court should not interfere in matters arising out of SARFAESI Act, 2002 when the Legislature has prescribed for special forum for the parties to exhaust remedy therein.

5. Meeting the preliminary objections, learned counsel for the petitioner submits that Section 18 of SARFAESI Act, 2002, as it stood originally came to be amended by amending Act No.- 30 of 2004 putting a rider that an appeal would lie against an order passed under Section 17 of the SARFAESI Act, 2002. He submits that an order passed on miscellaneous application regarding the court fee would not amount to an order passed under Section 17 of SARFAESI Act, 2002. He would submit that the provisions as contained under Section 17 of the SARFAESI Act, 2002, lays down a detailed procedure regarding recovery of the secured debts and it is after putting aggrieved person to notice and inviting objections under Sections 13(4) that recourse is taken to recover the secured assets by coercive measures. Section 17 of the SARFAESI Act, 2002 prescribed power of the Debt Recovery Tribunal to entertain an application filed at the instance of borrower or defaulter against the measures taken by the bank to secure debts under Section 13. Section 17 (1), (2), (3), (5) and (7) as are relevant for the purpose of the case are reproduced hereunder:

"17. Application against measures to recover secured debts.—(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter,1[may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section (1) of section 17.)

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section

(4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4)...

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application: Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) ...

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

6. From a bare reading of the aforesaid provisions it is clear that an application by a aggrieved person including the borrower may be made to the Tribunal for appropriate relief against the measures taken by the bank to recover the secured debts. The very power to entertain an application, therefore, would entail power to entertain any miscellaneous application as well because under Section 1(a) as quoted above gives power to the Tribunal to look into the cause of action wholly or in part. So in order to maintain an application as a competent application the Tribunal vested with power to look into all sorts of objections that may be raised either by the applicant or by the bank. This substantive provision has been given under Section 47 which includes the right to hear the miscellaneous application as well and any order passed on such miscellaneous application would, therefore, amount to an order passed under Section 17, may be interlocutory in nature. Rule 13 (1) of the Security Interest (Enforcement) Rules Act, 2002 is also worth mentioning here. Rule 13 of the Security Interest (Enforcement) Rules Act, 2002 is reproduced hereunder:

"13. Fees for applications and appeals under sections 17 and 18 of the Act*.- (1) Every application under sub-section (1) of section 17 the Appellate Tribunal under sub-section or an appeal to (1) of section 18 shall be accompanied by a fee provided in the sub-rule (2) and such fee may be remitted through a crossed demand draft drawn on a bank or Indian Postal Order in favour of the Registrar of the Tribunal or the Court as the case may be, payable at the place where the Tribunal or the Court is situated."*

7. Thus, for an application to be a competent application under Section 17 of SARFAESI Act, 2002 and an appeal to be competent under Section 18 of SARFAESI Act, 2002. It is provided to be accompanied by the requisite court fee as given under Sub-Rule 2 which is a chart provided therein.

8. If the borrower makes an application that earlier securitization application was moved but since the bank

withdrew its proceedings to recover the secured debts at that stage and subsequently issued a fresh notice and hence the court fee already paid should be taken into consideration, would amount to a miscellaneous application. Putting an objection by the Registrar of Tribunal upon the maintainability of the securitization application and any order passed thereupon by the Debt Recovery Tribunal upon any miscellaneous application shall be taken to be an order within the meaning of Section 17 of SARFAESI Act, 2002 read with Rule 13 of the Rules quoted above. Section 18 of the SARFAESI Act, 2002 is also reproduced hereunder:

"18. Appeal to Appellate Tribunal*.—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.*

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors

or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

9. From bare reading of the aforesaid provisions it is true that it comes out very clearly that any order made by Debt Recovery Tribunal is appealable but of course passed under Section 17 of SARFAESI Act, 2002. The section does not prescribe or put a rider that order should be a final order.

10. Thus, every order would include even interlocutory order rejecting a miscellaneous application. Hence the order passed by the Debt Recovery Tribunal upon the miscellaneous application filed by the petitioner impugned herein this petition is amenable to the appellate forum prescribed under Section 18 of the SARFAESI Act, 2002.

11. Besides above, in a recent judgment cited before this Court, Supreme Court has very categorically held that High Court should refrain from entertaining petitions invoking powers under Article 226 of the Constitution when in the special Act like Recovery of Debts and Bankruptcy Act, 1993 Act and SARFAESI Act, 2002 prescribed for statutory remedies. These being the special act, therefore, the parties should be left to invoke remedy provided therein first. Though the Supreme Court has held that there are certain exceptions enumerated in paragraph 29 of the judgment, in which power can be invoked under Article 226 of the Constitution but where the action has been taken or the order has been passed, in compliance of the provisions of natural justice and the case does not fall under the exceptional clauses, the High Court should refrain from entertaining such petitions. Vide paragraphs

29, 30, 31, 32 & 33 of the judgment the Supreme Court held held thus:

"29. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:

(i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

(ii) it has acted in defiance of the fundamental principles of judicial procedure;

(iii) it has resorted to invoke the provisions which are repealed; and

(iv) when an order has been passed in total violation of the principles of natural justice.

30. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

31. Undisputedly, the present case would not come under any of the exceptions as carved out by this Court in the case of Chhabil Dass Agarwal (supra).

32. We are therefore of the considered view that the High Court has grossly erred in entertaining and allowing the petition under Article 226 of the Constitution.

33. While dismissing the writ petition, we will have to remind the High Courts of the following words of this Court in the case of Satyawati Tondon (supra) since we have come across various matters wherein the High Courts have been entertaining petitions arising out of the DRT Act and the SARFAESI Act in spite of availability of an effective alternative remedy:

"55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

(Emphasis added)

12. The case in hand also does not fall in the exception clauses.

13. In view of the above, preliminary objection raised by the learned counsel for the contesting respondent – bank is upheld.

14. The petition thus lacks merit and is, accordingly dismissed on the ground of alternative remedy.

15. Liberty rests with the petitioner to avail the alternative remedy, if so advised.

16. Subject to the aforesaid liberty, this petition is dismissed and is, accordingly, consigned to records.

(2024) 5 ILRA 1214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-C No. 27653 of 2023

Shahnawaj Ali ...Petitioner
Versus
Election Tribunal D.J. Muzaffarnagar & Ors. ...Opp. Parties

Counsel for the Petitioner:

Ravi Ananad Agarwal, Shreya Gupta

Counsel for the Opp. Parties:
Vivek Kumar Singh

Civil Law - U.P. Municipalities Act, 1916 - Section20 - Prescribed Period of Limitation for Election Petition – Presentation, Admission, and Registration of Election Petition – Applicability of Limitation Act and General Rules - *Period of Limitation*: As per Section 20 of the Act, an election petition should be presented "within 30 days" after the result of the election is announced by the Returning Officer. The phrase "within 30 days" starts from the date when the result is announced - *Meaning of "Presented"*: The word "presented" in the context of an election petition conveys the act of giving, filing, or delivering the petition. Presentation is completed at the moment the petition is given or delivered to the competent authority - *General Clauses Act, Section 10*: If the limitation period expires during a vacation, the first opening day after the vacation is considered the last day of limitation - *General Rules (Civil), 1957, Rules 13 & 32*: During the vacation period, except with the consent of parties, no suit or case shall be heard on declared holidays - *Limitation Act:* 1916 Act does not provide specific provisions for the applicability of Limitation Act except Section 12(2) in view of the Proviso to Section 23 of 1916 Act - *Order IV, CPC:* According to Rule 1, every suit is instituted by presenting a plaint to the Court. Rule 2 requires the Court to register the particulars of every suit in a register. Admission and registration of a plaint are distinct from its presentation and are subsequent events subject to removal of defects (Para 15, 16)

Civil Law - U.P. Municipalities Act, 1916 - result of the election was declared on 13.05.2023 - Prescribed period of limitation for filing the election petition was up to 12.06.2023 - Respondent filed the election petition on 09.06.2023, along with an application under Rule 13 of the General Rules (Civil), 1957, seeking permission to file the petition during the vacation period - Application for leave was rejected due to opposition by the returned candidate - A second attempt was made on the opening day after vacation, i.e., 01.07.2023, but permission was again not granted due to the petitioner's absence - Ultimately, the election petition was admitted and registered on 03.07.2023 - *Issue* - Whether the election petition filed by the respondent was within the prescribed period of limitation ? - Held - respondent demonstrated bona fides by making sincere attempts to file the election petition within the prescribed period of limitation (i.e., 30 days from the declaration of results) - Petition was not admitted and registered immediately only due to procedural delays (Para 19)

Dismissed. (E-5)

List of Cases cited:

1. Sumitra Devi Vs Special Judge/Additional District & Sessions Judge, E.C. Act, Hardoi & ors. dt 12.6.2020

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

1. Heard Ms. Shreya Gupta, learned counsel for the petitioner, Shri Vivek Kumar Singh, learned counsel for the respondent no.2 and perused the record on board.

2. Petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India assailing the order dated 03.7.2023 passed by District Judge, Muzaffarnagar whereby election petition filed on behalf of respondent No.2 under section 20 of the U.P. Municipalities **Act, 1916** (in brevity 'Act, 1916'.) has been admitted and ordered to be registered as well as, simultaneously, notices were ordered to be issued to the defendant Nos. 2 to 11.

3. Facts culled out from the record are that election of Nagar Palika Parishad, Khatauli, District Muzaffarnagar was held on 04.5.2023 in pursuance of the

notification promulgated on 09.4.2023. The present petitioner has been declared successful as President of Nagar Palika Parishad. Having been aggrieved with the result of the election declared on 13.5.2023, respondent No. 2 has filed an election petition on 09.06.2023 under Sections 19 and 20 of Act, 1916. Aforesaid election petition was filed during summer vacation along with an application under Rule 13 of General Rules (Civil), 1957 (in brevity '**Rules, 1957'**) with a prayer to entertain the election petition. Said application was rejected, vide order dated 09.6.2023, and next date fixed viz. 02.07.2023 for hearing on admission of the election petition. On the first opening day, after summer vacation, in the month of July i.e. 01.7.2023, the election petitioner has moved miscellaneous application to entertain and register the election petition inasmuch as 01.07.2023 was the last date for the purpose of limitation to register the same and 02.07.2023, already fixed in the matter, was Sunday. Learned District Judge has rejected said miscellaneous application on the same day i.e. 01.7.2023 and fixed next date on 3.7.2023 for registration of the election petition. On the next date fixed i.e. 3.7.2023, election petition has been admitted and ordered to be registered, which is under challenge before this Court.

4. Learned Counsel for the petitioner, while assailing the order impugned dated 03.7.2023, has advanced two fold submissions; first, regarding the delay in filing the election petition on the ground that under section 20 of the Act, 1916 prescribed period of limitation is only 30 days since the date of result announced. However, in the instant matter, election petition has been filed and entertained on 03.7.2023, therefore, election petition was filed at belated stage. She has laid emphasis on Section 10 of General Clauses Act, 1963 and tried to submit that first opening day i.e. 01.7.2023 was the last date of limitation to entertain the election petition under section 20 of Act, 1916. However, election petition has been filed and entertained on 03.7.2023, thus, election petition was time barred. It is further submitted that law relating to the election petition is a special law, therefore, same may strictly be adhered to without any relaxation or laxity at the part of any party. The prescribed period of limitation as enunciated under Section 20 of the Act, 1916 is mandatory in nature. Therefore, court cannot extend the prescribed period of limitation for filing the election petition on its own wisdom unless there is a provision under the law to condone such delay. It is next submitted that previously the election petition was refused to be registered twice vide orders dated 09.6.2023 and 01.7.2023 respectively, however, same have not been assailed before any competent court, therefore, aforesaid orders became final between the parties qua registering and admitting an election petition filed by respondent No 2.

5. Learned counsel for the petitioner, in her second submission, has questioned maintainability of the election petition on two grounds; first, non-joinder of the State as a defendant in the election petition inasmuch as three State officers are arrayed as defendants No.9 to 11 in the cause title of the election petition, however, State has not been impleaded through authority competent and, second ground taken, qua method to present the election petition, with a plea, that same was not presented by the election petitioner himself rather it was presented through counsel, therefore, same is filed in violation of the provisions as enunciated under Section 20 of the Act, 1916. In support of her submission, learned

counsel for the petitioner has cited following judgments:-

1. Sumitra Devi Vs. Special Judge/Additional District and Sessions Judge, E.C. Act, Hardoi and others decided by this Court on 12.6.2020.

2. Mahendra Vs. State of Up and others, 2021 0 Supreme (All) 474

3. Akhilesh (Dr. Akhilesh Kumar Dwivedi Vs. Shri Ramesh Chand), Neutral Citation 2023: AHC: 157150

4. Ansar Ahmad Vs. Sub-Divisional Officer, kairana and others, AIR 1998 Allahabad 341.

5. Smt. Sharda Devi Vs. State of UP through Secretary and others Neutral Citation 2012: AHC: 158098.

6. Reji Thomas and others Vs. The State of Kerala and others, 2018 0 AIR (SC) 2236.

7. Ram Nath Priyadarshi Suman Vs. The Chief Election Commissioner or India and three others, Neutral Citation No. 2021:AHC:71133

8. Smt. Phool Kumar Vs. Sub-division Officer, Tehisl Maholi District Sitapur and others in Misc. Single No. 7620 of 2020 decided on 9.11.2020

9. Mohan Lal and another Vs. State of UP through Secretary in Election Petition No. 1 of 2014 decided on 18.4.2014.

10. Smt. Sushma Vs. Sub-Divisional Magistrate, Kairana and 23 others, Neutral Citation No. 2017:AHC:77353.

11. Viresh Kumar Tiwari Vs. Additional District Judge and others, Neutral Citation No. 2013:AHC:177152.

12. G.V. Sreerama Reddy and another Vs. Returning Officer and others in Civil Appeal No. 6269 of 2008 decided on 11.8.2009.

6. Per contra, learned counsel for the private respondent No.2 (election petitioner) has contended that the case was presented well within time on 09.06.2023 as required under Section 20(1) of the Act, 1916, however, hearing of the case has been deferred, after vacations, for dated 02.07.2024. Apart from that, vide order dated 01.07.2023, presence of the election petitioner has been acknowledged and the next date fixed on 03.07.2023 for registration of plaint after hearing the opposite party no.1 in the election petition (petitioner herein). Application under Rule 13 of the Rules, 1957 has been numbered as Misc. Case No.195 of 2023 whereby it is evident that election petition was presented within time. Learned counsel for the respondent No. 2 has tried to submit that presentation was done well within time and normal date was fixed for admission and registration of the plaint, therefore, election petition cannot be treated to be filed beyond prescribed period of limitation. It is further contended that other submissions, as advanced by learned counsel for the petitioner, are still to be adjudicated upon by the election tribunal, thus, the same cannot be adjudicated directly before this Court. The instant writ petition is liable to be dismissed being misconceived and devoid on merits.

7. In rejoinder, learned counsel for the petitioner submits that the District Judge has passed the order dated 09.06.2023, 01.07.2023 and 03.07.2023 in a very perfunctory manner by using the words 'Panjikrit' and 'Angikrit' etc. which is not sustainable in the eyes of law. Plea of equity cannot be entertained in the matter of election petition inasmuch as election law is an special provision to entertain the election petition. It is next submitted that the election petition was filed on 03.07.2023 and registered on 04.07.2023, which is evident from Annexure-SA-1 to the Supplement

Affidavit filed by the petitioner. It is next submitted that owing to non-joinder of State of U.P., who is a necessary party under Section 79 and 80 C.P.C., as well as proviso to Order 1 Rule 9 C.P.C., election petition filed on behalf of respondent no.2 is incompetent in the eyes of law.

8. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record it is manifested that instant writ petition is arising out of election petition filed under Section 20 of the Act, 1916. The returned candidate (petitioner herein) has questioned the election petition filed on behalf of respondent no.2 precisely on two grounds, as advanced by learned counsel for the petitioner, first; being barred by time and second; being not maintainable on the ground of non-joinder of the State Government and election petition has not been presented personally by the election petitioner. Order impugned dated 03.07.2023 evince that the learned District Judge (Election Tribunal) has simply admitted the election petition filed on behalf of respondent no.2 and issued a direction to register the same. Simultaneously, notices were ordered to be issued to other defendants in the election petition except defendant no.1 (petitioner herein).

9. This Court is skeptical of first point advanced by learned counsel for the petitioner qua filing of election petition beyond prescribed period of limitation. The provision for filing the election petition assailing the election of members of Zila Panchayat is enunciated under Section 20 of the Act, 1916. Having considered the point involved in the instant writ petition, scope of discussing Section 20 of the Act, 1916 lies in narrow compass except for the purposes of limitation to file the election petition. For ready reference, relevant part of Section 20(1) of the Act, 1916 is quoted herein below :-

"20. Form and presentation of election petitions.-(1) An election petition shall be presented within 30 days after the day of which the result of the election sought to be questioned is announced by the Returning Officer, and shall specify the ground or grounds on which the election of the respondent is questioned and shall contain a concise statement of the material facts on which the petitioner relies and set forth of the full particulars of any corrupt practices that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practices and the dates and place of the commission of each such practice."

10. As per Section 20, as mentioned above, election petition should be presented within 30 days after the date of which the result of election sought to be questioned is announced by the returning officer. I am convinced with the submissions as raised by learned counsel for the petitioner that election law should be interpreted strictly, particularly, with regard to the prescribed period of limitation for the purposes of entertaining the election petition inasmuch as there is no provision qua applicability of the Limitation Act, except Section 12 (2) of the Limitation Act as enunciated under Proviso to Section 23 of the Act, 1916. Therefore, the phrase ''within 30 days'' is relevant which starts from the date when result is announced by the returning officer. It is admitted to both the parties, and also a matter of record, that result of election for the post of President, Nagar Palika Parishad, Khatauli was declared on 13.05.2023, therefore, limitation for filing the election

petition available to respondent no.2 was up to 12.06.2023. However, intending to avoid any delay, respondent no.2 has filed the election petition on 09.06.2023. Owing to summer vacations in the month of June, respondent no.2 has presented the election petition along with an application under Rule 13 of the Rules, 1957 for obtaining permission to file the election petition during vacation period. The Election Tribunal, owing to oppose made on behalf of the returned candidate, has rejected the application to leave for filing the election petition. Thereafter, second attempt was made by respondent no.2 on 01.07.2023, however, again permission has not been granted for want of presence of the petitioner and, ultimately, vide order impugned dated 03.07.2023, election petition was admitted and ordered to be registered.

11. Normally, as per law, suit is presented during the regular court hours and on the court working days. The exact time and procedure for presenting a suit may vary depending on the jurisdiction and the specific rules and practices of the court where the suit is being filed. For the purposes of filing of a suit during the vacation period, the provisions as enunciated under Rule 13 and 32 of the Rules, 1957 is required to be discussed, which are quoted herein below :-

"13. Work on holidays. Except with the consent of parties, no suit, case, or appeal shall be heard on a day declared holidays for the subordinate courts:

Provided that on a day declared holiday for the subordinate Courts, a court shall not refuse to do any act or make any order urgently required or which may with propriety be done or made out of Court.

32. Time for presenting applications.-Except as otherwise provided by these rules, applications and petitions which can be presented to the Munsarim of a Court shall be received on any day other than an authorized holiday between 10.30 a.m. and such hour as may be fixed by the Court; provided that an application or petition presented after such hour and before 4 p.m. may be received on the ground, if any, of limitation or other urgent reason. Presiding Officers when accepting plaints or applications after Court hours will note on such papers the time of their presentation."

12. Rule 32 denotes that applications and petitions/plaints shall be received by Munsarim of the court on any day other than an authorized holiday between 10:30 a.m. and such hours as may be fixed by the court. It further denotes that application or petition can be presented and received even after such hours and before 4:00 p.m. on the ground of limitation or other urgent reasons. However, the Presiding Officer has been entrusted duty to make a note on application or petition/plaint the timing of presentation, in case, he receives such documents after the prescribed hours. The phrase used in Rule 32 i.e. "except as otherwise provided by these rules" indicates the exceptional provision in Rules, 1957 wherein plaint/case/appeal can be presented even during authorized holiday. The provision as enunciated under Rule 13 of Rules, 1957 is an exception to Rule 32, which denotes that generally no suit, case or appeal shall be heard on the declared holiday for the subordinate court except with consent of parties, however, court shall not refuse to do any act or make any order urgently required or which may with propriety be done or made out of court.

13. Thus, it is evident that the petitioner has attempted to present the election petition within 30 days of declaration of election result, however, same has been got registered on 04.07.2023 in pursuance of the order impugned dated 03.07.2023. In support of her submissions, learned counsel for the petitioner has placed reliance on the Full Bench decision of this Court in the case of **Sumitra Devi vs. Special Judge/Additional District & Sessions Judge & Others** (Misc. Single No.9920 of 2018 decided on 12.06.2020). In the cited judgment, provisions to file election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 (in brevity **'Act, 1947'**) has been examined by the Full Bench of this Court with respect to the question referred before him, which are quoted herein below :-

"1. Whether presentation of an election petition by the election petitioner personally is a mandatory requirement in view of Sub-section 3 of Section 12 C(1) of the Act, 1947 and Rule 3(1) of the Rules, 1994 and whether it's non-compliance is fatal or it would merely be ari improper presentation, a curable defect?

2. Whether the decision of the Single Judge Bench of this Court in the case of Viresh Kumar Tiwari (supra) lays down the law correctly with regard to the question framed at serial no. 1 or it is the division Bench judgment in the case Lal Bahadur Singh (supra) and the subsequent Single Bench judgment in the case of Urmila (supra) which lay down the law correctly?"

14. Learned counsel for the petitioner further submits that provision of Section 12-C of the Act, 1947 is pari materia to the provisions of Section 20 of the Act, 1916, therefore, the ratio decided by the Full Bench shall be made applicable as well in the facts and circumstances of the present case. I am not swayed by this submission inasmuch as point of discussion in the instant writ petition is very limited, to wit, as to when election petition is trated to be "presented". Question referred in the cited case with regard to the method/procedure for filing an election petition is not much relevant to decide the instant writ petition, at this stage. However I would like to rely on Full Bench judgment to explain the phrase ''presentation''.

15. Section 20 of the Act, 1916 clearly denotes that election petition shall be presented within 30 days. Thus, the phrase ''presented'' employed under Section 20 of the Act, 1916 has got graver importance for the purposes of deciding the limitation under Section 20 the Act, 1916. At page 9 of the judgment in the case of Sumitra Devi (supra), the Full Bench of this Court has expounded as under :-

"However, the words "presented by any candidate' are significant. The word "presented' is derived from the word "present'. It conveys an act of presentation. One of the meaning assigned in the Chamber's dictionary (1993 Edition) to the word 'present', which appears apposite in the context of Section 12-C(3), is, to give, or furnish, specially formally or ceremonially; to deliver, convey or handover. Thus, the word 'presented' conveys an act of giving, filing or delivering, in the case of an election petition. The word "present' has been defined by the Oxford English Dictionary (Second Edition, 2014) to mean, the act of giving something to somebody especially at a formal ceremony."

16. Thus, it is explicit that presentation of the plaint (election petition) is completed at that very moment, while it

was given/produced/furnished/delivered before the authority competent in the manner as prescribed by the Act, 1916. It would not be out of place to mention that for the purposes of deciding the election petition, the procedure as provided in C.P.C. (Act V of 1998) has been made applicable by virtue of Section 23 of the Act, 1916 which denotes that except so far as may be otherwise provided by this Act or by Rule, the procedure provided in the C.P.C. in regard to suits, shall, so far as it is not inconsistent with this Act or any Rule and so far as it can be made applicable, be followed in the hearing of the election petitions. While applying the provisions of C.P.C., Section 23 of Act, 1916 denotes some provisos wherein certain provisions has been mentioned to be followed on certain events. To better explain the phrases viz "presentation", "admission" and "registration" of the suit, reference of Section 26 C.P.C. and Order IV C.P.C. would not be out of place. For ready reference, Section 26 C.P.C. and Order IV C.P.C. is quoted herein below :-

"Section 26. Institution of suits.-(1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

(2) In every plaint, facts shall be proved by affidavit.

Order IV

1. Suits to be commenced by plaint.—(1) Every suit shall be instituted by presenting a plaint [in duplicate] to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

2. **Register of suits.** The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted."

17. Section 26 C.P.C. denotes that by way of "presentation of a plaint" or in such other manner as may be prescribed, every suit shall be treated to be instituted. Likewise order IV C.P.C. denotes that "presenting a plaint" [in duplicate] to the court or such officer as it appoints in this behalf, shall be treated as institution of a suit. In the context of "election petition" filed in Act, 1916, "suit" and "institution" may have different connotation as envisages in C.P.C., however, section 20 of Act, 1916 unequivocally enunciates that "election petition shall be presented". Order IV C.P.C. can easily be explained in two parts. Rule 1 denotes about instituting the suit through presenting a plaint and Rule 2 denotes the admission/registration of suit. Mere presentation of the plaint does not amount its admission to register of the suit. After presenting the plaint, it is to be scrutinized by the Munsarim of the court, if there is any defect in submitting the plaint, the plaintiff is required to remove the defect which is a procedural part before registration, for the purposes of competence of the plaint to be entered in the register of the suits. It would not be befitting to discuss the remaining contents of Order IV C.P.C., which relates to competence of the suit, inasmuch as in the matter in hands only presentation of the plaint is to be considered for the purposes of reckoning the limitation. Rule 2 of Order IV C.P.C. abundantly make it clear that after presenting the plaint there is a provision where court shall cause the particulars of every suit to be entered in a book to be kept

for the purposes and called the register of civil suit. Such entry shall be numbered in every year according to the order in which plaints are admitted. Thus, admission of the plaint and its registration as per satisfaction of the court concerned, subject to removal of defect, if any, is a distinct and subsequent event to the presentation of the plaint as enunciated under Rule 1 of Order IV C.P.C.

18. Having considered the provisions, as discussed above, in the given circumstances of the present case, it is evident that the election petition was filed/presented well within time on 09.06.23, to wit, within 30 days from the date of declaration of the result, however, the election petition could not be admitted and registered inasmuch as it was filed during the summer vacation and opposite party in the election petition (petitioner herein), who had filed caveat application, has not given his consent to entertain the aforesaid election petition as required under the provisions enunciated under Rule 13 of Rules, Rules,1957. As per Rule 13 of Rules, 1957, consent of the other party is mandatory for the purposes to entertain the suit/election petition during holidays/vacations. Thus, in absence of the consent, learned District Judge has not accorded leave for hearing the election petition. On the said date i.e. on 09.6.2023, learned Election Tribunal has deferred the hearing on admission for 02.7.2023. Having considered closing day on 02.7.2023, being Sunday, and the 01.07.2023 as a last day for the purposes of limitation, respondent no.2 has moved the miscellaneous application to prepone the hearing of election petition on admission, however, learned Election Tribunal has refused to accept the application for want of presence of the caveator (petitioner herein) and fixed 03.07.2023 as a day for hearing on admission. It is evident that respondent no. 2 has shown his bona fide conduct in taking sincere attempt to file/present the election petition well within prescribed period of limitation i.e. 30 days from the date of declaration of result. Under section 10 of the General Clauses Act, as cited by learned counsel for the petitioner, first opening day after vacation, in case limitation expires during vacation, shall be considered last day of limitation. Respondent no. 2 was fair enough in presenting plaint/election petition second time before the Election Tribunal on 01.07.2023 which was the first opening day just after summer vacations. The learned Election Tribunal, vide order dated 01.07.2023, has returned categorical finding that election petition will be registered after hearing defendant no.1 (petitioner herein).

19. Thus, the election petition could neither be admitted nor registered for want of hearing accorded to the returned candidate (petitioner herein). While passing the order impugned dated 03.07.2023, Election Tribunal has considered this aspect of the matter and returned definite finding that election petition was filed well within the prescribed period of limitation i.e. 30 days and there is no such case where election petition filed on behalf of the plaintiff has been returned to him, rather hearing on admission was deferred on 02.07.2023. It is further observed that, owing to this event, plaintiff has moved a miscellaneous application on 1.7.2023 to admit and register the election petition on the same day, however, admission and registration of the election petition has been deferred for want of presence of defendant no.1 (petitioner herein). Finding returned by learned Election Tribunal as mentioned above has not been refuted by petitioner in the instant writ petition. No specific plea has been taken by the petitioner that election

petition was never presented before the Election Tribunal on 9.6.2023 or 1.7.2023. Conversely, point of limitation as raised by counsel for the petitioner pales into insignificance in the light of the observation made by Election Tribunal, as mentioned above, in its order dated 03.07.2023. Learned Election Tribunal, in its order impugned, has tried as well to make out a difference between the filing and admission of the suit, as such, returned its finding that election petition was filed/presented within 30 days from the date of announcement of result, however, only admission of the election petition has been deferred which could be done even at later stage. Case law cited by the counsel for petitioner as mentioned above are not fully applicable in the instant matter. Facts and circumstances of all the cited cases are quite distinguishable in the given circumstances of the present case. All the judgments are relied upon by the learned counsel for the petitioner keeping in mind that delay was caused in filing the election petition after prescribed period of limitation. In the light of the facts, as discussed in preceding paragraphs, that no delay caused in presenting the election petition by respondent no.2 from the date of declaration of result, the cited case, placed reliance by the counsel for the petitioner, has got no relevance. Learned counsel for the petitioner has illegally assumed the condonation of delay allegedly caused in filing the election petition after prescribed period of limitation, whereas, no such event occur in the given circumstances of the present case wherein election petition has been filed/presented at belated stage or delay has indirectly been condoned by learned Election Tribunal. Conversely, learned Election Tribunal has returned categorical finding that election petition was filed on 9.6.2023 i.e. well within prescribed period of limitation. Thus, there was no occasion for respondent No. 2 to challenge the order dated 09.06.2023 and 01.07.2023 passed by election tribunals, whereby hearing of said election petition on admission was deferred. On the other hand, even assuming for the sake of argument, as advanced by learned counsel for the petitioner, that election petition was filed belated on 03.07.2023 and registered on 04.07.2023, respondent No. 2 (election petitioner) can't be punished for the act of court competent who has deferred the admission and registration of election petition presented within time, as discussed above.

20. So far as the second submission qua maintainability of the election petition on two grounds, as advanced by learned counsel for the petitioner, is concerned, I am of the considered view that it would not be befitting to address these points at this juncture inasmuch as same has to be raised at the first instance before the Election Tribunal. After hearing both the parties and appraising the evidence adduced by them, the Election Tribunal shall decide such points on its own merits. Directly entertaining the question qua non maintainability of the election petition, without being addressed on this point by the court at the first instance, would not be appropriate. The petitioner (returned candidate) has still an opportunity to raise these objections in his written statement, which can more appropriately be addressed by the Election Tribunal.

21. In this conspectus, as above, in my considered opinion, respondent no.2 has presented election petition well within the prescribed period of limitation as enunciated under section 20 of the Act, 1916. There is no apparent delay in filing the election petition to annul the same under section 22

of Act, 1916 which denotes that not complying the provisions under section 20 of the Act, 1916 would be resulted into rejection of election petition. Finding returned by learned Election Tribunal has not specifically been denied in the writ petition. Remaining point advanced by the learned counsel for the petitioner is still open to be raised before the Election Tribunal. There is no justifiable ground to entertain the instant writ petition and interfere in the order impugned dated 03.07.2023 passed by Learned District Judge (Election Tribunal), which is hereby affirmed. There is no illegality, perversity or irregularity in the order under challenge so as to warrant the indulgence of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. There is nothing on the record to demonstrate as to how the present petitioner is prejudiced, or if there is any likelihood of causing miscarriage of justice to the petitioner, owing to the order under challenge.

22. Resultantly, instant writ petition, being misconceived and devoid of merits, is **dismissed** with no order as to cost.

(2024) 5 ILRA 1224
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matter Under Article 227 No. 1073 of 2024

Satish Chandra Mishra ...Petitioner
Versus
Shri Gopal Mandir Virajman Thakur Ji Maharaj & Radha Ji ...Respondent

Counsel for the Petitioner:
Puneet Sahai Bisaria

Counsel for the Respondent:
Neera Yadav, Mayank Sinha

Civil Law – Provincial Small Causes Court Act, 1887 – Section 23 – Petitioner, a tenant in suit property, for his ejectment, Small Cause Suit has been instituted by respondent, who claimed to be Trust managing the affairs of Temple –Petitioner filed application u/s 23 for return of plaint, on the ground that there was serious title dispute between contesting respondent and Naresh Chandra Agarwal who claimed himself to be Shebait of Temple, instituted a regular suit seeking permanent prohibitory injunction – Application rejected – Revision filed, also dismissed – Impugned order – Held, where a party has instituted a suit for injunction would by itself not become a title dispute - Once Mr. Naresh Chandra Agarwal, applied for bail, himself admitted that he was not the Manager of Temple, no occasion for tenant to raise a title dispute as a third party – Petitioner, not raised any title dispute as to his status - How a tenant can non-suit the plaintiff in an eviction suit on the ground that someone has instituted a suit for injunction - If remotely some dispute is there, if accepted, tenant doesn't get a right to stay back in tenanted premises opposing the eviction suit. (Para 2, 3, 4, 15, 29)

Petition dismissed. (E-13)

List of Cases cited:

1. Mst. Bhagmani Devi Vs VIII A.D.J. and Anr., 2011 (9) ADJ 567

2. Gurmala & ors. Vs Mohd. Ishaq & ors, (2013) 99 ALR 624

3. M. Siddiq (dead) through Legal Representatives (Ram Janmabhumi Temple Case) Vs Mahant Suresh Das & ors, (2020) 1 SCC 1

4. Mohd. Noor & ors.Vs Mohd. Ibrahim & ors, (1994) 5 SCC 562

5. Budhu Mal Vs Mahabir Prasad & ors., (1988) 4 SCC 194

6. Pratap Singh Vs IXth Additional District Judge, Fatehpur & ors, 2000 (3) AWC 1995

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

1. Heard Sri Tarun Agrawal, learned counsel for the in the petitioner and Sri Ashish Kumar Singh, learned counsel for the respondent.

2. Petitioner before this Court is admittedly a tenant suit property and it is for his ejectment that Small Cause Suit No. 2 of 2018 has been instituted before the Judge, Small Causes, Pilibhit by the contesting respondent who claimed to be a Trust managing the affairs of the Temple namely Gopal Mandir Virajman Thakur Ji Maharaj and Radha Ji.

3. Upon suit being instituted, petitioner moved an application under Section 23 of the Provincial Small Causes Court Act, 1887 for return of the plaint on the ground that there was serious title dispute between the contesting plaintiff/ respondent and one Naresh Chandra Agarwal who claimed himself to be Shebait of the Temple and it was in that capacity that Mr. Agarwal had instituted a regular suit seeking permanent prohibitory injunction, being Original Suit No. 195 of 2017.

4. Upon the said application filed under Section 23 of the Act being rejected by the Judge, Small Causes vide order dated 14.12.2022, petitioner preferred a revision being No. 30 of 2023 which also came to be dismissed on 28.11.2023 and hence this petition.

5. The submission advanced by learned counsel for the petitioner is two fold:

i). There being a serious title dispute as to the management of the Temple in question between the contesting plaintiff/ respondent, a Trust and one Naresh Chandra Agarwal, who claimed to be a Shebait in a suit instituted by later for permanent prohibitory injunction, the plaint in eviction suit before the Judge, Small Causes Court Act was liable to be returned.

ii). Both the courts below have manifestly erred in failing to appreciate a fact that petitioner having been depositing the rent in an account managed by Naresh Chandra Agarwal, the petitioner was not liable to be treated as tenant of Trust to maintain a suit for eviction at its instance.

6. Learned counsel for the petitioner Sri Tarun Agrawal has relied upon a concurrent bench judgment of this Court in Mst. Bhagmani Devi v. VIII A.D.J. and Anr., 2011 (9) ADJ 567. He has also relied upon another judgment of this Court in the case of Gurmala & Ors v. Mohd. Ishaq & Ors, (2013) 99 ALR 624 and M. Siddiq (dead) through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das & Ors, (2020) 1 SCC 1.

7. Per contra, the argument advanced by learned counsel for the plaintiff/ respondent is that a suit for permanent prohibitory injunction may invite the court to incidentally go into the question of title but this suit by itself cannot become a declaratory suit to raise a dispute of title by the plaintiff claiming as Shebait.

8. It is argued that taking the plaint allegations of the injunction suit in its entirety, it is admitted to the alleged Shebait that a Trust got created with the registration of Trust Deed to manage the affairs of the Temple and unless and until a decree to

declare the Trust null and void in so far as management of temple is concerned, is prayed for, no title dispute prima facie can be said to have been raised.

9. Learned counsel for the contesting respondent has further argued that plaintiff of injunction suit namely Naresh Chandra Agarwal himself, upon being implicated in a criminal case for selling away properties of the Temple in collusion with the opposite party, as tenant of the temple, applied for bail, in which he denied himself to be Manager of Temple property and this fact having not been denied either in revision or before this Court, it does not lie in the mouth of the tenant to suggest that there was a serious title dispute to non-suit the plaintiff under Section 23 of the Act.

10. Having heard learned counsel for the respective parties and having perused the records, I find that core issue is as to whether the suit filed by Naresh Chandra Agarwal being O.S. NO. 195 of 2017 can be said to be a title suit as against the plaintiff/ respondent, to non-suit him by the tenant in a SCC suit.

11. It is true that germane to the concept of title is a legal right to manage and dispose of the property which also entails a right to hold possession.

12. Looking to the entire plant allegations of O.S. No. 195 of 2017, it transpires that the father of Naresh Chandra Agarwal was claimed to be the Manager of Temple property and upon his death on 01.08.2000, it was the Naresh Chandra Agarwal who had been connected with the affairs of Temple. Certain details of the property have been given in paras 10 and 11 and the names of tenants have also been given and he claimed his right to receive rent from the tenants. In para 13 of the plaint Naresh Chandra Agarwal claimed that Ganesh Prasad Mishra was the Pujari of the Temple and in that connection he was allotted rooms on the campus of the temple and his son Durga Prasad and Chhote Lal were residing with him and later on Durga Prasad started residing in a Ayurvedic College and after the death of Ganesh Prasad Mishra, the then Manager Sohan Lal was managing the affairs of the Temple. He stated that Chhote Lal was carrying Pooja Archana activities upon the guidance and dictates of his father Lala Chaturbhuj. It was the second son of Chhote Lal Mishra namely Dinesh Chandra Mishra who used to assist his father in Pooja Archana and when Chhote Lal died in 1992 then Durga Prasad Mishra started doing Pooja and Archana and after retirement from the service of the bank that he lodged some first information report against Naresh Chandra Agarwal in 2017 and created a Trust Deed and was interfering with the Pooja and Archana of the plaintiff and hence he instituted suit for injunction.

13. The entire pleadings as have been raised in the suit seeking permanent prohibitory injunction while the Trust Deed has been questioned but that has not been challenged. Still further the pleadings do not in any manner disclose that plaintiff of the suit Naresh Chandra Agarwal was carrying out any Pooja and Archana worship etc. or managing the affairs exclusively to be a Shebait. All that he claimed that father of Dinesh Chandra Mishra was doing the management of the Temple under the guidance and dictates of his father Lala Chaturbhuj and it is after the death of Chhote Lal Mishra, Dinesh Chandra Mishra was managing the affairs.

14. Thus, nowhere any claim of Shebait has been set up in the entire plaint allegations

except the plea that his father was managing the Temple and so he would be entitled to manage the Temple. This showed that he wanted a declaratory decree in his favour but conspicuously did not seek any relief of that nature in the plaint.

15. Thus, in my considered view, merely because there were some pleadings raised tracing rights from his father, Naresh Chandra Agarwal cannot be said to have set up a serious title claim. A suit for injunction is maintainable when there is a prima facie title and possession both are claimed at the same time. Further, I find that the trial court has returned finding to the effect that while applying for bail in a criminal case which has also been referred to in injunction suit, Naresh Chandra Agarwal made a plea that he was not the Manager of the Temple property.

16. This finding which has been returned by the trial Judge has been affirmed in revision and there is no whisper in the entire petition that this finding is perverse. The trial court as well as the District Judge sitting in revision in my considered view have rightly returned a finding that a mere allegation by a tenant that he has been paying rent to the Temple of which the Manager was Naresh Chandra Agarwal only and who had also instituted a suit for permanent prohibitory injunction, would not entitle him to non-suit the plaintiff in an eviction suit.

17. The judgment in the case of Mst. Bhagmani Devi (supra) is distinguishable on facts where the Court had framed issue whether there existed any relationship of landlord-tenant between the parties and it was upon the issue no. 1 that court doubted the title as admittedly the Maharaj of Banaras was managing the affairs of temple and the question arose as to whether property belonged to Deity or in the name of Maharaja Banaras as a custodian, whereas, in the present case as per the own admission in the plaint and looking to the entire plaint allegations in the injunction suit, Naresh Chandra Agarwal could not claim that he was managing the affairs of the Temple.

18. Similarly, the judgment in the case of Gurmala & Ors (supra) is also distinguishable on facts as in that case the property was sold out by real owners and the question arose as to in whose share the shop fell. The rent suit filed by respondent nos. 1 and 3 for ejectment was dismissed holding that there was no landlord-tenant relationship. There is no such issue involved in the present case as petitioner is admittedly tenant of the Deity.

19. The principle of law as discussed in paragraph no. 54 of the judgment is not questionable but whether it applies in the present case or not, is to be seen.

20. Looking to the facts of the present case, I do not see that there is any serious dispute of title so as to non-suit the plaintiff in this eviction suit.

21. In so far as the judgment in the case of Mohd. Noor & Ors v. Mohd. Ibrahim & Ors, (1994) 5 SCC 562 where the Court considered the question of transfer of ownership and transfer of interest in the property, is concerned, I do not see any such question to be arising in the present case unless and until the plaintiff Naresh Chandra Agarwal in his suit questiones the Trust Deed also and so declaratory decree to hold it null and void. Such issue not being in germane, more especially in view of the pleadings raised in the plaint, I do not see this judgment to be helping out in in any

manner to the present petitioner to succeed in getting the plaint returned.

22. Coming to the judgment in the case of Ram Janmabhumi Temple (supra) cited by learned counsel for the petitioner as he has relied upon paragraph nos. 425, 430, 434, 435, 436, 437 and 438, the argument advanced was that the role of Shebait is different from the role of Pujari (worshiper) and Hindu idol being a juristic person, the entire endowed property vested in the idol and Shebait being the Manager of the Temple, would be a person who has a right to sue on behalf of Hindu idol. Thus, it was sought to be contended that Naresh Chandra Agarwal having instituted a suit to set up a title as a Shebait of the Temple, there arose a serious dispute as to the title to manage the affairs of the Temple inter se Shebait and Trust. He submitted that any suit, therefore, on behalf of Temple, if was to be brought by Shebait, herein this case, it would have been by Naresh Chandra Agarwal and so the present suit for eviction before small cause court by Trust was certainly not maintainable.

23. In order to appreciate the aforesaid argument, relevant paragraphs are reproduced hereunder:

"425. Courts recognise a Hindu idol as the material embodiment of a testator's pious purpose. Juristic personality can also be conferred on a Swayambhu deity which is a self-manifestation in nature. An idol is a juristic person in which title to the endowed property vests. The idol does not enjoy possession of the property in the same manner as do natural persons. The property vests in the idol only in an ideal sense. The idol must act through some human agency which will manage its properties, arrange for the performance of ceremonies associated with worship and take steps to protect the endowment, inter alia by bringing proceedings on behalf of the idol. The shebait is the human person who discharges this role.

430. The position of a shebait in Hindu law is distinct from the position of a trustee in English Law. Before the Privy Council in Vidya Varuthi Thirtha v. Balusami Ayyar [Vidya Varuthi Thirtha v. Balusami Ayyar, 1921 SCC OnLine PC 58 : (1920-21) 48 IA 302 : AIR 1922 PC 123] the question was whether the terms "conveyed in trust" and "trustee" as they appear in Article 134 of the Limitation Act, 1908 apply to properties endowed to the Mahant of a Hindu mutt. The Privy Council rejected the contention that persons managing endowed properties are in the position of trustees under English Law. Ameer Ali, J. held : (SCC OnLine PC)

"It is also to be remembered that a "trust" in the sense in which the expression is used in English Law, is unknown in the Hindu system, pure and simple.? Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind.? Religious institutions, known under different names, and regarded as possessing the same "juristic. capacity, and gifts are made to them eo nomine ? When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol of the institution. ? In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties vesting on him, he is answerable as a trustee in the general sense, for maladministration. ?

? it would follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in English law.

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? Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a shebait or a mutavalli in the case of a dedication. Nor is any property vested in him, whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage."

(emphasis supplied)

434. In addition to the duties that must be discharged in relation to the debutter property, a shebait may have an interest in the usufruct of the debutter property. In this view, shebaitship is not an office simpliciter, but is also property for the purposes of devolution. [Approved by the Privy Council in Ganesh Chunder Dhur v. Lal Behary Dhur, 1936 SCC OnLine PC 53 : (1935-36) 63 IA 448 and Bhabatarini Debi v. Ashalata Debi, 1943 SCC OnLine PC 1 : (1942-43) 70 IA 57.] This view has been affirmed by this Court in Angurbala Mullick v. Debabrata Mullick [Angurbala Mullick v. Debabrata Mullick, 1951 SCC 420 : 1951 SCR 1125 : AIR 1951 SC 293] . The controversy in that case was whether the appellant, as the widow of the shebait, was entitled to act as the shebait of the idol instead of the minor son of the shebait born from his first marriage who was the respondent. It was contended that the office of shebaitship would devolve in accordance with the Hindu Women's Right to Property Act, 1937. B.K. Mukherjea, J. speaking for a four-Judge Bench of this Court accepted this contention and held : (Angurbala Mullick case [Angurbala Mullick v. Debabrata Mullick, 1951 SCC 420 : 1951 SCR 1125 : AIR 1951 SC 293] , AIR p. 296, para 11)

"11. ? But though a shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the shebaitship as a mere office. The shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property."

The Court held that a shebait has a beneficial interest in the usufruct of the debutter property. This beneficial interest is in the form of a proprietary right. Though the role of the shebait is premised on the performance of certain duties for the idol and the benefits are appurtenant, neither can be separated from the other. Thus, office and property are both blended in shebaitship, the personal interest of a shebait being appurtenant to their duties. [Affirmed in Badri Nath v. Punna, (1979) 3 SCC 71;

Profulla Chorone Requitte v. Satya Chorone Requitte, (1979) 3 SCC 409.]

Pujaris

435. A final point may be made with respect to shebaits. A pujari who conducts worship at a temple is not merely, by offering worship to the idol, elevated to the status of a shebait. A pujari is a servant or appointee of a shebait and gains no independent right as a shebait despite having conducted the ceremonies for a long period of time. Thus, the mere presence of pujaris does not vest in them any right to be shebaits. In Gauri Shankar v. Ambika Dutt [Gauri Shankar v. Ambika Dutt, 1948 SCC OnLine Pat 28 : AIR 1954 Pat 196] , the plaintiff was the descendant of a person appointed as a pujari on property dedicated for the worship of an idol. A suit was instituted for claiming partition of the right to worship in the temple and a division of the offerings. A Division Bench of the Patna High Court held that the relevant question is whether the debutter appointed the pujari as a shebait. Ramaswami, J. held : (SCC OnLine Pat para 7)

"7. ? It is important to state that a pujari or archak is not a shebait. A pujari is appointed by the Shebait as the purohit to conduct the worship. But that does not transfer the rights and obligations of the Shebait to the purohit. He is not entitled to be continued as a matter of right in his office as pujari. He is merely a servant appointed by the Shebait for the performance of ceremonies. Where the appointment of a purohit has been at the will of the founder the mere fact that the appointees have performed the worship for several generations, will not confer an independent right upon the members of the family so appointed and will not entitle them as of right to be continued in office as priest."

436. A shebait is vested with the authority to manage the properties of the deity and ensure the fulfilment of the purpose for which the property was dedicated. As a necessary adjunct of this managerial role, a shebait may hire pujaris for the performance of worship. This does not confer upon the appointed pujaris the status of a shebait. As appointees of the shebait, they are liable to be removed from office and cannot claim a right to continue in office. The distinction between a shebait and a pujari was recognised by this Court in Sree Sree Kalimata Thakurani of Kalighat v. Jibandhan Mukherjee [Sree Sree Kalimata Thakurani of Kalighat v. Jibandhan Mukherjee, AIR 1962 SC 1329] . A suit was instituted under Section 92 of the Code of Civil Procedure, 1908 for the framing of a scheme for the proper management of the seva-puja of the Sree Sree Kali Mata Thakurani and her associated deities. A Constitution Bench of this Court, speaking through J.R. Mudholkar, J. held : (AIR p. 1333, para 10)

"10. ? It is wrong to call shebaits mere pujaris or archakas. A shebait as has been pointed out by Mukherjea, J. (as he then was), in his Tagore Law Lectures on Hindu Law of Religious and Charitable Trusts, is a human ministrant of the deity while a pujari is appointed by the founder or the shebait to conduct worship. Pujari thus is a servant of the shebait. Shebaitship is not mere office, it is property as well."

437. A pujari is appointed by the founder or by a shebait to conduct worship. This appointment does not confer upon the pujari the status of a shebait. They are liable to be removed for any act of mismanagement or indiscipline which is inconsistent with the performance of their duties. Further, where the appointment of a pujari has been at the

will of the testator, the fact that appointees have performed the worship for several generations does not confer an independent right upon the appointee or members of their family and will not entitle them as of right to be continued in office as priests. Nor does the mere performance of the work of a pujari in and of itself render a person a shebait.

438. The position of a shebait is a substantive position in law that confers upon the person the exclusive right to manage the properties of the idol to the exclusion of all others. In addition to the exclusive right to manage an idol's properties, the shebait has a right to institute proceedings on behalf of the idol. Whether the right to sue on behalf of the idol can be exercised only by the shebait (in a situation where there is a shebait) or can also be exercised by the idol through a "next friend" has been the subject of controversy in the proceedings before us. The plaintiff in Suit No. 3, Nirmohi Akhara contends that the Nirmohis are the shebaits of the idols of Lord Ram at the disputed site. Mr S.K. Jain, learned Senior Counsel appearing on behalf of Nirmohi Akhara, urged that absent any allegation of maladministration or misdemeanour in the averments in the plaint in Suit No. 5, Devki Nandan Agarwal could not have maintained a suit on behalf of the idols as a next friend. Mr Jain placed significant reliance on the contention that the plaint in Suit No. 5 does not aver any mismanagement by the Nirmohis. Mr S.K. Jain urged that though the plaintiffs in Suit No. 5 (which was instituted in 1989) were aware of Suit No. 3 which was instituted by Nirmohi Akhara (in 1959) claiming as a shebait, the plaint in Suit No. 5 does not challenge the position of Nirmohi Akhara as a shebait. Consequently, Nirmohi Akhara urged that a suit by a next friend on behalf of the idol is not maintainable." (Emphasis added)

24. Having gone through the aforesaid paragraphs of the judgment of Ram Janmbhumi case, I find that a distinction is sought to be drawn between Shebait and the Trust and so long as Shebait manages the Temple property, the right to sue vests with him to the exclusion of any person's right to sue on behalf of Temple. Distinction is also sought to be drawn between the Trust as defined in English law and role of Trustee distinguishable than a Mahant managing Hindu Math to whom property is endowed.

25. In a nut shell the Hindu Idol becomes the owner of the entire endowed property and a Shebait or a Trust becomes custodian thereof to the extent of management with certain portion of it for the Shbait to survive as Manager of the property but this certainly will not be for a Trustee in case of Trust. A worshiper/ pujari has been defined with a status of a servant to be appointed by Shebait and does not enjoy any right independent of a Shebait.

26. Applying the above exposition of law as discussed and laid down in Ram Janmabhumi case to the facts of the present case, looking to the pleadings raised in injunction suit as discussed in earlier part of this judgment, I do not see Mr. Naresh Chandra Agarwal to be having a status of a Shebait to raise serious dispute of title.

27. The law is well settled that Section 23 of the Small Cause Courts Act is not a provision that makes obligatory for Small Cause Courts to invariably return the plaint once a question of title is raised by a tenant. The principle is that even the Small Cause Court can incidentally go into the title. In Budhu Mal v. Mahabir Prasad and others, (1988) 4 SCC 194 vide para 10 the Court observed thus:

"10. It is true that Section 23 does not make it obligatory on the court of small causes to invariably return the plaint once a question of title is raised by the tenant. It is also PG NO 243 true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be res judicata in a suit based on title. It cannot, however, be gainsaid that in enacting Section 23 the Legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties. ..... If the suits cannot be construed to be one between landlord and tenant they would not be cognizable by a court of small causes and it is for these reasons that we are of the opinion that these are such cases where the plaints ought to have been returned for presentation to appropriate court so that none of the parties was prejudiced." (Emphasis added)

28. In this regard it is also necessary to refer to the judgment of this Court in the case of Pratap Singh v. IXth Additional District Judge, Fatehpur and Ors, 2000 (3) AWC 1995 in which vide paragraph nos. 6 & 7 of the judgment it has been held thus:

"6. A Small Causes Court is expected to try suits of a comparatively simple character and, therefore, suits involving question of title should not be entertained by that Court. Section 23 is intended to enable the Courts of Small Causes to save their time by returning the plaints in suits which involve enquiry into the question of title. This section is designed to meet the cases in which Judge, Small Causes Court is satisfied that the question of title raised is so intricate and difficult that it should not be decided summarily but in ordinary Court in which evidence is recorded in full and the decision is open to appeal. The underlying principle under Section 23 seems to be that where it is considered advisable by a Small Causes Court that a final decision on a question of title, which decision would. if given by an original Court. ordinarily be subject to appeal and even to second appeal and which decision would ordinarily be res judicata between the parties, should be given in the particular case before a Small Causes Court, by an original Court, the Small Causes Court though competent to decide incidentally the question of title in that particular case might exercise with discretion. the power of returning the plaint to be presented to the original Court which would have jurisdiction to so decide on that title finally. Obviously, the section is designed to meet the cases in which the Judge. Small Causes Court is satisfied that the question of title raised is so intricate and difficult that it should not be decided summarily but in an ordinary Court in which evidence is recorded in full and decision is open to appeal.

7. Section 23 is framed in optional terms giving discretion to the Court to act in the matter or not. and therefore, in suits involving question of title, the Small Causes Court has a discretion either to decide the question of title or to act under this section and return the plaint. It is not always bound to return the same. Nevertheless, when any complicated question of title arises. it would be the wiser course for Small Causes Court in the exercise of its discretion to act under Section 23 and return the plaint."

(Emphasis added)

29. In view of the above, a mere reference of a case where a party has just instituted a suit for injunction would by itself not become a title dispute. The Small Cause Court shall

have to apply its mind to the facts pleaded in the case. Once Mr. Naresh Chandra Agarwal, in a judicial proceeding while applying for bail, himself admitted that he was not in any manner the Manager of the Temple, there was no occasion for a tenant to raise a title dispute as a third party, to non-suit the plaintiff in SCC case. The defendant/ petitioner admittedly is a tenant and he has not raised any title dispute as to his status. Therefore, it becomes a question how a tenant can non-suit the plaintiff in an eviction suit on the ground that someone has instituted a suit for injunction. Even if remotely some dispute is there, if accepted for argument sake, the tenant does not get a right to stay back in the tenanted premises opposing the eviction suit.

30. In view of the above, I do not see any error apparent on the face of record or any such manifest error otherwise committed by the trial court and the court sitting in revision in dismissing the application under Section 23 of Small Cause Court Act which may warrant interference in my supervisory and superintending jurisdiction under Article 227 of the Constitution.

31. Petition fails and is accordingly dismissed.

(2024) 5 ILRA 1233
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 1834 of 2024

M/S Amit Engg. Mainpuri ...Petitioner
Versus
Superintending Engineer, Lko. ...Respondent

Counsel for the Petitioner:
Puneet Sahai Bisaria

Counsel for the Respondent:
Neera Yadav, Mayank Sinha

Civil Law - Arbitration and Conciliation Act, 1996 – Sections 2(e), 11(6), 11(6-B), 20, 34 & 42 - Petitioner entered into contract with respondent for construction of independent feeders on turnkey basis within stipulated time - Disputes arose between them, petitioner filed application u/s 11 before High Court at Allahabad, allowed and Arbitrator appointed – Award was declared, direction to respondent to pay to petitioner a sum of Rs.1,20,43,129.00 along with interest at the rate of 8% p/a from 06.07.2020 till the date of award, also rate of interest was 10% p/a from date of award - Respondent challenged award before Commercial Court, Lucknow – Objection by petitioner on territorial jurisdiction – Rejected - Impugned order – Held, the Arbitrator appointed by High Court at Allahabad is residing at Aligarh, on first hearing, the Arbitrator mentioned that till any suitable arrangement is made, the venue of arbitral proceeding will be at Aligarh - Neither parties had agreed for seat/venue on the arbitration, nor had Arbitrator passed order to this effect - Filing of application u/s 11 at Allahabad would not create a bar u/s 42 against the exercise of jurisdiction by Commercial Court – No illegality, dismissed. (Para 3, 6, 8, 9, 10, 32)

Petition dismissed. (E-13)

List of Cases cited:

1. Inox Renewables Ltd. Vs Jayesh Electricals Ltd., (2023) 3 SCC 733

2. BBR (India) (P) Ltd. Vs S.P. Singla Constructions (P) Ltd., (2023) 1 SCC 693

3. Zapdor-Ubc-Abnjv Vs U.O.I., 2022 SCC OnLine All 594

4. Emkay Global Financial Services Ltd. Vs Girdhar Sondhi, (2018) 9 SCC 49

5. Indus Mobile Distribution (P) Ltd. Vs Datawind Innovations (P) Ltd., (2017) 7 SCC 678

6. BGS SGS Soma JV Vs NHPC Ltd., (2020) 4 SCC 234

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

1. Heard Sri K. K. Arora Advocate, the learned counsel for the petitioner and Sri Mayank Sinha Advocate, the learned counsel for the respondent.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of an order dated 07.03.2024 passed by the Commercial Court No. 2, Lucknow in Arbitration Case No. 126 of 2023, under Section 34 of the Arbitration and Conciliation Act, 1996 (which will hereinafter be referred to as 'the Act').

3. Briefly stated, facts of the case are that the petitioner had entered into a contract with the respondent for construction of 33 KV independent feeders emanating from 132 KV primary sub-station Amawan (Raebareli), 220 KV primary substation Sonik (Unnao) and 33/04 KV substation at District Courts Raebareli/Unnao on turnkey basis within stipulated time in compliance of order passed by Hon'ble High Court, U.P. on 29.06.2019.

4. Clause 16 of the General Requirements of Specification mentioned in the contract entered between the parties provides as follows: -

"16.0- JUDICIAL JURISDICTION:

All the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only."

5. Clause 38(A) of the General Conditions for the supply of plant and the execution of works in connection with schemes in Uttar Pradesh Power Corporation Limited (UPPCL) provides that *"any action taken or proceedings initiated on any of the term of this agreement shall be only in the court of competent jurisdiction under the high court of judicature at Allahabad..."*

6. Certain disputes arose between the parties, which led to the petitioner filing an application under Section 11 of the Act before this Court sitting at Allahabad, which was allowed and Justice Ifaqat Ali Khan, a former Judge of this Court was appointed as the sole Arbitrator for adjudicating upon the disputes between the parties.

7. The learned Arbitrator has held the first sitting of the arbitration proceedings on 30.08.2022 at his residence at Aligarh. The Rules of procedure and other incidental matters were decided on the first date and it was recorded in the aforesaid order that: -

"it is also made clear that till any other suitable arrangement is made, the venue of the arbitral proceeding will be as follows:

"4/4 H1 Aftab Apartment Opposite Ek Minar wali Masjid, Qila Road, Shamshad Market, Civil Lines, Aligarh (U.P.)-202001"

8. It appears that no further suitable arrangement could be made and the arbitration proceedings continued to be held at the aforesaid place and ultimately an award was declared on 26.08.2023 directing the respondent to pay to the petitioner a sum

of Rs.1,20,43,129.00 alongwith interest at the rate of 8% per annum from 06.07.2020 till the date of the award and the rate of interest will be 10% per annum from the date of award.

9. The respondent filed an application under Section 34 of the Act challenging the aforesaid award before the Commercial Court no. 2, Lucknow, which application has been registered as Arbitration Case No. 126 of 2023.

10. The petitioner filed an application (C-12) raising a preliminary objection regarding the territorial jurisdiction of the Commercial Court at Lucknow, stating that the entire arbitration proceedings took place at Aligarh without any protest of the respondent and the arbitration award was also passed at Aligarh, which falls within the territorial jurisdiction of this Court sitting at Allahabad. Therefore, the Courts sitting at Lucknow have no jurisdiction to entertain the application under Section 34 of the Arbitration Act.

11. The respondent filed objection against the aforesaid application *inter alia* stating that as per Clause 16.0 and 38(A) of the Contract referred to above and also keeping in view the fact that the contract was signed at Lucknow, the contract was for certain works to be carried out in the District Courts at Unnao and Raebareli and the respondent is situated at Lucknow, the Courts at Lucknow have jurisdiction to entertain the application under Section 34 of the Act. The Courts at Aligarh will have no jurisdiction in the matter merely because the Arbitrator held sittings at Aligarh, as per his convenience.

12. The Commercial Court rejected the petitioner's preliminary objection by means of the impugned order dated 07.03.2024 and held that a combined reading of Clause 16 and 38(A) of the Contract makes it clear that all the disputes arising out of and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts at Lucknow. The mere fact that arbitration proceedings took place at Aligarh cannot oust the jurisdiction of the Commercial Court at Lucknow.

13. Assailing the validity of the impugned order, the learned counsel for the petitioner has submitted that in the present case, the seat and venue of the arbitration was at Aligarh and the award was also passed at Aligarh and, therefore, the Courts at Aligarh only will have jurisdiction to entertain the application under Section 34 of the Act.

14. In support of his contention, the Learned counsel for the petitioner has placed reliance on the decisions of Hon'ble Supreme Court in the cases of **Inox Renewables Ltd. v. Jayesh Electricals Ltd.,** (2023) 3 SCC 733, **BBR (India) (P) Ltd. v. S.P. Singla Constructions (P) Ltd**., (2023) 1 SCC 693 and judgment rendered by a coordinate Bench of this Court in **Zapdor-Ubc-Abnjv v. Union of India**, 2022 SCC OnLine All 594.

15. Per contra, Sri Mayank Sinha, learned counsel for the respondent has relied upon the judgment of Hon'ble Supreme Court rendered in the case of **Emkay Global Financial Services Ltd. v. Girdhar Sondhi**, (2018) 9 SCC 49, in which it was held whether more than one courts have jurisdiction to decide the dispute and the parties have entered into an agreement to the effect that any dispute will be referred to the courts at a particular place, the courts at that

place alone will have jurisdiction over the matter.

16. I have heard learned counsel for the parties and gone through the record. It will be appropriate to look at the relevant statutory provisions, before proceeding to decide the matter.

17. The relevant part of Section 34(1) and 34(2)(a) of the Act provides as follows: -

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

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

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or

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

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

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

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

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

(b)…"

18. Section 20 of the Act provides that: -

"20. Place of arbitration*.—(1) The parties are free to agree on the place of arbitration. (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.*

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

19. The parties had entered into an agreement providing that *"all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only."* The agreement further provides that any action taken or proceeding initiated in terms of this agreement, shall be only in the court of competent jurisdiction under the High Court of Judicature at Allahabad.

20. In **Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd**., (2017) 7 SCC 678 the Hon'ble Supreme Court held that: -

"9…We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, ***the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place."***

(Emphasis added)

21. The Hon'ble Supreme Court has clearly held in **Indus Mobile Distribution (P) Ltd**. (Supra) that the Court at the place where the cause of action is located, will also have jurisdiction over the matter.

22. **Indus Mobile Distribution (P) Ltd. (Supra)** has been followed in **Emkay Global Financial Services Ltd. v. Girdhar Sondhi,** (2018) 9 SCC 49, wherein it has been held that where the agreement between the parties provided that the courts in Mumbai have exclusive jurisdiction, it is clear that it is the Mumbai courts and the Mumbai courts alone, before which a Section 34 application can be filed. The arbitration that was conducted at Delhi was only at a convenient venue.

23. In **Inox Renewables Ltd**. (Supra) relied by the learned Counsel for the petitioner, a purchase order dated 28-1-2012 was entered into between M/s Gujarat Fluorochemicals Ltd. and the respondent Jayesh for manufacture and supply of power transformers to wind farms. The arbitration clause contained in the purchase order provided that the venue of the arbitration shall be Jaipur. In the event of arbitrators' award being not acceptable to either party, the parties shall be free to seek lawful remedies under the law of India and the jurisdiction for the same shall be courts in the State of Rajasthan. Pursuant thereto, the learned arbitrator passed an award dated 28.07.2018, in which it was inter alia stated that *"as per arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific clause as to the venue of the arbitration would be at Ahmedabad and not at Jaipur"*. A Section 34 petition was filed by the appellant in Ahmedabad which was resisted by the respondent referring to the business transfer agreement and stating that the courts at Vadodara alone have jurisdiction.

24. The Hon'ble Supreme Court held in **Inox Renewables Ltd.** (Supra) that the parties had specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad by mutual agreement. The parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement which is recorded by the arbitrator in his award to which no challenge is made by either party.

25. The judgment in **Inox Renewables Ltd.** (Supra) was given in the

peculiar factual background of that case and is not applicable to the facts of the present case, where the parties have entered into an agreement that the Courts at Lucknow only will have jurisdiction in the matter and there was no agreement shifting the seat or venue of the arbitration. The arbitrator had held sittings at his residence at Aligarh as an Ad-hoc arrangement till some other suitable arrangement was made.

26. In **BBR (India) (P) Ltd**. (Supra) relied by the learned Counsel for the petitioner, the issue before the Hon'ble Supreme Court was "Whether conducting the arbitration proceedings at Delhi, owing to the appointment of a new arbitrator, would shift the "jurisdictional seat of arbitration" from Panchkula in Haryana, the place fixed by the first arbitrator for the arbitration proceedings?" The arbitration clause was silent and did not stipulate the seat or venue of arbitration. The contract and letter of intent were executed at Panchkula in Haryana. The corporate office of the respondent is also located at Panchkula. As disputes arose between the parties, the matter was referred to arbitration, and Mr Justice (Retd.) N.C. Jain was appointed as the sole arbitrator and he held that the venue of the proceedings would be H. No. 292, Sector-6, Panchkula, Haryana. Neither party had objected to the place of arbitration proceedings as fixed by the Arbitral Tribunal. Subsequently Mr Justice (Retd.) N.C. Jain recused himself from continuing as the arbitrator. Thereupon, Mr Justice (Retd.) T.S. Doabia took over as the sole arbitrator. The first procedural order dated 30.06.2015 stated that the venue of the proceedings would be Delhi. Thereafter, hearings were held and the award was signed and pronounced at Delhi on 29.01.2016. Thereafter, two proceedings were initiated. The respondent filed an application Section 9 of the Act before the Additional District Judge, Panchkula, on 07.05.2016. The appellant filed a petition under Section 34 of the Act before the Delhi High Court on 28.04.2016. The petition filed by the respondent under Section 9 of the Act at Panchkula, was dismissed on the ground of lack of territorial jurisdiction vide order dated 14.12.2016, recording that the jurisdiction to entertain the application vests solely with the Delhi High Court, where a prior petition under Section 34 had been filed, and was pending. The petition under Section 9, being a subsequent petition, would be barred under Section 42 of the Act. This order was set aside by the High Court of Punjab and Haryana vide order dated 14.10.2019.

27. The Hon'ble Supreme Court held in **BBR (India) (P) Ltd**. (Supra) that subsequent hearing of the proceedings at different location other than the place fixed by the arbitrator as 'seat of arbitration should not be regarded and treated as a change for relocation of the jurisdictional seat.' The seat once fixed by the arbitral tribunal under Section 20(2) should remain static and fixed, whereas the venue of arbitration can change and move from the seat to a new location. Venue is not constant and stationary and can move and change in terms of sub Section (3) to Section 20 of the Act. Change of venue does not result in change of relocation of the seat of arbitration.

`28. In **BBR (India) (P) Ltd.** (Supra) also, the agreement between the parties did not provide that the Courts at any particular place will have jurisdiction whereas the position is otherwise in the present matter. Hence, **BBR (India) (P) Ltd.** (Supra) is not relevant for decision of the present case.

29. The learned counsel for the petitioner has also relied upon a judgment rendered by a Co-ordinate Bench of this Court in **Zapdor-Ubc-Abnjv v. Union of India**, 2022 SCC OnLine All 594, in which the petitioner had invoked the Arbitration clause and an Arbitral Tribunal comprising of three officers of the Railways conducted the arbitral proceedings and they signed and delivered an Award at New Delhi. The respondent filed an Application under Section 34 of the Act before the Commercial Court at Lucknow along with an Application for Condonation of Delay. Subsequently the Petitioner preferred an Execution Application under Section 36 of the 1996 Act before the High Court at Delhi. This Court had framed the following four issues to be decided in the case: -

"a) Whether this petition under Article 227 is maintainable?

b) Whether Cause of Action or subject matter of the Suit would determine the Court which could exercise supervisory jurisdiction to decide the Section 34 petition?

c) Whether it would be the 'Venue' or the 'Seat' of Arbitral proceedings which would determine the Court which can exercise supervisory jurisdiction over the Arbitral proceedings?

d) Whether in the absence of a specific mention in the contract agreement regarding 'Seat' of Arbitration, the conduct of parties would determine the 'Seat' and therefore act as an exclusionary clause for Courts at all other places to exercise supervisory control over the Arbitral proceedings?"

30. Relying on **BGS SGS Soma JV v. NHPC Ltd**., (2020) 4 SCC 234, this Court held in Zapdor-Ubc-Abnjv (Supra) that a petition under Article 227 of the Constitution is maintainable against the order rejecting an application for return of Application under Section 34 of the Act of 1996. On issues no. b, c and d, this Court held that: -

"The contract being governed by the Tender Paper ELCORe, ***It was open for the parties, more specifically the Railways, to determine the place of arbitration by way of written agreement. Instead of any written agreement or conditions in the Contract or even in the correspondence between the parties, specifying the seat of arbitration, the Railways agreed to participate in the arbitration proceedings at New Delhi without any protest****. The Railways Hence can be said to have waived their right to object and by their conduct determined the venue of arbitration at New Delhi to be also the seat of the arbitration proceedings. Issues b, c, and d consequently are also decided in favour of the petitioner and it is held that failure to specifically mention a Seat of Arbitration and participation in Arbitration proceedings at New Delhi by the Railways without any protest shall be considered as determination of the Venue of arbitration as also the Seat, giving exclusive jurisdiction to the Courts at New Delhi to supervise the Arbitral proceedings including any attack on the Award."*

(Emphasis added)

31. In **Zapdor-Ubc-Abnjv** (Supra) the parties had not entered into any written agreement specifying the seat of arbitration and it appears that there was no agreement regarding restricting the jurisdiction to the Courts situated at any particular place, whereas in the present case, the contract between the parties provides that the Courts at Lucknow only will have jurisdiction over the matter.

32. The Arbitrator appointed by this Court sitting at Allahabad is residing at Aligarh and in the order passed on the first date of hearing, the Arbitrator has mentioned that till any suitable arrangement is made, the venue of the arbitral proceeding will be at Aligarh. Therefore, it is clear that neither the parties had agreed for the seat/venue on the arbitration, nor had Arbitrator passed any order to this effect. The Arbitrator had merely made an ad-hoc provision for venue of the arbitration till a suitable arrangement was made. Somehow, it so happened that suitable arrangement contemplated by the Arbitrator could never be made and the arbitration proceedings continued and concluded at Aligarh.

33. Section 20 of the Act provides that the parties are free to agree on the place of arbitration. The parties had agreed that *"all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only*, but they did not agree for the venue or the seat of arbitration proceedings. The Arbitrator also did not determine the place of arbitration and it merely passed an order making an Ad-hoc arrangement stating that till any suitable arrangement is made, the venue of the arbitral proceeding will be at Aligarh. This order for Ad-hoc arrangement will not amount to a determination of the place of arbitration and this Ad-hoc arrangement will not prevail upon the agreement of the parties regarding jurisdiction of the Courts at Lucknow only.

34. Although, Clause 16 of the contract between the parties provides that the dispute between the parties shall be subject to the jurisdiction of local courts at Lucknow Bench and High Court of Judicature at Allahabad, the petitioner filed an application under Section 11 of the Arbitration and Conciliation Act before this Court sitting at Allahabad. The learned counsel for the petitioner has submitted that the respondent has participated in those proceedings without raising any objection regarding jurisdiction of the Court and, therefore, all subsequent applications have to be filed within the territorial limits of this Court sitting at Allahabad in view the provision contained in Section 42 of the Act.

35. Section 42 of the Act provides as follows: -

***"42. Jurisdiction**.— Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*

36. The word "Court" used in Section 42 refers to the "Court" as defined under Section 2 (e) of the Act, which reads as follows: -

***"2. Definitions**.—(1) In this Part, unless the context otherwise requires—*

* * *

*(e) "**Court**" means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the*

subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;"

37. It would be appropriate to have a look at Section 11 (6) and (6-B) of the Act, which read as follows: -

"(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other *means for securing the appointment.*

*(6-A) * * **

(6-B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."

38. Appointment of Arbitrator under Section 11 of the Act is made by *"An arbitral institution designated by the High Court"* and not by a "Court" as defined in Section 2 (e) of the Act. It is further clarified by Section 11 (6-B) of the Act, which provides that designation of any person or institution by the High Court for the purposes of this section shall not be regarded as a delegation of judicial power by the High Court.

39. When the authority designated by the High Court to make appointment of Arbitration under Section 11 of the Act has not been delegated any judicial powers by the High Court, filing of any application under Section 11(6) of the Act before *'An arbitral institution designated by the High Court'* would not amount to filing any application under Part I of the Act in a Court. Therefore, the filing of an application under Section 11 at Allahabad would not create a bar under Section 42 of the Act against the exercise of jurisdiction by the Commercial Court at Lucknow.

40. **Indus Mobile Distribution (P) Ltd**. (Supra) lays down that the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place and **Emkay Global Financial Services Ltd.** (Supra) lays down that the Courts at a particular place have exclusive jurisdiction, an application under Section 34 of the Act can be filed before the Courts at the place alone. The arbitration that was conducted at Aligarh only for the same of convenience.

41. As in the present case, the agreement between the parties provides that *"all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only",* as per the law laid down by the Hon'ble Supreme Court in **Indus Mobile Distribution (P)**

Ltd. (Supra), **which** has been followed in **Emkay Global Financial Services Ltd.** (Supra), the Courts at Lucknow alone will have the jurisdiction to adjudicate upon an application under Section 34 of the Act and the respondent has rightly filed the application under Section 34 of the Act at Lucknow.

42. In view of the aforesaid discussion, I am of the considered view that there is no illegality in the impugned order dated 07.03.2024 passed by the Commercial Court No. 2, Lucknow in Arbitration Case No. 126 of 2023 rejecting the petitioner's objection regarding lack of territorial jurisdiction at Lucknow.

43. The petition lacks merits and is hereby ***dismissed.***

(2024) 5 ILRA 1242
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Matter Under Article 227 No. 2199 of 2023

M/S Devi Dayal Trust & Ors. ...Petitioners
Versus
M/S Rajhans Towers Pvt. Ltd. ...Respondent

Counsel for the Petitioners:
Sri Manish Goyal, Sr. Adv., Sri Nikhil Mishra

Counsel for the Respondent:
Sri Munna Pandey, Sri Harshit Pandey

Civil Law - Constitution of India,1950 - Article 227- Arbitration and Conciliation Act, 1996 - - Sections 11, 34 & 42 – Petitioner-Commercial Court's order holding lack of territorial jurisdiction to adjudicate application under Section 34 of the Act challenged- Section 42 of the Act- Once an application filed under Part I of the Act in a court- Subsequent applications pertaining to the same arbitral agreement to be made before the same court- Principle of jurisdictional exclusivity- ensures uniformity in adjudication of arbitral matters- Applications under Sections 8 and 11 are exception to the bar placed by Section 42- *Venue* cannot be exalted to the status of *seat*- Doctrine of *forum non conveniens* not applicable- Application under Section 34 to be filed before Gautam Buddh Nagar Court- Article 227 of the Constitution of India- High Court can set aside the order passed by Commercial Court- Petition allowed. (Paras 8, 10, 16, 17 and 20)

HELD:

Section 42 of the Act encapsulates the principle of jurisdictional exclusivity. It stipulates that once an application under Part 1 of the Act is made in a court with respect to an arbitration agreement, all subsequent applications under Part 1 of the Act will have to made before that court only. By vesting exclusive jurisdiction in a single court, Section 42 of the Act obviates the possibility of conflicting judgements and ensures uniformity in the adjudication of arbitral matters. (Para 8)

As such, the argument presented by the Respondents that since the application under Section 11 of the Act was made before the High Court of Delhi, all subsequent applications will have to be made before the High Court of Delhi, is devoid of any merit and is rejected. The rationale underlying this exception lies in the recognition of the distinctive nature of applications under Section 8 and Section 11 of the Act, which necessitate specialized adjudication and prompt intervention. Furthermore, since the arbitral clause between the parties, provides for only a venue and not a seat, it is not open for the respondent to argue that the venue in the instant case should be exalted to the status of seat. This is due to the bar placed by Section 42 of the Act, since an application under Section 9 had already been filed before the District Court at Gautam Buddh Nagar. (Para 10)

The question that remains now is whether this Court in exercise of its powers under Article 227

of the Constitution of India can set aside the impugned order passed by the District Court at Gautam Buddh Nagar returning the application filed under Section 34 of the Act for want of territorial jurisdiction. (Para 17)

Article 227 of the Constitution of India bestows upon the High Courts an extraordinary power of superintendence over all courts and tribunal within their respective jurisdiction. This power is a potent tool for ensuring the proper administration of justice and upholding the rule of law. It serves as a bulwark against judicial error, administrative excess, and procedural irregularity. Power of superintendence under Article 227 is inherent in the High Courts by virtue of their status of superior courts of record. This inherent jurisdiction enables the High Courts to exercise oversight over all subordinate courts and tribunals, irrespective of whether specific statutory provisions provide for such supervision. (Para 18)

Petition allowed. (E-14)

List of Cases cited:

1. St. of W. B.l Vs Associated Contractor (2015) 1 SCC 32

2. M/s Ravi Ranjan Developers Pvt. Ltd. Vs Aditya Kumar Chatterjee reported in SLP(C)17397 of 2021 (SC)

3. Manjusha Premi & ors. Vs Prakash Gupta & ors.(2016) 6 All LJ 695

4. Dalim Kumar Chakraborty Vs Smt. Gouri Biswar & anr. 2018 SCC Online Cal 282

5. Magma Fincorp Ltd. Vs Maa Vaishno Sales Pvt. Ltd. & ors.2015 SCC Online Cal 6267

6. M/s Gammon Engineers & Contractors Pvt. Ltd. Vs The St. of West Bengal AIR 2023 Cal. 338

7. SBP & Co. Vs Patel Engineer Ltd. (2005) 8 SCC 618

8. St. of Jharkhand Vs Hindustan Constructions (2018) 2 SCC 602

9. St. of West Bengal Vs Associated Contractor (2015) 1 SCC 32

10. Lafarge India Pvt. Ltd. Vs Kishore Kumar Sahoo AIR 2017 Cal 116.

11. BGS SGS Soma Vs NHPC Ltd. (2020) 4 SCC 234

12. Hindustan Construction Co. Ltd. Vs NHPC Ltd. & anr. (2020) 4 SCC 310

13. Homevista Decor & Furnishing Pvt. Ltd. & anr. Vs Connect Residuary Private Limited A.P. No. 358 of 2020 decided on 08.06.2023

14. Estelia Rubber -Vs- Dass ESt. (P) Ltd. (2001) 8 SCC 97

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

1. This is a writ petition under Article 227 of the Constitution of India wherein the petitioner is aggrieved by the order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar by which the Commercial Court held that it lacks the territorial jurisdiction to adjudicate the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) by the petitioner. The Commercial Court, Gautam Buddh Nagar accordingly, returned the said application with liberty granted to the petitioner to file the said application before the appropriate territorial court.

2. The facts of the instant case are delineated below:

(a) The parties herein entered into an agreement which contained an arbitration clause.

(b) As disputes and differences arose between the parties, the respondent filed an application under Section 9 of the Act before the Commercial Court, Gautam Buddh Nagar on March 20, 2007.

(c) Subsequently, the petitioners filed an application under Section 11 of the Act before the High Court of Delhi. The High Court of Delhi passed an order on September 11, 2007 appointing the sole arbitrator to decide the dispute between the parties. Subsequently, the arbitrator passed an award on July 3, 2017.

(d) Challenging the said award, the petitioners filed an application under Section 34 of the Act before the Commercial Court, Gautam Buddh Nagar which was dismissed for want of territorial jurisdiction vide order dated March 15, 2022. Hence, the instant petition has been filed challenging the said order.

CONTENTIONS OF THE PETITIONERS

3. Counsel appearing for the petitioners has made the following submissions:

(i) Since the application under Section 9 of the Act was filed before the Commercial Court, Gautam Buddh Nagar, the exclusive jurisdiction for hearing the Section 34 application would also lie with the Commercial Court, Gautam Buddh Nagar. Reliance in this regard is placed upon the judgments rendered in **State of West Bengal v. Associated Contractor** reported in **(2015) 1 SCC 32; M/s Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee** reported in **SLP(C)17397 of 2021 (SC); Manjusha Premi and Others v. Prakash Gupta and Others** reported in **(2016) 6 All LJ 695; Dalim Kumar Chakraborty v. Smt. Gouri Biswar and Another** reported in **2018 SCC Online Cal 282; Magma Fincorp Limited v. Maa Vaishno Sales Pvt. Ltd. and Others** reported in **2015 SCC Online Cal 6267 and M/s Gammon Engineers & Contractors Pvt. Ltd. v. The State of West Bengal** reported in **AIR 2023 Cal. 338**.

(ii) Furthermore, the filing of the application under Section 11 of the Act before the Delhi High Court, as the venue was fixed in Delhi would not make it the seat of arbitration. Reliance is placed upon the judgments rendered in **SBP & Co. v. Patel Engineer Ltd. reported in (2005) 8 SCC 618; State of Jharkhand v. Hindustan Constructions** reported in **(2018) 2 SCC 602; State of West Bengal v. Associated Contractor reported in (2015) 1 SCC 32; Manjusha Premi and Others v. Prakash Gupta and Others reported in (2016) 6 All LJ 695 and Lafarge India Private Limited v. Kishore Kumar Sahoo reported in AIR 2017 Cal 116.**

(iii) Since the application under Section 9 of the Act was made before the Commercial Court, Gautam Budh Nagar, all the subsequent applications under Part-I of the Act will have to be made before the same Court.

(iv) Bar placed by Section 42 of the Act does not apply to an application under Section 11 of the Act and, therefore, despite the fact that the Section 11 application was filed before the Delhi High Court, the same would not confer jurisdiction upon the Delhi High Court to hear other applications under the Part-I of the Act.

(v) Relying upon the judgment of the Supreme Court in **M/s Ravi Ranjan Developers Pvt. Ltd. case (supra)**, it is submitted that the doctrine of estoppel would apply upon the respondent as they have themselves filed the application under Section 9 of the Act before the Commercial Court, Gautam Buddh Nagar. They cannot now contend that the jurisdiction for filing the application under Section 34 of the Act would lie before the High Court of Delhi.

(vi) Unless the agreement specifically provides for it, venue cannot be

treated as the seat of arbitration unless there is contrary indicia present. In the instant case, filing of the application under Section 9 of the Act before the Commercial Court, Gautam Buddh Nagar, acts as contrary indicia preventing the venue to be elevated to the status of seat.

CONTENTIONS OF THE RESPONDENT

4. Counsel appearing for the respondent has made the following submissions:

(i) In the agreement dated 19.05.2006 between the parties, clause being clause No.53 clearly stipulates that if any disputes or differences arises between the parties in any manner whatsoever, they shall be referred to arbitration in accordance with the provisions of the Act and the "venue" of arbitration proceedings shall be at Delhi.

(ii) As clause 53 of the agreement, expressly designates a "venue" and does not designate of any alternative place as the "seat" the inexorable conclusion is that the venue is to be treated as the juridical seat of the arbitral proceedings.

(iii) Since proceedings were finally held at New Delhi without any objection and award was signed in New Delhi as both the parties have chosen New Delhi to be the, the same confers exclusive jurisdiction upon the Courts at New Delhi.

(iv) An application was filed by the Respondent before the High Court of Delhi for appointment of an arbitrator under Section 11 of the Act. The petitioner herein did not file any objection to the same.

(v) The order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar is perfectly legal, fully justified and as such no interference by this Court is warranted against the same.

(vi) The Supreme Court in the case of **BGS SGS Soma v. NHPC Ltd.** reported in **(2020) 4 SCC 234** and in **Hindustan Construction Company Ltd. v. NHPC Ltd. and Another** reported in **2020 4 SCC 310** has held that whenever there is a designation of a place of arbitration in an arbitration clause as being the venue of the arbitration proceeding the expression “arbitration proceedings" would make it clear that the venue is actually the "seat" of the arbitral proceedings.

(vii) The High Court of Calcutta after due deliberations has held in A.P. No. 358 of 2020 decided on 08.06.2023 **(Homevista Decor and Furnishing Pvt. Ltd. and another v. Connect Residuary Private Limited)** that the courts of the place selected as having exclusive jurisdiction over disputes should be considered as "Seat" thereby having exclusive jurisdiction to entertain applications under the Act.

ANALYSIS AND CONCLUSION

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. Since the crux of the instant dispute revolves around the bar placed by Section 42 of the Act, I have extracted the same herein for ease of reference:

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement

and the arbitral proceedings shall be made in that Court and in no other Court."

7. The Hon'ble Supreme Court in **BGS SGS SOMA JV -v- NHPC Limited** reported in **(2020) 4 SCC 234** espoused the intent and purpose behind Section 42 of the Act as follows:

"59.Equally incorrect is the finding inAntrix Corpn. Ltd.[Antrix Corpn. Ltd.v.Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with anon obstanteclause, and then goes on to state "...where with respect to an arbitration agreement any application under this part has been made in a court..." It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."

(Emphasis Added)

8. Section 42 of the Act encapsulates the principle of jurisdictional exclusivity. It stipulates that once an application under Part 1 of the Act is made in a court with respect to an arbitration agreement, all subsequent applications under Part 1 of the Act will have to made before that court only. By vesting exclusive jurisdiction in a single court, Section 42 of the Act obviates the possibility of conflicting judgements and ensures uniformity in the adjudication of arbitral matters. When two entities embroiled in a commercial disagreement, opt for arbitration as their chosen mode of resolution, they may often find themselves at the crossroads of jurisdictional ambiguity. It is here that Section 42 of the Act assumes pivotal importance. By centralizing jurisdiction in a designate court, Section 42 of the Act mitigates the risk of parallel proceedings, thus expediting the resolution of disputes and reducing legal costs.

9. The only exceptions to the bar placed by Section 42 of the Act are applications made under Section 8 of the Act or Section 11 of the Act. Reference in this

regard can be made to the judgment of the Hon'ble Supreme Court in ***State of West Bengal -v- Associated Contractors (supra)*** wherein it was held as follows:

"25.Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

(Emphasis Added)

10. As such, the argument presented by the Respondents that since the application under Section 11 of the Act was made before the High Court of Delhi, all subsequent applications will have to be made before the High Court of Delhi, is devoid of any merit and is rejected. The rationale underlying this exception lies in the recognition of the distinctive nature of applications under Section 8 and Section 11 of the Act, which necessitate specialized adjudication and prompt intervention. Furthermore, since the arbitral clause between the parties, provides for only a venue and not a seat, it is not open for the respondent to argue that the venue in the instant case should be exalted to the status of seat. This is due to the bar placed by Section 42 of the Act, since an application under Section 9 had already been filed before the District Court at Gautam Buddh Nagar.

11. Whether initiated before, during, or after the conclusion of arbitration, applications under Part 1 of the Act are subject to the jurisdictional constraints

imposed by Section 42 of the Act. By availing itself of the jurisdiction of the District Court at Gautam Buddh Nagar, the respondent implicitly recognized the authority of that court to adjudicate matters arising out of the arbitration agreement between the parties. This recognition, coupled with the principles of estoppel, precludes the respondent from subsequently disavowing the jurisdiction of the court at Gautam Buddh Nagar to entertain subsequent applications under Part 1 of the Act.

12. The principle of estoppel operates to prevent a party from resiling its prior representations or conduct to the detriment of another party. Here, the respondent's prior invocation of the jurisdiction of the court at Gautam Buddh Nagar under Section 9 of the Act constitutes a deliberate and unequivocal submission to the authority of that court. Having voluntarily invoked the jurisdiction of the said court, the respondent is estopped from adopting a position contrary to its prior conduct to the detriment of the petitioner. Additionally, the doctrine of forum non conveniens, which empowers a court to decline jurisdiction in favour of a more appropriate forum, is not applicable in the present case. The respondent's attempt to evade the jurisdiction of the court at Gautam Buddh Nagar is nothing but an effort to the circumvent the jurisdictional constraints imposed by Section 42 of the Act.

13. In **M/s Ravi Ranjan Developers Pvt. Ltd. case (supra),** the Supreme Court propounded that once the parties have invoked the jurisdiction of a court, they are estopped from invoking the jurisdiction of another court. Relevant paragraph is extracted herein:

"48.In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of A&C Act, before appointing an Arbitrator."

(Emphasis Added)

14. In **Gammon Engineers and Contracts Pvt. Ltd. -v- State of West Bengal (supra)** while dealing with a similar issue, I had concluded that since an application has already been made under Section 9 of the Act at Jalpaiguri, all subsequent applications will lie at Jalpaiguri in light of the bar placed by Section 42 of the Act. Relevant paragraph is extracted herein:

"21.The ratio of the judgment inSwadesh Kumar Agarwal(supra) must be kept in mind, wherein the court has categorically held in paragraph 32 that once an appointment is made under Section

11, the arbitration agreement cannot be invoked for the second time under Section 11. The procedure prescribed in the Act for termination of an arbitral tribunal's mandate is as per Sections 14 and 15 of the Act. The argument raised by the petitioner that a petition can be filed under Section 14 read with Section 15 and Section 11(6) is an argument in sophistry and is superfluous. This is quite evident from the ratio of the judgment inSwadesh Kumar Agarwal(supra), which has been specifically delineated in paragraph 32 of the said judgment and pointed out by me in the preceding paragraphs. In the present case, a Section 9 application was already made to the District Judge at Jalpaiguri, which is, for all purposes, the 'court' under Section 2(1)(e) of the Act. Therefore, the bar under Section 42 would lie and all applications to be made to a 'court' must be made to the District Judge at Jalpaiguri. An application under Section 14(1)(a) for termination of an arbitrator's mandate, being required to be made before a 'court' as under Section 2(1)(e) and 42 of the Act, has to presented before the District Judge at Jalpaiguri. In light of the above, A.P. 785 of 2022 is disposed of for not being maintainable before the High Court at this stage.I make it clear that the findings with regard to merits of the case in the preceding paragraphs are tentative in nature and the appropriate court shall decide the Section 14 application in accordance with law."

15. In **Manjusha Premi and Others -v- Prakash Gupta and Others (supra)**, this Court held that the bar placed by Section 42 of the Act will apply to applications made under Section 9 of the Act. Relevant paragraphs are extracted herein:

"40.He had further submitted that since first application under section 9 of the Act was filed before the District Judge, Varanasi on 28.10.2006, the Varanasi Court in the light of section 42 of the Act would alone have the jurisdiction. The aforesaid case has also discussed in detailed in previous paragraphs.

41.Referring to the judgment of Hon'ble Apex Court in the case ofSwastik Gases Private Limited(supra) he submitted that unless the jurisdiction of the Court is excluded in expression as such "exclusive" "alone" "only" the jurisdiction of a Court would not be excluded. For this purpose, a reference would not be excluded. On the strength of the aforesaid, he submitted that since there was no specific clause providing jurisdiction to a Court, thus the jurisdiction of a Civil Court is to be decided with reference to section 2(1)(e) of the Act and thus the same would be at Varanasi in the present case.

42.Sri K.K. Arora had also placed reliance on a decision of Hon'ble Apex Court in the case ofState of West Bengal(supra) to submit that if the proceedings initiated is one of the nature of section 8(before judicial authority) and section 11 of the Act (the Chief Justice or his delegates) applications filed before the Court inferior to the Principal Civil Court or to High Court having no original jurisdiction, the bar contained in section 42 would not apply. However, application filed under section 9 of the Act very much within the purview of section 42 as they are filed before the Court.

43.Undisputedly, the application under section 11 of the Act is filed before the Hon'ble Chief Justice or his delegates, which is not a "Court" in the eye of law and as such clearly, the provision of section 42 of the Act would not apply but the same would certainly be applicable if the application is filed under section 9 of the Act, which was done at the first instance

before the District Judge, Varanasi on 28.10.2006 in the present case.

44.In view of the aforesaid discussion and the fact that admittedly the property in dispute is situated at Varanasi and the first application under section 9 of the Act was filed on 28.10.2006 in the Court of District Judge, Varanasi, which is undisputedly the Principal Civil Court of original jurisdiction in a district having jurisdiction to decide questions forming subject-matter of the arbitration as provided under section 2(1)(e) of the Act, as section 42 of the Act had specifically provided that where with respect to any arbitration agreement when any application under this part (Part 1 of the Act which relates to domestic award) has been made in a Court, that Court shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitral proceedings shall be made in that Court and in no other Court, leaves no doubt that the Principal Civil Court of original jurisdiction at Varanasii.e., District Judge, Varanasi will have the jurisdiction to entertain application under section 34 of the Act against the arbitral award."

16. Accordingly, this Court holds that in light of Section 42 of the Act, the application under Section 34 of the Act, or for that matter any other application under Part 1 of the Act, will have to be made at Gautam Buddh Nagar.

17. The question that remains now is whether this Court in exercise of its powers under Article 227 of the Constitution of India can set aside the impugned order passed by the District Court at Gautam Buddh Nagar returning the application filed under Section 34 of the Act for want of territorial jurisdiction.

18. Article 227 of the Constitution of India bestows upon the High Courts an extraordinary power of superintendence over all courts and tribunal within their respective jurisdiction. This power is a potent tool for ensuring the proper administration of justice and upholding the rule of law. It serves as a bulwark against judicial error, administrative excess, and procedural irregularity. Power of superintendence under Article 227 is inherent in the High Courts by virtue of their status of superior courts of record. This inherent jurisdiction enables the High Courts to exercise oversight over all subordinate courts and tribunals, irrespective of whether specific statutory provisions provide for such supervision.

19. In **Estelia Rubber -v- Dass Estate (P) Ltd**. reported in **(2001) 8 SCC 97**, the Hon'ble Supreme Court reiterated the scope of Article 227 as follows:

"6.The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant

violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

20. In light of the aforesaid, it is palpably clear that the Commercial Court at Gautam Buddh Nagar has failed to exercise its jurisdiction. Accordingly, this Court, in exercise of its power under Article 227 of the Constitution of India sets aside the impugned order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar. This Court also directs the Commercial Court, Gautam Buddh Nagar to adjudicate the application filed by the petitioners under Section 34 of the Act expeditiously, preferably within a period of six months from date.

21. With the above directions, this petition is allowed. There shall be no order as to the costs.

(2024) 5 ILRA 1251
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 2475 of 2024

Chitra Misra & Ors. ...Petitioners

Versus

M/S Decathlon Sport India Pvt. Ltd. & Anr. ...Opp. Parties

Counsel for the Petitioners:
British Kumar, Amal Rastogi

Counsel for the Opp. Parties:
Sanjeev Singh

Civil Law - Arbitration & Conciliation Act, 1996 – Sections 7, 11, 16(2) & 37 - Commercial Court Act, 2005 - Section 13(1A) - Insolvency and Bankruptcy Code, 2016 – Sections 14 & 238 - Transfer of Property Act, 1882 - Section 109 - Claimants have purchased various portions of property, taken on lease by respondent no. 1 from M/s Rohtas Projects Limited, in violation of terms and conditions of registered lease deed - There is no arbitration agreement between the petitioners and respondent no. 1, the petitioners initiated arbitration proceedings claiming payment of arrears of rent, interest on arrears of rent, damages for use and occupation of property at the rate of rent, interest on damages, eviction of respondent no. 1 from demise premises and cost of proceedings - The proceedings under IBC have been initiated against lessor M/s Rohtas Projects Limited - A Resolution Professional has been appointed by NCLT, New Delhi - Respondents have deposited entire arrears of rent and damages etc. in NCLT and already vacated the premises in dispute – Hence, in view of facts and circumstances, orders passed by Sole Arbitrator and Commercial Court, Lucknow didn't require any interference, dismissed. (Para 43, 44) Petition dismissed. (E-13)

List of Cases cited:

1. Mayavati Trading (P) Ltd. versus Pradyuat Deb Burman, (2019) 8 SCC 714

2. Duro Felguera, S.A. versus Gangavaram Port Ltd., (2017) 9 SCC 729

3. Vidya Drolia & ors. Vs Navrang Studios: (1981) 1 SCC 523

4. Food Corporation of India Versus Indian Council of Arbitration & ors.: AIR 2003 SC 3011

5. Hindustan Petroleum Corporation Limited Versus Pink City Midway Petroleum: AIR 2003 SC 2881

6. Shri Subh Laxmi Fabrics (P) Limited Versus Chandmal Barodia & ors.: AIR 2005 SC 2261

7. Ambica Prasad Vs Alam & ors.: (2015) 13 SCC 13

8. Surender Kumar Singhal Vs Arun Kumar Bhalotia, 2021 SCC OnLine Del 3708

9. ONGC Ltd. Vs Discovery Enterprises (P) Ltd., (2022) 8 SCC 42

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Pritish Kumar and Sri Amal Rastogi Advocates, the learned counsel for the petitioners and Sri S.C. Mishra, Senior Advocate assisted by Sri Sanjeev Singh, Advocate for the respondents.

2. By means of instant petition filed under Article 227 of the Constitution of India, the petitioners have challenged the validity of an order dated 15.07.2022 passed by Hon'ble Justice Shri Dilip B. Bhosale (retired), Sole Arbitrator in the arbitration proceedings instituted by the petitioners against the respondents, whereby an application under Section 16(2) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') has been allowed and the arbitration proceedings have been dropped for want of jurisdiction, leaving it open to the parties to take appropriate remedy for redressal of their grievances at proper stage before appropriate Forum. The petitioners have also challenged the validity of the judgment and order dated 30.01.2024 passed by the Presiding Officer, Commercial Court No. 1, Lucknow in Arbitration Case No. 124 of 2022, dismissing an application under Section 13(1A) of the Commercial Court Act, 2005 read with Section 37 of the Arbitration Act, filed by the petitioners, challenging the aforesaid order dated 15.07.2022 passed by the Sole Arbitrator.

3. Briefly stated, facts of the case are that M/s Rohtas Projects Limited had executed a lease deed dated 07.04.2017 in favour of M/s Decathlon Sports India Private Ltd (the respondent no. 1), letting out an area of 21,825 Square feet i.e. 2,028 square meters, bearing Unit Nos. GF-01, GF-02, GF-03, GF-04, GF-05, GF-06, GF-07, GF-08, GF-9, GF-9A, GF-9B, GF-10A, GF-10B, GF-10C at Plot No. TC-G 4/4 in Rohtas Presidential Arcade situated in Vibhuti Khand, Gomti Nagar, Lucknow, for a period of 20 years.

4. The petitioner no. 2, Hina Juneja had entered into an agreement to purchase the unit no. GF-03 on 21.05.2013 and an agreement to sell Unit No. GF-05 of the Complex was executed in favour of Vijay Path Traders Link Private Limited on 28.03.2012. Rest of the petitioners claim to have purchased various units forming part of the leased premises from M/s Rohtas Projects Ltd. subsequent to execution of the lease deed in favour of the respondent no.1

5. The petitioners filed an Arbitration application No. 48 of 2020 before this Court under Section 11 of the Arbitration Act stating that they had been allotted commercial units by M/s Rohtas Projects Limited. M/s Rohtas Projects Limited had executed a lease deed in favour of respondent no. 1 for an area measuring 21825 square feet on 07.04.2017 for a period of 20 years w.e.f. 16.01.2017. The petitioners had obtained transfers of various

portions of the leased property between the years of 2017-2018 from M/s Rohtas Projects Limited. The petitioners requested the respondent no. 1 to clear the outstanding liability of payment of rent under the lease deed executed by M/s Rohtas Projects Limited in favour of respondent no. 1 and upon failure of the respondent no. 1 to clear the dues, they issued a joint notice dated 25.08.2020 terminating the tenancy of respondent no. 1 created by the lease deed dated 07.04.2017 executed by M/s Rohtas Projects Limited. They requested this Court to appoint an Arbitrator for adjudication of the dispute between the parties. Elaborate submissions were advanced on behalf of the parties in proceedings under Section 11 of the Arbitration Act.

6. The learned counsel for the petitioner had placed reliance on the decision of Hon'ble Supreme Court in the case of **Mayavati Trading (P) Ltd. versus Pradyuat Deb Burman**, (2019) 8 SCC 714, wherein the Hon'ble Supreme Court held that the scope of judicial intervention, as per under Section 11(6-A) is confined to examination of the existence of Arbitral Agreement and is to be understood in the narrow sense as has been laid down in the judgment rendered in **Duro Felguera, S.A. versus Gangavaram Port Ltd.**, (2017) 9 SCC 729, wherein it was held that: -

"in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

7. Learned counsel for the petitioner had also referred to a decision of the Hon'ble Supreme Court in the case of **Vidya Drolia and Others Vs. Navrang Studios**: (1981) 1 SCC 523, wherein Hon'ble Supreme Court held as under: -

"Whether Arbitration Agreement was in writing? or whether Arbitration agreement was contained in exchange of letters, telecommunication, etc.? or whether the Core contractual ingredients qua the arbitration agreement were fulfilled?, or whether the subject matter of dispute is arbitrable."

If the Court prima facie comes to a conclusion that there is no valid arbitration agreement then it would not refer the matter to an Arbitrator but on the other hand, if the validity of the Arbitration agreement cannot be determined on a prima facie basis then it should refer the matter to Arbitration. "Therefore, the Rule for the Court is "when in doubt, do refer".

8. After recording the submissions advanced by learned counsel for the parties, this Court passed an order dated 25.08.2021 in Arbitration Application No. 48 of 2020. The relevant portion of the order is as under: -

"(16) In view of the aforesaid, this Court proposes the name of Justice Anant Kumar (Retired) Resident of Flat No.703, Indraprastha Grand, Sector-4 A, Vrindavan Yojana, Near Kandhai Park, Lucknow, Mobile No.8004928592 as Sole Arbitrator.

(17) Let the notice in terms of Section 12 (6) of the Arbitration and Conciliation Act, 1996, be sent to the newly proposed Arbitrator for seeking his consent, list this matter on 16.09.2021."

9. The Arbitrator proposed by the order dated 25.08.2021 did not give his consent and, therefore, Hon'ble Justice Shri Dilip B. Bhosale (retired) was appointed as the sole Arbitrator by means of an order dated 06.10.2021.

10. The petitioners filed a statement of claim before the sole Arbitrator on 26.11.2021.

11. The respondents filed an application under Section 16(2) of the Arbitration Act on 28.10.2021 praying for dismissal of the arbitration proceedings initiated by the petitioners, as the Arbitral Tribunal does not have the jurisdiction to decide the dispute. A further prayer was made for stay of the proceedings, as per the moratorium imposed on institution of any proceeding as per Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the IBC').

12. The respondents had inter alia stated in the application under Section 16(2) of the Arbitration Act that before execution of the lease deed dated 07.04.2017 in favour of the respondent no. 1, the owner of the premises, M/s Rohtas Projects Limited had executed two agreements to sell - (i) dated 21.05.2013 in respect of unit GF-03 in favour of Hina Juneja (petitioner no. 2) and (ii) dated 28.03.2012 in respect of unit GF-05 in favour of M/s Vijay Path Traders Link Private Limited but no sale deed has been executed in respect of those units at that point of time. The respondent no. 1 had taken the property on lease under a bona fide belief that the same was free from all encumbrances and it had made substantial investments to further develop the property at its own expenses. The respondent no. 1 has stated that several of the petitioners did not have registered sale deeds in their favour. Three of the petitioners had not even an agreement to sell executed in their favour. The petitioners had invoked the arbitration agreement between the Respondent no. 1 and M/s Rohtas Projects Limited without impleading M/s Rohtas Projects Limited as a party and they had wrongly impleaded the respondent no. 1 whereas there was no arbitration agreement between the petitioners and the respondent no. 1.

13. The respondent no. 1 further contended that the proceedings under the IBC were already pending before the National Law Company Tribunal, New Delhi (hereinafter referred to as "the NCLT"), wherein a moratorium had been imposed under Section 14 of the IBC, according to which the proceedings cannot be initiated against M/s Rohtas Projects Ltd. in any other court of law. Section 238 of the IBC Code, 2016 gives an overriding effect to it or over other statute.

14. The respondent no. 1 also placed reliance upon the Clause 19 of the

lease agreement, which prohibits creation of any third party interest in respect of any part of the leased premises, without consent of the lessee and without execution of a tri-partite agreement regarding attornment of leasehold rights.

15. The petitioners filed objections against the application under Section 16(2) of the Act refuting the contentions of the respondents. The petitioners stated that most of them had sale deeds in their favour and the parties had acquired rights in respect of property prior to initiation of insolvency proceedings. The petitioners contended that this aspect had already been examined by this Court while passing the order dated 25.08.2021 under Section 11 of the Arbitration Act and, therefore, it could not be raised again.

16. The learned sole Arbitrator rejected the application under Section 16(2) of the Arbitration Act by means of impugned order dated 15.07.2022. It is s recorded in the order dated 15.07.2022 that the application under Section 16(2) of the Act questioning the jurisdiction of the Arbitral Tribunal has been filed on the following grounds: -

"(i) The Claimants have invoked the arbitration clause of the lease deed entered into between the Respondents and M/S Rohtas Projects Limited without making M/S Rohtas Projects Limited a party to the Arbitration Petition and the same is against the principles of natural justice.

(ii) Some of the parties do not hold a registered sale deed in their favour but they have also been made parties to the present arbitration proceedings and have been granted right to be part of the arbitration proceedings.

(iii) A moratorium has been imposed by the National Company Law Tribunal (NCLT) against initiation of any proceedings in any other court of law or tribunal and Section 238 of the IBC shall have overriding effect over all other laws and the present arbitration proceedings are barred by section 14(1)(a) of the said Code.

(iv) The Claimants did not exercise due diligence on the charges on the leased property despite the fact that they were aware of the lease deed that existed between the Respondents and M/S Rohtas Projects Limited.

(v) In view of the special provisions of the Uttar Pradesh Regulation of Urban Premises Tenancy Ordinance 2021, the arbitration proceeding initiated under the Act, which is a general law, is not maintainable in as much as the special law prevails over the general law of arbitration. The Claimants should have therefore filed their petition under the said Ordinance of 2021 and not under the provisions of the Arbitration and Conciliation Act, 1996."

17. The claimants/petitioners had opposed the application filed under Section 16(2) of the Act stating that the NCLT had jurisdiction to adjudicate on the issues regarding corporate insolvency of the corporate debtor Rohtas Projects Ltd. Only and not on any issues involved between the claimants and the respondents. The arbitration proceedings between the parties were not barred by the provisions of IBC. The petitioners further submitted that this High Court has passed the order under Section 11 of the Arbitration Act after being satisfied about the existence of an arbitration agreement between the parties.

18. The Tribunal relied upon the decisions in the cases of **Food Corporation of India Versus Indian Council of Arbitration and Others**: AIR 2003 SC 3011; **Hindustan Petroleum Corporation**

Limited Versus Pink City Midway Petroleum: AIR 2003 SC 2881 and **Shri Subh Laxmi Fabrics (P) Limited Versus Chandmal Barodia and others**: AIR 2005 SC 2261, wherein Hon'ble Supreme Court consistently held that if the question of jurisdiction of Arbitral Tribunal is raised by any party, the same has to be decided by the Arbitral Tribunal itself under Section 16 of the Act.

19. The Arbitrator held that in view of the moratorium imposed by the NCLT, the Arbitral Tribunal has no jurisdiction to proceed with the matter, therefore, although the learned counsel for the parties had made submissions touching rights and liabilities of the parties, the Arbitral Tribunal cannot embark upon to make any observation on the rights and liabilities of the parties as it has no jurisdiction to proceed with the matter.

20. The petitioners challenged the aforesaid order by filing an application under Section 13(1A) of the Commercial Court Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996, which has been rejected by means of an order dated 30.01.2024 passed by the Presiding Officer, Commercial Court no. 1, Lucknow.

21. The Commercial Court held that although the moratorium imposed by the NCLT, New Delhi came to an end on 13.12.2021, proceedings were going on before the NCLT. The Arbitrator has dealt with the objections of the claimants/petitioners and has drawn detailed conclusion, which do not suffer from any legal error. The petitioners have already cancelled the lease deed granted by the lessor M/s Rohtas Projects Limited in favour of the respondents and the respondents have vacated the property in dispute and they have deposited the entire arrears of rent before the NCLT. In view of the aforesaid facts, the Commercial Court found that there was no ground to interfere in the impugned order dated 15.07.2022 passed by the Arbitral Tribunal and it dismissed the appeal.

22. While assailing the validity of both the aforesaid orders passed by the Arbitral Tribunal as well as the order passed by the Commercial Court no. 1, Lucknow, Sri Pritish Kumar, the learned counsel for the petitioners has submitted that the learned Arbitrator has wrongly recorded in the impugned order dated 15.07.2022 that "it is not in dispute that during pendency of the arbitration proceedings before this Arbitral Tribunal, the NCLT has imposed moratorium against the proceedings any other Forum in respect of the subject matter of the present arbitration proceedings", whereas the correct position is that the moratorium had been imposed by means of an order dated 30.09.2019 passed by the NCLT in C.P. No. IB-1022/(ND)/2018, whereas the arbitration proceedings commenced in the year, 2021. Learned counsel submitted that moratorium seized to have affect w.e.f. 13.12.2021, as per an order passed by the NCLT on the aforesaid date.

23. Sri Pritish Kumar has further submitted that the respondents had merely prayed in the application under Section 16(2) for stay of the proceedings, as per moratorium imposed on the institution of any proceedings as per Section 14 of the IBC, and the learned Arbitral Tribunal has committed an error in dropping the proceedings, instead of staying the same till lifting of the moratorium. Moreover, as the moratorium has already seized to be in force with effect from 13.12.2021 i.e. prior to passing of the order dated 15.07.2022, the

learned Arbitrator was not justified in dropping the proceedings on the ground of the moratorium.

24. The learned counsel for the petitioners has also submitted that the petitioners being transferees of the lessor, possess the rights of lessor, as per the provision contained under Section 109 of the Transfer of Property Act. In support of his contention, he has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Ambica Prasad Vs. Alam and others**: (2015) 13 SCC 13, wherein it was held that it is well settled *"that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferrer landlord in respect of the subsisting tenancy"*. As per Sri. Pritish Kumar, this Section does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him and attornment is not necessary to confer validity to the transfer of the landlord's rights.

25. Per contra, Sri S. C. Mishra Senior Advocate appearing for the respondents has submitted that the lease deed dated 07.04.2017 executed by M/s Rohtas Projects Limited in favour of the respondent no. 1 mentions that the "Lessor" which expression shall, unless it be repugnant to the context or the meaning thereof, means and includes its successors and **permitted assigns**. Upon transfer of its rights by the lessor without permission of the lessee, the lessee was entitled to hold the monthly rentals of the lessor till execution of proper legal documentation/deed of attornment amongst the lessor, the lessee and the buyer, which was never done. The lease deed further categorically stated that the lessor had executed an agreement to sell Unit nos. GF-03 and GF-05 forming a part of the lease premises but neither the sale deeds had been executed nor had physical possession been handed over to the prospective buyer. The lessor undertook the responsibility of execution of attornment deed/supplementary deed with the buyers of the units before execution and registration of sale deeds in that regard.

26. Sri Mishra further submitted that the Resolution Professional, had submitted an application to NCLT, a copy whereof has been annexed by the petitioners themselves (at page no. 213 to 233 of the petition) stating that the members of the suspended Board of Directors of M/s Rohtas Projects Limited had executed sale deeds of various units to respondent nos. 5 to 15 in that application (including several of the petitioners), without obtaining 'No Objection Certificates' from the IDFC Limited and Allahabad Bank (now Indian Bank), with whom the units were mortgaged. The Resolution Professional requested for a declaration that the transactions of sale in respect of mortgaged property without seeking 'No Objection Certificates' from the secured creditors, is null and void and the effect of the said transfers be reversed.

27. The learned counsel for the petitioners has drawn attention of the Court to the statement of the Claim filed by the petitioners before the sole Arbitrator, wherein they have claimed arrears of rent, interest on arrears of rent, damages for use and occupation of property at the rate of rent, interest on damages, eviction of the respondent no. 1 from the demise premises and cost of the proceedings. He submitted that the respondents have already deposited the entire amount, payable in the NCLT and they have already vacated the premises, which contentions are not disputed by the

learned Counsel for the petitioners. The respondents having already performed their part for redressal of the grievances raised by the petitioners through the Claim Petition, they are not liable to do anything else for satisfying the claims of the petitioners and, in these circumstances, it would not be in the interest of justice that the respondents are made to face the arbitration proceedings.

28. Sri Mishra has further submitted that it is not that the respondents had only prayed for stay of proceedings through their application under Section 16(2) of the Arbitration Act. The prayers made in the application under Section 16 are as follows: -

"Prayer:-

In the premises, it is most respectfully prayed that the learned sole Arbitrator may graciously be pleased to: -

(a) dismiss the arbitration initiated by the petitioners as the Hon'ble Arbitral Tribunal does not have jurisdiction to try the matter, and/or;

(b) stay the proceedings as per the moratorium imposed on the institution of any proceedings as per Section 14 of IBC; and/or;

(c) pass any other order as learned Sole Arbitrator may deem fit.

29. The existence of an arbitration agreement between the parties is the prerequisite for initiating arbitration proceedings. Arbitration agreement is defined in Section 7 of the Arbitration and Conciliation Act, 1996 as follows: -

***" 7. Arbitration agreement**.—(1) In this Part, "arbitration agreement" means an **agreement by the parties** to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

*(a) **a document signed by the parties;***

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

30. There is no arbitration agreement between the parties, i.e the petitioners and the respondents. An arbitration Clause is contained in Clause 23 of the lease deed dated 07.04.2017 executed by the M/s Rohtas Projects Limited in favour of M/s Decathlon Sports India Private Ltd. (respondent no. 1), which provides as follows: -

"The parties agree that they shall attempt to resolve to good faith and consultation any dispute or difference between any of the parties in respect of or concerning or connected with the interpretation or implementation of this lease deed or arising out of this lease deed.

In the event of dispute or difference between the parties not getting resolved, such dispute or difference shall be referred to the Arbitration under the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or amendment thereof, by an arbitration Penal comprising of three Arbitrators. The Arbitration Penal shall comprise one Arbitrator each appointed by the lessor and the lessee and such Arbitrators shall appoint the third Arbitrator."

31. The expression 'parties' used in the above quoted Clause 23 refers to the parties to the lease deed, which was executed between: -

"ROHTAS PROJECTS LIMITED, a company incorporated and validly existing under the provisions of Indian Companies Act, 1956 with its corporate office at 27/18, Raja Ram Mohan Roy Marg (one way Road) Lucknow - 226001) acting through its authorized signatory, Mr. Pankaj Rastogi duly authorized vide board resolution dated 6th march 2017 (hereinafter referred to as the "Lessor" which expression shall, unless it be repugnant to the context or the meaning thereof, mean and include its Successors and permitted assigns), being Party of the FIRST PART.

AND

DECATHLON SPORTS INDIA PRIVATE LIMITED, a complay incorporated and validly existing under the provisions of the Indian Companies Act, 2956 (a wholly owned subsidiary of Decathlon S. A., France) with its registered office at Survey number 78/10, A2 0 – Chikkajala Village, Bellary road, Bangalore – 562 157, ("hereinafter referred to as "the Lessee" which expression shall, unless it be repugnant to the context or the meaning thereof, mean and include its Successors and permitted assigns), acting through _ _ _, being Party of the SECOND PART"

The lease deed further states that: -

"The Lessor is the absolute legal owner of all that piece of immovable property bearing No. TC-G 4/4, admeasuring 5000 square meters situated at Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh which is currently categorized as commercial use. The said property is hereinafter referred to as the Total Property and is more fully described in the Schedule written hereunder and is depicted in ANNEXURE A.

AND WHEREAS, the Lessor is into the business of developing commercial and residential projects and has constructed and developed a commercial complex under the name and style of 'Rohtas Presidential Arcade', which has been operational since 2015 and is spread over 5000 square meters (Hereinafter referred to as the Complex/Total Property) consisting of retail shops, stores, banks, offices etc. and basements for parking (plans of the Complex annexed herewith as ANNEXURE A) after obtaining all required approvals and sanctions in accordance with the building plans approved by the competent authority (ies). The Lessor has sold few units in the said Complex to various parties/individuals by virtue of Agreement to sale. Out of the Total property, ***the Ground Floor measuring 21825 square feet (i.e. 2028 square meters) of covered area bearing Unit Nos. GF-01, GF-02, GF-03, GF-04, GF-05, GF-06, GF-07, GF-08, GF-09, GF-09A, GF-09B, GF-10A, GF-10B and GF-10C at Plot No. TC-G 4/4, admeasuring 2028 square meters situated at Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh for retail space is available for lease and is owned/possessed by the Lessor, Though the Lessor has further***

presented to the Lessee that they have executed an Agreement to Sell dated 21.05.2013 for the Unit bearing Nos. GF-03 in the name of Mrs. Heena Juneja & Agreement to Sell dated 28.03.2012 for the Unit No. GF-05 of the Complex in favour of Vijay Path Traders Link Private Limited, but no conclusive sale has taken place for these two units*. The Lessor have further represented that as on date all the legal rights, interests and possession of the said two units stands in the name of the Lessor for all the purposes and the Lessor have obtained two separate registered Power of Attorneys from Mrs. Heena Juneja & Vijay Path Traders Link Private Limited respectively authorizing the Lessor to enter/deal/lease/execute on their behalf such business transactions as the Lessor may deem fit, after amalgamating their Units with the other Units of the Complex on the terms and conditions as the Lessor may deem fit. The Copies of the said registered Power of Attorneys for Unit No. GF-03 and GF-05 are annexed hereto as ANNEXURE B1 & B2."*

* * *

"4. RENT, ESCALATION & RENT COMMENCEMENT DATE

4.1 The Parties agree that in consideration of the grant of Lease and the continued right to enjoy and possess and use the Leased Premises during the Lease Term, the Lessee shall pay to the Lessor, the monthly rent as detailed in ANNEXURE-1 ("Monthly Rent") from the Rent Commencement Date. It is understood between the parties that the monthly rent is all inclusive of any/all kind of CAM charges during the tenure of this Lease.

4.2 The Lessee shall deposit the amount of monthly rentals, during the tenure of this lease and the security deposit in the bank account numbers to be provided by the Lessor to the Lessee, subject to Tax Deduction at Source.

* * *"

8. OBLIGATIONS ON PART OF THE LESSOR

* * *

8.3 In case the Lessor creates any lien after the execution hereof, that should be done with prior intimation to the Lessee. However, any charge or transfer of the Leased Premises to any third party during the subsistence of the lease can be created only in terms of Clause 19".

* * *

19.SALE, RIGHT OF FIRST REFUSAL & ATTORNMENT CLAUSE

*19**.1 In the event of proposed sale or transfer of its rights in any of the unit of the Leased Premises (either partially or whole), the Lessor shall first intimate the Lessee in writing to ascertain the interest of the Lessee to purchase the aforesaid premises** and the Lessee shall revert on their interest in the aforesaid premises within 15 days of receiving such intimation. If the Lessee does not reply within 15 days, then the Lessor shall assume that the Lessee is not interested in the aforesaid space and the Lessor will be free to offer to any third party and the Right of First Refusal shall expire for the Lessee.*

*19.2 **In case the Lessor doesn't comply with the above-said condition pertaining to the proposed sale or transfer of its rights of the Leased Premises, and does not intimate the Lessee then in such event the Lessee shall be entitled to hold the monthly rentals of the Lessor till proper legal documentation/Deed of Attornment is being executed between the Lessor, Lessee and such prospective buyer on the same terms and conditions of this Deed**.*

19.3 The Lessor hereby, Irrevocably agrees and undertakes to ensure the business continuity of the Lessee in the

Leased Premises for the entire tenure of the Lease (on the same terms and conditions) in case of sale or transfer of ownership rights by any manner whatsoever. ***In case of sale of the Leased Premises (either in part of full), the Lessor agrees to ensure the business continuity of the Lessee by executing Deed of Attornment between the Lessor, Lessee and such prospective buyer on the same terms and conditions of this Lease Deed before concluding the sale deed with such prospective buyer.***

19.4 The Lessor agreed ***that in case of sale of any unit of the Leased Premises, the Lessor shall immediately inform the Lessee before making an endorsement on such sale or transfer and all such sale/transfer shall be subject to execution of Attornment Deed between the Lessor, Lessee and such prospective buyer.***

19.5 The Lessee shall have the first right of refusal at the end of Lease Term for further renewal of Lease Term as per the mutually agreed terms and conditions.

19.6 It is well understood between the parties that ***the Lessor have already executed Agreement to Sell for the Unit No. GF-03 and GF-0S forming part of the Leased Premises, but neither the conclusive sale have been executed nor any physical possession of the same have been delivered. The Lessor have represented that such sale shall not at all any circumstance whatsoever shall disturb the peaceful possession and business operations of the Lessee in the Leased Premises. The Lessor shall ensure and takes responsibility to execute an Attornment Deed/Supplementary deed with the buyers of such units before concluding and registering a conclusive Sale Deed in that regard.***

19.7 The Lessor has unconditionally agrees that they will not sell the Leased Premises (either partially or fully) to any third party for the initial 06 months of Lease commencing from the handover of the Leased Premises to the Lessee.

32. Section 109 of the Transfer of the Property Act, 1982 relied upon by the petitioners reads as follows: -

"109. Rights of lessor's transferee.- If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, ***in the absence of a contract to the contrary****, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it****; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him****:*

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased."

33. Section 109 provides that **if the lessor transfers the property leased, in the absence of a contract to the contrary,** the transferee shall possess all the **rights of the lessor** and, **if the lessee so elects**, the transferee shall be subject to the liabilities of the lessor as to the property or part transferred. In the present case, there was a

contract to the contrary contained in the lease deed itself prohibiting transfer of any part of the leased property without prior permission of the lessee. In these circumstances, the rights of the lessor shall not stand transferred to the petitioners by virtue of Section 109 of the Transfer of Property Act. Further, Section 109 makes the transferees subject to all the liabilities of the lessor as to the property transferred, at the option of the lessee. Here the lessee has not exercised this option. Rather the lessee has objected to the transfer made in favour of the petitioners in violation of the conditions contained in the lease deed.

34. In **Ambica Prasad v. Mohd. Alam**, (2015) 13 SCC 13 relied upon by the learned Counsel for the petitioners, the question involved was whether the a person having purchased a property which had been let out and was subject to the provisions of the Assam Urban Areas Rent Control Act, 1972, would become a landlord. The expression "landlord" has been defined in Section 2(c) of the Assam Urban Areas Rent Control Act, 1972 which reads as under:

"2. (c) 'Landlord' *means any person who is, for the time being receiving or entitled to receive rent in respect of any house whether on his own account, or on account, or on behalf, or for the benefit of any other person, or as a trustee, guardian or receiver for any other person and includes in respect of his sub-tenant, a tenant who has sub-let any house and includes every person not being a tenant who from time to time derives title under a landlord."*

The Hon'ble Supreme Court held that the definition of "landlord" is couched in a very wide language, according to which not only the owner but also any person receiving rent, whether on his own account or on behalf of or for the benefit of any other person or as a trustee, guardian, or receiver for any other person, is also the landlord. However, for the purpose of eviction of a tenant on the ground of personal need or reasonable requirement, one must show that he is the owner of the building.

35. While considering the effect of transfer of property governed by of the Assam Urban Areas Rent Control Act, 1972 by a Landlord, the transferee gets all rights and liabilities of the lessor in respect of subsisting tenancy, the Hon'ble Supreme Court observed that: -

"The section does not insist that transfer will take effect only when the tenant attorns. It is well settled that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferor landlord in respect of the subsisting tenancy. The section does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him. Attornment by the tenant is not necessary to confer validity of the transfer of the landlord's rights."

36. The effect of the words ***"in the absence of a contract to the contrary" and "if the lessee so elects"***, occurring in Section 109 of the Transfer of Property Act was neither considered nor decided in this judgment. It is settled law that while interpreting a provision of any Statute, any word used by the Legislature cannot be ignored. It is also a settled law that a judgment is an authority for what it actually decides. Therefore, the decision in **Ambica Prasad (supra**) will not apply to the facts of the present case where there is contract prohibiting transfer by the lessor without prior permission of the lessee and lessee has

not opted to accept the transferees as its lessor.

37. So far as the submission of the learned Counsel for the petitioner that this Court having appointed the Arbitrator under Section 11 of the Arbitration and Conciliation Act, it was not open for the arbitrator to go into his question, in Vidya Drolia and Others Vs. Navrang Studios: (1981) 1 SCC 523, Hon'ble Supreme Court held that the Court has to appoint an arbitrator even if there is a doubt regarding existence of an arbitration agreement. Thus the appointment of an arbitrator does not require a conclusive finding by the Court that there is an arbitration agreement between the parties.

38. Moreover, Section 16 of the Act provides as follows: -

"16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

39. Sri. S. C. Mishra, the learned Counsel for the petitioner has relied upon a decision of the Delhi Hgih Court in **Surender Kumar Singhal v. Arun Kumar Bhalotia**, 2021 SCC OnLine Del 3708, in which it was held that: -

"25. ...the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so

perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.

Section 16 of the Act and consideration by Arbitral Tribunals

26. Coming to the second aspect, i.e., the law governing applications under Section 16 of the Arbitration & Conciliation Act, 1996 and the manner of consideration by arbitral tribunals. Section 16 of the Arbitration and Conciliation Act, 1996 deals with the competence of a Tribunal. Following the principle of kompetenze-kompetenze, an Arbitral Tribunal has the power to rule on its own jurisdiction. However, Section 16(5) requires that the Tribunal ought to ***decide the plea****."*

40. In **ONGC Ltd. v. Discovery Enterprises (P) Ltd**., (2022) 8 SCC 42, it was held that: -

55. ... Section 16 stipulates that where the Tribunal rejects a plea of a lack of jurisdiction, it must continue with the arbitral proceedings and make an award and the remedy of a challenge to the award would lie under Section 34. However, if the Arbitral Tribunal accepts a plea that it lacks jurisdiction, the order of the Tribunal is amenable to a challenge in appeal under Section 37(2)(a). In the exercise of the appellate jurisdiction, the court must have due deference to the grounds which have weighed with the Tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the Arbitral Tribunal with the power to rule on its own jurisdiction. The decision of the Tribunal that it lacks jurisdiction is not conclusive because it is subject to an appellate remedy under Section 37(2)(a). However, in the exercise of this appellate power, the court must be mindful of the fact that the statute has entrusted the Arbitral Tribunal with the power to rule on its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for the resolution of disputes."

41. When we examine the facts of the present case in light of the law referred to above, it appears that there is no arbitration agreement between the petitioners and the respondent no. 1. The transfer of property made by M/s Rohtas Projects Ltd. in favour of the petitioners, has been made in violation of the terms and conditions of lease deed executed by M/s Rohtas Projects Limited in favour of the respondent no. 1 and, therefore, none of the obligations contained in the lease deed dated 07.04.2017 by M/s Rohtas Projects Limited stood transferred to the petitioners, including the right to initiate the arbitration proceeding under Clause 23 of the lease deed. Therefore, there is no arbitration agreement between the petitioners and the respondent no. 1.

42. In view of the foregoing discussion, will not be in the interest of

justice to interfere in the order dated 15.07.2022 passed by the sole Arbitrator dropping the arbitration proceedings for want of jurisdiction, although for different reasons.

43. In the present case, the claimants have purchased various portions of a property that had been taken on lease by the respondent no. 1 from M/s Rohtas Projects Limited, in violation of the conditions of the registered lease deed. Although there is no arbitration agreement between the petitioners and the respondent no. 1, the petitioners initiated arbitration proceedings claiming payment of arrears of rent and damages etc. The proceedings under the IBC have been initiated against the lessor M/s Rohtas Projects Limited. A Resolution Professional has already been appointed by the NCLT, New Delhi. The respondents have deposited the entire arrears of rent and damages etc. in the National Company Law Tribunal and they have already vacated the premises in dispute.

44. Jurisdiction of this Court under Article 227 of the Constitution of India is supervisory jurisdiction which should be exercised to prevent injustice being caused to a party but where the order under challenge in the petition under Article 227 of the Constitution of India does not cause any injustice to any of the parties, this Court will not exercise its discretion in such a case. Keeping in view the circumstances stated in the preceding paragraph, interfering in the order dated 15.07.2022 passed by the Sole Arbitrator and the order dated 30.01.2024 passed by the Commercial Court No. 1, Lucknow will not serve the interest of justice in any manner.

45. In view of the aforesaid discussions, no interference is warranted in the present petition filed under Article 227 of the Constitution of India.

46. Accordingly, the petition is **dismissed**. Costs made easy.

(2024) 5 ILRA 1265
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Application u/s 482 No. 35636 of 2018

Vinod Kumar ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Pashupati Nath Tripathi, Desh Ratan Chaudhary, Hind Pratap Lal

Counsel for the Opp. Parties:
G.A., Ajay Kumar Pandey

Criminal Law – Criminal Procedure Code, 1973 - Section 482 - Applicant- Branch Manager- Complaint Case – Indian Penal Code, 1860 - Section 417, 504 & 506 - Complainant- Auction Purchaser- Proceedings against borrower under SARFAESI Act- Symbolic possession taken under Section 13(4) of SARFAESI Act- Application under Section 14 of the SARFAESI Act for physical possession- Auction purchaser- Allegation of misrepresentation regarding possession of the property against the applicant- Symbolic possession is a possession under law- Possession taken in 2012 itself- Auction in 2016- Action of the applicant in exercise of statutory powers is protected by Section 32 of SARFAESI Act- No criminal proceedings or prosecution can be lodged against Officer of the Bank- Criminal proceedings against the applicant set aside – Application allowed (Para – 6, 7, and 8)

HELD: Once the bank has declared in the auction notice that they are taken possession of the property in question under Section 14 of the SARFAESI Act, it is not open for the purchaser to raise objection in respect of the application of bank under Section 14 of the SARFAESI Act being pending before the District Magistrate which are only execution proceedings in respect of the order of possession passed under Section 13(4) of the SARFAESI Act. (Para 7)

It is further to be seen that the applicant was the Branch Manager and was exercising statutory powers under SARFAESI Act and as such he is protected by Section 32 of the SARFAESI Act and no criminal proceedings or prosecution can be lodged against the applicant, who is an Officer of the Bank. (Para 8)

Application allowed. (E-14)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

1-A. No one has appeared on behalf of opposite party no. 2. Previously on 05.03.2024, the opposite party no. 2 was proceeded ex-parte.

2. This application under Section 482 Cr.P.C. has been filed by the applicants for quashing the entire proceedings including the summoning order dated 09.08.2018 passed by Additional Chief Judicial Magistrate, IXth, Varanasi in Complaint Case No. 1865 of 2018 (Mohd. Akhlaq Khan vs. Vinod Kumar) under Sections 417, 504, 506 IPC, P.S. Cantt, District Varanasi.

3. It is submitted by learned counsel for the applicant that applicant is Branch Manager of Allahabad Bank. The proceedings against borrower was issued under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') by the Bank and thereafter the symbolic possession of property in question was taken on 30.07.2012. It is further submitted that thereafter the property in question was put to auction in terms of Section 13(4) of SARFAESI Act and date of auction was fixed as 30.04.2016.

4. Learned counsel for the applicant submits that complainant is auction purchaser and the complaint is filed with allegation that the applicant being the Branch Manager has represented the auction purchaser that the property of the borrower was taken possession by the bank and as such the complainant participated in the auction proceedings and deposited the auction sale consideration. Subsequently, he found that the bank was not in possession of the property in question as the bank has applied before the District Magistrate for taking physical possession of the property in question in terms of Section 14 of the SARFAESI Act.

5. Learned counsel for the applicant submits that act of the applicant was statutory in nature and is protected by Section 32 of SARFAESI Act as the same was done in good faith. It is further submitted by learned counsel for the applicant that the possession of the property in question was already taken on 30.07.2012 and the property was being sold on as is where is basis in case of any dispute the auction purchaser/complainant would have remedy under provisions of SARFAESI Act. He submits that the present criminal proceedings against applicant under Sections 417, 504, 506 IPC are not tenable.

6. In the present case, it is to be seen that the Allahabad Bank, who was the secured creditor has initiated proceeding under the SARFAESI Act against the

borrower and in this respect symbolic possession of the property was taken on 30.07.2012 in terms of Section 13(4) of the SARFAESI Act. Once the possession is taken, bank thereafter applied under Section 14 of the SARFAESI Act for execution of the possession proceedings for taking actual physical possession. Once an application under Section 14 of the SARFAESI Act is filed the same would relate to the provisions of Section 13(4) of the SARFAESI Act and actual possession would in no manner effect the taking of possession in terms of Section 13(4) by way of symbolic possession. The symbolic possession itself is the possession under law and as such once the bank has taken possession of the property in question in the year 2012 itself and the auction notice was issued on 18.03.2016 in respect of the auction to be held on 30.04.2016, the borrower was well aware of the fact that the bank has taken possession in terms of Section 13(4) of the SARFAESI Act as the auction notice itself stated the aforesaid fact in para-2, which is quoted herein below:

"And WHEREAS the borrower having failed to repay the amount, and hence, the undersigned, in exercise of powers conferred U/S 13(4) of the said Act read with Rule 8 of the Rules taken over possession of the property/properties, (hereinafter referred as the said properties) more fully described herein below on 30/07/2012."

7. Once the bank has declared in the auction notice that they are taken possession of the property in question under Section 14 of the SARFAESI Act, it is not open for the purchaser to raise objection in respect of the application of bank under Section 14 of the SARFAESI Act being pending before the District Magistrate which are only execution proceedings in respect of the order of possession passed under Section 13(4) of the SARFAESI Act.

8. It is further to be seen that the applicant was the Branch Manager and was exercising statutory powers under SARFAESI Act and as such he is protected by Section 32 of the SARFAESI Act and no criminal proceedings or prosecution can be lodged against the applicant, who is an Officer of the Bank.

9. In view thereof, the present criminal proceedings against applicant are bad in law, therefore, the summoning order dated 09.08.2018 passed by Additional Chief Judicial Magistrate, IXth, Varanasi in Complaint Case No. 1865 of 2018 (Mohd. Akhlaq Khan vs. Vinod Kumar) under Sections 417, 504, 506 IPC, is hereby set aside.

10. The present application under Section 482 Cr.P.C. is, accordingly, ***allowed***.

(2024) 5 ILRA 1267
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 NO. 264 of 2023

Smt. Jasvinder Kaur ...Appellant
Versus
N.H.A.I. & Ors. ...Opp. Parties

Counsel for the Appellant:
Ms. Gunjan Jadwani, Ms. Chandrika Patel

Counsel for the Opp. Parties:
Mr. Pranjal Mehrotra

Civil Law – the Arbitration and Conciliation Act, 1996 - Sections 31, 34 & 37 – Appellant- Commercial Court's order dismissing the application under Section 34 of the Act as time barred challenged- Appellant preferred arbitration under Section 3G (5) of the NHAI Act- Award passed by competent authority- back dated- Section 31(5) of the Act- Delivery of signed copy of the arbitral award is a mandatory requirement- plays pivotal role- Appeal allowed. (Paras 8, 9, 10, and 14)

HELD:

Delivery of an arbitral award under Section 31(5) of the Act plays a pivotal role by initiating various stages of the arbitration process, setting limitation periods, and conferring rights upon the parties. In the realm of sports, where victory and defeat hang in balance, arbitration serves as the referee adjudicating disputes on the field of play. Section 31(5) of the Act acts as the final whistle, signalling the end of the match and the declaration of the winner. For the prevailing party, the delivery of the award marks the culmination of their efforts and provides them with a means of enforcing their rights against the losing party. Conversely, for the losing party, the delivery of the award represents the beginning of the period within which they may challenge the award on specified grounds under Section 34 of the Act. (Para 8)

In such circumstances, placing the onus on the parties to request a copy of the award could potentially disadvantage parties who may 8 be unaware of their rights or unable to navigate the intricacies of the arbitration process effectively. This could lead to situations where one party, typically the more legally sophisticated or resourceful party, obtains a copy of the award promptly, while the other party, due to lack of awareness or means, is left uninformed and disadvantaged. Such an outcome would not only be contrary to the principles of equality and fairness that underpin arbitration but could also undermine public confidence in the arbitration process as a whole. (Para 9)

The only exception to Section 31(5) of the Act arises in situations where a party has consciously accepted the award or acted upon it. This exception is grounded in the principles of fairness, finality, and efficiency in arbitration. When a party has consciously accepted the award, it indicates a clear and unequivocal acknowledgment of the tribunal's decision. This acceptance can manifest in various forms, such as a written St.ment agreeing to the award, compliance with the terms of the award, or any conduct that demonstrates acknowledgment of the award's finality. By consciously accepting the award, the party essentially waives any procedural rights related to the formal receipt of the signed award copy. (Para 10)

The argument of the Respondents that the Appellant never requested for a certified copy of the award is of no consequence since Section 31(5) of the Act casts a duty upon the Arbitrator to deliver the award. Section 31(5) of the Act unequivocally imposes an obligation upon the Arbitrator to deliver a signed copy of the arbitral award to each party involved in the arbitration. This statutory duty is not contingent upon a party's request for the award; rather, it is an imperative that must be fulfilled by the Arbitrator irrespective of any such request. The failure to comply with this statutory obligation can lead to significant procedural irregularities, potentially undermining the arbitral process and the enforceability of the award. (Para 14)

Appeal allowed. (E-14)

List of Cases cited:

1. Smt. Sudha Vs U.O.I.& ors. (Appeal under Section 37 of the Arbitration & Conciliation Act, 1996 No. 271 of 2022) (Allahabad High Court)

2. U.O.I.Vs Bhola Prasad Agarwal & anr. 2022 SCC OnLine Chh 1644

3. Resurgent Power Projects Ltd. Vs ABB India Ltd. reported in MANU/TN/1154/2020

4. Ministry of Health & Family Welfare & anr. Vs M/s. Hosmac Projects Division of Hosmac India Pvt. Ltd. 2023 SCC OnLine Del 8296.

5. U.O.I.-Vs- Tecco Trichy Engineers reported in (2005) 4 SCC 239

6. Dakshin Haryana Bijli Vitran Nigam Ltd. Vs Navigant Technologies Pvt. Ltd. reported in (2021) 7 SCC 657

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

1. The instant application has been filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') by Smt. Jasvinder Kaur (hereinafter referred to as the 'Appellant') challenging the order dated February 7, 2023 passed by District Judge, Rampur by which the application under Section 34 of the Act filed by the Appellant was dismissed as time barred.

FACTS

2. I have laid down the factual matrix of the instant lis below:

a. A notification under Section 3A of the National Highways Act, 1956 (hereinafter referred to as the 'NHAI Act') was issued by National Highways Authority of India (hereinafter referred to as the 'Respondent No. 1'). Subsequently, a notification under Section 3D of the NHAI Act was published by the Respondent on June 17, 2013.

b. Appellant filed an objection before the Competent Authority, claiming higher rate of compensation. Objection of the Appellant was rejected by the Competent Authority. Against the award passed by the Competent Authority, the Appellant preferred arbitration under Section 3G(5) of the NHAI Act.

c. The Arbitrator passed an award on January 31, 2023 (back dated to October 11, 2022). Thereafter, the Appellant proceeded to challenge the said arbitral award under Section 34 of the Act before the District Judge, Rampur which was dismissed vide order dated February 7, 2023 as time barred.

d. Aggrieved by the order dated February 7, 2023, the Appellant has preferred the instant appeal under Section 37 of the Act before this Court.

CONTENTIONS OF THE APPELLANT

3. Learned counsel appearing for the appellant has made the following submissions before this Court:

a. District Judge, Rampur in its order dated February 7, 2023 has failed to return any finding as to when the signed copy of the award was served upon the Appellant. In the absence of any finding as to when the signed copy of the award was served upon the Appellant, it was erroneous on part of the District Judge, Rampur to return a finding that there was a delay in filing the application under Section 34 of the Act, in as much as Section 34(3) of the Act provides that the limitation for filing an application under Section 34 of the Act shall begin from the date when the arbitral award has been received by the aggrieved party.

b. In the application filed by the Appellant under Section 34 of the Act before the District Judge, Rampur, it was specifically pleaded by the Appellant that the award was not pronounced on October 11, 2022 which was the date fixed for pronouncement of award. The Appellant was making continuous efforts to enquire about the status of the award from court officer of the Arbitrator. Subsequently the award was pronounced only on January 31, 2023 and the certified copy of the same was made available to the Appellant only on February 1, 2023 pursuant to which the application under Section 34 of the Act was filed on February 7, 2023 and as such there is no delay in filing the application under Section 34 of the Act.

c. Appellant also sent a letter to the Respondents on February 6, 2023 duly

intimating them that the award was pronounced only on January 31, 2023 and as such the Appellant will be assailing the same by filing a case under Section 34 of the Act.

d. District Judge, Rampur, without considering the averments of the Appellant, proceeded to dismiss the application under Section 34 of the Act vide its order dated February 7, 2023 without arriving at any finding as to when the Appellant became aware of the award.

e. Reliance is placed upon the judgment of this Court in ***Smt. Sudha v. Union of India & 3 Others*** **(Appeal under Section 37 of the Arbitration & Conciliation Act, 1996 No. 271 of 2022).**

f. A bare perusal of the Counter Affidavit filed by the Respondents clearly goes to show that the Respondent No. 1 has not controverted the fact that the award was not pronounced by the Arbitrator on October 11, 2022 and instead the award was published only on January 31, 2023. No document, much less, any averment has been made by the Respondents to show that the award was published on October 11, 2022 and not January 31, 2023. Moreover, even the details of the order sheet of the arbitration case, filed by the Respondent No. 1, clearly shows that there is no recording of judgment delivery/pronouncement of order on October 11, 2022.

g. Respondents have sought to rely upon the judgment passed by the High C**ourt of Chhattisgarh in *Union of India v. Bhola Prasad Agarwal & Anr*. reported in** 2022 SCC OnLine Chh 1644 but the said judgment is distinguishable with the instant case, in as much as in the case before the High Court of Chhattisgarh, the Appellant therein was already aware of the award, which is not the circumstance in the instant case.

h. Respondents have sought to rely upon the judgment passed by the Madras High Court in ***Resurgent Power Projects Limited v. ABB India Limited*** reported in **MANU/TN/1154/2020** which is distinguishable from the facts of the instant case. There is a categorical finding about awareness of the award by the appellant therein, which is absent in the instant case.

i. Importance of delivering a signed copy of the award by the arbitrator to the party as per Section 31(5) of the Act has been considered by the High Court of Delhi in ***Ministry of Health & Family Welfare & Anr. v. M/s. Hosmac Projects Division of Hosmac India Pvt. Lt***d. reported in **2023 SCC OnLine Del 8296.**

j. In view of the aforesaid facts and circumstances, it is submitted that the present appeal filed by the Appellant under Section 37 of the Act be allowed and order dated February 7, 2023 passed by District Judge, Rampur be set aside.

CONTENTIONS OF THE RESPONDENTS

4. Learned counsel appearing for the Respondents has made the following submissions:

a. Appellant was well aware that the matter was fixed for orders on October 11, 2022. Even, then the Appellant applied for the certified copy well after the expiry of three months limitation period under Section 34(3) of the Act. This clearly shows that the Appellant was not interested in the matter. It must be borne in mind that this Court ought not to adopt an approach which helps a dishonest evader, and defeats the very intent of the legislation that is the Act. Had the Appellant been prudent, the Appellant would have applied for the certified copy of the award well within the three months period from October 11, 2022. The Appellant at this belated stage cannot

contend that the Appellant had no knowledge of the award being passed on October 11, 2022. Not even a shred of evidence is on record to established the bona fides of the Appellant.

b. The District Judge, Rampur in its order categorically records that there is a delay of 37 days in filing the application under Section 34 of the Act. As there is 37 days delay, the instant Appeal deserves to be dismissed with costs.

CONCLUSION & ANALYSIS

5. The primary issue raised in the instant case is that whether the District Judge, Rampur was justified in dismissing the application filed by the Appellant under Section 34 of the Act since the Appellant was never served with a signed copy of the arbitral award, which is a mandatory requirement under Section 31(5) of the Arbitration Act. Relevant parts of Section 31(5) of the Arbitration Act have been extracted herein below for ease of reference:

"31. Form and contents of arbitral award. —

(1) ...

(2) ...

(3) ...

(4) ...

(5) After the arbitral award is made, a signed copy shall be delivered to each party."

6. Section 31(5) of the Arbitration Act while seemingly procedural in nature, embodies broader objectives. The Hon'ble Supreme Court in ***Union of India -v- Tecco Trichy Engineers*** reported in **(2005) 4 SCC 239** propounded the importance of the requirement to deliver a signed copy of the arbitral award on parties. Relevant paragraph of the said judgment reads as under:

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

7. In ***Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited*** reported in **(2021) 7 SCC 657**, the Hon'ble Supreme Court reiterated that the limitation for filing objections to an arbitral award will only commence from the date of receipt of a signed copy under Section 31(5) of the Act. Relevant paragraph is extracted below:

"29.The judgment inTecco Trichy Engineers[Union of Indiav.Tecco Trichy Engineers & Contractors, (2005) 4 SCC

239] was followed inState of Maharashtrav.ARK Builders (P) Ltd.[State of Maharashtrav.ARK Builders (P) Ltd., (2011) 4 SCC 616 : (2011) 2 SCC (Civ) 413] , wherein this Court held that Section 31(1) obliges the members of the Arbitral Tribunal to make the award in writing and sign it. The legal requirement under sub-section (5) of Section 31 is the delivery of a copy of the award signed by the members of the Arbitral Tribunal/arbitrator, and not any copy of the award. On a harmonious construction of Section 31(5) read with Section 34(3), the period of limitation prescribed for filing objections would commence only from the date when the signed copy of the award is delivered to the party making the application for setting aside the award. If the law prescribes that a copy of the award is to be communicated, delivered, despatched, forwarded, rendered, or sent to the parties concerned in a particular way, and since the law sets a period of limitation for challenging the award in question by the aggrieved party, then the period of limitation can only commence from the date on which the award was received by the party concerned in the manner prescribed by law. The judgment inTecco Trichy[Union of Indiav.Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239] has been recently followed inAnilkumar Jinabhai Patelv.Pravinchandra Jinabhai Patel [Anilkumar Jinabhai Patelv.Pravinchandra Jinabhai Patel, (2018) 15 SCC 178 : (2019) 1 SCC (Civ) 141] ."

8. Delivery of an arbitral award under Section 31(5) of the Act plays a pivotal role by initiating various stages of the arbitration process, setting limitation periods, and conferring rights upon the parties. In the realm of sports, where victory and defeat hang in balance, arbitration serves as the referee adjudicating disputes on the field of play. Section 31(5) of the Act acts as the final whistle, signalling the end of the match and the declaration of the winner. For the prevailing party, the delivery of the award marks the culmination of their efforts and provides them with a means of enforcing their rights against the losing party. Conversely, for the losing party, the delivery of the award represents the beginning of the period within which they may challenge the award on specified grounds under Section 34 of the Act.

9. The duty to deliver an arbitral award, a cornerstone of the arbitration process, is unequivocally cast upon the arbitral tribunal. Rooted in the foundational principles of arbitration, procedural fairness, and judicial integrity, this obligation embodies the essence of justice delivery and the sanctity of due process. Arbitration, as an alternative dispute resolution mechanism, operates on the premise of party autonomy, where disputing parties voluntarily submit their grievances to a neutral arbitrator or tribunal, with the expectation of a fair and impartial adjudication process. Within this framework, the arbitral tribunal assumes a quasi-judicial role, vested with the authority to render decisions that are binding on the parties, akin to the solemn pronouncements of traditional courts. Arbitration proceedings often involve parties with disparate levels of legal knowledge, resources, and bargaining power. In such circumstances, placing the onus on the parties to request a copy of the award could potentially disadvantage parties who may be unaware of their rights or unable to navigate the intricacies of the arbitration process effectively. This could lead to situations where one party, typically the more legally sophisticated or resourceful party, obtains a copy of the award promptly, while the other

party, due to lack of awareness or means, is left uninformed and disadvantaged. Such an outcome would not only be contrary to the principles of equality and fairness that underpin arbitration but could also undermine public confidence in the arbitration process as a whole.

10. The only exception to Section 31(5) of the Act arises in situations where a party has consciously accepted the award or acted upon it. This exception is grounded in the principles of fairness, finality, and efficiency in arbitration. When a party has consciously accepted the award, it indicates a clear and unequivocal acknowledgment of the tribunal's decision. This acceptance can manifest in various forms, such as a written statement agreeing to the award, compliance with the terms of the award, or any conduct that demonstrates acknowledgment of the award's finality. By consciously accepting the award, the party essentially waives any procedural rights related to the formal receipt of the signed award copy. This waiver is based on the principle that actions speak louder than words; if a party behaves in a manner that indicates acceptance, insisting on formal delivery becomes redundant. Similarly, if a party acts upon the award, such as by making payments or performing obligations stipulated by the award, this conduct also signifies acceptance. Acting upon the award reflects the party's intention to comply with the tribunal's decision, further reinforcing the notion that the formal delivery of the signed award is unnecessary. The rationale behind this exception aligns with the core objectives of arbitration, which include resolving disputes efficiently and minimizing procedural formalities that could hinder the swift execution of arbitral awards. This exception prevents unnecessary delays that could arise if parties who have already accepted or acted upon the award were still required to wait for the formal delivery of a signed copy. Moreover, this exception upholds the principle of estoppel, where a party is prevented from denying the validity of the award after having accepted it or acted upon it. This is particularly important in maintaining the integrity and finality of arbitral decisions, as it prevents parties from engaging in conduct that would contradict their prior acceptance of the award.

11. It appears from the factual matrix of the instant case that a signed copy of the arbitral award was never delivered upon the Appellant by the Arbitrator. The Arbitrator had announced that the award was reserved on October 11, 2022 and also will be pronounced on October 11, 2022 but the Arbitrator did not deliver his award on that day. Instead, the award was actually pronounced on January 31, 2023 with a back date, which should not have been done. Appellant cannot be blamed for this lapse on part of the Arbitrator. Furthermore, what emerges from the Counter Affidavit filed by the Respondents is that there is no specific denial of the fact that although the award was scheduled to be pronounced on October 11, 2022 it was in reality pronounced on January 31, 2023. Relevant paragraph from the Counter Affidavit is extracted herein:

"That the contents of paragraph nos. 8,9,10,11,12,13 and 14 of the affidavits, as stated, are not admitted. In reply, it is respectfully submitted that from a perusal of the impugned judgment and order dated 7.2.2023 passed by the District Judge, Rampur, it is apparent that the appellant had not given any sufficient cause for the 37 days delay, nor any documents were filed in support of the Delay Condonation Application, and therefore, it is apparent

that the application under Section 34(3) of the Arbitration and Conciliation Act, 1996 filed by the Appellant was liable to be rejected, and the same was rightly rejected by the Learned Court Below by the judgment and order dated 7.2.2023."

12. The judgments in ***Bhola Prasad (supra)*** and ***Resurgent Power (supra)*** relied upon by the Respondents do not align with the factual circumstances in the instant case. In ***Bhola Prasad (supra)*** and ***Resurgent Power (supra)***, the Appellant was aware of the award and had knowledge of its content. However, nothing has been brought on record by the Respondents to establish that the Appellant in the instant case was aware of or had knowledge of the contents of the arbitral award. The lack of evidence supporting the Appellant's awareness of the arbitral awards creates a substantial disparity between the circumstances of the present case and those in ***Bhola Prasad (supra)*** and ***Resurgent Power (supra)*** therefore making the law laid down in the aforesaid judgments inapplicable to the instant case. The Appellant cannot be placed at a disadvantage as a result of statutory lapse on part of the Arbitrator to not deliver a signed copy of the award under Section 31(5) of the Act.

13. The Appellant in the instant case received a certified copy of the arbitral award which was passed on January 31, 2023 (although dated October 11, 2022) on February 1, 2023. Thereafter, the Appellant preferred the application under Section 34 of the Act before the District Judge, Rampur on February 7, 2023 that is within the prescribed limitation period of three months as provided under Section 34(3) of the Act. Since, a certified copy of the arbitral award was received by the Appellant only on February 1, 2023, it is from that date only that the clock of limitation will start ticking.

14. The argument of the Respondents that the Appellant never requested for a certified copy of the award is of no consequence since Section 31(5) of the Act casts a duty upon the Arbitrator to deliver the award. Section 31(5) of the Act unequivocally imposes an obligation upon the Arbitrator to deliver a signed copy of the arbitral award to each party involved in the arbitration. This statutory duty is not contingent upon a party's request for the award; rather, it is an imperative that must be fulfilled by the Arbitrator irrespective of any such request. The failure to comply with this statutory obligation can lead to significant procedural irregularities, potentially undermining the arbitral process and the enforceability of the award. The eventual pronouncement of the award on January 31, 2023, with a backdate, introduces a further layer of procedural irregularity. The practice of backdating an arbitral award is inherently problematic as it can obscure the actual timeline of the arbitral proceedings, potentially affecting the parties' rights and obligations. In this case, the backdated pronouncement of the award could mislead the parties regarding the timeline for challenging or enforcing the award, thereby affecting their legal recourse.

15. In light of the aforesaid, the instant Appeal under Section 37 of the Act is allowed and the order dated February 7, 2023 passed by the District Judge, Rampur is set aside. This Court directs the District Judge, Rampur to adjudicate the application filed by the Appellant under Section 34 of the Act on merits expeditiously and preferably, within a period of 6 months from the date of receipt of a certified copy of this order.

16. Accordingly, the instant appeal is allowed. There shall be no order as to the costs.

(2024) 5 ILRA 1275
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 418 of 2023

Beeru Kumar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Yashwant Pratap Singh

Counsel for the Opposite Party:
G.A.

Criminal Law – Modification application in a Bail application- Applicant- Granted bail a year ago- Bail order prescribed one of the sureties to be a family member- No family member of the applicant in the St. of Uttar Pradesh- Father, sole surviving member, resides abroad- Unable to come back to give surety- Trial court – Fixing surety- to apply mind to socioeconomic conditions of the prisoner- It shall not impose any onerous or arbitrary surety conditions- Order granting bail should not get defeated- Onerous surety condition put by the court recalled – Dictum in *Arvind Singh Vs St. of Uttar Pradesh* reiterated- Application allowed.

HELD: Courts should examine the socioeconomic conditions of a prisoner while fixing surety conditions. Further, the Courts should not impose conditions which cannot be satisfied by the prisoner on account of his destitute circumstances or conditions of want or deprivation faced by him.

While fixing sureties the trial court has to apply its mind to the socioeconomic conditions of the prisoner. Further the trial court while fixing sureties shall not impose any onerous or arbitrary conditions which defeat the order granting bail to the concerned prisoner or prevent the applicant from being set forth at liberty.

All trial courts as well as DLSAs are under an obligation to comply with the directions of this Court in Arvind Singh (supra) as well as those made above in this order. Learned District Judge, Deoria shall make necessary enquiries and appropriately counsel the trial judge and the DLSA, Deoria in the matter.

Application allowed. (E-14)

List of Cases cited:

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

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

1. The applicant was granted bail by this Court by order dated 18.05.2023. While granting the bail following terms and conditions of sureties were provided by this Court in the order dated 18.05.2023:

"7. Let the applicant, Beeru Kumar, who is involved in the aforesaid case crime, be released on bail on his furnishing a personal bond and two sureties (one should be of a family member) each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

i. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

ii. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

iii. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail."

2. The applicant does not have any family member in the State of Uttar Pradesh. The sole surviving member of family is his father who resides abroad. His father is unable to return home and give his surety.Consequently, the applicant is unable to furnish the sureties as directed by this Court. Hence, the said surety condition is onerous. The applicant continues to remain in jail despite the order granting him bail.

3. The fixation of sureties has engaged the attention of various constitutional courts. This Court upon consideration of authorities point in **Arvind Singh v. State of U.P. Thru. Prin. Secy. Home Deptt. (Application U/S 482 No.2613 of 2023)** held:

"24. However despite unequivocal holdings of various constitutional courts the trial courts continue to adopt a rote response to a dynamic problem and approach the issue of fixation of sureties in a mechanical manner and neglect to make requisite enquiries as contemplated in the preceding parts of the judgment. The duties of the trial courts as well as other agencies while fixing sureties can be summed up as under:-

(1) In case a prisoner cannot arrange the sureties fixed by the trial court the former can make an application to the learned trial court for a lesser surety. Material facts relating to the socioeconomic status and roots in the community of the prisoner shall be stated in the application.

(2) Similarly it is bounden duty of the DLSA to examine the status of the prisoners who have been enlarged on bail but are not set at liberty within seven days of the bail order. In case the prisoners cannot arrange for sureties they may be advised and assisted to promptly move an application for refixation of the surety in light of this judgment.

(3) Once the prisoner makes such application the trial court shall make an enquiry consistent with this judgment and pass a reasoned order depicting consideration of relevant criteria for fixing sureties with utmost expedition.

(4) Every trial court is under an obligation to satisfy itself about the socioeconomic conditions of the prisoner and probability of absconding and his roots in the community and fix sureties commensurate with the same. The State authorities or other credible agencies as the court may direct to promptly provide the requisite details.

(5). In case the prisoner is from another State and is unable to produce local sureties, sureties from the prisoner's home district or any other place of his choice determined by the court of competent jurisdiction of the said district and State shall be accepted by the trial court.

(6) The prisoner/counsel may state the details of the socio-economic status of the prisoner in the bail application in the first instance. This will facilitate an expeditious consideration of the issue related to sureties."

4. Courts should examine the socioeconomic conditions of a prisoner while fixing surety conditions. Further, the Courts should not impose conditions which cannot be satisfied by the prisoner on account of his destitute circumstances or conditions of want or deprivation faced by him.

5. I find merit in the submission that the condition put by this Court of (one

should be of a family member) is an onerous one in the facts and circumstances of this case.

6. In the wake of preceding discussion the modification application is allowed. The surety conditions put by this Court in the order dated 18.05.2023 to the effect that (one should be of a family member) as sureties is recalled. The matter is remitted to the trial court. The trial court shall fix sureties as per socioeconomic conditions of the applicant and in light of the observations made above.

7. While fixing sureties the trial court has to apply its mind to the socioeconomic conditions of the prisoner. Further the trial court while fixing sureties shall not impose any onerous or arbitrary conditions which defeat the order granting bail to the concerned prisoner or prevent the applicant from being set forth at liberty.

8. Before parting some observations have to be made in the facts of this case. The applicant is in jail for almost one year. The bail application of the applicant was allowed by this Court on 18.05.2023. However, the applicant has not been set forth at liberty on account of the surety conditions in the bail order.

9. Prima facie it appears that the trial court and the DLSA did not discharge their duties of making necessary enquiries even after the prisoner was not set forth at liberty within one week after the bail was granted by this Court in light of **Arvind Singh (supra).** The District Legal Services Authority has not moved any application nor preferred any advice to the applicant in light of the judgment rendered in **Arvind Singh (supra)** to seek a modification of the order dated 18.05.2023.

10. It appears that the directions of this Court in **Arvind Singh (supra)** have not been complied with by the trial court and the DLSA respectively.

11. All trial courts as well as DLSAs are under an obligation to comply with the directions of this Court in **Arvind Singh (supra)** as well as those made above in this order. Learned District Judge, Deoria shall make necessary enquiries and appropriately counsel the trial judge and the DLSA, Deoria in the matter.

12. It is clarified that the above observations shall not be construed adversely against any judicial officer.

13. A copy of this order shall be sent to Secretary, State Legal Services Authority.

(2024) 5 ILRA 1277
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Bail Application No. 13444 of 2023

Praveen ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Rajrshi Gupta, Rizwan Ahamad, Sr. Advocate

Counsel for the Respondent:
G.A., Harshit Gupta, Ramanand Gupta

Criminal Law – Bail application- Applicant- Allegation of shooting dead a businessman by multiple close range firearm shots- Conspiracy unearthed- Main conspirator and co-accused bail application rejected- Some other co-accused persons granted

bail- Established principles of jurisprudence of bail- Relevant factors for consideration of bail application- reiterated- Parity with other co-accused persons rejected- Practice of engaging a new advocate- Object of obtaining adjournment- discouraged- Application dismissed. (Paras 8 and 12)

HELD:
I have considered the above mentioned rival submissions in referred factual and legal backgrounds and in view of established principle of jurisprudence of bail i.e. 'bail is rule and jail is exception' as well as relevant factors for consideration of a bail application such as (i) whether there is any prima facie or reasonable ground to believe that the accused had committed 5 the offence; (ii) nature and gravity of the accusation (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; (viii) danger, of course of justice being thwarted by grant of bail etc, and that an order to grant or not to grant bail must assigned reasons. (Para 8)

A practice to engage a new Advocate by an applicant through his pairokar on date of hearing or few days back, only with an object to take an adjournment, specifically in bail applications, which has already been adjourned repeatedly on earlier dates on request of counsel for applicant, is liable to be discouraged. It is duty of an Advocate to expedite hearing of a bail application and not to prolong it. (Para 12)

Application dismissed. (E-14)

List of Cases cited:

1. Deepak Yadav Vs St. of U.P. (2022) 8 SCC 559

2. Manoj Kumar Khokar Vs St. of Raj. & anr.(2022) 3 SCC 501

3. The St. of Jharkhand Vs Dhananjay Gupta @ Dhananjay Prasad Gupta: Order dated 7.11.2023 in SLP(Crl) No.10810/2023

4. Shiv Kumar Vs The St. of U.P. & ors. : Order dated 12.9.2023 in Criminal Appeal No.2782 of 2023

5. Ramayan Singh Vs The St. of U.P. & anr., 2024 SCC OnLine SC 563

6. Sanjeev Vs St. of Kerala, 2023 INSC 998

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

1. Heard Sri I.P.S. Tomar and Sri Rizwan Ahamad, learned counsels for applicant, Sri Roshan Kumar Singh, learned AGA for State and Sri Sagir Ahmad, learned Senior Advocate assisted by Sri Harshit Gupta, learned counsel for Informant.

2. Applicant-Praveen has approached this Court by way of filing present bail application seeking enlargement on bail in Case Crime No. 543 of 2021 (Session Trial No. 1197 of 2022), under Sections 302, 506, 120B, 34, 201, 473 IPC, Police Station Civil Lines, District Aligarh.

3. This bail application was filed on 01.03.2023 and was taken up earlier for hearing on eight dates, however, it was mainly adjourned on request of counsel for applicant or due to his absence or for exchange of pleadings. Details of order passed on earlier dates are reproduced hereinafter:

Date	Order
01.06.2023	1. Counter affidavit, if any, be filed by the State counsel on or before the date fixed. 2. List this case on 12.07.2023 as fresh.
12.07.2023	Counter affidavit filed by learned counsel for the informant is taken on record.

Learned counsel for the applicant prays for and is granted one week's time to file rejoinder affidavit.

Put up this case on 20.7.2023 as a fresh case.

20.07.2023 As prayed put up this case on 1.8.2023 as a fresh case.

08.08.2023 As prayed, list this case on 28.8.2023.

20.09.2023 1. As prayed, list after two months.

19.10.2023 1. Counsel for the applicant prays for adjournment.
2. Counsel for the informant informs that trial is on the verge of conclusion.
3. List this case peremptorily on 28.10.2023.

03.11.2023 Learned counsel for the informant informs that trial is on the verge of conclusion.
Learned counsel for the applicant is seeking regular adjournment in this case.

List this case after three months.

08.02.2024 परिवादी के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता उपस्थित हैं।
आवेदक की ओर से कोई उपस्थित नहीं है।
इस वाद को दि० 19.03.2024 को अतिरिक्त वाद सूची में सूचीबद्ध किया जाय।

4. Present case is arising out of an occurrence where a businessman was shot dead by multiple close range firearm shots (five entry and three exit firearm wounds) in his car by contract killers, who were following deceased by another vehicle, at about 08.45 PM on 27.12.2021 at a busy place in the heart of Aligarh City. A thorough investigation was conducted and a large conspiracy was unearthed. In was revealed that main conspirator was co-accused, Ankush Agrawal, whose bail application was rejected by a Coordinate Bench of this Court on 09.01.2023 (Neutral Citation No. 2023:AHC:5455). For reference reasons assigned to reject bail application are mentioned hereinafter:

"After hearing the rival contention, this court finds that main motive for commission of alleged offence has been attributed to the applicant by the witnesses. The settlement an amount of Rs. 90 lacs was disliked by the applicant since the deceased was pursuing the settlement and wanted that Deepti Gupta should be paid remaining amount of Rs. 45 lacs as permanent alimony by the applicant. The deceased was got murdered by the applicant by hiring shooters and hatching conspiracy with his friend and co-accused stated above."

5. During investigation, on basis of CCTV footage and eye witness account, sketches of two assailants and driver of vehicle were drawn. During investigation, gradually layers of conspiracy were pealed out, truth revealed and involvement of as many as 13 accused came into light. Trial is proceeding and it has reached upto statement of last prosecution witness. Submission was made that an application under Section 311 Cr.P.C. is being filed on behalf of applicant, but it was not supported by any document. Otherwise also, it would be a fatal argument as it would amount to delay trial on part of accused side only.

6. Learned counsel for applicant has mainly urged that there was no eye witness who could identify real culprits. Applicant's name was disclosed in confessional statement of co-accused (Sahil Yadav), who

has already been released on bail. There is no direct evidenve of conspiracy and role assigned to applicant being contract killer alongwith other co-accused (Jitendra) is not supported by cogent evidence. Driver of car, who was also alleged to be a contract killer, has been released on bail and other co-accused, alleged to be part of conspiracy, have also been granted bail.

7. Per contra, learned Senior Advocate appearing for Informant submitted that applicant being contract killer, has no fear of law and order. He has long criminal history of atleast eighteen cases involving offences of attempt to murder, murder, murder during robbery, Arms Act etc. Applicant is menace to society and if bail is granted, he not only being remain a flight risk but there is likelihood to repeat grievous offences. Ballistic report also proved that weapon recovered on pointing out of applicant, was used in occurrence. List of criminal cases are as follows:

"i. Case Crime No. 508 of 2013 under Sections 147, 148, 149, 302, 302, 307 IPC and 7 CLA Act P.S.- Civil Lines District Aligarh.

ii. Case Crime No. 606 of 2013 under Section 25 Arms Act, Civil Lines District Aligarh.

iii. Case Crime No. 543 of 2021 under Sections 302, 120B, 506, 34, 201, 473 IPC Civil Lines District Aligarh.

iv. Case Crime No. 368 of 2019 under Sections 147, 148, 149, 307, 323, 504 IPC P.S. Khair
District Aligarh.

v. Case Crime No. 89 of 2020 under Section 2/3 Gangster Act P.S. Banna Devi District Aligarh.

vi. Case Crime No. 147 of 2019 under Sections 147, 148, 149, 307 IPC P.S. Banna Devi District Aligarh.

vii. Case Crime No. 148 of 2019 under Section 25/27 Arms Act P.S. Banna Devi District Aligarh.

viii. Case crime no. 155 of 2022 under Section 2/3 Gangster Act, P.S. Civil Line, Aligarh.

ix. Case Crime No. 198 of 2014 under Section 392 IPC P.S. Tappal District Aligarh.

x. Case Crime No. 1402 of 2018 under Sections 147, 148, 149, 307 IPC P.S. Kotwali Sadabad District-Hathras.

xi. Case Crime No. 234 of 2015 under Sections 302, 120B, 34 IPC P.S. Chandpa District- Hathras.

xii. Case Crime No. 17 of 2016 under Section 2/3 Gangster Act P.S. Chandpa District- Hathras.

xiii. Case Crime No. 400 of 2017 under Sections 392, 34 IPC & 25 Arms Act P.S. Badshahpur District- Gurugram.

xiv. Case Crime No. 58 of 2018 under Sections 392, 394, 395, 397, 365, 34 IPC & 25/27 Arms Act P.S. Dwarika District- New Delhi.

xv. Case Crime No. 182 of 2018 under Sections 147, 148, 149, 307, 302 P.S. Shikarpur District- Bulandshehar.

xvi. Case Crime No. 76 of 2022 under Sections 25/27/3 Arms Act P.S. Tappal District- Aligarh.

xvii. Case Crime No. 01 of 2017 under Section 25 Arms Act P.S. Special Cell Lodhi Colony District- New Delhi.

xviii. Case Crime No. 36 of 2022 under Section 3/25 Arms Act, P.S. Bharatpur, Rajasthan."

8. I have considered the above mentioned rival submissions in referred factual and legal backgrounds and in view of established principle of jurisprudence of bail i.e 'bail is rule and jail is exception' as well as relevant factors for consideration of a bail application such as (i) whether there is any

prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; (viii) danger, of course of justice being thwarted by grant of bail etc, and that an order to grant or not to grant bail must assigned reasons (see **Deepak Yadav vs State of U.P. (2022) 8 SCC 559, Manoj Kumar Khokar vs State of Rajasthan and Anr (2022) 3 SCC 501, The State of Jharkhand vs Dhananjay Gupta @ Dhananjay Prasad Gupta: Order dated 7.11.2023 in SLP(Crl) No.10810/2023, Shiv Kumar Vs The State of U.P. and Ors : Order dated 12.9.2023 in Criminal Appeal No.2782 of 2023; Ramayan Singh vs. The State of U.P. and another, 2024 SCC OnLine SC 563**), I am of considered opinion that present is not a fit case to grant bail to applicant mainly on following grounds:-

(i) The orders whereby co-accused were granted bail were not accompanied with reasons as warranted by Supreme Court in **Manoj Kumar Khokhar (supra) and Brijmani Devi vs. Pappu Kumar (2022) 4 SCC 497**. All co-accused were mainly alleged to be part of larger conspiracy whereas allegations against applicant are of execution of plan to cause death by firing, therefore, claim of parity is rejected.

(ii) In the present case a thorough investigation was conducted that not only various evidence such as, photo sketch, CCTV footage, statement of various witnesses, call details etc. were collected but active involvement of applicant being contract shooter was also unearthed and at this stage there is no material to doubt credibility of evidence collected during investigation.

(iii) Trial is proceeding and applicant has not placed statement of witnesses recorded during trial and is relying only upon material collected during investigation. It appears that they want that this Court may not peruse even prima facie nature of evidence before Trial Court. This factor also goes against applicant. Complainant has filed some statement but counsel for applicant has not referred it. In this regard Court takes note submission of learned Senior Advocate for Informant that testimony of witnesses are prima facie against applicant.

(iv) The argument with regard to lack of evidence for hatching conspiracy is also liable to be rejected as not only nature of evidence before Trial Court is not brought before this Court but question likely to be put under Section 313 Cr.P.C. are still not ascertained. In this regard paras 35 and 36 of **Sanjeev Vs. State of Kerala, 2023 INSC 998**, being relevant, are mentioned hereinafter:

"35. After consideration of these depositions, we must decide whether the evidence on record is sufficient to establish a conspiracy under Section 120B, IPC. The ingredients to constitute a criminal conspiracy were summarised by this Court in State through Superintendent of Police v. Nalini & Ors. (1999)5 SCC 253 (3-Judge Bench). They are as follows:

i. Conspiracy is when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means.

ii. The offence of criminal conspiracy is an exception to the general law, where intent alone does not constitute crime. It is the intention to commit a crime

and join hands with persons having the same intention.

iii. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

iv. Where in pursuance of the agreement, the conspirators commit offenses individually or adopt illegal means to do a legal act that has a nexus to the object of the conspiracy, all of them will be liable for such offenses even if some of them have not actively participated in the commission of those offenses.

36. These principles were followed in Yakub Abdul Razak Memon v. State of Maharashtra, (2013)13 SCC 1 (2-Judge Bench), wherein this Court reiterated that to establish conspiracy it is necessary to establish an agreement between the parties. Further, the offence of criminal conspiracy is of joint responsibility, all conspirators are liable for the acts of each of the crimes which have been committed as a result of the conspiracy. [See also: Arvind Singh v. State of Maharashtra, (2021)11 SCC 1 (3-Judge Bench); Mohd. Naushad (supra)]"

(v) The Court also takes note of long criminal history of grievous offences of applicant and submission that he is a flight risk as well as likelihood of repeating offence is also very high.

(vi) The Court also takes note of reasons assigned while rejecting bail application of co-accused, Ankush Agrawal. (vii) It has not been denied that prosecution witnesses have substantially supported prosecution case and that they have been tested with lengthy cross-examination.

9. The bail application is accordingly rejected.

10. Trial Court concerned is directed to conclude trial expeditiously.

11. Registrar (Compliance) to take steps.

12. A practice to engage a new Advocate by an applicant through his pairokar on date of hearing or few days back, only with an object to take an adjournment, specifically in bail applications, which has already been adjourned repeatedly on earlier dates on request of counsel for applicant, is liable to be discouraged. It is duty of an Advocate to expedite hearing of a bail application and not to prolong it.

(2024) 5 ILRA 1282
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 72 of 1984

Rahatjan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
S.I. Jafri, Amar Nath Sharma, Kuldeep Johri, Shadab Ali, Vimlendu Tripathi

Counsel for the Respondent:
DGA

Criminal Law: Indian Penal Code, 1860 – Section 302 – Murder – Evidence Act, 1872 – Sections 25, 26 & 27 - Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 15, 16 - accused committed murder of a young boy of 12 years of age by strangulating him - accused made an

extra judicial confession – Charge Sheet - cognizance of the offence - Trial court framed charge - prosecution examined nine witnesses – Contention – Based on circumstantial evidence - no eye witness - prosecution neither produced doctor nor examined constabl e - St.ment under section 313 Cr.P.C. that he has been falsely implicated due to some land dispute between the informant and accused - appellant raised plea of juvenility – JJB declared juvenile on the date of offence - finding - not been set aside by order of any superior court – hence, declared juvenile - as per medical age determination report, accused is 50 years of age – not required to sent to Special Home – Conviction upheld and affirmed.(Para - 3, 16, 38, 41, 42, 47, 48, 49)

Held: Although confession of accused for committing murder of deceased on account of his ill intention to commit unnatural sex with the deceased and consequent threatening hurled by the deceased being made before the police and police custody cannot be permitted to be proved by the public witnesses like PW-5 and PW-6 on account of statutory prohibition under section 25 and 26 of Evidence Act, yet the recovery of dead body and Angochha used in strangulation of the deceased based on disclosure St.ment of the accused before the police and therefore, protected under section 27 of the Evidence Act, which is exception of section 25 and 26 of Evidence Act. Prosecution has successfully proved the links of the chain of circumstantial evidence, accused was last seen by three witnesses in the company of the deceased and the deceased was never found alive thereafter in the evening preceding to the recovery of dead body. Appellant raised plea of juvenility during pendency of appeal . Juvenile Justice Board declared appellant age around 14 years on the date of offence. (Para - 39, 40, 41, 42, 48)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. R. Sreenivasa Vs St. of Kar., 2023 SCC Online SC 1132

2. Hiralal Mallick Vs The St. of Bihar, (1977) 4 SCC 44

3. Rakesh Kumar & anr. Vs The St. of U.P., 1976 SCC Online All 530

4. Karan alias Fatiya Vs St. of M. P., (2023) 5 SCC 504

5. Mahesh Vs St. of Raj., (2021) 18 SCC 582

6. Narayan Chetanram Chaudhary Vs St. of Mah., 2023 SCC Online SC 340

7. R. Sreenivasa Vs St. of Karn.

8. Karan @ Fatiya Vs St. of M. P.

9. Jitendra Singh Vs St. of U.P. (2013) 11 SCC 193

10. Mahesh Vs St. of Raja., (2021) 18 SCC 582

11. Satya Deo Vs St. of U.P., (2020) 10 SCC 555

12. Pratap Singh Vs St. of Jharkhand & ors.

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

1. Heard Sri Vimlendu Tripathi and Sri Kuldeep Johri, learned counsels for the appellant and Sri Sushil Kumar Pandey, learned AGA for the State.

2. This criminal appeal has been filed against the judgement and order dated 22.12.1983 passed by Additional Sessions Judge, Rampur in Session Trial No. 83 of 1983 arising out of Case Crime no. 35/1983 under section 302 IPC, P.S. Suar, District Rampur whereby appellant has been convicted of charge under section 302 IPC and sentenced to imprisonment for life.

3. The prosecution case, in brief, is that on 5.3.1983 after 6:00 pm, the accused Rahatjan had committed the murder of Firasat, a young boy of 12 years of age by strangulating him in his wheat field, situated

in village Aglaga, P.S. Suar, District Rampur. It is also said that on 6.3.1983 on being arrested, the accused made an extra judicial confession of his having caused the death of Firasat by strangulating him with the help of Angochha and he helped the police personnel in making available the dead body of deceased Firasat inside his wheat field and muffler with the help of which, Firasat was strangulated by him by taking out the same from the rahat situated in hat very field.

Police investigated the case and filed charge-sheet against the appellant for charge under section 302 IPC. Learned C.J.M., Rampur took cognizance of the offence and committed the case to the court of session for trial. On commencement of trial, learned trial court framed charge under section 302 IPC against the appellant and he was put to trial for said charge. The prosecution examined as many as nine witnesses in support of charge.

4. Akhtar Ali (PW-1), who is the father of the deceased Firasat and is de-facto complainant in this case. He has stated that Firasat Ali, aged 10-11 years, had gone to pray Asar ki Namaz on 5.3.1983, in the evening and thereafter he had not returned. At that time, he was wearing a shirt, Baniyan, Trouser and woollen sweater. He made search on the next day at about 9:00 am. Khurshid Ahmad met him and told about his having seen Firasat alongwith Rahat Jan going towards the side of cane centre after the period of Asar ki Namaz. Thereafter, Chhotey and Noor Ali also met him and they also told him about their having seen Firasat and Rahat Jan going towards the side of Bijlighar on 5.3.1983 at about 6:00 pm. The accused Rahat Jan had a field towards Bijlighar. On having these informations, he went to the house of Rahat Jan and found Rahat Jan not available at his house. He was told by Safadar Mian about Rahat Jan having not returned to the house since 6:00 pm yesterday. He got the report Ex. Ka-1, written from Hashim Husain and went to the police station and lodged the same. It is also stated that the accused is in the habit of indulging in sodomy and his activities were made known to this effect. He has been cross examined at length. He has stated that Firasat Ali deceased had not gone to offer prayer of Asar Ki Namaz in his presence rather he came to know from his wife on return from the jungle. On that day, he had gone to his field, which is at distance of a furlong from his house. Asar Ki Namaz is being offered at about 5:00 pm. He has stated to have participated in Maghrib Ki Namaz and after offering the prayer there, he came to his house and was informed about Firasat having not returned till then. He enquired from the children with whom he used to play but he could not get his whereabouts. It is also stated that, in the night he had not gone to lodge the report with a thinking that Firasat might have gone to the house of his Mamu in village Khempur and in the morning he went to village Khempur to enquire and thereafter returned to his village when Khurshid, Chhotey and Noor Ali met him and informed about their having seen Firasat with the accused after the hours of Asar Ki Namaz. He has also stated that towards the east of his house, there is an open piece of land where there is a Pakar tree. This land is of Barkat Shah and not of the father of Rahat Jan accused but in the same sequence he has shown his ignorance about the same. He has stated to have also gone along with the police party to the house of Safdar but he had not gone inside the house. He has stated to have remained at a distance and had not gone with the police personnel to the house of Safdar. On return from the house of

Safdar, he had not gone to any other place alongwith the police party. He has denied the fact of his ever intended to purchase open land from the father of the accused. He has also denied the deference suggestion of his ever abused either the accused or his other family members and his having implicated the accused in this case falsely. He has proved the clothes Ext. -01 to 05, which, the deceased Firasat was wearing at the time when he had gone from his house.

5. Khurshid (PW-2) is a minor boy of 12 or 13 years of age but he is capable of giving the reply and being well understandable one. He has stated that 3 or 4 months back at about 6:00 pm, he had gone to invite Qazi Sahib and when he was going, he saw the accused Rahat Jan and Firasat going towards cane centre. In the morning, he told this fact to Akhtar Ali, father of Firasat. He came to know that the dead body of Firasat had been recovered in the field. In his cross examination, he has stated that he and Firasat used to have the teaching of Quran from Qazi Sahib in the mosque being near the cane centre. When he had gone to invite Qazi Sahib, at that time, Maghrib Ki Namaz was already over. It is stated that the house of Firasat is at a distance of 8 or 10 houses from his house. He has stated that his father had been in the house in the night at about 9 or 9:30 and by that time he had already slept. He has been questioned about the timings of the prayer being made, to which, he replied in detailed. It is also stated that the deceased Firasat used to pray Zohar and Asar ki Namaz in the mosque of Qazi Sahib. On the next day, the father of Firasat met him in the morning at about 8 or 9 am. He has stated that he had not paid any attention about the clothes, which the accused Rahat Jan was wearing at the time when he had seen Firasat and Rahat Jan going towards cane centre. He has denied the suggestion of his having not seen Firasat and Rahat Jan going towards cane centre. He has further denied the defence suggestion of his deposing the false facts at the instance of father of Firasat.

6. Chhotey (PW-3) has stated that about four months back at about 6 or 6:30 pm, he was chewing cane at cane centre alongwith Noor Ali. The accused alongwith Firasat was seen going towards Bijalighar, where Rahat Jan accused has his field, the accused Rahat Jan is in the habit of committing sodomy. On the next day, the corpse of Firasat was recovered. It is also stated that at that time, latif was not with them. He has denied the defence suggestion of his having not seen Firasat and the accused going towards Bijalighar side. He has further denied the suggestion of his deposing on account of any relationship. He has definitely stated that he has not in relation with Akhtar Ali, father of deceased Firasat.

7. Noor Ali, (PW-4), has also stated the same facts of his being with Chhotey at cane centre and chewing cane. He has also stated the facts of his having seen the accused and Firasat going towards Bijalighar. There is a plot of Rahat Jan towards the side of Bijalighar. On the next day, the dead body of Firasat was found in the wheat field of the accused Rahat Jan. He has stated that the Panchayatnama on the dead body was prepared in his presence and he is also witness of all the formalities having been done there in connection with the Panchayatnama. In his cross examination, he has stated that the house of the deceased Firasat is at the distance of 100 or 150 yards from his house. It is stated that when the accused and Firasat were seen going, he had not talked with either of them. He has detailed the particulars of the clothes, which

both the persons Firasat and Rahat Jan were wearing at that time. It is also stated that on the road of cane centre, there is no Abadi of Bijlighar, rather the houses of the persons of Bijlighar are on one side towards Rampur-Suar road and the houses of Bijlighar as well as the building itself is/are not visible from the field of the accused. He has denied the suggestion of his having not seen the deceased Firasat in the company of the accused a day before his dead-body was recovered. He has further denied the suggestion of his having any relationship with the family of Firasat deceased.

8. Mohd. Raza (PW -5) has stated that he along with Ahmad Ali and Mohammad Ali was standing at a place when police personnel met them and desired to accompany them. At that time, it was 12 or 12:30 'O' Clock. They were told by the police personnel that they had an information about the accused Rahat Jan having concealed himself at the house of grand-father and they went to arrest him for which their help was desired. He along with others proceeded with the police personnel to the house of Abdul Hasan- the grand-father of the accused. After entering into the house of Abdul Hasan, the accused tried to run-away after coming out of the room, but he was arrested then and there. On interrogation, the accused Rahat Jan has told the facts of his having taken Firasat to the cane centre to enjoy the chewing of cane and cane being not available there, he took him to his field, where he wanted to have sodomy with Firasat, which was not conceded by Firasat, rather he (Firasat) said to inform the villagers about the same as well as to the parents. The accused thereafter confessed his guilt of having murdered Firasat and also said that his dead-body was lying in his wheat field, which, he could make available by going there as well as the Angochha, with which he had caused the death of the Firasat by strangulation. After his having stated this facts, the accused took the police-party to the wheat field, where he made available the dead-body of Firasat, which was lying in his wheat field. He also made available the Angochha, with which, he had strangulated Firasat to death, after taking out from the Rahat of his well, situated in the same field. The witness has proved the Fard Ext. Ka-2, which was prepared at the house of Abdul Hasan pertaining to the arrest of the accused and his having made extra judicial confession to the offence committed by him. He has further proved the Fard of the dead-body being recovered and Angochha as Ext. Ka 3. He has further proved the Angochha itself as Ext. -6, which was taken out by the accused from the well and with which the accused is stated to have strangulated Firasat to death. He has also stated that sample of the wheat crops was also taken by the police personnel vide Fard Ext. Ka- 4 and the sample of the same has been proved by him as Ext.-7. The dead-body of Firasat was sealed and the Panchayatnama and the other papers were prepared at the spot, over which the witness stated to have also signed. He has been cross-examined at length. He has stated that at the time, when they were taken by the police personnel to the house of Abdul Hasan, there was no other public person other than them and the police personnel were three in number. It is stated that at the place where they were standing , there is a Pakar tree, which is at the land of grave-yard.

9. Mohd. Ali, (PW-6), has stated the facts of his being with Mohammad Raza (PW-5) at Pakar tree, when he was also called by the police personnel to help them in arresting the accused Rahat Jan, who was informed to be available and concealing his

presence at the house of his grand-father Abdul Hasan. This witness has stated that apart from him, Mohammad Raza and Ahmad Ali were also with them. He has described the manner in which the accused was arrested while coming out from the room itself intending to escape and his having made extra-judicial confession about his having caused the death of Firasat by strangulation with the hep of Angochha and his having desired to help them in making the recovery of dead-body of Firasat and the Angochha itself. He has stated to have put his thumb-impression on the Fard Ext. Ka-2, having been prepared at the house of Abdul Hasan and thereafter the accused Rahat Jan having taken them and the police personnel to the place where he left the dead-body of Firasat and kept the Angochha with which he had strangulated him. It is also stated that the dead body of Firasat was made available by the accused Rahat Jan after taking them at his own wheat-field lying there and the Angochha itself after taking out the same from the Rahat of the well, situated in the very field. He has acknowledged his thumb-impression on the Fard Ext. Ka-3 having been prepared at the spot and the Angochha Ext.-6, with which the accused is said to have strangulated and caused the death of Firasat.

10. Raees (PW-7) has stated that 8 or 9 months back at about 7:30 P.M. he and Latif had seen the accused in the state of feeling too much worried and going towards his house.

11. Shri Daya Nand Tiwari (PW-8) is the Investigating Officer. He has stated that on 6.3.1983 at about 10:40 A.M., an information was made at the police-station about non-availability of Firasat. On the basis of this report Ext. Ka-1, G.D. entry was made, copy of which has been proved as Ext. Ka-6. He at once started the matter itself and went to the house of Rahat Jan, where he was not found. He had prepared its Fard Ext. Ka-7. At about 01 'O' clock. He had sent information through an informant about the accused being available at the house of his grand-father Abdul Hasan. He at-once proceeded to the house of Abdul Hasan and took Mohammad Raza, Mohammad Ali and Ahmad Ali. While being at the house of Abdul Hasan, the accused Rahat Jan tried to run-away, but was arrested. On interrogation, the accused Rahat Jan made extra-judicial confession of having caused the death of Firasat by strangulation and his having concealed the dead-body as well as the Angochha, with which he was strangulated at his wheat field and accused also desired to make available both the things to them. He had prepared the Fard of the house-search and arrest Ext. Ka-2 at the house of Abdul Hasan and therefrom proceeded to the direction to which the accused had taken them. While being at the field, the accused made available the dead-body of Firasat and the Angochha after taking out from the well. He had prepared its Fard Ext. Ka-3. From the spot itself, a constable was sent to the police-station along with a letter, copy of which has been proved as Ext. Ka-9. That constable came at the spot at 3:45 P.M. along with two other constable as well as the papers pertaining to Panchayatnama. He had prepared the Panchayatnama Ext. Ka-10 and proved the photo Lash Ext. Ka-11, chalan Lash Ext. Ka-12, memo to C.M.O. in two sheets Ext. ka-15 and Ex. Ka-16. He had sealed the dead body of Firasat and prepared the specimen of seal Ext. Ka-17. The dead-body was sent to the District Hospital, Rampur for ensuring post-mortem with constables Dharam Singh and Jaipal Singh. Angochha Ext.-6 was sealed at the spot. He had prepared the site-plan of the place of recovery of dead-body

as Ext. Ka-18. He had taken the sample of wheat crop and proved the same as Ext.-7 vide its Fard Ext. Ka-4. The accused along with these papers and the sealed articles were brought up to the police-station, where entries were made in the G.D. at about 7:00 P.M. on 6.3.1983, copy of which has been proved as Ext. Ka-19. He has further proved the site plan Ext. Ka-20 pertaining to the place of arrest of the accused and after his having the post-mortem report Ext. Ka-5 and completing the investigation having submitted the charge-sheet Ext. Ka-21 against the accused in court. In his cross-examination, he has stated that from the police-station, they had proceeded to the house of Rahat Jan on cycles and Akhtar Ali, the father of deceased Firasat, had not gone with them to the house of Rahat Jan. Safdar met them at the house of Rahat Jan and there the accused was not found. He has stated to have taken Mohammad Ali, Ahmad Ali and Mohammad Raza from the place where there is a Pakar tree and none of them was known to him from before that day. The house of Abdul Hasan was pointed to him by the witnesses, who had accompanied them. He had denied the suggestion of the accused having not been arrested in the manner, as is told by him as well as the accused having not made the extra judicial confession after his arrest. He has denied the defence suggestion of the dead body having not been recovered at the field of the accused. He had also denied the suggestion of Angochha having not been recovered at the instance of the accused.

12. Dharam Singh, (PW-9), is a formal witness of the fact that on 6.3.1983 he had taken the dead body of Firasat along with the papers to the District Hospital, Rampur and no one was allowed to see the dead body till it remained with him.

13. Learned trial court after appreciation of evidence on record in the light of contentions of learned counsel for the parties observed that the case is based on circumstantial evidence as there is no eye witness in the case. In support of charge against the accused, prosecution has relied upon following circumstances:-

(i) the fact that accused was last seen in the company of deceased Firasat in the evening preceding the discovery of his dead body. (ii) the fact that the accused had absconded and was seen in the perplexed state of affairs. (iii) the extra judicial confession made by the accused on being arrested about his having caused the death of Firasat by strangulating him with the help of Angochha (towel). (iv) the recovery of dead body of Firasat having been made at the instance of the accused by taking the police personnel and witnesses to the place where he had concealed it i.e. in his wheat field. (v) the recovery of Angochha, Ext.-6, from the rahat from the well being situated in the same wheat field after taking it out by the accused himself therefrom.

14. Learned trial court after appreciating these circumstantial evidence in the light of evidence adduced by the prosecution concluded that the circumstances mentioned herein above rather proved by prosecution on strength of evidence adduced during trial, through oral evidence as well as some documentary evidence. Court found that the evidence being that of oral, post mortem notes and the medical is clinching to the issue of guilt thereby establishing the involvement of the accused in the commission of the murder of Firasat with the help of Angochha by way of strangulation and after his having made the extra judicial confession of his guilt ensuring the recovery of his dead body as well as Angochha, Ext-6, itself after taking the same out from the rahat of the well situated in the very wheat field from where

the dead body of Firasat was taken out by the accused himself. Thus the cumulative effect of the circumstantial evidence on record is that the prosecution has succeeded to prove the guilt of the accused to the crime and to the offence with which he has been charged beyond all reasonable shadow of doubts and to its hilt. The accused thus is found to be guilty to the offence under section 302 IPC with which he has been charged.

15. Learned trial court, accordingly, passed verdict of guilt against the appellant for charge under section 302 IPC and sentenced him as above. Feeling aggrieved by the impugned judgement and order, present appeal has been filed by the appellant before this Court.

16. Learned counsel for the appellant submitted as follows:

(i) the case is based on circumstantial evidence as this is admitted case that there is no eye witness account of the commission of offence of murder of deceased Firasat.

(ii) the prosecution neither produced doctor, who conducted post mortem examination of the dead body of deceased nor examined constable, who entered missing report of Firasat in General Diary and registered Case Crime No. 35 of 1983.

(iii) the prosecution did not produce any formal witness to prove G.D. entry, registration of case etc.

(iv) the evidence against the appellant is only to the effect of last seen and recovery of dead body of the deceased and recovery of Gamachha from the agricultural field of his father.

(v) according to prosecution version, accused was arrested at 13:30 hours on 6.3.1983 and after that, the dead body was shown to be recovered at 14:30 hours on 6.3.1983 on pointing out of the accused. Thereafter, criminal case was registered at police station Suar, District Rampur as Crime No. 35/1983 under section 302/201 IPC by making entry in the General Diary at 3:15 pm. However, the inquest proceedings were started at 11:00 am on 6.3.1983, wherein, even the Crime No. 35 of 1983 is also mentioned at the top of the inquest report, Ex. Ka-10. Moreover, the investigating officer also states that he reached at the place of the incident at 15:45 hours on 6.3.1983. These factual status demonstrates that the dead body was recovered much before the time of arrest of the appellant and after recovery of the dead body, a story was set up regarding arrest, recovery and last seen etc. and hence the entire story of prosecution appears doubtful and unreliable.

(vi) so far as the evidence of last seen is concerned, the testimony of prosecution witnesses Khurshid (PW-2), Chhotey (PW-3), Noor Ali (PW-4) and the prosecution witness Raees (PW-7), who had given stereotyped statements regarding last seen and their testimony appears to be unreliable. Infact, if these witnesses had actually seen the deceased in company of accused as last seen on 5.3.1983, there is no reason why they could not locate the dead body until 6.3.1983 at about 14:30 hours, where distance of cane centre and electric house is 30-40 yards where the deceased and accused were allegedly last seen and distance between electric house and the agricultural field of the accused where dead body was recovered is only 10 to 15 footsteps.

17. There is no close link or live link between the last seen evidence and the recovery of the dead body and hence the

evidence of last seen is unreliable keeping in view the timing of inquest, arrest of the accused and recovery of dead body and the registration of the criminal case at police station concerned.

18. Even if the appellant Rahat Jan is held to be guilty of the alleged crime, he is entitled to be extended benefit of Section 18(1), 20 and 21 of the Juvenile Justice (Care and Protection) Act, 2015. He can only proceeded in terms of Section 18(1) of the Act and no substantive sentence of imprisonment is liable to be inflicted on him. The appellant was held to be juvenile by the Juvenile Justice Board after conducting due inquiry in its report dated 15.3.2019 placed on reference made by this Court vide order dated 22.1.2019 whereby District Judge, Rampur was directed to get an inquiry conducted from the appropriate forum regarding plea of juvenility made by the appellant/ applicant in present appeal. The Juvenile Justice Board in its order dated 15.3.2019 held that the appellant was juvenile in conflict with law on the date of offence i.e. 5.3.1983 and he was of age 14 years at that time.

19. Learned counsel for the appellant placed reliance upon the judgement of Hon'ble Apex Court in **R. Sreenivasa vs. State of Karnataka, 2023 SCC Online SC 1132, Hiralal Mallick vs. The State of Bihar, (1977) 4 SCC 44, Rakesh Kumar and another vs. The state of U.P., 1976 SCC Online All 530, Karan alias Fatiya vs. State of Madhya Pradesh, (2023) 5 SCC 504, Mahesh vs. State of Rajasthan, (2021) 18 SCC 582, Narayan Chetanram Chaudhary vs. State of Maharashtra, 2023 SCC Online SC 340**, in support of his submissions.

20. In **R. Sreenivasa vs. State of Karnataka,** Hon'ble Apex Court while deciding criminal appeal against the judgement of conviction and sentence in case under section 302 IPC where High Court reversed the order of acquittal against the appellant recorded by the trial court, allowed the appeal and restored verdict of acquittal passed by the trial court, observed as under:-

"17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant. In Laxman Prasad v State of Madhya Pradesh, (2023) 6 SCC 399, we had, upon considering Sharad Birdhichand Sarda v State of Maharashtra, (1984) 4 SCC 116 and Shailendra Rajdev Pasvan v State of Gujarat, (2020) 14 SCC 750, held that '… In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.' It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to Suresh Thipmppa Shetty v State of Maharashtra, 2023 INSC 7494."

21. Other judgements cited by learned counsel for the appellant relates to plea of juvenility raised by the accused at appellate stage. In **Karan alias Fatiya vs. State of Madhya Pradesh**, Hon'ble Supreme Court while deciding criminal appeal arising out from the judgement and order of High

Court, Madhya Pradesh, Bench at Indore in case under section 302, 363, 376(2)(i) and 201 IPC, held as under:-

"According to sub- section (3) of section 9 of the 2015 Act, the Court which finds that the person who committed the offence was a child on the date of commission of such offence would forward the child to the JJB for passing appropriate orders and sentence, if any, passed by the Court shall be deemed to have no effect. This does not specifically or even impliedly provide that the conviction recorded by any Court with respect to a person who has subsequently after the disposal of the case found to be juvenile or a child, would also lose its effect rather it is only the sentence if any passed by the Court would be deemed to have no effect.

Further, the intention of the legislature was to give benefit to a person who is declared to be a child on the date of the offence only with respect to its sentence part. If the conviction was also to be made ineffective then either the jurisdiction of regular Sessions Court would have been completely excluded not only under section 9 of the 2015 Act but also under section 25 of the 2015 Act, provision would have been made that on a finding being recorded that the person being tried is a child, a pending trial should also be relegated to the JJB and also that such trial would be held to be null and void. Instead, under section 25 of the 2015 Act, it is clearly provided that any proceeding pending before any Board or Court on the date of commencement of the 2015 Act shall be continued in that Board or Court as if this Act had not been enacted.

Having considered the statutory provisions laid down in section 9 of the 2015 Act and also section 7A of the 2000 Act which is identical to section 9 of the 2015 Act, we are of the view that merits of the conviction could be tested and the conviction which was recorded cannot be held to be vitiated in law merely because the inquiry was not conducted by JJB. It is only the question of sentence for which the provisions of the 2015 Act would be attracted and any sentence in excess of what is permissible under the 2015 Act will have to be accordingly amended as per the provisions of the 2015 Act. Otherwise, the accused who has committed a heinous offence and who did not claim juvenility before the Trial Court would be allowed to go scot-free. This is also not the object and intention provided in the 2015 Act. The object under the 2015 Act dealing with the rights and liberties of the juvenile is only to ensure that if he or she could be brought into the main stream by awarding lesser sentence and also directing for other facilities for welfare of the juvenile in conflict with law during his stay in any of the institutions defined under the 2015 Act"

22. In that case, appellant was awarded death sentence for said charge by the judgement of trial court dated 17.5.2018 and appeal filed by the appellant was dismissed by the High Court and death reference forwarded by trial court was affirmed. The appellant raised plea of juvenility before the Supreme Court by filing I.A. No. 43271 of 2019. The Supreme Court directed the trial court to make endevour to consider whether the appellant was juvenile as on the date when the offence in question was committed after considering all relevant documents as well as medical check-up of the appellant in the manner known to the law.

23. Pursuant to the said order, a report was received from the court of first Additional Sessions Judge, Madhya Pradesh dated 27.10.2022, wherein, it was stated that date of incident being 15.12.2017; the

appellant was 15 years 04 months and 20 days of age on the date of incident. Hon'ble Supreme Court with above observation and proposition of law as laid down by the Court in Jitendra Singh vs. State of U.P. (2013) 11 SCC 193; Mahesh vs. State of Rajasthan, (2021) 18 SCC 582; Satya Deo vs. State of U.P., (2020) 10 SCC 555, upheld the conviction of appellant for said charges. However, the sentence was set aside. It is further observed that as the appellant at present would be more than 20 years, there would be no requirement of sending him to the JJB or any other child care facility or institution. The appellant is in judicial custody. He shall be released forthwith. The impugned judgement shall stand modified to the aforesaid extent.

24. Per contra, learned AGA submitted that the finding of guilt recorded against the appellant by the trial court is based on proper and meticulous examination or evidence adduced during trial and same may not be disturbed or set aside in the present appeal as the prosecution has successfully proved all links of circumstantial evidence emerged from the evidence on record and charge against the appellant is duly proved by the prosecution to the hilt. The link of chain of circumstances form complete chain in present case and appellant has been rightly convicted and sentenced by the trial court. However, he did not dispute the fact that the plea of juvenility raised by the appellant has been accepted by the Juvenile Justice Board, Rampur in its order dated 15.3.2019.

25. On perusal of records it appears that chik of FIR has been lodged in the case and missing report was lodged at police station Suar, District Rampur on the basis of written report, Ext.Ka-1 dated 6.3.1983 filed by informant Akhtar Ali, father of deceased Firasat aged about 10-11 years vide GD report no. 16 dated 6.3.1983 and Dariyaft Head (DH) no. 3/83 was registered. Police proceeded to inquire missing son of informant namely Firasat on the basis of this GD entry; search was conducted in the house of suspect Rahatjan son of Safdar and eventually search and arrest was made; Fard was prepared by investigating officer on 6.3.1983 at 13:30 hour. The suspect Rahatjan was arrested by the police in the process of fleeing away from his house on noticing police team according to recovery memo of dead body of Firasat and Angochha dated 6.3.193 at 14:30 hours, Ext. Ka-2. It appears that dead body of the deceased Firasat was recovered on pointing out of appellant after his arrest on same day i.e. 6.3.1983 at 14:30 hours from the well situated in wheat field of accused; crops of wheat were broken in the surrounding of the well from where dead body and Angochha, used in strangulating the deceased, were recovered. The length of Angochha was 3 hath, 1 balist, 4 angul and 1 hath, 1 balist 8 angul; this angochha (towel) was taken into possession and recovery memo was prepared on the site in presence of police and witnesses of locality namely Mohd. Raja, Mohd. Ali and Ahmad Ali.

26. This is also stated in this recovery memo that accused confessed his guilt of committing murder of Firasat, minor, by strangulating him and throwing the dead body in the well; investigating officer also collected broken plants of wheat from the place of incident on which Ext.Ka- 4 was marked. In inquest report, time of report at police station is shown as 6.3.1983 at 10:40 am and inquest started at 11:00 am on same day, which was concluded at 5:00 pm; in inquest report Ext.Ka-10, it is stated that in opinion of witnesses of inquest, deceased was done to death by strangulation,

therefore, its post mortem examination is required. In present case, genuineness of post mortem report was admitted by learned counsel for defence during course of trial and for that reasons, same is admissible in evidence under section 294 Cr.P.C., which provides as under:-

1. "Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.]

2. The list of documents shall be in such form as may be prescribed by the State Government.

3. Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed;

Provided that the Court may, in its discretion, require such signature to be proved."

27. As genuineness of this documents was admitted by adversary (accused side) this is rightly exhibited by the court on which Ext.-Ka-5 has been marked. This post mortem report, being exhibited during course of trial, is liable to be read in evidence and statement of learned counsel for the appellant in this regard that the doctor, who conducted post mortem of the dead body of the deceased, was not produced in evidence and for that reason this report is not duly proved cannot be subscribed. Ext.Ka-5 reveals that post mortem examination of dead body of the deceased boy, Firasat, aged about 12 years, was conducted on 7.3.1983 at 1:00 pm at district hospital, Rampur by Dr. K. Chandra. The dead body was identified by two constables Jaipal and Dharmpal of P.S. Suar, who carried the body to post mortem house; the time of death was about two days prior to its rigour-mortise was present in lower extremity and present on upper extremity, post mortem staining was present over back and buttock; eyes were closed; conjunctiva congested and pupils dilated; face livid cyanosed; mouth half opened; frothy fluid coming out from nostrils; lips cyanosed and saliva marks present over chin; froth coming out from both nostrils; nails cyanosed and finger of both hand closed.

28. Ante mortem injuries:-

(1) abraded ligature mark 11cm X 3 cm over front of neck which is horizontal (2) abrasion 2cm X 2cm over left side of face 4cm of below left ear; dead body was handed over for post mortem alongwith 11 enclosures.

29. Internal examination:

(i) fracture of larynx and trachea and also hyoid bone and ecohymosis present under injury no. 1, curtile veins ruptured; mussels of neck lacerated; membranes, brain, skull, lungs were congested; right chamber of heart was full, left was empty. In the opinion of doctor, cause of death was asphyxia as a result of strangulation.

30. PW-1, Akhtar Ali, who is father of deceased stated in evidence that his son Firasat Ali went to pray Namaz of Asar on 5.3.1983 and did not come back. He was around 10-11 years of age. He wore Kamij, Payjama, Baniyan and Suitor, when he did not come back he went for his search and on next day at 9:00 am, Khurshid Ahmad, PW-

2 told him that he had seen his son Firasat alongwith Rahatjan towards cane centre on 5.3.1983 after offering Namaz of Asar. Witness stated that after meeting Khurshid he also met Chhote and Noor, who told that when they were having sugar cane, they saw Firasat and Rajhatjan moving towards electric house on 5.3.1983 in the evening; witnesses identified accused in the court. He also stated that after meeting the witnesses, he went to the house of Rahatjan but did not find him there and he was apprised that he was not traceable from last evening since 6:00 pm. Thereafter, he got written report scribed by Hashim Husain and after it was read down to him, he signed it in Urdu, which is marked as Ext. Ka-1 during his evidence. He also stated that accused Rahatjan is a man of bad image and he is known to be a sodomized. In cross examination, this witness stated that apart from the deceased Firasat Ali, he was left with two sons when he came back to home on 5.3.1983 after paying Namaz of Asar, his wife told him that Firasat had gone to offer Namaz. He went in search of his son on getting information on finding him absent after offering Namaz of Asar, which usually take place at 8:00 to 8:30 pm; he visited many places for search of him but could not find him in the night; Khurshid met him in the morning at around 9:00 am, who is his neighbour. Khurshid Ahmad (PW-2), Chhotey son of Altaf (PW-3), Noor Ali (PW-4) are witnesses of last seen.

31. Khurshid, PW-2, is a child witness but after asking some preliminary question, the trial court found him understandable; he gave rational answers to the questions and therefore oath was administered to him. There is nothing in evidence of these two witnesses either in their examination in chief or in their cross examination on account of which casts any suspicion or doubt inferred as regards their version that they had seen deceased and accused Rahatjan in company in the evening on 5.3.1983 and his dead body was recovered in the well situated in the field of accused next day; deceased and PW-2 were studying in same school.

32. PW-3- Chhotey is also witness of last seen, who stated that he had seen deceased and accused together on 5.3.1983 at around 6:30 pm when they were moving towards electric house and field of accused Rahatjan situated towards electric house; there was complaint of sodomy against accused Rahatjan; in cross examination witness stated that there is gap of 3 to 4 fields between his field and field of accused.

33. PW-4, Noor Ali, is also witness of last seen, who stated in his evidence that he had seen the deceased and accused together at around 6:30 pm while they were moving towards electric house and field of accused Rahatjan situates towards electric house; dead body of Firasat was found in the wheat field of accused on next day; inquest was conducted by Darogaji before him and thereafter dead body was sealed and sent for post mortem; when he saw deceased and accused together at last time he was chewing sugar-cane alongwith witness Chhotey; witness clarified that he was not related to the deceased in any manner.

34. PW-5, Mohd. Raza, has stated in his evidence that he was standing with Ahmad Ali and Mohd. Ali together at a place and noticed that one Sub Inspector was going alongwith two constables at around 12:30 hours in the day and they were called by the police officials to be witnesses of arrest of suspect Rahatjan and accused was arrested from the house of grandfather, Hazi Abdul Hasan in their presence by police; accused confessed his guilty in his presence

before the police, who stated that he had taken Firasat at cane centre on pretext of chewing sugar-cane but they could not find sugar-cane there and therefrom he took him to his field on pretext of taking fodder but on reaching the field, his intention got polluted and he intended to sodomise the boy (Firasat); he was not inclined to concede to his filthy demand and threatened him that he would tell this thing to people of Mohalla on reaching there and would also tell this fact to his father. The accused confessed to commit murder of the boy and had thrown the body in the wheat field of the accused situated in east of electric house; he pointed out towards the dead body of Firasat, which was lying in the field and took out Angochha, which was hanging on bucket attached to his rahat; inquest was conducted by Darogaji at the place of recovery of dead body; witness also stated that rahat was also installed in the well lying in the field of accused from where dead body was recovered.

35. PW-6, Mohd. Ali, is also witness of arrest of the accused and recovery of dead body of the deceased and Angochha used in strangulating the deceased on pointing out of the accused. This witness has also stated that accused Rahatjan had been arrested by the police in his presence and stated to sub inspector (Darogaji) on being interrogated by him that he intended to do some filthy act with Firasat but when he latter did not agree to his offer and threatened to told this fact to family members, he strangulated him by Angochha and concealed the dead body in the wheat field, Ext.Ka-3 was marked on recovery memo of Angochha and material Ex.-6 was marked on Angochha allegedly used in the commission of murder. The accused had pointed out the dead body in a far place in the wheat field, which was lying around 30 fits away from the mer of field as crop of wheat was grown up at that time; dead body was not visible from frontage of the field, this chak was one and half acre.

36. PW-7, Raees, has stated in his evidence that they saw accused Rahatjan in perplexed condition near go-down at around 7:30 pm, 8 to 9 months prior to his evidence before the court, who was moving towards his home fastly and darkness had engulfed the locality at that time.

37. PW-8, SI, Dayanand Tiwari, I.O. of the case; who also proved the factum of arrest of the accused, recovery of dead body and one Angochha used in strangulating the deceased; steps taken for investigation and registration of case on 6.3.1983 vide GD report no. 16 time 10:40 hours on information of informant regarding missing of his son. He proved extract of GD of registration of case in absence of its author constable Rajendra Singh on which Ext. Ka-6 was marked. He stated that he recovered Angochha from rahat installed in the well, which was situated in the field of accused and he also recovered dead body of the deceased, which was lying in the wheat field of the accused. He proved search and arrest memo of the accused as Ext. Ka-2. He also proved site plan of the place of incident as Ext.Ka-18 being its author. He also proved inquest report, Ext.Ka-10, of the deceased as well as annexures sent alongwith dead body like photo lass Ext. Ka-11 and Ext. Ka-14 report and letter R.I. as Ext. Ka-15 and Ka-16 in evidence.

38. Accused has stated in his statement under section 313 Cr.P.C. that he has been falsely implicated due to some land dispute between the informant and accused. He introduced DW-1, Nabi Jaan in defence evidence, who stated that he is acquainted with informant; the deceased and accused

belong to his Mohalla; an altercation took place prior to this incident, between informant and father of accused with regard to tethering of cattle at an open land lying in front of Abadi of informant; this altercation occurred 8 to 10 days ago of death of deceased boy; witness denied prosecution suggestion that he is related to the accused and for that reason he deposed in his favour.

39. Be that as it may, it would for fetching exercise to extend benefit of doubt to the accused only due to the fact that after some days of this unfortunate murder of tendered boy around 10 to 11 years of age, some altercation took place between father of deceased and father of accused due to some land dispute on account of tethering of cattle, as many as three witnesses of last seen has supported prosecution version. Angochha used in strangulation of deceased boy as well as dead body of the deceased has been recovered on pointing out of the accused on next day of missing boy from the field of accused is duly proved. Although confession of accused for committing murder of deceased on account of his ill intention to commit unnatural sex with the deceased and consequent threatening hurled by the deceased being made before the police and police custody cannot be permitted to be proved by the public witnesses like PW-5, Mohd. Raza and PW-6 Mohd. Ali on account of statutory prohibition under section 25 and 26 of Evidence Act, yet the recovery of dead body and Angochha used in strangulation of the deceased based on disclosure statement of the accused before the police and therefore, same be protected under section 27 of the Evidence Act, which is exception of section 25 and 26 of the Evidence Act. It provides that "when any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact discovered may be proved, but not the information, whether it amounts to a confession or not, **as relates distinctly to the fact thereby discovered may be proved."**

40. Thus, on re-appreciation of evidence on record, we are of the considered opinion that incriminating circumstances put-forth by prosecution against the appellant are duly proved by the prosecution evidence during trial and circumstances established against the appellant are of such tendency that unerringly point towards the commission of accused and the prosecution has successfully proved the links of the chain of circumstantial evidence completely and reasonably; accused was last seen by three witnesses in the company of the deceased and the deceased was never found alive thereafter in the evening preceding to the recovery of dead body; name of accused find place in the missing report registered with police station at the instance of father of the deceased in the morning on 6.3.1983 mentions the name of accused as suspect; accused was arrested on the same day in the afternoon on 6.3.1983 and on his pointing out, dead body and Angochha used in the commission of offence were recovered; a natural motive has been introduced in evidence of witnesses that accused intended to commit unnatural sex (sodomy) with the boy and when he objected to his immoral desire and threatened him to disclose this fact to the people, the accused killed him to avoid any further public outrage against him and concealed the dead body in his field, which was subsequently recovered on his pointing out together with Angochha used in strangulation of the deceased.

41. With foregoing discussions, we find no factual or legal error or infirmity in recording conviction of the appellant by learned trial court in the impugned

judgement of conviction to the appellant for charge under section 302 IPC and the same is affirmed. However, the fact that the appellant raised plea of juvenility during pendency of present appeal and direction was issued by this Court to session court vide order dated 22.1.2019 to get an inquiry conducted from the appropriate forum regarding plea of juvenility made by the appellant/ applicant- Rahatjan, after hearing respective parties and submits its report.

42. Learned Juvenile Justice Board, Rampur acted on direction of Session Judge and proceeded with the order of this court and held the appellant as juvenile in conflict with law on the date of offence on 5.3.1983 vide report dated 15.3.2019 after conducting inquiry envisaged under the Act under the Juvenile Justice (Care and Protection) Act. In the opinion of Juvenile Justice Board, appellant was aged around 14 years on the date of offence. This finding of Juvenile Justice Board as has given, same has not been stated to be set aside by order of any superior court.

43. In **Satya Deo vs. State of U.P. (supra)**, a plea of juvenility was taken by the appellant before the Supreme Court in case under section 302/34 IPC. The Apex Court directed the trial court to conduct an inquiry to ascertain if the appellant was juvenile on the date of occurrence i.e. 11.12.1981 on the basis of material, which could be placed on record. Pursuant to direction, the trial court examined plea of juvenility and reported that the appellant was not juvenile as per the Juvenile Justice Act, 1986 as he was more than 16 years of age on the date of commission of offence i.e. 11.12.1981. Hon'ble Supreme Court in this case considered the conflicting plea for age of juvenility prescribed under the Juvenile Justice Act, 1986, Juvenile Justice (Care and Protection) Act, 2000 and Juvenile Justice (Care and Protection of Children) Act, 2015 in the light of Pratap Singh vs. State of Jharkhand and others and some other judgements.

44. In **Pratap Singh vs. State of Jharkhand and others**, the Constitution Bench held that 2000 Act would be applicable in pending proceedings instituted under the 1986 Act in any court or authority, if the person had not completed 18 years of age as on 1.4.2001 when 2000 Act came into force. On the first question "whether date of occurrence will be reckoning date of determining the age of the alleged offender as juvenile offender or the date when he produced in the court/ competent authority. The Apex Court held that reckoning date for determination of age of juvenile is the date of offence and not the date when he is produced before the authority or in a court. Consequently, the 2000 Act would have prospective effect and not retrospective effect except in cases where the person had not completed the age of eighteen years on the date of commencement of the 2000 Act. Other pending cases would be governed by the provisions of the 1986 Act.

45. Subsequent to the decision of Constitution Bench in Pratap Singh (supra), several amendments were made to the 2000 Act by Amendment Act No. 33 of 2006 under section 2(i) of 2000 Act "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence" In terms of clause (l) to section 2 of the 2000 Act, Satya Deo, being less than 18 years of age, was juvenile on the date of commission of offence as 11.12.1981 whereas his date of birth was recorded as 15.4.1965.

46. In the opinion of Hon'ble Apex Court, 2000 Act does not distinguish

between a boy or a girl and a person under the age of 18 years is juvenile. However, under the 2000 Act, age on the date of commission of offence is determining factor. Section 20 in Satya Deo case, Apex Court observed as under:-

"20. Special provision in respect of pending cases.— Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.—In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed." Section 20 is a special provision with respect to pending cases and begins with a limited non-obstante or overriding clause notwithstanding anything contained in the 2000 Act. Legislative intent clearly expressed states that all proceedings in respect of a juvenile pending in any court on the date on which the 2000 Act came into force shall continue before that court as if the 2000 Act had not been passed. Though the proceedings are to continue before the court, the section states that if the court comes to a finding that a juvenile has committed the offence, it shall record the finding but instead of passing an order of sentence, forward the juvenile to the Juvenile Justice Board (Board) which shall then pass orders in accordance with the provisions of the 2000 Act, as if the Board itself had conducted an inquiry and was satisfied that the juvenile had committed the offence. The proviso however states that the Board, for any adequate and special reasons, can review the case and pass appropriate order in the interest of the juvenile. Explanation added to Section 20 vide Act 33 of 2006, which again is of significant importance, states that the court where 'the proceedings' are pending 'at any stage' shall determine the question of juvenility of the accused. The expression 'all pending cases' includes not only trial but even subsequent proceedings by way of appeal, revision etc. or any other criminal proceedings. Lastly, 2000 Act applies even to cases where the accused was a juvenile on the date of commission of the offence, but had ceased to be a juvenile on or before the date of commencement of the 2000 Act. In even such cases, provisions of the 2000 Act are to apply as if these provisions were in force for all purposes and at all material time when the offence was committed.

Thus, in respect of pending cases, Section 20 authoritatively commands that the court must at any stage, even post the judgment by the trial court when the matter is pending in appeal, revision or otherwise, consider and decide upon the question of

juvenility. Juvenility is determined by the age on the date of commission of the offence. The factum that the juvenile was an adult on the date of enforcement of the 2000 Act or subsequently had attained adulthood would not matter. **If the accused was juvenile, the court would, even while maintaining conviction, send the case to the Board to issue direction and order in accordance with the provisions of the 2000 Act.**

12. By the amendment Act No. 33 of 2006, Section 7-A was inserted in the 2000 Act setting-out the procedure to be followed by the court to determine the claim of juvenility. Section 7A, which came into effect on 22.08.2006, reads:

"7-A. Procedure to be followed when claim of juvenility is raised before any court.—(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

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

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect." Proviso to Section 7A is important for our purpose as it states that the claim of juvenility may be raised before 'any court' 'at any stage', even after the final disposal of the case. When such claim is made, it shall be determined in terms of the provisions of the 2000 Act and the rules framed thereunder, even when the accused had ceased to be a juvenile on or before commencement of the 2000 Act. Thus it would not matter if the accused, though a juvenile on the date of commission of the offence, had become an adult before or after the date of commencement of the 2000 Act on 01.04.2001. He would be entitled to benefit of the 2000 Act.

13. **Section 64 of the 2000 Act** was also amended by Act No. 33 of 2006 by incorporating a proviso and explanation and by replacing the words 'may direct' with the words 'shall direct' in the main provision. Post the amendment, Section 64 reads as under:

"64. Juvenile in conflict with law undergoing sentence at commencement of this Act-

In any area in which this Act is brought into force, the State Government shall direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of section 16 of this Act.

Provided that the State Government, or as the case may be the board, may, for any adequate and special

reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing a sentence of imprisonment, who has ceased to be so on or before the commencement of this Act , and pass appropriate order in the interest of such juvenile.

Explanation :– In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clause (l) of section 2 and other provisions contained in this act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in section 15 of this act." Substitution of the words 'may direct' with 'shall direct' in the main provision is to clarify that the provision is mandatory and not directory. Section 64 has to be read harmoniously with the newly added proviso and explanation and also other amendments made vide Act 33 of 2006 in Section 20 and by way of inserting Section 7A in the 2000 Act. The main provision states that where a juvenile in conflict with law is undergoing any sentence of imprisonment at the commencement of the 2000 Act, he shall, in lieu of undergoing the sentence, be sent to a special home or be kept in a fit institution in such manner as the state government thinks fit for the remainder of the period of sentence. Further, the provisions of the 2000 Act are to apply as if the juvenile had been ordered by the Board to be sent to the special home or institution and ordered to be kept under protective care under sub-section (2) of Section 16 of the Act. The proviso states that the state government or the Board, for any adequate and special reasons to be recorded in writing, review the case of the juvenile in conflict with law who is undergoing sentence of imprisonment and who had ceased to be a juvenile on or before the commencement of the 2000 Act and pass appropriate orders. However, it is the explanation which is of extreme significance as it states that in all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment on the date of commencement of the 2000 Act, the juvenile's case including the issue of juvenility, shall be deemed to be decided in terms of clause (l) to Section 2 and other provisions and rules made under the 2000 Act irrespective of the fact that the juvenile had ceased to be a juvenile. Such juvenile shall be sent to special home or fit institution for the remainder period of his sentence but such sentence shall not exceed the maximum period provided in Section 15 of the 2000 Act. The statute overrules and modifies the sentence awarded, even in decided cases.

14. This Court in Dharambir v. State (NCT of Delhi) and Another 4 had analysed the scheme and application of the 2000 Act to the accused who were below the age of eighteen years on the date of commission of offence which was committed prior to the enactment of the 2000 Act, to opine and hold:

"14. Proviso to sub-section (1) of Section 7-A contemplates that a claim of juvenility can be raised before any court and has to be recognised at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the Rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a

juvenile who had not completed eighteen years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act.

15. It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1-4-2001 would be treated as juveniles even if the 4 (2010) 5 SCC 344 claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. In the view we have taken, we are fortified by the dictum of this Court in a recent decision in Hari Ram v. State of Rajasthan [(2009) 13 SCC 211: (2010) 1 SCC (Cri) 987]."

15. In **Mumtaz v. State of U.P,** while referring to several earlier decisions, this court dealt with effect of Section 20 of the 2000 Act and its inter-play with the 1986 Act, to elucidate:

"18. The effect of Section 20 of the 2000 Act was considered in Pratap Singh v. State of Jharkhand [Pratap Singh v. State of Jharkhand, (2005) 3 SCC 551: 2005 SCC (Cri) 742] and it was stated as under: (SCC p. 570, para 31) "31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause.

The sentence 'notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act came into force' has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to 5 (2016) 11 SCC 786 be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile."

19. In **Bijender Singh v. State of Haryana [Bijender Singh v. State of Haryana, (2005) 3 SCC 685 : 2005 SCC (Cri) 889]** , the legal position as regards Section 20 was stated in the following words: (SCC pp. 687- 88, paras 8-10 & 12):

"8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to the age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.

9. A person above 16 years in terms of the 1986 Act was not a juvenile. In

that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations.

12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

20. In Dharambir v. State (NCT of Delhi) [Dharambir v. State (NCT of Delhi), (2010) 5 SCC 344 : (2010) 2 SCC (Cri) 1274] the determination of juvenility even after conviction was one of the issues and it was stated: (SCC p. 347, paras 11-12) "11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1-4-2001, when the 2000 Act came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

12. Clause (l) of Section 2 of the 2000 Act provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the 2000 Act."

47. In the light of aforesaid dictum of Hon'ble Apex Court in **Satya Deo (supra**), it is manifest that the present case will be governed by the provision of Juvenile Justice (Care and Protection of Children) Act, 2000. In any case Juvenile Justice Board had held age of appellant below 16 years on the date of commission of offence ie he will be treated as juvenile both under the 1986 Act as well as 2000 Act and also under 2015 Act. The matter will be governed subject to the final order in present case as the appellant has been declared as juvenile in conflict with law by JJB on reference made by this Court during pendency of present appeal. He cannot be sentenced in view of prohibition contained in Section 16 of the Act, which provides as under:-

16. Order that may not be passed against juvenile

(1)Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death [or imprisonment for any term which may extend to imprisonment for life] [Substituted by Act 33 of 2006, Section 13, for " or life imprisonment" (w.e.f. 22.8.2006).], or committed to prison in default of payment of fine or in default of furnishing security:Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.(2)On receipt of a report from a Board under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit:[Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act.] [Substituted by Act 33 of 2006, Section 13, for the proviso (w.e.f. 22.8.2006).]

Prior to its substitution, the proviso read as under:-Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the juvenile could have been sentenced for the offence committed.

Whereas in Section-15 of the Act, 2000 is is provided that orders that may be passed regarding juvenile:-

15. Order that may be passed regarding juvenile.

(1)Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,(a)allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;(b)direct the juvenile to participate in group counselling and similar activities;(c)order the juvenile to perform community service;(d)order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;(e)direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;(f)direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;(g)[make an order directing the juvenile to be sent to a special home for a period of three years: [Substituted by Act 33 of 2006, Section 12, for Clause (g) (w.e.f. 22-8-2006).]Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such

period as it thinks fit.](2)The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.(3)Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law:Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.(4)The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

48. The appellant has now become more than 50 years of age in his medical age determination report as manifest from the report of JJB of the year 2019, therefore, no useful purpose of law would be served by directing the juvenile to be sent to Special Home for a period of three years, taking into consideration the various judgements which may be passed regarding juvenile on the facts of the case as well as present situation of the applicant, who has been declared juvenile on the date of incident, is directed to be released on probation of good conduct under section 15(e) of the Act No. 56 of 2000, as stated above, on execution of personal bond and furnishing two sureties each in the like amount to the satisfaction of JJB, Rampur for a period of three years with undertaking to maintain good behaviour and peace and not indulgence in any criminal activity during period of probation and he may be placed under supervision of District Probation Officer, who will keep a watch on him during period of probation and will apprise the Board regarding any adverse fact appearing regarding appellant/ juvenile during this period. The bonds shall be filed before the Board within 10 days from the order of this Court, by the appellant and Board shall forward a copy of this order to the District Probation Officer for compliance.

49. Accordingly, conviction recorded by the trial court against the appellant for charge under section 302 IPC is upheld and affirmed. However, sentence stands set aside in view of above manner. Appeal is partly **allowed** accordingly.

50. Let the lower court record be sent back to the court concerned for necessary compliance.

(2024) 5 ILRA 1305
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 467 of 1983
connected with
Government Appeal No. 1361 of 1983

Nanhak & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Palok Basu, Saurabh Basu

Counsel for the Respondent:
A.G.A., S.P. Singh

Criminal Law: Indian Penal Code, 1860 – Sections 147, 149, 325, 323 & 426 - Punishment for culpable homicide not amounting to murder – Section 304 - appellants who were five in number, had formed an unlawful assembly and armed with lathi, had reached the place of incident - hurling abuses to Ramdev started plucking mangoes and when he resisted, on the exhortation of appellant Hira Lal, all the five persons, assaulted the victim and further when other witnesses rushed to rescue him, they were also assaulted, consequent to which, they suffered injuries and have been medically examined - During trial, all the three injured witnesses and medical report have completely corroborated the prosecution story - Evidence of PW-1 Khetal, PW-2 Sukhdev and PW-3 Shiv Kumari, clearly St.d that appellants were members of an unlawful assembly and in furtherance of their common object has committed the incident (Para - 2, 43, 50)

Held: The cause of death, as noted in the post-mortem report, appears to be coma and shock due to head injury whereas other injuries have been noted to be simple in nature. The weapon assigned to the appellants is lathi danda, which, by no stretch of imagination, can be said to be a lethal weapon.The court must address itself to the question of mens rea. If Section 300 (3) is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Intention to kill is not the only intention that makes a culpable homicide a murder. Thus, the appellants had not committed the offence that fall within the meaning of Section 300 of IPC which is punishable under Section 302 of IPC. The offence committed by the appellants would be under Section 304 of IPC. Their conviction under Section 325/149 IPC is, therefore, set aside. CJM is directed to ensure the custody of the appellants to serve out the remaining sentences. Accordingly, the criminal appeal, filed by the appellants, is dismissed (Para - 55, 56, 72, 73, 78, 81, 84)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Masalti Vs St. of U.P. reported in (1964) 8 SCR 133

2. Bholey Vs St. of M.P., (Criminal Appeal No. 890 of 2012)

3. Sandeep Kumar Vs St. of Har., (Criminal Appeal No. 2195 of 2023)

4. Parshuram Vs St. of U.P , (Criminal Appeal No. 524 of 2021)

5. Anbazhagan Vs The St. Represented by the Inspector of Police, (Criminal Appeal No. 2043 of 2023)

6. Smt. Mathri Vs St. of Pun., reported in AIR 1964 SC 986

7. Bhagwant Vs Kedari, I.L.R. 25 Bombay 202

8. Basdev Vs St. of Pepsu, AIR 1956 16 SC 488

9. Reg. Vs Monkhouse, (1849) 4 COX CC 55(C)

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

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

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Saurabh Basu, learned counsel for the appellants, Shri Purshottam Upadhyay, learned AGA for the State and perused the record.

2. The instant criminal appeal as well as government appeal has been filed against the judgment and order dated 18.02.1983 passed by 4th Additional Sessions Judge, Mirzapur in Sessions Trial No. 134 of 1981 (State of U.P. Vs. Nanhak and 4 Others), arising out of Case Crime No. 109 of 1979, Police Station Kotwali Dehat, District Mirzapur, by which the appellants have been convicted for the offence under Section 147 IPC and awarded the sentence of one year rigorous imprisonment, under Section 325/149 IPC and awarded the sentence of five years rigorous imprisonment with a fine of Rs.500/-, under Section 323/149 IPC and awarded the sentence of six months imprisonment with a fine of Rs.500/- and under Section 426/149 IPC and awarded the fine of Rs.50/- with default stipulations.

3. Apart from the aforesaid criminal appeal, State of U.P. has also preferred a government appeal against the said judgment and order with the prayer to reverse the acquittal of the accused-appellants under Section 302/149 IPC and convict them for the said offence.

4. During the pendency of the aforesaid appeals, accused-appellants Purshottam and Hira Lal have passed away and as such, criminal appeal as well as government appeal, qua the said accused persons, has been dismissed as abated.

5. Since both the appeals arise from the same judgment and order, they are being taken up together and disposed of by a common judgment.

6. Shorn of unnecessary details, the prosecution case is unravelled in the written report lodged by one Ramdev, which was registered vide Case Crime No. 109 of 1979, under Sections 147, 149, 307, 325, 426 IPC, Police Station Kotwali Dehat, District Mirzapur registered vide G.D. Report No. 21. The written report, on the basis of which, chik FIR has been registered, has been marked as Exhibit Ka-1, prepared by PW-10 Juit Ram at the relevant date and time.

7. The allegations made in the FIR are that first informant Ramdev is a permanent resident of Village Mahkuchhwa, Police Station Kotwali Dehat, District Mirzapur. It is further stated that on 08.05.1979, accused Nanhak had cut the Bamboo belonging to Khetal and this fact was disclosed to Khetal by the first informant Ramdev, consequent to which, Nanhak got angry with Ramdev and threatened to teach him a lesson.

8. It is further stated that on 09.05.1979 at about 6:00 PM, when the first informant Ramdev was guarding his mango crop, which he had purchased from one Ram Khelawan, accused persons Nanhak, Purshottam, Hira Lal, Baul and Bihari, armed with lathi danda, reached there and started, felling mangoes and further hurled abuses to Ramdev. On being resisted not to abuse and pluck the mangoes, Hira Lal exhorted the accused persons to assault and kill the first informant Ramdev. On his exhortation, all the assailants with a common object, started assaulting Ramdev with lathi danda. On alarm being raised, Khetal, Sukhdev, Shiv Kumari and many other persons rushed to rescue Ramdev,

however, the assailants started assaulting them also, consequent to which, Khetal, Sukhdev and Shiv Kumari received injuries. On alarm being raised, the assailants made their escape good.

9. On the basis of the said allegations, the first informant/ injured Ramdev got a written report scribed by one Lallan (PW-4) and reached the Police Station and handed over the said written report to the Head Moharrir Juit Ram (PW-10), who, on the basis of the said written report, lodged the chik FIR, which has been proved and marked as Exhibit Ka-18. Corresponding G.D. Report No.21 was also drawn, which has been proved and marked as Exhibit Ka-21. Khetal, Sukhdev and Shiv Kumari, who also received injuries in the said incident, had reached the Police Station alongwith Ramdev, who was also an injured and their Chitthi Majroobi was prepared, which has been proved and marked as Exhibit Ka-22 and Exhibit Ka-23. On the basis of Chitthi Majroobi, the first informant alongwith three other injured persons were medically examined on 09.05.1979 by Dr. C.P. Singh (PW-6) and their injury reports were prepared, which has been proved and marked as Exhibit Ka-20, 21, 22, 23.

10. The investigation of the said case was entrusted to S.I. Mohammad Kamil, who visited the place of incident and prepared the site plan, which has been proved and marked as Exhibit Ka-8. The Investigating Officer also collected the blood-stained and plain earth from the place of incident and kept it in a container and prepared a fard recovery memo, which has been proved and marked as Exhibit Ka-9. The blood-stained clothes of the injured Ramdev were also taken in possession by the police, who prepared the fard recovery memo, which has been proved and marked as Exhibit Ka-10.

11. The Investigating Officer thereafter recorded the statement of the witnesses, however, since the condition of the victim Ramdev was serious, he was admitted in District Hospital, Mirzapur. The Investigating Officer reached the District Hospital, Mirzapur to record his statement, however, he was found unconscious, thereafter, he could not regain his consciousness and ultimately, he succumbed to his injuries on 12.05.1979. The information about the death of the victim Ramdev was sent to S.O., Police Station Kotwali Dehat, District Mirzapur through ward boy, which was reduced in writing in the General Diary at 4:00 PM, which has been proved and marked as Exhibit Ka-27. On the basis of the said death memo, the case was converted under Section 302 IPC. Thereafter, on the basis of the said death memo, the police of Police Station Kotwali Dehat reached the District Hospital, Mirzapur and conducted the inquest on the person of the deceased and thereafter, prepared the relevant documents, namely, photo nash, challan nash, Chitthi R.I., Chitthi C.M.O., etc. and thereafter, dead body was sealed and despatched for post-mortem and an autopsy was conducted on the person of the deceased on 12.05.1979 at about 12:30 PM. In the said post-mortem report, the Doctor has noted following injuries on the person of the deceased, which are noted herein-below:-

(i) Lacerated wound 3 cm. x ¼ cm. x scalp deep on middle of left side head 11 cm. above left ear with contused swelling 16 cm. x 9 cm. extending to forehead and bridge of nose.

(ii) Contusion 5 cm. x 2.5 cm. over both eye lids of Rt. Eye.

(iii) Abrasion 5 cm. x 3 cm. outer, middle of Rt. Arm.

(iv) Lacerated wound 2 cm. x ½ cm. x muscle on front and middle of Rt. leg.

(v) Abrasion 2.5 cm x ½ cm. over outer part of Rt. Elbow.

The cause of death has been noted to be head injury and shock as a result of anti-mortem injury.

12. The Investigating Officer after concluding the investigation, submitted the charge-sheet against the accused persons, on the basis of which, learned Magistrate had taken cognizance of the offence and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial, where it was registered as Sessions Trial No. 134 of 1981 (State of U.P. Vs. Nanhak and Others). The trial court thereafter framed the charges against the accused-appellants, which were read out and explained to them, however, they abjured the charges, did not plead guilty and claimed to be tried.

13. During the course of trial, the prosecution, in order to bring home the guilt against the accused-appellants, examined following witnesses. Their testimony, in brief, is enumerated herein-under :-

14. PW-1 Khetal is an injured witness and he, in his testimony, has stated that on the day and time of the incident, the deceased Ramdev was guarding his mango crop, when the accused-appellants Nanhak and Purshottam, Bihari, Hira Lal and Baul reached there at about 6:00 PM and at the relevant time, he was standing in the eastern side, where Sukhdev and Shiv Kumari were also present. He further stated that at the relevant time, all the five assailants hurling abuses to Ramdev started felling/ plucking his mangoes. On resisting not to abuse and to pluck the mangoes, Hira Lal exhorted the assailants to kill him. He alongwith Sukhdev and Shiv Kumari rushed to rescue him, however, the said five assailants started assaulting Ramdev, when they reached there, he alongwith Sukhdev and Shiv Kumari were also assaulted. On receiving injuries, Ramdev fell down and his injuries were bleeding, when the villagers reached there, the assailants made their escape good. The report in respect of the incident was scribed by one Lallan, which was read out to him and thereafter, he alongwith Ramdev, Sukhdev and Shiv Kumari reached the Police Station and handed over the report, on the basis of which, the FIR was registered. The police thereafter had sent them to the hospital for medical examination, however, since the injuries of Ramdev were serious, he was admitted in the District Hospital, Mirzapur, where he survived for two days and thereafter, he succumbed to his injuries. He further stated that one day prior to the said incident, Nanhak had forcibly cut his Bamboo and this fact was disclosed to him by Ramdev, however, Nanhak came to know about the said incident, as such, he threatened to see him.

15. During cross-examination, PW-1 has reiterated the same story and further stated that at the time of incident, Sukhdev had pelted stones, which hit Purshottam, however, Sukhdev had not assaulted Purshottam with the lathi. In the said incident, Sukhdev and Shiv Kumari also received injuries. Ramdev suffered five injuries, which were bleeding. At the time of incident, Ramdev was not in a serious condition and was speaking. The FIR was scribed by Lallan, however, he did not visit the Police Station. The FIR was registered

on the dictation of Ramdev and thereafter, he was taken to the Police Station on a Rickshaw. He has denied the fact that Ramdev was not unconscious and had not dictated the FIR. He further denied the suggestion that no attempt was made to pluck the mangoes, consequent to which, the quarrel started. He further denied the suggestion that Sukhdev assaulted Baul by kicks and fists, consequent to which, Purshottam assaulted him, then he was assaulted by Sukhdev and in the said fight, they received injuries. He has further denied the suggestion that FIR was lodged on the next day.

16. PW-2 Sukhdev is another injured witness and he has stated that on the day of incident at about 6:00 PM, Ramdev was guarding his mango crop and on the eastern side, he was standing alongwith Khetal and Shiv Kumari, when the assailants Nanhak, Purshottam, Bihari Lal, Baul and Hira Lal reached there and hurling abuses to Ramdev, started plucking the mangoes. On resistance being raised by Ramdev, Hira Lal exhorted the accused persons to kill Ramdev, consequent to which, all the five accused persons assaulted Ramdev by lathi and when they reached near Ramdev to to rescue him, they were also assaulted. On receiving injuries, Ramdev fell down and blood had also fallen there. He further stated that on account of cutting of Bamboo belonging to Khetal, there was quarrel between Nanhak and Ramdev, who extended threats to see him leading to enmity. The information in respect of the incident was scribed by Lallan on the dictation of Ramdev and he alongwith Khetal, Shiv Kumari and Ramdev had reached the Police Station and lodged the report. He has further stated that the police constable has noted their injuries and thereafter, they were taken for medical examination, however, since the condition of Ramdev was serious, he was admitted in the District Hospital, Mirzapur.

17. During cross-examination, he stated that at the relevant time of incident, Lallan was not present there, however, he reached subsequently. He further denied the suggestion that mangoes were not plucked and no quarrel took place. He further stated that Ramdev suffered four-five injuries and at the relevant time, Shiv Kumari was grazing her cattle. He further denied the suggestion that at the relevant time of quarrel, five accused persons were not present.

18. PW-3 Shiv Kumari is another injured witness and she, in her examination-in-chief, has stated that incident had taken place at about 6:00 PM in the evening and at the relevant time, Ramdev was present in the orchard guarding his mango crop, while she was present in the sugar-cane field, Khetal and Sukhdev were also present there. She further stated that at the relevant time, five persons Nanhak, Purshottam, Bihari, Baul and Hira Lal, armed with lathi danda, reached there and started plucking mangoes and hurled abuses. On resistance by Ramdev, Hira Lal exhorted to kill him, consequent thereto, all the accused persons started wielding lathi and when, she alongwith Sukhdev and Khetal rushed to rescue him, they were also assaulted. When Sukhdev received injuries, he pelted stones, which hit Purshottam causing him injury. The FIR was scribed by Lallan and thereafter, they reached the Police Station and lodged the report, from where, they were taken to the hospital for medical examination.

19. During cross-examination, she stated that they had reached the Police Station on a Rickshaw and the injuries of

Ramdev were not simple in nature and at the relevant time, she was grazing her cattle in the field of Ram Khelawan, where sugar-cane was grown and she received injuries in the incident and fell down. Her statement was recorded at about 10:00-12:00 PM. She denied the suggestion that they received injuries due to pelting of stones and not on being assaulted by lathi. She further denied the suggestion that Lallan was not present and the FIR was scribed by some other person.

20. PW-4 Lallan Ram is the scribe of the FIR, who, in his examination-in-chief, has stated that Ramdev was assaulted under the mango tree and after the incident, he had scribed the FIR on the dictation of Ramdev, which was read out to him, who had put his thumb impression. The written report has been proved by him, which has been marked as Exhibit Ka-1.

21. During cross-examination, he denied the suggestion that Ram Lakhan is his real brother and he is falsely deposing in the instant case. On hearing alarm, he himself reached the place of incident and Ramdev asked him to scribe the report, which was scribed at the dictation of Ramdev. He further denied the suggestion that he was not present at the place of incident and had not scribed the FIR at the dictation of Ramdev. He further denied the suggestion that on the written report, thumb impression of Ramdev is not marked and subsequently, manipulated.

22. PW-5 Ram Nath is another witness of the incident and has stated that incident had taken place at 6:00 PM, while he was returning to his home, however, he had not witnessed the incident of assault as the assailants had already made their escape good, when he reached there, however, saw Khetal, Shiv Kumari, Sukhdev and Ramdev in an injured condition.

23. During cross-examination, he stated that when he would proceed towards his house from the shop, the mango tree would fall on the way, where the incident had taken place and he had seen the assailants running away from the place of incident and Ramdev had informed him the name of the assailants. He further denied the suggestion that he has falsely deposing in the incident.

24. PW-6 is the Doctor C.P. Singh, who had examined all the four injured witnesses and prepared the injury reports, which has been proved and marked as Exhibit Ka-2, 3, 4, 5 respectively. All the injured persons were brought to the hospital by Constable Janardan Pandey on 09.05.1979.

25. During cross-examination, he stated that Ramdev was got admitted in the hospital and at the time of his admission, he was conscious and oriented, however, on 12.05.1979 at about 3:00 PM, he died. The death memo was sent at the Police Station. He further proved the post-mortem examination report of the deceased Ramdev and has found anti-mortem injuries on the person of the deceased. He further stated that on account of assault, frontal bone of the deceased was fractured in several pieces and blood had coagulated there. He further stated that on account of anti-mortem injuries, he died and proved the post-mortem examination report, which has been exhibited as Exhibit Ka-7. He further stated that in the ordinary course, his head injury was sufficient to cause death. He further stated that injuries of injured persons and the deceased could have been caused by pelting of stones.

26. PW-7 Mithoo Ram had accompanied the Investigating Officer Mohammad Kamil Siddiqui (Now Dead) for the investigation. He further stated that on the next day, the Investigating Officer had recorded the statement of Sukhdev, Khetal and Shiv Kumari and prepared the site plan, which has been proved and marked as Exhibit Ka-8. The factum of recovery of blood-stained earth and plain earth collected by the Investigating Officer and kept in a container, was also proved by him and marked as Exhibit Ka-9. The blood-stained cloth, which was brought at the Police Station by one Murli Prasad, was also taken in possession and fard recovery memo was proved and marked as Exhibit Ka-10. After concluding the investigation, the charge-sheet was submitted by the Investigating Officer, which has been proved by him as Exhibit Ka-11.

27. During cross-examination, he stated that blood was found under the mango tree, however, no Bamboo was found. He denied the suggestion that he had not accompanied the Investigating Officer.

28. PW-8 Tribhuwan Yadav is the Constable, who had taken the dead body of the deceased for post-mortem examination and handed over the relevant papers to the Doctor for conducting the post-mortem, however, he has not cross-examined.

29. PW-9 Murli Prasad is the witness of fard recovery memo and has stated that at the relevant time, from the field of Ram Khelawan, the Investigating Officer had collected the blood-stained earth and plain earth and prepared the recovery memo, which has been proved and marked as Exhibit Ka-9. He further stated that blood-stained cloth of the deceased was also given by him to the Investigating Officer to prepare its recovery memo and was got signed by him.

30. PW-10 Juit Ram is the Head Moharrir, who on the basis of written report of the deceased Ramdev, had scribed the chik FIR, which has been proved and marked as Exhibit Ka-18. On the basis of the said FIR, corresponding G.D. entry was made vide G.D. Report No.21, which has been proved and marked as Exhibit Ka-19. He further stated that alongwith Ramdev (Deceased), Khetal, Shiv Kumari and Sukhdev had also reached the Police Station and majroobi chitthi was prepared by Chandra Bhan Yadav, which has been proved and marked as Exhibit Ka-22 and Ka-23. He further stated that at the relevant time, S.I. Mohammad Kamil Siddiqui was not present at the Police Station, however, on his return, the investigation was entrusted to him, who reached the place of incident and prepared the relevant documents including the fard recovery memos. On 12.05.1979, information about the death of Ramdev was transmitted by ward boy, which was noted in the G.D. and thereafter, the case was converted from Section 307 IPC to Section 302 IPC. The inquest on the person of the deceased was done by S.I. Bharat Ratna and relevant documents were prepared by him. On 09.05.1979, accused Purshottam gave a report at the Police Station on the basis of which, a non-cognizable report (NCR) under Section 323 IPC was registered, which has been proved and marked as Exhibit Ka-31. On the basis of which, G.D. Report No.23 was prepared and accused Purshottam was also medically examined.

31. During cross-examination, he further denied the suggestion that Ramdev had not reached the Police Station and his injuries report was subsequently prepared.

He further denied the suggestion that at the relevant time, the FIR was not registered and was subsequently registered.

32. PW-11 Dr. O.P. Taneja is the Assistant Chemical Analyst at Vidhi Vigyan Prayogshala and has stated that relevant material relating to Case Crime No. 109 of 1979 was received by him in the lab and on the basis of which, Guru Sharan Bhatnagar had prepared the analysis report and he had seen him preparing the documents in his hand writing, which has been proved and marked as Exhibit Ka-13.

33. After concluding the testimony of the witnesses, statement of accused-persons under Section 313 CrPC was recorded by putting all the incriminating circumstances to the accused-appellants, who denied the incriminating circumstances and stated that they have been falsely implicated and in his defence, produced DW-1 Dr. G.D. Dubey, who examined accused Purshottam to prove his injuries, which are as under :-

(1). फटा हुआ घाव 4 से०मी० x .5 से०मी० मांस तक गहरा सर की दाहिनी तरफ दाहिने तरफ कान से 13 से०मी० ऊपर था।

(2). नीलगू निशान 3 से०मी० x 2 से०मी० बाएं शोल्डर के कंधे के सामने भाग पर था।

(3). खंराश 5 से०मी० x 2 से०मी० बाएं तरफ पीठ पर इलीयक क्रेश्ट से जरा सा ऊपर था व इनटीयर सुपीरियर इलीयक स्पाइन के 9 से०मी० दूरी पर था।

ये चोटे ताजी थी रगड़ व कुन्द आले से आई थी व साधारण थी।

34. Dr. G.D. Dubey has further stated that all the injuries are simple in nature caused by blunt object and has proved the said injuries, which has been marked as Exhibit Kha-1. He has further stated that said injuries are caused by lathi at 4:00-5:00 PM in the evening.

35. During cross-examination, he stated that injury no.3 could be caused by friction, whereas injury no.2 could be caused by some blunt object, which may be a result of pelting stones. He further stated that injury nos. 2 & 3 are superficial, however, injury no.1 is not superficial but such injuries could be fabricated.

36. The trial court, after appreciating the entire material and evidence available on record, has held that the prosecution has successfully established its case beyond all reasonable doubts against the surviving accused-appellants Nanhak, Bihari and Baul, however, not for the offence under Section 302/149 IPC but under Sections 147, 325/149, 323/149, 426/149 IPC. The explanation tendered by surviving appellants has been found to be inadequate and as such, they are liable for conviction for the aforesaid offences.

37. Learned counsel for the appellants has submitted that trial court has not appreciated the material evidence on record in right perspective and has illegally recorded the finding of conviction against the appellants even under the aforesaid offences.

38. Learned counsel for the appellants has next submitted that injuries of the injured persons, namely, Khetal, Sukhdev and Shiv Kumari are self inflicted and has not been caused as alleged in their respective testimonies.

39. Learned counsel for the appellants has further submitted that in fact, accused-appellant Baul was being assaulted by Surli, Murli and Sukhdev by kicks and fists and at the relevant time, accused-appellant Purshottam reached there and tried to rescue Baul, he was also assaulted by Surli, Murli

and Sukhdev, on account of which, Purshottam also received injuries and was medically examined, which has been proved by D.W.-1 however, the trial court has completely overlooked the injuries received by Purshottam and has illegally recorded the finding of conviction against the appellants, though a non-cognizable report has also been lodged by Purshottam at the relevant Police Station for assaulting him in the said incident, as such, the impugned judgment and order convicting and sentencing the appellants is bad in law and is liable to be set aside.

40. Per contra, learned AGA has submitted that information in respect of the said incident was lodged by victim Ramdev himself, who has given a compete version of the incident, wherein it is stated that accused-appellants formed an unlawful assembly and with a common object to kill him, had assaulted him with lathi danda and when other witnesses came to rescue him, they were also assaulted having suffered injuries on their person, who have testified before the court and the defence has not been able to elicit anything to doubt the credibility of the said witnesses.

41. Learned AGA has next submitted that looking to the injuries sustained by the deceased and the injured persons as well as the impeccable testimonies of the injured witnesses recorded during the course of trial before the court below, a clear case under Section 302/149 IPC is made out against the appellants. The contrary finding recorded by the trial court that since only a single fatal injury has been suffered by the deceased but the author of the said fatal injury has not been specified by the prosecution in its evidence, as such, the offence would fall under Section 325 read with Section 149 and not under the changed section i.e. 302/149 and other allied offences is patently illegal, erroneous and liable to be set aside outrightly.

42. Learned AGA has further submitted that in the instant case, as many as five persons had formed an unlawful assembly and with a common object had assaulted the deceased with an intention to kill him, therefore, in any case, the offence would not fall under Section 325/149 IPC as held by the trial court but under Section 302/149 IPC, the contrary finding given by the trial court is wholly illegal and is liable to be set aside.

43. Having considered the rival submissions made by learned counsel for the parties and the evidences adduced by the witnesses during the course of trial, it is clear that the accused-appellants, who were five in number, had formed an unlawful assembly and armed with lathi, had reached the place of incident and hurling abuses to Ramdev started plucking mangoes and when he resisted not to hurl abuses, on the exhortation of accused-appellant Hira Lal, all the five persons, armed with lathi danda, assaulted the victim Ramdev and further when other witnesses, namely, Khetal, Sukhdev and Shiv Kumari rushed to rescue him, they were also assaulted, consequent to which, they suffered injuries and have been medically examined. During the course of trial, all the three injured witnesses have completely corroborated the prosecution story in all material particulars and the defence has not been able to point out any ambiguity or embellishment, exaggeration or improvement in their testimony so as to doubt the credibility of the said witnesses. Even the medical report of the deceased as well as that of the injured witnesses completely corroborates the prosecution

story and there is nothing on record to doubt the credibility of the said witnesses.

44. So far as the submission of learned counsel for the appellants to the extent that in the said incident, accused-appellant Purshottam has also suffered injuries on his person and was also medically examined and has also lodged a non-cognizable report against the injured person Sukhdev, however, trial court has not considered the said evidence and has illegally recorded the finding of conviction against the appellants is concerned, it may be pointed out that the said incident of assault made on Purshottam, incident is said to have taken place at 4:00 PM in the evening, while the incident in question is alleged to have occurred at 6:00 PM in the evening and therefore, the information lodged by Purshottam in respect of his assault by Sukhdev can not be said to be the counter version of the instant case, where victim Ramdev was done to death and in fact, the incident reported by Purshottam is completely a different incident and therefore, on account of receiving injuries by Purshottam, the veracity of the instant case can not be affected, in any manner, as pleaded by learned counsel for the appellants and therefore, the non-cognizable report lodged by Purshottam in respect of his assault by Sukhdev and two others, does not affect, in any way, the credibility of the said incident, in which, Ramdev was killed and Khetal, Sukhdev and Shiv Kumari had received injuries. Thus, we are of the opinion that the said incident, in which, Purshottam suffered injuries will not have any hearing upon the instant case and the prosecution will not have any burden to explain the injuries alleged to be received by Purshotttam probably in some other incident and both the cases cannot be linked together.

45. Thus, we find that the defence has not been able to point out any circumstance, which may doubt the credibility of the witnesses, who by their impeccable testimonies has proved the case against the appellants beyond all reasonable doubt and therefore, the finding of conviction recorded by the trial court against the appellants do not suffer from any illegality and the same is just, proper and legal and the conviction recorded against the appellants is liable to be affirmed by dismissing the criminal appeal.

46. Now, the main question that arises for our consideration in the Government Appeal filed by the State is whether the judgment and order passed by the trial court acquitting the accused-appellants under Section 302/149 IPC and convicting him only under Section 325/149 IPC and other allied offences is just, proper and legal or erroneous, on the basis of evidence adduced by the witnesses during the course of trial.

47. It is germane to point out here that while recording the finding of acquittal against the appellants under Section 302/149 IPC, the trial court has held that in the instant case, since the deceased Ramdev received only a single fatal injury on his head at the hands of the accused persons, which was caused by lathi but there is no cogent evidence on record to prove that the accused-appellants had common object to kill Ramdev and the author of said injury has not been specified, therefore, the offence, in any case, would not fall under Section 302/149 IPC but under Section 325/149 IPC.

48. In our considered opinion, the said finding recorded by the trial court does not appears to be just, proper and legal. From the entire evidence adduced before the trial court, it is evident that the accused persons, who were five in number, had formed an

unlawful assembly and with a common object, had assaulted the deceased and the injured persons in furtherance of their common object to kill Ramdev, as such, present offence would not fall under Section 325/149 as held by the trial court.

49. Moreover, since the appellants were the part of an unlawful assembly, it was not necessary for the prosecution to attribute the specific role to each of them. In ***Masalti Vs. State of U.P. reported in (1964) 8 SCR 133***, the Constitution Bench of this Court has observed as under :-

13. The law with regard to conviction under Section 302 read with Section 149 of IPC has been succinctly discussed by a Constitution Bench of this Court in the locus classicus of Masalti Vs. State of U.P., wherein this Court observed thus:

"17. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

It is in that context that the observations made by this Court in the case of Baladin [AIR 1956 SC 181] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly.

In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

14. It could thus clearly be seen that the Constitution Bench has held that it is not necessary that every person constituting an unlawful assembly must play an active role for convicting him with the aid of Section 149 of IPC. What has to be established by the prosecution is that a person has to be a member of an unlawful assembly, i.e. he has to be one of the persons constituting the assembly and that he had entertained the common object along with the other members of the assembly, as defined under Section 141 of IPC. As

provided under Section 142 of IPC, whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

50. Undisputedly, from the evidence of PW-1 Khetal, PW-2 Sukhdev and PW-3 Shiv Kumari, it is clear that the present appellants were members of an unlawful assembly and undoubtedly, in pursuit of their common object has committed the incident, as such, in view of law laid down by this Court in the case of **Masalti (Supra)**, it is not necessary that each of such person for being convicted, must have actually assaulted the deceased.

51. The Hon'ble Apex Court in ***Criminal Appeal No. 890 of 2012 (Bholey Vs. State of M.P.)*** has clearly held that to constitute an offence under Section 149 IPC, one cannot expect a witness to speak with graphic detail about the specific overt act that can be attributed to each accused. Further, the Hon'ble Apex Court in ***Criminal Appeal No. 2195 of 2023 (Sandeep Kumar Vs. State of Haryana)*** has held that "for offence" under Section 149 IPC, one simply has to be a part of unlawful assembly. No overt act needs to be assigned to a member of unlawful assembly.

52. In Criminal Appeal No. 524 of 2021 (Parshuram Vs. State of U.P.), Hon'ble Apex Court held that individual role/ and or overt act by individual accused is not significant, when all accused persons are charged under Section 149 IPC and were part of unlawful assembly.

53. As such, in view of the aforesaid proposition of law laid by Hon'ble Apex Court, we are of the view that in the facts and circumstances of the case and the evidence adduced by the injured eye witnesses, the act of the accused respondents would not fall under Section 325 read with Section 149 IPC as held by the trial court, which finding in our opinion is bad in law and liable to be set aside.

54. Having held that the question, which we are left to answer is as to whether the conviction under Section 302/149 IPC, as submitted by learned AGA in the connected government appeal, would be tenable or not. In this respect, we have already gone through the evidence adduced by the prosecution and the genesis of the occurrence and the participation of the appellants herein, PW-6 Dr. C.P. Singh was medically examined by the prosecution, being the Medical Officer, who conducted the post-mortem on the person of the deceased. In the post-mortem report, the Dr. C.P. Singh has noted five injuries, which are as under:-

(i) Lacerated wound 3 cm. x ¼ cm. x scalp deep on middle of left side head 11 cm. above left ear with contused swelling 16 cm. x 9 cm. extending to forehead and bridge of nose.

(ii) Contusion 5 cm. x 2.5 cm. over both eye lids of Rt. Eye.

(iii) Abrasion 5 cm. x 3 cm. outer, middle of Rt. Arm.

(iv) Lacerated wound 2 cm. x ½ cm. x muscle on front and middle of Rt. leg.

(v) Abrasion 2.5 cm x ½ cm. over outer part of Rt. Elbow.

55. The cause of death, as noted in the post-mortem report, appears to be coma and shock due to head injury resulting from injury no.1, whereas other injuries have been noted to be simple in nature.

56. It is further germane to point out here that in the instant case, the weapon assigned to the appellants is lathi danda, which, by no stretch of imagination, can be said to be a lethal weapon used in the incident, on the basis of which, we will now determine as to whether there was any intention on the part of the accused-appellants to cause the death of the deceased or just to assault him with an intention to cause bodily injury.

57. The Hon'ble Supreme Court in its recent decision in ***Criminal Appeal No. 2043 of 2023 (Anbazhagan Vs. The State Represented by the Inspector of Police) reported in*** ……..… has very lucidly explained distinction between the terms 'intention' and 'knowledge'.

58. The word "intent" is derived from the word archery or aim. The "act" attempted to must be with "intention" of killing a man.

59. Intention, which is a state of mind, can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are proved. The intention may be proved by res gestae, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case.

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

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

(Emphasis supplied)

61. In the case of **Basdev Vs. State of Pepsu, AIR 1956 16 SC 488, at Page 490,** the following observations have been made by Chadrasekhara Aiyar J. :-

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

(Emphasis supplied)

62. In para 9 of the judgment, at page 490, the observations made by Coleridge J. in ***Reg. v. Monkhouse, (1849) 4 COX CC 55(C)***, have been referred to. They can be referred to, with advantage at this stage, as they are very illuminating:-

"The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look

into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely; was he rendered by intoxication entirely incapable of forming the intent charged ?"

(Emphasis supplied)

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

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

(i) The nature of the weapon used, (ii) whether the weapon was carried by the accused or was picked up from the spot, (iii) whether the blow is aimed at the vital part of the body, (iv) the amount of force employed in causing injury, (v) whether the act was in the course of sudden quarrel or sudden fight, (vi) whether the incident occurred by chance or whether there was any premeditation, (vii) whether there was any prior enmity or whether the deceased was a stranger, (viii) whether there was a grave or sudden provocation and if so, the cause for such provocation, (ix) whether it was heat of passion, (x) whether a person inflicting the injury has taken undue advantage or has acted in a cruel manner, (xi) whether the accused persons has dealt a single blow or several blows.

65. Thus, while defining the offence of culpable homicide and murder, the framers of the IPC laid down that the requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be. The framers of the IPC designedly used the two words 'intention' and 'knowledge', and it must be taken that the framers intended to draw a

distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he "must have been aware that certain specified harmful consequences would or could follow." **(Russell on Crime, Twelfth Edition, Volume 1 at Page 40**).

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

67. Thus, in order that the requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide proved, it is necessary that any of the two specific intentions must be proved. But, even when such intention is not proved, the offence will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death, that is, with the knowledge that the result of his doing his act may be such as may result in death.

68. The important question which has engaged our careful attention in this case is, whether on the facts and in the circumstances of the case we should maintain the conviction of the appellant herein for the offence under Section 302 or we should further alter it to Section 304 Part II of the IPC ?

69. Sections 299 and 300 of the IPC deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300 of the IPC, however, deals with 'murder', although there is no clear definition of 'murder' in Section 300 of the IPC. As has been repeatedly held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'. (see ***Rampal Singh vs. State of U.P., (2012) 8 SCC 289).***

70. The scope of clause thirdly of Section 300 of the IPC has been the subject

matter of various decisions of this Court. The decision in ***Virsa Singh (supra)*** has throughout been followed in a number of cases by this Court. In all these cases the approach has been to find out whether the ingredient namely the intention to cause the particular injury was present or not? If such an intention to cause that particular injury is made out and if the injury is found to be sufficient in the ordinary course of nature to cause death,then clause thirdly of Section 300 of the IPC is attracted.

71. The Hon'ble Supreme Court further in its decision in ***Criminal Appeal No. 2043 of 2023 (supra)*** has thus held that the distinction between culpable homicide (Section 299 of IPC) and the murder (Section 300 of IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

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

73. Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

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

75. Now, we recapitulate the facts and circumstances of the instant case on the fateful day of the incident, the appellants had reached the mango orchard of the deceased and started plucking mangoes and hurling abuses and on resistance being raised by the deceased, the appellants, who were five in number, had started assaulting the deceased by lathi, consequent to which, the deceased suffered a single fatal blow on his head resulting in his death, though, there was no intention to cause his death, therefore, we find it is difficult to come to

the conclusion that when the appellants struck the deceased with the lathi, they intended to cause him bodily injury, sufficient in the ordinary course of nature, to cause death. In the present case, admittedly the weapon of offence is lathi danda, which is a common item carried by the villagers in this country linked to his identity.

76. It is true that the deceased had suffered internal head injury, consequent to which, he succumbed injuries, however, the important question is whether internal head injury is sufficient to draw inference that the appellants intended to cause such bodily injury to the deceased, was sufficient to cause his death.

77. Thus, from the aforesaid circumstances, we are of the considered opinion that none of the clauses of Section 300 of IPC are attracted as intention of the appellants to cause death or such bodily injury, which they knew would cause the death of other person or sufficient in the ordinary course of nature to cause death, is not proved.

78. Thus, we are of the considered opinion that the appellants had not committed the offence that fall within the meaning of Section 300 of IPC i.e "culpable homicide amounting to murder", which is punishable under Section 302 of IPC. The present incident had occurred without premeditation in a fit of rage on a trivial matter of plucking mangoes and hurling abuses. Thus, in our considered opinion, the offence committed by the appellants would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 of IPC.

79. Now, the next question would be as to whether the appellants would be guilty in Part-I or Part-II of Section 304 of IPC as is evident from the record. The purpose apparently was to beat up the deceased by giving a sound beating but certainly not with any intention to kill him. To us, it appears that at the most it can be said that the act of the appellant in hitting the deceased was done with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. The case of the appellant would, therefore, clearly fall under Section 304 Part II IPC. The trial court did not apply its mind in proper perspective and was rather swayed by the fact that on account of lathi blow by the appellants, deceased died an unnatural death and since, the author of single fatal injury to the deceased is not known, therefore, offence would fall under Section 325/149 IPC as held by the trial court, in our opinion, is not the correct view and sought to be reversed in the facts and circumstances of the case, however, the offence, in our opinion would fall under Section 304/149 IPC. There was no material on record to show that the appellant was bent upon killing the deceased and eventually death came out to be the result. Section 304 is as under :-

Punishment for culpable homicide not amounting to murder.

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge

that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

80. This section is in two parts. If analysed the section provides for two kinds of punishment to two different situations. (1) if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death. Here important ingredients is the "intention"; (2) if the act is done with knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death. When a person hits another with a lathi danda on vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation, case will fall in part II of Section 304 IPC as in the present case.

81. We, therefore, hold that the appellants to be guilty for an offence under Section 304 (Part II) of IPC. Their conviction under Section 325/149 IPC is, therefore, set aside. Instead of convicting the appellants under Section 325/149 IPC, they are liable to be convicted under Section 304 (Part II)/149 of IPC and sentence them for six years rigorous imprisonment with a fine of Rs.30,000/-.

82. Thus, in sum and substance, the appellants shall now stand convicted under Section 147 IPC and sentenced to undergo rigorous imprisonment for one year and a fine of Rs. 500/- each, under Section 304 (Part II)/149 IPC and sentenced to undergo six years R.I. With a fine of Rs. 30,000/- each, under Section 323/149 IPC and to a fine of Rs. 100/- each and under Section 426/149 IPC and to a fine of Rs. 50/- each.

83. In case of default of payment of fine under Section 147 IPC, the defaulter accused shall undergo R.I. for three months each. In case of default of payment of fine under Section 304 (Part II)/149 IPC, the defaulter accused shall undergo R.I. for six months each. In case of default of payment of fine under Section 323/149 IPC, the defaulter accused shall further undergo R.I. for one month each. In case of default of payment of fine under Section 426/149 IPC, the defaulter accused shall undergo R.I. for 15 days each.

84. The appellants are on bail. Chief Judicial Magistrate concerned is directed to ensure the custody of the appellants to serve out the remaining sentences. Accordingly, the criminal appeal, filed by the appellants, is **dismissed**, however, government appeal, filed for reversing the acquittal of the appellants under Section 302 IPC, is **partly allowed** in terms of aforesaid order of conviction and sentence.

85. Let a copy of this judgment and order be forwarded to the court concerned along with the trial court record for information and necessary compliance.

(2024) 5 ILRA 1322
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 681 of 1984
connected with
Government Appeal No. 1876 of 1984

Ashok **...Appellant**

Versus

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

Counsel for the Appellant:
Murlidhar, Rajesh Srivastava, Ram Pal, S.P. Srivastava

Counsel for the Respondent:
D.G.A., R.P. Singh

Criminal Law: Indian Penal Code, 1860 – Section 302/34 – Murder - Criminal Procedure Code,1973 - Section 313 - on 02.12.1982 PW-2 was accompanying his maternal uncle (deceased) along with another person for watching a movie - en-route to the Picture Hall, the accused persons met the deceased and other accused caught him by his waist - whereas other accused caught him by his hands - he was assaulted by accused- assailants with their knives -causing injuries to the deceased - Court convicted & sentenced the appellant u/s 302/34 I.P.C. for life imprisonment - other accused have been acquitted from all the charges framed against them – Held, PW-2 is a natural witness in the facts and circumstances of the case, who has deposed against the accused in a most natural way -the defence has not point out any inconsistency in his testimony – Presence of PW-3 is doubtful – Trial Court declared him "chance witness" – Liable to be discarded - FIR is not a substantive piece of evidence - any omission could not ipso facto render the prosecution story doubtful - when in the subsequent St.ment and evidence it has been clearly mentioned - where an accused is the main perpetrator, resort to Section 34 IPC is not necessary as he is himself individually liable for having caused the offence - when an incident takes place, a witness does not necessarily react in a particular manner- Every person, who witnesses a murder, reacts in his own way - Some are stunned, some become speechless and stand rooted to the spot – Hence, appeal has no merits, accordingly dismissed (Para - 4, 69, 73, 74, 77, 83, 88, 93, 94)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Gadadhar Chandra Vs St. of W. of B.l (Criminal Appeal No. 1661 of 2009)

2. Chandra Pratap Singh Vs St. of M.P (Criminal Appeal No. 1209 of 2011)

3. Mala Singh & ors. Vs St. of Hary. reported in (2019) 5 SCC 127

4. Chittarmal Vs St. of Raj. reported in (2003) 2 SCC 266

5. Chhota Ahirwar Vs St. of M. P. reported in (2020) 4 SCC 126

6. Ram Naresh Vs St. of U. P. (Criminal Appeal No. 3577 of 2023)

7. Puran Vs St. of Punj., (1952) 2 SCC 454

8. Mousam Singha Roy Vs St. of West Bengal, (2003) 12 SCC 377

9. Shankarlal Vs St. of Raj., (2004) 10 SCC 632

10. Jarnail Singh Vs St. of Pun. (2009) 9 SCC 719

11. Mritunjoy Biswas Vs Pranab @ Kuti Biswas & anr.reported in (2013) 12 SCC 796

12. St. of Rajasthan Vs Gurbachan Singh & ors. (Criminal Appeal No. 2201 of 2011)

13. Ram Naresh Vs St. of U. P. (Criminal Appeal No. 3577 of 2023)

14. Rana Pratap Singh & ors. Vs St. of Har. reported in (1983) 3 SCC 327

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Arun Kumar Pundir, learned counsel for the appellant in Criminal Appeal, Shri Ashish Tiwari, learned AGA for the State, Shri Abhishek Gupta, learned counsel for the accused-respondent- Raju, Shri Harshit Gupta, holding brief of Shri Rohan Gupta, learned counsel for the accused respondent- Kalloo and perused the record.

2. The instant criminal appeal as well as government appeal has been filed against the judgment and order dated 28.02.1984 passed by 6th Additional Sessions Judge, Kanpur in Sessions Trial No. 63 of 1983 (State of U.P. Vs. Ashok and 3 Others), arising out of Case Crime No. 411 of 1982, Police Station Harbans Mohal, District Kanpur, by which the accused-appellant Ashok has been convicted for the offence under Section 302 read with Section 34 IPC and awarded the sentence of life imprisonment, whereas accused-respondents Raju, Kalloo and Chander have been acquitted of all the charges framed against them.

3. Since the basic facts, issues and the judgment of the trial court are similar and common, both criminal appeal as well as government appeal have been clubbed and heard together and the same are being decided by the common judgment.

4. Shorn of unnecessary details, prosecution story as unfurled in the FIR lodged by one Kamal Kumar, son of Shyam Lal based on a written report, which has been proved and marked as (Ext. Ka-2) is that first informant Kamal Kumar is the resident of House No. 61/203, Sitaram Mohal and few days back, there has been some verbal duel between his maternal uncle Dinesh Chand and one Ashok, who was putting his shop/kiosk in front of tea stall of the deceased, which was resisted by his maternal uncle, consequent to which, on 02.12.1982, when he along with his maternal uncle and one Satya Narayan had reached near Shivraj Tobacco Company in Harbans Mohal at about 06:40 p.m., Ashok son of Ram Chander, Chander son of Ram Shanker, Raju son of Ajay Gupta and Kalloo son of Kuwarji met them. Ashok and Raju were armed with knife, Kalloo then caught hold of his uncle Dinesh Chand by his waist and Chander held him his hands and made him fall down and exhorted to assault him, consequent to which, Ashok and Raju by their knives gave 4-5 blows causing injuries to Dinesh Chand, who fell down. On raising alarm, Ram Narayan and his younger brother Vimal Kishor reached the place of incident and witnessed the crime, however, the accused-assailants made their escape good. On account of fear, they did not chase them, however, since his maternal uncle was badly injured, as such, his brother Vimal Kishor rushed to take him to the hospital, however, en-route to the hospital, he succumbed to his injuries. Leaving his dead body there, he had gone to the Police Station to lodge the report. On the basis of a written report, FIR was lodged vide Case Crime No. 411 of 1982, under Section 302 IPC, carbon copy whereof has been drawn vide G.D. Report no. 46 at 20:10 hours dated 02.12.1982, which has been proved and marked as Exhibit Ka-4. The FIR was registered in the presence of S.H.O., Police Station Harbans Mohal, who was entrusted with the investigation of the present case.

5. The Investigating Officer recorded the statement of the first informant Kamal Kumar (P.W.1) and thereafter, he alongwith PW-1 reached the place of incident and found the blood and a shoe of the deceased lying there, which were taken in his possession and its fard recovery memo was prepared.

6. The Investigating Officer has further collected the plain earth and bloodstained earth from the place of incident and kept it in a container and prepared its recovery memo, which has been proved and marked as Ext. Ka-6 and Ext. Ka-7.

7. Thereafter, the Investigating Officer has prepared the site plan, which has been

proved and marked as Ext. Ka-8 and then, reached the hospital and saw the corpse of the deceased but in the absence of proper arrangement, could not conduct the inquest, however, in the hospital, he recorded the statement of Vimal Kishor (P.W.3) and Satya Narayan, another eye-witness of the incident.

8. On the next day i.e. 03.12.1982, the inquest was conducted by S.S.I. R.S. Kushwaha, which has been proved and marked as Ext. Ka-9. The relevant documents, namely, photo-nash, challan-nash, letter to R.I., letter to C.M.O. etc. were prepared, which have been proved and marked as Ext. Ka-9 to Ext. Ka-12. Thereafter, dead body of the deceased was sealed and dispatched to the mortuary for post-mortem examination.

9. An autopsy was conducted on the person of the deceased on 03.12.1982 at 04:40 p.m. The doctor has noted six injuries on his person, which are as under :-

(i) incised wound of 7cm x 3cm x muscle deep down at the right lateral side of Back, transverse in direction 7 cm below the posterior axillary angle.

(ii) Incised punctured wound of 3cm x 2cm x Chest cavity deep at the intercostal spine between 3rd & 4th ribs on right side of back, which is at medial end 14cm below the root of the back & 4cm from the backbone. It is transverse in direction.

(iii) Incised wound of 4 cm x 2 cm x muscle deep at the right side of Back, above downwards in direction and at medial end (upper) is 14cm below the injury no. 2 and 7cm from the backbone.

(iv) Incised wound of 3 cm x 1x1/2 cm x muscle deep at the right side of skull which is from transverse in direction and 11 cm above the right ear Tragus.

(v) Incised wound 1 cm x ½ cm x muscle deep at the left side of eyebrow.

(vi) Contusion of 4 cm x 2.5 cm at the right side of forehead just above the eyebrow.

10. Thereafter, an attempt was made to arrest the accused person but to no avail nor any incriminating article was recovered, in respect of which, Ext. Ka-13 to Ext. Ka-15 have been drawn.

11. On 25.12.1982, the Investigating Officer after concluding the investigation, submitted the charge-sheet against the accused persons, which has been proved and marked as Ext. Ka-16. On the basis of the said charge-sheet, learned Magistrate had taken cognizance, however, since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions, where it was numbered as S.T. No. 63 of 1983 (State of U.P. Vs. Ajay @ Raju and others).

12. The trial court thereafter framed the charges against the accused-appellant under Section 302 read with Section 34 IPC, which was read out and explained to the accused person in Hindi, however, they abjured the charges, pleaded not guilty and claimed to be tried.

13. During the course of trial, the prosecution examined as many as two witnesses of fact and four other formal witnesses. Their testimony, in brief, is enumerated herein-under :-

14. P.W.1 Dr. Madan Bihari is the person, who conducted an autopsy on the person of the deceased and proved the autopsy report and contents thereof, which has been proved and marked as Ext. Ka-1. He further stated that injury nos.1 to 5 could

be caused by knife and the deceased could have died on 02.12.1982 at 06:45 p.m.

15. During cross-examination, he stated that injury no.6 could be caused by some blunt object and the said injuries were sufficient in the ordinary course of nature to cause death. He further stated such injuries could be caused by some small axe or *Khurpi*.

16. P.W.2 Kamal Kumar is the first informant of the case and the nephew of the deceased. In his testimony, he stated that he is a permanent resident of House No. 61/203, Sitaram Mohal, where he, his mother, his brother Vimal Kishor, his sister Kamini Devi, his maternal uncle Dinesh Chand used to live and Dinesh Chand used to run a tea stall in Sitaram Mohal. He identified the accused Ashok, present in the court and stated that he used to keep a fruits kiosk in front of the shop of his maternal uncle Dinesh Chand, however, his maternal uncle used to resist putting his kiosk in front of his shop because his sister was young and he used to stand in front of his sister. His shop is situated at Canal Patari and there has been some verbal duel between Ashok and his maternal uncle Dinesh Chand over placing of his kiosk in front of his shop.

17. He further stated that about one year back, his maternal uncle Dinesh Chand, his brother Vimal Kishor and Satya Narayan were present at his house, however, Vimal Kishor had gone out for some work and they were conversing for watching a movie in Apsara Talkies. Their mother asked them to take their meals, however, they refused to take the meals and proceeded towards Apsara Talkies and when, they reached near the Shivraj Tobacco Company, they saw the accused persons Ashok, Chander, Raju and Kalloo, present in the court, standing in front of tea-shop of Arjun.

18. He further stated that accused Kalloo came from behind and caught hold of the victim Dinesh Chand by his waist, whereas Chander held him by his hands and then, Chander exhorted to assault and not to spare him, then Chander made his maternal uncle Dinesh Chand fall down. Ashok and Raju, armed with knives, assaulted him. After assaulting the victim, accused persons tried to make their escape good, however, on hearing the alarm, Ram Narayan and his younger brother Vimal Kishor reached there and witnessed the incident. His maternal uncle suffered injuries by knife, as such, he along with his brother Vimal Kishor had taken him to the K.P.M. Hospital on a rickshaw, however, on reaching there, the doctor declared him dead.

19. The said incident had occurred at about 07:00 p.m. in the evening. After his death, he returned back to his house, scribed the report and lodged the same at the Police Station, which has been proved and marked as Ext. Ka-2.

20. He further stated that at the Shivraj Tobacco Company, bulbs were lit and even at the tea stall, bulbs were lit and at a distance of 10-15 paces, electric tube-light was also lit and there was sufficient source of light.

21. He further stated that Satya Narayan and Ram Narayan have colluded with the accused persons and as such, they do not wish to adduce their evidence and all the other accused persons are the friends of Ashok.

22. During cross-examination, he stated that there are four shows of screening

of movies i.e. 12:00 Noon to 03:00 PM, 03:00 PM to 06:00 PM, 06:00 PM to 09:00 PM and 09:00 PM to 12:00 PM, however, the film does not starts at the exact time but around 06:30 PM. On the fateful day, Satya Narayan had reached his house at 06:15 p.m. and his maternal uncle's tea stall is situate at a distance of 10-15 paces from his house. Near the shop of his maternal uncle, there are 12-15 other shops. At 6:00 p.m., Satya Narayan had reached his shop and asked him to go together for watching a movie. At the relevant time, his maternal uncle Dinesh was also present there as his shop was closed. He, however, does not remember as to which movie was being screened in Apsara Talkies, where they were proceeding for watching the movie. The incident had occurred about 02-03 furlongs on canal road turning, where on both the sides, shops were situated and were opened. The accused persons were standing at the shop of Arjun Prasad, who also was present there. The said incident was witnessed by him and several other persons.

23. He further stated that when he had gone about 10-15 paces ahead of shop of Arjun, then the incident had occurred, however, when they crossed the accused persons, they did not utter a word. He denied the suggestion that when he reached near the Shivraj Tobacco Company, accused persons met him and held them.

24. On his attention been drawn to the contents of the FIR, he admitted the fact that in the FIR, it is not stated that accused persons were standing in front of tea stall of Arjun but it is stated that accused persons met near the Shivraj Tobacco Company.

25. On his further attention been drawn to the contents of the FIR, he stated that Kalloo came from behind and caught hold of the deceased from the back by his waist. At the place of incident, he stayed for 3-4 minutes and he and his brother had lifted his maternal uncle, who was bleeding profusely and took him in a rickshaw to the hospital, consequent to which, their clothes and hands were smeared with blood. They had shown their bloodstained clothes to the Investigating Officer, however, the Investigating Officer did not took them in his possession. The victim had fallen in a prone position and thereafter, he could not rise. The accused persons had stabbed the deceased on his back and head but the blood did not gushed out. When the deceased was assaulted by knife, he was bent on his knees but did not raise alarm, however, he had raised the alarm. The incident took place within 2-3 minutes. When the victim was held by the waist, he was standing beside him but could not rescue him. The victim was made to fall down and assault started. He was also pushed but he did not fall down and was standing at the chabutra of Shivraj Tobacco Company, from where, he witnessed the incident. The accused persons also tried to assault him but could not and thereafter, ran away. He is known to Chander for the last about 1½ years as he used to sell Kerosene and used to come at his crossing. He further stated that all the accused persons are friends but the said fact is not stated in the F.I.R.

26. He further denied the suggestion that shop of the deceased was not his own but that of Ramanand @ Buddhu Baba and he wanted to take forcible possession of the said shop, as such, deceased had assaulted Pappu, son of Buddhu Baba. The factum that Ashok wanted to put his kiosk in front of shop of his maternal uncle, was stated in the FIR.

27. He further categorically stated that when he had seen the accused persons

standing at the shop, he had not seen that they were having knives, though, in the FIR, he has stated that Ashok and Raju were having knives but when the deceased was held by his waist, then he had seen the knife. When the accused persons exhorted to assault, then he raised alarm, however, nobody rushed to rescue him. To quote :-

"जब मुलजिमानों को खड़े देखा तब उन पर चाकू नहीं देखे थे। रिपोर्ट में मैंने राजू व अशोक पर चाकू होना लिखा है मगर जब कमर पकड़ी तब यह चाकू देखे थे। जब मुलजिमान ने मारने को ललकारा तब मैं चिल्लाया। जब मारने को चिल्लाए तो आस पास का कोई नहीं दौड़ा चूंकि इतना समय नहीं मिला था।" At the place of incident, shops are situated on both the sides, houses are also built and Shivraj Tobacco Company is also there. After the incident, he had not asked anyone to lodge the report nor to inform anyone at his house, although within 12 minutes, one can reach the Police Station walking on foot from the place of incident.

28. He further denied the suggestion that report was lodged at the dictation of police. Earlier, in the instant case, 10th was fixed for adducing evidence. On 6th - 7th, he had informed Satya Narayan to adduce his evidence, however on 9th, he was threatened by the accused persons not to depose, consequently, he ran away from the village and did not adduce his evidence. It is wrong to state that since the story is cooked-up as such, Satya Narayan does not want to adduce his evidence.

29. He further stated that hundreds of time, he had gone to the house of Raju, in which, a coaching school is run and he used to study there and had also gone in the portion, where he used to live. Further, it is wrong to state that Raju was not involved in the incident and his name has been falsely implicated. For Kallu, he stated that he had seen his house but had never visited there, though has passed through there, hundreds of time. It is wrong to state that Kallu does not live in Kachiyana.

30. He further denied the suggestion that at the instance of Mahesh, son of Munna, who is his friend, he has falsely implicated Kalloo in the instant case. It is also wrong to state that he neither held the victim by his waist nor was present there.

31. It is further stated that his sister's name is Kamini Devi and she used to sit at his shop, where he alongwith his brother used to sit and the factum of Ashok putting his kiosk in front of his shop was not liked by them as his younger sister also used to sit at the shop, as such he, his brother and his mother asked Ashok not to place his kiosk there.

32. He further denied the suggestion that there was friendship between his sister and Ashok, for which, he and his mother had rebuked and beaten her, however over that, there was no verbal duel between him, his mother and Ashok.

33. He further categorically stated that when the deceased was being assaulted, then nobody had held the victim. When he was being given knife blows, then he did have any chance to stand up or rescue himself. He did not even tried to roll over.

34. He further denied the suggestion that incident did not take place at the scheduled place nor he was not present there. He further denied the suggestion that his brother had taken the deceased to the hospital and he was not present there and reached there on being informed.

35. PW-3 Bimal Kumar is another eye-witness of the incident and is real brother of

PW-2 Kamal Kumar and nephew of the deceased. He, in his statement, has stated that his maternal uncle's tea stall is at canal road on the Naher Patari. Prior to the incident, his maternal uncle Dinesh, his brother Kamal and his friend Satya Narayan were conversing/ planning for watching a movie in Apsara Talkies at about 6:00 PM.

36. He further stated that for some personal work, he had gone out at *Trimurti Mandir* and after completing his work, he was returning back to his home, en-route to the Apsara Talkies, he heard the alarm raised by his brother Kamal and then, reached at the Shivraj Tobacco Company, when he saw Kalloo holding his maternal uncle by his waist and Chander by his hands and made him fall down. When his maternal uncle fell on his knees, then Raju and Ashok assaulted him with knives and thereafter, escaped towards Hoolaganj, then he alongwith his brother Kamal took him to K.P.M. Hospital, where he was declared dead by the Doctors. Kamal then went to the Police Station, however, he remained in the hospital. He was interrogated by the Investigating Officer at 10:00 PM in the night. The incident had taken place at about 6:40 PM near the Shivraj Tobacco Company, where there was sufficient light and tube-lights were lit. One or two persons were present at the office of the Tobacco Company, however, they did not reach the place of incident. Apart from his brother Kamal, Satya Narayan also raised the alarm but no one rushed to the place of incident nor anyone raised alarm. When he heard the alarm, then he was present at a distance of 25-30 paces from the place of incident and from the said place, his maternal uncle was visible. He further stated that when Kamal raised alarm, then for the first time, he had seen there. At the relevant time, Satya Narayan was also present with him, who also raised alarm.

37. He further denied the suggestion that he had not seen Kamal holding his maternal uncle by his waist and Chander by his hands but has only seen him assaulted by knives, however, he had not disclosed this fact to the Investigating Officer. To quote :-

"यह कहना गलत है कि मैंने कल्लू को कमर पकड़ते व चन्दर को हाथ पकड़ते नहीं देखा बल्कि केवल चाकू मारते ही देखा था। मैंने दरोगा जी को नहीं बताया था कि कल्लू ने मेरे मामा जी को कमर पकड़कर उठा ली और चन्दर ने हाथ पकड़ लिया था। चूंकि दरोगा जी ने नहीं पूछा था इसलिए नहीं बताया था। मैं दरोगा जी को मन से अपने बाते बता रहा था ऐसा नहीं कि जो वो मुझसे पूछ रहे थे वही बता रहा था। मैं घबड़ा गया था। इसीलिए यह बात मैंने दरोगा जी को नहीं बताई थी।"

38. He further stated that Kalloo caught him by his waist and Chander by his hands and his back was towards him and when his maternal uncle had fallen on his knees, then he was assaulted by knife. When knife blows were given, then his hands and waist were released. He could not state whether the knife was stabbed or was used otherwise. A knife was also hit on the forehead. He further stated that :-

"मैंने दरोगा जी से नहीं कहा था "मैं अपना काम करके अप्सरा टाकीज की तरफ जाने के लिए बैजनाथ शुक्ला गली में पहुंचा। मैं नहीं बता सकता यह बयान कैसे लिख लिया। पहले दरोगा जी को बता दिया था कि घटना के समय सत्य नरायन मौजूद था। मैं नहीं बता सकता कि दरोगा जी ने यह बात क्यों नहीं लिखी।"

39. He further stated that he is not aware of the fact that several cases were lodged against his maternal uncle Dinesh and that he was arrested for enticing away Rama Devi's sister and gambling used to take place at his shop. He further denied the suggestion that there was friendship

between Ashok and his sister Kamini Devi, for which, his mother had beaten his sister.

40. PW-4 Pratap Singh is the Head Moharrir, who, on the basis of a written report, had lodged the FIR at 8:10 PM, which has been proved and marked as Ex. Ka-2. On the basis of which, a chik report was prepared, which has been proved and marked as Ex. Ka-3 and corresponding G.D. Entry No. 46 has also been proved and marked as Ex. Ka-4. The chemical examination report has also been proved and marked as Ex. Ka-5.

41. During cross-examination, he stated that FIR was not registered after due deliberation by the police, however, no cognizable report after the aforesaid incident was written. It is wrong to state that on getting information of murder, G.D. entry was withheld and later, fake entry has been made.

42. PW-5 Inspector D.C. Seth is the Station House Officer of Police Station Harbans Mohal, District Kanpur. He, in his testimony, has stated that on 02.12.1982, on the basis of a written report of Kamal Kumar, a FIR was registered in his presence and he was entrusted with the investigation. He had recorded the statement of first informant at the Police Station and then, he reached at the place of incident and found blood lying there and a shoe was also found there, in respect of which, a fard recovery memo was drawn. He had also collected the sample of plain earth and blood-stained earth and prepared the recovery memo, which has been proved and marked as Ex. Ka-6 and Ex. Ka-7. The site plan was also prepared, which has been proved and marked as Ex. Ka-8. He had also recorded the statement of the witnesses and went to the hospital and seen the dead body of the deceased. On the next day i.e. on 03.12.1982, the inquest was prepared by S.S.I. R.S. Kushwaha, which has been proved and marked as Ex. Ka-9 and the other relevant papers were prepared, which has been proved and marked as Ex. Ka-10 to Ex. Ka-12. After concluding the investigation, the charge-sheet was submitted against the accused persons on 25.12.1982, which has been proved and marked as Ex. Ka-16.

43. During cross-examination, he stated that when the first informant came to lodge the report, he was present, however, did not mark any blood on his clothes. He further stated that if any blood is found on the clothes of the first informant, then it is noted and the clothes are taken in possession. He further stated that Kamal Kumar has not pointed out any blood on his clothes or the clothes of his brother Bimal Kumar. He further stated that Bimal Kumar, in his statement, has stated that :-

"गवाह विमल किशोर ने मुझ से कहा था कि मैं अपना काम करके आधा पौन घंटे में अपसरा टाकीज की तरफ जाने के लिए बैजनाथ शुक्ल रोड पर पहुँचा। विमल किशोर गवाह ने सत्य नरायन का घटनास्थल पर मौजूद होना मुझसे नहीं कहा। विमल किशोर ने कहा की घटना देखी नक्शा नजरी में नहीं दिखाया।"

44. In the FIR, time of death of the victim has not been mentioned, it is only stated that en-route to the hospital, he died, even in the challan-nash, time of death has been mentioned on the basis of imagination.

45. After concluding the recording of the testimonies of the witnesses, statement of the accused under Section 313 Cr.P.C. has been recorded by putting all the incriminating circumstances to the appellant, who denied all the incriminating circumstances and claimed that they have been falsely implicated in the instant case.

46. In his defence, Accused-appellant has produced Ashok Kumar Gupta, Clerk, Central Bank of India, Nayaganj Branch, Kanpur as DW-1 and Shri Ram Lakhan Shukla, Clerk, Area Rationing Office, Cantonment, Kanpur as DW-2. DW-1 has submitted the Statement of Bank Account of one Rakesh Kumar Awasthi, Resident of 65/267, Moti Mohal, Kanpur. The accused persons has also filed certain documents that the deceased was a man of bad character. Ex. Kha-1 and Ex. Kha-2 are the copies of charge-sheet and the FIR of the case, which was lodged against the deceased in respect of incident dated 22.08.1981. Ex. Kha-3 is a copy of the charge-sheet submitted against the deceased for an offence under Section 324 IPC. The trial court on appreciating the evidence has held that the prosecution has successfully established its case against the appellant Ashok by relying upon the testimony of PW-2 Kamal Kumar, however, so far the testimony of PW-3 Bimal Kumar, is concerned, the trial court has held that he is a chance witness. The trial court has further pointed out that there has been noticeable variance in his statement before the court and his statement before the Investigating Officer, where he stated that after finishing his work, he reached at Baijnath Shukla Lane for going to the Apsara Talkies, even though before the court, he stated that accused persons came and caught the deceased by waist and held him by his hands and then, he was assaulted, however, these facts were not stated by him before the Investigating Officer. PW-3 reached the incident on hearing the alarm raised by his brother Kamal Kumar, when for the first time he had seen the incident, therefore, it can not be said that he witnessed the incident from the initial stage, on the basis of which, his testimony has been doubted and only on the basis of solitary testimony of PW-2 Kamal Kumar, appellant Ashok has been convicted, while other three accused persons, namely, Raju, Chander and Kalloo have been acquitted vide impugned judgment and order dated 28.02.1984.

47. Being aggrieved and dissatisfied by the said order, accused-appellant Ashok has filed instant criminal appeal before this Court against his conviction, whereas government appeal has been preferred against the order of acquittal of Chander, Raju and Kalloo. During the course of pendency of the said appeal, Chander has already passed away and as such, his appeal has been dismissed as abated vide order dated 13.03.2014.

48. So far as the arguments of learned counsel for the appellant in criminal appeal is concerned, he has submitted that even according to the prosecution own case, the incident has taken place in a market place, where number of shops were situated. Except the two brothers PW-2 and PW-3, who are the nephews of the deceased, no independent witness has come forward to corroborate the prosecution story, which creates a serious dent in the prosecution story. Admittedly, PW-2 and PW-3 are highly interested and partisan witnesses being the nephews of the deceased Dinesh, therefore, by placing implicit reliance on their testimony, the appellant could not be convicted.

49. Learned counsel for the appellant has next submitted that even as per the impugned judgment and order passed by the trial court, the testimony of PW-3 Bimal Kumar has been discarded and it has been held that he could not be an eye-witness of the incident and that his testimony do not inspire confidence and as such, at the time of recording the finding of conviction, he

has been disbelieved and held to be a chance witness.

50. Learned counsel for the appellant has thus submitted that PW-2 is only a solitary witness in the instant case, who is highly partisan and interested. There are several contradictions and embellishment in his testimony, which goes to the root of the case and as such, by no stretch of imagination, he can be said to be a wholly reliable witness and his testimony can not be said to be of "sterling quality." However, the trial court by placing implicit reliance on his testimony has recorded the finding of conviction against the appellant Ashok but on the same set of facts, has acquitted the accused Raju, Kalloo and Chander, which creates serious dent in the prosecution story and renders the conviction illegal.

51. Learned counsel for the appellant has further submitted that in the FIR lodged by PW-2, there is no mention of the fact that at the relevant time, he alongwith his maternal uncle Dinesh and Satya Narayan were proceeding to watch a movie in the Apsara Talkies, however subsequently, the said factum has been mentioned, which is nothing but is an improvement in his testimony.

52. Learned counsel for the appellant has next submitted that Section 34 of IPC is not attracted in the instant case and that prior concert and pre-arranged plan to kill the deceased has not been established. He further submitted that existence of a pre-arranged plan has to be proved from the conduct of the accused or the circumstances or from any incriminating circumstance and does not infer to have same intention independently.

53. Learned counsel for the appellant Ashok has further submitted that by the impugned judgment and order dated 28.02.1984, the appellant Ashok has been convicted under Section 302 read with Section 34 of IPC, however, except the appellant Ashok, who has been convicted, none of the three other accused persons has been convicted for the offence under Section 34 IPC. It is well settled principle of law that there must be two or more than two persons to attract the provisions of Section 34 IPC, however, in the instant case, the appellant has solely been convicted for the offence under Section 302 read with Section 34 IPC, which is bad in law and as such, the entire conviction is liable to be set aside.

54. In support of his arguments, learned counsel for the appellant has relied upon the judgments passed in ***Criminal Appeal No. 1661 of 2009 (Gadadhar Chandra Vs. State of West of Bengal)*** and ***Criminal Appeal No. 1209 of 2011 (Chandra Pratap Singh Vs. State of M.P.)***. He has further placed reliance upon the case law reported in ***(2019) 5 SCC 127 Mala Singh and Others Vs. State of Haryana*** and further on the cases reported in ***(2003) 2 SCC 266 Chittarmal vs. State of Rajasthan and (2020) 4 SCC 126 Chhota Ahirwar Vs. State of Madhya Pradesh.***

55. Per contra, learned AGA has submitted that though the testimony of PW-3 is not of much relevance but so far as the testimony of PW-2 is concerned, there are no serious contradictions, embellishment or exaggeration in his testimony on material particulars, which goes to the root of the case, rather his testimony is of sterling quality and as such, he is a "wholly reliable witness" and relying upon his sole testimony, the finding of conviction can well be recorded.

56. Learned AGA has next submitted that though the factum of witnesses going

with the deceased for watching a movie in the Apsara Talkies has not been mentioned in the FIR but has been categorically stated in subsequent statements, thus it can not be said to be a material improvement in the testimony of PW-2 and the contrary submissions of learned counsel for the appellant in this regard is liable to be discarded.

57. Learned AGA has further submitted that there is consistent evidence to the extent that the deceased, his nephew and Satya Narayan were proceeding for watching a movie in the Apsara Talkies and at the relevant time, all the four accused persons had assembled at the tea stall of Arjun, therefore, it can be said that prior concert, which necessarily postulates existence of pre-arranged plan implying the prior meeting of minds can very well be inferred and thus, the appellant can very well be convicted for the offence under Section 302 read with Section 34 IPC alongwith co-accused Raju, whose case stands on identical footing as that of Ashok, who has been convicted by the trial court.

58. Learned AGA has further submitted that Section 34 IPC introduces vicarious liability and when the common intention is proved, the appellants can very well be convicted under Section 302 read with Section 34 IPC, for which, they have been charged.

59. Learned AGA has further submitted that for Section 34 IPC to apply, there should be a common intention between co-perpetrators, which means there should be community of purpose and common design or pre-arranged plan but it is not necessary that co-perpetrators may have engaged in any prior discussion, agreement or valuation as held by the Hon'ble Apex Court in several of its decisions.

60. Learned AGA while arguing the government appeal challenging the order of acquittal of other accused persons has submitted that since the entire act has been committed by the accused-appellant with prior concert, which necessarily postulates existence of pre-arranged plan implying the prior meeting of minds and in furtherance of a common intention, therefore, they all should have been convicted for the offence under Section 302 read with Section 34 of IPC, however, the trial court has illegally acquitted three of them, while convicting only appellant Ashok under Section 302 read with Section 34 IPC, which order is bad in law and is therefore liable to be set aside.

61. Learned AGA has further submitted that PW-2 Kamal Kumar is a "wholly reliable witness" and his testimony is of impeccable nature and except minor discrepancies here and there, which is quite natural, his testimony is of sterling quality, as such, on his sole testimony, all the surviving accused persons are liable to be convicted under Section 302 read with Section 34 of IPC.

62. Learned AGA while arguing the government appeal challenging the order of acquittal of other two accused-respondents, has submitted by relying upon a recent decision of Hon'ble Apex Court passed in ***Criminal Appeal No. 3577 of 2023 (Ram Naresh Vs. State of Uttar Pradesh)*** that for Section 34 IPC to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act has to be performed. Common intention can be formed just a minute before the actual act happens. Common intention is

necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. From the conduct of the accused-respondent, it is evident that they had participated in the incident with a common intention to cause the death of the deceased Dinesh Chand, therefore, all the accused persons are liable to be convicted under Section 302 read with Section 34 IPC by reversing the acquittal of accused-respondents Raju and Kalloo and the impugned order acquitting the accused-respondents Raju and Kalloo is bad in law and is, therefore, liable to be set aside.

63. Per contra, learned counsel for the accused-respondent Kalloo has submitted that even taking the entire evidence and material on record, it can not be said that accused-respondent Kalloo had a common intention to kill the deceased and he has only been assigned the role of catching hold the victim by his waist and at the relevant time, even as per the prosecution case, he was unarmed.

64. Learned counsel for the accused-respondent Kalloo has further submitted that even according to the testimony of PW-2, accused-respondent Kalloo was not holding the victim at the time, when he was stabbed by knife and therefore, the provisions of Section 34 of IPC can not be invoked against him, as he can not be said to be sharing common intention with the other accused to kill the deceased.

65. Learned counsel for the accused-respondent Kalloo has further pointed out that in the entire evidence to show prior concert, which necessarily postulates existence of pre-arranged plan implying of prior meeting of minds is necessary, in absence of which, accused-respondent Kalloo can not be convicted by reversing his acquittal under Section 302 read with Section 34 IPC.

66. Learned counsel for the accused-respondent Kalloo has further submitted that even in the statement of PW-2, it is stated that when the assailants were seen standing on the tea stall of Arjun, then he had not seen knives in their hands and had seen the knives only when he was caught hold of. Further, in his statement, PW-2 has categorically stated that when deceased was being assaulted, nobody held him. To quote :-

"जब मृतक को चाकू मारे जा रहे थे तब कोई पकड़े हुए नहीं था।"

67. Thus, it is evident that the accused-respondent Kalloo, prior to the incident of killing, was not aware of the fact that the assailants Raju and Ashok were carrying knives and had a common intention to kill the deceased. Further at the time of stabbing, nobody held him, thus in any case, necessary ingredients of Section 34 IPC are not applicable at all qua accused-respondent Kalloo, who, in view of backdrop of the said facts and circumstances of the case, has rightly been acquitted by the trial court, which order does not suffer from any perversity or illegality or can be said to be an impossible view, as such, the order of acquittal qua accused-respondent Kalloo is not liable to be reversed in view of settled principle of law in this regard.

68. Learned counsel for the accused-respondent Raju has also submitted that in absence of any evidence of prior concert, which necessarily postulates existence of pre-arranged plan implying of prior meeting

of minds, accused-respondent Raju can not be convicted with the aid of Section 34 of IPC by reversing his acquittal.

69. Having considered the rival submissions made by the parties and having gone through the record, it is evident that PW-2 Kamal Kumar was accompanying his maternal uncle Dinesh Chand (Deceased) alongwith Satya Narayan for the purposes of watching a movie and as per the prosecution own case, en-route to the Picture Hall, the accused persons met the deceased and Kalloo caught him by his waist, whereas Chander caught him by his hands and thereafter, he was assaulted by accused-assailants Ashok and Raju with their knives causing injuries to the deceased; one on his chest and the other on his waist, consequent to which, he succumbed to his injuries.

70. In the backdrop of the said circumstance, if we analyse the submissions of learned counsel for the appellant Ashok in criminal appeal that the incident is said to have taken place in a market place, where large number of persons were present and many shops were situated, however, except the two witnesses i.e. PW-2 and PW-3, who are the real brothers among themselves and nephews of the deceased, no other independent witness have come forward to corroborate the prosecution story, even Satya Narayan has not turned up to adduce his evidence against the accused persons, as such, the testimonies of partisan and interested witnesses cannot be relied upon to record finding of conviction, more so, when the testimony of PW-3 has been discarded by the trial court being a chance witness.

71. In this respect, it is germane to point out here that it has come in evidence that Satya Narayan, who had accompanied the victim at the time of incident, in fact was threatened by the accused-appellant not to depose, subsequently, on the day when his testimony was to be recorded, he ran away from the village as is evident from the statement of PW-2. Other witnesses, in order to avoid any bad blood with the accused persons being resident of the same place, also did not turn up to adduce their evidence, which nowadays is quite common as held by the Hon'ble Apex Court in several of its decisions.

72. More so, it is not necessary that in every case, where the witnesses are withheld from the court, an adverse inference must be drawn against the prosecution. The totality of the circumstances is to be considered for concluding whether any adverse inference could be drawn. The testimony of PW-2 Kamal Kumar, who was accompanying the deceased at the time of incident, is of an impeccable nature and the defence has not been able to elicit anything contrary to doubt his credibility.

73. Having gone through his complete evidence, we are of the considered opinion that PW-2 Kamal Kumar is a natural witness in the facts and circumstances of the case, who has deposed against the accused-respondent in a most natural way and the defence has not been able to point out any inconsistency, contradictions or embellishment in his testimony, which goes to the root of the case, we rather find a ring of truth in his testimony, as such, we have no hesitation to hold that his testimony is of a sterling quality and on the basis of which, the conviction against the accused-respondent can very well be recorded.

74. So far as the testimony of PW-3 Vimal Kumar is concerned, his presence at the time of incident is highly doubtful. Admittedly at the time, when PW-2 Kamal

Kumar alongwith Satya Narayan and the deceased Dinesh Chand were planning to leave for watching a movie, he had left his house for some personal work near the Trimurti Temple and it is stated that after completing the said task, he reached the place of incident and has said to have witnessed the incident, however, when we carefully go through his testimony, we find that there are many loopholes in his testimony and he appears to be a "chance witness" as held by the trial court.

75. The defining attributes of a "chance witness" were explained by Mahajan, J., in ***Puran v. State of Punjab, (1952) 2 SCC 454***. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

76. In ***Mousam Singha Roy v. State of West Bengal (2003) 12 SCC 377***, this Court discarded the evidence of chance witnesses while observing that certain glaring contradictions/ omissions in the evidence of PW-2 and PW-3 and the absence of their names in the FIR has been very lightly discarded by the courts below. Similarly, Shankarlal v. State of Rajasthan (2004) 10 SCC 632 and Jarnail Singh v. State of Punjab (2009) 9 SCC 719 are authorities for the proposition that deposition of a chance witness, whose presence at the place of incident remains doubtful, ought to be discarded.

77. Therefore, in view of the settled principle of law laid above and when we go through the testimony of PW-3, we find that there are many loopholes in his testimony and taking a holistic view that PW-3 appears to be a chance witness as held by the trial court, his testimony is liable to be discarded, which we agree, however, looking the impeccable testimony of PW-2 Kamal Kumar, we are of the considered opinion that conviction of the appellant Ashok is just, proper and legal and do not call for any interference.

78. The submission of learned counsel for the appellant that on the basis of testimony of solitary witness Kamal Kumar (PW-2), the accused-appellant Ashok alongwith other accused persons cannot be convicted, more so, when he is the real nephew of the deceased and highly interested and partisan witness, as such, liable to be discarded.

79. This submission of learned counsel for the appellant do not appeal much to us looking to the impeccable testimony of PW-2 Kamal Kumar, we are of the considered view that on the basis of "sole testimony" of PW-2 Kamal Kumar, which in our opinion, is of sterling quality, a person can be convicted as held by Hon'ble Apex Court in several of its decisions.

80. The submission of learned counsel for the appellant that no recovery was made in the said case, further falsify the prosecution story and creates serious dent in the prosecution story also does not appeal to us.

81. The Hon'ble Apex Court in the case of ***Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas & Another reported in (2013) 12 SCC 796*** has held that when there is ample unimpeachable ocular evidence and same has been corroborated by medical evidence, non-recovery of weapon does not affect the prosecution case. The relevant paragraphs i.e. paragraph nos. 33 and 34 are being quoted herein below:

***"33**. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.*

***34**. In **Lakshmi v. State of U.P. reported in (2002) 7 SCC 198**, this Court has ruled that :*

"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder."

*In **Lakhan Sao v. State of Bihar reported in (2000) 9 SCC 82**, it has been opined that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.*

In State of Rajasthan v. Arjun Singh reported in (2011) 9 SCC 115, the Hon'ble Apex Court has expressed that :

"18. ……. mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place."

82. Further submission of learned counsel for the appellant that the factum of PW-2 Kamal Kumar accompanying the deceased at the time of incident for watching a movie, has not been mentioned in the FIR but subsequently developed, which renders the prosecution story doubtful.

83. In our considered opinion that said argument does not hold much water because FIR is not a substantive piece of evidence and any omission in the FIR could not ipso facto render the prosecution story doubtful, particularly, when in the subsequent statement as well as the evidence adduced before the court, the said factum has been clearly mentioned.

84. The submission of learned counsel for the appellant that Section 34 of IPC is not attracted in the instant case as there is no evidence to show that there was a prior concert and pre-arranged plan to kill the deceased.

85. The said submission of learned counsel for the appellant is also not of much significance in view of specific and clear law laid down by Hon'ble Apex Court in ***Criminal Appeal No. 2201 of 2011 (State of Rajasthan Vs. Gurbachan Singh and Others)***, wherein it has been clearly stated that Section 34 of IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 of the IPC to apply, there should be common intention among the co-perpetrators, which means that there should be community of purpose and common design. Common intention can be formed at the spur of the moment and during the occurrence itself. Common intention is necessarily a psychological fact and as such, direct evidence normally will not be available. Therefore, in most cases,

whether or not there exists a common intention, has to be determined by drawing inference from the facts proved. Constructive intention, can be arrived at only when the court can hold that the accused must have preconceived the result that ensued in furtherance of the common intention.

86. Moreover, learned AGA has relied upon ***Criminal Appeal No. 3577 of 2023 Ram Naresh Vs State of Uttar Pradesh***, wherein it has been held that for Section 34 to apply, it is not necessary that the plan should be prearranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved.

87. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co- assailants/ perpetrators, object and purpose behind the occurrence or the attack, etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 IPC are satisfied.

88. We must remember that Section 34 IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/ performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 IPC is not necessary as the said perpetrator is himself individually liable for having caused the injury/ offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants.

89. A plain reading of the above paragraph reveals that for applying Section 34 IPC there should be a common intention of all the co-accused persons which means community of purpose and common design. Common intention does not mean that the co-accused persons should have engaged in any discussion or agreement so as to prepare a plan or hatch a conspiracy for committing the offence. Common intention is a psychological fact and it can be formed a minute before the actual happening of the incidence or as stated earlier even during the occurrence of the incidence.

90. Thus, from the aforesaid principle laid down by the Hon'ble Apex Court, it can not be said that in the instant case, Section 34 of IPC would not be applicable as submitted by learned counsel for the appellant and the said argument is liable to be discarded and the cases relied upon by learned counsel for the appellant are distinguishable on facts as stated in the subsequent decisions of Hon'ble Apex Court, which has been quoted above.

91. Learned counsel for the appellant has further submitted that though the incident is said to have taken place in presence of number of witnesses and even in presence of PW-2 and PW-3, who are his real nephews, however, none of them have come forward to rescue the victim-deceased, which points out towards the unnatural conduct of the said witnesses clearly

indicating that none of them were present at the time of incident and reached subsequently and on imagination, have deposed against the appellants, which creates a serious dent in the prosecution story.

92. The said submission of learned counsel for the appellant that though PW-2 and PW-3 are the real nephews of the deceased Dinesh Chand and claims to be present at the time of incident, when the deceased was in clutches of the accused-assailants, yet none of them has made any attempt to rescue the victim-deceased, which rules out their presence at the relevant time and place of incident, is also not much significance.

93. In this respect, it is relevant to point out here that when an incident takes place, a witness does not necessarily react in a particular manner. Every person, who witnesses a murder, reacts in his own way. Some are stunned, some become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way as held by the Hon'ble Apex Court in the case of ***Rana Pratap Singh and Others Vs. State of Haryana reported in (1983) 3 SCC 327***, It can not be said that since the witnesses has not reacted in a particular way and not made any attempt to rescue the victim-deceased, their presence at the time and place of the incident would become doubtful is too far-fetched and in our considered opinion cannot be accepted to doubt the presence of eye witnesses.

94. In view of aforesaid discussions, taking a holistic view of the evidence adduced and the material brought on record, we are of the opinion that prosecution has established its case beyond all reasonable doubt against the appellant Ashok. More so, when the medical evidence also lends credence to the prosecution story. The post-mortem examination report also points out conclusively to the culpability of the appellant Ashok, as such, he is liable to be convicted for the charges framed against him under Section 302 read with Section 34 IPC alongwith Raju. Thus, the criminal appeal filed by Ashok has no merits and is accordingly dismissed.

95. Now, so far as the government appeal is concerned against the surviving accused-respondents Raju and Kalloo is concerned, it is evident that the case of Raju stands on the same footing as that of accused-appellant Ashok and being based on same set of facts, in our considered opinion, he is also liable to be convicted for the offence under Section 302 read with Section 34 IPC alongwith accused-appellant Ashok by partly allowing the Government Appeal.

96. In the facts and circumstances of the case, keeping in mind the evidence adduced and the material brought on record against the accused-respondent Raju, which even finds corroboration from the medical evidence, we are of the opinion that finding of acquittal recorded against the accused-respondent Raju is liable to be reversed by partly allowing the government appeal qua the accused-respondent Raju.

97. So far as reversal of acquittal qua accused-respondent Kalloo is concerned, we find that from the entire evidence adduced and the material available on record, it can not be said that Kalloo shared a common intention to kill the deceased. Even as per the evidence of PW-2, he is said to be an unarmed at the time of incident and is assigned the role of catching hold the victim-deceased Dinesh Chand by his waist, which, in our opinion, does not inspire confidence, inasmuch as, the victim-deceased is not said to have been caught hold of by the accused-respondents Kalloo and Chander, while he was being assaulted.

98. If we go through the post-mortem examination report of the deceased, we find that one of the injuries has been caused to the deceased on his waist by knife, therefore, the prosecution story assigning the role of catching hold the deceased by his waist at the relevant time further becomes highly doubtful as the possibility of accused himself receiving the injury by knife blow cannot be ruled out.

99. Moreover, we are of the opinion that the accused-respondent Kalloo did not share a common intention to cause the death of the deceased, which is also evident form the testimony of PW-2 Kamal Kumar, wherein he has categorically stated that at the time, the accused-assailants were standing at the tea stall of Arjun, he had not seen knives in the hands of two accused persons Ashok and Raju and for the first time, only when they were trying to stab the deceased, he had seen the knife in their hands and as such, it can very well be inferred that the accused-respondent Kalloo may not be aware of the fact that the accused-assailants at the relevant time were armed with knives with a common intention to kill the deceased.

100. Furthermore, there is one more circumstance, which clinchingly establishes that the accused-respondent Kalloo had no common intention to kill the deceased, which is evident from the fact that PW-2 Kamal Kumar, in his testimony, has categorically stated that the time, when the accused-appellant Ashok and accused-respondent Raju were assaulting the deceased by knives, he was not holding the deceased by his waist and as such, in the backdrop of the said circumstance, we are of the opinion that he did not share the common intention to kill the deceased, as such the finding of acquittal qua accused-respondent Kalloo recorded by the trial court is just, proper and legal and do not call for any interference by this Court.

101. In the facts and circumstances of the case, the government appeal qua accused-respondent Kalloo is not sustainable and is liable to be partly dismissed, however, so far as the government appeal qua accused-respondent Raju is concerned, we are of the opinion that the government appeal qua the accused-respondent Raju is liable to be allowed and as such, his acquittal is set aside and he is also liable to be convicted alongwith accused-appellant Ashok for the offence under Section 302 read with Section 34 IPC.

102. Thus, in sum and substance, the criminal appeal filed by the accused-appellant Ashok in facts and circumstances of the case, enumerated herein above, deserves to be dismissed and is accordingly dismissed. He is on bail. His bail bonds are cancelled and his sureties are discharged. He shall surrender before the court below within two weeks from today and serve out the remaining sentence awarded to him by the trial court and shall also pay a fine of Rs.10,000/-, in default of payment of fine,

shall further undergo six months rigorous imprisonment.

103. The finding of acquittal recorded by the trial court against the accused-respondent Raju is set aside in the Government Appeal preferred by the State. He is also held guilty alongwith Ashok and is convicted for the offence under Section 302 read with Section 34 IPC and sentenced to imprisonment for life and a fine of Rs.10,000/-. In default of payment of fine, to further undergo six months rigorous imprisonment. He shall also surrender before the court below within two weeks from today and serve out the remaining sentence. His bail bonds are cancelled and his sureties are discharged under Section 437-A of IPC.

104. Accordingly, the criminal appeal, filed by the accused-appellant Ashok, stands **dismissed** and the government appeal is partly allowed by reversing the acquittal of the accused- respondent Raju, however, the government appeal qua accused-respondent Kalloo is dismissed. The government appeal is accordingly **partly allowed.**

105. Let a copy of this judgment and order be forwarded to the court concerned alongwith the trial court record for the information and necessary compliance.

(2024) 5 ILRA 1341
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.05.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 2376 of 2023
connected with other cases

Mohammad Aleem @ Abdul Aleem & Anr. **...Appellants**

Versus

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

Counsel for the Appellants:
Furkan Pathan

Counsel for the Respondent:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 167(2)-Unlawful Activities (Prevention) Act, 1967-Section 43-D-Indian Penal Code, 1860-Sections 121A & 123-these appeals challenge the order of Special Judge, N.I.A. concerning the rejection of default bail applications-the appellants sought default bail-the prosecution failed to file a charge sheet within 90 days period prescribed u/s 167(2) Crpc-however, the prosecution sought an extension of the investigation period, which was granted without the presence of the accused or proper notice to them-The court emphasized that the presence of accused and notice to them is mandatory during the hearings-failure to follow these procedures constitutes a violation of Article 21 of the constitution-Extension of time for investigations under UAPA are not be granted as a matter of routine, they require detailed reasons and due process-Thus, the rejection of default bail by the lower court was found to be improper.(Para 1 to 70)

B. It is well settled that in case of any ambiguity in the construction of a penal statute, the Court must favour the interpretation which leans towards protecting the rights of the accused. This principle is applicable even in the case of a procedure providing for curtailment of liberty of the accused.(Para 38)

The appeals are allowed. (E-6)

List of Cases cited:

1. Uday Mohanlal Acharya Vs St. of Mah. (2001) 5 SCC 453

2. Menka Gandhi Vs U.O.I. (1978) AIR SC 597

3. S.Kasi Vs St. (2021) 12 SCC 1

4. Hitendra Vishnu Thakur & ors. Vs St. of Mah. & ors. (1994) 4 SCC 602

5. Sanjay Dutt Vs St. of Mah. thru C.B.I. Bombay (1994) 5 SCC 410

6. M.Ravindran Vs Intelligence Offr. Directorate Revenue (2021) 2 SCC 485

7. Jagar@ Jimmy Pravinchandra Adatiya Vs St. of Guj. (2022) SCC OnLine SC 1290

8. St. of Mah. Vs Surendra Pundlik Gadling (2019) 5 SCC 178

9. U.O.I. Vs Nirmala Yadav (2014) 9 SCC 457

10. Syed Mohd. Ahmad Kazmi Vs St. (Govt of NCT of Delhi) (2012) SCC 1.

11. Rakesh Kumar Paul Vs St. of Assam (2017) 15 SCC 67

12. Bikramjit Singh Vs St. of Punj. (2020) 10 SCC 616

13. Mohamed Iqbal Madar Sheikh & ors. Vs St. of Mah. (1996) I SCC 722.

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. We have heard Shri Aarif Ali, Sri O.P. Tiwari and Sri Furkan Pathan, learned counsel for the appellants, learned Sri Shiv Nath Tilhari, Additional Government Advocate for the State-respondent and perused the record.

2. **Criminal Appeal No. 2376 of 2023 (Mohammed Aleem @ Abdul Aleem and another v. State of U.P.)** has been filed against the order dated 03.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail Application No. 148 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') read with Section 43-D of Unlawful Activities Prevention Act, 1967 (hereinafter referred to as the 'Act of 1967') in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20, 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Criminal Appeal No. 2377 of 2023 (Lukman v. State of U.P.) has been filed against the order dated 03.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail Application No. 86 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Cr.P.C. read with Section 43-D of the Act of 1967 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20, 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Criminal Appeal No. 2378 of 2023 (Mudassir and another v. State of U.P.) has been filed against the order dated 03.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail Application No. 145 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Cr.P.C. read with Section 43-D of the Act of 1967 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Criminal Appeal No. 2379 of 2023 (Mohammad Nadeem and another v. State of U.P.) has been filed against the order dated 03.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail

Application No. 985 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Cr.P.C. read with Section 43-D of the Act of 1967 in Case Crime No. 3 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Criminal Appeal No. 2380 of 2023 (Mohammad Harish and another v. State of U.P.) has been filed against the order dated 13.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail Application No. 969 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Cr.P.C. read with Section 43-D of Act of 1967 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20, 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Criminal Appeal No. 2381 of 2023 (Qari Shahjad and another v. State of U.P.) has been filed against the order dated 13.02.2023 passed by Additional Sessions Judge, Court No. 5, Special Judge, N.I.A., Lucknow in Bail Application No. 971 of 2023, rejecting the default bail application of the appellants under Section 167(2) of Cr.P.C. read with Section 43-D of the Act of 1967 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 38 of Act of 1967, registered at Police Station A.T.S., Lucknow.

Since all the aforementioned appeals involve a common question of law, they are decided together. Criminal Appeal No. 2376 of 2023 (Mohammed Aleem @ Abdul Aleem and another v. State of U.P.) will be treated as the leading appeal.

Facts of Criminal Appeal No. 2376 of 2023

3. First Information Report was registered on 27.09.2022 against two persons, namely Lukman, son of Imran and Abdul Talha @ Hussain @ Zakir under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 and 38 of the Act of 1967 in Case Crime No. 04 of 2022 at Police Station A.T.S. Gomti Nagar, Lucknow.

4. The appellants Mohammed Aleem @ Abdul Aleem and Mohammad Nawajis Ansari were arrested on 06.10.2022 in Case Crime No. 04 of 2022, referred to above. They were produced before the Special Court on 07.10.2022. The Special Court granted police custody remand from 07.10.2022 to 20.10.2022 by order dated 07.10.2022. Thereafter, the remand was extended from time to time. The statutory period of 90 days was to complete on 05.01.2023. By order dated 14.12.2022, the appellants were granted remand up to 22.12.2022. On 19.12.2022, an application was filed by Sri Anurag Darshan, Additional Superintendent of Police/Investigating Officer A.T.S., Lucknow, U.P., for an extension of 60 days time for further investigation under Section 43(d) of Act of 1967. On the aforesaid application, an endorsement was made by the Public Prosecutor on 21.12.2022 "submitted". On the same day, i.e. 21.12.2022, the Special Court passed an order "Permitted for 45 days only". The application dated 19.12.2022 has been annexed at page no. 20 as annexure no. 7 to the counter affidavit filed by Abhilash Kumar Singh on 27.09.2022 along with application No. A/5/23 for taking the aforesaid counter affidavit on record.

5. On 22.12.2022, further remand of 30 days was allowed by the Special Court, which was extended till 18.01.2023. An application was filed by the appellants for being released on default bail as, according to them, the statutory period of 90 days was to expire on 05.01.2023, and by the said date, no charge sheet was filed by the police in the aforesaid case crime number. The application filed by the appellant was registered as Bail Application No. 148 of 2023. After the exchange of affidavits, the abovementioned application was rejected by the Special Court by its order dated 03.02.2023, which is impugned in the present appeal.

6. During the pendency of the application for grant of bail, the period of investigation was again extended on an application moved by the Public Prosecutor for 30 days. Again, on 04.03.2023, the period of investigation was extended for 20 days by an order dated 04.03.2023 passed by the Special Court. During this period, the remand of the appellant was also extended. The investigating officer submitted the charge sheet against the appellants under Section 121A/123 I.P.C. and Sections 13/18/18B/20/38 of the Act of 1967 on 22.03.2023. On 23.03.2023, the Special Court directed to register the case as Misc. Case. On 13.04.2023, the State granted prosecution sanction, and by order dated 28.04.2023, the Special Court had taken cognizance.

7. The contention of the learned counsel for the appellants is that the statutory period of 90 days was going to expire on 05.01.2023. The application dated 19.12.2022 was filed by the investigating officer for extension of time for investigation under Section 43-D of the Act of 1967. Application dated 19.12.2022 was filed behind the back of appellants and without any notice to them. It has been further contended by learned counsel for the appellants that the application was moved by the investigating officer and not by the Public Prosecutor as required by the proviso to Section 43-D of the Act of 1967. The Public Prosecutor has merely endorsed words ‘submitted’ on the aforesaid application. It is next submitted by the learned counsel for the appellants that the Special Court has passed an order dated 21.12.2022 without application of mind. It has extended the period of investigation for 45 days. It is also contended by learned counsel for the appellant that the order dated 21.12.2022 passed by the Special Court has been passed in the absence of the appellants. The appellants were neither present in person nor through video conferencing on the date, i.e. 21.12.2022, when the order was passed, extending the period of investigation for 45 days. It has also been contended that the Special Court has merely passed an order "permitted for 45 days only". No reasons have been given by the Special Court for permitting the extension of time for investigation. The order dated 21.12.2022 is cryptic and has been passed mechanically by the Special Court. After the expiry of the statutory period, the appellants filed a bail application for being released on bail as no charge sheet was submitted within the statutory period of 90 days. Only when the objection was filed by the opposite party, the appellants came to know about the order dated 21.12.2022.

8. Per contra, learned Standing Counsel submitted that the Special Court had committed no illegality in rejecting the bail application of the appellants. It has been further contended by learned Standing Counsel that since the charge sheet has been submitted by the investigating agency and

sanction has been granted by the government, the right of bail, if any, under Section 167(2) of Cr.P.C. is extinguished, and now the same cannot be granted. It is further contended that since time for further investigation was extended by an order dated 21.12.2022 for 45 days, the default bail cannot be given to the appellants on the expiry of the statutory period of 90 days.

9. Before considering the rival submissions of the learned counsel for the parties, it will be useful to look into the relevant statutory provisions:

Section 167 Cr.P.C., 1973 provides for the procedure when the investigation cannot be completed in the time frame provided by the Code of Criminal Procedure. Section 167 of the Code of Criminal Procedure is quoted as follows:

167. Procedure when investigation cannot be completed in twenty-four hours.- *(1)Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.*

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

10. Section 43D of the Unlawful Activities (Prevention) Act, 1967, provides for the modified application of certain provisions of the Code. Section 43D of the Act of 1967 is quoted as under:

[43D. Modified application of certain provisions of the Code.-(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and

"cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

(a) the references to "fifteen days", "ninety days", and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days", and "ninety days", respectively, and

(b) after the proviso, the following provisos shall be inserted, namely:-

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

Provided also that if the police officer making the investigation under this Act requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

11. An order for release on bail under proviso (a) to section 167(2) may appropriately be termed an order on default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) is absolute. If the investigating agency fails to file a charge sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail, irrespective of the order passed under Section 439. The object of incorporating the proviso is to see that a person arrested by police does not languish unnecessarily in prison awaiting the completion of the investigation. The provisions contained in Section 167(2) are mandatory and failure of the Investigating Agency to complete the investigation within the prescribed period entitles the accused to be enlarged on bail Proviso (a) to Sub-section (2) Section 167, Cr.P.C. is not controlled by Section 437 of Cr.P.C. Merits of the case are immaterial. Whatever may be the serious nature of the crime and gravity of the offence, no discretion is given to the Magistrate when the accused files an application for grant of bail under the said section, and thereupon, the accused is entitled to bail as a matter of right.

12. We cannot lose sight of the fact that legislature envisaged that the investigation should be completed in 24 hours, but practically, that was never found feasible. It is in these circumstances that Section 167 of the Code of Criminal Procedure provided for time period within which investigation should be completed depending upon the nature of offence. Since liberty is a constitutional right, time periods were specified in default of which the accused will have a right of default bail.

13. It would be useful to refer to Section 57 Cr.P.C., which provides that any person arrested by the police should not be detained for more than 24 hours unless an order is obtained from the Magistrate under Section 167 of the Code. The Code was originally enacted in the year 1898. We must remember that at that time, the means of communication were very primitive; the means of telecommunication barely existed. Despite that, in the Code as originally enacted, the police were expected to complete the investigation within 15 days,

and the Magistrate did not have any jurisdiction to pass an order detaining a person beyond 15 days if the investigation was not completed. This system worked well enough for more than seven decades. After the country attained independence, we enacted and gave to ourselves the Constitution of India, which came into force on 26.01.1950. Article 21 of the Constitution provides that "no man shall be deprived of his life and personal liberty except in accordance with procedure established by law". The right of personal liberty is not only a legal but also a human right, which is inherent in every citizen of any civilized society. Article 21 only recognizes this right. We can read Sections 57 and 167 to be the procedure established by law that curtails this right.

14. The Code of Criminal Procedure enacted in 1898 contained Section 167, which laid down the procedure to be followed if the investigation into an offence is not completed within twenty-four hours. The legislative expectation was that the investigation would ordinarily be completed within twenty-four hours. Incidentally, this legislative expectation continues till today. Whatever the anxiety of the Legislature in 1898, there can be no gainsaying that investigation into an offence deserves an early closure, one way or the other. Therefore, when Section 167 was enacted in the Code of Criminal Procedure, 1898, it was premised on the conclusion of investigations within twenty-four hours or 15 days on the outside, regardless of the nature of the offence or the punishment. Section 167 of the Code of Criminal Procedure, 1898 reads as follows:

167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. Suppose he has no jurisdiction to try or commit the case for trial and considers further detention unnecessary. In that case, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class and no Magistrate of the second class not specially empowered in this behalf by the State Government shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate."

15. The Law Commission of India, in its 41st report, proposed to increase the time limit for completion of an investigation to 60 days, which was accepted by the

legislature while enacting the new Code, i.e. Code of Criminal Procedure, 1973 incorporating the time limit to be 60 days by providing the same under Section 167 of the Code of Criminal Procedure, 1973, regardless the nature of offence or punishment. Section 167 of Cr.P.C., 1973 provides as under:

167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole: and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention."

16. In 1978, a need was felt to amend Section 167 Cr.P.C. by not only extending the period of completing the investigation but also relating that period to the offence. Section 167 Cr.P.C., as amended in 1978, has already been quoted above.

17. Generally speaking, therefore, it could be said that ever since 1898, the legislative intent has been to conclude investigations within twenty-four hours. This intention has not changed for more than a century. However, the Legislature has been pragmatic enough to appreciate that it is not always possible to complete investigations into an offence within twenty-four hours. Therefore, initially, in the Cr.P.C. of 1898, a maximum period of 15 days was provided for completing the investigations. Unfortunately, this limit was being violated through the subterfuge of taking advantage of Section 344 of the Cr.P.C. of 1898. The

misuse was recognized in the 41st Report of the Law Commission of India. Consequently, the Law Commission recommended fixing a maximum period of 60 days for completing investigations, and that recommendation was enacted as the law in the Cr.P.C. of 1973. Subsequently, this period was also found to be insufficient for completing investigations into more serious offences, and, as mentioned above, the period for completing investigations was bifurcated into 90 days for some offences and 60 days for the remaining offences.

18. From the mid-eighties, the prevailing conditions have been surcharged with terrorism and disruption, posing a serious threat to the sovereignty and integrity of India as well as creating panic and a sense of insecurity in the minds of people. Added to that, the brutality of terrorism let loose by the secessionists and anti-nationals in the highly vulnerable area of Indian territory was causing grave concern even about the chances of survival of the democratic polity and process. There was also the continuous commission of heinous offences such as gruesome mass-killings of defenceless innocent people, including women, children and bystanders, destroying the peace, tranquillity and security. The existing ordinary criminal laws were found inadequate to deal sternly with such activities perpetrated on humanity. It was only in these prevailing circumstances the legislature was compelled to bring forth various special Acts such as The Terrorist and Disruptive Activities (Prevention) Act, 1987, The Prevention of Terrorism Act, 2002, The Narcotic Drugs and Psychotropic Substance Act, 1985, etc. to prevent and deal with conditions prevailing providing different procedure.

The Legislature responded to the menace without sacrificing the national values and to combat terrorism by extending and expanding the legal powers of the State and taking steps/measures in a legalised way. The outcome of such responses is the enactment of these Acts after a prolonged debate in both Houses of Parliament as the Legislature has felt that the ordinary criminal laws, both Penal and Procedural, are quite inadequate to meet the challenges, especially when the incidents of terrorists and disruptionists activities have increased astronomically.]

19. In cases involving serious offences, such as those under the Terrorist and Disruptive Activities (Prevention) Act, Prevention of Terrorism Act, Unlawful Activities (Prevention) Act and Narcotic Drugs and Psychotropic Substances Act, the Legislature has given some latitude to the investigating machinery in the manner of completion of the investigation by providing for extension of time to complete the investigation. Under the Act of 1967, Section 43-D was inserted by Act 35 of 2008. The amended Section provided for modified applications of certain provisions of the Code of Criminal Procedure. Under the special Acts, this period was further extended by the legislature to a period ranging from 180 days to 365 days, on certain eventualities provided in the Act itself. Though Section 43-D of the Act of 1967 provides for the extension of time for completing the investigation. The extension is, however, not to be granted as a matter of course but subject to conditions enumerated in the Act. Unless those conditions are satisfied, the Court will refuse to grant an extension.

20. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours or within an otherwise time-bound period

remained unchanged, even though the period had been extended several times under the special Acts. This indicates that in addition to giving adequate time to the investigating agency to complete investigations, the Legislature has always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time limits have been laid down by the Legislature. There is a legislative appreciation of the fact that certain offences require more extensive and intensive investigations and, therefore, for those offences, a longer period is provided for completing investigations.

21. The question of grant of default bail is that once the maximum period for investigation of an offence is over under the first proviso (a) to Section 167(2) of Cr.P.C., the accused shall be released on bail, this being an indefeasible right granted by the legislature. Sub Section (2) of Section 167 of Cr.P.C. lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody as he may deem fit for a term specified in that Section. Proviso to Sub-section (2) fixes the outer limit within which the investigation must be completed, and in case, the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Cr.P.C.

22. Section 167 Cr.P.C., thus, strictly speaking, is not a provision for 'grant of bail' but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) Cr.P.C., therefore, creates an indefeasible right in an accused person on account of 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order of his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) Cr.P.C. is termed as an order of 'default' as it is granted on the ground of 'default' of the prosecution to complete the investigation and file the charge-sheet within the prescribed period.

23. Before we proceed to consider the parameters of the right to default bail under Section 167 (2) as interpreted by various decisions of this Court and Supreme Court, we find it pertinent to note the observations made by this Court in case of **Uday Mohanlal Acharya v. State of Maharashtra** reported in (2001) 5 SCC 453 on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows: (SCC P 472 p. 13)

"13. .... Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in

accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution."

24. Article 21 of the Constitution of India provides that *"no person shall be deprived of his life or personal liberty except according to procedure established by law"*. It has been settled by a Constitution Bench of this Court in ***Meneka Gandhi v. Union of India*** reported in *AIR 1978 SC 597* that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2) Cr.P.C. and the safeguard of "default bail" contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law.

25. Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention and must be interpreted in a manner that serves this purpose. In our opinion, the entire matter before us must also be looked at from the point of view of expeditious conclusion of investigations and the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court. Therefore, the courts cannot adopt a rigid or formalistic approach when considering any issue that touches upon the rights contained in Article 21.

26. We may also refer with benefit to the recent Judgment of this Court in **S. Kasi v. State** reported in **(2021) 12 SCC 1** wherein it was observed that the indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasized that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a chargesheet.

27. Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the Courts must favour the interpretation that leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused.

28. With respect to the CrPC, the Statement of Objects and Reasons is an important aid for construction. Section 167(2) has to be interpreted keeping in mind the three-fold objectives expressed by the legislature namely ensuring a fair trial, expeditious investigation and trial, and setting down a rationalized procedure that protects the interests of indigent sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed under Article 21. The entire

justice-delivery system is dependent upon the concept of fairness. It is the interest of justice that has a predominant role in the criminal jurisprudence of the country- the hallmark of justice is the requirement of the day and the need of the hour.

29. In case of **Hitendra Vishnu Thakur and others v. State of Maharashtra and others** reported in **(1994) 4 SCC 602**, while interpreting Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA Act') read with Section 167 Cr.P.C., the Supreme Court held that once the period for filing the charge-sheet has expired and either no extension under Clause (bb) has been granted by the designated court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under Sub-Section (4) of Section 20 of TADA Act read with Section 167 of Cr.P.C. and designated court shall release him on bail, if the accused seeks to be released and furnishes the requisite bail bonds but that does not mean that on expiry of the period, during which investigation is required to be completed under Section 24 of TADA Act read with Section 167 of Cr.P.C., the court must release the accused on bail on its own motion even without any application from the accused person on his offering to furnish bail. The accused will be required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency, and once such an application is made, the court should issue notices to the Public Prosecutor who may either show that prosecution has obtained the order for completing the investigation from the court under Clause (bb) or that the charge-sheet has been filed in the designated court before the expiry of prescribed period or even that the prescribed period has actually not expired and thus, resists the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid a multiplicity of proceedings. It would, therefore, serve the ends of justice, if both sides are heard on the petition for bail on account of prosecution 'default'. It has been further held by the Supreme Court that when a report submitted by the Public Prosecutor to the designated court, for grant of extension for Clause (bb), its notice should be issued to the accused, before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. Even though neither Clause (b) nor Clause (bb) of Section 20 (4) of the TADA Act provide for the issuance of such notice but, the issuance of such notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice, and issuance of notice to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or Public Prosecutor in the scheme of the Act, and no prejudice whatsoever can be caused by the issuance of such a notice to any party. (para 21 of Judgment on pages 627 to 628)

30. The Constitutional Bench of the Supreme Court in the case of **Sanjay Dutt v. State of Maharashtra** through C.B.I.

Bombay reported in **(1994) 5 SCC 410**, in para no. 2 was considering the following questions which were referred to the bench:

"2. The question of law indicated in the said order of reference, to be decided by us, are three, namely:

(1) The proper construction of Section 5 of the TADA Act indicating the ingredients of the offence punishable thereunder and the ambit of the defence available to a person accused of that offence;

(2) The proper construction of clause (bb) of sub-section (4) of Section 20 of the TADA Act indicating the nature of the right of an accused to be released on bail thereunder, on the default to complete the investigation within the time allowed therein; and

(3) The proper construction and ambit of sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder."

31. In the present case, we are only concerned with question no. 2, which was referred to the Supreme Court in the case of Sanjay Dutt (Supra). The above reference was answered by the Apex Court in para no. 53 of the Judgment which is as under:

"1. ....

(2)(a) Section 20(4)(bb) of the TADA Act only requires the production of the accused before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the Judgment of the Division Bench of this Court in Hitendra Vishnu Thakur. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to-the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage.

3. ....."

32. The decision of the Supreme Court in the case of Hitendra Vishnu Thakur (Supra) was modified by the Constitutional Bench in the case of Sanjay Dutt (Supra) on a very limited aspect. The requirement of law as laid down in the case of Hitendra Vishnu Thakur (Supra) regarding procuring the presence of accused at the time of

considering the report seeking extension of time and the requirement of putting the accused to the notice of the filing of such a report has not been disturbed in the case of Sanjay Dutt (Supra). On the contrary, the decision of the Constitutional Bench in the case of Sanjay Dutt (Supra) reiterates the mandatory requirement of production of the accused before the court at the time of consideration of the report submitted by the Public Prosecutor. The only modification made by the Constitution Bench in the decision of Hitendra Vishnu Thakur (Supra) is by holding that the mode of giving notice to the accused is by informing about the filing of such a report by producing him before the Special Court and a written notice is not required. The Supreme Court, in the case of Sanjay Dutt (Supra), has laid down the requirement of informing the accused about the filing of a report seeking extension of time. The accused on receiving the intimation is entitled to object to the prayer made by the Public Prosecutor for grant of extension of time. In the case of Sanjay Dutt (Supra), it has been held that it is not necessary for the Special Court to supply a copy of the report submitted by the Public Prosecutor to the accused. Section 43-D of the U.A.P.A. is pari-materia with the proviso added by Clause (bb) of Sub Section (4) of Section 20 of T.A.D.A.

33. In the case of **Uday Mohanlal Acharya v. State of Maharashtra** reported in **(2001) 5 SCC 453** in paragraph 13 thereof, the majority view has been summarised which read thus:

"On the aforesaid premises, we would record our conclusions as follows:
1. Under sub-section (2) of Section 167. a Magistrate before whom an accused is detention of the accused in such custody as the Magistrate thinks fit exceeding 15 days on the whole.
2. Under the proviso to the aforesaid of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.
3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.
4. When an application for bail is filed by an accused for enforcement of his Indefeasible right alleged to have been accrued in his favour on account of the default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

34. In the case of **M. Ravindran v. Intelligence Officer, Directorate Revenue** reported in **(2021) 2 SCC 485**, again considered the matter and the conclusion of the said decision can be summarised as under:

"(i) Majority view in the case of Uday Mohanlal Acharya is correct;

(ii) Sub-section (2) of Section 167 of CrPC was enacted for providing an outer time limit to the period of remand of the accused proportionate to the seriousness of the offence alleged. On the failure to complete the investigation within the defined outer limit, the accused acquires an indefeasible right to get default bail;

(iii) The timelines provides under sub-section (2) of Section 167, CrPC ensure that investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This provision ensures that the Court takes cognizance of the case without undue delay after investigation is completed within the time provided in subsection (2) of Section 167, CrPC;

(iv) The Legislature has enacted sub-section (2) of Section 167 for balancing the need to provide sufficient time to complete the investigation with the need to protect civil liberties of the accused, which is given paramount importance in our Constitution;

(v) Sub-section (2) of Section 167 is integrally linked to the constitutional commitment under Article 21 of the Constitution of India promising protection of the personal liberty against unlawful and arbitrary detention;

(vi) The decision of this Court in the case of S. Kasi was quoted with the approval which holds that the indefeasible right to default bail is an integral part of the right to personal liberty under Article 21, and the said right cannot be suspended even during the pandemic situation; and

(vii) It is well settled that in case of any ambiguity in the construction of a penal statute, the Court must favour the interpretation which leans towards protecting the rights of the accused. This principle is applicable even in the case of a procedure providing for curtailment of liberty of the accused."

35. So far as the contention of the learned counsel for the appellants that the application was filed on 19.12.2023 by the Investigating Officer for extension of time for investigation under Section 43-D of the Act of 1967, which was allowed by the Special Court by order dated 21.12.2022 extending the time for 45 days for further investigation without giving any notice of the application and also in the absence of the appellants. On 21.12.2022, the appellants were not present before the Special Court in person or virtually. We have to consider the legal consequences of failure of the Special Court to procure the presence of accused at the time of consideration of the reports submitted by Investigating Officer / Public Prosecutor for a grant of extension of time to complete the investigation. In addition, we must also consider the effect of failure to give notice to the accused of the reports

submitted by the Public Prosecutor/Investigating Officer.

36. Sub-section (2) of Section 43-D of the Act of 1967 provides that Section 167 Cr.P.C. shall apply in relation to a case involving an offence punishable under this Act subject to modification that in Sub-section (2).

37. Clause (b) of Sub-section (2) of Section 43-D of the Act of 1967 is a pari-materia proviso that empowers the designated court to extend the period provided in Clause (a) of Sub-section (2) of Section 167 Cr.P.C.

38. The Supreme Court, in the case of **Jigar alias Jimmy Pravinchandra Adatiya v. State of Gujarat** reported in **2022 SCC OnLine SC 1290**, considered this question while considering the provisions of Gujarat Control of Terrorism and Organised Crime Act, 2015 (hereinafter referred to as "the Act of 2015") which also contained a pari-materia proviso in Section 20 (2) of the Act of 2015. The Supreme Court in case of Jigar alias Jimmy (Supra) relying upon the Judgment in case of Hitendra Vishnu Thakur (Supra) and the case of Sanjay Dutt vs. State of Maharashtra (Supra) held as under:

"34. Clause (b) of sub-section (2) of Section 167 of CrPC lays down that no Magistrate shall authorise the detention of the accused in the custody of the police unless the accused is produced before him in person. It also provides that judicial custody can be extended on the production of the accused either in person or through the medium of electronic video linkage. Thus, the requirement of the law is that while extending the remand to judicial custody, the presence of the accused has to be procured either physically or virtually. This is the mandatory requirement of law. This requirement is sine qua non for the exercise of the power to extend the judicial custody remand. The reason is that the accused has a right to oppose the prayer for the extension of the remand. When the Special Court exercises the power of granting extension under the proviso to sub-section (2) of Section 20 of the 2015 Act, it will necessarily lead to the extension of the judicial custody beyond the period of 90 days up to 180 days. Therefore, even in terms of the requirement of clause (b) of sub- section (2) of Section 167 of CrPC, it is mandatory to procure the presence of the accused before the Special Court when a prayer of the prosecution for the extension of time to complete investigation is considered. In fact, the Constitution Bench of this Court in the first part of paragraph 53(2)(a) in its decision in the case of Sanjay Dutt holds so.

The requirement of the report under proviso added by sub-section (2) of Section 20 of the 2015 Act to clause (b) of sub-section (2) of Section 167 of CrPC is two-fold. Firstly, in the report of the Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused beyond the said period of 90 days. Therefore, the extension of time is not an empty formality. The Public Prosecutor has application the Court must apply its mind to the contents of the report before accepting the prosecution has to make out a case in terms of both the aforesaid prayer for grant of extension.

35. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt to the decision in the case of Hitendra Vishnu Thakur is about the mode of service of notice of the application

for extension. In so many words, in paragraph 53 (2)(a) of the Judgment, this Court in the case of Sanjay Dutt held that it mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to sub-section (2) of section 167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by sub-section (2) Section 20 of the 2015 Act to sub-section (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

36. The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. We accept the argument that the failure of the prosecution to produce the accused before the Court and to inform him that the application of extension is being considered by the Court is not a mere procedural irregularity, it will negate the proviso added by sub-section (2) of Section 20 of the 2015 Act and that may amount to violation of rights conferred by Article 21 of the Constitution. The reason is the grant the extension of time takes away the right of the accused to get default bail which intrinsically connected with the fundamental rights guaranteed under Article 21 of Constitution. The procedure contemplated by Article 21 of the Constitution which required to be followed before the liberty of a person is taken away has to be a fair reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Article 21. The failure to procure the presence the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Article 21.

37. An attempt was made to argue that the failure to produce the accused will not cause any prejudice to him. As noted earlier, the grant of extension of time to complete the investigation takes away the indefeasible right of the accused to apply for default bail. It takes away the right of the accused to raise a limited objection to the prayer for the extension. The failure to produce the accused before the Court at the time of consideration of the application for extension of time will amount to a violation of the right guaranteed under Article 21 of the Constitution. Thus, prejudice is inherent and need not be established by the accused."

39. In the facts of the case in hand when the Special Court considered the report submitted by the Public Prosecutor for grant of extension of time on 21.12.2022, the presence of the appellants was admittedly not procured before the Special

Court either personally or through video conferencing.

40. This Court, by order dated 18.12.2023, directed for the original remand file available with the lower court where the trial is pending in the aforesaid case be brought before this Court by the next date to enable the Court to ascertain whether the accused-appellants were present on 21.12.2022 either personally or through electronic mode when the Special Court granted 45 days further time for completing the investigation by order dated 21.12.2022. The order dated 18.10.2023 is quoted as under:

"Let the original remand file available with the lower Court where the trial is pending of case Crime No. 4 of 2022, under Sections 121A, 123 IPC and Section 13, 18, 38 of Unlawful Activities (Prevention) Act relating to Police Station ATS Lucknow be produced before the Court by the next date to enable it to see as to whether the accused were present on 21.12.2022 either personally or through electronic mode when the Court below granted 45 days further time for completing the investigation on the application of the prosecution dated 19.12.2022, as, thereafter on 22.12.2022 based on this ground the judicial custody of the appellants was extended.

Requisition be sent accordingly by the Senior Registrar of this Court to the Court below.

List this case on 30.10.2023 amongst first ten cases of the day."

41. It is also admitted position that the information about the filing of such a report by the Public Prosecutor was not provided to the accused-appellants. This Court in its order dated 01.11.2023, has recorded the following finding:

"We have perused the original records, as already stated hereinabove, it does not mention the presence of the appellants-accused on 21.12.2022 when the Court allowed the application of the respondents for extending the time for completing the investigation.

We would, however, like to verify the aforesaid facts from the Jail Authorities as to whether the appellants-accused had joined the proceedings on 21.12.2022 from jail through Video Conferencing or had been brought to the Court for the said purpose or not.

Let an affidavit of Superintendent of District Jail, Lucknow, where the appellants-accused are odged, be filed on the aforesaid aspect of the matter before the next date."

42. In compliance with the order dated 01.11.2023, an affidavit of Mr Ashish Tiwari, Senior Superintendent, District Jail, Lucknow, has been filed in which it has been mentioned that as per the records, no summoning order was received to produce the accused-appellants on 21.12.2022 through video conferencing. Paragraph no. 5 of the affidavit is quoted as under:

"5. यह कि अभिलेखों के अनुसार उपरोक्त अपीलार्थीगण / बंदीगण को दिनांक 21-12-2022 को माननीय न्यायालय के समक्ष वीडियो कान्फ्रेसिंग से पेश कराने हेतु कोई तलबी आदेश प्राप्त नहीं हुआ था।"

Thus, it is clear that on 21.12.2022, when the order of extension of time for investigation was passed by the Special Court, the accused-appellants were neither present personally nor through video conferencing and as such, the order was passed in their absence.

43. We must note here that the period of 90 days was going to expire on 05.01.2023, and the application for extension was submitted by the Investigating Officer/Public Prosecutor on 19.12.2022. The application was filed more than 17 days before the completion of the period of 90 days. The order was passed by the Special Court on 21.12.2022, 15 days before the completion of 90 days period. There was no such reason for such a hurry. The Special Court could have always granted time of a couple of days to the prosecution to procure the presence of the accused, either physical or virtual. In this case, the remand was expiring on 22.12.2022, and there was no impediment for the prosecution or Special Court to have secure the presence of accused-appellants who were likely to be produced on 22.12.2022 for extension of remand and were actually produced on 22.12.2022 for extension of remand.

44. The accused may not be entitled to know the contents of the report but they are entitled to oppose the grant of extension of time on the grounds available to them in law. In the facts of the present case, the grant of extension of time without complying with the requirements laid down by the Constitution Bench has deprived the accused-appellants from their right to seek default bail. It has resulted in the failure of justice.

45. The order passed by the Special Court extending the period of investigation is rendered illegal on account of the failure of the respondents to produce the accused-appellants before the Special Court either physically or virtually when the prayer for grant of extension made by the Public Prosecutor was considered. It was the duty of the Special Court to ensure that this important procedural safeguard was followed. Moreover, the oral notice, as contemplated by the Supreme Court in the case of Sanjay Dutt (Supra), was also not given to the accused-appellants.

46. The other contention raised by learned counsel for the appellants is that the application dated 19.12.2022 was moved by Anurag Darshan, Additional Superintendent of Police/Investigating Officer, A.T.S., U.P., Lucknow. On the aforesaid application Public Prosecutor has made an endorsement 'submitted' on 21.12.2022. It has been further contended by learned counsel for the appellants that in view of the provisions of Section 43-D of the Act of 1967, the application for an extension of time has to be moved by the Public Prosecutor and not by the Investigating Officer. The order of extending the period of investigation passed by the Special Court on an application moved by the Investigating Officer is wholly illegal and against the law laid down by the Apex Court in the case of Hitendra Vishnu Thakur (Supra). In paragraph no. 23 of the Judgment in case of Hitendra Vishnu Thakur (Supra), the Supreme Court held thus:

"23. We may, at this stage, also, on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking an extension of time for the completion of an investigation on a report of the public prosecutor. **The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged**

investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for the completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before Submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. **The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb).** The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. **The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to**

independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the Justification, from the report of the public prosecutor, to grant extension of time to complete the investigation.

Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes indefeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this Judgment. We are unable to agree with Mr Madhava Reddy or the Additional Solicitor General Mr Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. **We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report falls in the performance of one of its essential duties and renders its order under clause (bb) vulnerable.** Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his Indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court**. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension."**

47. The Supreme Court reiterated the aforesaid principle in case of Jigar alias Jimmy Pravinchandra Adatiya (Supra) in following words: **"Firstly in the report of**

Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused-appellants beyond the set period of 90 days, therefore, the extension of time is not an empty formality. The Public Prosecutor has to apply his mind before he submits the report/application for extension." (para 35)

48. In the present case, it is apparent that on the application/report submitted by the Investigating Officer, the Public Prosecutor has merely made an endorsement on 21.12.2022 'submitted'. There is no application of mind by the Public Prosecutor to the report submitted by the Investigating Officer to the fact whether there was any need for extension of time for investigation and, further, that the ground set forth by the Investigating Officer in its report were worthy for submitting the report by the Public Prosecutor for extension of time. On this score, the order of extension of time for investigation dated 21.12.2022 passed by the Special Court is also vitiated.

49. It has also been submitted by the learned counsel for the appellants that on 21.12.2022, the Special Court passed an order "permitted for 45 days only". It has been further submitted by the learned counsel for the appellants that the order of extension passed by the Special Court on 21.12.2022 does not indicate an application of mind by the Special Court, and the order has been passed merely on the asking by the Investigating Officer. It is next submitted by learned counsel for the appellants that the order of extension passed by the Special Court does not contain any reason for extending the time for investigation and, as such, is arbitrary.

50. Recording of reason is a principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and legality in decision-making. The person who is adversely affected comes to know as to why his application has been rejected. The recording of reason in cases where the order is subject to further appeal is very important from yet another angle. An appellate court or authority ought to have the advantage of examining the reasons that prevailed with the court or the authority making the order. Conversely, absence of reasons in a appealable order deprives the appellate court or authority of that advantage and casts and onorus responsibility upon it to examine and determine the question on its own.

51. As Lord DENNING has emphasized in Breen v. A.E.U. (1971) 2 QB 175, the giving of reason for a decision is one of the fundamentals of good administration. It constitutes a safeguard against arbitrariness on the part of the decision-maker. Articulating the basis of a decision can improve the quality of decision making in a number of significant ways such as if he is made to give reason for his decision, it will impose some restriction upon him in a matter involving personal rights. Secondly, if an adjudicator is obligated to give reason for his conclusions, it will make it necessary for him to consider the matter carefully. The condition to give reason introduces clarity, ensures objectivity and impartiality on the part of the decision-maker and minimizes unfairness and arbitrariness for "compulsion of disclosure guarantees consideration".

52. In India, the position is somewhat different but the Courts have shown a good deal of creativity in this area. A very significant reason of the Indian Courts is to develop the idea that natural justice demands that adjudicatory bodies

give reasons for their decisions. The Supreme Court has also held that as several constitutional provisions guarantee judicial control of adjudicatory bodies, it is obligatory for such bodies to render reasoned decisions so as to make judicial control effective and meaningful. In administrative law the duty to assign reason is, however, a judge made law but in case of judicial authorities that includes Magistrates, Special Courts, who exercise the judicial powers under the various statutes, there is no dispute that their order must contain reasons to support the orders. The judicial order without assigning any reason is not an order in the eye of the law.

53. In case of Jigar alias Jimmy Pravinchandra Adatiya (Supra), the Supreme Court has held as under:

"The prosecuting has to make out a case in terms of both the aforesaid requirements and the court must apply its mind to the contents of the report before accepting prayer for grant of extension."

54. The Supreme Court in the case of **State of Maharashtra v. Surendra Pundlik Gadling** reported in **(2019) 5 SCC 178** held as under (para 14, 14.1, 14.2, 14.3, 14.4, page 184):

"14. A perusal of the proviso to Section 43-D(2)(b) of the said Act shows that there are certain requirements that need to be fulfilled, for its proper application. These are as under:

14.1. It has not been possible to complete the investigation within the period of 90 days.

14.2. A report to be submitted by the Public Prosecutor.

14.3. Said report indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the period of 90 days.

14.4. Satisfaction of the Court in respect of the report of the Public Prosecutor."

55. Thus, before an order is passed by the Special Court while exercising the power under proviso to Section 43-D (2)(b) of the Act of 1967 it has to satisfy itself that all the above four ingredients are complied with.

56. The application of mind is only reflected by the reasons given in the judgment. An order supported by reasons ensures that the adjudicatory authority/court genuinely addressed itself to the arguments and evidence advanced at the time of the hearing. It is the well-known principle that justice should not only be done but should also seen to be done. Unreasoned decisions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have the appearance of justice.

57. It has been contended by the learned counsel for the respondents that at the stage of granting an extension of time for completing the investigation, the Special Court/designated court is not required to pass judgment containing elaborate reasons. Indeed, the designated court or Special Court is not supposed to pass judgment and give an elaborate reason but the designated court/ Special Judge is supposed to pass an order which must reflect the application of mind by the court to the grounds taken by the Public Prosecutor in its report for extension of time for completing the investigation.

58. In the facts of the present case, the designated court has passed the order

"permitted for 45 days only" is an unreasoned order. It does not reflect that the Special Court has applied its mind to the grounds whatsoever were there for an extension of time for the investigation. On this score also the order of extension of time for investigation passed by the Special Court cannot be sustained.

59. The contention of the learned Standing Counsel is that since the charge sheet has been submitted by the investigating agency and the sanction has been granted by the State Government, the right of 'default' bail, if any, under Section 167 (2) of Cr.P.C. is extinguished and now the same cannot be granted. It has been further submitted that even if, it is taken that extension of time by order dated 21.12.2022 was not in accordance with law, the same gets cured by subsequent orders passed for extension of time by the Special Court and therefore, now, the appellants cannot claim bail on the ground of 'default'.

60. The question as to whether 'default' bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of three Judges Bench of the Supreme Court in Uday Mohanlal Acharya (Supra), the Supreme Court reviewed the decisions of the Supreme Court and in particular expression "if already not availed of" in Sanjay Dutt (Supra). The Court then held (SCC pp. 469-70 & 472-74, para 13):

“13.…The crucial question that arises for consideration, therefore, is what is the true meaning of the expression “if already not availed of”? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression “availed of” to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression “availed of” is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression “if not availed

of' in a manner which is capable of being abused by the prosecution. A two-judge Bench decision of this Court in State of M.P. v. Rustam [1995 Supp (3) SCC 221: 1995 SCC (Cri) 830] setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in Sanjay Dutt [(1994) 5 SCC 410:1994 SCC (Cri) 1433]…In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without the filing of a challan by the investigating agency would be subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail…But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

* * *

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the

accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail if he is prepared to and furnishes the bail as directed by the Magistrate.

* * *

6. The expression "if not already availed of" used by this Court in the Sanjay Dutt case [(1994) 5 SCC 410: 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and theaccused has not furnished the same." (Emphasis Supplied)

61. Again in the case of **Union of India v. Nirmala Yadav** reported in **(2014) 9 SCC 457**, a two Judges Bench of the Supreme Court referred to all the relevant authorities on the subject including the majority judgment of Uday Mohanlal Acharya (Supra) and then concluded (SCC pp. 482-84, paras 44-46):

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in the Uday Mohanlal Acharya case (supra) and how the two-judge Bench has understood the same in Pragya Singh Thakur (supra). We have already reproduced the paragraphs in extenso from the Uday Mohanlal Acharya case (supra) and the relevant paragraphs from Pragya Singh Thakur. Pragya Singh Thakur, has drawn support from Rustam 1995 Supp (3) SCC 221 case to buttress the principle it has laid down though in Uday Mohanlal Acharya case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of Uday Mohanlal Acharya case. We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in Pragya Singh Thakur which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya which has been followed in Hassan Ali Khan and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi case has been rendered by a three-judge Bench. We may hasten to state, though in Pragya Singh Thakur case the learned Judges have referred to Uday Mohanlal Acharya case but have stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-judge Bench decision in the Mushtaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in the Uday Mohanlal Acharya case. The learned Judge dissented

with the majority as far as the interpretation of the expression "if not already availed of" by stating so: (SCC p. 481, paras 29-30)

"29. My learned Brother has referred to the expression 'if not already availed of' referred to in the judgment in the Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression 'availed of' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if, on the 61st day, an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of the proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression 'availed of' does not mean the mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after the filing of the challan because thereafter the right under default clause cannot be exercised."

On a careful reading of the aforesaid two paragraphs, we think, the two-judge Bench in Pragya Singh Thakur case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-judge Bench in Sayed Mohd. Ahmad Kazmi case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case which is based on the three-judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragya Singh Thakur case (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd."

62. Also, in **Syed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)** reported in **(2012) 12 SCC 1,** Section 43-D of the UAPA came up for consideration before the Court, in particular the proviso which extends the period for investigation beyond 90 days up to a period of 180 days. An application for default bail had been made on 17.07.2012, as no charge sheet was filed within a period of 90 days of the appellant's custody. The charge sheet in the aforesaid case was filed thereafter on 31.07.2012. Despite the fact that this application was not taken up for hearing before the filing of the charge sheet, this Court held that since an application for default bail had been filed prior to the filing of the charge sheet the "indefeasible right" spoken of earlier had sprung into action, as a result of which default bail had to be granted. The Court held: (SCC pp. 9-10, para 25-27)

"25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf

of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for an extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, but it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt [(1994) 5 SCC 410: 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant statutory bail before the charge sheet is filed, he loses his right to such benefit once such charge sheet is filed and can, thereafter, only apply for regular bail.

26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right to grant statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise."

63. In a fairly recent judgment reported as **Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67**, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted.

64. In the case of **Bikramjit Singh v. State of Punjab** reported in **(2020) 10 SCC 616**, held in paragraph no. 36 as under:

"36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to

default bail becomes complete. It is of no moment that the criminal court in question either does not dispose of such application before the charge sheet is filed disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted."

65. In view of the law laid down by the Supreme Court in the aforementioned cases, the submission of the learned Standing Counsel that the appellant will lose the right of 'default' bail since the charge sheet has been submitted by the investigating agency and sanction has been granted by the State Government, is devoid of merit as in the present case, application for bail on 'default' was moved by the appellants on 05.01.2023, the day on which 90 days was completed. Since we have already held that the order of extension granting further time for investigation by the Special Court is not valid, therefore, in our considered opinion filing of charge-sheet after filing of the application for bail by the appellants is of no consequence.

66. In the present appeal, the order passed by the Special Court on 21.12.2022, extending the period for investigation is vitiated for the reasons aforementioned.

67. Once we hold that the order granting an extension of time to complete the investigation is illegal and stands vitiated, it follows that the appellants are entitled to default bail.

68. When the appellants applied for bail, they had no notice of extension of time granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellants are entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the caes of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellant on the cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of **Mohamed Iqbal Madar Sheikh and others v. State of Maharashtra reported in (1996) 1 SCC 722**, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

69. Accordingly, the impugned order dated 21.12.2022, passed by Special Court, granting an extension of time to complete the investigation and the order dated 03.02.2023 passed by Special Court rejecting the default bail application filed by the appellants are hereby quashed and set aside. The appellant shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 4 of 2022, under Section 121A, 123 of I.P.C. and Section 13, 18, 18B, 20, 38 of Act of 1967 registered at Police Station A.T.S., Lucknow on the following conditions:

a) The appellants shall furnish a bail bond of Rs. 1,00,000/- with appropriate sureties as

may be decided by the Special Court;

b) The appellants shall surrender their passport (if they have one) to the Special Court at the time of furnishing security;

c) The appellants shall not interfere in any manner with the further investigation,

if any and shall not make any effort to influence the prosecution witnesses; and

d) The appellants shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

e) The appellants shall cooperate with the Special Court for the early conclusion of the trial.

70. The appeal is **allowed** on the above terms.

Criminal Appeal No. 2377 of 2023

1. The accused-appellant Lukman was arrested on 26.09.2022 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow. He was produced before the Special Court on 27.09.2022. The Special Court granted police custody remand from 27.09.2022 to 10.10.2022. Thereafter, the remand was extended from time to time. On 14.12.2022, the remand was granted by the Special Court till 22.12.2022. The statutory period of 90 days was to complete on 26.12.2022. On 19.12.2022, an application was filed by Sri Anurag Darshan, Additional Superintendent of Police, A.T.S., Lucknow, U.P. for an extension of 60 days time for further investigation under Section 43-D of the Act of 1967. On the aforesaid application, an endorsement was made by the Public Prosecutor on 21.12.2022 'submitted'. On 21.12.2022 the Special Court passed an order 'permitted for 45 days only'. The application dated 19.12.2022 has been annexed at page no. 22 as annexure no. 7 to the counter affidavit filed by Shri Abhishek Kumar Singh on 27.09.2022 along with an application No. 4 of 2023 for taking the aforesaid counter affidavit on record. On 22.12.2022, remand was granted by the Special Court till 18.01.2023. An application dated 03.01.2023 was filed by the appellant for being released on default bail as according to them, the statutory period of 90 days expired on 26.12.2022 and by the said date, no charge-sheet was filed by the police in the aforesaid case crime number. The said application filed by the appellant was registered as Bail Application No. 86 of 2023. After the exchange of affidavits, the aforesaid application was rejected by the Special Court by its order dated 03.02.2023 which is impugned in the present appeal.

2. During the pendency of the application for grant of bail, the period of investigation was extended. By order dated 03.02.2023, the remand was extended till 04.03.2023. By another order dated 04.03.2023, the period of investigation was extended for another period of 20 days and the remand was also extended till 04.03.2023. The charge sheet submitted by the Investigating Officer against the appellant on 22.03.2023, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of Act of 1967. On 23.03.2023, the Special Court directed to register the case as a Misc. Case. On 13.04.2023, prosecution sanction was granted by the State Government and by order dated 28.04.2023, the Special Court has taken cognizance.

3. In the present appeal also the order passed by the Special Court on 21.12.2022, is vitiated for the reasons as mentioned in Criminal Appeal No. 2376 of 2023.

4. Once we hold that the order granting extension to complete the investigation is illegal and stands vitiated, it follows that the appellant is entitled to default bail.

5. When the appellant applied for bail, he had no notice of an extension of time

granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellant is entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the case of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellant on the cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of **Mohamed Iqbal Madar Sheikh and others v. State of Maharashtra reported in (1996) 1 SCC 722**, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

6. Accordingly, the impugned order dated 21.12.2022, passed by Special Court, granting an extension of time to complete the investigation and the order dated 03.02.2023 passed by Special Court rejecting the default bail application filed by the appellant are hereby quashed and set aside. The appellant shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow, on the following conditions:

(a). The appellant shall furnish a bail bond of Rs. 1,00,000/- with appropriate sureties as may be decided by the Special Court;

(b). The appellant shall surrender his passport (if he has one) to the Special Court at the time of furnishing security;

(c). The appellant shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(d). The appellant shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

(e). The appellant shall cooperate with the Special Court for the early conclusion of the trial.

7. The appeal is allowed on the above terms.

Criminal Appeal No. 2378 of 2023

1. The appellants Mudassir and Mohammad Mukhtar were arrested on 05.10.2022 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow. They were produced before the Special Court on 06.10.2022. The Special Court granted police custody remand from 06.10.2022 to 19.10.2022 by order dated 06.10.2022. Thereafter, the remand was extended from time to time. By order dated 14.12.2022 passed by Special Court remand was extended up to 22.12.2022. The statutory period of 90 days was to complete on 03.01.2023. On 19.12.2022, an application was filed by Sri Anurag Darshan Additional Superintendent of Police/Investigating Officer A.T.S., Lucknow, U.P. for extension of 60 days time for further investigation under Section 43(d) of Act of 1967. On the aforesaid application, an endorsement was made by the Public Prosecutor on 21.12.2022 "submitted". On the same day i.e. 21.12.2022, the Special Court passed an order "Permitted for 45 days only". The application dated 19.12.2022 has been annexed at page no. 18 as annexure no. 7 to the counter affidavit filed by Abhilash Kumar Singh on 27.09.2022 along with an application No. 5/23 for taking the aforesaid counter affidavit on record.

2. On 22.12.2022, further remand of 30 days was allowed by the Special Court

which was extended till 18.01.2023. An application was filed by the appellants for being released on default bail as according to them the statutory period of 90 days was to expire on 04.01.2023 and by the said date no charge sheet was filed by the police in the aforesaid case crime number. The said application filed by the appellants was registered as Bail Application No. 145 of 2023. After the exchange of affidavits, the aforesaid application was rejected by the Special Court by its order dated 03.02.2023 which is impugned in the present appeal.

3. During the pendency of the application for grant of bail, the period of investigation was again extended on an application moved by the Public Prosecutor for 30 days. Again on 04.03.2023, the period of investigation was extended for 20 days by an order dated 24.03.2023 passed by the Special Court and during this period the remand of the appellant was also extended. The charge sheet was submitted by the investigating officer against the appellants under Section 121A/123 I.P.C. and Sections 13/18/18B/20/38 of the Act of 1967 on 22.03.2023. On 23.03.2023, the Special Court directed to register the case as Misc. Case. On 13.04.2023, prosecution sanction was granted by the State and by order dated 28.04.2023, the Special Court had taken cognizance.

4. In the present appeal also the order passed by the Special Court on 21.12.2022, is vitiated for the reasons as mentioned in Criminal Appeal No. 2376 of 2023.

5. Once we hold that the order granting extension to complete the investigation is illegal and stands vitiated, it follows that the appellants are entitled to default bail.

6. When the appellants applied for bail, they had no notice of extension of time granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellants are entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the case of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellant on the cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of Mohamed Iqbal Madar Sheikh and others v. State of Maharashtra reported in (1996) 1 SCC 722, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

7. Accordingly, the impugned order dated 21.12.2022, passed by Special Court, granting extension to complete investigation and order dated 03.02.2023 passed by Special Court rejecting the default bail application filed by the appellants are hereby quashed and set aside. The appellant shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow, on the following conditions:

(a). The appellant shall furnish a bail bond of Rs. 1,00,000/- with appropriate sureties as may be decided by the Special Court;

(b). The appellants shall surrender their passport (if they have one) to the Special Court at the time of furnishing security;

(c). The appellants shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses;

and

(d). The appellants shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

(e). The appellants shall cooperate with the Special Court for the early conclusion of the trial.

8. The appeal is **allowed** on the above terms.

Criminal Appeal No. 2379 of 2023

1. First Information Report was registered on 12.08.2022, against Mohd. Nadeem (appellant no. 1) in Case Crime No. 3 of 2022, under Section 121A, 123 I.P.C. read with Section 13, 18 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow. The appellant no. 1 Mohd. Nadeem was arrested by the police on 11.08.2022 and was produced before the Special Court on 12.08.2022. On 12.08.2022, the Special Court granted remand for the period 12.08.2022 to 25.08.2022. The accused-appellant no. 2 Habeedul Islam @ Shaifullah was arrested on 13.08.2022, in Case Crime No. 3 of 2022 referred to above. The appellant no. 2 was produced before the Special Court on 14.08.2022. By order dated 14.08.2022, remand was granted by the Special Court from 14.08.2022 to 26.08.2022. Thereafter, the remand was extended from time to time. The statutory period of 90 days was to complete on 09.11.2022 in the case of appellant no. 1 and on 10.11.2022 in the case of appellant no. 2. On 07.11.2022, an application for an extension of the period of investigation by 30 days was moved by the Investigating Officer. On 07.11.2022, by the order passed by Special Court, the accused were summoned fixing 09.11.2022. On 09.11.2022, the period of investigation was extended by the Special Court. The Order passed by the Special Court on 09.11.2022 was 'permitted'. The accused-appellants were present on 09.11.2022 as of 09.11.2022, the remand was extended for 30 days i.e. up to 08.12.2022. Again on 03.12.2022, an application was moved by the Senior Prosecuting Officer for an extension of the period of 30 days for completing the investigation which is on page 27 of the counter affidavit filed by Shailendra S. Rathore filed along with the application dated 03.12.2022. On the aforesaid application dated 03.12.2022, the Public Prosecutor made an endorsement on 06.12.2022 'submitted'. On 06.12.2022, the Special Court passed an order 'permitted'. On 08.12.2022, the custody of the appellants was extended for another period of 30 days i.e. up to 03.01.2023.

2. Again on 02.01.2023, an application was moved by the Investigating Officer for an extension of investigation on which an endorsement was made by the Public Prosecutor 'submitted'. The Special Court by order dated 03.01.2023 extended the period of investigation for 30 days and passed the order 'permitted for 30 days only'. On 03.01.2023, the accused-appellants were present through virtual mode before the Special Court and their period of remand was extended till 02.02.2023. On 12.12.2022, a default bail application was filed by the appellants as the extended period for investigation of 30 days as extended by an order dated 09.11.2022, expired on 10.12.2022.

3. The bail application filed by the appellants was registered as Bail Application No. 985 of 2023. After the exchange of affidavits, the aforesaid application was rejected by the Special Court by its order dated 03.02.2023 which is impugned in the present appeal.

4. During the pendency of the appeal, a charge sheet was submitted by the Investigating Agency in court on 07.02.2023

against the appellants under Section 121A, 123 I.P.C. read with Sections 13, 18 & 38 of the Act of 1967. On 07.02.2023, the Special Court directed to register the case as Misc. Case.

5. In the present appeal though the first order of extension of time dated 09.11.2022 was passed in the presence of the appellants but the second order of extension dated 06.12.2022 has been passed in the absence of the appellants. Appellants were not present before the Special Court on 06.12.2022 either personally or virtually. The application dated 03.12.2022, for an extension of the period of investigation was moved by the Senior Prosecuting Officer on which an endorsement was made by the Public Prosecutor 'submitted' on 06.12.2022 and the order was passed by Special Court on 06.12.2022 'permitted'. This Court by its order dated 22.1.2023 directed the appellants to file an affidavit to the effect indicating as to whether the appellants were present either personally or virtually on 06.12.2022 when time for completing the investigation was extended by the Special Court. In compliance thereof in the rejoinder affidavit, paragraph no. 5 of the affidavit, it has been stated that on 06.12.2022, when the Special Court allowed the application dated 03.12.2022 for extension of the period for further investigation was without securing the presence of the appellants physically or virtually.

6. For the reasons given in the judgment in appeal No. 2376 of 2023, we are of the considered opinion that the order passed by the Special Court on 06.12.2022, extending the period of investigation, is illegal on account of the failure of the respondents to produce the accused before the Special Court either physically or virtually when the prayer for grant of extension made by the Public Prosecutor was considered.

7. Once we hold that the order granting an extension to complete the investigation is illegal and stands vitiated, it follows that the appellants are entitled to default bail.

8. When the appellants applied for bail, they had no notice of extension of time granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellants are entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the case of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellants on cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of **Mohamed Iqbal Madar Sheikh and others v. State of Maharashtra** reported in **(1996) 1 SCC 722**, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

9. Accordingly, the impugned order dated 06.12.2022, passed by Special Court, granting extension to complete investigation and order dated 03.02.2023 passed by Special Court rejecting the default bail application filed by the appellants are hereby quashed and set aside. The appellants shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 3 of 2022, under Section 121A, 123 I.P.C. read with Section 13, 18 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow, on the following conditions:

(a). The appellants shall furnish a bail bond of Rs. 1,00,000/- each with appropriate sureties as may be decided by the Special Court;

(b). The appellants shall surrender their passport (if they have one) to the Special Court at the time of furnishing security;

(c). The appellants shall not interfere in any manner with the further

investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(d). The appellants shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

(e). The appellants shall cooperate with the Special Court for the early conclusion of the trial.

10. The appeal is **allowed** on the above terms.

Criminal Appeal No. 2380 of 2023

1. The appellants Mohammad Harish and Ash Mohammad were arrested on 30.10.2022 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow. They were produced before the Special Court on 01.11.2022. The Special Court granted remand from 01.11.2022 to 30.11.2022 by order dated 01.11.2022. Thereafter, the remand was extended from time to time. The statutory period of 90 days was to complete on 29.01.2023. By order dated 14.12.2022, the appellants were granted remand up to 22.12.2022. On 19.12.2022, an application was filed by Sri Anurag Darshan Additional Superintendent of Police/Investigating Officer A.T.S., Lucknow, U.P. for extension of 60 days time for further investigation under Section 43(d) of Act of 1967. On the aforesaid application, an endorsement was made by the Public Prosecutor on 21.12.2022 "submitted". On the same day i.e. 21.12.2022, the Special Court passed an order "Permitted for 45 days only". The application dated 19.12.2022 has been annexed at page no. 14 as annexure no. 5 to the counter affidavit filed by Abhilash Kumar Singh on 27.09.2022 along with an application No. 3/2023 for taking the aforesaid counter affidavit on record.

2. On 22.12.2022, the remand was extended by the Special Court till 18.01.2023. An application dated 31.01.2023 was filed by the appellants for being released on default bail as according to them the statutory period of 90 days was to expire on 29.01.2023 and by the said date no charge sheet was filed by the police in the aforesaid case crime number. The said application filed by the appellant was registered as Bail Application No. 969 of 2023. After the exchange of affidavits, the aforesaid application was rejected by the Special Court by its order dated 13.02.2023 which is impugned in the present appeal.

3. During the pendency of the application for grant of bail, the period of investigation was again extended on an application moved by the Public Prosecutor for 30 days. Again on 04.03.2023, the period of investigation was extended for 20 days by an order dated 04.03.2023 passed by the Special Court and during this period the remand of the appellant was also extended. The charge sheet was submitted by the investigating officer against the appellants under Section 121A/123 I.P.C. and Sections 13/18/18B/20/38 of the Act of 1967 on 22.03.2023. On 23.03.2023, the Special Court directed to register the case as Misc. Case. On 13.04.2023, prosecution sanction was granted by the State and by order dated 28.04.2023, the Special Court had taken cognizance.

4. In the present appeal also the order passed by the Special Court on 21.12.2022, is vitiated for the reasons as mentioned in Criminal Appeal No. 2376 of 2023.

5. Once we hold that the order granting extension to complete the investigation is illegal and stands vitiated, it

follows that the appellants are entitled to default bail.

6. When the appellants applied for bail, they had no notice of extension of time granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellants are entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the case of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellant on the cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of Mohamed Iqbal Madar Sheikh v. State of Maharashtra reported in (1996) 1 SCC 722, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

7. Accordingly, the impugned order dated 21.12.2022, passed by Special Court, granting extension to complete investigation and order dated 13.02.2023 passed by Special Court rejecting the default bail application filed by the appellants are hereby quashed and set aside. The appellant shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow, on the following conditions:

(a). The appellants shall furnish a bail bond of Rs. 1,00,000/- with appropriate sureties as may be decided by the Special Court;

(b). The appellants shall surrender their passport (if they have one) to the Special Court at the time of furnishing security;

(c). The appellants shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(d). The appellants shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

(e). The appellants shall cooperate with the Special Court for the early conclusion of the trial.

8. The appeal is **allowed** on the above terms.

Criminal Appeal No. 2381 of 2023

1. The appellants Qari Shahjad and Ali Noor @ Unamul Haque were arrested on 05.10.2022 in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow. They were produced before the Special Court on 06.10.2022. The Special Court granted police custody remand from 06.10.2022 to 19.10.2022 by order dated 06.10.2022. Thereafter, the remand was extended from time to time. The statutory period of 90 days was to complete on 03.01.2023. By order dated 14.12.2022, the appellants were granted remand up to 22.12.2022. On 19.12.2022, an application was filed by Sri Anurag Darshan Additional Superintendent of Police/Investigating Officer A.T.S., Lucknow, U.P. for extension of 60 days time for further investigation under Section 43(d) of Act of 1967. On the aforesaid application, an endorsement was made by the Public Prosecutor on 21.12.2022 "submitted". On the same day i.e. 21.12.2022, the Special Court passed an order "Permitted for 45 days only". The application dated 19.12.2022 has been annexed at page no. 18 as annexure no. 7 to the counter affidavit filed by Abhilash Kumar Singh on 27.09.2022 along with an

application No. 5/2023 for taking the aforesaid counter affidavit on record.

2. On 22.12.2022, the remand was extended by the Special Court till 18.01.2023. An application was filed by the appellants on 31.01.2023 for being released on default bail as according to them the statutory period of 90 days was to expire on 03.01.2023 and by the said date no charge sheet was filed by the police in the aforesaid case crime number. The said application filed by the appellant was registered as Bail Application No. 971 of 2023. After the exchange of affidavits, the aforesaid application was rejected by the Special Court by its order dated 13.02.2023 which is impugned in the present appeal.

3. During the pendency of the application for grant of bail, the period of investigation was again extended on an application moved by the Public Prosecutor for 30 days. Again on 04.03.2023, the period of investigation was extended for 20 days by an order dated 04.03.2023 passed by the Special Court and during this period the remand of the appellant was also extended. The charge sheet was submitted by the investigating officer against the appellants under Section 121A/123 I.P.C. and Sections 13/18/18B/20/38 of the Act of 1967 on 22.03.2023. On 23.03.2023, the Special Court directed to register the case as Misc. Case. On 13.04.2023, prosecution sanction was granted by the State and by order dated 28.04.2023, the Special Court had taken cognizance.

4. In the present appeal also the order passed by the Special Court on 21.12.2022, is vitiated for the reasons as mentioned in Criminal Appeal No. 2376 of 2023.

5. Once we hold that the order granting extension to complete the investigation is illegal and stands vitiated, it follows that the appellants are entitled to default bail.

6. When the appellants applied for bail, they had no notice of extension of time granted by the Special Court. Moreover, the application was made before the filing of the charge sheet, hence, the appellants are entitled to default bail. At this stage, we may note here that in the case of Sanjay Dutt (Supra) as well as in the case of Bikramjeet Singh (Supra), the Supreme Court held that the grant of default bail does not prevent re-arrest of the appellant on the cogent ground after filing the charge-sheet. Thereafter, the accused can always apply for regular bail. However, as held by the Supreme Court in the case of Mohamed Iqbal Madar Sheikh and others v. State of Maharashtra reported in (1996) 1 SCC 722, re-arrest cannot be made only on the ground of filing a charge sheet. It all depends on the facts of each case.

7. Accordingly, the impugned order dated 21.12.2022, passed by Special Court, granting extension to complete investigation and order dated 13.02.2023 passed by Special Court rejecting the default bail application filed by the appellants are hereby quashed and set aside. The appellants shall be enlarged on default bail under Sub-section (2) of Section 167 of Cr.P.C. in Case Crime No. 4 of 2022, under Section 121A, 123 I.P.C. and Section 13, 18, 18B, 20 & 38 of the Act of 1967, Police Station A.T.S., Gomti Nagar, Lucknow, on the following conditions:

(1). The appellants shall furnish a bail bond of Rs. 1,00,000/- with appropriate sureties as may be decided by the Special Court;

(2). The appellants shall surrender their passport (if they have one) to the Special Court at the time of furnishing security;

(3). The appellants shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(4). The appellants shall mark regular attendance with such police station and at such periodical intervals as may be determined by the Special Court; and

(5). The appellants shall cooperate with the Special Court for early conclusion of the trial.

8. The appeal is **allowed** on the above terms.

(2024) 5 ILRA 1378
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 3820 of 2022
connected with
Criminal Appeal No. 2023 of 2022

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

Counsel for the Appellant:
Anjali Singh Tomar, Inder Pal Singh Tomar, Pramod Kumar Singh, Somit Shukla

Counsel for the Respondent:
Bheshaj Puri, G.A.

Criminal Law – Appellate proceedings – Appellants- husband and mother-in-law of the deceased- conviction and sentence- Sections 304B and 498A IPC- dowry demand- dowry death by burn injuries- death within seven years of marriage- demand of dowry made- no complaint made to police earlier- not determinative of fact- whether dowry demand was made or not- cumulative analysis of evidence- deceased committed suicide within seven years of marriage- harassment meted out to her- demand of dowry- inability to bear child- accused being husband responsible for safety and security of his wife- conviction of the husband sustained- no reason given by trial court for awarding maximum punishment- sentence already undergone by him awarded as punishment- husband's appeal partly allowed- conviction of mother-in-law set aside- Appeal allowed. (Paras 25, 26, 27, 28, 29 and 30)

HELD:
Upon cumulative analysis of evidence on record, we are of the view that this was a case of suicide committed by the deceased within 7 years of marriage on account of harassment meted out to her due to demand of dowry as also her inability to bear a child. So far as the conviction of accused appellant Ankur Gupta is concerned, it is admitted that he is the husband of deceased and is responsible for safety and security of his wife but he has failed to perform his responsibilities as husband and, therefore, his conviction under Sections 498A, 304-B IPC & 4 of Dowry Prohibition Act is sustained. (Para 25)

So far as the role of accused appellant Smt. Vimlesh (mother-in-law) in demanding dowry is concerned, the allegation is not specific as against her and the allegations at best appear to be omnibus and vague. It is evident that she has firstly reported that smoke was coming out of the room of deceased and on her screams DW-1 & ors.came to the house and broke open the door. As we have already observed that the deceased had committed suicide and looking to the conduct of the accused mother-in-law, we are of the view that the accused mother-in-law cannot be convicted for offence under Sections 498A, 304B IPC and 4 of Dowry Prohibition Act, in the absence of any specific allegation against her with regard to demand of dowry. The conviction of accused Smt. Vimlesh under Sections 498A, 304B IPC and 4 of Dowry Prohibition Act is, therefore, reversed. (Para 26)

Coming to the question of sentence, we find that the trial court has awarded life sentence to the accused appellant Ankur Gupta under Section

304-B IPC. Punishment under Section 304-B IPC varies from 7 years to life. When the court proceeds to award maximum permissible sentence for an offence, it is the cardinal principle of law that reasons have to be given for awarding such maximum punishment. We do not find any such reasons to have been disclosed by the trial court. We otherwise find that there are no circumstances, which may justify awarding of extreme punishment to the accused appellant Ankur Gupta in the facts of the present case. Considering the evidence in its entirety, we are of the view that punishment of life under Section 304-B IPC to the accused appellant Ankur Gupta is not warranted, and ends of justice would be met if the sentence already undergone by the accused appellant Ankur Gupta is awarded to him under Section 304-B IPC. To that extent, we modify the impugned judgment and order of the court below. (Para 27)

Appeals allowed. (E-14)

List of Cases cited:

1. Hem Chand Vs St. of Har., (1994) 6 SCC 727

2. Kashmira Devi Vs The St. of Uttarakhand, AIR 2020 SC 652

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

1. These two appeals are directed against the judgment and order of conviction and sentence dated 09.03.2022, passed by Additional District and Sessions Judge, Court No.16, Aligarh in Sessions Trial No. 297 of 2017 (State Vs. Ankur Gupta and others) arising out of Case Crime No.1064 of 2016, Police Station Quarsi, District Aligarh, whereby the accused appellants Ankur Gupta (husband of deceased) and Smt. Vimlesh (mother-in-law of deceased) have been convicted under Section 304B IPC and sentenced to life imprisonment; under Section 498A IPC for two years rigorous imprisonment with fine of Rs.10,000/- each and in default of payment of fine they are to further undergo six months additional imprisonment and; under Section 4 of Dowry Prohibition Act for one year rigorous imprisonment with fine of Rs.5,000/- each and in default thereof they are to further undergo three months additional imprisonment. All sentences are to run concurrently.

2. The informant Umesh Chandra (PW-1), who is the father of deceased, has made a written report (Ex.Ka.1), scribed by Pradeep Nath Sharma (not produced in trial), to the Station House Officer, Police Station Quarsi, informing that he is resident of District Budaun and had married his daughter Shreya Varshaney (deceased) to accused appellant Ankur Gupta with Hindu customs and traditions on 06.03.2013 and had spent nearly Rs.10 lac for the purposes. Ever since the marriage in-laws of his daughter were demanding additional dowry. On several occasions he met the demands and persuaded his daughter to stay with her in-laws. On 26-27.10.2016 the deceased informed informant on phone that accused Ankur requires Rs.5 lac for establishing factory. If such amount is not given before Deepawali, her mother-in-law, husband and sister-in-law (Nanad) would kill her for dowry. The incident occurred on 29.10.2018 in the morning hours. Informant's brother-in-law Girish intimated him that deceased has been strangulated to death by her mother-in-law Vimlesh, husband Ankur and sister-in-law Swati @ Sona and thereafter set her ablaze. Request was made for lodging First Information Report and taking appropriate legal action.

3. Based upon the aforesaid written report (Ex.Ka-1) the First Information Report (Ex.Ka.11) was lodged on 29.10.2016 at 07.20 pm as Case Crime No.1064 of 2016 under Sections 498-A,

304-B, 201 IPC and ¾ of Dowry Prohibition Act against three accused Ankur Gupta (husband), Smt. Vimlesh (mother-in-law) and Swati @ Sona (sister-in-law). Investigation proceeded. The Investigating Officer recovered a ring having thread (kalawa) and a blue cane on which Artele was mentioned and there was smell of kerosene. This recovery has been exhibited as Ex.Ka.4. The inquest (Ex.Ka.5) was conducted and the inquest witnesses found that the deceased died due to burn injuries and her tongue had protruded. The death apparently occurred due to burn injuries but in the opinion of inquest witnesses postmortem was required to be conducted to ascertain the cause of death. The dead body was accordingly sealed and sent for postmortem. The postmortem (Ex.Ka.7) was conducted on 30.10.2016 at 12.15 and the Autopsy Surgeon noted following conditions of the body:-

"Age: 31 years

General Examination: Average body built, pugilistic attitude present, both eyes closed, tongue protruded.

External Examination/Antemortem Injuries:

Superficial to deep thermal burn injury present all over the body except both foot sole and some part of scalp. Singing of hairs (scalp) present. Line of redness present at places. Smell of kerosene oil present. About 95& thermal burn injury. Exudate present at places.

Time of death: Expired about one day back.

Cause of death: Due to asphyxia with hypovolumic shock as a result of antemortem thermal burn injury."

4. The Investigating Officer, after recording the statement of witnesses under Section 161 Cr.P.C. and collecting other evidence etc., concluded the investigation and submitted a chargesheet (Ex.Ka.10) on 15.12.2016 against the accused Ankur Gupta, Smt. Vimlesh and Swati @ Sona. Cognizance was taken on the chargesheet and the case was committed to the court of sessions where it got registered as Sessions Trial No.297 of 2017. Charges were framed against all named accused under Sections 498A, 304B IPC and ¾ of Dowry Prohibition Act. Alternate charge was also framed under Section 302 IPC in addition to aforesaid sections. The accused denied the charges and demanded trial.

5. The prosecution in addition to the documentary evidence, noticed above, has produced the first informant as PW-1. In his examination-in-chief, he has stated that marriage of deceased daughter with accused Ankar was solemnized on 06.02.2013 and he had spent Rs.10 lac in the marriage. From the very initial days the deceased was being harassed for dowry by her in-laws. He had intervened and got the issues resolved. It is also stated that demand of Rs.5 lac was being raised as dowry and on 26.10.2016 the deceased made a phone call stating that if amount of Rs.5 lac is not paid, then her in-laws would kill her. It was about quarter to 12 in the afternoon on 29.10.2016 that informant's brother-in-law Girish Gupta informed him that the mother-in-law, sister-in-law and husband have killed the deceased by burning her. PW-1 has proved the written report.

In the cross-examination, PW-1 has stated that he was saddened and perplexed by the death of daughter and does not know if the date of marriage was mentioned as 06.03.2013 in the FIR. He has supported the allegation of demand of dowry from the very beginning. He has, however, admitted that though various

incident kept happening regarding demand of dowry from 2013 onwards but he never lodged any report with the police. He has denied the suggestion that in-laws kept his daughter well and a false report has been lodged. In his further cross-examination, PW-1 has stated that telephone call for demand of dowry of Rs.5 lac was received by his wife on 26-27.10.2016 and not by him. He has denied the suggestion that his daughter was not keeping well. Deceased was treated at Aligarh and Bareilly as she was not able to conceive. The incident occurred on the day of Chhoti Diwali. He has denied the suggestion that the family was busy celebrating Diwali when the incident occurred. When he arrived at the house of her deceased daughter nobody from the family was present. He had not seen as to whether accused Ankur and his mother was present at the time of inquest. PW-1 has admitted that father of accused Ankur died long back and two brother of accused Ankur also died by drowning in the Ganges. It is also stated that the deceased visited her maternal house about 5-6 months ago and stayed there for about one month. He further denied the suggestion that his daughter was undergoing depression and that she had beaten her own mother while she was at her maternal house. He has also stated that accused Ankur was working in a factory at R. K. Puram. He has denied the suggestion that his daughter has committed suicide because she has beaten her mother or she was under depression. He has also denied the suggestion that on 29.10.2016 before death of deceased, at about 2-2½ pm she called her mother and informed her that she is in trouble and would not meet her today.

6. PW-2 (Uma Devi) is the mother of deceased and has fully supported the prosecution case with regard to torture being extended to the deceased. She has stated that there was no independent witness with regard to dowry of Rs.10 lac. The deceased called her on 26-27 saying that her in-laws are asking for Rs.5 lac. In the cross-examination, PW-2 has stated that sister-in-law of deceased had beaten her with slippers and thrown her out of house. She had, however, not lodged police report about the incident. She did not remember the mobile number of her daughter from which she called her. She had denied the suggestion that her daughter was under depression and she had beaten her. She has also denied the suggestion that on the date of incident her daughter called her at 02.16 in the afternoon from her mobile no.9319726234. She has admitted that mother-in-law of the deceased is widow, who lost her two sons by drowning in river Ganga and accused Ankur was the only son alive in the family. Sister-in-law of the deceased, Swati, is married and has two children and is living elsewhere.

7. PW-3 (Girish Gupta) happens to be the maternal uncle of the deceased. He claims that information regarding the incident was received from medical representative Dushyant, who informed him that outside the house of deceased a crowd had gathered. When he entered the house he found that the deceased was lying dead. He claims that the deceased was strangulated and later burnt and her tongue protruded. He has supported the prosecution case about demand of dowry.

8. PW-4 (Harendra Singh) is the Sub Inspector, who has proved the recovery of ring having thread (Kalawa) vide Ex.Ka.4. He has also proved the arrest of accused persons on 30.10.2016. He has stated that he received information of incident at police chowki on wireless. He has also proved the inquest.

9. PW-5 (Dr. Anupam Bhaskar) is the Autopsy Surgeon, who has proved the postmortem report. He has stated that in the trachea soot particles were available. Both lungs were congested. Superficial deep thermal burn injuries were present on the entire body except sole and some portion of head. Smell of kerosene was also coming. The deceased was 95% burnt. Cause of death was asphyxia with hypovolumic shock as a result of antemortem thermal burn injury.

10. PW-6 (Rajeev Kumar) is the Investigating Officer, who has stated that 29.10.2016 at about 03.12 pm information was received from mobile no.8650521855 of Dinesh that the deceased has committed suicide. It is on the basis of this information that the police came on spot. Avinash and Mahesh were immediate neighbours. He had not recorded statement of neighbours or those who were present. He was informed by mother of the deceased that her daughter was treated at Bareilly and Aligarh between 2013 to 2016. PW-6 has admitted that he has not recorded the statement of any independent witness. He has also came to know that sister-in-law of the deceased has kids and she lives separately with her husband at Gular Road.

11. PW-7 (Manvendra Singh) is the Constable, who has proved the police papers and has denied the suggestion that FIR is ante-timed.

12. Based upon the evidence led during trial by the prosecution, statement of accused persons under Section 313 Cr.P.C. has been recorded. Accused Swati has stated that she is innocent and lives separately and that the deceased was suffering from mental depression. Accused mother-in-law of deceased has also stated that she is innocent and the deceased was suffering from depression on account of which she committed suicide. Similar stand is taken by the accused Ankur, who has stated that the deceased had committed suicide in which he has no role to play and he is innocent.

13. The defence has produced Atul Kumar Varshaney as DW-1. He has stated that he has business of locks in which 20 persons are working. Accused Ankur Gupta was working in his factory and his name finds place in the Employees State Insurance list. He has stated that accused Ankur came to the factory at 09.00 in the morning and left at 02.30 pm when he got a call from his mother about his wife having got burnt. He knew the accused Ankur for the last 5-6 years as he is distantly related to his wife. The accused was working as supervisor. Attendance register for the date of incident, however, has not been produced by him.

14. DW-2 (Mahesh Chandra) is the neighbour of accused persons, who has stated that he has his shop in front of house of deceased. He claims that he is living in the same area for the last twenty years and knows accused persons since then. It was Chhoti Diwali on the date of incident that the mother-in-law of deceased rushed out of the house and told that smoke is coming out of the room which was locked from inside. He claims to have rushed to the place and door was broke open from outside. He has denied the suggestion that the shop was closed on the day of incident and he was not present.

15. DW-3 (Hari Prakash) is also neighbour of accused persons, who has stated that he has business of handle plate and the house of accused is in front of his house and that he knows the accused for last 7-8 years. He claims that the deceased has committed suicide.

16. DW-4 (Dr. Mohd. Riyad) is the Psychiatrist in City Hospital, Civil Lines, Aligarh, who has stated that the deceased was suffering from depression and he has examined the deceased on 17.05.2016. He has certified that mentally depressed patient can commit suicide. In the cross-examination he has disclosed that he is MD in Psychiatrist and has not produced original records. He had given his statement on the basis of copy of prescription.

17. It is on the basis of above evidence led during trial by the prosecution and upon consideration of the explanation furnished by the accused appellants under section 313 Cr.P.C. and defence version that the court below has come to the conclusion that the prosecution has established its case beyond reasonable doubt against the accused appellants Ankur Gupta (husband) and Smt. Vimlesh (mother-in-law) and found them to be guilty of committing the offence. Ultimately, the court below has convicted and sentenced the accused appellants vide impugned judgment and order and acquitted the accused Swati, sister-in-law of the deceased. Thus aggrieved, the accused appellants are before this Court in the present appeals.

18. Learned counsel for the appellants states that this is a case of suicide by the deceased as she had not been able to bear a child. It is submitted that the deceased was undergoing depression and treated by the doctors at Aligarh and Bareilly Learned counsel, therefore, submits that in the depressed mental state the deceased committed suicide by pouring kerosene on herself and, therefore, the accused appellants cannot be convicted for dowry death. It is also contended that marriage was solemnized three years back but not a single complaint of demand of dowry was made, nor any independent witness has been produced to prove the demand of dowry. It is further argued that merely on the strength of suspicion the accused appellants have been convicted and sentenced by the court below. It is also urged that the accused appellant Smt. Vimlesh is a widow elderly lady, aged about 71 years, and has already lost her two sons who drowned in the river Ganga. It is further argued that the accused appellant Ankur was not present at the place of occurrence when the deceased committed suicide and returned only after coming to know of incident, and that the trial court has imposed maximum punishment upon the accused appellants without disclosing reasons for it while the minimum punishment provided under Section 304-B IPC is seven years. Submission is that the accused appellant Ankur Gupta has already undergone incarceration of 8 year 1 month 14 days with remission as on 09.05.2024, while the appellant Smt. Vimlesh has served sentence incarceration of 3 year 1 month 12 days as on 09.05.2024. It is moreover submitted that the trial court has not correctly appreciated the evidence on record and, therefore, the impugned judgment and order of conviction and sentence is liable to be set aside.

19. Learned AGA, on the other hand, submits that this is a case of dowry death, inasmuch as ingredients of dowry death are clearly made out in the facts of the case. Learned A.G.A. has supported the reasoning of trial court that had it been a case of suicide the deceased would have attempted to save herself and the articles kept in the room like bed, refrigerator etc. would have been damaged but nothing happened of this kind, which clearly shows that the deceased was burnt and the accused persons did not let her save herself. It is, therefore, submitted that judgment and order of conviction and sentence requires no interference.

20. We have heard Shri Somit Shukla, learned counsel for the appellants and learned A.G.A. for the State and have perused the material on record, including the records of court below.

21. In the facts of the case, evidence on record shows that the marriage of the deceased was solemnized with accused appellant Ankur Gupta on 06.02.2013 and she died on 29.10.2016. It is, therefore, clear that the deceased has died within seven years of marriage. The first condition for an offence under Section 304B IPC is clearly made out.

22. Coming to the second condition with regard to demand of dowry the testimony of PW-1 and PW-2, who are the parents of deceased, is specific on that count. PW-1 has stated that they spent Rs.10 lac at the time of marriage towards dowry and that there was a continuous demand of dowry from the side of accused persons. It is alleged that in the year 2013 itself, as also in the year 2014, 2015 and 2016 there was consistent demand of dowry. Although it is alleged by the counsel for the accused appellants that there was no report lodged with the police or the specific dates for demand of dowry are not mentioned but this would not be decisive in our opinion because parents of a bride firstly try to make efforts for the marriage to succeed and, therefore, such instance of demand of dowry are not reported at the first instance. The mere fact that complaint has not been made to the police ipso facto cannot be determinative of fact as to whether there has been demand of dowry or not. It may well be a factor to be considered. In the facts of the present case, PW-1 has specifically stated that she got a call from the deceased on 26/27.10.2016 with regard to demand of dowry of Rs.5 lac. This money was needed for establishing factory for accused Ankur. The evidence in that regard is consistent on part of the prosecution witnesses. In such circumstances, upon evaluation of evidence on record, we find that the trial court has correctly returned findings with regard to dowry given in the marriage and that the deceased was being harassed for dowry. This demand continued even soon before the death of the deceased. The second condition for an offence to be proved under Section 304B is also met.

23. Coming to the next aspect of death of the deceased, it is apparent that she died on account of burn injuries. The death is, therefore, unnatural. So far as the prosecution case that the deceased was strangulated and then burnt is concerned, we find that the allegation is based entirely upon suspicion, inasmuch as the only reason for making such allegation is that the tongue of deceased had protruded. We have examined the medical evidence on record and find that there is no evidence to suggest that the deceased has been strangulated prior to death. The Autopsy Surgeon has given his opinion as per which the tongue of deceased could have protruded on account of lack of oxygen since room itself was filled with smoke. The postmortem report shows no other sign of injury on the body of deceased. The only injuries found on the body of deceased is with regard to burn injuries. The prosecution, therefore, has not been able to prove the allegation that the deceased was strangulated or physically tortured before death occurred on account of burn injuries.

24. We have examined the testimony of defence and prosecution witnesses from a perusal whereof it is apparent that the deceased had got married in the year 2013 but she could not bear a child. This fact is admitted to PW-2, who is the mother of

deceased. She has admitted that her daughter was taken to different hospital for treatment at Aligarh and Bareilly. The specific case of the defence is that the deceased was undergoing depression on account of such fact. DW-4, who is the psychiatrist, has certified that the deceased was examined by him as she was suffering from depression. It has also come in evidence of defence witnesses that the mother-in-law of deceased firstly reported that smoke was coming out of the room whereafter DW-1, who is the immediate neighbour, came to the house and broke open the door. The evidence on record thus suggest that it is in the afternoon hours that the deceased committed suicide. Apart from the depression as the deceased was not able to bear a child, the demand of dowry and harassment by her in-laws apparently was the cause for her to have committed suicide. Existence of soot particles in trachea of deceased also shows that the deceased had committed suicide.

25. Upon cumulative analysis of evidence on record, we are of the view that this was a case of suicide committed by the deceased within 7 years of marriage on account of harassment meted out to her due to demand of dowry as also her inability to bear a child. So far as the conviction of accused appellant Ankur Gupta is concerned, it is admitted that he is the husband of deceased and is responsible for safety and security of his wife but he has failed to perform his responsibilities as husband and, therefore, his conviction under Sections 498A, 304-B IPC & 4 of Dowry Prohibition Act is sustained.

26. So far as the role of accused appellant Smt. Vimlesh (mother-in-law) in demanding dowry is concerned, the allegation is not specific as against her and the allegations at best appear to be omnibus and vague. It is evident that she has firstly reported that smoke was coming out of the room of deceased and on her screams DW-1 and others came to the house and broke open the door. As we have already observed that the deceased had committed suicide and looking to the conduct of the accused mother-in-law, we are of the view that the accused mother-in-law cannot be convicted for offence under Sections 498A, 304B IPC and 4 of Dowry Prohibition Act, in the absence of any specific allegation against her with regard to demand of dowry. The conviction of accused Smt. Vimlesh under Sections 498A, 304B IPC and 4 of Dowry Prohibition Act is, therefore, reversed.

27. Coming to the question of sentence, we find that the trial court has awarded life sentence to the accused appellant Ankur Gupta under Section 304-B IPC. Punishment under Section 304-B IPC varies from 7 years to life. When the court proceeds to award maximum permissible sentence for an offence, it is the cardinal principle of law that reasons have to be given for awarding such maximum punishment. We do not find any such reasons to have been disclosed by the trial court. We otherwise find that there are no circumstances, which may justify awarding of extreme punishment to the accused appellant Ankur Gupta in the facts of the present case. Considering the evidence in its entirety, we are of the view that punishment of life under Section 304-B IPC to the accused appellant Ankur Gupta is not warranted, and ends of justice would be met if the sentence already undergone by the accused appellant Ankur Gupta is awarded to him under Section 304-B IPC. To that extent, we modify the impugned judgment and order of the court below.

28. In Hem Chand Vs. State of Haryana, (1994) 6 SCC 727, the Supreme Court has observed that though punishment

under Section 304-B IPC varies from 7 years to life but award of extreme punishment should not be as a matter of course and must be awarded in rare cases. In para 7 and 8, the Supreme Court observed as under:-

"7. Now coming to the question of sentence, it can be seen that Section 304-B IPC lays down that:

"Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case. A reading of Section 304-B IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B IPC also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 IPC. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr Usha Rani PW 6 and Dr Indu Lalit PW 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decomposed. On the other hand, Dr Dalbir Singh PW 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post-mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B IPC would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable under Sections 304-B and 201 IPC have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence under Section 304-B IPC was made out. Coming

to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime, he himself indulged therein and precipitated in it and that bride-killing cases are on the increase and therefore a serious view has to be taken. As mentioned above, Section 304-B IPC only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

8. Hence, we are of the view that a sentence of 10 years' RI would meet the ends of justice. We, accordingly while confirming the conviction of the appellant under Section 304-B IPC, reduce the sentence of imprisonment for life to 10 years' RI. The other conviction and sentence passed against the appellant are, however, confirmed. In the result, the appeal is dismissed subject to the above modification of sentence."

29. In Kashmira Devi Vs. The State of Uttarakhand, AIR 2020 SC 652, the principle laid down in Hem Chand (supra) has been reiterated and the Court observed as under in para 24:-

"24. Having arrived at the above conclusion the quantum of sentence requires consideration. The High Court has awarded life imprisonment to the appellant on being convicted under Section 304-B IPC. The minimum sentence provided is seven years but it may extend to imprisonment for life. In fact, this Court in Hem Chand v. State of Haryana [Hem Chand v. State of Haryana, (1994) 6 SCC 727 : 1995 SCC (Cri) 36] has held that while imposing the sentence, awarding extreme punishment of imprisonment for life under Section 304-B IPC should be in rare cases and not in every case. Though the mitigating factor noticed in the said case was different, in the instant case keeping in view the age of the appellant and also the contribution that would be required by her to the family, while husband is also aged and further taking into consideration all other circumstances, the sentence as awarded by the High Court to the appellant herein is liable to be modified."

30. In light of the observation made in para 24 (reproduced above), the Court modified the sentence to a period of 7 years. Para 25 of the judgment in Kashmira Devi (supra) is, thus, reproduced hereinafter:-

"25. In the result, the following:

Order

25.1. The conviction of the appellant recorded by the High Court under Section 304-B IPC and Section 498-A IPC through its judgment dated 29-6-2017 [State v. Govind Singh, 2017 SCC OnLine Utt 1932] is upheld and affirmed.

25.2. The sentence ordered by the High Court through its order dated 10-7-2017 [State of Uttarakhand v. Govind Singh, GA No. 42 of 2010, decided on 10-7-2017 (Utt)] is modified and the sentence of imprisonment for life is altered by ordering the appellant to undergo rigorous imprisonment for a period of seven years which shall include the period of sentence already undergone by the appellant. The fine as imposed and the default sentence is sustained.

25.3. The appeal is allowed in part, in the above terms.

25.4. The parties to bear their own costs."

31. Consequently, the Criminal Appeal No. 3820 of 2022 filed by the accused appellant Ankur Gupta succeeds and is

allowed in part. Since the accused appellant Ankur Gupta has been taken in custody on 30.10.2016 and he has remained in jail ever since then and the period of incarceration undergone is more than 8 years with remission, as such, his sentence is modified to the sentence already undergone by him. The fine and the additional sentence, on failure to deposit the fine, are maintained. The appellant Ankur Gupta is set to liberty on the sentence already undergone, subject to observance of Section 437A Cr.P.C., provided he is not wanted in any other case.

32. Criminal Appeal No. 2023 of 2012 at the instance of accused appellant Smt. Vimlesh, accordingly, succeeds and is allowed. The judgment and order of conviction and sentence dated 09.03.2022, insofar as it convicts the accused appellant Smt. Vimlesh, is set aside. Accused appellant Smt. Vimlesh is reported to be in jail, she shall be released forthwith, subject to compliance of section 437A Cr.P.C. provided she is not wanted in any other case.

(2024) 5 ILRA 1388
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 4350 of 2005

Rajveer Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
K.K. Dwivedi, R.P. Dwivedi

Counsel for the Respondent:
Govt. Advocate, D.N. Wali, Manoj Yadav

Criminal Law: Indian Penal Code, 1860 – Section 302 – Murder – Indian Evidence Act, 1872 – Sections 8, 27 & 60 - Criminal Procedure Code,1973 - Section 161, 313 - blind murder committed during night hours - none of three witnesses P.W.1, P.W.3 and P.W.5 have witnessed the incident - F.I.R. has been lodged against unknown persons - appellant alongwith another person has been implicated as an accused on the basis of suspicion – Court convicted & sentenced the appellant u/s 302 I.P.C. for life imprisonment – Held, appellant is the scribe of the F.I.R. which has been lodged by P.W.1 and present at the time of inquest and is also a witness of inquest and participated in the last rites as pointed out by P.W.2.- Allegation against accused - quarrel with his brother over partition of property and for not sharing the sale proceeds of the plot which was in the name of his mother- recovery of an axe is recovered by the police itself and not at his pointing out - in a circumstantial evidence - motive plays pivotal role and non proving creates serious dent in the prosecution story - St.ment of an accused recorded by a police officer under Section 27 of the Evidence Act is a memorandum of confession during interrogation , confessional part of such St.ment is inadmissible and only the part which leads to discovery of fact is admissible in evidence - Evidence Act - Section 60 mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section - finding of trial court in respect of recovery is against the settled proposition of law as laid down by Hon'ble Apex Court and it can't be sustained and is liable to discarded - conduct of an accused may be relevant fact under section 8 of Evidence Act, by itself, cannot be a ground to convict him or hold guilty for a serious offence like murder - finding by trial court is not just, proper and legal and is liable to be set-aside.(Para 28, 29, 32, 33, 35, 40, 46, 48)

Appeal is allowed. (E-13)

List of Cases cited:

1. Aghnoo Nagesia Vs St. of Bihar, (1966) 1 SCR 134

2. Sharad Birdhichand Sarda Vs St. of Mah.

3. Babu Sahebagouda Rudragoudar & ors. Vs St. of Karn. (Criminal Appeal No (S). 985 of 2010)

4. St. of U. P. Vs Deoman Upadhyaya

5. Mohd. Abdul Hafeez Vs St. of Andhra Pradesh

6. Subramanya Vs St. of Karn.

7. Ramanand @ Nandlal Bharti Vs St. of U. P.

8. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Maharasthra (Criminal Appeal No. 739 of 2017)

9. St. (NCT of Delhi) Vs. Navjot Sandhu, (2005) 11 SCC 600

10. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406

(Delivered by Hon'ble Rajiv Gupta, J. & Hon'ble Shiv Shanker Prasad, J.)

1. Heard Shri G.S. Chaturvedi, Senior Advocate assisted by Shri Alok Ranjan Mishra, learned counsel for the appellant, learned A.G.A. for the State and perused the record.

2. The instant criminal appeal has been filed against the judgment and order dated 23.9.2005 passed by the Additional Session Judge, Court No. 11, Agra in S.T. No. 832 of 1999, State Vs. Rajveer Singh and another, arising out of case crime no. 207 of 1999 P.S. Dauki, Agra, under section 302 I.P.C., by which the trial court has convicted the appellant under section 302 I.P.C. and awarded the sentence of life imprisonment alongwith fine of Rs. 25000/-

3. As per the prosecution case as unfurled in the F.I.R. lodged by one Surendra Kumar, P.W.1, vide written report Ex. Ka.1 dated 5.8.1999 which was registered vide case crime no. 207 of 1999 under section 302 I.P.C., P.S. Dauki, District Agra, vide G.D. report, Ex. Ka. 4 prepared by PW.4 at the relevant date and time. The allegations made in the F.I.R. are that on 4.8.1999 at about 8.30 p.m. in the night his father Nem Singh posted as Kanungo, Sadar, District Agra returned back to his house. After taking his meals at about 10.00 p.m., on account of disruption in the electric supply he slept alone on the Chabutara outside the Baithaka. At about 5.00 a.m., his mother Smt. Jamira Devi came out of the house and saw blood flowing below his cot. Above the cot his father was done to death by some unknown persons by wielding some sharp edged weapon on his neck and face. On the noise raised by his mother and on her wailing he alongwith his other family members reached at the place of incident. On the basis of the said written report scribed by the appellant, Rajveer Singh himself an F.I.R was registered against unknown persons at P.S. Dauki, District Agra.

4. The said F.I.R. was registered in the presence of Station Officer, P.S. Dauki, P.W. 6 Satyaveer Singh who was entrusted with the investigation of the said case. The investigating officer thereafter recorded the statement of the first informant and reached at the place of incident and inspected the place of incident, and prepared the site plan. The Investigating Officer further collected the blood stained earth and plain earth from the place of incident and kept it in a container, sealed it and prepared the recovery memo which has been proved and marked as Ex. Ka. 6 and Ex. Ka. 7. A hair strand was also taken in possession from the

right palm of the deceased and its fard recovery memo was prepared and marked as Ex. Ka. 8. A small handkerchief lying near the corpse of the deceased was also taken in possession and its fard recovery memo was prepared and marked as Ex. Ka. 9. The investigating officer had also collected the blood stained string of cot and a blood stained pillow and prepared its recovery memo which has been proved and marked as Ex. Ka. 10 and then recorded the statement of witnesses Phool Singh and Giriraj. Thereafter Station Officer conducted the inquest on the person of the deceased and prepared the inquest memo which has been proved and marked as Ex. Ka. 15. Thereafter the dead body of the deceased was wrapped in a cloth and dispatched for post mortem examination by preparing the seal. An autopsy was conducted on the person of the deceased on 5.8.1999. As per the post mortem report , the victim received six injuries on his person. The injuries noted by the Doctor in the post mortem report are as under.

1- कटा हुआ घाव 16 सेमी x 2 सेमी x हड्डी तक गहरा, माथे पर बाई तरफ तथा बाये कान कट चुका था।

2- कटा हुआ घाव 14 सेमी x 2 सेमी x हड्डी तक गहरा, बाई तरफ चेहरे पर।

3- कटा हुआ घाव 16 सेमी x 2 सेमी xगर्दन की गुहा तक गहरा गर्दन के अन्दर।

4- कटा हुआ घाव 2 सेमी x 1 सेमी x हड्डी तक गहरा, दाये हाथ के अंगूठे पर।

5- कटा हुआ घाव 1सेमी x 1/2 सेमी हड्डी तक गहरा दाये हाथ की अंगुली पर।

6- कटा हुआ घाव 1सेमी x 1/2 सेमी x हड्डी तक गहरा दाहिने हाथ की रिंग तथा मिडिल अंगुली पर।

On internal examination, the central bone of the head was found fractured and membranes were found congested.

5. Thereafter on 5.8.1999, Investigating Officer recorded the statement of Meera Devi wife of the deceased and Geeta, daughter of the deceased. On 16. 8.1999 the appellant, Rajveer Singh was arrested and his statement was recorded and on his pointing out, an axe was recovered from an open place near the Bithoora. Thereafter blood stained Pyjama and Shirt of the appellant was also recovered on the pointing out of the appellant, Rajveer Singh from his room kept in a box which were taken in possession by Investigating officer and its fard recovery memos were prepared which have been proved and marked as Ex. Ka. 2 and Ex. Ka.3 respectively.

6. After concluding the investigation, the Investigating Officer submitted the charge sheet against the appellant and one Rakesh which has been proved and marked as Ex. Ka. 13. On submission of the charge sheet, learned Magistrate had taken cognizance of the offence and since the case was exclusively triable by court of sessions made over the case to the court of session for trial where it was registered vide S.T. No. 832 of 1999, State Vs. Rajveer Singh and another under section 302 I.P.C. The trial court thereafter framed the charge against the appellant under section 302 I.P.C; and under section 302/34 I.P.C., against co-accused Rakesh vide order dated 5.1.2000. The said charges were read out and explained to the accused in Hindi who abjured the charges, did not plead guilty and claimed to be tried.

7. During course of trial, prosecution in order to bring home the guilt of the appellant has examined as many as three witnesses of fact P.W.1, P.W.3 and P.W.5 and two other formal witnesses, P.W.4 and P.W.6. Their testimony in brief is enumerated below.

8. P.W.1 Surendra Kumar is son of the deceased. He in his examination in chief has

stated that accused Rajveer Singh is his real uncle whereas accused Rakesh is his servant. Nem Singh, the deceased was his father who was working in Tehsil Sadar as Kanungo. On the fateful night between 4/5.8.1999 on account of disruption in the electric supply his father Nem Singh was sleeping all alone on a cot outside his Chabutara. At about 5.00 a.m. in the morning his mother woke up and came out and saw that his father was lying dead and his neck and face was cut and blood had collected below his cot on which his mother raised alarm, then he along with neighbours reached there. He immediately got a written report scribed by his uncle Rajveer and after putting his signature there on reached at the police station and handed over the written report to the police, on the basis of which a F.I.R. was registered. It is further stated that his father had purchased a plot in the name of his mother i.e. his grand mother and had sold it 2-3 years back for an amount of Rs. 12.00 lacs. His uncle Rajveer Singh used to demand his share, in the said money. On account of which there had been verbal duel between his father and uncle Rajveer Singh as such he used to bear enmity with his father. In his cross examination he has stated that his father was Kanungo in Tehsil, Sadar whereas his another uncle Raghuveer was an agriculturist. It is wrong to state that the accused Rajveer Singh used to look after the agriculture work. Earlier his family was a joint family. However, one year back partition took place between them and his father and his other brothers were given equal shares of the field. He further denied the suggestion that his father being Kanungo had illegally amassed great wealth, on account of which he had number of enemies. On the fateful night, he was sleeping on the roof and his uncle Ranveer and accused Rajveer Singh were in their respective houses. He denied the suggestion that his uncle used to sleep at his tube-well. In the morning on the cries of his mother, he woke up at about 5.00 a.m. After the incident, Ranveer and Rajveer Singh had also reached at the place of incident. However, by that time he had not suspected Rajveer Singh to have committed the incident. On the date of incident, Investigating Officer had recorded his statement, however, in his statement he had not disclosed to the investigating officer that "मैने दरोगा को नही बताया कि मेरे पिता ने एक प्लाट जो दादी के नाम खरीदा था उसे बारह लाख में बेच दिया मेरे चाचा राजवीर हिस्सा मांगते थे और इस बात को लेकर मेरे पिता व चाचा मे कहा सुनी हुई थी और इस कारण राजवीर मेरे पिता से रंजिश मानते थे पहली बार यह बात अदालत में कहा है यह पूछे जाने पर कि आपने उक्त बात दरोगा को क्यो नही बताई कहा कि मां व बहन ने बताई थी इसलिए मैने दरोगा को नही बताई।". He further stated that at the time of inquest accused Rajveer Singh was present and is also a witness of inquest. On being questioned as to why he had earlier not disclosed the name of Rajveer Singh to the investigating officer he stated that at the earlier point of time he did not suspected him to be an accused. The said suspicion arose after two days, although his mother suspected Rajveer Singh to be involved in the incident. He further denied the suggestion that he is falsely deposing in the case and concealing the true facts.

9. P.W.2, Dr. B.B. Agrawal, is the Medical Officer who conducted an autopsy on the person of the deceased and has noted the injuries which has already been described. The post mortem report is proved and marked as Ex. Ka.2. He further stated that injuries found on the person may be sufficient for his death on 4/5.8.1999 at 5.00 a.m. During cross examination he stated that all the injuries may be caused by some sharp edged object like Farsa, Sword but could not be caused by axe.

10. P.W.3 Ranveer Singh is another brother of the deceased. He in his

examination in Chief has stated that the deceased Nem Singh was his elder brother and accused Rajveer Singh is his another brother and the other accused is Rakesh. The incident had taken place about five and half years back. At the relevant time he was sleeping on his roof whereas the deceased was sleeping on the Chabutara of his house. He heard noise at about 12.30 a.m. and had seen Rajveer Singh bathing in the bathroom and washing his clothes. On being questioned he stated that on account of release of buffalo he had gone to tie it. His clothes got dirty on being hit by its tail as such he is taking bath, moreover in the early morning he has to go to his shop, thereafter the witness lied down on his cot. In the morning at 5.00 a.m. his sister-in-law Meera Devi cried loudly that Surendra "your father has been killed by some one". He was attracted by the loud voice and reached there and found his brother Nem Singh lying dead having injury marks on his neck. When he reached there, Rajveer Singh was not present though number of villagers had reached there. At the relevant time Rajveer Singh was giving fodder to his cattle. He then called Rajveer Singh who stated that "as one sow so shall he reap, he should have died earlier". His nephew then went to lodge the report. Rajveer Singh used to quarrel with his brother Nem Singh in respect of a plot situated at Agra which was purchased by deceased Nem Singh in the name of his mother. After about 11-12 days, the police again reached at his village and recorded his statement and arrested Rakesh and thereafter police brought Rajveer Singh after arresting him. Rajveer Singh gave certain clothes from a box kept in his house. Its recovery memo was prepared by the police which has been proved and marked as Ex. Ka. 2. Thereafter the police came out and from the roof of the Chappar, recovered an axe and also prepared its recovery memo which has been proved and marked as Ex. Ka.3. Axe has been marked as Material Ex. Ka.1 and shirt as Material Ex. Ka.2. He further stated that Nem Singh was having 42-43 Bighas of land in the village having tube-well and he used to manage the entire agricultural activities. He further denied the suggestion that he and his brother often used to stay in the room built at the tube-well and rarely used to come home. He further stated that he did not disclose to the investigating officer that when the villagers gathered at the place of incident, Rajveer Singh was giving fodder to his cattle. Since they were brothers, as such did not disclose the said fact and for the first time is stating it in the court. Rajveer Singh stayed at the place of incident for about two hours when he stated that "as one sow so shall he reap, that he should have died earlier", then too he did not suspect him nor had disclosed this fact to the investigating officer. Rajveer Singh was present at the time of inquest and also participated in the last rites of the deceased and though he suspected Rajveer Singh to be involved in the incident of murder of Nem Singh, yet he did not disclose this fact to the investigating officer as it was a family matter. He did not met investigating officer for 10-12 days and met police only when Rajveer and Rakesh were arrested. He further denied the suggestion that after 10-12 days of the incident, Surendra and Giriraj had got Rajveer Singh arrested. He further denied the suggestion that relation between Rajveer and Nem Singh deceased were cordial and there was no dispute between them. He further denied the suggestion that after the death of Nem Singh there has been dispute between him, his mother and Rajveer Singh over partition of land. He further denied the suggestion that he and Surendra wanted to usurp the entire immoveable property which was objected to by Rajveer Singh, then they in collusion of

the police, got him falsely implicated and arrested. He further stated that it is correct to say that after inquest Rajveer Singh was not seen in the village and only at the time of last rites, was seen. He further denied the suggestion that his brother Nem Singh was Kanungo and on account of making illegal demaracations large number of persons started bearing enmity with him, on account of which he has been done to death. He further denied the suggestion that on account of dispute over partition of property with Surendra son of Nem Singh, he has been falsely implicated.

11. P.W.4 is the Head Moharrir who on the basis of written report had drawn the F.I.R. and also prepared corresponding G.D. entry which has been marked as Ex. Ka.4 and Ka. 5 respectively. However, he has not been cross examined.

12. P.W.5 Meera Devi Alias Amiro Devi is wife of the deceased. She in her statement has stated that Rajveer Singh was her Dewar and co-accused Rakesh was the servant of Rajveer Singh. About six years back on the fateful night her husband returned back at his house at about 8.30 p.m. and after taking his meals slept on the Chabutara whereas she was sleeping in her room. At about 5.00 a.m. when she woke up, she saw her husband lying dead. On her cry his son Surendra and other family members reached there, however, Rajveer Singh did not come and continued to give fodder to his cattles. During cross examination she stated that seeing her husband she was wailing and did not go any where. Prior to the incident, partition has been carried out between them and Rajveer. She further stated that while she was wailing Rajveer did not come there. Rajveer used to quarrel with her husband as such she suspected him. It is wrong to state that there was love and affection between her husband and other brothers rather there was dispute between them. She further denied the suggestion that after the death of her husband she tried to usurp the entire property in the village and in the city Agra on which Rajveer Singh objected and stated that only after Terewahi ceremony, partition will ensue. Treating him to be a hurdle, he has been falsely implicated. It is wrong to state that on the instigation of her son, she has been falsely deposing.

13. P.W. 6, Satyaveer Singh is investigating officer who has conducted the investigation and prepared relevant memos of recoveries including pillow, shirt, and Pyjama, belonging to the accused Rajveer and after concluding the investigation submitted the charge sheet. He has proved various documents including recoveries. He had taken the sample of hair strands but did not sent it for matching with that of the accused. On 7.8.1999, wife of the deceased, had suspected Rajveer Singh to be involved in the said incident on account of family dispute, however, on 5.8.1999 Surendra had not suspected any one to be involved in the incident. It is true that at the time of inquest the accused was present and is a witness of inquest. On 16.8.1999, accused Rajveer Singh was arrested and crime weapon was recovered from point 'B' near pond which is an open place accessible to all and sundry. It is wrong to state that who actually committed the murder is not known and there was no evidence against Rajveer, as such he colluded with Surendra and falsely implicated Rajveer, so that he may not be able to demand his share in the property.

14. After concluding the evidence, the statement of accused was recorded under section 313 Cr.P.C. and the trial court held that though the case is based on circumstantial evidence and there is no eye

witness account of the incident but prosecution has successfully proved its case against the appellant, by relying upon the recovery of crime weapon axe, under section 27 of the Evidence Act coupled with the conduct of the accused in getting recovered his Pyjama and shirt which he was allegedly wearing at the time of incident from his house kept in a box and held that the chain of circumstances stood complete, indicating beyond reasonable doubt that it was the accused-appellant and none other, who committed the murder of his brother Nem Singh. It was further held that the explanation tendered by the appellant u/s 313 Cr.P.C., was found inadequate and as such he is liable to be convicted. Being aggrieved and dissatisfied by the said Judgment and order the instant criminal appeal has been filed.

15. Learned counsel for the appellant has submitted that the instant case is based on circumstantial evidence and the prosecution has failed to prove any incriminating circumstances so as to prove the guilt of the appellant. However, the Trial Court without appreciating the evidence and material on record has illegally recorded the finding of conviction against the appellant as such the impugned order passed by the trial court is wholly illegal and liable to be set-aside.

16. Learned counsel for the appellant has next submitted that the F.I.R. in the instant case was lodged against unknown person, however, subsequently after two days of the incident, only on the basis of suspicion the name of the appellant has been roped in as an accused.

17. Learned counsel for the appellant has next submitted that from the perusal of the evidence and material on record, it is evident that the appellant was the scribe of the F.I.R. and all throughout remained present in the house and is also a witness of the inquest report. However, subsequently without there being any cogent evidence or material he has been nominated as an accused in the instant case on the basis of suspicion.

18. Learned counsel for the appellant has next submitted that the prosecution has miserably failed to prove the motive against the appellant yet the trial court by relying upon an imaginative and after thought motive, that there was dispute between the brothers over partition of property and sharing of sale proceeds of the house which was in the name of his mother, had illegally recorded the finding of conviction against the appellant which is bad in law and is liable to be set-aside.

19. Learned counsel for the appellant has next submitted that even the recovery of axe and his Pyjama and shirt which he was allegedly wearing at the time of incident at the instance of the accused appellant has not been put to him while recording his statement under section 313 Cr.P.C., in the absence of which the finding of conviction recorded by the trial court against the appellant is wholly illegal and is liable to be set-aside.

20. Learned counsel for the appellant has next submitted that the prosecution has miserably failed to prove the chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused as such the finding of conviction recorded by the trial court is wholly illegal and is liable to be set-aside.

21. Learned counsel for the appellant has next submitted that merely on the basis of suspicion, howsoever strong it may be, the accused-appellant can not be convicted.

22. Learned counsel for the appellant has next submitted that the alleged recovery of axe and clothes of the accused from his house kept in a box have not been proved as required under section 27 of the Indian Evidence Act as well as cannot be said to be relevant under sec. 8 of the evidence Act, as held by the trial court on the basis of which he has been convicted. The impugned Judgment and order is therefore wholly illegal and liable to be set aside.

23. Learned counsel for the appellant has next submitted that even disclosure statement on the basis of which the recovery is alleged to have been made has not been proved by the Investigating Officer as per the settled principle of law and in the absence of which the evidence of recovery is inadmissible in law. However, the trial court by placing implicit reliance on the said recovery has illegally recorded the finding of conviction against the appellant which is bad in law and is liable to be set-aside.

24. In order to buttress his argument, learned counsel for the appellant has placed implicit reliance upon the case reported in [1966]1 SCR 134, Aghnoo Nagesia Vs. State of Bihar and has submitted that the recovery alleged to be made on the pointing out of the appellant is inadmissible and as such can not be made ground for convicting the appellant.

25. Per contra, learned A.G.A. has submitted that the motive against the appellant has been cogently and convincingly proved by the prosecution and as such the finding of conviction recorded by the trial court is just, proper and legal and do not call for any interference by this Court.

26. Learned A.G.A has further submitted that though the recovery of axe alleged to be made on the disclosure statement of the appellant may not be said to be proved under section 27 of the Evidence Act, yet while discarding the evidence in the form of memorandum of discovery his conduct in getting the clothes recovered from his house kept in a box would be an admissible link in the chain of circumstance and would be relevant u/s 8 of the Evidence Act, on the basis of which the appellant complicity in the instant case stands proved as rightly held by the trial court in recording the finding of conviction against the appellant which in the facts and circumstance of the case is just proper and legal and do not call for any interference.

27. Learned A.G.A. has further submitted that in the instant case, the appellant absconded from the scene of incident and as such is abscondance is also indicative of his involvement in the instant case and points towards guilt of the accused.

28. Having considered the rival submissions made by learned counsel for parties and appreciating the evidence and material on record, it is evident that the instant case is based on circumstantial evidence and a blind murder committed during night hours and none of three witnesses P.W.1, Surendra, P.W.3, Ranveer Singh and P.W.5, Meera Devi who is the son, brother and wife of the deceased have witnessed the incident at all and only in the morning when the dead body of the victim was found the F.I.R. has been lodged against unknown persons. However, subsequently after two days of the incident, the appellant alongwith one Rakesh has been implicated as an accused merely on the basis of suspicion.

29. It is germane to point out here that the appellant was throughout present in the

house when the deceased wife cried seeing the dead body of her husband. Furthermore, the appellant is the scribe of the F.I.R. which has been lodged by P.W.1 and remained present at the time of inquest and is also a witness of inquest and also participated in the last rites as pointed out by P.W.2. However, subsequently, on the basis of suspicion he has been made an accused stating that he used to quarrel with his brother over partition of property and for not sharing the sale proceeds of the plot which was in the name of his mother. It is further germane to point out here that an imaginative motive in the present case has subsequently been tried to be cooked up in the statement of P.W.1 wherein for the first time before the court he has stated that his father had purchased a plot in the name of his grand mother and had sold it for a sum of Rs. 12.00 lacs., 2-3 years prior to the incident. Accused Rajveer Singh used to quarrel with his father over giving of his share in the sale amount, which was the bone of contention between his father and accused Rajveer Singh, consequent to which he used to bear enmity with him. However, in his cross examination it has been categorically stated by P.W. 1, that the said factum was not disclosed to the investigating officer while recording his statement u/s 161 Cr.P.C., and has been stated for the first time in the court which clearly shows that in respect of motive there is clear contradiction in the statement of the witnesses which goes to the root of the case. Thus, from the said circumstances, it is evident in the instant case that motive has not at all been cogently and convincingly proved. It is well settled principle of law that in a case of circumstantial evidence motive plays very pivotal role and non proving the factum of motive creates serious dent in the prosecution story as in the present case, and make the entire prosecution story doubtful.

30. Furthermore it is evident from the material on record, that the instant case is based on circumstantial evidence and the prosecution has miserably failed to prove the chain of evidence so far as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Moreover, the law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, wherein this Court held thus:

"152. Before discussing the cases relied upon by the

High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is ***Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]***. This case has been uniformly followed and applied by this Court in a large number of later decisions up to date, for instance, the cases of ***Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198: 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625: AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]*** :

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the

hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the

following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783], where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence." It is also settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

Learned Amicus-curiae further relied upon a case reported in ***(2010) 8 SCC 593 G. Parshwanath Vs. State of Karnataka***, wherein it has been held as under :

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not

essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

31. Now if we analyse the evidence in the instant case on the basis of principle of law as discussed above, we find that there is absolutely no circumstance proved by the prosecution so as to establish the guilt of the appellant. It is further evident from the evidence that only on the basis of suspicion an attempt has been made to falsely implicate the accused in the instant case. It is well settled principle of law that suspicion, howsoever strong it may be, can not take place of prove as in the present case.

32. Now coming to the circumstance regarding recovery of blood stained Axe, and blood stained clothes alleged to be made on the basis of disclosure statement made by the accused. It is germane to point out here that the accused Rajveer Singh was arrested by the police on 16.8.1999 and his disclosure statement is to have been recorded and thereafter on its basis clothes having blood stained are said to have been recovered from a box kept inside the house. Thereafter an axe is said to have been recovered by the police from the chappar. So far as the recovery of an axe is concerned, it is evident from the evidence adduced that the same has been recovered by the police itself from chappar of the appellant and not at his pointing out. It is further germane to point out here that even in the statement of the I.O. it is pointed out that the said axe has been recovered from a open place accessible to all and sundry which further makes the recovery doubtful. Recently, Hon'ble Apex Court in a decision in Criminal Appeal No (S). 985 of 2010, ***Babu Sahebagouda Rudragoudar and others Vs. State of Karnataka*** had dealt the requirement under law so as to prove a disclosure statement under section 27 of the Indian Evidence Act.

33. The statement of an accused recorded by a police officer under Section 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the Investigating Officer during interrogation which has been taken down in

writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of ***State of Uttar Pradesh v. Deoman Upadhyaya.***

34. Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of incriminating fact(s).

35. As per Section 60 of the Evidence Act, oral evidence in all cases must be direct. The section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section. In case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same.

36. The manner of proving the disclosure statement under Section 27 of the Evidence Act has been the subject matter of consideration by this Court in various judgments, some of which are being referred to below.

37. In the case of ***Mohd. Abdul Hafeez v. State of Andhra Pradesh***, it was held by this Court as follows:-

"5. ....If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person."

38. Further, in the case of ***Subramanya v. State of Karnataka***, it was held as under: -

"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

"27. How much of information received from accused

may be proved. —

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station

itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter." (emphasis supplied)

39. Similar view was taken by this Court in the case of ***Ramanand @ Nandlal Bharti v. State of Uttar Pradesh***, wherein this Court held that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot amount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement.

40. Now applying the said principle in the instant case, we find that none of the aforesaid procedure laid down by Hon'ble Apex Court for proving the disclosure statement has been followed. There is no description at all of the conversation which had transpired between Investigating Officer and the accused which was recorded in the disclosure statements. Thus, these disclosure statements can not be read in evidence and the recoveries made in furtherance thereof are non est in the eyes of law. Thus, finding of trial court while recording the conviction against the appellant in respect of recovery to be proved, is against the settled proposition of law as laid down by Hon'ble Apex Court and therefore it can not be sustained and is liable to discarded.

41. Now we may discuss the submission of learned A.G.A., regarding the manner in which recovery of blood stained Pyjama and blood stained shirt is said to have been made at the instance of the accused from his house kept in a box which may be relevant circumstance under section 8 of the Evidence Act as held by Hon'ble Apex Court in a recent decision in ***Criminal Appeal No. 739 of 2017, Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharasthra,*** wherein it has been held that even while discarding the evidence in the form of discovery panchnama the conduct would be relevant under section 8 of the Act.

The evidence of discovery would be admissble as conduct under section 8 of the Act quite apart from the admissibility of the disclosure statement under section 27, as this Court observed in AN. Venkatesh V. State of Karnataka, (2005) 7 SCC 714,:

"By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand Vs. State (Delhi Admn.) [(1979) 3 SC 90]. Even if we hold that the disclosure statement made by the accused appellants (Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8."

42. In the ***State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600***, the two provisions i.e. Section 8 and Section 27 of the Act were elucidated in detail with reference to the case law on the subject and apropos to Section 8 of the Act, wherein it was held:

"Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either previous or subsequent conduct. There are two Explanations to the Section, which explains the ambit of the word 'conduct'. They are:

Explanation 1 : The word 'conduct' in this Section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other Section of this Act.

Explanation 2 : When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant. The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. The Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute 'conduct' unless those statements "accompany and explain acts other than statements". Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention. (f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence --the police are coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant. We have already noticed the distinction highlighted in Prakash Chand's case (supra) between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr.P.C. The evidence of the circumstance, simpliciter, that the accused

pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as 'conduct' under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand's case. In Om Prakash case (supra) this Court held: Even apart from the admissibility of the information under Section, the evidence of the Investigating Officer and the Panchas that the accused had taken them to PW11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW11 himself would be admissible under Section 8 of the Evidence Act as 'conduct' of the accused".

43. However, it would be relevant to note that the Hon'ble Apex Court in the said Judgment has further held that in the aforesaid context, we would like to sound a note of caution. Although the conduct of an accused may be a relevant fact under Section 8 of the Act, yet the same, by itself, cannot be a ground to convict him or hold him guilty and that too, for a serious offence like murder. Like any other piece of evidence, the conduct of an accused is also one of the circumstances which the court may take into consideration along with the other evidence on record, direct or indirect. What we are trying to convey is that the conduct of the accused alone, though may be relevant under Section 8 of the Act, cannot form the basis of conviction.

44. Even the case cited by learned counsel for the appellant reported in [1966] 1 SCR 134 lends support to his case and makes the recoveries liable to be discarded. It is further germane to point out here that the recovers said to be made at the pointing out of the appellant has not been put at all to the accused in his statement under section 313 Cr.P.C. which further seriously dents the prosecution story and makes the appellant liable to be acquitted. It is well settled principle of law that all incriminating circumstances against the appellant should necessarily be put to the accused and if any circumstance on the basis of which finding of conviction is said to be recorded is not put to the accused to offer his explanation then the said circumstance would create serious dent in the prosecution story and would entitle the accused to be acquitted as in the instant case.

45. It is further germane to point out here that the abscondence of the accused at the relevant point of time from the place of incident otherwise would also not be a material ground to hold the conviction of the appellant. The Hon'ble Apex Court in several of its decisions has held that "Mere abscondence by itself does not necessarily lead to a firm conclusion of guilty mind. An innocent man may also abscond in order to evade arrest, as in the light of prevailing situation, such an action may be part of natural conduct of accused, as held by the Hon'ble Apex Court in its decision reported in ***(2013) 12 SCC 406 Sujit Biswas Vs. State of Assam.***

Thus on the basis of the aforesaid facts and surrounding circumstances, discussed above we are of the opinion that only on the basis of abscondence of the accused the appellant cannot be held to be guilty in the instant case as such in the light of the settled proposition of law laid above the said argument of the learned AGA does not hold much significance and is liable to be repelled.

46. Now if we recapitulate the entire facts and circumstances of the case in the

light of the above principle of law in the instant case, we find that the evidence of discovery may be admissible as conduct under section 8 of the Act as held by the trial court but at the same time it has been held by Hon'ble Apex Court, sounding a note of caution, wherein it has been held that the conduct of an accused may be relevant fact under section 8 of the Act, yet the same, by itself, cannot be a ground to convict him or hold guilty and that too, for a serious offence like murder. Thus, in the backdrop of the circumstances even considering section 8 of the Evidence Act. Conviction of the appellant under section 302 I.P.C., can not be sustained in the eye of law and is liable to be set-aside.

47. Thus, from the entire discussions, we find that prosecution has miserably failed to prove its case against the appellant and the evidence adduced is in fact in admissible as discussed above. Even from the entire evidence it can not be said that in all human probability act must have been done by the accused particularly when there were two other male members in the family present in the house at the time of incident and the instant case, being the case of a blind murder.

48. Thus, in view of the foregoing discussions, we are of the opinion that the prosecution has miserably failed to prove its case against the appellant and he is entitled for benefit of doubt. The finding of conviction recorded by trial court is not just, proper and legal and is liable to be set-aside and the appellant is acquitted of the charges framed against him by allowing the present appeal. He is on bail. His bail bonds are cancelled and sureties are discharged, subject compliance of provision u/s 437 A Cr.P.C, within 15 days from the date of the Judgment.

49. This criminal appeal is accordingly **allowed**.

(2024) 5 ILRA 1403
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 3195 of 2024

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

Counsel for the Petitioner:
Ritesh Srivastava

Counsel for the Respondents:
G.A.

Criminal Law- The Code of Criminal Procedure, 1973 – Sections 154(3), 156(3), 190 & 200 – Information to the Police and their powers to Investigate - Jurisdiction – Constitution of India, 1950 – Article 226 – Registration of FIR - Police are obligated to lodge an F.I.R. if the complaint meets the requirments of cognizable offence, and if the police fail in their duty, the aggrieved person can approach the Court of Magistrate for redressal of their grievances - Aggrieved citizen with clean hands must have free access to invoke the power under Section 156(3) Cr.P.C. which warrants the application of judicial mind - Lodging a complaint with the police regarding the commission of a cognizable offence does not entitle the complainant to invoke writ jurisdiction to seek a writ of mandamus directing the police to register an FIR - Especially true in cases where there are allegations and counter-allegations between two parties involved in the dispute. (Para- 11, 14, 22,)

Writ Petition is dismissed. (E-13)

Held: Advocates are resorting to unethical practices by invoking the writ jurisdiction under the pretext of fundamental rights infringement, while it appears to be an attempt to settle a personal vendetta with the police. Petitioner is currently facing four serious criminal cases in the same police station. The proceedings initiated by the petitioner are an abuse of the process of law, and any indulgence by this Court would have an adverse effect on the administration of justice and detrimentally impact the morale of the police, an institution tasked with upholding law and order in civil society. Anyone who has been graced with the owner of wearing of robes is the officer of the Court, and his prime duty is to assist the Court in the administration of justice. This is a novel profession not only because he enjoys an aristocratic position in society but also obligates him to be worthy of the community's confidence in him as a vehicle of achieving justice. (Para - 27, 28, 31,)

List of Cases cited:

1. Sindhu Janak Nagargoje Vs The St. of Mah. & ors. (Special Leave to Appeal (Criminal) No.5883 of 2020)

2. Lalita Kumari Vs St. of U. P. & ors., (2014) 2 SCC 1

3. Maksud Saiyed Vs St. of Guj. & ors. , (2008) 5 SCC 668

4. Sakiri Vasu Vs St. of U.P. & ors. , (2008) 2 SCC 409

5. Anil Kumar & ors. Vs M.K. Aiyappa & anr., (2013) 10 SCC 705

6. Ramdev Food Products Pvt. Ltd. Vs St. of Gujarat , (2015) 6 SCC 439

7. Suresh Kankra Vs St. of U.P. , (2022) SCC OnLine SC 1947

8. Waseem Haider Vs St. of U.P. through Principal Secretary Home Lko & Ors. , (2020) SCC OnLine All 1866

9. M. Subramaniam & anr. Vs S. Janaki & Anr. , (2020) 16 SCC 728

10. Sudhir Bhaskarrao Tambe Vs Hemant Yashwant Dhage & Ors, (2016) 6 SCC 277

11. Sweta Bhadoria Vs St. of M.P, (2017) (I) MPJR 247

12. Priyanka Srivastava & anr. Vs St. of U.P. & Ors, (2015) 6 SCC 287

13. Bar Council of Mah. Vs M.V. Dabolkar, AIR 1976 SC 242

14. Whirlpool Corporation Vs Registrar of Trade Marks, (1998) 8 S.C.C. 1

15. Baker Oils Tools (India) Pvt. Ltd. Vs Baker Hughes Ltd. & ors. (R.F.A. No.583/2004)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. The petitioner1 has approached this Court through the instant writ petition to issue a writ, order or direction in the nature of mandamus directing the Principal Secretary, Department of Home, Lucknow, U.P., to take stringent action against (i) the Commissioner of Police, Prayagraj; (ii) Deputy Commissioner of Police, Prayagraj; (iii) Assistant Commissioner of Police, Colonelganj, Prayagraj; (iv) Station House Officer, P.S. Colonelganj, Prayagraj; (v) S.I. Sandeep Yadav posted at P.S. Colonelganj, Prayagraj; (vi) PRO Deputy Commissioner of Police, Prayagraj; and further sought mandamus to take action on the complaint dated 26.2.2024.

2. On examination of the complaint, it reveals that the petitioner has made a complaint on 26.2.2024 at 04:00 p.m. at P.S. Colonelganj, Prayagraj with respect to the allegations inter-alia stating that the petitioner's husband was at his residence when a dispute arose between petitioner's husband and his neighbours, someone dialled 112, the police reached at the place of incident, slapped and abused the

petitioner's husband and forcibly took him to the police station at Colonelganj. The petitioner informed her husband's friends to reach the police station at the earliest, who all are practising Advocate of this High Court. The petitioner's husband was brutally assaulted and kept in the police lock-up, where paper weight and locks were thrown at him with intention to kill, but somehow he managed to save his life. The incident was witnessed by petitioner's husband's friends, namely, Shri Tejbhan Singh, Shri Acharya Tripathi and Shri Harish Srivastava. The petitioner reported the incident by way of a written complaint to police to register an F.I.R. against the police officers, and the PRO of Commissioner of Police was also informed about the matter and the issue was also brought into the knowledge of the higher officers, but despite that no heed was paid to her grievances.

3. Shri Ashish Kumar Mishra, Treasurer of the High Court Bar Association, also met with the PRO of Commissioner of Police Prayagraj and apprised him about the incident and requested action against the errant police officers. A communication dated 26.2.2024 in respect of the Advocates' grievances at 09:00 p.m. was also allegedly communicated to the office of the Hon'ble Chief Justice of this Court to save the Advocate's life.

4. Aggrieved by the non-registration of F.I.R. against the police officers, the petitioner approached this Court under writ jurisdiction and thus, Shri I.K. Chaturvedi, learned Senior Counsel for the petitioner argued that (i) the contents of the complaint dated 26.2.2024 is forming part of the cognizable offence, therefore the police are duty bound to register an F.I.R., (ii) there are serious allegations of forceful abduction in a police van, (iii) the petitioner's husband was brutally beaten up in the police lock-up and ill-behaved by the police officers at the police station, and, therefore, police is duty bound to register the first information report and in support of arguments he has relied upon ***Sindhu Janak Nagargoje v. The State of Maharashtra and others***[2], and celebrated judgment of ***Lalita Kumari v. State of Uttar Pradesh and others***[3].

5. On the other hand, Shri P.C. Srivastava, learned Additional Advocate General, assisted by Shri G.P. Singh learned A.G.A. submits that there is no iota of truth in the contents of the complaint dated 26.2.2024. The complaint is deceptive, artificial, motivated and contrived for the purpose and object to prima-facie ensure that the ingredients of any cognizable offence are satisfied on plane reading of the contents of complaint. The writ petition is not maintainable, as the petitioner had an equally efficacious remedy to approach the Magistrate concerned under Chapter XII and XV of the Code of Criminal Procedure, 1973. The writ petition is also liable to be dismissed at this stage because of the non-joinder of the necessary parties. Initially the petitioner's husband tried to encroach upon the public land for their private use in the vicinity of which there exists an ancient Kali Mata Temple, in which all the neighbours gather for the religious congregations. This led to have an altercation between the petitioner's husband on one side and a group of neighbours comprising advocates and public spirited persons on the other side. As there is one advocate on one side and several advocates on other side, the issue got boiled and the matter was taken to the police station. The petitioner's husband was heavily drunk and was abusing in filthy language and ill-behaving with everyone present over there on the spot. The police

was called by one of the aggrieved lawyer's family and the petitioner's husband was taken to the police station respectfully and dignity of an individual was very well taken care by the local police. As the campaigning for the High Court Bar Association was on high spirit, therefore, a group of advocates reached at the spot and thereafter gathered at the police station, from both the sides. Sensing that there could be a law and order problem, the additional police force was called from the nearby police station/district over through ROIP (Radio Over Internet Protocol System). He prays for dismissal of the petition with costs being frivolous and devoid of merits.

6. In support of his submission, learned A.A.G. contends that there is no mechanism before this Court under writ jurisdiction to verify the truth and veracity of the allegations made in the complaint. This is particularly significant when both parties' claims and counter-claims are supported by respective affidavits and CCTV footage. It is emphasized that within the scope of criminal writ jurisdiction, the Court is not empowered to assess the veracity of allegations or determine the credibility of evidence.

7. Shri P.C. Srivastava has relied upon **Maksud Saiyed v. State of Gujarat and others[4], Sakiri Vasu v. State of U.P. and others[5], Anil Kumar and others v. M.K. Aiyappa and another[6], Ramdev Food Products Private Limited v. State of Gujarat[7], Suresh Kankra v. State of U.P.[8], Waseem Haider v. State of U.P. through Principal Secretary Home Lko & Ors.[9], M. Subramaniam & Anr. v. S. Janaki & Anr.[10], Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage & Ors[11], Sweta Bhadoria v. State of M.P.[12].**

8. On perusal of the record, it's transpired that the police were called upon to file counter affidavit twice; the first counter affidavit dated 4.3.2024 was filed by Deputy Commissioner of Police, Prayagraj Commissionerate and the second affidavit of compliance dated 4.4.2024 was filed by S.H.O. P.S. Colonelganj, District Prayagraj. On perusal of the both the affidavits it's revealed that; (i) on the complaint of Advocate Alok Srivastava, the next door neighbour of the petitioner's husband, SHO Colonelganj informed the Chowki-in-charge, Mumfordganj at 13:42 to reach at the spot, and maintained peace at the place of incident, (ii) the SHO and the Chowki-in-charge immediately reached at the spot and found that Advocate Alok Srivastava, Advocated Arun Sharma, Pradeep Kumar Srivastava, Anoop Srivastava, Pranav Tripathi, Advocate Dilip Srivastava, Vimal Gupta, Vineet Srivastava, Prabal Pratap Srivastava, Atul Singh, and Aniruddh Maurya have complained that the petitioner's husband, Shri Amarjeet Singh, is forcibly occupying the land of the ancient Kali Mata Temple and when he was objected to stop encroachment on the public land, he under the influence of liquor hurled filthy language to the men, women and all neighbours gathered there at the time of incident and terrorized the neighbours by waving long stick in his hand, (iii) after assessing the overall situation, the local SHO informed the PRV and sought the additional force to control the situation, and law and order, (iv) despite repeated persuasion by the chowki incharge and the neighbours, the petitioner's husband was not ready to listen to anyone and was bent upon to assault the neighbours and police personnels, (v) to control the situation of unrest/law and order, ROIP (Radio Over Internet Protocol System) was activated by the police force around 14:10, the

petitioner's husband was brought in a respectful manner at the police station in PRV Vehicle 0084 and requested all the victims to reach at the police station, (vi) the Advocates from both the sides were also reached at the police station along with dozen of complaints against petitioner's husband, who were asked to sit properly and asked to explain their grievances so that everything could be settled amicably in a dignified manner, (vii) after a herculean task by the police officers with the aim to maintain harmony and brotherhood between the neighbours-particularly between two group of advocates- the petitioner's husband was cooled down and his custody was handed over to his friend Dinesh Pratap Singh by executing a Supurdaginama, which is annexed as Annexure-CA-2 along with the counter affidavit, (viii) again after few hours a group of advocates associated with the petitioner's husband reached at the police station and started ill-behaving with the police force, the SHO and ACP Colonelganj was abused by threatening them to dis-robe their uniform, (ix) the CCTV footage of police station is also attached with the counter affidavit filed by the police, (x) the incident was recorded in the GD, which is forming part of the counter affidavit as Annexure-CA-3, (xi) again on 28.3.2024 at around 11:30 a.m. the neighbours, who were aggrieved by the illegal encroachment of the public land and criminal act of the petitioner's husband, filed a written complaint to the ACP and apprised that the petitioner's husband is a man of suspicious character and is found involved in four criminal cases enumerated herein: (a) Case Crime No.1090 of 2004, under Sections 307, 286, 332, 353 I.P.C. and Section 7 of C.L.A. Act, registered at P.S. Colonelganj, District Prayagraj, (b) Case Crime No.1092 of 2004, under Sections 336, 332, 147, 148, 427 I.P.C. and Public Property Damages Act, registered at P.S. Colonelganj, District Prayagraj, (c) Case Crime No.1094 of 2004, under Sections 147, 148, 149, 307, 332, 353, 427, 442, 286, 332 I.P.C., registered at P.S. Colonelganj, District Prayagraj, (d) Case Crime No.2118 of 1998, under Sections 307, 504, 427 I.P.C., registered at P.S. Colonelganj, District Prayagraj, (xii) a copy of the District Crime Report Bureau (DCRB) report is also annexed along with the counter affidavit reflecting with above-stated cases.

9. Upon scrutiny of the counter affidavit submitted by the Deputy Commissioner of Police, it came to light that there were two complaints dated 26.2.2024 and 28.2.2024, signed by multiple individuals including Ms. Sandhya Srivastava, Ms. Stuti Srivastava, Ms. Reeta Srivastava, Mr. Manu Srivastava, Advocate Alok Srivastava, Advocate Arun Sharma, Pradeep Kumar Srivastava, Anoop Srivastava, Pranav Tripathi, Advocate Dilip Srivastava, Vimal Gupta, Vineet Srivastava, Prabal Pratap Srivastava, Atul Singh, and Aniruddh Maurya. Further examination revealed that on 26.2.2024, around 12:30 p.m., the petitioner's husband attempted to encroach upon the land belonging to the temple. Upon objection from neighbours, Shri Amarjit Singh, the petitioner's husband, in a heavily intoxicated state, verbally abused and behaved inappropriately with the women and neighbours. The neighbours promptly informed the police, leading to the petitioner's husband being taken to the police station. Subsequently, his friends, all of whom were advocates, further engaged in abusive, disrespectful, and threatening behaviour towards the police officers present at the station.

10. Advocate Arun Sharma, Advocate Alok Srivastava, Advocate Dilip Srivastava,

Prabal Pratap Srivastava, Aniruddh Maurya, Pradeep Srivastava, Pranav Tripathi, Anoop Srivastava, Atul Singh, Vineet Srivastava, and Vimal Gupta have filed respective affidavits duly notarized by notary public inter-alia stating in the line of contents of the above-stated complaint. The same are not repeated herein for the sake of brevity.

11. As the complaints from both groups of advocates, prima-facie, satisfy the basic requirements to attract the ingredients of cognizable offence, it would be judicious to have a bird's eye view of the judgments passed by the Supreme Court in this regard. Undoubtedly, the police are obligated to lodge an F.I.R. if the complaint meets the requirments of cognizable offence, and if the police fail in their duty to register an F.I.R., the aggrieved person reserves its right to approach the Court of Magistrate for redressal of their grievances.

12. The Constitution Bench in ***Lalita Kumari v. State of U.P. and others (supra)*** has outlined the law with regard to the registration of F.I.R. The relevant portion of the judgment is reiterated herein under:

"120. In view of the aforesaid discussion, we hold:

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate

reasons, six weeks' time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.13

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

13. The Supreme Court in ***Priyanka Srivastava & Anr. v. State of U.P. & Ors.***[14], further clarified certain aspects in relation to the registration of F.I.R. where, primarily, dispute is of a commercial nature or as if somebody is determined to settle the personal score by taking undue advantage of criminal courts and thus, observed:

"2. This Court has held in Sakiri Vasu v. State of U.P. [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440, that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440 : AIR 2008 SC 907] because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."

(Emphasis supplied)

14. A principled and really aggrieved citizen with clean hands must have free access to invoke the power under Section 156(3) Cr.P.C. which warrants the application of judicial mind. It protects the citizens. This provision serves to safeguard citizens' rights; however, when malicious litigations are pursued to harass fellow citizens, measures should be taken to thwart such abuse. The situation can be viewed from a different perspective.

15. When the complainants are lawyers, the pivotal role of a lawyer hinges upon their integrity and professional conduct. Justice Krishna Aiyar, speaking for the bench in ***Bar Council of Maharashtra v. M.V. Dabolkar***[15], highlighted that a lawyer's primary duty is to administer justice, which entails adhering meticulously to ethical

standards to maintain the community's trust in them as custodians of justice. "Law is not a commodity to be traded in briefs; it transcends no merchandise."

16. In ***Whirlpool Corporation v. Registrar of Trade Marks***[16], the Supreme Court was of the view that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court should not normally exercise its jurisdiction. But the alternative remedy as has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of the act is challenged.

17. The relevant paragraph of ***Sudhir Bhaskarrao Tambe case (supra)*** is extracted herein below in which the Hon'ble Supreme Court has relied and referred Sakiri Vasu v. State of U.P. (supra):

"2. This Court has held in Sakiri Vasu v. State of U.P. [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440, that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440 : AIR 2008 SC 907] because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

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(Emphasis supplied)

18. In ***M. Subramaniam & Anr. (supra)***, the Hon'ble Supreme Court was of the view that when any power is expressly granted by the statute, it is impliedly included in the ground, even without special mention, every power and every control of the denial of which would render the grant itself ineffective. Where an act confers jurisdiction, it impliedly also grants the power to do all such acts or employ such means as are essentially necessary for its execution.

19. A co-ordinate Bench of this Court in the ***Waseem Haider case (supra)*** has occasioned to deal with a similar case where the petitioner had approached the High Court seeking mandamus for registration of F.I.R. against the respondents. While declining the petitioner's prayer, the co-ordinate Bench of this Court was of the opinion that the Code of Criminal Procedure incorporates enough safeguards for victims and the accused. It lays down detailed procedures for conducting an investigation, filing of final report, taking cognizance, and conducting the trial. It provides enough safeguards against the illegal action of police. It is a self contained code and comprehensive on all aspects of criminal law. A complainant has statutorily engrafted remedies to ensure that his complaint is taken to its logical end. Thus, he must first exhaust said remedies and cannot invoke extraordinary writ remedy as a matter of course, even when a crime is not registered and there is no progress in the investigation.

20. A writ of mandamus seeking to compel the police to fulfil its statutory obligation under Section 154 of the Cr.P.C. may be refused to the complainant if they have not first pursued alternative remedies available under Section/s 154(3), 156(3), 190, and 200 of the Cr.P.C., unless the complainant falls within the four exceptions outlined in the Whirlpool Corporation (supra) case.

21. We respectfully say, the ***Lalita Kumari case (supra)*** does not pertain to the issue of entertainment of writ of mandamus for compelling the police to perform its statutory duty under Section 154 Cr.P.C. without availing alternative remedy under Sections 154(3), 156(3), 190 and 200 Cr.P.C. Moreover, it was not a case Under Article 226 of the Constitution, where alternative remedy has been exhausted by the complainant or the writ petition has been filed for the enforcement of any of the Fundamental Rights or; where there has been a violation of the principle of natural justice or; where the order or proceedings are whole without jurisdiction, or the vires of an Act is challenged.

22. Merely lodging a complaint with the police regarding the commission of a cognizable offence does not automatically entitle the complainant to invoke writ jurisdiction to seek a writ of mandamus directing the police to register an FIR. This is especially true in cases where there are allegations and counter-allegations between two parties involved in the dispute. If, subsequently, one party clandestinely seeks relief under writ jurisdiction to compel the registration of an FIR against the police, particularly targeting high-ranking officers in the district, with apparent ulterior motives driven by a history of serious cases registered against them, aimed at seeking retribution from the police, as evidenced by the circumstances of the present case.

23. The complainants, who have been aggrieved by the illegal actions of the petitioner's husband and have formally reported the incident to the police, their complaint being reported in the General Diary, have not been arrayed as respondents for reasons known only to the petitioner. The contents of the complaint appear patently false, and the initiation of criminal proceedings appears to be motivated by malice and ill-intent, with the aim of seeking revenge against the neighbours and settling personal scores with the police. This is evident from the complaints dated 26.02.2024 and 28.02.2024, as well as from video recordings captured by CCTV cameras installed at the police station.

Furthermore, the allegations made by the petitioner in the complaint dated 26.2.2024 are so outlandish and inherently improbable that no reasonable person could conclude that there is even a shred of truth to the claims therein.

24. Essentially, on one hand their is the petitioner's husband, who is an advocate, allegedly engaged in abusive and threatening behaviour towards the neighbours, including women, while apparently intoxicated, as evidenced by CCTV footage. This behaviour occurred in the context of an attempt to encroach upon public land. On the other hand, there are neighbours, including women and advocates, filed notarized affidavits on Rs.100 stamp paper, detailing their grievances. Both parties approached the police, who responded to a neighbours phone call by bringing the petitioner's husband to the police station and summoning additional forces to maintain to bring the law and order situation under control.

25. Against this backdrop, the petitioner filed a complaint dated 26.02.2024 at the police station, expressing dissatisfaction with the non-registration of an FIR against various officials, including the Commissioner of Police, District Prayagraj, the Deputy Commissioner of Police, the Assistant Commissioner of Police, the Station House Officer of P.S. Colonelganj, and S.I. Sandeep Yadav posted at Colonelganj, along with the Public Relations Officer of the Commissioner of Police, District Prayagraj. The petitioner has now filed a writ petition under Article 226 of the Constitution seeking a directive for the registration of an FIR. It is worth noting that the advocates who filed the complaints dated 26.02.2024 and 28.02.2024, namely Arun Sharma, Alok Srivastava, Dileep Srivastava, Prabal Pratap Srivastava, and Aniruddha Maurya, have not been arrayed as respondents in the instant writ petition. Additionally, it is surprising to note that no accusations have been levied against them throughout the entirety of the petition. Moreover, neither have the other group of advocates who lodged the complaints dated 26.02.2024 and 28.02.2024 approached this Court.

26. The principal issue before this Court is whether, in light of the provisions contained in Chapters XII and XV of the Code of Criminal Procedure, a writ of mandamus can be issued to the police authorities to register an F.I.R. on the basis of a complaint containing certain indictments against the police officer by ignoring disputed facts containing counter allegations of a serious nature.

27. It is an admitted fact that the petitioner’s husband is a practising Advocate of this Court and involved in the criminal history of four cases outlined herein: (a) Case Crime No.1090 of 2004, under Sections 307, 286, 332, 353 I.P.C. and Section 7 of C.L.A. Act, registered at P.S. Colonelganj, District Prayagraj, (b) Case Crime No.1092 of 2004, under Sections 336, 332, 147, 148, 427 I.P.C. and Public Property Damages Act, registered at P.S. Colonelganj, District Prayagraj, (c) Case Crime No.1094 of 2004, under Sections 147, 148, 149, 307, 332, 353, 427, 442, 286, 332 I.P.C., registered at P.S. Colonelganj, District Prayagraj, (d) Case Crime No.2118 of 1998, under Sections 307, 504, 427 I.P.C., registered at P.S. Colonelganj, District Prayagraj. The outcome of these cases remains uncertain at this juncture. However, it is regrettable that Advocates are resorting to unethical practices by invoking the writ

jurisdiction of this Court under the pretext of fundamental rights infringement, while in reality, it appears to be an attempt to settle a personal vendetta with the police. This is evident, particularly considering that the petitioner is currently facing four serious criminal cases in the same police station.

28. Based on the forgoing discussion and on thorough deliberations and examination of records containing complaints filed by both parties, affidavits filed by the advocates and other neighbours, who have called the police at the spot, scrutiny of CCTV footage, reasons for mobilization of police from the nearest police station to maintain law and order and non-joinder of necessary parties before this Court, we are of the view that this is not a fit case where indulgence of this Court is warranted. The proceedings initiated by the petitioner are an abuse of the process of law, and any indulgence by this Court would have an adverse effect on the administration of justice and detrimentally impact the morale of the police, an institution tasked with upholding law and order in civil society.

29. Further, we have no hesitation to record our finding that the petitioner has approached this Court under writ jurisdiction with an ulterior motive for wreaking vengeance on the police and with the view to spite them due to private personal grudge and does not call for the exercise of extraordinary powers of this Court to direct the Principal Secretary (Home) Uttar Pradesh to register F.I.R. against the respondents.

30. Parting with the facts of this case, there is another issue of vital importance; the complainant is the wife of an advocate on one side and the other side, a group of neighbours, including dozens of advocates. Initially, the dispute was between the two group of advocates majorly; the police reached at the spot on receipt of a phone call by one of the parties, and subsequently, the neighbours lodged a complaint against the assailant Advocate., surprisingly, the writ was filed only against police officers, and other neighbours, have not been arrayed as respondents in the instant writ petition, nor have any accusations been made against them in the entirety of the petition and in a dramatic twist to the scenario, everyone, including the aggrieved party, brandished their guns towards the police in a shocking turn of events, for reasons known only to the petitioner,.

31. Thus it is apt to quote, Kailash Gambhir J, speaking for the Bench in ***Baker Oils Tools (India) Pvt. Ltd. v. Baker Hughes Ltd. And others***,[17] that the Advocates Act, 1961 and the Bar Council of India Rules prescribe Rules for professional conduct and ethics for lawyers. It cannot be forgotten that anyone who has been graced with the owner of wearing of robes is the officer of the Court, and his prime duty is to assist the Court in the administration of justice. The Rules of Conduct, as per Bar Council of India Rules, may act as a guardian angel for ensuring the moral conduct of the lawyers, but the legacy of the traditions of the Bar cannot be bedaubled by a few for lucre of commercial gains. A lawyer cannot forget that this is a novel profession not only because he enjoys an aristocratic position in society but also because it obligates him to be worthy of the community's confidence in him as a vehicle of achieving justice. The rules of the conduct of this profession with its ever expending horizons are governed by the

Bar and by the cannons of conscience of the members of the calling of justice of being the Smaritance of the society,

32. It is seemingly interesting to emphasize the introductory part of ***Lawyers and Justice: An Ethical Study***[18] the book's central idea is that the moral activism as an appropriate role conception. It respects each lawyer's personal autonomy and enhances the public welfare. The relevant excerpts are produced hereinafter:

"The law, Holmes said, is no brooding omnipresence in the sky. But if that is true, it is because we encounter the legal system in the form of flesh-and-blood human beings: the police if we are unlucky, but for the (marginally) luckier majority, the lawyers. For practical purposes, the lawyers are the law.

This is why the professional ethics of lawyers matters to us. Since the law as it touches us cannot be different from what lawyers do, it will not be better than lawyers care to make it. The commonest and bitterest complaint against the legal profession is that lawyers do not give a damn about justice, or, when they do, it is despite their profession rather than because of it. This means that the law has to do with justice only accidentally.

The complaint is exaggerated and the chronicle of its splendid exceptions would have to be a long one. I have written this book because I believe that the complaint is nevertheless largely accurate. Lawyers, no matter how high-minded their private concerns and commitments, are professionally concerned with the interests of their clients, not the interests of justice. And taken as a totality, the activities of lawyers can scarcely rise higher in the pursuit of justice than the projects of their clients. Justice is left to the largesse of the Invisible Hand.

Though I take this complaint seriously, I am not interested in contributing to the cacophonous lawyer-bashing that is practically a national hobby. Quite the contrary, I am convinced that there is, in Louis Brandeis's words, "opportunity in the law"-indeed, "special opportunities for usefulness to your fellow-men"-precisely because lawyers are uniquely situated to bring the law down to earth and to make the law more just and the lawyer's clients more public spirited.

This is a grandiose ambition. But we all know lawyers, with humble practices as well as great ones, who fulfil it, and so it is scarcely an impossible dram. I shall be urging a professional ethic according to which lawyers should seize the opportunity in the law, and I shall defend it against a professional vision based only on client service and the bottom line. My task is philosophical: to examine, as carefully as I known how, the reasons that can be offered in justification of one or the other professional vision, to try them, as Kant put it, before "tribunal of reason" itself."

33. We have underscored the excerpts from the introductory part of the Luban's work primarily for two reasons: Firstly, the book delves into the ethics of the legal profession, rooted in the fundamental premise that our nation relies heavily on its lawyers, thus their ethical dilemmas often translate into social and public challenges. Secondly, echoing the sentiments of Benjamin N Cardozo J.19, "a lawyer's life is no life of cloistered ease to which you dedicate your powers. This is a life that touches your fellow men, of every angle of their being, a life that you must live in the crowd, and yet apart from it, man of the world and philosopher by turns."

34. The writ petition is accordingly ***dismissed.***

35. A copy of this judgement be transmitted to the Chairman, Bar Council of Uttar Pradesh and office bearers of the High Court Bar Association, Allahabad to sensitize the learned advocates to uphold the ethics of moral activism by employing ethical means, even in challenging circumstances- ***let's revatilized a tradition we are known for.***

(2024) 5 ILRA 1415
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.05.2024

BEFORE

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

Government Appeal No. 511 of 1987

State of U.P. ...Appellant
Versus
Hirdai Narain & Ors. ...Respondents

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:
Pawan Kumar Tiwari, Pranjal Krishna

Criminal Law-Indian Penal Code-1860-Sections 307 r/w 34-The Code of Criminal Procedure,1973-Section 385- Government Appeal against the judgment by which the accused-respondent has been acquitted by the trial court-In the absence of any evidence the respondents were ultimately acquitted- Entire record of Sessions Trial weeded out and its reconstruction is not possible-Appeal cannot be decided in the absence of trial court record- No paper relating to the case is available except the impugned judgement, therefore possibility of retrial at this stage, after a long gap of about 36 years since the occurrence of the incident appears to be bleak.

Appeal dismissed. (E-15)

List of Cases cited:

1. Shyam Deo Pandey Vs St. (1971) 1 SCC 855

2. Sita Ram & ors. Vs St. 1981 Cri. LJ 65

3. Pati Ram & anr. Vs St. of U.P. : 2010 Cri. LJ 2767

4. Chandrappa & ors. Vs St. of Karn., (2007) 4 SCC 415

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. We have heard Ms. Meera Tripathi, learned A.G.A. for the State-appellant and have also perused the records available before us.

2. By means of the present government appeal, the State seeks to assail the judgment and order dated 11.03.1987, passed by the learned IXth Additional Session Judge, Lucknow in Sessions Trial Nos.472 of 1984, arising out of Crime No.135 of 1984, under Section 307 I.P.C., Police Station, Alambagh, District Lucknow, whereby the learned trial Court has acquitted the accused-respondents, Phool Chand and Hirdaya Narain of the charges under Sections 307 read with 34 I.P.C.

3. From a perusal of record, it transpires that the instant government appeal was filed against two respondents, namely, Hirdaya Narain and Phool Chand. However, the respondent, Phool Chand has died during the pendency of this appeal. The instant appeal in respect of respondent, Phool Chand has already been abated vide order dated 22.08.2022. Therefore, the appeal survives only with regard to the respondent, Hirdaya Narain.

4. The prosecution case, in short conspectus, is that the informant, Sri Chinaji Lal Badhani, was going home from his office on 10.04.84 when he found 10 persons, who were ex-employees of Scooter India Limited, staging a Dharna at the gate of the factory after being dismissed. All the ex-employees, including the accused Phool Chand and Hirdai Narain, nourished grudge towards the informant. Upon seeing the informant alone, the accused persons, Phool Chand and Hirdai Narain, assaulted the informant with a Danda. The informant sustained injuries on his left hand, right leg and forehead.

5. On the basis of aforesaid written report, Ext. Ka-1, a first information report as Crime No.98 of 1980, under Sections 147, 148, 149 & 302 I.P.C. came to be registered against all the accused-respondents at Police Station, Jethwara, District Pratapgarh.

6. From a perusal of the impugned judgment and order dated 11.03.1987, it appears that various opportunities were afforded to the prosecution to adduce evidence in support of its case. However, as the prosecution failed to adduce any evidence in support of its case, consequently, the learned trial Court closed the opportunity of adducing evidence and proceeded to pass the impugned judgment and order dated 11.03.1987, whereby, the respondents have been acquitted of all the charges leveled against them as there was no evidence against them.

7. On the face of it, we do not find any perversity with the findings of the learned trial Court. After affording a reasonable opportunity to the prosecution to adduce evidence in support of its case, the trial court proceeded to decide Sessions Trial No.472 of 1984. In the absence of any evidence to support the prosecution's case, the respondents were ultimately acquitted vide judgment and order dated 11.03.1987.

8. We notice that while admitting the instant government appeal, the trial court record was summoned. In this regard, the then District and Sessions Judge, Lucknow submitted a report dated 18.07.2022. The report reveals that the entire papers in the form of Natthi-B of the record of Sessions Trial Nos. 472 of 1984 have been weeded out and only the original judgment was available on the record, which was sent to this Court by the then Sessions Judge, Lucknow.

9. Section 385 Cr.P.C. requires that before the appeal is heard and decided it is necessary to send for the records of the case. Being relevant Section 385 Cr.P.C. is quoted hereinbelow:-

385. Procedure for hearing appeals not dismissed summarily.—

(1) .....

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) .....

(Emphasis supplied by us)

10. Hon'ble the Supreme Court in the case of ***Shyam Deo Pandey Vs. State (1971) 1 SCC 855***, has held that perusal of the record is necessary for the appellate court to adjudicate upon the correctness or otherwise of the judgment against which the

appeal is preferred. The relevant paragraph of the judgment is quoted hereinbelow:-

"18.Coming to section 425, which has already been quoted above, it deals with powers of the appellate court in disposing of the appeal on merits. It is obligatory for the appellate court to send for the record of the case, if it is not already before the court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgement appealed against not only with reference to the judgement but also with reference to the records which will be the basis on which the judgement is founded. The correctness or otherwise of the findings recorded in the judgment on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for the appellate court."

(Emphasis supplied by us)

11. Thus, it is clear that for deciding a criminal appeal, it is incumbent upon the appellate court to call for the record of trial Court and to peruse the same at the time of disposal of such appeal. As such the appeal cannot be decided in the absence of trial court record.

12. According to the report of the then District and Sessions Judge, Lucknow dated 18.07.2022, as noted above, in the present matter, the trial Court record has already been weeded out and its reconstruction is not possible.

13. In a similar situation a division bench of this Court in the case of **Sita Ram and others Vs. State 1981 Cri. LJ 65** has held as under :-

"On a careful consideration of the relevant statutory provisions and the principles laid down in the cases cited before us, ***we are of the opinion that where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate court to affirm the conviction of the appeal since perusal of the record of the case is one of the essential elements of the hearing of the appeal.*** *The appellant has a right to try to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time gap between the date of the incident and date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the cases since witnesses normally would be available and it would not cause undue strain on the memory of the witnesses. Copies of the F.I.R., statements of the witnesses under Section 161 Cr.P.C., reports of medical examinations etc. would also be normally available if the time gap between the incident and the order of retrial is not unduly long. Where, however the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of the F.I.R. and statements of the witnesses under Section 161 Cr.P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witnesses are available, apart from the fact that heavy strain would be put on the memory of the* ***witnesses, it would not be possible to test their statements made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will***

be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardships to the accused and waste of time, money and energy of the State."

(Emphasis supplied by us)

14. In the case of **Pati Ram and another Vs. State of U.P. : 2010 Cri. LJ 2767**, in almost similar situation, this court held as under :-

" I have given my thoughtful consideration to the rival submissions made by parties' counsel. It is true that another Bench of this Court in case of Raj Narayan Pandey (supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgement only, but in my considered opinion, the appeal cannot be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal cannot be considered and decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgment, no order on merit can be passed in an appeal."

15. Thus, it is settled law that for deciding the appeal, perusal of the record of trial court is necessary and if the record is not available and reconstruction of record is also not possible, then following two courses are open to the appellate court :-

(i). To order for re trial after setting aside the conviction; or,

ii). If there is a long gap, then close the matter for want of record as the retrial will also not serve any purpose as the relevant documents are not available.

17. Adverting to the case in hand, we are constrained to observe that the circumstances, which led the trial Court to close the opportunity of prosecution to adduce the evidence leading to the acquittal of the respondents herein cannot be adjudicating by this Court for want of record of trial Court. Even reconstruction of record of Session Trial No.472 of 1984 is not possible, which is reflected from the report of then District Judge, Lucknow and the officer-in-charge of record room, District Court Lucknow.

18. This incident took place in the year 1984 and the respondents were acquitted thereafter on 11.03.1987. Thereafter this appeal was filed in the year 1987 and record was called for but record could not be made available to this Court. Efforts were made to get the record reconstructed, however, the same remained unsuccessful. About 36 years have passed since acquittal under challenge. It is a long gap. Since no paper relating to this case is available except the impugned judgement, therefore possibility of retrial at this stage, after a long gap of about 36 years since the occurrence of the incident appears to be bleak.

19. We have also noticed that as the record of the Sessions Trial No. 472 of 1984 was not made available to this Court despite the same having been requisitioned by this Court for the reason that the entire papers of Natthi-B have been weeded out. The report of the District and Sessions Judge, Lucknow as well as report of officer-in-charge record room, District Court, Lucknow make it clear that reconstruction of records of Sessions Trial No.472 of 1984 is also not possible.

Therefore, having regard to the judgment rendered by the Hon'ble Supreme Court in Shyam Deo Pandey (Supra) and also having regard to the judgments passed by this Court in Sita Ram (Supra) & Pati Ram (Supra) we are constrained to uphold the impugned judgment and order dated 11.03.1987 acquitting the respondents.

20. Hon'ble Supreme Court in the case of **Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415** has held that an appellate court must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. It also held that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

21. We are, thus, of the considered view that instant appeal deserves to be dismissed and the same is, accordingly, **dismissed**.

22. In compliance with the provision contained in Section 437-A Cr.P.C. the surviving respondent, Hirdaya Narain is directed to furnish personal bond and two sureties to the satisfaction of the court concerned within a period of six weeks from today.

23. Only original judgment and order dated 11.03.1987 was sent to this Court by the trial Court, which may be sent along with a copy of this judgment to the learned trial Court for information and necessary compliance.

(2024) 5 ILRA 1419
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Government Appeal No. 1549 of 1984

State of U.P. ...Appellant
Versus
Kailash Nath ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
V.S. Singh, Virendra Kumar Yadav

Criminal Law- The Code of Criminal Procedure, 1973 - Sections 161,313 & 378 - Appeal in case of acquittal, Indian Penal Code, 1860 - Section 302/34 - Murder - power and jurisdiction of High Court while interfering in an appeal against acquittal – Evidence Act, 1872 – Section 106 - Burden of proving fact especially within knowledge - no direct evidence in the case to prove the guilt of the accused person and case is based on circumstantial evidence - Prosecution to prove that the fact was specially in the knowledge of the accused- Acquittal can't be reversed by higher court until and unless it is found perverse, illegal or impossible - miscarriage of justice should be avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but it is based upon reason and common sense (Para- 20, 28, 29,)

Appeal is dismissed. (E-13)

Held: The acquittal of the accused/respondent cannot be reversed on the basis of the St.ment recorded u/s 313 Cr.P.C. The prosecution has miserably failed to prove chain of circumstances leading to the guilt of the accused/respondent. Even motive has not been conclusively proved by the prosecution rather a faint effort has been made by the prosecution to establish the motive, moreover, merely on the basis of motive, the accused cannot be held guilty for the offence. Impugned judgement and order passed by the trial court is just, proper and legal and do not call for any interference. Record and proceedings sent back to the Court below. (Para – 32, 33, 38, 39, 40)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Maharashtra

2. Ballu @ Balram @ Balmukund & anr. Vs The St. of M. P., (Criminal Appeal No. 1167 of 2018)

3. Hanumant Govind Nargundkar v. St. of M.P.

4. State Vs Mahender Singh Dahiya and Ramesh Harijan v. St. of U.P.

5. Sanatan Naskar Vs St. of W. B. reported in 2010 (8) SCC 249

6. Ashok Kumar Vs St. of Har.

7. Rajesh Prasad v. St. of Bihar & anr.

8. H.D. Sundara & ors. Vs St. of Karn.

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Arun Kumar Pandey, learned Additional Government Advocate for the appellant, Shri Virendra Kumar Yadav, learned counsel for the accused-respondent and perused the trial court record.

2. The instant Government Appeal has been preferred against the judgement and order dated 24.2.1984 passed by the Sessions Judge, Varanasi in S.T. No. 219 of 1983, State vs. Kailash Nath by which the accused respondent has been acquitted of charge under section 302/34 I.P.C.

3. Briefly stating, the prosecution case, as unravelled in the FIR is that one Geeta Devi was married to the accused-respondent about one and half years back. After the said marriage, it is alleged that on account of non-fulfillment of demand of dowry she has been done to death in the night between 4-5/7/1982 by setting her ablaze at her matrimonial house. In respect of the said incident, a written information marked as Ex. Ka-2 in respect of the death of Geeta Devi after receving burn injuries, was also given by Gopal Prasad, P.W.3 at police station Sarnath at about 5.00 a.m. in the morning. In the said report it was stated that at about 2.30 a.m. in the night when all the family members had gone to sleep after taking their meals, they suddenly saw smoke emerging out and smell of kerosene oil emitting. Hearing sighs of the deceased, his mother rushed there and opened the door and saw her daughter-in-law Geeta Devi lying in a burning state. On alarm being raised by her mother, they also rushed to the room of the deceased and saw that her Sister-in-law had died on account of burn injuries. On the basis of the said report, the police reached at the place of incident and conducted the inquest on the person of the deceased and after preparing relevant documents had sealed the dead body and despatched the same for autopsy.

4. Perusal of the record shows that an autopsy was conducted on the person of the deceased on 5.7.1982 at 4.00 p.m. wherein the doctor had noted number of injuries on her neck and burn injuries on her person which is evident from the postmortem report

which has been proved and marked as Ex. Ka.14. It is further stated that in the morning of 5th July 1982, Munni Lal PW-1, was also informed by one Swaminath Yadav resident of the same village that his daughter has been done to death by the accused-respondent Kailash Nath and his father Raghunath by setting her ablaze. On the basis of the said information, Munni Lal father of the deceased reached at the police station Sarnath and lodged a written report stating therein that in the night between 4-5/7/1982 at about 12.00 in the night his daughter has been done to death by setting her ablaze by his in-laws on account of a dispute over demand of dowry. On the basis of said written report an F.I.R. was lodged at P.S. Jaitpura on 6.7.1982 at 7:30 p.m., vide case crime no. 117 of 1982 under section 302, 201 I.P.C., at P.S Jaitpura, District Varanasi. Subsequently, all the relevant documents, namely, inquest report, postmortem examination report, F.I.R. lodged at the instance of P.W.1, Munni Lal and other connected papers were transmitted by Sarnath police to police station Jaitpura, Varanasi within the territorial jurisdiction of which the incident had taken place. Consequent thereto, the investigation of the said case was entrusted to P.W.7, Prem Chandra Pandey who visited the place of incident and prepared the site plan which has been proved and marked as Ex. Ka. 8. Thereafter the Investigating Officer recorded the statement of Munni Lal, Suraj Prasad, Kewala Devi and Swaminath Yadav. However, thereafter the investigation of the said case was taken over by Jagat Bahadur Singh PW-8, who after concluding the investigation submitted the charge sheet against the accused-respondent.

5. On the basis of the said charge sheet, learned magistrate had taken cognizance and since the case was exclusively triable by the court of sessions, committed it to the court of sessions where it was registered vide S.T. No. 219 of 1983, State Vs Kailash Nath. The trial court framed the charges against the accused-respondent on 3.1.1984 u/s 302 read with section 34 IPC, which was read out and explained to the accused-respondent who abjured the charges, pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove the guilt against the appellant examined PW1 Munni Lal, PW2 Mewa lal, and PW3 Gopal Prasad as witnesses of fact. PW4 Rajbali Yadav, PW5 Jai Nath Singh, PW6 Kali Charan Verma, PW7 Prem Chandra Pandey, PW8 Jagat Bahadur Singh, PW9 Chaturi Prasad and PW10 Bhonu were produced as formal witnesses. One Dr. K.C. Gupta was also examined as court witness.

7. Their testimony in brief is enumerated as under.

8. P.W.1, Munni Lal is the first informant of the instant case and father of the deceased, he in examination-in-chief has stated that the deceased, Geeta Devi was his daughter who was married to one Kailash Nath son of Raghunath. On 5.7.1982 at about 6.00 a.m. one Swami Nath Yadav informed him at his house that Kailash Nath and Raghunath has killed his daughter by setting her ablaze. Her marriage had taken place about one and half years back. At the time of the marriage whatever dowry was demanded was given to them. However, only a motor cycle and Goderaj Steel Almirah was not given. After receiving the said information from Swaminath, he rushed to the P.S. Sarnath and lodged the FIR which has been proved by him as Ex. Ka.1. Before lodging the report, he had reached at the place of incident and had seen his daughter

lying dead in a burnt condition, in a room on the first floor. During cross examination he denied the suggestion that Swaminath, had informed him about the death of his daughter, at the instance of accused-respondent, on the contrary, on his own, he had informed him about the death of his daughter.

9. P.W.2, Mewa Lal is another witness of the incident who in his examination in chief has stated that about one and half years back at about 10.00p.m. while he was having tea at a distance of 50 metres from the house of the accused-respondent. He heard shrieks coming out from the house of the accused-respondent, however, then corrected himself and denied having heard any shrieks coming out from the house of the accused-respondent rather saw number of persons standing outside the house of accused-respondent raising alarm. He went at the door step of the accused-respondent house but did not knock the door. After 2-3 days he came to know about the death of daughter-in-law of Raghunath(now dead). On the basis of the said statement, he was declared hostile. On cross-examination by the public prosecutor, he stated that he is the resident of the village of accused-respondent and Munni Lal's daughter was married to kailash. After about 5-7 months of the incident, the Investigating Officer had recorded his statement. However, on further cross examination he denied to have given any statement to the police, and when his attention was drawn to his statement shown to be recorded under section 161 Cr.P.C., he denied to have given any such statement to the police. He further denied the suggestion that he has colluded with the accused and as such is falsely deposing.

10. P.W. 3, Gopal Prasad is the real brother of the accused-respondent who was present in the house at the time of incident. He in his examination-in-Chief has stated that about one and half years back at about 2.30 a.m his mother woke up hearing sighs of the victim and his servant raised alarm on which he woke up and then it was disclosed that his brother's wife received burn injuries who soon thereafter died. It is further stated that at about 5:00 in the morning he reached at the police station and lodged the report which has been proved as Ex. Ka. 2. Deceased Geeta was sleeping in a room at the upper floor of the house. During cross examination he stated that the information regarding unfortunate death of Geeta Devi was sent to his father Munni Lal through one Markandey. The room in which Geeta was sleeping a nylon rope tied with the hook was found, which too was burning.

11. P.W.4, Rajbali Yadav, Constable is the person who had taken the dead body of the deceased at 4 p.m. to the Mortuary for post mortem examination who identified the same, however, he has not been cross examined by the defence.

12. P.W.5, Jainath Singh, is the Head Constable posted at police station Sarnath. who had received the written information given by Gopal prasad PW3, regarding the unfortunate death of the deceased Geeta Devi proved & marked as Ex. ka. 2. The corresponding G.D. entry of which was made and proved as Ex. Ka. 3. He further states that a written report Ex. ka. 1 was also given by one Munni Lal in respect of which corresponding G.D. entry No. 10 at 8:40 hrs was drawn by him which is proved and marked as Ex. Ka. 4. Thereafter the investigation was transferred to P.S. Jaitpura. on 5.7.1982 itself which has been noted in the general diary and marked as Ex. Ka.-5. The said witness has not been cross-examined.

13. P.W. 6, Kali Charan Verma, is the Head Moharrir who had drawn the chik F.I.R. at police station Jaitpura, on the basis of the written report given by P.W.1 which has been proved and marked as Ex. Ka. 6. and corresponding G.D. entry of which was also drawn which has been proved and marked as Ex. Ka. 7. He has also not been cross examined by the defence.

14. P.W.7, Prem Chandra Pandey is the first Investigating Officer of the incident who had recorded the statement of the relevant witnesses and prepared the site plan which has been proved and marked as Ex. Ka. 8. Thereafter the investigation has been handed over to one Jagat Bahadur PW-8, who concluded the investigation and submitted the charge sheet which has been proved and marked as Ex. Ka. 9. However, the said witness has also not been cross examined by the defence.

15. P.W.8, Jagat Bahadur Singh is the second Investigating Officer who after recording the statement of the relevant witnesses submitted the charge sheet against accused-respondent and other co-accused Raghunath(now dead) who has also not been cross examined by the defence.

16. P.W.9, Chaturi Prasad is another witness of the incident who stated that at the time of marriage, PW-1 Munni Lal had sent the Customary Chimmi(peas) and sugarcane juice at the house of the accused-respondent who had refused to accept the said ceremonial articles but later accepted the same with reluctance but did not show any resentment. He further stated that on the said date, he met Geeta Devi, who asked him to inform her father to give motor cycle and Godrej Steel Almirah else there is threat to her life. In cross examination he denied the suggestion that he had not gone to deliver the Customary Chimmi(peas) and sugarcane juice at the house of Raghunath.

17. P.W. 10, Bhonu is another witness who has been produced to prove the alleged motive for commissioning of the said offence and stated that after marriage, for several days, the victim did not go to her matrimonial house and when accused Raghunath father of Kailash Nath, came for her 'Bidai', he asked for providing him a motor cycle and Godrej Steel Almirah. However, P.W.1 showed his inability to provide the said articles and promised to give it later. In respect of giving of the said articles no Panchayat was held. During cross examination he stated that after about 3-4 months of the marriage Raghunath had asked for giving him a motor cycle and a Godrej Steel Almirah. However, when P.W.1 assured him to give it later then he performed Bidai of his daughter. He further categorically stated that in respect of giving of a motor cycle and Godrej Steel Almirah there was no dispute/altercation between the two.

18. C.W. 1, Dr. K.C. Gupta is the doctor who has proved the post mortem report of the deceased which is marked as Ex. Ka 14. The post mortem examination was in-fact done by Dr.D.B. Singh who has gone for two months training to Bangalore. He perused the injuries noted in the postmortem examination report and expressed the opinion that the burn injuries are postmortem burn injuries and not anti mortem as noted by Dr. D.B. singh who conducted the post mortem. In his cross examination he has discussed the cause of the death of the deceased and its symptoms on the basis of Modi's medical jurisprudence.

19. After adducing of the said evidence, the statement of the accused-respondent under section 313 Cr.P.C. has been recorded by putting all the incriminating circumstances to him in which

he has denied the incident and has categorically stated that on the night of incident, he was not present at or near his house and had gone to Vindhyachal. His father had also gone to Vindhyachal at the relevant time. His other brothers and servant were only present in the house.

20. On the basis of the entire evidence produced before the trial court, the trial court held that there is no direct evidence in the instant case to prove the guilt of the accused persons and the instant case is based on circumstantial evidence. The trial court further held that even from the statements of P.W.1 Munni Lal, P.W. 9 Chaturi Prasad and P.W.10 Bhonu, factum of alleged motive has not been proved moreover, it has been held by the trial court that motive alone can not prove the guilt of the accused. Even the alleged demand of dowry in the form of motor cycle and Godrej Steel Almirah had not been proved and it was shown from the evidence that accused-respondent were only unhappy in respect of the non-fulfilment of said demand but it did not provide any motive to commit the murder of the deceased. The trial court further held that on the basis of evidence on record, there is no incriminating evidence to prove the guilt of the accused-respondent though the incident has taken place within four corners of his house, yet no reliable inference could be drawn against the accused-respondent. The trial court further held that the chain of circumstances is not complete so as to hold the accused-respondent guilty of the incident and thus acquitted the accused-respondent.

21. Being aggrieved and dissatisfied by the said order, the present Government Appeal has been filed.

22. Learned A.G.A. for the appellant has submitted that the factum of marriage of the deceased with the accused-respondent is admitted further the fact that the deceased died within the four corners of her house is also proved therefore, it was incumbent upon the accused-respondent to explain as to under what circumstances the victim died, which explanation has not been furnished by the accused-respondent as such he is guilty of the offence.

23. Learned A.G.A. for the appellant has next submitted that on account of non-fulfilment of demand of dowry, the victim has been done to death, however, the trial court has not appreciated the evidence and material on record in right perspective and has illegally recorded the finding of acquittal against the accused-respondent more so when the accused-respondent has failed to discharge the said burden.

24. Learned A.G.A. for the appellant has next submitted that since the victim died within the four corners of her house, therefore, presumption under section 106 of Evidence Act. Could well have been drawn against him and accused-respondent should have been held guilty for the offence. The contrary finding of acquittal recorded by trial court is therefore perverse and illegal and liable to be reversed by allowing the instant Government Appeal.

25. Per contra learned counsel for the accused-respondent has submitted that the impugned order passed by the trial court is just, proper and legal. He has further submitted that there is no eye witness account of the incident in question and the case is based on circumstantial evidence.

26. Learned counsel for the accused has further submitted that the law with regard to conviction on the basis of circumstantial evidence has very well been

crystalized in the judgment of this Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra**, wherein the apex Court held thus:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is **Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]**. This case has been uniformly followed and applied by this Court in a large number of later decisions up to date, for instance, the cases of **Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198: 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625: AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :**

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783]**, where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on

circumstantial evidence." It is also settled law that the suspicion, how so ever strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

Learned Amicus-curiae further relied upon a case reported in **(2010) 8 SCC 593 G. Parshwanath Vs. State of Karnataka**, wherein it has been held as under :

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

27. Learned counsel for the accused-respondent has further submitted that even the provisions under section 106 of the Evidence Act is not attracted in the instant case, therefore, the finding recorded by the trial court acquitting the accused-respondent is just and proper, legal and do not call for any interference by this Court.

28. Learned counsel for the accused-respondent has further submitted that Hon'ble Apex Court in in-numerable cases has held that finding of acquittal can not be reversed by higher court until and unless it is found perverse, illegal or impossible as held by Hon'ble Apex Court in ***Criminal***

Appeal No. 1167 of 2018, Ballu @ Balram @ Balmukund and another Vs. The State of Madhya Pradesh.

29. Before we delve in the question of the applicability of the provision of Section 106 Indian Evidence Act in the present case, it would be useful to quote the Provisions of Section 106 of the Indian Evidence Act :-

"Section 106 of the Evidence Act envisages that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

Hon'ble Apex Court as well as this Court in catena of decision has held that in order to attract the provision of Section 106 of Evidence Act, it is necessary for the prosecution to prove that the fact was specially in the knowledge of the accused and further that whether the prosecution has discharged its initial burden of proving the guilt of the appellant beyond all reasonable doubt.

While considering the applicability of Section 106 of the Indian Evidence Act, it should be kept in mind that the said provision in anyway does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has proved that the burden in regard to such facts was within the special knowledge of the accused, then only burden may be shifted to the accused for explaining the same. It may be that in a situation of this nature where the Court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well settled principle of law that suspicion, howsoever grave it may be, cannot take the place of proof, and there is a large difference between something that `may be' proved, and something that `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: **Hanumant Govind Nargundkar v. State of M.P., State v. Mahender Singh Dahiya and Ramesh Harijan v. State of U.P.)**

30. Now examining the fact whether appellant's participation in the crime is proved by the prosecution evidence adduced in the trial, we find that none of the four witnesses have stated that at the time of incident, the appellant was present at or near

his house nor any other witness has been examined to suggest that the appellant was at or around his residence at the relevant time. In the absence of which in our opinion the presumption under Section 106 of the Evidence Act cannot be drawn. Thus, we are of the opinion that the presumption under Section 106 of the Evidence Act cannot be drawn in the present case on the basis of which the appellant can be convicted. The view taken by the trial court in this respect is, therefore, just proper and legal and do not call for any interfence. Moreover there is nothing on record to show that within all human probability the act must have been done by the accused when other male members and servants were present in the house.

31. We are now left only with the material i.e. the statement of the accused-appellant under Section 313 Cr.P.C. wherein he has stated that at the time he was not present at his house and had gone to Vindhyachal and only his other brothers and servants were present at his house. Now we have to examine the facts as to whether in the absence of any corroborating evidence only on the basis of the statement given by the accused-appellant under Section 313 Cr.P.C. can the appellant be convicted for the offence punishable under Section 302 IPC ?

It is well settled principle of law that the statement of an accused made under Section 313 Cr.P.C. can be taken into consideration is not in dispute; not only in view of the what has been contained under Section 313 (4) of the Code but also because of the law laid down by the Hon'ble Apex Court as well as this Hon'ble Court in several pronouncements. We may in this regard refer to the decision of this Court in the **Sanatan Naskar v. State of West Bengal reported in 2010 (8) SCC 249**, where this observed: (SCC page 258-59, paras 21-24)

"21. The answers by an accused under Section 313 of the Cr.P.C. are of relevance for finding out the truth and examining the veracity of the case of the prosecution.

22. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

23. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) of Cr.P.C. explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for, any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the

accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

24. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.P.C. as it cannot be regarded as a substantive piece of evidence."

To the same effect is the decision of this Court in Ashok Kumar v. State of Haryana.

Reference may also be made to the decision of this Court in Brajendra Singh v. State of M.P. where this Court said : (SCC page 297, para 15)

"15. It is a settled principle of law that the statement of an accused under section 313 of Cr.P.C can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under section 313 of Cr.P.C simpliciter normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 Cr.P.C is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced."

32. Thus in view of the aforesaid settled principle of law laid down by the Apex Court, we are of the opinion that the acquittal of the accused-respondent cannot be reversed on the basis of the statement recorded u/s 313 Cr.P.C. The contrary arguments raised by learned AGA in this respect is liable to be repelled.

33. It is further germane to point out here that from the entire evidence adduced during the course of trial, we find that the instant case is based on circumstantial evidence and in order to bring home guilt against the accused-respondent five golden principles as discussed has to be proved against the accused-respondent. However, in the present case on the basis of evidence, we find that the prosecution has miserably failed to prove chain of circumstances leading to the guilt of the accused-respondent. Even motive has not been conclusively proved by the prosecution rather a faint effort has been made by the prosecution to establish the motive which has not been conclusively proved, moreover, merely on the basis of motive, the accused-respondent can not be held guilty for the offence, as held by the trial court.

34. Moreover the Hon'ble apex court time and again has laid down the principles governing the scope of interference by the High court in an appeal filed by that state for challenging the acquittal of the accused recorded by the trial court. This Court in the case of ***Rajesh Prasad v. State of Bihar and Another*** encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not distrub the finding of acquittal recorded by the trial court."

35. Further, in the case of ***H.D. Sundara & Ors. v. State of Karnataka*** this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -

"8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappreciate the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

36. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

a) That the judgment of acquittal suffers from patent perversity;

b) That the same is based on a misreading/omission to consider material evidence on record;

c) That no two reasonable views are possible and only the view consistent

with the guilt of the accused is possible from the evidence available on record.

37. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court.

38. In the light of above proposition of law if we go through the impugned judgment and order, we find that the trial court had given cogent and convincing reasons for recording the finding of acquittal against the accused-respondent and that the acquittal of the accused-respondent is plausible and justifiable view emanating from the discussion of the evidence available on record and does not suffer from any infirmity or perversity. Therefore, we are of the opinion that the impugned judgement and order passed by the trial court is just, proper and legal and do not call for any interference by this Court.

39. The present government appeal lacks merit and is accordingly dismissed.

40. Trial court's record be remitted back forthwith.

(2024) 5 ILRA 1431
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

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

Second Appeal No. 163 of 2008

Smt. Bajifunnisha ...Appellant
Versus
Khunni Lal & Ors. ...Respondents

Counsel for the Appellant:
Sri B.N. Agarwal, Sri Sanjay Agarwal

Counsel for the Respondent:
Sri Subhash Kumar, Sri Subhash Chnadra, Sri Sunil Dutt Kautilya, Sri Umesh Kumar Gupta

Civil Law- Civil Procedure Code, 1908 - Sections 100 - Order XLI Rules 11, 31, 35-A, 80 - Uttar Pradesh Municipalities Act, 1916 – Sections 80, 185, 186, 221, 326, - Specific Relief Act, 1963 – Section 41 – Limitation Act, 1963 – Article 54 – Second Appeal - arising out of a suit for mandatory injunction – jurisdiction- Held, the Lower Appellate Court is the last Court of fact and it cannot be said that the inferences drawn by it on the issues arising between parties are perverse in any manner - the Court does not have the jurisdiction to reappreciate evidence under Section 100 of CPC and substitute a view of our own based on pure appreciation of evidence, unless there be some perversity or illegality - regarding issue (A), the aforesaid Court has substantially complied with the requirements of Order XLI Rule 31 of CPC , while issue (B) and (C) is answered in negative as the said Court has not committed any illegality in reversing the decree passed by the Trial Court, as it was based on all relevant issues and cogent reasoning and also had rightly drawn conclusion that plaintiff does not have a right of frontage or access to the public road on the northern side, as the frontage of the shop in question, in the documents of title produced by the plaintiff, lies to the south of the said shop – Appeal dismissed with cost- directions, accordingly. (Para - 49, 50, 51, 52, 53)

Appeal is dismissed with cost. (E-13)

List of Cases cited:

1. Malluru Mallappa (dead) through Legal Representatives Vs Kuruvathappa & ors., (2020) 4 SCC 313

2. H. Siddiqui (dead) by LRs Vs A. Ramalingam, (2011) 4 SCC 240

3. G. Amalorpavam & ors Vs R.C. Diocese of Madurai & ors., (2006) 3 SCC 224

4. Santosh Hazari Vs Purushottam Tiwari (deceased) by LRs, (2001) 3 SCC 179

5. Bharatkumar Dhanajibhai Kuber Vs Markand Umedlal Joshi, 2018 SCC OnLine Guj 3114

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

1. This is a plaintiff's second appeal, arising out of a suit for mandatory injunction.

2. The plaintiff, Bajifunnisha, instituted Suit No.217 of 1983, initially against the State of Uttar Pradesh, represented by the Collector, Jalaun at Orai and the Municipal Board, Kalpi, District Jalaun through its Administrator, praying that a decree of mandatory injunction be passed in her favour, directing that the tinshed worked illegal construction, admeasuring 15'x9', shown by letters ABJK in the plaint map, situate to the north of the plaintiff's shop, shown by letters ABHI, be removed by the defendants, rendering the land underlying the offending construction in the same state as it formally was, so that the plaintiff may use it for her access (ingress-egress) in the manner, it was earlier done.

3. Khunni Lal, who was a tenant in one of the plaintiff's shops and had raised the tinshed worked construction denoted by letters ABJK, was impleaded later on as defendant No.3 to the suit. This was done because in substance, the decree that the plaintiff claimed was against Khunni Lal; not the State or the Municipal Board.

4. The facts giving rise to this appeal are these:

Smt. Bajifunnisha, the plaintiff-appellant, who shall hereinafter be called 'the plaintiff', instituted the suit with allegations in the plaint to the effect that she is the owner of a shop, situate in Tarnanganj, Town Kalpi, District Jalaun, denoted by letters ABHI in the plaint map. To the east of the shop under reference, which shall be called 'the shop in question', there are other shops of the plaintiff. To the west of the shop in question, lies land which is parti; to the north, the frontage of the plaintiff's shop and thereafter land described as parti. To the south of the shop in question is a road. The plaintiff is the owner of other shops, besides the shop in question, of which the former owner was the late Mustaq Ali son of Danish Ali, a resident of Mohalla Bhattipura, Town Kalpi, District Jalaun. The shop in question and the other shops are situate on a part of Nazul land, Plot No.4475 and shown in the Khasra Abadi for town Kalpi, relating to the year 1902-1903. A part of Nazul Plot No.4475 aforesaid was taken on lease in the year 1958 by Mustaq Ali.

5. Mustaq Ali got a plan sanctioned by the Municipal Board, Kalpi for the purpose of constructing five shops on the said land. He did construct five shops in accordance with the sanctioned plan. Each of these five shops had a projection (chhajja) sanctioned for them on both sides, to wit, the north and the south. The five shops last mentioned were transferred by way of sale in the plaintiff's favour by Mustaq Ali vide registered sale deed dated 15.09.1975. In this manner, the plaintiff became owner of the shop in question and the other shops that Musaq Ali owned. Her name was entered in the assessment register of the Municipal Board relating to the shop in question as well as the other shops, mutating out Mustaq Ali's rights.

6. The shop in question was let out to Khunni Lal, defendant No.3 to the suit at a rent of Rs.30/- per mensem. Khunni Lal, while in tenancy occupation of the shop in question, raised a wall in front of it i.e. to the north of the said shop, the pucca wall raised running from east to west. The wall was raised as aforesaid in the month of June, 1981 and a tinshed worked roof placed over it, occupying an area 15'x9', denoted by letters ABJK in the plaint map. The aforesaid unauthorized construction was put up after demolishing the plaintiff's projection (chhajja) illegally and unauthorizedly, about which the plaintiff says that Khunni Lal had no right. The plaintiff, accordingly, served a notice upon Khunni Lal on 20.07.1981, saying that the construction raised was without authority and illegal, which ought to be removed. In answer, Khunni Lal, by a reply, informed the plaintiff that the construction that he had raised over land to the north of the shop in question was rented out to him by the Municipal Board, Kalpi.

7. The plaintiff says that the shop in question has two doors, one to the north and the other to the south. The shop in question, owned by the plaintiff, has its frontage to the north and that using this frontage, the shop in question has its access to the highway. The land to the north of the shop in question is the plaintiff's appurtenant land. She has the right of access and use under the law over the said land and this beneficial use and access has been in vogue after construction of the shop in question. The construction raised by Khunni Lal leads to a violation of the plaintiff's rights, which would happen in the future too. The plaintiff has a right to approach the highway from the shop in question and the constructions raised have led to the value of the said shop being diminished.

8. The plaintiff says that land to the north of the shop in question is the shop's frontage and appurtenant land, which the Municipal Board, Kalpi has no right to let out to Khunni Lal. Also, Khunni Lal has deposited earth to the north of the shop in question, raising its height, which leads to water logging and blockage of water drainage to the western side. Now, the other shops, that the plaintiff owns, suffer water logging up in the front, causing the other tenants, who are in occupation, considerable annoyance, besides imperiling those constructions by a possible collapse.

9. The plaintiff says that the Municipal Board, Kalpi, their officers and servants are in connivance with Khunni Lal and have damaged the frontage of the shop in question. According to the plaintiff, it is for the said reason that the illegal construction raised to the north of the shop in question by Khunni Lal has not led the Municipal Board to proceed against him under Section 185 of the Uttar Pradesh Municipalities Act, 1916 (for short, ‘the Act of 1916’) though the officers and servants of the Municipal Board have been cognizant of the offending construction. The Municipal Board, defendant No.2 to the suit, in breach of their duties, are not taking any action against Khunni Lal.

10. The plaintiff says that under the circumstances, she is entitled to a mandatory injunction, directing the defendants to the suit to cause removal of the offending constructions denoted by letters ABJK (for short, 'the suit property'), lying to the north of the shop in question. The plaintiff has asserted that the suit property is owned by the State and in the management of the Municipal Board. Since the Municipal Board have let out the suit property to Khunni Lal, which the State owns, the State

represented by the Collector and the Municipal Board, represented by its Administrator, have been impleaded as defendant Nos.1 and 2 to the suit.

11. The plaintiff also says that she has caused to be served a composite notice dated 31.03.1983 under Section 80 of the Code of Civil Procedure, 1908 (for short, 'the Code') and Section 326 of the Act of 1916 upon defendant Nos.1 and 2, respectively, which they have received on 02.04.1984, but not caused the suit property to be restored, after demolishing the offending construction.

12. By the amendment and impleadment undertaken pending suit, Khunni Lal was impleaded as defendant No.3 to the suit and the mandatory injunction earlier directed against defendant Nos. 1 and 2 alone, claimed against him as defendant No.3, as well.

13. Defendant Nos.1 and 2 to the suit, who are proforma respondent Nos.2 and 3 to this appeal, respectively, filed a joint written statement. Defendant-respondent Nos. 2 and 3 to the appeal, shall hereinafter be referred to as 'defendant Nos.1 and 2', respectively. The case of the said defendants, pleaded in the written statement, is that Mustaq Ali got a lease of the shop in question executed in his favour in the year 1958. The lease was one for land meant to be utilized for residential purpose. He, however, constructed shops over the leased land. Mustaq Ali had no right to transfer the shops that he had constructed. If Mustaq Ali has transferred the shops constructed by him, that includes the shop in question, in the plaintiff's favour, defendant Nos. 1 and 2 are not bound by the said transfer. Khunni Lal's possession over the shop in question and raising of a tinshed worked construction to the north of the said shop is admitted to defendant Nos.1 and 2. It is also admitted to the said defendants that the tinshed worked construction is illegal. It is the said defendants' case that the suit property has not been given on rent to Khunni Lal by them. Defendant Nos.1 and 2 merely realize tehbazari from Khunni Lal. The suit property is in the use of Khunni Lal, but it is neither the plaintiff's frontage nor land appurtenant to it. Since the suit property is being used by Khunni Lal, defendant No.2 is entitled to realize tehbazari from him. He has unauthorizedly raised constructions on the suit property and, therefore, defendant Nos.1 and 2 are not answerable for Khunni Lal's acts. The suit property was never let out by defendant No.2 to Khunni Lal nor did they ever authorize him to raise constructions thereon. Against Khunni Lal's illegal encroachment over the suit property, defendant No.2 has issued a notice under Section 186 read with Section 221 of the Act of 1916 on 22.07.1981.

14. It is also the case of these defendants that the suit is undervalued and court-fee paid insufficient. The suit is also claimed to be bad for non-joinder. There is also a plea on behalf of defendant Nos.1 and 2 that the composite notice served under Section 80 of the Code and Section 326 of the Act of 1916 is illegal. The plaintiff has no cause of action and the suit is not maintainable. The suit is also claimed to be barred by Section 41 of the Specific Relief Act, 1963.

15. Khunni Lal, who is defendant No.3 to the suit and was the sole appellant before the Lower Appellate Court, died pending appeal. His heirs and LRs were brought on record before the Lower Appellate Court, to wit, Santosh Kumar son

of Khunni Lal, Ram Janki widow of Khunni Lal and Smt. Rajni Porwal daughter of Khunni Lal, arrayed as appellant Nos.1/1 to 1/3, in that order. In the present appeal, the heirs and LRs of the late Khunni Lal are arrayed as defendant-respondent Nos.1/1, 1/2 and 1/3. Khunni Lal's interest represented by his heirs and LRs before this Court arrayed as defendant-respondent Nos.1/1 to 1/3, shall hereinafter be referred to as 'defendant No.3' collectively, except where an individual reference to one of them or to Khunni Lal becomes imperative in the context.

16. Defendant No.3 filed a written statement separately. He accepted the case that he had taken the shop in question on lease; that the said shop was transferred by a sale deed in the plaintiff's favour and on that basis, she is its owner. According to defendant No.3, the suit property, where tinshed worked construction has been raised by him, is neither in the ownership of the plaintiff nor subject to any easementary rights of hers. It is in no way the frontage of the shop in question. Defendant No.3 had taken the suit property on a yearly rent from defendant No.2 and pays that rent. All construction, that defendant No.3 has raised, is of a very temporary character. While undertaking the aforesaid construction, neither any projection of the plaintiff has been demolished nor the value of the shop in question diminished. It is more than 20 years since constructions were raised on the suit property. The plaintiff is not in possession of the suit property or has a right of passage over it. Instead, possession of the suit property and right of passage is held by defendant No.3, albeit by virtue of his tenancy right. So long as defendant No.3 is a tenant, the plaintiff has no right of passage over the shop in question or the suit property. Also, by putting up a temporary tinshed worked construction, no obstruction is laid in gaining access to the road for the plaintiff.

17. There is also some pleading by defendant No.3 what this Court might not only consider unnecessary, but also scandalous. Nevertheless, it needs some reference. It is averred by defendant No.3 that the history of acquisition of the shop in question, or the land over which the shops are constructed, is very interesting. The plaintiff's husband, Abdul Rehman Khan was a prominent Congress Party leader of town Kalpi. He remained a member of the Nagar Palika for a considerable period of time. During the tenure of his office, using his influence with the Nagar Palika of which he was the Vice-Chairman and also the head of many of its committees as the Chairman, got the land housing the shop in question leased to Mustaq Ali, the plaintiff's brother or so to speak, Abdul Rehman Khan's brother-in-law. Later on, he made Abdul Rehman to execute a sale deed in the plaintiff's favour. The entire proceedings of lease by the Nagar Palika to Abdul Rehman and the subsequent sale are all but a sham and a device to perpetrate fraud. The suit against the third defendant has been instituted on unsustainable premises and ought to be dismissed with special costs under Section 35-A of the Code.

18. On the pleadings of parties, the following issues were struck by the Trial Court (translated into English from Hindi):

"1. Whether the suit is undervalued and court-fee paid insufficient?
2. Whether the notice issued under Section 80 CPC and Section 326 of the Municipalities Act is illegal?
3. Whether the plaintiff's suit does not disclose a cause of action?

4. Whether the suit property is the plaintiff's shop's frontage?
5. Whether the suit property is land appurtenant to the plaintiff's shop?
6. Whether the sale deed executed by Mustaq Ali in favour of the plaintiff illegal?
7. Whether the suit is barred by Section 41 of the Specific Relief Act?
8. Whether the plaintiff's suit is maintainable?
9. Whether the plaintiff has a right to move across from her shop to the National Highway?
10. Whether the construction raised by defendant No.3 is illegal and unauthorized?
11. Whether the construction raised by defendant No.3 is of a permanent character? If yes, its effect?
12. Whether defendant No.3 is entitled to costs under Section 35-A CPC?
13. To what relief, if any, is the plaintiff entitled?"

19. The plaintiff examined in support of her case, Abdul Rehman as PW-1, Noor Ali as PW-2, whereas defendant No.3, Khunni Lal examined Muzaffar Khan, the Nazul Clerk with the Nagar Palika as DW-1, defendant No.3 himself as DW-3/1 and Hari Shanker as DW-3/2. Both sides produced a wealth of documentary evidence, details of which find elaborate mention in the Trial Court's judgment. It need not be recapitulated for the sake of brevity. However, so much of the evidence, documentary or oral, shall be referred as relevant at the appropriate stage during the course of this judgment.

20. In entering its judgment, the Trial Court held in the plaintiff's favour on Issues Nos.1, 2 and 3. Issue No.7 was answered in the plaintiff's favour, because defendant No.3 did not press it. Issue No.8 was also answered in the plaintiff's favour, whereas Issue No.6 was answered against the defendant, holding the sale deed by Mustaq Ali in the plaintiff's favour to be valid. Issues Nos.4 and 5 were answered together, holding in the plaintiff's favour on both issues to the effect that the suit property constitutes frontage of the shop in question and that it was land appurtenant to the said shop. Issue No.9 was answered by the Trial Court also in the plaintiff's favour, holding that the plaintiff was entitled to approach the P.W.D. Road, both from the northern side of the shop as well as the southern. Issues Nos.10 and 11 were answered together. Issue No.10 was answered in the plaintiff's favour holding that the construction raised on the suit property was illegal and unauthorized, whereas Issue No.11 was answered in the negative, holding that the construction standing on the suit property was temporary in nature. Issues Nos.12 and 13 were also tried together, where Issue No.13 was answered in the plaintiff's favour holding that defendant Nos.1 and 2 have not been able to explain why they permitted the illegal construction to remain in existence on the suit property. It was also held that it would be in the interest of justice to issue necessary directions to the said defendants. Issue No.12 was answered against defendant No.3, holding that he was not entitled to costs because he had himself committed an illegality. The suit was held fit to be decreed.

21. The Trial Court decreed the suit with costs vide judgment and decree dated 22.05.2000, issuing a mandatory injunction to defendant No.3 to remove the temporary construction standing on the suit property, denoted by letters ABJK within a month and restore the property to its original state. In default, the Trial Court directed defendant Nos.1 and 2 upon expiry of the period of time allowed to defendant No.3 to cause the constructions standing on the suit property

to be removed, with costs to be borne by defendant No.3 and cause the suit property to be restored to its original state.

22. Defendant No.3 appealed to the District Judge, Jalaun at Orai, where the appeal was registered as Civil Appeal No.17 of 2000. It was assigned to the Special Judge (E.C. Act), Jalaun at Orai. The appeal came on for hearing before the Lower Appellate Court on 03.11.2007, when it was allowed, the decree of the Trial Court set aside and the suit dismissed.

23. The present second appeal was instituted by the disillusioned plaintiff on 12.02.2008. The appeal remained pending for a very long time for hearing under Order XLI Rule 11 of the Code. It was admitted to hearing as late as on 02.09.2021 on the following substantial questions of law:

(A) Whether the judgement of the appellate court complies with Order 41, Rule 31 C.P.C.?

(B) Whether the lower appellate court has committed an illegality in exercise of its jurisdiction in reversing the judgement and decree passed by the trial court without meeting out the reasonings given by the trial court?

(C) Whether the obstruction created by raising structure over the patri in front of the shop of the plaintiff by the defendant/respondent amounts to depriving the plaintiff of access to the public road and as such the plaintiff/appellant had the cause of action and the right to file the suit?

24. Heard Mr. B.N. Agarwal, learned Counsel for the plaintiff, Mr. S.D. Kautilya, learned Counsel for defendant No.3 and learned Standing Counsel appearing on behalf of defendant No.1. No one appears on behalf of defendant No.2.

25. It is submitted by Mr. B.N. Agarwal, learned Counsel for the plaintiff that the Lower Appellate Court has committed a manifest error of law while writing the impugned judgment, inasmuch as the learned Judge has not set out points for determination, recording a decision on each point with reasons relative to the decision on those points. Mr. Agarwal submits that not doing so on the Lower Appellate Court's part is a breach of the mandatory requirement of Order XLI Rule 31 of the Code. He has pointed out that the Lower Appellate Court has written findings of reversal dealing with Issues Nos.4, 5, 8 and 9, framed by the Trial Court, without framing any points for determination. In support of his contention, Mr. Agarwal has placed reliance upon a decision of the Supreme Court in Malluru Mallappa (dead) through Legal Representatives v. Kuruvathappa and others, (2020) 4 SCC 313. Learned Counsel for the plaintiff has placed further reliance upon the decision of the Supreme Court in H. Siddiqui (dead) by LRs v. A. Ramalingam, (2011) 4 SCC 240.

26. Repelling the submissions advanced by Mr. B.N. Agarwal, the learned Counsel for defendant No.3, Mr. S.D. Kautilya, has submitted that Order XLI Rule 31 of the Code does not postulate an inflexible rule about the necessity of framing points for determination by the first Appellate Court, though these invariably ought to be framed. The submission is that if the Court of first appeal has substantially complied with the provisions of Order XLI Rule 11 of the Code in the sense that the findings of the Trial Court, necessary for the decision of the lis, have been discussed, the evidence appreciated and those findings reversed for reasons given, the mere absence of points of determination formally framed, would not vitiate the first Appellate Court's

judgment. Mr. Kautilya has placed reliance in support of his submissions upon G. Amalorpavam and others v. R.C. Diocese of Madurai and others, (2006) 3 SCC 224.

27. This Court is of opinion that Substantial Questions of Law (A) and (B) are so inextricably interlinked that both ought to be dealt with together. The Court, therefore, proposes to briefly notice the submissions of parties with reference to Substantial Question of Law (B) as well, inasmuch as the submissions hereinbefore noticed were largely confined to the necessity of framing points for determination.

28. As regards the related Substantial Question of Law (B), Mr. Agarwal has urged that the Lower Appellate Court has reversed a well reasoned judgment passed by the Trial Court without effectively setting aside the findings of the Trial Court on fact and law, which it could not do. It is urged that the Lower Appellate Court has carved out a third case to the effect that the plaintiff would become owner of the suit property if the suit is decreed for demolition of the temporary structure standing on the suit property. It is urged that the said finding is absolutely erroneous, inasmuch as the pleadings of parties are about the right to ingress and egress from the northern side of the shop in question. It is not at all about a claim by the plaintiff to ownership or an easementary right over the suit property. In support of his submissions, learned Counsel for the plaintiff has placed reliance upon a decision of the Supreme Court in **Santosh Hazari v. Purushottam Tiwari (deceased) by LRs, (2001) 3 SCC 179.**

29. On this substantial question, rebutting Mr. Agarwal's submissions, Mr. S.D. Kautilya, learned Counsel for the third defendant says, as already noticed, that the Lower Appellate Court has given detailed reasons to differ from the Trial Court on all effective findings necessary to reverse the Trial Court's decree.

30. Upon hearing learned Counsel for the parties, this Court is of opinion that the moot question, so far as Substantial Question of Law (A) is concerned, is whether the mere failure to frame points for determination, without anything more, would vitiate the judgment of a Court of first appeal. So far as Substantial Question of Law (B) is concerned, this Court thinks that it has to be seen from the tenor of the judgment by the first Appellate Court, the evidence on record and the findings of the two Courts below, if the Lower Appellate Court has effectively reversed the Trial Court's judgment, setting aside all relevant findings for good and valid reasons. It would be well to remember for this Court that in a second appeal, if the Lower Appellate Court has considered the findings recorded by the Trial Court and reversed the same, giving reasons supported by evidence on record and the law quite different from the Trial Court's, it is not the domain of this Court under Section 100 of the Code to interpose our opinion merely on the ground that the Trial Court's opinion is more plausible or convincing, unless the Lower Appellate Court has failed to give reasons for a finding in disagreement with the Trial Court, or given reasons that are perverse, or manifestly illegal, because those are against the settled position of the law. This Court has no jurisdiction to interfere with the Lower Appellate Court's findings, either on fact or law, reversing the Trial Court, for reasons that can be plausibly assigned.

31. It is no doubt true that the first Appellate Court ordinarily ought to frame points for determination arising in the

appeal, render decision thereon with reasons, going by the provisions of Order XLI Rule 31 of the Code, but the mere failure to frame points of determination would not lead to the judgment of the first Appellate Court being vitiated, if otherwise all effective findings of the Trial Court, on which the decree is based, are reversed with reasons assigned that are not perverse or manifestly illegal; or ones recorded ignoring material evidence, or still more, placing reliance on some irrelevant evidence.

32. The insistence of the learned Counsel for the plaintiff on the necessity to frame points for determination, which has not been done in this case by the Lower Appellate Court, is largely inspired by the guidance of the Supreme Court in **Malluru Mallappa** (supra), where it has been held by their Lordships:

"13. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for reconsideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see : Santosh Hazariv. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] , Madhukar v. Sangram [Madhukar v. Sangram, (2001) 4 SCC 756] , B.M. Narayana Gowda v. Shanthamma [B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476 : (2014) 2 SCC (Civ) 619] , H.K.N. Swami v. Irshad Basith [H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243] and Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar [Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259]].

14. A first appeal under Section 96 CPC is entirely different from a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature.

18. It is clear from the above provisions and the decisions of this Court that the judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply with the requirement of Order 41 Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. No doubt, when the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by the trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice."

(emphasis by Court)

33. The decision in **Malluru Mallappa** arose from a suit for specific performance of contract. The Trial Court had held against the plaintiff on issues of readiness and willingness as also the issue of limitation, on the foot of which, the suit was dismissed. The first appeal came up before

the High Court, about which, their Lordships observed that the appeal was dismissed by a cryptic order without reappreciating evidence of parties or recording a reasoned order. There is also a remark that the case of the plaintiff was that the suit was well within limitation under Article 54 of the Schedule to the Limitation Act, 1963, but that question too was not examined in the proper perspective. It is in the background of these facts that the remarks of their Lordships about adherence to the requirement of Order XLI Rule 31 of the Code, including that mandating the first Appellate Court to frame points of determination, were made.

34. In **H. Siddiqui** (supra), the remarks, on which much reliance has been placed by the plaintiff, figure in Paragraph No.21 of the report. These read:

"21. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide Sukhpal Singh v. Kalyan Singh [AIR 1963 SC 146] , Girijanandini Devi v. Bijendra Narain Choudhary [AIR 1967 SC 1124] , G. Amalorpavam v. R.C. Diocese of Madurai [(2006) 3 SCC 224] , Shiv Kumar Sharma v. Santosh Kumari [(2007) 8 SCC 600] and Gannmani Anasuya v. Parvatini Amarendra Chowdhary [(2007) 10 SCC 296 : AIR 2007 SC 2380].)"

35. The appeal before their Lordships in **H. Siddiqui** again arose out of a suit for specific performance of contract, where the suit agreement had been entered into on behalf of the defendant by his power of attorney holder. The agreement was registered and the plaintiff's case was that the defendant failed to take necessary steps in furtherance of the agreement. Amongst other pleas, the defendant denied the execution of the power of attorney in favour of his brother, who entered into the suit agreement on his behalf. The defendant's case was that the power of attorney had been given with a limited authority for the management of property. It did not authorize the attorney to alienate. The Trial Court had held the power to be a valid authority for alienation in favour of the plaintiff on ground that the defendant had admitted his signatures on the power of attorney, when a copy thereof was shown during cross-examination. The inference drawn by the

Trial Court was that the execution of the power in favour of his brother being admitted by the defendant, there was an admission by him as to the fact of execution of the document. Their Lordships were of opinion that the Trial Court could not draw that inference validly for reason that the defendant had merely admitted his signatures on the photocopy of the power, but not the contents. It was also observed by the Supreme Court that the Court should have borne in mind that the admissibility of a document is different from its probative value. It was in the context of these facts that about the two points of determination formulated by the High Court, while hearing an appeal from the original decree, it was observed in **H. Siddiqui**:

"20. The High Court failed to realise that it was deciding the first appeal and that it had to be decided strictly in adherence with the provisions contained in Order 41 Rule 31 of the Code of Civil Procedure, 1908 (hereinafter called "CPC") and once the issue of the alleged power of attorney was also raised as is evident from Point (a) formulated by the High Court, the Court should not have proceeded to Point (b) without dealing with the relevant issues involved in the case, particularly, as to whether the power of attorney had been executed by the respondent in favour of his brother enabling him to alienate his share in the property."

36. It was in the context of remarks in Paragraph No.20 of the report in **H. Siddiqui** that the latter remarks in Paragraph No.21 came to be made. To the understanding of the Court, it was not meant to be laid down as an ironcast formula that the formality to frame points of determination by a Court of first appeal would always lead to the judgment being vitiated. Rather, the facts in H. Siddiqui show that the High Court, sitting as the Court of first appeal, did frame two points of determination (a) and (b) and yet failed to address the vital distinction, amongst others, on one hand about the scope of the power given by the defendant to his brother, on the foot of which he had executed the suit agreement involved there and the fact of its execution per se on the other. What, therefore, really seems to be the law about the necessity of framing points for determination is that generally these ought to be framed by a Court of first appeal, but even if these are not, a Court of first appeal must be alive to all that is substantially an issue between parties and must pronounce on all issues arising between parties necessary to render judgment. In doing so, a Court of first appeal must do a wholesome review of evidence as much as necessary to vary, affirm, reverse or modify the findings of the Trial Court. In short, the Court of first appeal has to undertake a wholesome review of the case of parties, examining all evidence on record bearing on the issue, about which the parties are at variance. In this connection, reference may be made to the decision of the Supreme Court in **G. Amalorpavam** (supra), where the substantial question of law involved in the second appeal before the High Court was formulated in terms, as noticed by their Lordships in Paragraph No.3 of the report. It reads:

"3. At the time of admission of the second appeal the following question was framed for determination: "Whether the lower appellate court is correct in deciding the appeal without any points for determination as contemplated under Order 41 Rule 31 CPC?""

37. The issue in **G. Amalorpavam** arose before their Lordships in the context of a suit for possession and recovery of

arrears of rent and damages. The suit was decreed by the Trial Court and affirmed on a first appeal being carried to the subordinate Judge from the Munsif's decree. Their Lordships in the context of the substantial question of law quoted in Paragraph No.3 of the report, held on the necessity of framing points for determination by the Court of first appeal:

"9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC."

(emphasis by Court)

38. On the issue under consideration, reference may be made to the decision of the Gujarat High Court in **Bharatkumar Dhanajibhai Kuber v. Markand Umedlal Joshi, 2018 SCC OnLine Guj 3114**, where the principle has been laid down thus:

"34. Thus, the principle discernible from the case law referred to above, is that whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 of the CPC has to be determined on the nature of the judgment delivered. Non-compliance with the provisions by itself would not vitiate the judgment and make it wholly void. If it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. The judgment of the appellate Court should reflect an honest endeavour to consider the controversy between the parties and that there is proper appraisement of the respective cases and weighing and balancing

of the evidence, facts and the other considerations. If all relevant aspects of the matter are gone into by the appellate Court and discussed properly, then the same would be a valid judgment even though it may not have framed the points for determination."

(emphasis by Court)

39. Taking up the other substantial question marked (B), it has to be seen if in fact the Lower Appellate Court, while reversing the Trial Court, has effectively set aside its findings on relevant issues sufficient to reverse the decree. The Lower Appellate Court has thought that the entire gamut of controversy, on which the edifice of the suit rests, is wholesomely covered by Issues Nos.4, 5, 8 and 9. Now, if those four issues indeed encapsule the entirety of controversy, that has arisen between parties, is a matter to be seen by this Court in order to form an opinion if the Lower Appellate Court has effectively reversed all relevant findings by the Trial Court. The suit is essentially about the defendant's right, the defendant being admittedly a tenant of the plaintiff in the shop in question, to raise a temporary structure on the suit property, abutting the said shop on its northern side. The plaintiff has said that the temporary structure raised by defendant No.3 damages the frontage of the shop in question and blocks its access to the highway.

40. It is also the plaintiff's case that the suit property, where the temporary structure has been erected by defendant No.3, is the plaintiff's appurtenant land, because enabling as it does ingress and egress to the shop in question, it is necessary for its beneficial use. The construction raised on the suit property by the third defendant has also been claimed to diminish the value of the shop in question. There is also a cause of action pleaded by the plaintiff on account of waterlogging in front of the other shops owned by the plaintiff on account of the offending constructions raised on the suit property. The last of the grounds, claimed by the plaintiff to support the case for a mandatory injunction, does not appear to have been suited by parties, as there is no finding about it by the Courts below. The plaintiff essentially pleaded a cause of action against the State and the Municipal Board, saying that the suit property is located over land which is parti, where the temporary construction has been raised without a permission by defendant No.2, the Municipal Board, Kalpi. The land vests in the State and managed by the Municipal Board, therefore, defendant Nos.1 and 2, that is to say, the State and the Municipal Board, in particular, the Municipal Board, ought to remove the constructions by taking out statutory proceedings under the Act of 1916. At the commencement of the suit, there was no relief claimed against defendant No.3 at all. The mandatory injunction was claimed against defendant Nos.1 and 2, in particular, defendant No.2, the Municipal Board, to remove the offending construction comprising the suit property, denoted by letters ABJK. Later on, on better advice, defendant No.3 was impleaded to the suit and the injunction claimed against him as well.

41. Issue No.4 is about the fact if the suit property constitutes the frontage of the shop in question, whereas Issue No.5 is about the fact if the suit property is land appurtenant to the said shop. Issue No.8 is to the effect if the plaintiff's suit is maintainable, whereas Issue No.9 is about the plaintiff's right to access the National Highway, located to the north of the shop in question from all directions. One of the principal controversies that has permeated

the issues, on which the parties went to trial, is whether the shop in question has its access to the north and south both, or it is to the south alone and not the north.

42. The Trial Court took up Issues Nos.4 and 5 together, and as already noticed, answered them for the plaintiff. In answering both these issues, the Trial Court proposed to look into the testimony of Abdul Rehman, examined as PW-1, the plaintiff's husband. The Trial Court has devoted much of its wisdom to the admissibility of this witness's testimony, because he died before defendant No.3 could cross-examine him. The Trial Court held that the witness testified on 06.04.1989 and 29.01.1996 and was also cross-examined by defendant Nos.1 and 2. However, defendant No.3 did not cross-examine him on those dates, where it is written 'nil' in the column of cross-examination. Opportunity was given to defendant No.3 to examine Abdul Rehman, but before it could come, he died. The witness's testimony has, therefore, been held relevant under Section 33 of the Indian Evidence Act, 1872, but not much of that testimony has been discussed or inference based on it. The Trial Court has founded most of its reasoning on the admitted facts that defendant No.3 is a tenant in the shop in question, who has asserted that he uses the suit property for ingress and egress and access to the shop. His rights to access are limited to the nature of his estate in the shop in question, which is admittedly a tenancy.

43. The Trial Court has believed the testimony of DW-3 that he uses the suit property as his frontage and for the purpose of access to his shop. This is a right of the landlord, according to the Trial Court, which he is using so long as he is the tenant. The Trial Court has also relied on the pleadings of defendant Nos.1 and 2, that defendant No.2 realizes tehbazari from defendant No.3 for the use of the land comprising the suit property. The inference drawn is that it could be only so if defendant No.3 had an easementary right or his frontage necessary for ingress and egress. The testimony of PW-3 has also been considered to the effect that he sells sweetmeats orienting his counter to the north, that is to say, the northern side of the suit property. The testimony of DW-3 has also been noticed to the effect that his customers approach his shop from the highway, that is to say, the northern face of the shop in question. From the fact of levy of tehbazari, the Trial Court has drawn the conclusion that defendant No.3 utilized the suit property to begin with for his convenience, and later on, as the frontage of the shop in question as well as for access, ingress and egress. It has also been held that the land comprising the suit property is land appurtenant to the shop in question and used as its frontage. The Trial Court has, more or less, held that these rights appertain to the shop in question and belong to defendant No.3 so long as he is the tenant. Else, these are the rights of the plaintiff, who is the owner and the landlord. There being much issue between parties if indeed the suit property serves as frontage of the shop in question, necessary for ingress and egress, and used as land appurtenant to it, the Lower Appellate Court has looked into the sale deed of 15.09.1975, by which four shops were sold by Mustaq Ali to the plaintiff.

44. Upon a perusal of the said sale deed, paper No.20-Ka, the Lower Appellate Court has recorded a finding that the sale deed indicates the boundaries of the shop sold by Mustaq Ali to the plaintiff. The northern boundary of the shop shows land, described as parti, and to the south, the boundary shown is a road. The Amin Commissioner's report, paper No.50-Ga too

has been considered on the point. The Commissioner's report shows to the south the road and to the north the suit property. The Lower Appellate Court has concluded from these documents that the shops purchased by the plaintiff from Mustaq Ali vide registered sale deed dated 15.09.1975, had their frontage to the south, and to the north, there is land classified as parti. Both parties, according to the Lower Appellate Court, are ad idem on the issue that the land to the north, described as parti, vests in the State. None of the parties has a right in or to it, until the State Government confers or grants such a right. The Lower Appellate Court has held that on this ground, the suit is not maintainable.

45. This particular finding has come in the course of the Lower Appellate Court disposing of Issue No.8. We may say that while the findings about the boundaries of the shop in question and the inference drawn from it about the frontage of the shop may not be very wrong, as would be further elucidated in this judgment, but to say that the suit is not maintainable, is certainly a finding that this Court cannot approve. It is manifestly illegal. There is always a subtle distinction between the maintainability and sustainability of an action. Maintainability refers to that state of things, where the action brought on account of some bar created by law or otherwise is not triable. If, however, the action is triable, but by evidence, it cannot be proved, it cannot be said to be not maintainable. It has to be regarded as not sustainable, that is to say, a case which the plaintiff has not been able to establish at the trial; not one which was not triable at all.

46. There are further findings by the Lower Appellate Court to the effect that the plaintiff purchased the property in question through the registered sale deed dated 15.09.1975, and defendant No.3 is a tenant in the said shop. It has been recorded that it is admitted fact that the shop in question has its door oriented to the south and there is a road to the south, whereas to the north, the boundary shows it to be land i.e. parti, vested in the State and managed by the Municipal Board, defendant Nos.1 and 2. There is a further finding that the earlier findings while dealing with Issue No.8 would lead to the conclusion that the shop in question does not have access on all sides and the frontage is to the south, whereas to the north, the land is Nazul. There is also a finding to the effect that the evidence shows that earlier defendant No.3, before he raised the temporary structure, comprising the suit property, would sit on his shop, facing the east and receive his customers on that side. Now, the suit property, the temporary structure, that he has put up, enables him to receive customers from the Kanpur-Jhansi Highway, for which he pays tehbazari to defendant No.2. The Lower Appellate Court has held that the right to remove the structure erected on the northern side of the shop in question, can be removed by defendant Nos.1 and 2, but not at the instance of the plaintiff. This is so because the shop in question, belonging to the plaintiff, does not have its frontage or a right of ingress and egress to the north. The plaintiff has been held not to have a right of way on all sides of the shop in question, but only to the south.

47. Elaborating these findings, while discussing Issues Nos.4 and 5, apart from looking into the sale deed dated 15.09.1975 executed in the plaintiff's favour by Mustaq Ali, the Court has also looked into the Nazul Patta, paper No.19-Ka of the year 1958. The Lower Appellate Court has recorded a finding that this Patta shows that to the north is shown land that is parti. On

the basis of the title documents relating to the shop in question, the Lower Appellate Court has recorded plausible findings with reference to its boundaries that the plaintiff has no right of frontage or appurtenance over the suit property, which vests in the State. The Lower Appellate Court has affirmed the finding of the Trial Court that the temporary structure raised over the suit property by the defendant is illegal. But, the right to remove it vests in defendant Nos.1 and 2 and not the plaintiff. The reason assigned is that it is neither the frontage of the shop in question owned by the plaintiff nor land appurtenant to the said shop, that is to say, land necessary for its beneficial enjoyment. The shop in question has its access to the south, where it has a door and there is a public road, passing next to it. Therefore, the Lower Appellate Court, on the basis of documentary evidence and for very valid reasons, has reversed the findings of the Trial Court.

48. This Court may remark at this juncture that the original records, when summoned from the Trial Court, led to a most surprising report that Files "C1, C2 and D" were destroyed and the record keeper was not aware about the precise date of destruction/ weeding out of this record. File “A” alone was available. Some directions were issued about destruction of records vide order dated 22.09.2021 and by the same order, the weeded out/ destroyed record was directed to be reconstructed. We have, therefore, before us records comprising Files “C1, C2 and D”, that is reconstructed, being photostat copies etc., duly authenticated by the District Judge, Jalaun ar Orai. File 'A' carries whatever record is there in original.

49. We have looked into the sale deed dated 15.09.1975 executed by Mustaq Ali in the plaintiff's favour and find an elaborate description of boundaries with dimensions of the four shops sold. The northern boundary shows land that is parti, whereas the south boundary shows a road or way, described in Hindi as 'Rasta'. In the Patta, relating to the land on which the shops in question were constructed, dated 05.06.1958, executed by the Governor of Uttar Pradesh in favour of Mustaq Ali, the plaintiff's vendor, a document admitted by the plaintiff by an endorsement to its face, would show that the boundaries of the land on which the shops were constructed, including the shop in question, are: to the north, land, that is parti; and to the south, a road. The eastern boundary shows shop of Hafiz Kallu and shops of Dr. Haji Nazir. The western boundary shows again land that is parti. A perusal of the said document re-enforces the findings recorded by the Lower Appellate Court, drawing a plausible conclusion on documentary evidence to reverse the findings of the Trial Court to the contrary, that are based entirely on parole and circumstantial evidence. The Lower Appellate Court is the last Court of fact and it cannot be said that the inferences drawn by it on the issues arising between parties, particularly, Issues Nos.4, 5, 8 and 9 are perverse in any manner. This Court does not have the jurisdiction to re-appreciate evidence under Section 100 of the Code and substitute a view of our own based on pure appreciation of evidence, unless there be some perversity or manifest illegality. Far from that in point here, a very reasonable view of the evidence has been taken by the Lower Appellate Court.

50. In the circumstances, Substantial Question of Law (A) is answered in the manner that the Lower Appellate Court has substantially complied with the requirements of Order XLI Rule 31

of the Code and Substantial Question of Law (B) is answered in the negative, holding that the Lower Appellate Court has not committed any illegality in reversing the decree passed by the Trial Court, which it has done after setting aside findings of the Trial Court on all relevant issues, based on cogent reasoning.

51. So far as Substantial Question of Law (C) is concerned, evidence has been adequately appreciated by the Lower Appellate Court to come to the conclusion that the plaintiff does not have a right of frontage or access to the public road on the northern side, as the frontage of the shop in question, in the documents of title produced by the plaintiff, lies to the south of the said shop. To the north, there is land described as parti. The Lower Appellate Court has opined that no doubt defendant No.3 has no right to put up a temporary structure there on land that belongs to defendant No.1 and managed by defendant No.2, but that infraction does not afford a cause of action to the plaintiff to sue for mandatory injunction against defendant No.3, seeking removal of those unlawful construction. The said right is vested in defendant Nos.1 and 2. Since the evidence shows, as concluded by the Lower Appellate Court, that there is no frontage of the shop in question on the northern side, there is no deprivation of the plaintiff's rights of access to the public road on that side. The plaintiff may have had a cause of action to object to the temporary construction raised on the northern side of the shop in question, but he has not been able to prove his case, either of frontage or an appurtenance of that land enjoyed by virtue of ownership of shop in question. These findings have been recorded by the Lower Appellate Court on the basis of cogent evidence, about which there is no perversity.

52. Substantial Question of Law (C) is, therefore, answered in the **negative** and against the plaintiff.

53. In the result, this appeal fails and is **dismissed with costs throughout**.

54. Let **a decree** be drawn up accordingly.

55. Let the records be returned to the Trial Court by the Registry.

(2024) 5 ILRA 1447
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 237 of 2010

Anarkali ...Appellant
Versus
Siyawati ...Respondent

Counsel for the Appellant:
Somesh Tripathi, Alok Kr. Misra, Manoj Kumar Shukla, Mukesh Kumar Sharma, Vinod Kr. Yadav

Counsel for the Respondent:
Ankit Srivastava, Mohd. Ali, Ramesh Pandey, Sudeep Seth

A. Hindu Marriage Act, 1955 - Sections 5, 7, 11, 13 & 29(2) - Customary Divorce - While customary divorce is not explicitly provided for u/s 13, the saving clause in S. 29(2) states that nothing in the Act affects any rights recognized by custom to dissolve a Hindu marriage, thus permitting customary divorce - Customary Divorce - Pleading and Proof: To claim a custom as a rule of law, it must be pleaded and proved with cogent evidence demonstrating that it is ancient, continuously observed, and recognized within the relevant community - For proving a custom, not only the custom

is required to be pleaded and proved but it's prevalence and recognition for a considerable long time through some examples with proof (Paras 14, 15, 16)

B. In the instant case the only pleading made in the plaint was that Late Rampal had divorced defendant no.1 / appellant by the custom of chhoda chhutti - No pleading was made as to what was the custom prevalent and since how long time such 'custom' was continuing and recognised in the community of the appellant and her husband with some instances. Trial court held that no divorce had taken place. However, appellate court without considering as to whether there was sufficient pleading and proof of custom of divorce through chhoda chhutti in the community of the appellant or not, held that there was custom of Chhoda Chhutti in their community without any basis and proof in accordance with law - *Held* - Since it was not pleaded and proved that the custom of chhoda chhutti was prevalent, continuing and recognised in the community of the appellant and Late Rampal, it could not be held that there was divorce between the appellant and Late Rampal.

C. Procedure and Practice - Single appeal against the common judgment and decree dismissing Suit and allowing counter Claim - Maintainability - In the instant case Defendant/Appellant filed a counter claim against the suit filed by the plaintiff/respondent no.1 - while dismissing the suit of the plaintiff/respondent no.1, the counter claim of the appellant was allowed - plaintiff/respondent no.1 filed only one appeal against the judgment and decree passed by the trial court - Held - though every decree is required to be challenged on being aggrieved after paying the required court fees. However, in case one appeal is filed challenging the common judgment and decree passed in the main suit and counter-claim paying required court fees, it will not vitiate the proceedings on this ground. (Para 47)

Allowed. (E-5)

List of Cases cited:

1. Loya Padmaja @ Venkateswaramma Vs Loya Veera Venkata Govindarajulu;1999(6) ALD 413 AP HC

2. Rameshchandra Rampratapji Daga Vs Rameshwari Rameshchandra Daga;(2005) 2 SCC 33

3. Dolly Rani Vs Manish Kumar Chanchal; Transfer Petition (C) No(s).2043/2023

4. YamunaBai Anantrao Adhav Vs Anantrao Shivram Adhav & anr.; (1988) 1 SCC 530

5. Smriti Singh @ Mausami Singh & ors. Vs State of U.P. & anr.;Application U/S 482 No.23148 of 2022

6. Badri Prasad Vs Deputy Director of Consolidation & ors.; AIR 1978 SC 1557

7. Smt. Shiramabai w/o Pundalik Bhave Vs Captain Record Officer for O.I.C. records Sena Corps

8. Abhilekh, Gaya, Bihar State; AIR 2023 SC 3920

9. Samar Kumar Roy(Dead) Through Legal Representative(Mother) Vs Jharna Bera;(2017) 9 SCC 591

10. P.Kishore Kumar Vs Vittal K.Patkar;2023(41) LCD 2817

11. Gurdev Kaur & ors. Vs Kaki & ors.;(2007) 1 SCC 546

12. Satyender & ors. Vs Saroj & ors.;2022 Live Law (SC) 679

13. Narhari & ors. Vs Shanker & ors.;AIR 1953 SC 419

14. Rajni Rani & anr. Vs Khairati Lal & ors.;(2015) 2 SCC 682

15. Sri Gangai Vinayagar Temple & anr. Vs Meenakshi Ammal & ors.;(2015) 3 SCC 624

16. State of Andhra Pradesh & ors. Vs B.Ranga Reddy(Dead) by Legal Representatives & ors.;(2020) 15 SCC 681

17. Nazir Mohamed Vs J.Kamala & ors.;(2020) 19 SCC 57

18. G.Amalorpavam & ors. Vs R.C. Diocese of Madurai & ors.; (2006) 3 SCC 224

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

1. Heard, Sri Alok Kumar Mishra alongwith Sri Manoj Kumar Shukla, learned counsel for the appellants, Sri Mohd. Ali, learned counsel for the respondent no.1 and Sri Rajnish Maurya, Advocate holding brief of Sri Ankit Srivastava, learned counsel for the respondent no.2. None appeared on behalf of the respondent no.3, despite sufficient service.

2. This second appeal, under Section 100 of Civil Procedure Code(hereinafter referred to as CPC), has been filed against the judgment and decree dated 05.03.2010 passed by the Additional District Judge, Court No.7,Raibareli in Civil Appeal No.86/2009; Smt.Siyawati versus Smt. Anarkali and others, by means of which the appeal has been allowed and the judgment and decree dated 29.07.2009 passed by the Civil Judge(S.D.), Court No.14, Raebareli in Regular Suit No.411/2002;Siyawati versus Anarkali has been set aside and the suit of the plaintiff-respondent no.1(hereinafter referred to as the respondent no.1) has partly been decreed and the declaration has been made that the respondent no.1- Siyawati is legally wedded wife of Late Rampal son of Shiv Balak. For rest of the reliefs, the suit of the respondent no.1 has been dismissed with cost. The claim of the defendant-appellant(hereinafter referred to as the appellant) has also been dismissed with cost.

3. The husband of the appellant, Late Rampal was working on the post of peon in Baiswara P.G. College. He died-in-harness on 20.10.1999. The respondent no.1, claiming herself to be the wife of Late Rampal, obtained the succession certificate from the office of the District Magistrate,Raibareli on 25.11.1991. On the basis of the said certificate, she got compassionate appointment on 19.10.2000 in the defendant-respondent no.3 institution(hereinafter referred to as the respondent no.3). The appellant preferred Misc. Case No.76/2000;Anarkali versus Public in General for issuance of succession certificate for release of G.P.F. amount to the tune of Rs.85,642/- and the amount deposited in Saving Bank Account of her husband Late Rampal in the defendant-respondent no.2 Bank(hereinafter referred to as the respondent no.2) to the tune of Rs.5674/-, which was allowed by means of the order dated 26.11.2000. The respondent no.1 moved application under Order 1 Rule 10 C.P.C. in the said succession suit, which was rejected on 22.12.2001. Thereafter, the respondent no.1 filed Regular Suit No.411 of 2002 for declaration to the effect that she be declared the legally wedded wife of Late Rampal and therefore entitled for the G.P.F. amount as well as the amount deposited in the saving bank account of the deceased in State Bank of India, Lalganj Branch. A further declaration was sought to the effect that order passed in Misc. case No.76/2000; Anarkali versus Public in General on 26.11.2001 is null and void alongwith consequential prayer. The appellant, after putting appearance in the suit, filed a written statement denying the averments made in the plaint. She further filed a counter claim for declaration to the effect that the compassionate appointment of the respondent no.1 on 19.12.2000 in the respondent no.3-College as wife of Late

Rampal be declared null and void alongwith consequential prayer. The respondent no.3 also filed its written statement admitting that the respondent no.1 has been given appointment on compassionate ground on the basis of succession certificate issued from the District Magistrate, Raebareli. It has also been admitted that the respondent no.1 and the appellant both had applied for the compassionate appointment.

4. During pendency of the suit, it was amended, therefore the additional written statement was filed by the appellant. The replication to the written statement was filed by the respondent no.1. On the basis of the pleadings of the parties, 8 issues were framed by the trial court, which are extracted here-in-below:-

वाद बिन्दु

1. क्या यह घोषित किये जाने योग्य है कि वादिनी स्व0 राम पाल निवासी ग्राम चादा प0,त0 लालगंज, रायबरेली की विवाहित पत्नी है एवं स्व0 राम पाल की मृत्यु पश्चात जी0पी0एफ0 की धनराशि मु0 85642/—रू0 एवं बचत खाता सं0 3281, भारतीय स्टेट बैंक शाखा लालगंज, रायबरेली में जमा मु0 56741/—रू0 प्राप्त करने की अधिकारिणी है?

2. क्या यह घोषित किये जाने योग्य है कि सिविल जज सी0 डि0 रायबरेली द्वारा पारित आदेश दिनांकित 26.11.2000 प्रकीर्ण वाद अ0सं0 संख्या 76/2000 अनारकली बनाम हरखास आम निष्प्रभावी है?

3. क्या कोई वाद कारण उत्पन्न नहीं हुआ?

4. वादिनी किस अनुतोष को पाने की अधिकारिणी है?

5. क्या वादिनी का वाद आदेश 7 नियम 11 जा0 दी0 के प्रावधान के तहत निरस्त होने योग्य है?

6. क्या वादी ने न्याय शुल्क का आकलन कम किया है?

7. क्या वाद में पक्षकारों के कुसंयोजन का दोष है?

8. क्या प्रतिवादिनी सं0 1 अपने काउण्टर क्लेम के आधार पर कोई अनुतोष पाने की अधिकारिणी है?

5. Certain documentary evidences were filed by the respondent no.1 and the appellant, which would be referred at the relevant places. After considering the pleadings of the parties and evidence adduced before the trial court, the trial court dismissed the suit of the respondent no.1 by means of the judgment and order dated 29.07.2009 and decreed the claim of the respondent no.1 and declared that the appointment of the respondent no.1 as wife of Late Rampal in respondent no.3 institution is illegal and void.

6. Being aggrieved by the judgment and decree dated 29.07.2009, the respondent no.1 preferred Civil Appeal No.86 of 2009. The first appellate court after considering the pleadings of the parties and affording opportunity of hearing to the parties allowed the appeal and set aside the judgment and decree dated 29.07.2009 pased by the trial court and decreed the suit of the respondent no.1 declaring the respondent no.1 as legally wedded wife of Late Rampal and for rest of the prayers dismissed the same. The claim of the appellant has also been dismissed. Hence the instant second appeal has been filed.

7. The appeal was admitted by means of the order dated 17.08.2010 on the substantial question of law nos. 1 and 2 as prayed by the appellant. By means of the order dated 26.02.2013, the substantial question of law no. 2 was not pressed, accordingly, this Court had passed an order that the parties are directed to confine their arguments at the time of hearing on the first substantial question of law only and the second substantial question of law shall be ignored as not pressed. Considering the said orders, by means of the order dated 01.09.2022, this Court formulated one more substantial question of law. By means of the order dated 10.11.2022, this Court formulated one more substantial question of

law. As such following substantial questions of law have been formulated by this Court in this second appeal:-

"(i) Whether the suit of the plaintiff respondent could be decreed by the first appellate court in the absence of specific finding that the plaintiff-respondent was the legally wedded wife of late Rampal.

(ii) Whether the first appeal filed by the respondent no.1-Siyawati was maintainable in view of the fact that the suit and counter claim both were decided by the common judgment dated 29.07.2009 by the trial court?

(iii)Whether customary divorce was not prevalent in the family of appellant and family of the respondents and the findings recorded by the lower court regarding customary divorce of appellant with Late Rampal was void and on this count the judgment of the first appellate court cannot be sustained and the judgment and decree of the lower court is liable to be restored.?"

8. Learned counsel for the appellant submitted that the appellant was the legally wedded wife of Late Rampal and remained as such till his death as there was no judicial separation or divorce between them. There was no custom of divorce by chhoda chhutti in their Kuswaha community but without framing any point of determination in this regard, learned first appellate court erred in law as well as on fact in holding that there was divorce between the appellant and her husband Late Rampal through the custom prevalent in their community, whereas neither any such custom was prevalent in their community nor the same was proved by either of the parties. He also submits that the custom having force of law is only admissible. Therefore unless the custom is proved as per law it cannot be accepted and enforced. Learned first appellate court also failed to consider that the appellant had preferred a suit for maintenance under Section 125 Cr.P.C. against Late Rampal,in which the maintenance was allowed which was regularly paid through cheques and Late Rampal had also filed a suit under Section 25 of the Guardian and Wards Act against the appellant for custody of their minor daughter. He further submitted that first appellate court has recorded contrary findings in regard to the issues no.1 and 2 and has failed to consider the statement on oath of the respondent no.1, who appeared as PW1 that it is true to say that Siyawati was legally wedded wife of Late Rampal till his death, which is in fact the admission on the part of the respondent no.1 and in view of this admission, as per Hindu Law he could not have married another woman during his lifetime. He further submitted that the appellant is nominee in the service book of her husband, which is still intact. The amount of G.P.F. of the husband of the appellant has also been paid to the appellant on the basis of succession certificate issued by the competent court of law.He also submitted that the appellant had filed a counter claim against the suit filed by the respondent no.1 and while dismissing the suit of the respondent no.1, the counter claim of the appellant was allowed but only one appeal was filed against the judgment and decree passed by the trial court therefore it was not maintainable and liable to be dismissed on this ground alone. Thus, the submission of learned counsel for the appellant is that judgment and decree passed by the first appellate court suffers from manifest error of law and findings recorded by it are erroneous and perverse and it is liable to be set aside by this Court.

9. He relies on ***Yamanaji H. Jadhav versus Nirmala; (2002) 2 SCC 637,***

Rameshchandra Rampratapji Daga versus Rameshwari Rameshchandra Daga;(2005) 2 SCC 33,State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others;(2020) 15 SCC 681,Rajni Rani and Another versus Khairati Lal and Others;(2015) 2 SCC 682, YamunaBai Anantrao Adhav versus Anantrao Shivram Adhav and another;(1988) 1 SCC 530,Gurdev Kaur and Others versus Kaki and Others;(2007) 1 SCC 546,P.Kishore Kumar versus Vittal K.Patkar;2023(41) LCD 2817, Samar Kumar Roy(Dead) Through Legal Representative(Mother) versus Jharna Bera;(2017) 9 SCC 591, Smt. Shiramabai w/o Pundalik Bhave versus Captain Record Officer for O.I.C. records Sena Corps Abhilekh, Gaya, Bihar State; AIR 2023 SC *3920 and a coordinate Bench judgment of this Court in the case of* ***Smriti Singh Alias Mausami Singh and 3 others versus State of U.P. and Another;Application U/S 482 No.23148 of 2022 .***

10. Per contra, learned counsel for the respondent no.1 submitted that the appellant was divorced by her husband late Rampal as per the custom prevalent and recognised in their community, which was proved by the statement of D.W.2 i.e. witness produced by the appellant and after divorce from the appellant, her husband had married to the respondent no.1 in accordance with law and the custom in the community. Therefore it cannot be said that the marriage of respondent no.1 with her husband late Rampal was void. He further submitted that the respondent no.1 was appointed in the respondent no.3 institution on the basis of the succession certificate issued by the District Magistrate under Dying-in-Harness in place of her husband in accordance with law on 28.09.2000. He also submitted that the respondent no.1 has three children out of the wedlock with Late Rampal. Thus, the submission is that the trial court had wrongly and illegally dismissed the suit filed by the respondent no.1, which has rightly and in accordance with law been allowed by the first appellate court after considering the pleadings of the parties and evidence adduced before the trial court. Therefore the judgment and decree passed by the first appellate court does not suffer from any illegality or error. On the basis of above, submission of learned counsel for the respondent no.1 is that the substantial questions of law formulated by this Court does not arise in this appeal and the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed with cost.

11. He relies on ***Satyender and Others versus Saroj and Others;2022 Live Law (SC) 679, State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others;(2020) 15 SCC 681,Sri Gangai Vinayagar Temple and Another versus Meenakshi Ammal and Others;(2015) 3 SCC 624,Nazir Mohamed versus J.Kamala and Others;(2020) 19 SCC 57,Gurdit Singh versus Mst. Angrez Kaur Alias Gej Kaur alias Malanand Others;1968 AIR 142,,Badri Prasad versus Deputy Director of Consolidation and Others; AIR 1978 SC 1557,Narhari and others versus Shanker and Others;AIR 1953 SC 419,Smt. Nirmala and others versus Mamta and others;FAM No.143 of 2017 of Chattisgarh High Court, Bilaspur,Loya Padmaja @ Venkateswaramma versus Loya Veera Venkata Govindarajulu;1999(6) ALD 413 of Andhra Pradesh High Court and G.Amalorpavam and others versus R.C. Diocese of Madurai and Others;(2006) 3 SCC 224. .***

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

13. The respondent no.1 filed suit stating that the appellant was the legally wedded wife of Late Rampal. Late Rampal had desolved the marriage with her according to the custom of chhoda chhutti prevalent and recognised in their community 22 years back. Thereafter, he had married with the respondent no.1 about 11-12 years back according to the customary rights and ceremonies prevalent in the community. Therefore the first question to be considered in this case is as to whether the custom of Chhoda Chhutti was prevalent, continuing and recognised in the community of the appellant and her husband or not and if it was prevalent, and continuing and recognised,the marriage of the appellant with Late Rampal was desolved with the said custom of chhoda chhutti or not.

14. As per Section 5 of the Hindu Marriage Act 1955(hereinafter referred to as the Act of 1955), the first condition of the conditions for Hindu Marriage is that the marriage may be solemnized between two hindus if neither of the party has spouse living at the time of marriage. The exception to it is if a person has got divorce, in accordance with law. Section 13 of the Act of 1955 provides as to how a marriage may be desolved. Therefore a person whose marriage has been desolved in accordance with law is entitled to remarry. Though the customary divorce is not provided under Section 13 of the Act of 1955, however, as per Saving clause provided under Section 29(2),it will not affect any right recognised by custom to obtain dissolution of a Hindu Marriage, as such the customary divorce is permissible, if it is recognised. Section 29(2) is extracted hereinbelow:-

"(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act".

15. The 'custom' has been defined in Sub-section(a) of Section 3 of the Act of 1955, which is extracted hereinbelow:-

3. Definitions.—In this Act, unless the context otherwise requires,—

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

16. In view of above, the expression 'custom' signify any rule which, having been continuously and uniformly observed for a long time and recognised in a community, would obtain the force of law among Hindus, provided that the rule is certain and not unreasonable or opposed to public policy. If it is in regard to a family it is applicable only to a family, where it has not been discontinued by the family. Therefore for claiming a custom as a rule of law, it has to be necessarily pleaded and proved by cogent evidence that the same was ancient and being continuously and uniformly been observed for a long time and recognised in the community of the person(s) claiming it.

17. The Andhra Pradesh High court, in the case of ***Loya Padmaja @***

Venkateswaramma versus Loya Veera Venkata Govindarajulu(supra), has held that where there is a custom prevalent in a community either for dissolution or for performance of a marriage which is accepted and recognised the same shall not be affected by any provisions of the Hindu Marriage Act 1955.

18. The Chattisgarh High Court, in the case of ***Smt. Nirmala and others versus Mamta and others(supra)***, has held that for custom to have the colour of a rule of law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient. The Court also considered and followed the judgment of the Hon'ble Supreme Court, in the case of ***Gurdit Singh versus Mst.Angrez Kaur(supra)***, in which it has been held that when the existence of custom has been proved in a community to which the parties belong, in such case, the custom of divorce would be saved and would lead to a valid divorce.

19. The Hon'ble Supreme Court, in the case of ***Yamanaji H. Jadhav versus Nirmala(supra)***, has held that as per the Hindu Law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore there was an obligation on the trial court to have framed the issue as to whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. The Hon'ble Supreme Court further opined that the lack of sufficient pleading in the plaint or in the written statement would not in our opinion permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. The relevant paragraph 7 is extracted here-in-below:-

"7.In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there

was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law. Therefore, we are of the opinion to do complete justice in this case. It is necessary that the trial court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside court) in their community and then test the validity of the divorce deed dated 26.6.1982 based on the finding arrived at in deciding the new issue."

20. The Hon'ble Supreme Court, in the case of ***Rameshchandra Rampratapji Daga versus Rameshwari Rameshchandra Daga(supra)***, has declined to accept the registered document of Chhor Chithhi from the previous husband on the ground that the existence of such customary divorce in Vaish community of Maheshwaris has not been established. The Hon'ble Supreme Court has further held that a Hindu marriage can be dissolved only in accordance with the provisions of the Act by obtaining a decree of divorce from the court.

21. In view of above, unless and untill a 'custom' and it's prevalence, continuance for a considerable long time and recognition in the community concerned etc. is specifically pleaded and proved by cogent evidence before the court of law,in case of dispute,the claim on the basis of said custom cannot be accepted and no right will accrue on the basis of said custom. For proving a custom, not only the custom is required to be pleaded and proved but it's prevalence and recognition for a considerable long time through some examples with proof.

22. Adverting to the facts of the present case, this Court finds that only pleading made in the plaint is that Late

Rampal had divorced defendant no.1 i.e. the appellant by the custom of chhoda chhutti prevalent and recognised in the community but no pleading has been made as to what was the custom prevalent and since how long time such 'custom' was continuing and recognised in the community of the appellant and her husband with some instances and when there was no pleading it could not have been proved and in fact not proved. Not even a single instance of it's existence and observance has been shown. The appellant has specifically denied the pleadings in this regard. It has further been stated in the additional statement that Late Rampal had not divorced the appellant in his life time through any custom or competent court. The trial court, after considering the pleadings of the parties and evidence adduced before it, has held that no divorce had taken place between Late Rampal and Anarkali i.e the appellant. The respondent no.1, who appeared as P.W.1, has also admitted in his statement on oath that it is correct to say that till the death of Rampal, Anarkali was his legally wedded wife and she would not be able to tell as to whether Anarkali and Rampal were divorced or not. She has stated about divorce of Anarkali and Rampal on the basis of information given by Rampal. D.W.2. Kali Babu has also stated that he knows Anarkali and Late Rampal. They remained as husband and wife throughout his life and there was no divorce between Smt. Anarkali and Rampal through court or community. However, learned appellate court without considering as to whether there was sufficient pleading and proof of custom of divorce through chhoda chhutti in the community of the appellant or not, only considering the plea of the respondent no.1 and on the basis of the evidence of the real brother of Late Rampal, P.W.2 Rajaram and statement of D.W.2-Kali Babu that there is custom of Chhoda Chhutti in their community without any basis and proof in accordance with law, held that chhoda chhutti as dissolution of marriage was prevalent in the caste and community of the appellant, whereas as to whether it was a custom prevalent and recognised in the community or not has not been proved.

23. Learned appellate court has also failed to consider the admission on the part of the respondent no.1 in regard to continuance of the marital relations between the appellant and Late Rampal till his death. Merely, because the husband and wife were not living together for a long time, it cannot be said that there was divorce between them. Learned appellate court has also failed to consider the admission of Late Rampal recorded in the written statement filed by him in a petition under Section 125 Cr.P.C. filed by the appellant for maintenance. Though it may not be of much evidentiary value but when considered in the light of evidence in the present case, it strengthens it.

24. In view of above, since it could not be pleaded and proved that the custom of chhoda chhutti was prevalent, continuing and recognised in the community of the appellant and Late Rampal, merely on the basis of statement of P.W 2 that Late Rampal had divorced the appellant through Chhoda Chhutti before the community is not sufficient to hold that the appellant and Late Rampal were divorced through the said custom, whereas P.W. 2 also failed to disclose the persons who were present at the time of alleged divorce through the said custom and as to how the custom was performed. Therefore also it could not have been held that there was divorce between the appellant and Late Rampal.

25. Now the question arises that if the 'custom' of Chhoda Chhutti for divorce

could not be proved by adducing cogent and convincing evidence by the respondent no.1, as to whether the respondent no.1 could have been said to be legally wedded wife of Late Rampal.

26. Section 5(i) of the Act of 1955 provides that the marriage may be solemenized between any two Hindus if neither party has a spouse living at the time of the marriage. Therefore since the legally wedded wife of Late Rampal i.e. the appellant was alive throughout his life time, Late Rampal could not have married to any other woman or the respondent no.1. The marraige of Late Rampal with the respondent no.1 even if held, cannot be said to be a legal and valid marriage in the eyes of law, giving her status of legally wedded wife of Late Rampal and benefits and rights of same. Section 11 of the Act of 1955 provides about void marriages, according to which any marriage solemnized in contravention of conditions specified in clauses (i), (iv) and (v) of section 5 is void. Therefore even if the marriage was solemnized by Late Rampal during subsistence and life of the appellant, who was admittedly the legally wedded wife of Late Rampal throughout her life time, the marriage would be void.

27. Even otherwise, it has to be seen as to whether the marriage of the respondent no.1 with Late Rampal was in accordance with Hindu law or not. Sub-Section (i) of Section 7 of the Act of 1950 provides that the Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-Section (2) provides where such rites and ceremonies include the 'Saptapadi' (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. Therefore one who claims that he/she was married in accordance with the rites and ceremonies of Hindus, if a dispute is raised, he/she will have to plead and prove what were the rites and ceremonies and as to whether such rites and ceremonies include 'Saptapadi' or not and if includes, the 'Saptapadi' was performed or not. Normally the 'Saptapadi' before the sacred fire is an essential ceremony in Hindus and in absence of such ceremony, the Hindu marriage cannot be said to have been performed in accordance with law.

28. In regard to the claim of marriage of the respondent no.1 with Late Rampal,respondent no.1 has pleaded in his plaint that Rampal was of the caste of respondent no.1 and he had married to the respondent no.1 in accordance with the customs prevalent in their community and their marriage was recognised by their family community and society. However, there is no pleading that what were the customary rights and ceremonies in the family and community of Late Rampal and the respondent no.1. It has also not been pleaded as to whether 'Saptapadi' was included in the rights and ceremonies of the family and community of the respondent no.1 and Late Rampal or not, and if it was included, as to whether it had taken place or not. The respondent no.1 in his statement on oath recorded on 28.03.2007 has stated that she had married with Rampal 15-16 years back. It has also been pleaded that respondent no.1 and Late Rampal were living together as husband wife during their life time and their relationship as husband and wife was recognised by their family and community but it cannot be said on the basis of these pleadings and evidence on record that they were legally wedded in accordance with law. P.W.2 and P.W.3 also could not prove it.

29. The Hon'ble Supreme Court, in a recent judgment of ***Dolly Rani versus***

Manish Kumar Chanchal; Transfer Petition (C) No(s).2043/2023, has held that there has to be hindu marriage in accordance with Section 7 of the Act in-as-much as there must be a marriage ceremony which has taken place between the parties in accordance with the said provision. Although the parties may have complied with the requisite conditions for a valid hindu marriage as per Section 5 of the Act but in absence of there being a Hindu marriage in accordance with Section 7 of the Act i.e. solemnization of such marriage there would be no hindu marriage in accordance with law. It has further been held that in absence of any Hindu marriage as per the provisions of law, the man and woman cannot acquire status of being husband and wife to each other. It has further been held that there should not only be compliance of the conditions as prescribed under Section 5 of the said Act but also the couple must solemnize a marriage in accordance with Section 7 of the Act and the critical conditions for solemnizing a hindu marriage should be assiduosly, strictly and religiously followed. The Hon'ble Supreme Court has also held that where a Hindu Marriage is not performed in accordance with the applicable rites or ceremonies such as saptapadi when included, the marriage will not be construed as a Hindu marriage. In other words, for a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the said ceremony when an issue/controversy arise. Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act.

30. The Hon'ble Supreme Court, in the case of ***YamunaBai Anantrao Adhav versus Anantrao Shivram Adhav and another(supra),*** has held that so far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party and held that the marriage of a woman in accordance with Hindu Rites with a man having a living spouse is a complete nullity in the eye of law. The relevant paragraphs 3 and 7 are extracted hereinbelow:-

"3. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act,1955(hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms:

" 11. Void marriages-Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5. "

Clause (1)(i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to Section 12 the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories

of marriage and is not applicable to one solemnised in violation of s. S(1)(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void-ipso- jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect:

" 16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws(Amendment) Act 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child not withstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1), by using the words underlined above clearly, implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by Setion 12, sub- section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Section 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception."

7. Lastly it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party."

31. A coordinate Bench of this Court, in the case of ***Smriti Singh Alias Mausami Singh and 3 others versus State of U.P. and Another(supra)***, has held that it is well settled that the word solemnize means in connection with a marriage, to celebrate the marriage with proper ceremonies and in due form and unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be solemnized. If the marriage is not a valid marriage, according to the law applicable to the parties, it is not a marriage in the eyes of law. The court has also held that saptapadi ceremony under the Hindu law is one of the essential ingredients to constitute a valid marriage, therefore if it is not performed, the marriage cannot be said to be legal and valid marriage.

32. The Hon'ble Supreme Court, in the case of ***Badri Prasad versus Deputy Director of Consolidation and Others(supra***), has held that strong presumption arises in favour of wedlock where the partners have lived for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Therefore there was heavy burden on the respondent no.1 who was seeking to deprive the relationship of the appellant with Late Rampal to prove divorce between them in accordance with law and the marriage of the respondent no.1 with Late Rampal in accordance with law with due compliance of rites and ceremonies, which she has failed to do.

33. The Hon'ble Supreme Court, in the case of ***Smt. Shiramabai versus Captain Record Officer for O.I.C. records Sena Corps Abhilekh, Gaya, Bihar State(supra)***, has held that it is no longer res intergra that if a man and woman cohabit as husband and wife for a long duration, one can draw a presumption in their favour that they were living together as a consequence of a valid marriage and this presumption can be drawn under Section 114 of the Evidence Act. The court has further held that no doubt, the said presumption is rebuttable and can be rebutted by leading unimpeachable evidence and when there is any circumstance that weakens such a presumption, courts not to ignore the same. The burden lies heavily on the party who seeks to question the cohabitation and to deprive the relationship of a legal sanctity. Therefore merely relying the separate living of the appellant and Late Rampal for a long period is not sufficient to presume that there was a divorce between them and in absence of proof of the marriage of respondent no.1 with Late Rampal in accordance with law, which has been disputed by the appellant,it cannot be said that there was divorce between the appellant and late Rampal and if divorce between the appellant and Late Rampal could not be proved, he could not have married in view of Section 5(i) of the Act of 1955 and the marriage in contravention of the said statutory provision would be void under Section 11 of the Act of 1955. Even otherwise the respondent no.1 has failed to prove her marriage with Late Rampal in accordance with law. Thus, this Court is of the view that learned appellate court has committed grave illegality and error in holding that the appellant was divorced with Late Rampal and the respondent no.1 was married to him without considering and recording any finding as to whether the respondent no.1 was married with Late Rampal in acordance with law, therefore the same is not sustainable in the eyes of law. Thus the substantial questions of law no.3 and 1 are answered accordingly.

34. The Hon’ble Supreme Court, in the case of ***Samar Kumar Roy(Dead) Through Legal Representative(Mother)***

versus Jharna Bera(supra), has held that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law.

35. The Hon'ble Supreme Court, in the case of ***P.Kishore Kumar versus Vittal K.Patkar(supra),*** has held that the decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. The relevant paragraph 28 is extracted hereinbelow:-

"28. The first appellate court having examined the facts in extenso, the High Court ought not to have interfered with the findings rendered therein by virtue of being, in second appeal, a court of law. As was astutely said by this Court in Gurdev Kaur vs. Kaki, a second appellate court is not expected to conduct a "third trial on facts" or be "one more dice in the gamble." The decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. With utmost respect to the High Court, we are constrained to observe that the question framed by it could be regarded as one of law, if it all, but did not merit the label of a substantial question of law so as to warrant interference with the first appellate decree under section 100 of the CPC."

36. Similar view has been taken by the Hon'ble Supreme Court, in the case of ***Gurudev Kaur and Others versus Kaki and Others(supra)*** and held that It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble".

37. The appellant had filed the counter claim in the suit filed by the respondent no.1. The suit of the respondent no.1 was dismissed by the trial court against the appellant and the counter claim filed by the appellant was allowed and the declaration was made that the appointment of the respondent no.1 in respondent no.3 institution on 19.10.2000 is illegal and void by means of a common judgment and decree dated 29.07.2009. However, the respondent no.1 had filed only one appeal challenging the judgment and decree passed by the trial court, which has been allowed with cost and the judgment and decree passed by the trial court has been set aside. The suit of the respondent no.1 has been partly decreed with cost declaring her as legally wedded wife of Late Rampal. However, the suit of the respondent no.1 for rest of the prayers and counter claim of the appellant has been dismissed. Thus in view of the second substantial question of law formulated by this Court, the question arises as to whether the first appeal filed by the respondent no.1 was maintainable or not against the common judgment and decree dated 29.07.2009 passed by the trial court.

38. Order VIII Rule 6-A CPC makes a provision for counter claim by the defendant in a suit filed against him claiming any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. Whether such counter-claim is in the nature of a claim for damages or not and

such counter-claim should not exceed the pecuniary limits of the jurisdiction of the Court. Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. Rule 6-A is extracted hereinbelow:-

"6A. Counter-claim by defendant.

(1)A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3)The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints"

39. As per Rule 6-D of Order VIII CPC, if in any case in which the defendants sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with. Thus, the counter claim filed under the aforesaid provision would be in fact a cross suit claiming relief against the plaintiff . However, the same can be decided alongwith the suit by common judgment and decree.

40. The Hon'ble Supreme Court, in the case of ***Satyender and Others versus Saroj and Others(supra)***, has held that the counter-claim cannot exceed the pecuniary limits of the jurisdiction of the court, and that such counter-claim must be instituted before the defendant has delivered his defence or before the time limit for delivering his defence has expired. More importantly, such a counter claim must be against the plaintiff.

41. Section 96 CPC provides Appeal from original decrees. It provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction of the Court authorized to hear appeals from the decisions of such Court.It also lies against the original decree passed ex parte. Therefore the appeal can be filed against a decree. Section 96 is extracted here-in-below:-

"96.Appeal from original decree.—

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex pane.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

1[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small

Cause, when the amount or value of the subject-matter of the original suit does not exceed 2[ten thousand rupees]."

42. The 'decree' as defined in Sub-section (2) of Section 2 CPC means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Sub-section (2) of Section 2 is extracted hereinbelow:-

"(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final"

43. The Hon'ble Supreme Court, in the case of ***Narhari and others versus Shanker and Others(supra)***, has held that it is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up as determining factor is not the decree but the matter in controversy because the two decrees in substance are one.

44. The Hon'ble Supreme Court, in the case of ***Rajni Rani and Another versus Khairati Lal and Others(supra***), has held that a Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree.The relevant paragraphs 9 to 9.6 and 25 are extracted here-in-below:-

"9. To appreciate the controversy in proper perspective it is imperative to appreciate the scheme relating to the counter-claim that has been introduced by CPC (amendment) Act 104 of 1976 with effect from 1.2.1977.

9.1 Order 8, Rule 6A deals with counter-claim by the defendant.

Rule 6A(2) stipulates thus:-

"6-A(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim."

9.2. Rule 6A(3) enables the plaintiff to file a written statement. The said provision reads as follows:-

"6-A(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court."

9.3. Rule 6A(4) of the said Rule postulates that

"6-A(4) The counter-claim shall be treated as a plaint and governed by rules applicable to a plaint.

9.4 Rule 6-B provides how the counter-claim is to be stated and Rule 6C deals with exclusion of counter-claim.

9.5 Rule 6-D deals with the situation when the suit is discontinued. It is as follows:-

" 6D. Effect of discontinuance of suit. – If in any case in which the defendant sets up a counter-claim, the suit of the

plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with."

9.6 . On a plain reading of the aforesaid provisions it is quite limpid that a counter-claim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counter-claim shall remain alive for adjudication. For making a counter-claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter-claim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the Judgment against the plaintiff in relation to the counter-claim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings. When a counter-claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim. The seminal purpose is to avoid piece-meal adjudication. The plaintiff can file an application for exclusion of a counter-claim and can do so at any time before issues are settled in relation to the counter-claim. We are not concerned with such a situation.

25. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

45. The Hon'ble Supreme Court, in the case of ***Sri Gangai Vinayagar Temple and Another versus Meenakshi Ammal and Others(supra)*** which is in regard to the applicability of the principles of res judicata under Section 11 CPC, has held that principles of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment. It has also been observed that procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. It has further been held that the decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit/ The relevant paragraph nos. 25 to 27 are extracted here-in-below:-

25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various

High Courts have given divergent and conflicting opinions and decisions. The High Court of Madras and erstwhile High Courts of Lahore, Nagpur and Oudh have held that there could be no res judicata in such cases whereas the High Courts of Allahabad, Calcutta, Patna, Orissa and erstwhile High Court of Rangoon have taken contrary views. It should also be noted that there are instances of conflicting judgments within the same High Court as well. The decision of Tek Chand, J. in Full Bench Judgment of the Lahore High Court in Lachhmi vs. Bhulli and Full Bench Judgment of the Madras High Court in Panchanda Velan vs. Vaithinatha Sastrial and of the Oudh High Court in B. Shanker Sahai v. B. Bhagwat Sahai appear to be the leading decisions against the applicability of res judicata. Without adverting to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigorous of res judicata flowed from the notion that Section 11 of the Code refers only to "suits" and as such does not include "appeals" within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

26. On the other hand, the verdict of Full Bench of the Allahabad High Court in Zaharia vs. Debia and decisions of the Calcutta High Court in Isup Ali vs. Gour Chandra Deb *and of the Patna High Court in Mrs. Getrude Oastes vs. Mrs Millicent D'Silva are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology "suit" is not limited to the Court of First Instance or Trial Court but encompasses within its domain proceedings before the Appellate Courts; that non-applicability of res judicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree; that the issue of res judicata has to be decided with reference to the decrees, which are appealable under Section 96 of the CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in the CPC; that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of the Explanation II of Section 11, that provides that the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court; and that Section 11 of the CPC is not exhaustive of the doctrine of res judicata, which springs up from the general principles of law and public policy.*

27. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again.

Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the CPC, as clarified by this Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement . In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of O.S. 5/78, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

46. The Hon'ble Supreme Court, in the case of ***State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others(supra)*** has held that it is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties and even in terms of Order 41 Rule 33 of the Code, the Appellate Court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it.

47. In view of above, though every decree is required to be challenged on being aggrieved after paying the required court fees. However, in case one appeal is filed challenging the common judgment and decree passed in the main suit and counter-claim paying required court fees, it will not vitiate the proceedings on this ground.

48. Adverting to the facts of the present case and on perusal of the records of the first appellate court, this Court finds that the appeal was filed by the respondent no.1 with prayer for allowing the appeal by setting aside the judgment and decree of the counter claim passed by the lower court and decree the suit of the appellant, i.e. the respondent no.1 in this appeal, with cost. On filing the appeal, office reported that sufficient court fees has been filed and it is within the territorial jurisdiction and limitation. Thus, both the decrees passed in the main suit filed by the respondent no .1 as well as counter claim of the appellant were challenged by the respondent no.1 by filing sufficient court fees.Therefore it cannot be said that the appeal was not maintainable and only one decree was challenged and the other was not challenged and merely because only one appeal was filed it would not vitiate the proceedings. Even otherwise, if there was any objection in this regard, the same could have been raised at the thresh-

hold, when the appeal was filed and the appellant had appeared in the appeal on caveat and since it was not raised, it cannot be raised at this stage. However, it doesn't affect the merits of the case or jurisdiction of the court, therfore it cannot be a ground for reversing or modifying the decree in view of Section 99 CPC and it is a settled law that the first appeal is in continuation of the proceedings of the suit. Thus, the Second substantial question of law is answered accordingly.

49. One of the issues raised by learned counsel for the respondents was that no substantial question of law arises in this case and the factual findings recorded by the appellate court cannot be interfered by this Court. The Hon'ble Supreme Court, in the case of ***Nazir Mohamed versus Kamala and Others(supra***), has held that whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. Thus this Court is of the view that the substantial questions of law were rightly and in accordance with law have been formulated, which have been answered by this Court after considering the rival contentions.

50. Learned counsel for the respondent, relying on the case ***of G.Amalorpavam and others versus R.C. Diocese Of Madurai & Ors(supra),*** had submitted that the first appellate court is a final court of facts and the findings of fact recorded by it cannot be challenged before the High Court in second appeal. This case is not applicable on the facts and circumstances of the case because the first appellate court has failed to consider the legal issues involved in the case, which are substantial, as dealt by this Court in this judgment.

51. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the first appellate court has allowed the appeal wrongly and illegally without considering the legal issues involved in the case. Therefore in view of the aforesaid findings recorded by this Court in regard to the substantial questions of law no.(3) and (1) formulated by this Court,it is not sustainable. Thus the appeal is liable to be allowed and the judgment and decree passed by the first appellate court is liable to be set aside.

52. The Second Appeal is, accordingly, **allowed.** The judgment and decree dated 05.03.2010 passed by the Additional District Judge, Court No.7,Raibareli in Civil Appeal No.86/2009; Smt.Siyawati versus Smt. Anarkali and others is hereby set aside. No order as to costs.

(2024) 5 ILRA 1467
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ Tax No. 128 of 2024

M/S Rajshi Processors Raebareli ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Mishra

Counsel for the Respondents:
C.S.C.

Civil Law – GST Act, 2017 - Sections 16(2) & 74 - Rule 36 - Petitioner- Assailed the order imposing tax liability and penalty for the payment of false input tax credit- Petitioner had filed GSTR 3B- Inward supplies from different firms- Investigation by the authority- Firms non-existent and bogus- Petitioner knowingly claimed excessive amount towards in his GSTR-2A- Show cause notice under Section 74 of the Act- Explanation dissatisfactory- Impugned order passed- Appeal dismissed- Received the goods means the person claiming ITC must have actually received the goods- No supplies actually received by the petitioner- No estoppel against the authority for claiming refund of benefit wrongly availed- Writ petition dismissed. (Paras 17 and 21)

HELD:

Section 16 of the GST Act provides the eligibility conditions for taking input tax credit and Sub Section 2(b) provides that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods unless he has received the goods. "Received the goods means the person claiming input tax credit must have actually received the goods". Where a person merely produces document, mentioned in Rule 36 regarding receipt of goods, he has actually not received any goods and it is established that the 8 transaction of goods was merely a paper transaction, without any actual supply of goods, the person will not be entitled to get the benefit of input tax credit in view of the provision contained in Section 16(2)(b) of the GST Act, 2017. (Para 17)

Undisputedly, the petitioner had fulfilled the requirements and, therefore, the input tax credit was claimed and was granted to him. However, when an enquiry was conducted by the Special Investigation Branch subsequently, it came to light that the firms from which the petitioner claimed to have received inward supplies, were non-existent and bogus. Neither the firms were found on the addresses, claimed by them, nor was any godown or other premises of those firms could be found. It appears that the firms were existing on paper only. (Para 18)

It is settled law that fraud vitiates even the most solemn proceedings and the mere fact that the I.T.C. benefit had earlier been granted to the petitioner merely because the firms were registered, would not create any estoppel against the authority taking appropriate action for claiming refund of the benefit wrongly availed by the petitioner on the ground of receiving inward supplies from non-existent firms. (Para 21)

Application dismissed. (E-14)

List of Cases cited:

W.P.(C) 6093/2017 (On Quest Merchandising India Pvt. Ltd. Vs government of NCT of Delhi & Others) [Delhi High Court]

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

1. Heard Sri Pranjal Shukla, learned counsel for the petitioner and Sri Vikram Soni, learned Additional Chief Standing Counsel.

2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioner has prayed for quashing of the order dated 16.07.2021 passed by the Deputy Commissioner, Commercial Tax, Division-1, Raebareli, Lucknow (B), whereby the tax liability and penalty has been imposed on the petitioner on the ground that he had been paid false input tax credit. The petitioner has also challenged the validity of an order dated 10.04.2024 passed by Additional Commissioner. Grade-2 (Appeal)-Ist, State Tax, Lucknow, whereby the Appeal bearing number GST 37/2021, filed by the petitioner, against the aforesaid order dated 16.07.2021, has been dismissed.

3. Briefly stated, the facts of the case are that the petitioner is engaged in manufacturing and sale of Aluminum Casting & Machinery Parts. The petitioner

had filed GSTR 3B for the month of May, 2019, August, 2019 and December, 2019. The Deputy Commissioner, Special Investigation Branch, Commercial Tax, Lucknow had conducted a survey of the place of business on 25.02.2020. During survey it was found that the petitioner claimed to have received inward supplies worth Rs.16,39,200/-from M/s Ridhi Sidhi Enterprises (GSTIN-09FDTPD8965GIZQ), worth Rs. 17,25,160/- from M/s Siddhartha Trading Company (GSTIN-09HUCPK4270HIZF) and worth Rs. 29,78,025/- from M/s Satvik Enterprises (GSTIN-09GSRPK8763FIZV) and claimed Rs.2,95,056/-, Rs.2,63,160/- and Rs. 4,54,275/- respectively towards I.T.C. Claim for inward supplies received from the aforesaid firms. When the survey of the aforesaid three firms was conducted by the Special Investigation Branch, Agra, it came to the light that all the aforesaid three firms were non-existent and bogus firms. Besides the place of business declared by the aforesaid three firms, no other godown or Branch was found to be in existence. The petitioner had fraudulently claimed I.T.C. benefit of Rs.10,12,491/- without any actual supply of goods, on the basis of the fake invoice issued by the aforesaid three non-existence bogus firms. The Special Investigation Branch found in the enquiry that the petitioner has knowingly claimed excessive amount towards I.T.C. in his GSTR-2A, on the basis of an auto formulated I.T.C. and had adjusted the same in the tax payable by him. Thus, the petitioner claimed a total of Rs. 15,93,491/- I.T.C. in violation of the provisions of law.

4. The adjudicating authority had issued a notice under Section 74 on 03.08.2021. The petitioner submitted his explanation alongwith the evidence, stating that it had received inward supplies worth Rs.16,39,200/- from M/s Ridhi Sidhi Enterprises, Rs. 17,25,160/- from M/s Siddhartha Trading Company and Rs. 29,78,025/- from M/s Satvik Enterprises and had claimed I.T.C. claim of Rs.2,95,056/-, Rs.2,63,160/- and Rs.4,54,275/- respectively regarding the goods received from the aforesaid three firms. In support of its claim of actual receipt of inward supplies, the petitioner had submitted invoices, copies of GR (goods receipts), e-way bill, laser and bank statements of the firms, evidence of transaction of amounts through RTGS and evidence of physical receipts of goods. The inward supplies received by the petitioner have been entered in the stock register.

5. The adjudicating authority did not accept the explanation of the petitioner because the Special Investigation Branch, Agra had found the aforesaid three firms, namely, M/s Ridhi Sidhi Enterprises, M/s Siddhartha Trading Company and M/s Satvik Enterprises to be non-existent and bogus and that the tax invoices had been issued without any actual supply of goods upon which the petitioner had fraudulently taken benefit of I.T.C. The adjudicating authority declined the benefit of I.T.C. to the petitioner and imposed penalty on the petitioner and fixed the liability of interest also.

6. The petitioner filed an appeal against the aforesaid order of the adjudicating authority.

7. The appellate authority found that in his explanation submitted before the adjudicating authority, the petitioner had produced GR No. 213/dated 13.05.2019, 694/dated 21.08.2019, 695/dated 21.08.2019 and 1363/dated 15.12.2019 issued by M/s Goyal Goods Carry Corporation, Daresi No. 2, Agra as evidence

for transport of goods from Agra to Raebareli. The adjudicating authority found that GR No. 213/dated 13.05.2019 and 1363/dated 15.12.2019 had been issued on a similar format, whereas GR No. 694/dated 21.08.2019 and 696/dated 21.08.2019 had been issued on a different format, whereas all of those have been issued by the same transport company and it had no other branch. The GSTIN-09AJBPG5336KIZ5 and phone number 6395078684 was mentioned at the transport builty. GST is payable on transport services. When an enquiry was conducted on the basis of GSTIN number mentioned on the transport Bilty, the GSTIN was found to be not valid as per the information available on the common portal. The phone number mentioned on the transport Bilty, was found to be in use of some lady at Kasganj. From the aforesaid facts, it appears that the Bilties had been attached with the explanation of the petitioner to somehow show the real inward supply by making adjustments. The adjudicating authority found that the alleged supplier firms were non-existence and the Bilties had been produced merely to establish transactions with non-existing firms. No goods were transported from Agra to Raebareli and the transactions were paper transactions only.

8. The appellate Authority found that keeping in view the aforesaid facts, there was no reason for making any interference in the order passed by the adjudicating authority.

9. While assailing the validity of the aforesaid orders, the learned counsel for the petitioner has submitted that the petitioner had actually received inward supplies which is established from the records produced before the adjudicating authority. The supplier firms were having valid GSTIN registration when the petitioner had received the supplies. In case GSTIN registration of the firm is cancelled subsequently, the petitioner cannot be penalized for the same. Learned counsel for the petitioner has further submitted that the GST registration of the aforesaid three firms was cancelled on their own request.

10. The learned counsel for the petitioner has drawn attention of this Court towards the provisions of Section 16(2) of the GST Act, 2017 which provides as follows:

"16(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

[(aa) the details of the invoice of debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37:]

(b) he has received the goods or services or both.

[Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be services-

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise; (ii) where the services are provided by the

supplier to any person on the direction of and on account of such registered person.]

(c) subject to the provisions of [section 41 or Section 43A], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon."

11. Rule 36 of GST Rules, 2007 provides as follows:

"**Rule 36. Documentary requirements and conditions for claiming input tax credit.-**

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34;

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54.

(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document and the relevant information, as contained in the said document, is furnished in FORM G.S.T.R.-2 by such person:

[Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, G.S.T.I.N. of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.]

(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

[(4) Input tax credit to be availed by a registered person in respect of invoices

or debit notes the details of which are required to be furnished by the suppliers under sub-section (1) of Section 37 [In FORM G.S.T.R.-01 or using the invoice furnishing facility] shall not exceed [5 per cent] of the eligible credit available. In respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of Section 37 [In FORM G.S.T.R.-01 or using the invoice furnishing facility] under sub-

[Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM G.S.T.R.-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above:]

[Provided further that such condition shall apply cumulatively for the period April, May and June, 2021 and the return in Form G.S.T.R.-3B for the tax period June 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulatively adjustment of input tax credit for the said months in accordance with the condition above:]"

12. The learned counsel for the petitioner has submitted that for availing inputs tax credit, the petitioner was merely required to be in possession of a tax invoice or debit note issued by the supplier, receipt of goods and actual payment of tax to the Government. As per learned counsel for the petitioner, all the aforesaid three requirement of Section 16 of the GST Act, 2017 had been fulfilled by the petitioner. The documents, required to be submitted for claiming I.T.C. benefit, as mentioned in Rule 36 of GST Rules 2017, had been furnished by the petitioner.

13. Learned counsel for the petitioner has placed reliance on a **decision of Delhi High Court passed in W.P.(C) 6093/2017 (On Quest Merchandising India Pvt. Ltd. Vs. government of NCT of Delhi & Others)** alongwith some other connected matters, decided on 26.10.2017, wherein the Delhi High Court held as under:

"39. Applying the law explained in the above decisions, it can be safely concluded in the present case that there is a singular failure by the legislature to make a distinction between purchasing dealers who have bona fide transacted with the selling dealer by taking all precautions as required by the DVAT Act and those that have not. Therefore, there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

41. The Court respectfully concurs with the above analysis and holds that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Alternatively, what Section 9 (2) (g) of the DVAT Act requires the purchasing dealer to do is that after transacting with the selling dealer, somehow ensure that the selling dealer does in fact deposit the tax collected from the purchasing dealer and if the selling dealer fails to do so, undergo the risk of

being denied the ITC. Indeed Section 9 (2) (g) of the DVAT Act places an onerous burden on a bonafide purchasing dealer."

14. The Delhi High Court has further held in Para no. 46.06 of the aforesaid judgment as under:
"46.6 In the present case, the conditions imposed for the grant of ITC are spelt out in Sections 9 (1) and (2) of the DVAT Act and have been adverted to earlier. The claim of the purchasing dealer in the present case is not that it should be granted that ITC de hors the conditions. Their positive case is that each of them, as a purchasing dealer, has complied the conditions as stipulated in Section 9 and therefore, cannot be denied ITC because only selling dealer had failed to fulfil the conditions thereunder. More importantly, the Court finds that there is no provision in the MVAT Act similar to Section 40A of the DVAT Act. Section 40A of the DVAT Act takes care of a situation where the selling dealer and the purchasing dealer act in collusion with a view to defrauding the Revenue. In fact, the operative directions in Mahalaxmi Cotton Ginning Pressing and Oil Industries (supra) indicate that such a measure was suggested by the State Government itself to go after defaulters, i.e. selling dealers failing to actually pay the tax. The Department there undertook to upload on its website the details of the defaulting dealers. It was further undertaken that once there was a final recovery of the tax from the selling dealer, refund would be granted to the purchasing dealer."

15. Per contra, learned Additional Chief Standing Counsel has opposed the writ petition and he has submitted that it is not a case where the I.T.C. benefit has been declined to the petitioner and subsequently the liabilities have been imposed on him merely because the registration of supplier firms was cancelled subsequently. The orders against the petitioner have been passed for the reason that he had shown false inward supply from non-existent and bogus firms and he has claimed I.T.C. fraudulently without any actual inward supplies.

16. I have considered the aforesaid facts and circumstances of the case and the submissions advanced by learned counsel for the parties.

17. Section 16 of the GST Act provides the eligibility conditions for taking input tax credit and Sub Section 2(b) provides that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods unless he has received the goods. **"Received the goods means the person claiming input tax credit must have actually received the goods".** Where a person merely produces document, mentioned in Rule 36 regarding receipt of goods, he has actually not received any goods and it is established that the transaction of goods was merely a paper transaction, without any actual supply of goods, the person will not be entitled to get the benefit of input tax credit in view of the provision contained in Section 16(2)(b) of the GST Act, 2017.

18. Undisputedly, the petitioner had fulfilled the requirements and, therefore, the input tax credit was claimed and was granted to him. However, when an enquiry was conducted by the Special Investigation Branch subsequently, it came to light that the firms from which the petitioner claimed to have received inward supplies, were non-existent and bogus. Neither the firms were found on the addresses, claimed by them,

nor was any godown or other premises of those firms could found. It appears that the firms were existing on paper only.

19. Although, the registration of the firms existed when the petitioner claimed to have obtained inward supplies, the investigation revealed that the firm itself does not exist. In case, GSTIN registration has been obtained in the name of any non-existent firm. It being a non-existent firm, could not have made any actual supplies. Merely because the firm was registered on the date of transaction, it cannot be said that the department is bound to give I.T.C. benefit to the petitioner, even though it has been revealed later on the firm was non-existent and it could not have made any actual supplies.

20. The findings of Special Investigation Branch reveal that inward supplies have been received from non-existent firm to take advantage of I.T.C., which amounts to committing fraud against the department and the public exchequer.

21. It is settled law that fraud vitiates even the most solemn proceedings and the mere fact that the I.T.C. benefit had earlier been granted to the petitioner merely because the firms were registered, would not create any estoppel against the authority taking appropriate action for claiming refund of the benefit wrongly availed by the petitioner on the ground of receiving inward supplies from non-existent firms.

22. The contention that no supplies had been received from the non-existent firms also finds support from the fact that the goods receipts issued by M/s Goyal Goods Carry Corporation, were on different formats. The GSTIN mentioned in the transport Bilties was found to be not valid. The phone number mentioned in the Bilties, was also not of any transport company and it was being used by some lady at Kasganj.

23. The aforesaid findings recorded by the Special Investigation Branch give rise to sufficient material to support the order passed by the adjudicating authority against the petitioner for recovery of the amount claimed by him as input tax credit and for imposing penalty and liability to pay interest thereon. The appellate authority has passed the impugned order after taking into consideration the facts and circumstances of the case and the material available on record.

24. There appears no illegality in the impugned orders. The writ petition lacks merit and the same is hereby dismissed.

(2024) 5 ILRA 1474
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

Writ Tax No. 799 of 2024

Rahul Sachan ...Petitioner
Versus
Income Tax Officer ...Respondent

Counsel for the Petitioner:
Rahul Agarwal

Counsel for the Respondents:
Gaurav Mahajan

Civil Law - Income Tax Act, 1961 - Sections 148, 148 A(b) & 148 A(d) - Show cause notice under Section 148 A(b) of the Act- proposing to initiate reassessment proceedings- Explanation rejected-

reassessment proceedings ordered under Section 148 A(d) of the Act- Test of subjective satisfaction vis-à-vis amended and unamended provision- presently, pre-existing rule requiring to record 'reason to believe' does not exist- Pre-conditions for initiating reaassessment proceedings under amended law explained- information/objective material that 'suggest' escapement of income- conduct of an inquiry- show cause notice- opportunity to the assessee- decision of the assessing officer- 'fit case to initiate assessment proceedings under Section 148 of the Act- No minute/detailed examination of decision required- unless mindless, perverse of patently contrary- No fault in initiation of reassessment proceedings- Writ petition dismissed. (Paras 9, 11, 12, 16 and 19)

HELD:
What is now required by way of a pre-condition to initiate reassessment proceedings is : the information/objective material that 'suggests' escapement of income; the conduct of an 'enquiry', if required, with respect to that; issue of a show cause notice to grant the assessee an opportunity to respond to the information/objective material that income chargeable to tax had escaped assessment in his case; a 'decision' of the assessing officer (on the basis of that material and the reply furnished by the assessee), that the material that may have come to the hands of the assessing authority 'suggests', it is a 'fit case' to initiate reassessment proceedings under Section 148 of the Act.(Para 11)

Thus, the legislature has carefully departed from the strict test of recording of 'reason to believe' and substituted the same with a lighter and more subjective 'decision' of the assessing officer that it is a 'fit case' to reassess the assessee, based on the 'suggestion' (emerging from perusal of the 'information' i.e. objective/relevant material), that income had escaped assessment at the hands of the assessee. (Para 12)

Thus, read in conjunction, Section 148A(b), (c) and (d) would require that assessing authority may not act whimsically or capriciously or on extraneous material or in ignorance of the reply that may have been furnished by the assessee (to the show cause notice issued under Section 148A(b) of the Act), at the same time, that provision does not obligate the assessing authority to specifically deal with the individual objections, pointwise, or to record detailed reasons while making the 'decision' that it is a 'fit case' to initiate reassessment proceedings, in the case of an assessee. (Para 14)

So long as that exercise is bona fide and not mindless, perverse or patently contrary to the law etc., and so long as that 'decision' made by the assessing authority-to initiate such reassessment proceedings is not unconnected/disjuncted or contrary to the 'suggestion' directly arising from the 'information'/relevant material received by him-that income has escaped assessment, no minute/detailed examination of that 'decision' is required to be made. (Para 16)

Writ petition dismissed. (E-14)

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Donadi Ramesh, J.)

1. Heard Shri Rahul Agarwal, learned counsel for the petitioner and Shri Gaurav Mahajan, learned Senior Standing Counsel, for the revenue.

2. Challenge has been raised to the order dated 27.03.2024 passed under Section 148A(d) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and the consequential notice of the same date, issued under Section 148 of the Act for the Assessment Year 2020-21.

3. For the Assessment Year 2020-21, the petitioner had filed his regular return of income. However, no scrutiny assessment arose in his case. On 19.02.2024, a show cause notice was issued to the petitioner under Section 148A(b) of the Act, proposing to initiate reassessment proceeding for the Assessment Year 2020-21. The annexure to that notice contains the summary of

information on which such proceedings were proposed to be initiated. It reads as below :

"As per information flagged under Risk Management strategy(RMS) formulated by Central Board of Direct Taxes (CBDT), it has been noticed that you have supplied goods /services of Rs. 73968000/- during financial year 2019-20 (relevant to assessment year 2020-21) to M/s Everett Infra and Engineering Equipments Private Limited. On the basis of enquiries conducted by the Income Tax Department it has been established the M/s Everett Infra and Engineering Equipments Private Limited is not doing any actual business activities and providing accommodation entries. This company is involved in receiving and giving bogus contracts/sub-contracts and raising invoices without delivery of any actual goods/services. The company is merely working as entry/exit provider.

As you have entered into the transaction with this bogus company which is involved in providing accommodation entries the supply of goods/services to this company also appears to be bogus. It leads to inference that you are also one of the participants the tax evasion mechanism of above company. The above information suggests escapement of income in your case. Please also refer to attachment of this show cause notice which encloses sheet containing details of information suggesting escapement of income in your case. The details of information has also been elaborately discussed in above para which may also be referred to.

In the light information (as discussed in above para) suggesting escapement of income in your case in assessment year 2020-21, please submit your response on the issue raised in this show cause notice by the due date, as mentioned in this notice, positively."

4. The petitioner responded to the above notice and submitted a detailed reply dated 18.03.2024. In that, the petitioner referred to entries recorded in his books of accounts and other materials to assert that he had actually sold goods to M/s Everett Infra and Engineering Equipments Pvt. Ltd. (hereinafter referred to as the 'purchaser). He also referred to the statement of profit and loss account of the purchaser to assert that the 'purchaser' had disclosed its revenue receipts in excess of Rs. 290 crores, for the Assessment Year 2020-21.

5. Thereafter, the petitioner's Assessing Authority passed the impugned order under section 148A(d) of the Act. It has rejected the petitioner's objection after relying on oral statements of certain entities, recorded during the course of other/search proceedings (not involving the petitioner or the 'purchaser'), as also on the reports of the Inspector of Income Tax, Central Circle-19, New Delhi, as received by the Assessing Authority. Also, reference has been made to the fact that notices/summons issued to the 'purchaser', arising from the information received from the Inspector of the Income Tax, have remained unresponded. The above information was communicated to the petitioner's Assessing Authority by the Deputy Commissioner of Income Tax, Central Circle-19, New Delhi.

6. In such fact background, learned counsel for the petitioner would submit, the petitioner's objections as to absence of relevant material, have remained from being considered. After taking note of those objections raised, the Assessing Authority has proceeded to reject the same, without giving even minimal reasons to reject the

objections. In his submission, though the statute has been amended and the formal requirement to record 'reason to believe' to initiate reassessment proceedings does not exist, at the same time, the amended provision itself obligates the assessing authority to 'consider the reply' submitted in response to the show cause notice issued under Section 148A(b) of the Act. Only on such consideration, the assessing authority may 'decide', on the strength of material available on record (including the reply of the assessee), whether it is a 'fit case' to initiate reassessment proceedings. That exercise has not been done. The order passed under Section 148A(d) of the Act is wholly non-speaking. It has been passed in a perfunctory manner with a pre-conceived notion. Therefore, the same may never be sustained as jurisdiction has not arisen to reassess the petitioner for the Assessment Year 2020-21.

7. On the other hand, learned counsel for the revenue would contend, the pre-requirement of 'reason to believe' has been done away. Therefore, the strict test of existence of such 'reason to believe'-to initiate reassessment proceedings cannot be reintroduced by reading the amended statute in the manner suggested. In his submission, insofar as show cause notice was issued to the petitioner and its reply was 'considered' before the impugned order [under Section 148A(d)] was passed, no procedural lapse has occurred. The manner or words in which decision has been recorded may not be justiciable and it may not be read in a manner as may resurrect or reintroduce the pre-existing requirement of recording of 'reason to believe' (as it existed under the unamended law).

8. Coming to the facts of the case, he would submit, sufficient material exists to allow the reassessment proceedings to arise on the test of subjective 'satisfaction' recorded by the assessing authority that it was a 'fit case' to initiate reassessment proceedings against the petitioner for the Assessment Year 2020-21. That subjective 'satisfaction' has arisen on the consideration of the facts that the Inspector of Income Tax had disclosed in his successive reports that at none of the places of business of the 'purchaser' namely, (i) 2664/2/3T/F, Beadonpura Bank Street, Karol Bagh, Delhi-110005; (ii) Y.C. Co-working Space, 3rd floor, Plot No. 94, Dwarka Sector-13, Opposite Metro Station, New Delhi-110078; (iii) M4, (ground and First Floor), South Extension II, South Delhi, New Delhi-110049; and (iv) RH H-4AM, Mahavir Enclave, Palam Colony, New Delhi-110045 any business activity of the petitioner was found existing. Also, the 'purchaser' and its key person had not responded to the notices and summons issued to them, to ascertain the correct facts. Once these facts exist, according to learned counsel for the revenue, the subjective 'satisfaction' recorded by the assessing authority to reassess the petitioner, may not be faulted.

9. Having heard learned counsel for the parties and having perused the record, in the first place, it needs no elaboration that the pre-existing rule, to record 'reason to believe' does not exist. That rule required : existence of relevant material to indicate escapement of income from assessment; application of mind by the assessing authority to that material to entertain relevant reasons; formation of belief that any income had escaped assessment, based on such reasons. Therefore, the precedential law that arose in that statutory context, is neither relevant nor the same requires any consideration, at this stage.

10. Section 148A of the Act reads as below :

"1[Conducting inquiry, providing opportunity before issue of notice under section 148.

148A. *The Assessing Officer shall, before issuing any notice under section 148,-*

(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(b) provide an opportunity of being heard to the assessee, 2[***] by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where,-

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, 70[relate to, the assessee; or

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.]

Explanation.-For the purposes of this section, specified authority means the specified authority referred to in section 151.]

11. What is now required by way of a pre-condition to initiate reassessment proceedings is : the information/objective material that 'suggests' escapement of income; the conduct of an 'enquiry', if required, with respect to that; issue of a show cause notice to grant the assessee an

opportunity to respond to the information/objective material that income chargeable to tax had escaped assessment in his case; a 'decision' of the assessing officer (on the basis of that material and the reply furnished by the assessee), that the material that may have come to the hands of the assessing authority 'suggests', it is a 'fit case' to initiate reassessment proceedings under Section 148 of the Act.

12. Thus, the legislature has carefully departed from the strict test of recording of 'reason to believe' and substituted the same with a lighter and more subjective 'decision' of the assessing officer that it is a 'fit case' to reassess the assessee, based on the 'suggestion' (emerging from perusal of the 'information' i.e. objective/relevant material), that income had escaped assessment at the hands of the assessee.

13. True, in reaching such 'decision', the assessing authority is obligated to consider only that material that may be relevant (and not extraneous) and the reply that may have been furnished by the assessee, at the same time, it is not the statutory law that he must record specific/objective reasons to deal with each and every objection, that may be raised. The statute only requires an overall or broad consideration of the reply furnished by the assessee, to reach a 'decision' that it is 'fit case' to initiate reassessment proceedings. To read-recording of exact reasons (to reject any objection), into the language of Section 148A of the Act would be to indirectly reintroduce the requirement to record “reasons to believe”, as a pre-condition to initiate reassessment proceedings. That requirement of law has been specifically and completely, done away.

14. Thus, read in conjunction, Section 148A(b), (c) and (d) would require that assessing authority may not act whimsically or capriciously or on extraneous material or in ignorance of the reply that may have been furnished by the assessee (to the show cause notice issued under Section 148A(b) of the Act), at the same time, that provision does not obligate the assessing authority to specifically deal with the individual objections, pointwise, or to record detailed reasons while making the 'decision' that it is a 'fit case' to initiate reassessment proceedings, in the case of an assessee.

15. Therefore, the new statutory test laid down under Section 148A requires-in essence, the concern voiced by the assessee [in his reply to notice under Section 148A(b)], either as to absence of 'information'/relevant material or as to lack of bonafide/prudent 'suggestion' arising therefrom, has to be addressed, upon requisite application of mind, seen to exist on a plain reading of the 'decision' [contained in the order passed under Section 148A(d) of the Act, that it is a 'fit case' to initiate reassessment proceedings, for reason of 'suggestion' arising therefrom, that income had escaped assessment. Thereafter, as before, all merit issues/defences may remain open to consideration in the reassessment proceedings. The 'decision' that it is a 'fit case', to initiate reassessment proceedings is-as the language plainly suggests a reflection of desirability perception/evaluation of the assessing authority-to initiate reassessment proceeding. To that extent it is a provision to arm the revenue authority, to expose an assessee to a proceeding to reassess him.

16. So long as that exercise is bona fide and not mindless, perverse or patently contrary to the law etc., and so long as that 'decision' made by the assessing authority-to initiate such reassessment proceedings is not unconnected/disjuncted or contrary to the

'suggestion' directly arising from the 'information'/relevant material received by him-that income has escaped assessment, no minute/detailed examination of that 'decision' is required to be made.

17. In the present facts, the 'decision' of the assessing authority to initiate reassessment proceedings in the case of the petitioner for Assessment Year 2020-21 has arisen on the 'information' received that the 'purchaser' does not exist. That is contained in the reports of the Income Tax Officer with respect to the four addresses of the 'purchaser'. No direct evidence was disclosed by the petitioner, (in his reply), - to doubt the existence of that 'information'. The 'suggestion' as to escapement of income qua sales made to the (non-existing) 'purchaser', inheres in it. Thus, the 'information' is relevant to the 'suggestion' as to 'escapement of income' at the hands of the petitioner.

18. As to the non-existence of the 'purchaser', that satisfaction further appears to have arisen on the conduct of the purchaser in not responding to any of the notices and summons issued. Third, the assessing officer has taken note, during the course of a search proceedings and upon recording of statement of a third party, it was also suggested that the 'purchaser' did not exist. Such facts had been clearly noted in the impugned order passed under Section 148A(d) of the Act.

19. It may not be denied that the assessing authority has not recorded any reason to squarely deal with the further objection raised by the petitioner that there existed details of activity and income of the purchaser as was available on the website of the Registrar of Companies. In that regard, the petitioner had also pointed out that the purchaser company continues to exist and it is active on the MCA portal. As noted above, that was not a mandatory condition to be fulfilled, at this stage. Also, in absence of any obligation in law, to record a categorical finding to reject any particular objection (at this preliminary stage), no fault exists in the initiation of reassessment proceedings occasioned by an over all consideration of the 'information'/relevant material. As noted above, the 'suggestion' is clearly seen to have arisen on the own strength of the 'information'/relevant material. Thus, the subjective 'decision' that it is a 'fit case' to initiate reassessment proceedings, (notwithstanding the objection raised by the petitioner), may not be faulted.

20. Suffice to note, all merit objections that may be raised and the manner in which they may be raised by the assessee in response to a notice issued under Section 148A(b) of the Act are not required to be decided pointwise, at the stage of assumption of jurisdiction i.e. at the stage of order under Section 148A(d) of the Act. Strictly speaking that requirement of law did not exist even under the unamended law. Even then, as noted above, the strict test of 'reason to believe' having been done away and replaced with the more subjective and lighter test of 'suggestion' arising from the 'information' received by an assessing officer-that income may have escaped assessment, we are not inclined to lay down a stricter test (to be satisfied by the assessing authorities), while making a subjective 'decision', to initiate the reassessment proceedings.

21. Accordingly, the writ petition lacks merit and is dismissed. However, the assessment proceedings may continue and be concluded strictly in accordance with law without being prejudiced by any observation made in this order. Thus, all merit

objections/defences are open to the petitioner. No order as to costs.

(2024) 5 ILRA 1481
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 96 of 2024

Ramesh Kumar Pathak @ Ramesh Kumar ...Appellant

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Vishal Kumar Upadhyay

Counsel for the Respondent:
C.S.C.

(A) Service Law - Regularisation of services - The Uttar Pradesh Public Service Commission Rules, 1998 - The Uttar Pradesh Regularization of Daily Wages Appointments on Group "D' Posts Rules, 2001 - Rule 4 - Regularisation of daily wages appointments on Group 'D' Posts - Interpretation of - Eligibility conditions for consideration - Vacancy existing on date of promulgation of rules - Consideration of eligible persons - Obligation of authorities - if a vacancy is existing on the date of promulgation of those rules and before making any regular appointment such persons who are eligible under the said rules would be considered for regularisation.(Para - 19)

(B) The Uttar Pradesh Regularization of Daily Wages Appointments on Group "D' Posts Rules, 2001 - Rule 4 - Retrospective regularization - Distinction from consideration for regularization from date of eligibility - Claim not for retrospective regularization but for consideration from date of eligibility.(Para -18)

Appellant (Group - D post of mali) was engaged as a daily wage worker in 1986 - later regularized in 2010 - seeking regularization of his services from 2001, when the relevant regularization rules came into force, rather than from 2010 – representation was moved by appellanat - authorities rejected his representation, which was upheld by the Single Judge.(Para-19)

HELD: - Court set aside a single judge's judgment and ordered a fresh decision, directing the respondent to consider petitioner's claim for regularization from 2001 in accordance with the Rules 2001 and the law on the subject. (Para - 20)

Writ Petition & Special Appeal allowed. (E-7)

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard.

2. By means of this appeal the appellant has challenged the judgment dated 05.04.2024 passed in Writ A No.2741 of 2024 which reads as under :-

"1. Heard Sri Vishal Kumar Upadhyay, the learned counsel for the petitioner, Sri Uttam Kumar Srivastava, the learned Standing Counsel appearing on behalf of the State and perused the records.

2. By means of the instant application filed under Section 226 of the Constitution of India, the petitioner has prayed for quashing of an order dated 13.02.2024, whereby the petitioner's request for granting the benefit of regularization with effect from 2003 instead of regularization with effect from the date of order dated 10.09.2010, has been rejected.

3. The petitioner's services on a Group-D post of Mali were regularized along with the services of six other employees by means of an order dated

10.09.2010, with effect from the date of passing of the order.

4. The petitioner and some other persons filed Writ-A No.3068 of 2011 seeking a direction to the opposite parties to regularize services of the petitioners with effect from 2001 when the relevant Regularization Rules were notified. The said writ petition was disposed of by means of an order dated 01.11.2023 giving the petitioners liberty to file a fresh individual representation regarding their grievance.

5. Accordingly, the petitioner submitted a representation dated 25.11.2023 praying that the benefit of regularization of service be granted to him with effect from 2003 since when he is working against a vacant post. The said representation has been rejected by means of the impugned order dated 13.02.2024.

6. It is stated in the impugned rejection order that the petitioner used to work as a daily wage labour for rendering assistance to malis in taking care of plants and trees and he was given wages for the post he worked. The petitioner was not appointed as per the prescribed rules by issue of an advertisement, under a transparent process. The petitioner was paid minimum wages in compliance of the orders passed by this court with effect from the year 2003. The daily wagers Shiv Kumar and Gautam, who were senior to the petitioner have been regularized with effect from 11.09.2014 and 10.09.2016. Therefore, the Deputy Director rejected his representation holding that there was no ground for granting benefit of regularization to the petitioner with effect from 2003.

7. The learned counsel for the petitioner has placed reliance on the following passage of a judgment of a coordinate Bench of this Court in the case of Jag Lal and others Vs. Director, Horticulture, U.P.: 2003 (3) UPLBEC 2528:-

"25. Repeated directions were given by this Court in the order dated 12.12.1995, as well as subsequent orders passed in these writ petitions to give petitioners regular wages in the minimum of the pay scale and allowances. Respondents violated the orders and are facing action in contempt. The same Horticulture Department of the State Government, however, accepted the orders passed by the Lucknow Bench of this Court in group of cases led by Writ Petition No. 6378 (S/S) of 1997, between Bechan All and Ors. v. Government of U.P., and that the Director of Horticulture by his order dated 17.2.2001 annexed in Annexure-I in Writ Petition No. 37136 of 1999, directed payment of minimum of pay scale to the daily wages in the department. These petitioners were, however, arbitrarily discriminated. Having accepted similar orders passed by Lucknow Bench the Department could not have ignored the claims of the petitioners supported by similar orders. All the petitioners are, therefore, entitled to regular pay scale with effect from 17.2.2001 i.e., the date when State Government accepted the claims of similarly situated employees."

8. The aforesaid judgment nowhere lays down the law that a person who has worked on daily wages can be regularized with retrospective effect. Therefore, the aforesaid judgment is of no help to the petitioner.

9. The petitioner has failed to establish any legal right for giving him the benefit of regularization of services with effect from 2003. The writ petition is without any force. It is accordingly dismissed."

3. The petitioner herein had initially filed a writ petition bearing Writ Petition

No.4142 (S/S) of 1995 for issuance of writ of mandamus to opposite party to allow the petitioners to continue to work without creating any artificial break and to pay equal wages to them, which are being paid to the regularly absorbed persons and to consider the petitioners for their regular absorption taking into account their long tenure of engagement and not to appoint any one without absorbing the petitioners on the regular side. The said petition *was decided on 05.04.1999 in the following terms :-*

"The petitions by the present petition under Article 226 of the constitution of India have prayed for issue of a writ of mandamus to command the opposite parties to allow the petitioners to continue to work without creating any artificial break and to pay equal wages to the petitioners which are being paid to the regularly absorbed persons and to consider the petitioners for their regular absorption taking into account their long tenure of engagement and not to appoint any one without absorbing the petitioners on the regular side. The petitioners are continuing till the present day and they are all working on the Muster-roll prepared by the opposite parties and they have completed 240 days and they are entitled for regularization. The further contention of the petitioners is that the opposite parties have adopted a practice of engaging the persons on the basis of daily wages and after 2-3 years they have absorbed such daily wages employees in the regular cadre on the post of Mali while the petitioners have not been absorbed on the regular cadre and are being paid Rs 33.00 per day only. Since the petitioners are continuing in service itself indicates that the vacancies is of permanent nature are available against which the petitioners can be engaged if they are not being paid the minimum wages prescribed under the minimum wages Act. They have further submitted that on account or poverty and the lack of job opportunities the petitioners are working on such a meager amount.

A counter-affidavit has been filed in which it has been stated that whenever work is available then the daily wages labourers are engaged from time to time and they are being paid their wages daily. They are not being appointed against any of the vacant post. Only petitioners are being engaged to work in the Garden/Farm/Nursery as daily wage labourers, and they are being paid wages at the rate fixed by the State Government from time to time.

Learned Counsel for the petitioners submitted that since the petitioners are working from the years 1979,84,1986 and 1997, they have become over age and they are being continuously engaged shows that the work is available with the petitioners.

In these circumstances, the respondents are directed to consider the case of the petitioners for giving them regular appointment and for considering them in regular employment on Class IV posts, a seniority list of daily wages be prepared and no person from the outside shall be given regular appointment till the petitioners are absorbed.

With the aforesaid observations, this writ petition is disposed of finally."

4. This judgment was never put to challenge by the opposite parties.

5. The case of the petitioner in said petition was that he along with others were initially engaged in the year 1986 and had been continuing since then.

6. Be that as it may, the case of the petitioner was considered in terms of the above judgment, however, the same was rejected vide order dated 05.04.1999.

7. The said order was put to challenge by the petitioner along with others in Writ Petition No.275 (S/S) of 2000 wherein an interim order was passed on 20.01.2000 allowing the petitioners to continue to work and to pay minimum of pay scale and also to consider them for regularization within a period of three months. Ultimately the opposite parties in compliance of such order granted minimum of pay scale to the petitioner along with others vide order dated 22.04.2003.

8. Thereafter on 14.07.2004 another order was passed by the concerned opposite party of the said petition rejecting the claim of the petitioner along with others for regularization. This happened during pendency of Writ Petition No.275 (S/S) of 2010.

9. The petitioner filed another writ petition along with others bearing Writ Petition No.4078 (S/S) of 2004 challenging the order dated 14.07.2004 referred hereinabove. The said writ petition was connected with the earlier writ petition, filed by the petitioner, and both of them were decided by a common judgment dated 15.02.2010 which reads as under :-

"Writ Petition No.275 (SS) of 2000, has been filed for quashing the oral disengagement order 1.12.1999 and allowing the petitioners to work and pay them minimum scale, whereas the order passed by the opposite party No.2 dated 14.7.2004 has been assailed in Writ Petition No. 4078 (SS) of 2004.

Heard learned Counsel for the parties.

Learned counsel for the petitioners submit that all the petitioners were engaged during the period 1979 to 1987. Since then they are working intermittently, but continuously and have been paid wages. He submits that the petitioners and identically situated employees in the Forest Department have preferred writ petitions, on being disengaged, in this Hon'ble Court as well as at Lucknow Bench of this Hon'ble Court and by means of judgment and order dated 24th May, 1996, passed in Writ Petition No. 5442 (SB) of 1995 of this Court, this Court has directed for regularization of services of the daily wage employees. The said judgment and order was assailed by the State of U.P. before the Apex Court and the Apex Court dismissed S.L.Ps so preferred by the State of U.P. During the pendency of the aforesaid proceedings, the case of the State of U.P. and others Versus Putti Lal reported in (1998) 1 UPLBEC 313, in respect of Forest Department employees, was decided by the Apex Court. In the said case of employees of Forest Department, this Court has provided, as an interim measure, for placing the employees in the minimum of the regular pay scale. The Apex Court while disposing of the SLP has observed as under :

"Therefore, benefits of the said judgment of the learned Judge have to go to all the Daily Wagers/Muster Roll employees. It is admitted by the respondents that the pay at the rate as directed by the learned Judge in the said case, is being paid to those Daily Wagers who are members of Kumaun Van Shramik Sangh Centre and such payment is not being made to any other daily wager working anywhere in the State including in Kumaun hills. It is also admitted that the Scheme as directed by the leaned Judge has not been framed by the Government so far. The judgment of the learned Judge is binding on the Government and its functionaries. They are, therefore, bound to pay in terms of the said judgment to every daily rated labourers/muster roll employees and the Government is also bound to frame scheme for regularization of their service."

Thereafter, the State of U.P. has framed Uttar Pradesh Regularization of Daily Wages Appointment on Group "C' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 1998 for regularization of category "C' employees in the year 1998 and the Uttar Pradesh Regularization of Daily Wages Appointments on Group "D' Posts Rules, 2001 for regularization of category "D' employee in the year 2001. On perusal of Rule 4 of the aforesaid Rules, it will be abundantly clear that a daily wage employee, who has been working on the cut off date, that is, 30th June, 1991 and has been working continuously on the proclamation of the notification of the aforesaid Rules shall be entitled for consideration of regularization of his services.

The aforesaid argument has been rebutted by the learned Standing Counsel on the grounds that the petitioners have working intermittently and not continuously from the cut off date till coming into force the aforesaid Rules in the year 2001. le 4 of the Rules, 2001 has been interpreted by this Hon'ble Court in the case of Visheshwar vs. Principal Secretary, Forest Anubhag-3 and others (writ petition No. 47568 of 2002, decided on 29.11.2004) and this Court in the said case has held that in case the employee is working on the cut off date and is continuing as such on daily wage post on the date of proclamation of the notification of the aforesaid Rules, he is entitled for regularization, inspite of the fact that the employee worked intermittently.

In the instant case, the petitioners, as stated by counsel for the petitioners, were engaged during the period 1979 to 1987, though have worked intermittently, but on the cut off date i.e. 26th June 1991 as provided under the Rules they were working as daily wagers and further on coming into force of the Rules, 2001 and as such, in view of the provisions of Rule 4 of the said Rules, which specifically provides that the daily wager employees, who has been working on the cut off date and on the proclamation of the notification are entitled for consideration of regularization of his services and as such the petitioners are entitled for consideration of regularization of his services in view of the provisions of Rule 4 of the aforesaid Rules as interpreted by this Court in the case of Visheshwar (Supra).

While entertaining the writ petition No. 275 (SS) of 2000, this Court, vide order dated 20.1.2000 directed the opposite parties to allow the petitioners to continue to work and shall be paid minimum of the pay scale and shall also be considered for regularization within a period of three months from the date of production of a certified copy of this order.

In compliance of this Court's Order dated 22.1.2000, the case of the petitioners was considered and rejected by the impugned order dated 14.7.2004 is rejected.

Considering all the aspects of the matter in view, the opposite parties are directed to consider the case of the petitioners for regularization, under the U. P. Regularization of Daily Wages Appointments on Group 'D' Rules, 2001, ignoring the order dated 14.7.2004 passed in Writ Petition No. 4078 (SS) of 2004, within a maximum period of three months from the date of presentation of a certified copy of this order.

With these observations, both writ petitions succeed and are allowed."

10. This judgment was never put to challenge by the opposite parties.

11. Now in compliance of this judgment, the services of the petitioner

along with others were regularized vide order dated 10.09.2010, copy of which is on record. The date of the order is incorrectly mentioned in the impugned judgment. It appears that the services were regularized w.e.f. passing of the said order, i.e. 10.09.2010. The order itself speaks of the U.P. Regularization of Daily wages Appointments on Group D Post Rules 2001 (hereinafter referred to as 'Rules 2001'), therefore, obviously the consideration was made as per the said Rules 2001.

12. The petitioner being aggrieved immediately filed a writ petition bearing Writ Petition No.3068 of 2011 seeking regularisation of his services from 2001. This petition was disposed of on 01.11.2023 by this Court in the following terms :-

"1. Heard learned counsel for the petitioners and learned State counsel for opposite parties.

2. ***This petition has been filed seeking direction to opposite parties to regularize the services of petitioners w.e.f. 2001 when the Regularization Rules, applicable upon the petitioners, were notified. Arrears of salary has also been prayed. By means of amendment, petitioners have also challenged the order dated 10.10.2010 whereby petitioners' services have been regularized with the prospective effect.***

3. It has been submitted by learned counsel for the petitioners that petitioners were initially engaged in service between 1979 to 1986 in the Horticulture Department whereafter they have been continuously performing their duties. It is submitted that earlier petitioners' regularization was rejected but subsequently their services have been regularized vide order dated 10.10.2010 without taking into account services rendered by the petitioners earlier on daily wage basis.

4. For the said grievance, petitioners have already submitted representation to the authorities concerned but seek liberty to file a fresh representation.

5. Considering the fact and without entering into the merits of the case, liberty is granted to the petitioners to file fresh individual representations regarding their grievance which shall be considered and decided by the opposite party No.3-Deputy Director Horticulture, Faizabad Mandal, Faizabad within a period of eight weeks from the date said representation is submitted.

6. With the aforesaid directions, petition stands disposed of."

13. The said order was subsequently corrected on 08.11.2023 in the following terms :-

"I.A. No.22 of 2023

1. This application has been filed seeking correction of the order dated 1st November, 2023. It has been submitted that date of impugned order has wrongly been indicated.

2. The errors indicated in the judgement are purely typographical in nature and, therefore, order dated 1st November, 2023 is corrected to the extent that date of impugned order indicated as 10th October, 2010 in paragraphs 2 and 3 shall be read as 10th September, 2010

3. Application is allowed.

4. Office is directed to issue corrected copy of the order dated 1st November, 2023."

14. The matter remained pending for almost 12 years before this Court but for no fault of the appellant-petitioner.

15. In the aforesaid writ petition a claim was raised for regularization w.e.f. 2001, i.e. the cut off date mentioned in Rules, 2001. In pursuance of the aforesaid judgment dated 01.11.2023, the claim of the petitioner was considered along with others and by an order dated 13.02.2024 the claim was rejected firstly on the ground the minimum of the pay scale was granted to the petitioner in the year 1999 under the orders of the High Court and also seniors to him were also getting the same. Moreover the seniors to the petitioners, their services had been regularised on 11.09.2014 and 06.10.2015. In the earlier part of the order it is also mentioned that the initial engagement of the petitioner was on casual basis. This order was put to challenge in Writ-A No.2741 of 2024.

16. The learned Single Judge in his wisdom has dismissed the aforesaid writ petition on the ground that the initial appointment of the petitioner on daily wages was for assisting the Malis and he was given wages for the post he worked upon, but the appointment was not as per the prescribed Rules. This reasoning is not sustainable as the learned Single Judge has lost sight of the fact that based on the same appointment the services had been regularized in 2010 as already referred hereinabove, therefore, this ground was neither open to the opposite parties before the Writ Court nor to the Writ Court for dismissal of the writ petition. The other ground discussed by the learned Single Judge is that seniors to the appellants-petitioners, namely, Shiv Kumar and Gautam, their services had been regularised on 11.09.2014 and 10.09.2016. In our opinion, this could hardly be a ground for rejecting the claim of the appellant-petitioner by the opposite parties in their writ petition as also by the Writ Court. In fact, the seniors could have very well claimed regularisation from the date of regularisation of their juniors or for that matter they could have claimed regularisation of their services if otherwise it was permissible from 2001 when the regularization rules came into force, but if they had been sitting over the matter and sitting over their rights, how the appellant-petitioner can be deprived of consideration of his claim as aforesaid. Whether the claim would ultimately be acceptable or not is a different matter, but he could not have been denied consideration of his claim to seek regularisation since 2001.

17. The other reasoning given by the learned Single Judge is that the judgment referred in its order does not lay down the law that a person who has worked on daily wages can be regularized with retrospective effect, however, this reasoning is also not sustainable. The learned Single Judge lost sight of the fact that the petitioner has been litigating ever since 1999 continuously as already narrated hereinabove. Once the services were regularised on 10.09.2010, he immediately raised an objection by filing a writ petition and thereafter also he has been agitating the matter before the Court. It is not a case where he accepted his regularisation from 10.09.2010 without any demur and filed a writ petition belatedly but the case is that he immediately came to the Court. It was in fact an obligation of the concerned authority to consider the claim of eligible persons in 2001 when the Rules of 2001 came into force if the vacancies were existing and it is the case of the appellant that this was not done. The appellant-petitioner's case was that the consideration for regularisation is belated, therefore, resulting in a belated order of regularization. It should have been considered in 2001.

18. Most important it is not a case of consideration for regularisation with retrospective effect rather it is a case of being considered for regularisation from the

date on which as per the appellant-petitioner's understanding he became eligible for consideration in view of Rule 4 of the Rules 2001, which reads as under :-

"4. Regularisation of daily wages appointments on Group 'D' Posts –
(1) Any person who-
(a) was directly appointed on daily wage basis on a Group 'D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and
(b) possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group 'D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.
(2) In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other backward Classes) Act, 1994, and the Uttar Pradesh Public Services (Reservation for Physically Handicapped. Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1) the Appointing Authority shall constitute a Selection Committee in accordance with the relevant provisions of the service rules.

(4) The Appointing Authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arrange in order of seniority as determined from the date of order of appointment on daily wage basis and if two or more persons were appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to assess their suitability.
(5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also.
(6) The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same to the Appointing Authority."

19. The said rule clearly provides the eligibility conditions for consideration and it clearly stipulates that if a vacancy is existing on the date of promulgation of those rules and before making any regular appointment such persons who are eligible under the said rules would be considered for regularisation. It is in this light that the appellant -petitioner claims a right of consideration of his services for regularization w.e.f. 2001, i.e. from the cut off date (29.06.2001) mentioned in the said Rules 2001 and also challenges the order passed by the opposite parties denying the claim which according to him is contrary to the Rules. The learned Single Judge has lost sight of this provision in the Rules 2001.

20. In fact, as we find that the reasoning given by the concerned official opposite party for rejecting the claim is also not sustainable, in fact, the concerned

authority should have considered the same in the light of the Rules 2001 and thereafter should have taken a considered decision and the consideration had to be in accordance with the Rules 2001 and the law on the subject, which has not been done as already discussed hereinabove, and as it is not the case of the opposite parties at least as of now that there was no vacancy existing on the date of coming into force of the Rules 2001 against which the petitioner could have been considered, therefore, while we set aside the judgment of the Writ Court, we also set aside the order impugned in the writ petition out of which this appeal arises and direct the concerned respondent no.3 to take a fresh decision in the matter in the light of the observations made hereinabove.

21. The writ petition and appeal are **allowed** in the aforesaid terms.

(2024) 5 ILRA 1489
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 266 of 2024

M/S Moksh Innovations Inc.Lko.
...Appellant
Versus
E City Property Management & Services (P) Ltd. New Delhi & Ors. ...Respondents

Counsel for the Appellant:
Desh Mitra Ananad

Counsel for the Respondent:
Pushpila Bisht

(A) Arbitration Law - The Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 - special appeal - Maintainability - Arbitration and Conciliation Act, 1996 - Section 11(7) - Bar on appeal against decision of High Court - Not affected by Amendment Act, 2019, as notification not issued for omission of Section 11(7).

Appellant filed a special appeal against the judgment of a Single Judge in an arbitration matter - respondents raised a preliminary objection - appeal was not maintainable due to the bar under Section 11(7) of the Arbitration and Conciliation Act, 1996 - court criticized appellant for raising a ground that was "highly objectionable" - not raised earlier, and for not informing the Single Judge about a relevant fact(Para – 4,9,10)

HELD: - Special appeal was dismissed as not maintainable due to the bar under Section 11(7) of the Arbitration and Conciliation Act, 1996. Amendment omitting Section 11(7) had not been notified, so the bar still existed. High Court Rules cannot override statutory bar. Left open for the appellant to pursue other remedies as may be permissible in law.(Para -11,12,13)

Special Appeal dismissed as not maintainable. (E-7)

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard Mr. Desh Mitra Anand, learned counsel for the appellant and Ms. Pushpila Bisht, learned counsel for the respondents.

2. There is a delay of 135 days as on 01.05.2024 in filing the special appeal. Counsel for the respondents has no objection in application for condonation of delay being allowed, therefore, we allow the application for condonation of delay and condone the delay in filing the special appeal.

3. This special appeal has been filed under Chapter VIII Rule 5 of the Allahabad

High Court Rules, 1952 (hereinafter referred as 'High Court Rues') challenging the judgment of learned Single Judge of this Court dated 18.11.2023 passed in ***Arbitration and Conciliation Application under Section 11 (4) No. 3 of 2022 (M/s Moksh Innovations Inc. Thru. Manager vs. E-City Property Management and Services (P) Ltd. and others)*** as also the order dated 12.01.2024 passed by the said Single Judge Bench in ***Civil Misc. Review Application No. 178 of 2023 (M/s Moksh Innovations Inc. Thru Manager Jitendra Singh Bisht vs. E-City Property Management and Services Pvt. Ltd.).***

4. At the very outset, Ms. Pushpila Bisht, learned counsel for the respondents invited our attention to ground (h). Without saying much, we have perused the same. We have also seen the averment made in support of the application for interim relief and an order dated 16.02.2009 passed by a Division Bench of this Court in First Appeal From Order No. 718 of 2008. Apart from the fact that the wording of ground (h) is highly objectionable, we have summoned the scanned copy of records of First Appeal From Order No. 718 of 2008 and we find that the learned Single Judge who has passed the impugned judgments/orders had not signed the vakalatnama on behalf of the appellant herein who was the appellant in First Appeal From Order No. 718 of 2008. The vakalatnama is signed by Mr. B.K. Saxena, Advocate. The learned Judge at the relevant time was junior to Mr. Saxena. Mr. Saxena had filed his vakalatnama and thereafter moved an application for recall of some order in the said First Appeal From Order No. 718 of 2008 and on 16.02.2009 the learned Single Judge who at that time was an Advocate holding the brief of his senior informed a fact to the Division Bench, nothing more to seek recall of an order. There is no other pleading nor any material on record of this appeal that he was the counsel for appellant in his independent capacity in that appeal or in any other proceedings on behalf of the appellant.

5. Most important, when we confronted the learned counsel for the appellant as to whether at any point of time during pending of Application under Section 11 (4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'Act 1996') the said order dated 16.02.2009 and the aforesaid fact was brought to the notice of the learned Single Judge, he submitted that this was not brought to the notice because the appellant himself was not aware of this fact during pendency of the said proceedings.

6. We find that against impugned judgment dated 18.11.2023 a review application was filed, but, we do not find any such ground in the said review application nor any such averment in any affidavit or application filed along with it informing the learned Single Judge about the said fact. The learned counsel for the appellant says that this fact came to the knowledge of the appellant only after decision in the review application. If it is so, then, how the learned Single Judge could have known that 15 years ago he had been holding the brief of his senior and had made some mention before the Division Bench in an application for recall in First Appeal From Order No. 718 of 2008 filed by the appellant herein. In these circumstances it is highly unjust to make such an averment as has been made in ground (h) and the affidavit in support of the interim relief.

7. One could understand if this fact was brought to the notice of the learned Single Judge and then an order had been

passed on merits. Even otherwise, the learned Single Judge did not appear in his independent capacity but was associated with the counsel who had filed his vakalatnama and only as a junior lawyer he appeared and made a statement before the Division Bench.

8. The only reason we have narrated these facts is that in our view it is unfair to expect the learned Single Judge to remember that he had by chance appeared in some matter that too on behalf of his Senior in an application for recall and had informed the Division Bench in the aforesaid First Appeal From Order No. 718 of 2008 15 years ago in an appeal filed by the appellant that some proceedings had already been initiated elsewhere and then to recuse himself from hearing of the Application under Section 11 (4) of the Act 1996, 15 years thereafter, without being informed about the said fact. It was the duty, if at all the appellant felt that the matter should not have been heard by the said learned Single Judge, to inform him about the said fact, but, it seems that having contested the matter unsuccessfully before the learned Single Judge this idea came to the appellant only thereafter. Even in the review application this fact was not mentioned. Although a second review is not maintainable but, in these circumstances, if the appellant was serious about this objection, he could have filed an application for recall of the impugned judgment informing the learned Judge about the aforesaid fact but, even this has not been done, instead, uncalled for language has been used in ground (h) of this appeal. The only reason we have mentioned all this is because of manner in which the ground raised in this appeal has been phrased.

9. We say no more on this issue, as, a preliminary objection has been raised by Ms. Pushpila Bisht, learned counsel for the respondents that the Special Appeal is not maintainable on account of the bar in view of Section 11(7) of the Act 1996 which reads as under:

"(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision."

10. In response, learned counsel for the appellant says that the appeal is maintainable under Chapter VIII Rule 5 of the High Court Rules, as, it does not fall in any of the exclusionary categories mentioned therein. As regards Section 11 (7) of the Act 1996, he says that the said provision has been omitted and, therefore, the bar in maintaining a special appeal which is analogous to Letters Patent Appeal is no longer in existence.

11. However, we find that as per the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter referred as 'Amending Act 2019') (Act No. 33 of 2019) the same was enacted to amend the Act 1996. As per Section 1 (2) save as otherwise provided in this Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision. Now, Section 11 of the Act 1996 was amended omitting sub-Section (7) of Section 11 thereof vide Section 3 of the Amending Act 2019. A

notification dated 30.08.2019 was issued by the Ministry of Law and Justice in exercise of the powers conferred by sub-Section (2) of Section 1 of the Amending Act 2019 by which 30.08.2019 was appointed as the date on which the provisions contained in Section 1; Sections 4 to 9 (both inclusive); Sections 11 to 13 (both inclusive); Section 15 of the Amending Act 2019 shall come into force. The words used in the notification: - "the provisions of the following Sections of the said Act" refer to the Amending Act 2019 and not the original Act 1996. Now, when we peruse the Amending Act 2019, we find that no date has been appointed for coming into force of Section 3 of the Amending Act 2019 by which Section 11 (7) of the original Act 1996 is sought to be omitted, meaning thereby, sub-Section (7) of Section 11 of the Act 1996 barring a Letters Patent Appeal/Special Appeal against an order passed under Section 11 (4) (5) (6) of the Act 1996, still exists, therefore, the bar continues so long as Section 3 of the Amending Act 2019 is not notified.

12. This being the position, there is a statutory bar in the Act 1996 which is a special enactment and Chapter VIII Rule of the High Court Rules cannot be read, understood and applied contrary to the said provision, therefore, this special appeal is not maintainable.

13. We ***dismiss*** the special appeal as not maintainable, leaving it open for the appellant to pursue other remedies as may be permissible in law.

14. The records of First Appeal From Order No. 718 of 2008 which were summoned by us shall be returned to the concerned section.

(2024) 5 ILRA 1492
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 769 of 2023

Rehan Ahmad ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Mohammad Ali Ausaf, Sri Sankalp Narain

Counsel for the Respondent:
C.S.C., Sri Pranav Mishra, Sri Sanjeev Singh

(A) Education Law - Allahabad High Court Rules (Rules of the Court, 1952) - Rule 5 of Chapter VIII - Special Appeal - Validity of Scheme of Administration and competence of Registrar - Uttar Pradesh Madarsa Education Board Act, 2004 - Sectio 3 ,3(3) , 22(5) - Uttar Pradesh Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 - Regulation 16 - disciplinary action can be taken, against teaching and non-teaching staff of a Madarsa only in accordance with the duly approved Scheme of Administration - appeal against the order passed with the consent of the parties are normally not entertainable in unless any such legal question is involved that may cause a serious legal consequence - only non-contesting parties have privilege to prefer appeal.(Para - 9,21,22)

Challenged validity of Scheme of Administration and competence of Registrar - dismissed from service by Madarsa - filed writ petition challenging dismissal order - disposed of by Writ Court - Registrar of Uttar Pradesh Madarsa Education Board set aside dismissal order - directed -Manager to reinstate appellanat - Committee of Management also filed a writ

petition challenging Registrar's order - Writ Court set aside Registrar's order & remitted matter to Registrar for a fresh order - hence appeal - Scheme of Administration was not challenged earlier - Registrar's order was passed with consent of parties. (Para – 1 to 8)

HELD: - Special Appeal arising out of an order passed with consent of the parties incompetent and not maintainable. Remedy lies in approaching the learned Single Judge for recall/review of the order, if the parties feel that the consent order was passed on wrong premises. Open to the parties to press their pleas before the Registrar. Registrar was directed to pass an order strictly in accordance with law. No reason to interfere with the impugned order.(Para - 22,23)

Special Appeal dismissed. (E-7)

List of Cases cited:

1. Arshad Javed Khan Vs St. of U.P. & ors., WRIT-A No. 10967 of 2022

2. Committee of Management, Madarsa Masdarul Uloom Asdaqiya & ors.Vs Arshad Javed Khan & Ors., 2023 (3) ADJ 605 (DB)

3. Committee of Management Madarsa Masdarul Uloom Asdaqiya Purani Chakiya & anr. Vs Arshad Javed Khan & ors., Special Leave Petition (Civil) No. 9393 of 2023

4. Godde Venkateshwara Rao Vs Govt. of A.P. & ors. AIR 1966 SC 828

5. St. of Uttaranchal through Collector, Dehradun & ors. Vs Ajit Singh Bhola & ors., 2004 (6) SCC 800

6. Ashok Kumar Pandey & ors .Vs Basic Shiksha Adhikari & ors., 1992 (2) UPLBEC 960 (DB)

7. Asha Saxena Vs S. K. Chaudhari & ors., 1990 (01) UPLBEC 516. (FB)

8. United India Insurance Company Ltd. Vs B. Rajendra Singh & ors., JT 2000(3) SC 151)

9. Ram Chandra Singh Vs Savitri Devi & ors., 2003(8) SCC 319)

10. Employers in Relation to the Management of Bhalgora Area of Bharat Coking Coal Limited Vs Workmen being represented by Janta Mazdoor Sangh, (2021) 10 SCC 717

11. S.P. Chengal Varaya Naidu (dead) by L. Rs Vs Jagannath (dead) by L. Rs & ors., AIR 1994 SC 853

12. C/M Madarsa & anr. Vs St. of U.P. & 7 ors., Writ Petition No.11817 of 2023

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. The instant intra Court Appeal has been filed by the appellant-respondent no. 4 under Rule 5 of Chapter VIII of Allahabad High Court Rules (Rules of the Court, 1952), against the judgment and order dated 07.11.2023 passed in Civil Misc. Writ-A No. 11817 of 2023 (Committee of Management Madarsa Sayeedul-Uloom (Behka) Post Office Puramufti, District-Allahabad through its Manager and another versus State of U.P. and others), by means of which the Hon'ble Single Judge partly allowed the writ petition filed by the Committee of Management, Madarsa Sayeedul-Uloom (Behka) Post Office Puramufti, District- Allahabad through its Manager Mohd. Ishaq (hereinafter referred to as 'Committee of Management').

2. Facts that are culled out from the pleadings and the material available on record before this Court that the appellant herein was appointed as Assistant teacher in Tahtaniya (Class 1 to 5) in the Madarsa Sayeedul-Uloom (Behka) Post Office Puramufti, District- Allahabad (hereinafter referred to as 'Madarsa') on 25.03.2005, based upon his eligibility for the post i.e. the 'Hafiz Certificate' said to have been issued in the year 1992 by the Madarsa Islahul Muslemeen, Alipurjeeta, District Kaushambi, as claimed by the appellant. It

has not been disputed by the contesting parties in the present case that the appellant has been working as an Assistant Teacher in the Madarsa (respondent no. 4) since the date of his appointment.

3. The District Minority Welfare Officer, Prayagraj vide letter dated 22.02.2022 directed the Madarsa concerned to furnish a report as desired by the Registrar, U.P. Board of Madarsa Education, Lucknow vide his letter dated 14.02.2022 in respect of the teachers appointed on the basis of the 'Hafiz Certificate' that from which institution the said certificate was issued and about the issuing authority, for its onward transmission to the Registrar (respondent no.2). During the said process, the appellant herein was required to provide the aforesaid 'Hafiz Certificate' in original but he failed to produce the same. The contention of the learned counsel for the Committee of Management (respondent no.4) is that upon verification from the Madarsa Islahul Muslemeen, Alipurjeeta, District Kaushambi (respondent no.6) from where the appellant claimed to have obtained the 'Hafiz Certificate', but the said Madarsa (respondent no.6) denied the issuance of the said 'Hafiz certificate'. As a consequence of the same, the Committee of Management of the Madarsa (respondent no. 4) initiated disciplinary proceedings against the appellant. Accordingly the appellant was placed under suspension and a show cause notice was issued, to which he duly replied and since the reply filed by the appellant was not found to be satisfactory, a Charge-Sheet dated 05.08.2022 was issued by the Committee of Management (respondent no.4). The appellant submitted his reply to the said charge-sheet on 29.08.2022 and thereafter, the Enquiry Officer submitted his enquiry report on 06.09.2022 holding therein that the appellant could not prove the genuineness of the 'Hafiz Certificate'. On the basis of the said enquiry report, a resolution by the Committee of Management (respondent no.4) is stated to have been passed on 17.09.2022 for the dispensation of the services of the appellant and consequently the order of dismissal from service was communicated to the appellant on 21.09.2022.

4. Against the aforesaid dismissal, the appellant herein preferred a writ petition being Writ-A No. 19669 of 2022 (Rehan Ahmad versus Uttar Pradesh Board of Madarsa Education and others), which came to be disposed of vide order dated 24.01.2023 in the wake of the fact that there existed an alternative remedy available in terms of paragraph no.11 of the 'Scheme of Administration'. The operative portion the order dated 24.01.2023 passed by the Hon'ble Single Judge in Writ-A No. 19669 of 2022 is quoted hereinbelow,

"Learned counsel for parties have not disputed that there is an alternative remedy available in terms of paragraph 11 of the Scheme of Administration to challenge the impugned order. However, a contention has been raised on behalf of petitioner that order impugned is still not send to the Registrar U.P. Madarsa Shiksha Parishad to which learned counsel for respondents has made an objection.

Be that is it may, since there is an agreement between the parties that there is an alternative remedy available in terms of paragraph 11 of the Scheme of Administration to challenge the impugned order, this writ petition is disposed of with direction to the Committee of Management that if the impugned order is still not sent, it will be sent forthwith to the authority concerned within a period of sixty day after

hearing the parties on merit in accordance with law"

5. In pursuance of the aforesaid order dated 24.01.2023 passed by the Writ Court, the respondent no.2 issued notices to the concerned parties including notice to the respondent no.6 and decided the matter vide order dated 19.06.2023, whereby the petitioner was reinstated in service.

6. Assailing the aforesaid order dated 19.06.2023 passed by the Registrar (respondent no.2), the Committee of Management of Madarsa (respondent no. 4) filed a writ petition which was registered as Writ- A No. 11817 of 2023 (C/M Madarsa and another versus State of U.P. and others) inter alia challenging the veracity of the order dated 19.06.2023 passed by the Registrar (respondent no.2).]

7. The Learned Writ Court by a detailed judgment and order decided the aforesaid writ petition vide the impugned order dated 07.11.2023. The relevant portion of the same is reproduced as under:

"18. This Court from the perusal of the order impugned passed by the second respondent, Registrar/Inspector Uttar Pradesh Board of Madarsa Education finds that the said order suffers from fundamental defect making it not only vulnerable but vitiated. The second respondent, Registrar/Inspector Uttar Pradesh Board of Madarsa Education has completely overlooked the settled principle of law that eligibility is to be seen on the last date of submission of the application form. He has relied upon the qualifications obtained by the fourth respondent post advertisement. A further question also arises that what would be the import and impact of the continuance of the fourth respondent since 2005 till the passing of the order/the verification exercise undertaken by the writ petitioners with regard to the doctrine of equity. These issues are also need consideration while deciding the issues in question. The second respondent is also required to go into the issue relating to the effect of non-verification of Hafiz certificate particularly when the stand of the respondents is that the register containing the details about the Hafiz certificate possessed by the fourth respondent was not verifiable. In the opinion of the Court, the second respondent was required to take a further exercise while going deeply into the issue as to what would be the net consequences when the register maintained for the said purposes did not suggest or prove that the qualification obtained by the writ petitioner, Hafiz certificate was not verifiable. No such exercise appears to have been undertaken by the second respondent, Registrar/Inspector Uttar Pradesh Board of Madarsa Education, Lucknow, lastly, the Court further finds that though a finding has been recorded that there has been violation of principles of natural justice and the disciplinary proceedings was conducted de hors the regulations but no reasons are forthcoming in the order impugned in coming to the said conclusion. Obviously, reasons are the heart beat and in absence of any reasons in coming to the conclusion the order becomes vitiated. Since the order impugned does not address the core and fundamental issues, thus, the order is liable to be set aside. At this juncture, Sri Tarun Agarwal, learned counsel who appears for the fourth respondent, Sri Pranav Mishra, learned counsel who appears for the second respondent and learned Standing Counsel who appears for respondents Nos. 1 and 3 have made a

statement at bar that the order dated 19.06.2023 be set aside and the matter be remitted back to the second respondent to pass a fresh order.

19. To such a submission, learned counsel for the writ petitioners has no objection, however, he submits that he may be also allowed to raise all contentions seeking jurisdictional issue also.

20. Sri Pradeep Kumar Shahi, learned Additional Chief Standing Counsel and Sri Pranav Mishra have no objection to the same.

21. Considering the submission of the rival parties as well as the stand taken by them, the writ petition is being decided in the following terms:

(a) the order dated 19.06.2023 passed by the second respondent is set aside;

(b) the matter stands remitted back to second respondent to pass a fresh order after putting to notice the writ petitioners, fourth and also the fifth respondent while fixing a particular date;

(c) on the date so fixed by the second respondent the version submitted by the writ petitioners, fourth respondent and fifth respondent be exchanged and after hearing, the orders be passed within a period of six weeks from the date of production of certified copy of the order.

22. Needless to point out that the second respondent shall pass an order strictly in accordance with law dealing with each and every contentions either legal or factual raised by the respective parties.

23. With the aforesaid observations, the writ petition stands partly allowed."

8. Being aggrieved by the said order dated 07.11.2023, the appellant has approached this Court by means of the instant Special Appeal. Assailing the said impugned order, learned counsel for the appellant contended as under:

9. The foremost submission as advanced by Sri Sankalp Narain, the learned counsel for the appellant is that by setting aside the order dated 19.06.2023 passed by the Registrar, Madarsa Education Board (respondent no.2) the Hon'ble Single Judge has effectively revived the illegal resolution and dismissal order passed by the Committee of Management (respondent no. 4) dated 17.09.2022 and 21.09.2022 respectively. His contention is that as per the provisions of 'U.P. Madarsa Education Board Act, 2004' and Regulation 16 the 'Uttar Pradesh Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016' clearly provides that disciplinary action can be taken, against teaching and non-teaching staff of a Madarsa only in accordance with the duly approved Scheme of Administration, but in the instant case, the Registrar (respondent no.2) on 20.05.2023 itself suspended the approval order dated 30.08.2022 granted to the Scheme of Administration of 31 Madarsas including that of the Madarsa (respondent no. 4) on the ground that the said approval was in contravention to the provisions of Section 22(5) of the U.P. Madarsa Education Board Act, 2004. In support of his contention, he submitted that in terms of Section 2(a) conjointly read with Section 3 and 22(5) of U. P. Madarsa Education Board Act of 2004, it was the Madarsa Education Board duly constituted under Section 3 of the U. P. Madarsa Education Board Act, 2004 and was exclusively empowered to approve the Scheme of Administration of the Madarsa. The Registrar, Madarsa Education Board merely happens to be a member of the Madarsa Education Board in terms of Section 3(3) of the Act and was not

individually empowered to approve the Scheme of Administration. He submitted that on being noticed that the said approval dated 03.08.2022 was granted by the Registrar, Madarsa Education Board in its' individual capacity and suffers from the defect of coram non judice, the Registrar (respondent no.2) itself issued an order dated 20.05.2023 whereby it suspended the aforesaid approval granted to the Scheme of Administration of Madarsa (respondent no. 4) till an approval in that regard is granted by the U. P. Madarsa Education Board in terms of Section 22(5) of the U. P. Madarsa Education Board Act, 2004.

10. It has also been asserted on behalf of the appellant that the ramification of the aforesaid suspension order dated 20.05.2023 passed by the Registrar (respondent no. 2) is that once the order of approval of said Scheme of Administration has been suspended then all the actions taken by the Committee of Management of Madarsa (respondent no. 4) in terms of the said Scheme of Administration as well as the powers of the Authorities flowing from the same are rendered void ab initio, consequently, the resolution and dismissal order dated 17.09.2022 and 21.09.2022 respectively passed by the Committee of Management (respondent no. 4) and subsequent orders becomes illegal being beyond the competence and jurisdiction. In support of his argument, the learned counsel has placed reliance upon the judgment dated 05.08.2022 passed by in the case of **Arshad Javed Khan versus State of U.P. and 3 Others**, having WRIT-A No. 10967 of 2022 that has been affirmed by the Division Bench of this Court in Special Appeal No. 573 of 2022 **Committee of Management, Madarsa Masdarul Uloom Asdaqiya and Ors. versus Arshad Javed Khan and Ors**. as reported in **2023 (3) ADJ 605 (DB)** and subsequently by the Hon'ble Supreme Court vide order dated 12.05.2023 passed in Special Leave Petition (Civil) No. 9393 of 2023 **Committee of Management Madarsa Masdarul Uloom Asdaqiya Purani Chakiya & Anr. versus Arshad Javed Khan & Ors**.

11. Learned counsel for the appellant further submitted that it is trite law that there can be no consent given by the counsel appearing for the parties to confer jurisdiction upon a State officer against the legal provisions. In the present case the Hon'ble Single Judge vide Order dated 24.01.2023 passed in Writ-A No. 19669 of 2022 relegated the matter to the Registrar Madarsa Education Board in view of the provision contemplated under paragraph 11 of the Scheme of Administration and now when the approval of the same has been suspended by the Registrar (respondent no. 2) itself on 20.05.2023, no occasion arose to the Hon'ble Single Judge to remit the matter for re-consideration before the Registrar (respondent no. 2) even if consent in that regard was given by the counsels appearing for the parties. Further, by setting-aside the order dated 19.6.2023 passed by the Registrar (respondent no.2), the Hon'ble Single Judge vide the impugned Order dated 19.06.2023, virtually revived of illegal orders of termination dated 17/21.09.2022 passed by the Committee of Management (respondent no. 4). In support of his submission, he has relied upon the judgments passed by the Hon'ble Supreme Court in the cases of **Godde Venkateshwara Rao** versus **Government of Andhra Pradesh and Others**, reported in **AIR 1966 SC 828** and **State of Uttaranchal through Collector, Dehradun and Others** versus **Ajit Singh Bhola and Others**, reported in **2004 (6) SCC 800** and also the judgment passed by the Divisional

Bench of this Court in the case of **Ashok Kumar Pandey and Others** versus **Basic Shiksha Adhikari and Others**, reported in **1992 (2) UPLBEC 960 (DB).**

12. Lastly, the learned counsel for the appellant submitted that the appellant was appointed on the post of Assistant Teacher in the Madarsa (respondent no. 4) way back on 25.03.2005 and has served as a teacher for a considerably long period of 17 years. Therefore, his appointment as a teacher cannot be terminated after a considerable lapse of time in view of the Full Bench judgement passed by of this Court in the case of **Asha Saxena versus S. K. Chaudhari and Others**, reported in **1990 (01) UPLBEC 516. (FB).** Relevant portion of Paragraph 16 of the said judgment is reproduced hereinbelow,

"16. ... In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a long period. Even the earlier Full Bench had quashed the order of the Regional Inspectress of Girls Schools referring the matter under Section 16-E(10) of the Act we are also of the opinion that the aforesaid order is liable to be quashed. It is true that there is power under Section 16-E (10) of the Act to cancel the appointments but the power has to be exercised within a reasonable time. The appointments had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the /apse of 17 year by the Director of Education under Section 16-E(10), on the facts and circumstances of the case can be said to be exercise of a power within a reasonable time. In our opinion, the order of the Regional Inspectress of Girls Schools referring the matter to the Director of Education under Section 16-E(10) is thus liable to be quashed.

13. Per contra, Sri Sanjeev Singh, learned counsel appearing for the Committee of Management (respondent no. 4), vehemently opposed the arguments made by the learned counsel for the appellant. He submitted that the appellant procured the appointment on the post of Assistant Teacher in the Madarsa (respondent no. 4) on the basis of a fake 'Hafiz Certificate'; which was found to be a non-existent document during the course of verification and the Committee of Management of Madarsa (respondent no. 4) after noticing the said fraud, terminated the services of the appellant with immediate effect. He contends that it is well-settled proposition of law that fraud unravels everything and vitiates every solemn act. He in support of his assertion placed reliance upon judgments passed by this Court as well as by the Hon'ble Supreme Court in the case of **United India Insurance Company Ltd. versus B. Rajendra Singh and others,** reported in **JT 2000(3) SC 151)** and **Ram Chandra Singh** versus **Savitri Devi and others**, reported in **2003(8) SCC 319**). He submits that the Hon'ble Supreme Court in the case of **Employers in Relation to the Management of Bhalgora Area of Bharat Coking Coal Limited** versus **Workmen being represented by Janta Mazdoor Sangh**, reported in **(2021) 10 SCC 717** has made it abundantly clear that 'fraudulent practice to gain public employment cannot be countenanced to be permitted by a court of law'.

14. Defending the impugned order dated 07.11.2023 passed by the Hon'ble Single Judge, learned counsel for the Committee of Management (respondent no.

4) asserted that it has very rightly set aside the order dated 19.06.2023 passed by the Registrar (respondent no. 2) in as much as the Writ Courts cannot let an appointment obtained through fraud to survive. He submitted that the principle of finality of litigation will not apply where fraud has been played by the delinquent to secure appointment. To substantiate his argument he placed reliance upon the judgement passed by the Hon'ble Apex Court the case of S.P. Chengal Varaya Naidu (dead) by L.Rs versus Jagannath (dead) by L.Rs and others, reported in AIR 1994 SC 853, wherein the Hon'ble Supreme Court held as under,

"7. The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank loan- dodgers and other unscrupulous is persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely."

15. In the instant special appeal, we are required to examine the correctness of the impugned order dated 07.11.2023 passed by the learned Single Judge setting aside the order dated 19.06.2023 by means of which the matter was remitted to the Registrar (respondent no.2) to pass a fresh order after putting to notice the concerned parties. It would not be out of place to note that the said order was passed with the consent of the contesting parties.

16. We have heard the learned counsel for the parties and perused the material available on record. The issue on illegality of the Scheme of Administration for the first time has been raised on behalf of the appellant-petitioner before this Court in appeal. The fact that suspension of the approval of the Scheme of Administration by the Registrar vide order dated 20.05.2023 and its consequential effects were never raised earlier by either of the parties. It is noteworthy that in earlier two rounds of litigation, the question of legality of the Scheme of Administration and the competence of the Registrar to deal with the matter flowing from the said Scheme of Administration were never raised by the parties and in the earlier round of litigation in Writ- A No.19669 of 2022 (Rehan Ahmad versus Uttar Pradesh Board of Madarsa Education and 5 others) filed by the appellant-petitioner assailing the order of dismissal from service, the appellant-petitioner did not dispute the same rather accepting the legality of the same, accorded consent for the matter to be decided by the Registrar as an alternative remedy in terms of paragraph no.11 of the Scheme of Administration and accordingly, the Writ Court vide order dated 24.01.2023 disposed of the writ petition with certain directions. Accordingly the Registrar (respondent no.2) decided the matter and passed the following order:

"पंत्रावली पर प्राप्त अभिलेखों / साक्ष्यों का अनुशीलन, परीक्षण करने पर पाया गया कि सेवायोजित होने के समय श्री रेहान अहमद द्वारा प्रबन्तंत्र / प्रवस्यक पाया सईदुल उलूम बेहका प्रामुपती, प्रयागराज को उपलब्ध करायी गयी हिब्ज की डिग्री हाफिज (हिब्ज) के अभिलेखों को प्रबन्धक, मदरसा इस्लाहुल मुस्लेमीन अलीपुरजीता, कौशाम्बी से प्राप्त कर अवलोकन किया गया और पाया गया कि हिब्ज का रजिस्टर किसी सक्षम स्तर से प्रमाणित नहीं है। प्रबन्धक मदरसा के अनुसर हिब्ज के छात्र की हाजिरी अंकित नहीं होती है। हिब्ज़ का प्रमाण पत्र मदरसे में आयोजित होने वाले वार्षिक जलसे में छात्रों को

वितरित कर दिया जाता है, जिसकी प्रति को सम्बन्धित रजिस्टर में नहीं रखा जाता है। हिब्ज से सम्बन्धित छात्र द्वारा कुरान मजीद को कंठस्थ कर लेने के पश्चात हिब्ज का प्रमाण पत्र दे दिया जाता है। यह मदरसा बोर्ड द्वारा निर्धारित कोई पाठ्यक्रम नहीं है तथा हिब्ज के सम्बना में गदरसा बोर्ड द्वारा कोई समय सीमा निर्धारित नहीं है, जिरा) श्री रेहान अहमद के हिब्ज की डिग्री के सम्बन्ध में कोई स्पष्ट पुष्टि नहीं हो पायी। इसके अतिरिक्त श्री रेहान अहमद द्वारा उपलब्ध कराया गया अन्य अकपत्रों / प्रमाण पत्रों का भी अवलोकन किया गया जिसमें उनके द्वारा इण्टरमीडिएट उर्दू राहित एवं नियुक्ति के समय वर्ष 2005 की कामिल की डिग्री एवं फाजिल के अतिरिक्त अन्य डिग्री भी दो अलग-अलग बोर्ड से प्राप्त करायी गयी हैं, के अवलोकन से रपष्ट होता है कि तहतानिया कक्षाओं में शिक्षण कार्य हेतु उनके पास पर्याप्त डिग्री हैं। ऐसी स्थिति में मात्र हिब्ज की डिग्री के आधार पर प्रबन्धक मदरसा द्वारा उनकी रोवा समाप्त किया जाना न्यायोचित नहीं है। क्योंकि हिब्ज की डिग्री किसी विश्वविद्यालय एवं बोर्ड रो प्रमाणित नहीं है और इसी आधार पर प्रदेश केः लगभग सभी मदरसों में शिक्षक कार्यरत हैं। ऐसी स्थिति में प्रबन्धतत्र / प्रबन्धक मदरसा द्वारा श्री रेहान स०अ० तहतानिया की; की गयी सेवा समाप्ति दिनांक 17.09.2022 नियमानुरूप न होने के कारण निरस्त किये जाने योग्य है, जिसे निरस्त किया जाता है एवं श्री रेहान को सवेतन बहाल करते हुए प्रबन्धक मदरसा को निर्देशित किया जाता है कि वह श्री मोहम्मद रेहान स०अ० तहतानिया से पूर्व की भांति नियमानुसार शिक्षण कार्य कुरायें।

रिट याचिका संख्यां-19669/2022 में मा० उच्च न्यायालय इलाहाबाद द्वारा पारित आदेश दिनांक 24.01.2022 के समादर में प्रकरण को एतद्वारा निस्तारित किया जाता है।"

17. In the second round of litigation, wherein the Committee of Management (respondent no.4) dissatisfied with the aforesaid order dated 19.06.2023 passed by the Registrar (respondent no.2) filed a Writ Petition No.11817 of 2023 (C/M Madarsa and another versus State of U.P. and 7 others). The appellant who was the respondent in the said writ petition contested the matter but did not raise the aforesaid question regarding the validity of the said Scheme of Administration nor did he raise the competence of the Registrar to deal with the matter and the writ petition was finally allowed by the Writ Court vide the impugned order dated 07.11.2023. The Hon'ble Single Judge with the consent of the parties remitted the matter to the Registrar (respondent no.2) to pass a fresh order by setting aside the order dated 19.06.2023 passed by the Registrar (respondent no.2).

18. Suffice it to say that in the aforesaid second round of litigation too, the appellant did not raised the question of the validity of the Scheme of Administration or the competence of the Registrar rather accorded his consent for the remittance of the matter to the respondent no.2. It has also been brought to the notice of this Court that the order of the Registrar dated 20.05.023 whereby he suspended the approval of the said Scheme of Administration has never been challenged by the parties. The order dated 20.05.2023, is reproduced below for the ready reference:

"प्रेषक,

रजिस्ट्रार,

उ०प्र० मदरसा शिक्षा परिषद

704, जवाहर भवन, लखनऊ।

सेवा में,

जिला अल्पसंख्यक कल्याण अधिकारी संबंधित जनपद (बस्ती, संतकबीर नगर, देवरिया, बलरामपुर, गाजीपुर, कुशीनगर, जौनपुर, लखनऊ,कौशाम्बी, प्रयागराज)

पत्रांक- 476/म०शि०परि०/2023

दिनांकः 20/05/2023

विषयः मदरसों की प्रशासन योजना के अनुमोदन के सम्बन्ध में।

महोदय,

विषयगत संदर्भ में अवगत कराना है कि उत्तर प्रदेश मदरसा शिक्षा परिषद अधिनयम, 2004 की धारा- 22(5) में मदरसों की प्रशासन योजना के संबंध में निम्न व्यवस्था दी गई है- "प्रत्येक संस्था की प्रशासन की योजना परिषद के अनुमोदन के अधीन होगी और प्रशासन की योजना में किसी भी समय कोई संशोधन या परिवर्तन परिषद के पूर्व अनुमोदन के बिना नहीं किया जायेगा।

उल्लेखनीय है कि पत्र के साथ संलग्न 31 मदरसों की सूची जिनकी प्रशासन योजना पर परिषद कार्यालय द्वारा सहमति प्रदान की गई है, उसे उ०प्र० मदरसा शिक्षा परिषद द्वारा अनुमोदन प्राप्त होने तक अथवा परिषद द्वारा संशोधन का सुझाव दिये जाने तक प्रदान की

गई सहमति तत्काल प्रभाव से अग्रिम आदेश तक स्थगित की जाती है।

संलग्नक- उपरोक्तानुसार।

(भवदीय)

(जगमोहन सिंह) रजिस्ट्रार/ निरीक्षक

पत्रांक व दिनांक उपरोक्तानुसार।

प्रतिलिपि- निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित- 1. मा० अध्यक्ष, उ०प्र० मदरसा शिक्षा परिषद, लखनऊ। 2. प्रबन्धक/प्रधानाचार्य संबंधित मदरसा।

(जगमोहन सिंह) रजिस्ट्रार/ निरीक्षक"

19. Furthermore, it is evident from the record that the Scheme of Administration in question was suspended by the Registrar (respondent no.2) only on 25.05.2023 vide the above the above-mentioned order meaning thereby that the same was enforced at the time of passing of the dismissal order. In any case the legality of the Scheme of Administration was not a subject matter of dispute before the Writ Court. Accordingly, the judgments referred by the learned counsel for the appellant in respect of his contention are not attracted in the factual matrix of the case.

20. Insofar as the correctness of the impugned order dated 07.11.2023 passed by the Hon'ble Single Judge is concerned, the same was passed on the basis of the material that was available before the leaned Writ Court. The Hon'ble Single Judge while deciding the said writ petition, set aside the order dated 19.06.2023 passed by the Registrar (respondent no.2) and remitted the matter to the respondent no.2 with a direction to pass a fresh order after putting to notice the writ petitioner, Rehan Ahmad (respondent no.4) and Principal, Madarsa Islahul Muslemeen Alipurjeeta, District-Kaushambi (respondent no.5). While fixing a particular date, it is also directed that on the date so fixed, the version submitted by the parties be exchanged and after hearing the orders be passed within a stipulated period.

21. While deciding the matter, the Hon'ble Single Judge categorically observed that the respondent no.2 shall pass order strictly in accordance with law dealing with each and every contentions either legal or factual raised by the respective parties. Taking into consideration the factual matrix of the case and also the settled legal preposition that the appeal against the order passed with the consent of the parties are normally not entertainable in unless any such legal question is involved that may cause a serious legal consequence.

22. It is a trite law that once the consent by the contesting parties is accorded before the Court of law then they have no right to challenge the order passed on the basis of their consent in appeal and only non-contesting parties have privilege to prefer appeal. A co-ordinate Bench of this Court while deciding the Special appeal Defective No.826 of 2015 [Neutral Citation No.2016: AHC: 285 (D.B.)] has held that an Special Appeal arising out of an order passed with consent of the parties is incompetent and not maintainable. The relevant portion of the order passed in the above mentioned case is as under:

"On the matter being taken up today, in our respectful opinion, present special appeal in question cannot be held to be competent and maintainable for the simple reason that once the order dated 20th March, 2015 is a consent order, then in such situation, in this background, the special appeal in question will not at all be entertained and in case it is the case of the respondents-appellants that on wrong premise the said agreement has been arrived at and the question is not covered with the

decision of Special Appeal No.276 of 2006 decided on 28th August, 2010, then the remedy lies in approaching the learned Single Judge for recall/ review of the said order.

In view of this, present special appeal in question is dismissed as incompetent."'

23. Having regard to the facts and circumstances of the case, this Court finds no reason to entertain the said appeal filed by the petitioner in the teeth of the fact that the Hon'ble Single Judge vide the impugned order dated 07.11.2023 has made it open to the parties to press their pleas before the Registrar (respondent no.2) with a direction to the said authority to pass order strictly in accordance with law dealing with each and every contentions either legal or factual raised by the respective parties.

24. In view of the deliberations as made hereinabove, we find no reason to interfere with the impugned order.

25. The present Special Appeal is accordingly **dismissed** with no order as to cost.

(2024) 5 ILRA 1502
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-A No. 3660 of 2024

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

Counsel for the Petitioner:
Arunima Shukla

Counsel for the Respondents
C.S.C.

(A) Service Law - Pensionary benefits - Uttar Pradesh State Educational Institution Employees Contributory Provident Fund-Insurance Pension Rules, 1965 - Rule 19(b), Regulation 21 of Chapter III , Uttar Pradesh Intermediate Education Act, 1921 - Regulation 21 of Chapter III of the Regulations made under the Act 1921 - date of superannuation/retirement - where a power is given to do a certain thing in certain way, the thing must be done in that way or not at all and the other methods of performance are necessarily forbidden. (Para - 20)

Matter for grant of pensionary benefits to petitioner remitted back - petitioner appointed on an ad-hoc basis - later regularized - attained age of superannuation - Deputy Director of Education (Secondary) denied petitioner's pensionary benefits - citing Government Order - petitioner challenged order - ground - Government Order does not have retrospective effect - entitled to pensionary benefits from the date of superannuation. (Para -3 to 5)

HELD: - Petitioner entitled to pensionary benefits from the date of superannuation. Government Order does not have retrospective effect. Impugned order quashed. (Para - 22,23)

Writ Petition Allowed. (E-7)

List of Cases cited:

1. Chairman Railway Board Vs C.R. Rangadhamaiah , AIR (SC) 1997 0 3828 (Constitutional Bench)

2. Punj. St. Cooperative Agricultural Development Bank Ltd Vs Registrar, Cooperative Societies, AIR (SC) 2022 0 1349

3. Assistant Excise Commissioner, Kottayan & ors. Vs Estgappan Cherian & Anr., 2021(10) SCC 210

4. Nazir Ahmad Vs King-Emperor, 1936 SEC OnLine PC 41

5. Chandra Kishroe Jha Vs Mahavir Prasad & ors., (1999) 8 SCC 266

6. Cherukuri Mani Vs Chief Secretary, Govt of A.P. & ors, (2015) 13 SCC 722

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

1.) Heard Mr. Adarsh Singh and Ms. Arunima Shukla, learned Counsels for the petitioner, Mr. Shailendra Kumar Singh, learned Chief Standing Counsel and Mr. Vivek Shukla, learned Additional Chief Standing Counsel for the State-respondents.

2.) Since, the pure legal question is involved, hence the matter is decided at admission stage.

3.) Under challenge is the order dated 21.03.2024 passed by the Deputy Director of Education (Secondary), 9th Region, Ayodhya whereby the matter for grant of pensionary benefits to the petitioner is remitted back.

4.) The contention of Counsel for the petitioner is that the petitioner was appointed on the post of Assistant Teacher on ad-hoc basis on 09.08.1995 and he joined thereafter on 14.08.1995 and later on, when the financial concurrence was not granted by the District Inspector of Schools, a writ petition bearing no. 839 (S/S) of 1997 was preferred before this Court, whereby, he was granted salary by an interim order. He further submitted that once the provision under Section 33G of the U.P. Act No. 5 of 1982 was promulgated, the petitioner was considered and his services were regularized vide order dated 08.06.2017 and thereafter, he was also granted the other benefits. He also added that the petitioner attained the age of superannuation after completing 62 years of age on 30.04.2023.

5.) Further contention of Counsel for the petitioner is that once the matter was preferred before the Deputy Director of Education (Secondary), 9th Region, Ayodhya for payment of pension, the same was relegated back, while observing that since the Government Order dated 12.12.2023 came into effect which says that the qualifying service for grant of pension shall be counted from the date of substantive appointment, thus, the petitioner is not entitled for pension. Adding his argument, he submits that in fact, the petitioner could be treated retired while attaining the age of superannuation while completing 62 years of age on 30.04.2023 as provided under Regulation 21 of the Regulations made under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921'), and therefore, the date of retirement is much prior than the date of issuance of the Government order, hence, the Government order dated 12.12.2023 will not apply so far as the case of the present petitioner is concerned.

6.) In support of his contention, he has placed reliance on judgment & order dated 25.04.2024 passed in Writ A 2202 of 2024 and has referred Paragraph 19 to 21 which are quoted herein below:-

".....(19.) It is undisputed fact that the services of the petitioner was regularised on 30th March 2019 that is much prior than the Government order dated 12th December 2023, is issued, when the Clause 4 of the Pension Rules was not in existence.

(20.) The legal principal culled out is that the vested rights cannot be taken away by way of amendment giving the effect retrospectively. Further, if any statute do not provide any specific terms regarding the provision to be applicable retrospectively, the same shall be applicable prospectively.

(21.) It has been the view of the Apex Court consistently, including the judgment and order rendered in ***Chairman Railway Board versus C.R. Rangadhamaiah*** *reported in* ***AIR (SC) 1997 0 3828 (Constitutional Bench)*** *and in case of* ***Punjab State Cooperative Agricultural Development Bank Ltd versus Registrar, Cooperative Societies*** *reported in* ***AIR (SC) 2022 0 1349*** *that it would have unjust and unreasonable to give any effect to any statute retrospectively unless any claim or right is vested by way of legislation. Further, recently in case of Assistant Excise Commissioner, Kottayan & Ors. Vs. Estgappan Cherian & Anr. reported in 2021(10) SCC 210, it has been held that there is a profusion of judicial authority and the proposition that a rule of law cannot be constituted as retrospective unless it expresses a clear or manifest intention to the contrary."*

7.) Referring the aforesaid, he submits that the controversy has been put to rest and it has been held that if the institute does not envisage the provision regarding retrospective effect, applying it contrary, amounts to legislate such provisions which is not permissible under the law.

8.) Concluding his arguments, he submits that in fact the Deputy Director of Education (Secondary), 9th Region, Ayodhya, under the impression that the petitioner was retired after completing the benefit of academic session on 31.03.2024 remitted back the matter, while observing that the Government order dated 12.12.2023 came into effect and he is not entitled for salary, though the same is incorrect and thus submission is that the order date 21.03.2024 may be quashed and Deputy Director of Education (Secondary), 9th Region, Ayodhya may be directed to decide the matter afresh.

9.) On the other hand, Counsel appearing for the State has refuted the contentions above said on the ground that there is nothing in the order dated 21.03.2024 which goes against the petitioner. He added that so far as the issue with respect to the application of the Government order dated 12.12.2023 is concerned, that has already been settled and since the petitioner is retired on 21.03.2024, therefore, the Government order dated 12.12.2023 would apply in case of the petitioner. Thus submission is that the petitioner is not entitled for any relief.

10.) Considering upon the submissions advanced by learned Counsels for the parties and after perusal of records, it transpires that the controversy arose, when the Deputy Director of Education (Secondary), 9th Region, Ayodhya passed an order on 21.03.2024 whereby observing about the Government order dated 12.12.2023 and remitted back the matter while not granting the benefit of pension which amounts to denial of the same.

11.) While examining the matter in facts and law, it emerges that Rule 19(b) of Uttar Pradesh State Educational Institution Employees Contributory Provident Fund-Ensurance Pension Rules introduced vide Government Order dated 17th of December 1965, effected from 1st October 1964, provides provision regarding count of qualifying service for pensionary benefits. Rule 19 (b) is extracted as under:-

"Continuous, temporary or officiating service followed without interruption by confirmation in the same or

another post shall also count as qualifying service."

The aforesaid provision is amended vide order dated 12th of December 2023, which is quoted herein under:-

"(1) लाभत्रयी योजना नियमावली दिनांक 01-अक्टूबर1964, शासनादेश दिनांक 17.12.1965, शासनादेश संख्या-531/पन्द्रह-8-3004(2)/1974 दिनांक 31, मार्च 1978 प्रख्यापित/प्रभावी होने के फलस्वरूप लाभत्रयी योजना के शासनादेश दिनांक-17 दिसम्बर, 1965, का अध्याय तीन विलोपित किया जाता है।

(2) दिनांक-31.03.2024 के बाद नियुक्ति सहायता प्राप्त शिक्षण/प्रशिक्षण संस्थाओं के शिक्षक/कर्मचारी अनिवार्य जीवन बीमा योजना से आच्छादित नहीं माने जायेंगे ।

(3) लाभत्रयी पेंशन नियमावली 1965 के अध्याय पांच, नियम 17 वर्तमान उप नियम-4 के पश्चात नया उप नियम-05 बढ़ाया जाता है, अर्थात (5), यह नियमावली उत्तर प्रदेश सहायता प्राप्त शिक्षा संस्थाओं के संबंध में पेंशन स्थापन सेवाओं और पदों पर चाहे वे अस्थाई हों या स्थाई हों, 01 अप्रैल 2005 को या उसके पश्चात प्रवेश करने वाले कर्मचारियों पर लागू नहीं होगी। यह आदेश दिनांक 01.04.2005 से प्रभावी माना जायेगा ।

(4) लाभत्रयी पेंशन नियमावली 1965 के अध्याय-पांच (पेंशन) के बिन्दु संख्या-19 (ख) में परंतुक के रूप में प्रस्तावित व्यवस्था "ऐसे शिक्षक जो तदर्थ अल्पकालिक रिक्त पद पर। नियुक्ति प्राप्त करके उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड अधिनियम 1982 की धारा-33 छ के अन्तर्गत विनियमित हुए हैं, उनकी सेवा मौलिक नियुक्ति की तिथि 22 मार्च 2016 से ही अर्हकारी सेवा के रूप में गिनी जायेगी।"

12.) The provisions of the order dated 12th of December 2023 came into effect, though, without retrospective effect but the authorities assuming that the same is applicable from the retrospective effect but passed the order while observing that the qualifying service would be counted from the date of substantive appointment and so far as the case of the present petitioner is concerned, his services were regularised with effect from 22nd of March 2016, and, therefore, he was otherwise denied for pensionary benefits.

13.) In an identical circumstances, this issue has been dealt with in Special Appeal (Defective) No. 976 of 2023 as well as in Writ-A No. 2202 of 2024, vide judgements and orders dated 24.1.2024 and 25.4.2024 respectively, wherein, it has been held that 'if an statute does not envisage the provision regarding retrospective effect, applying it contrary, would amount to legislate such provisions, which is not permissible under the law, and it has categorically been held that the provision would be applicable with effect from 12th of December 2023, i.e., the date of issuance of the order.

14.) So far as the case of the present petitioner is concerned, he would have

retired after attaining the age of superannuation on 30th of April 2023, i.e., 62 years of age though fact remains that he was accorded the benefit of academic session and was retired on 31st of March 2024.

15.) Now, the question crop up, whether for the purposes of grant of pensionary dues, including the pension, the age of superannuation would be counted as 62 years or it can be beyond the same, after getting the benefit of academic session, being retired subsequently?

16.) The Regulation 21 of Chapter III of the Regulations made under the Act 1921 envisaged the provisions of age of superannuation as 62 years of age. Regulation 21 is extracted as under:-

"[21. आचार्य, प्रधानाध्यापक, अध्यापकों का अधिवर्ष वय 62 वर्ष होगा। फलस्वरूप 58 वर्ष की अधिवर्षता पर मिलने वाले सेवानिवृतिक लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवानिवृतिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होगा। यदि किसी आचार्य, प्रधानाध्यापक अथवा अध्यापक का उपर्युक्त अधिवर्ष वय 2 अप्रैल और 30 मार्च के मध्य में किसी तिथि को पड़ता है तो उसे, उस दशा को छोड़ कर जबकि वह स्वंय सेवा विस्तरण न लेने हेतु लिखित सूचना अपने अधिवर्ष वय की तिथि से 2 माह पूर्व दे दें. 31 मार्च तक सेवा विस्तरण स्वमेव प्रदान किया गया समझा जायेगा, ताकि ग्रीष्मावकाश के उपरान्त जुलाई में प्रतिस्थानी की व्यवस्था हो सके। इसके अतिरिक्त सेवा विस्तरण केवल उन्हीं विशिष्ट दशाओं में प्रदान किया जा सकेगा जो राज्य सरकार द्वारा निर्धारित की जाये। यदि किसी लिपिक अथवा चतुर्थ वर्गीय कर्मचारियों के अधिवर्ष वय की तिथि किसी माह के मध्य किसी तिथि को पड़ती है तो उसका सेवा विस्तारण उस मास की अन्तिम तिथि पर प्रदान किया गया समझा जायेगा। किन्तु यदि किसी कर्मचारी की सेवानिवृत्ति की तिथि किसी माह पहली तारीख को पड़े तो उसे पूर्ववर्ती मास की अन्तिम तिथि को सेवानिवृत्ति कर दिया जायेगा।]"

17.) The aforesaid provision is very clear in terms of the age of superannuation with respect to teacher and headmaster, i.e., completion of 62 years of age and, therefore, this Court is of the considered opinion that any further continuation while granting the benefit of academic session would not change the age of superannuation as provided under the Regulation. The very purpose of granting benefit of academic session is limited to the extent of paramount interest of the students and, thus, the intent of legislature is very clear so far as the date of age of superannuation is concerned.

18.) The petitioner has attained the age of superannuation on 30.4.2023, when he completed 62 years of age, though he was accorded the benefit of academic session, hence he retired on 30.4.2023. Since the petitioner attained the age of superannuation on 30.4.2023, therefore, all the rights of pensionary benefits etc. would accrue on 30.4.2023 itself.

19.) The decision taken by the Deputy Director vide order dated 21.3.2024 while observing the provisions of order dated 12.12.2023, thereby, remitting back the matter while granting the pension to the petitioner, treating the substantive appointment of the petitioner since 22.3.2016, goes against the settled proposition of law rendered vide Judgment and Order passed in Special Appeal (Defective) No. 976 of 2023 as well as in

Writ-A No.2202 of 2024, which clearly provide that the Government Order dated 12.12.2023 would not have retrospective effect and shall apply from the date of issuance.

20.) It is so long settled law in case of ***Nazir Ahmad Vs. King-Emperor, 1936 SEC OnLine PC 41*** rendered by the Privy Council, wherein it is held that 'where a power is given to do a certain thing in certain way, the thing must be done in that way or not at all' and the other methods of performance are necessarily forbidden'. This Court has also considered the judgment and order rendered in the case of ***Chandra Kishroe Jha Vs. Mahavir Prasad and Others***, reported in ***(1999) 8 SCC 266***, wherein, the following principle is laid down:-

".....17. It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner an di8n no other manner. (See with advantage: Nazir Ahmad V. King Emperor [(1935-36) 63 lA 372 : AIR 1936 PC 253 (lI)] , Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) l SCWR 57] .) An election petition under the rules could only have been presented in the open court up to 16-05-1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done....."

21.) Further, in case of ***Cherukuri Mani Vs. Chief Secretary, Government of Andhra Pradesh and Ors, (2015) 13 SCC 722***, it has been held by the Apex Court that 'where the law prescribed a thing to be done in a particular manner, following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure'. So far as the present matter is concerned, the age of superannuation has been provided by way of promulgating Regulation 21 of Chapter IIIrd of regulations made under the Act, 1921. Therefore, no other inference or meaning can be drawn so far as the age of superannuation is concerned.

22.) The petitioner has admittedly attained the age of superannuation on 30.4.2023, which in fact is the date of superannuation/retirement as per the provision of Regulation 21 of Chapter III of Regulations made under Act 1921 and, therefore, the date of superannuation is much prior to the issuance of the Government Order dated 12.12.2023 and in considered opinion of this Court, the right of pensionary benefit of the petitioner would accrue on the date of retirement, while attaining the age of superannuation, i.e., on 30.4.2023.

23.) In this view of the aforesaid submission and discussions, the writ petition succeeds and the impugned order dated 21.03.2024 is hereby **quashed**.

24.) The writ petition is **allowed** accordingly.

25.) Resultantly, matter is relegated back to the Deputy Director of Education (Secondary), 9th Region, Ayodhya to decide the matter afresh, considering the judgment and orders passed in Special Appeal Defective No. 976 of 2023, as well as, Writ A No. 2202 of 2024, for grant of pension to the petitioner, within a period of eight

weeks, from the date a certified copy of this order is produced before him.

(2024) 5 ILRA 1508
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

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

Writ-A No. 13460 of 2023

Om Prakash ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar Mathur

Counsel for the Respondent:
C.S.C., Sri Ganesh Datt Mishra

(A) Service Law - Claim of Terminal dues - The U.P. Cooperative Employees Service Regulations, 1975 - The Right to Information Act, 2005 - The Constitution of India - Article 300-A - right to property - leave encashment cannot be taken away without any statutory provision - Petitioner is entitled to leave encashment dues upon resignation, as there is no valid distinction between an employee retiring, dying in harness, or resigning in accordance with rules. (Para - 9)

Petitioner's claims for unpaid dues - gratuity, leave encashment, and interest on delayed payments - dues on account of medical leave - special pay under the family planning scheme and other dues in consonance with the 6th Pay Commission - respondents delayed payment of gratuity without justification, and now owe interest. (Para - 2,4)

HELD: - Court orders respondents to pay Leave encashment dues. Interest on delayed gratuity payment (6% p.a.). Interest on leave encashment dues (6% p.a.). Total amount to be paid within 6 weeks. Court dismisses claims for medical leave, special pay under family planning, and other dues, finding no legal basis for these entitlements. (Para - 14,15)

Writ Petition allowed. (E-7)

List of Cases cited:

1. Praveen Kumar Vs M.D., PCDF & ors., Service Single No.18548 of 2016

2. St. of Jharkh. & Ors. Vs Jitendra Kumar Srivastava & anr., (2013) 12 SCC 210

3. Arun Kumar Das Vs St. of U.P. through Principal Secy., Dept. of Dairy Development & anr., Service Bench No.994 of 2011

4. Ram Khelawan Shukla Vs M.D. Pradeshik Cooperative Dairy Federation Lko. & anr. , Service Single No. - 22370 of 2021

5. M.D. Pradeshik Cooperative Dairy Federation Ltd. & anr. Vs Ram Khelawan Shukla, Special Appeal Defective No.541 of 2021

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

1. Heard Mr. Rakesh Kumar Mathur, learned Counsel for the petitioner, Mr. G.D. Mishra, learned Counsel appearing on behalf of respondent No. 4 and Mr. Roopesh Tiwari, learned Standing Counsel appearing on behalf of the State.

2. The petitioner in this writ petition prays that a writ in the nature of mandamus be issued, directing the Chairman, Committee of Management/ Managing Director, Pradeshik Cooperative Dairy Federation Limited to pay the balance of gratuity due to the petitioner, together with interest on the entire gratuity paid with delay, leave encashment dues, dues on account of medical leave, special pay under the family planning scheme and other dues in consonance with the 6th Pay Commission.

3. The petitioner says that it is not in issue that the Project Director, the Project Engineer, Assistant Project Engineer and

Junior Engineers appointed with the NOIDA Dairy Project, would be placed on deputation with the National Dairy Development Board (for short, 'the NDDB') till completion of project, and further for the employees and officers of the NOIDA Dairy Project, the U.P. Cooperative Employees Service Regulations, 1975 would govern their conditions of service until the framing of separate service rules. The petitioner was appointed on 11/15.08.1992 as an Assistant Project Engineer (Civil) with the NDDB, acting on behalf of the Pradeshik Cooperative Federation Limited (for short, 'the PCDF') on 23.11.1992. He joined as an Assistant Engineer on 23.11.1992 with the NOIDA Dairy Project, an autonomous unit of the PCDF. The petitioner's appointment letter shows that he would remain on deputation with the NDDB, wherefrom he was posted with the NOIDA Dairy Project. He was repatriated to his parent employer, to wit, the PCDF. He joined at the PCDF, NOIDA Dairy Project, NOIDA on 01.09.1999.

4. After serving the PCDF for 16 years, the petitioner resigned on 27.09.2008, giving a month's notice. His resignation was duly accepted by the Chairman, Committee of Management, Parag Dairy NOIDA, previously known as NOIDA Dairy. He was relieved on the same day. He asserts that on the day he resigned, the 6th Pay Commission had already come into force and that entitled him to all benefits of emoluments in terms of the 6th Pay Commission. The petitioner claimed his due gratuity, leave encashment of 259 days, medical leave and what the petitioner calls, other legitimate dues, including special pay under the family planning scheme. All these terminal dues, the petitioner claimed with interest, on account of the said claims being illegally withheld. He represented in the matter time over again. The writ petition is replete with details of these representations that the petitioner preferred. His grievance is that no heed was paid to any of his demands. He sought information under the Right to Information Act, 2005 and in response to one of his applications, he was furnished with an information dated 15.04.2014 that gratuity to the tune of Rs.29,000/- had been paid to the petitioner vide cheque dated 15.05.2012, and Rs.1,15,242/- by a cheque dated 15.04.2014, after deduction of 10% out of the total gratuity payable. Thus, a sum of Rs.1,60,269/- was paid to the petitioner.

5. So far as the leave encashment is concerned, the petitioner was informed that since he had resigned from service, all other claims that the petitioner made, stand refused. This letter was issued to the petitioner on 15.04.2014 under the Right to Information Act. The petitioner being dissatisfied with the aforesaid disposition of his claim, addressed repeat representations to the Milk Commissioner, U.P., Lucknow and other Authorities of the PCDF. The petitioner was in the course of this correspondence informed that leave encashment is not payable to an employee, who resigns service, and so also medical leave. So far as gratuity is concerned, it had been paid to the petitioner in three installments.

6. It is the petitioner's case that gratuity in the three detailed installments, that were paid to the petitioner, is as follows: Rs.29,000/- paid on 14.05.2012; Rs.1,15,242/- on 15.04.2014; and, Rs.16,027/- on 27.12.2016. This, according to the petitioner, does make for a figure of Rs.1,60,269/-, but in the payment of this sum of gratuity, there is a delay of eight years after his resignation. The petitioner says that it entitles him to interest on the

belated payment of gratuity. It is next pleaded that the Chairman, PCDF, Lucknow, vide his office order dated 13.09.2002, has raised the ceiling limit of gratuity from Rs.2,50,000/- to Rs.3,50,000/-. Therefore, according to the petitioner, he is entitled to a sum of Rs.2,16,360/-, going by the number of years that he put in, instead of Rs.1,60,269/-, that were worked out on a gratuity ceiling of Rs.2,50,000/-.

7. So far as the claim to the payment of dues on account of leave encashment is concerned, though it is disputed that the petitioner is entitled to it, because he resigned, but that leave encashment is payable in case of an employee upon superannuation is not in issue. Nothing has been shown to this Court, where two affidavits have been filed on behalf of respondent No.4 that an employee of the PCDF, working with a particular Cooperative Society, like the fourth respondent, if resigns, would not be entitled to leave encashment. This Court also notices that during the course of hearing of this petition, an additional sum of Rs.86,546/- was paid to the petitioner through an instrument dated 04.11.2023, on account of revision of gratuity. This was done because in reckoning the petitioner's salary for the purpose of post retiral benefits, additional dearness allowance payable to him, was not earlier taken into consideration. It is no longer in dispute for the said reason that the petitioner has been paid a total sum of Rs.2,16,360/- in gratuity albeit without interest, and now as it transpires, the total sum of gratuity has been paid in four installments from 14.05.2012 to 04.11.2023, a period spread across 11 years approximately.

8. So far as the entitlement to leave encashment is concerned, it possibly cannot be denied by the respondents for reason that in the last pay certificate dated 27.09.2008 drawn for the petitioner, there is a credit of earned leave, shown due to the petitioner, for 259 days. Now, if this earned leave, which was not availed, is encashable for an employee of the PCDF, is clinched in terms of an office memo dated 13/21.01.2006 issued by the Managing Director/ Chairman, Administrative Committee, PCDF, that reads:

"कार्यालय ज्ञाप

प्रादेशिक कोआपरेटिव डेरी फेडरेशन के कर्मचारियों एवं केन्द्रियित सेवा के अधिकारियों को उपार्जित अवकाश नकदीकरण के मद में 300 दिवस की अधिमास सीमा तक उपार्जित अवकाश संचय करने, सेता निवृत्ति से पूर्व उपार्जित अवकाश उपभोग करने या सेवा निवृत्ति के पश्चात या मृत्यु की दशा में उनके आश्रितों को नकद भुगतान किए जाने के सम्बन्ध में शासन द्वारा जारी शासनादेश के अनुरूप धनराशि का भुगतान किए जाने विषयक प्रादेशिक कोआपरेटिव डेरी फेडरेशन लि0 की प्रबन्ध समिति की बैठक दिनांक 30-03-2005 के प्रस्ताव संख्या-10 एवं केन्द्रियित सेवा के अन्तर्गत गठित प्रशासनिक समिति की बैठक दिनांक 16-12-2005 के प्रस्ताव संख्या-1 का अनुमोदन दुग्ध आयुक्त/ निबन्धक द्वारा क्रमशः पत्रांक 869/ दुग्ध-2/ जनशक्ति दिनाँक 08-12-2005 एवं पत्रांक 985/दुग्ध- 2/ जनशक्ति दिनाँक 05-01-2005 द्वारा प्रदान कर दिया गया है।

अतः प्रादेशिक कोआपरेटिव डेरी फेडरेशन लिमिटेड की केन्द्रियित सेवा के अन्तर्गत गठित प्रशासनिक समिति एवं प्रादेशिक कोआपरेटिव डेरी फेडरेशन लिमिटेड की प्रबन्ध समिति द्वारा पारित प्रस्ताव के क्रम में दुग्ध आयुक्त/निबन्धक द्वारा प्रदत्त अनुमोदन क्रमशः दिनांक 08-12-2005 एवं दिनाँक 06-01-2006 में प्रादेशिक कोआपरेटिव डेरी फेडरेशन लिमिटेड के कर्मचारियों एवं केन्द्रियित सेवा के अधिकारियों को 300 दिवस की अधिकतम सी तक उपार्जित अवकाश संचय करने, सेवा निवृत्ति से पूर्व उपार्जित अवकाश उपभोग करने या सेवा निवृत्ति के पश्चात या मृत्यु की दशा में उनके आश्रितों को नकद भुगतान किए जाने की स्वीकृति प्रदान की जाती है।

ह0 अपठित

21.1.06

(सुषमा तिवारी)

प्रबन्ध निवेशक/अध्यक्ष (प्रशा0 समिति)

कार्यालय प्रादेशिक कोआपरेटिव डेरी फेडरेशन लिमिटेड, 29- पार्क रोड, लखनऊ

पत्रांक6276 / डी-1/पीईआर/एच/सी0ए0 98 (वालू-11) दिनांक 13/21-01-06

प्रतिलिपि सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित:

1- पी0सी0डी0एफ0 की समस्त इकाइयों/औ0एफ0, नान ओ0एफ0 दुग्ध संघ/ परियोजनाएँ/ समस्त क्षेत्रीय विप0 कार्यालय तथा समस्त प्रशिक्षण केन्द्र।

2- महाप्रबन्धक (वित्त), पीसीडीएफ मुख्यालय, लखनऊ।

ह0 अपठित

21.1.06

(सुषमा तिवारी)

प्रबन्ध निवेशक/अध्यक्ष (प्रशा0 समिति)"

9. A perusal of the said office memo shows that an employee of the PCDF accumulates a maximum of 300 days of earned leave that he can encash, if not utilized, upon his retirement, or by his dependents in the event of his demise. It is on the foot of this office memo, that decidedly gives the right to a retiring employee, or one who dies before retiring, to encash his accumulated unutilized earned leave up to 300 days, that the respondents say that it would not apply to a case where an employee resigns. There is no intelligible differentia shown to this Court by the respondents between the case of an employee retiring on superannuation or dying in harness, and one resigning in accordance with rules, vis-a-vis his right to claim leave encashment, that is one of his terminal dues. In the view that I take, I am fortified by the opinion of Hon'ble Mr. Justice Rajesh Singh Chauhan in **Praveen Kumar v. Managing Director, PCDF and others, Service Single No.18548 of 2016**, decided on 27.09.2021, where it has been held by His Lordship:

"Attention has been drawn towards Annexure No.CA-1 to the counter affidavit, which is an office memo dated 13/21.01.2006 issued by opposite party no.1 wherein it has been indicated that after completion of entire period of service, the employee shall be paid the amount of earned leave for maximum 300 days. However, in the aforesaid office memo, it has not been indicated that in case of resignation, such payment shall not be made.

Therefore, learned counsel for the petitioner has submitted that without there being any basis, the claim of 234 days of earned leave has been denied. Sri Sanjay Kumar Srivastava has submitted that whatever amount has been earned by the employee during his period of service, the same would be paid to such employee. In the present case, it is an admission on the part of the opposite parties that the petitioner has earned the amount of leave encashment for 234 days. At this stage, Sri Srivastava has placed reliance upon the dictum of the Apex Court in re; **State of Jharkhand and Others v. Jitendra Kumar Srivastava and Another, (2013) 12 SCC 210**, whereby the Apex Court has held that leave encashment cannot be taken away without any statutory provision. 'Earned leave', which is created by the statute, partakes the character of an emolument protected as a right to property of the concerned Government Servant under Article 300-A of the Constitution of India.

Considering the facts and circumstances of the issue in question and perusing the material available on record, the opposite parties could not demonstrate any statutory provision taking away the amount of leave encashment. The Apex Court in re; Jitendra Kumar Srivastava (supra) has clearly held that the amount of leave encashment cannot be taken away without any statutory provision."

10. To the same effect is the holding of this Court in **Arun Kumar Das v. State**

of U.P. through Principal Secretary, Department of Dairy Development and another, Service Bench No.994 of 2011, decided on 13.02.2020. There is, therefore, no reason for the respondents to have denied the payment of dues on account of leave encashment for reason alone that the petitioner had resigned from service, though in accordance with rules and not retired or passed away in harness. This kind of a narrow interpretation cannot be placed upon the terms of the circular dated 13/21.01.2006 issued by the Managing Director/ Chairman, Administrative Committee, PCDF. If that were done, it would certainly militate against the principles enshrined in Article 300-A of the Constitution.

11. Now, the next question that arises for consideration is if on the delayed payment of gratuity, which the respondents have admittedly paid in four installments, spread across 11 years approximately from 14.05.2012 to 04.11.2023, interest is payable to the petitioner.

12. I had occasion to consider this issue while sitting at Lucknow in Service **Single No. - 22370 of 2021, Ram Khelawan Shukla v. M.D. Pradeshik Cooperative Dairy Federation Lko. & Another,** decided on 25.10.2021, where I held:

"Now, the petitioner presses for payment of interest due on the much belated payment of the substantial sum of his gratuity. The impugned order dated 21.06.2021 has been passed holding that there is no delay in payment of the petitioner's gratuity, as it was dependent upon availability of funds. About the order of the Managing Director dated 21.06.2021, this Court must remark that it is not only manifestly illegal but contumacious. This Court had clearly held inter partes in Service Single No.22272 of 2020 that financial stringency or precarious financial condition is not a ground to delay payment of post retiral benefits of an employee, holding so, on the strength decisions of their Lordships of the Supreme Court in D.S. Nakara (supra) and Kapila Hingorani (supra). The Managing Director, in writing the same reasoning to deny interest, has not only transgressed his office and passed an illegal order, but also virtually said something in contempt of the judgment dated 25.11.2020 passed by this Court inter partes. This Court does not wish to enter into that issue as in these writ proceedings, that is not the office or the frame of the cause. Apart from the fact that non-availability of funds is not a ground to delay payment of post retiral benefits of an employee like the petitioner here, what has been belatedly paid to the petitioner is his gratuity and it is a common ground between parties that the Payment of Gratuity Act, 1972 applies.

Sub-sections (3) and (3-A) of Section 7 of the Payment of Gratuity Act, 1972 read:

"(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3-A) If the amount of gratuity payable under sub-section (3), the employer shall pay, from the date on which the gratuity become payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing

from the controlling authority for the delayed payment on this ground."

Clearly, any delay in payment of gratuity after thirty days carries interest payable at the rate that is payable on long-term deposits that the Government may, by notification, specify. Taking note of the prevalent rates of interest provided on long-term deposits, the delay in payment of the sum of gratuity to the petitioner, which is beyond thirty days, from his retirement, ought to carry simple interest at the rate of 6% per annum. In the opinion of this Court, the impugned order by the reasoning indicated, cannot be sustained."

13. The decision of mine in Ram Khelawan Shukla (supra) was affirmed by the Division Bench in M.D. Pradeshik Cooperative Dairy Federation Ltd. and Another v. Ram Khelawan Shukla, Special Appeal Defective No.541 of 2021, decided on 23.12.2021, to which the attention of the Court was drawn by the learned Counsel for the petitioner towards the close of arguments in this case.

14. There are certain other dues, which the petitioner presses his claim about and these are on account of medical leave, special pay under family planning and then that elusive description: other dues in consonance with the 6th Pay Commission. This Court, upon hearing the learned Counsel and perusing the record, does not find that any foundation has been laid for the said entitlement by the petitioner in accordance law and we cannot accede to that part of the petitioner's prayer.

15. In the result, this petition succeeds and is allowed in part. A writ in the nature of mandamus is issued, ordering respondent Nos.2, 3 and 4 to ensure amongst themselves payment of leave encashment dues to the petitioner and interest on the delayed payment of gratuity @ 6% simple annual calculated in the manner that interest would run from a month after the date of the petitioner's resignation till payment of the relative part of the due gratuity. The leave encashment dues shall also carry simple interest @ 6% per annum, reckoned from a month after the petitioner's resignation till the said dues are paid. The entire sum of money on account of interest on the belated payment of gratuity, dues on account of leave encashment and interest thereon, shall be paid within a period of six weeks from the date of receipt of a copy of this judgment by the respondents.

16. Let a copy of this judgment be forwarded to the Managing Director, PCDF, the Chairman, PCDF and the General Manager, Gangol Sahkari Dugdh Utpadak Sangh Limited, Partapur, Meerut by the Registrar (Compliance).

(2024) 5 ILRA 1513
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 54273 of 2014

Kulpavitra Tyagi ...Petitioner
Versus
Board of Revenue, Meerut & Ors. ...Respondents

Counsel for the Petitioner:
P.R. Maurya, Amitabh Agarwal, Shashank Maurya

Counsel for the Respondent:
C.S.C., Mahesh Narain Singh, Sunil Kumar Singh

Civil Law Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. -

Sections 18(1)(a), 176, 229B & 331 – Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 49 - Consolidation of Holdings - - Petitioner- Share could not be determined by consolidation authorities- suit under Section 229 B filed- dismissed- barred by Section 49 of the UP Consolidation of Holdings Act, 1953- Appeal before Commissioner- dismissed- Second Appeal before Board of Revenue- Dismissed- All orders challenged- Suit of the petitioner could not be dismissed on the ground of Section 49 of UPCH Act- No limitation for filing of suit under Section 229B- Relevant issues pertaining to the plot in question ought to be decided- Impugned orders quashed- Petition allowed. (Paras 13, 14, 15, 16 and 17)

HELD:
The suit filed by the co-sharer cannot be dismissed as barred by Section 49 of U.P.C.H. Act. (Para 14)

The suit of the petitioner under Section 229B of U.P.Z.A. & L.R. Act cannot be dismissed on the ground of Section 49 of U.P.C.H. Act without deciding other relevant issues in respect to the plot in question considering the revenue entries of the plot in dispute as well as other evidence in respect to the plot in question. (Para 16)

So far as scope of the suit under Section 229B of U.P.Z.A. & L.R. Act is concern this Court in the case reported in 2005 (99) RD 529 Pan Kumari Vs Board of Revenue, U.P. Allahabad has held that the suit under Section 229B of U.P.Z.A. & L.R. Act are suit of special character and no limitation is provided for filing suit under Section 229B of U.P.Z.A. & L.R. Act. (Para 17)

Petition allowed. (E-14)

List of Cases cited:

1. Writ- B No.52717 of 2013 (Ram Briksha & anr. Vs Deputy Director of Consolidation & ors.) reported in 2017 (6) ADJ 356

2. Writ- B No.356 of 2013 (Deepak Kumar & ors.Vs Board of Revenue & ors.) decided on 21.10.2022 reported in (2023) 158 RD 429

3. Mata Shiromani Vs St. of U.P. & ors. 2022 (10) ADJ 158

4. Prashant Singh & ors.Vs Meena & ors. (Civil Appeal No.8743-8744/2014) vide judgment 13 dated 25.4.2024 (Supreme Court)

5. Karbalai Begum Vs Mohd. Sayeed, (1980) 4 SCC 396

6. Amar Nath Vs Kewla Devi, (2014) 11 SCC 273

7. Attar Singh Vs St. of U.P., 1959 Supp (1) SCR 928

8. Pan Kumari Vs Board of Revenue, U.P. Allahabad 2005 (99) RD 529

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

1. Heard Mr. Amitabh Agarwal, learned counsel for the petitioner, Mr. W.H. Khan, learned Senior Counsel assisted by Mr. Gulrez Khan, learned counsel for the contesting respondent nos.8 to 12, learned Standing Counsel for the State-respondents and Mr. Sunil Kumar Singh, learned counsel for the respondent- Gaon Sabha.

2. Brief facts of the case are that in Khewat of 1336 fasli, name of Mahal Sullarh Singh Bandobast Vah Sahab, Village- Kharkhauda was recorded in the name of father of Rohtash Singh (father of petitioner as well as respondent nos.8 to 11). In Khewat of 1336 fasli, plot no.1119, 1385 & 1386, total three plots area 4 bigha, 18 biswa were recorded as Sir in the name of Rohtash Singh, Babu Ram and Raghubir Singh. Plot no.183G along with 23 other plots total area 14 bigha 14 biswa & plot no.1083 area 15 biswa was recorded as Khudkasht in the 1333 fasli in the name of Chhatar Singh, grandfather of petitioner & respondent nos.8 to 12. Plot no.1119 along with other plots situated in Village-Kharkhauda, Pargana Sarawa, Tahsil- Meerut, District- Meerut

was recorded in the name of Babu Ram, Raghubir Singh and Rohtash Singh son of Chhatar Singh having 1/3 share each in the khatauni of 1359 fasli. The aforementioned plots, which have been recorded in the Khatauni of 1359 fasli as Sir and Khudkasht has been recorded in the C.H. Form-11 as bhumidhari plot. During consolidation operation 1/3 share has been recorded in the C.H. Form 23 in Khata No.233 and other plots which have been recorded as having 1/3 share are plot nos.43, 50, 829, 830/1, 1083, 1084 total area 6 biswa 4 biswansi. In C.H. Form 45 new plot has been allotted to chak no.610, plot no.1518 area 5 bigha 2 biswa 11 biswansi, plot no.1529 area 7 bigha 15 biswa 6 biswansi total two plots total area 12 bigha 15 biswa 19 biswansi was recorded in the share of Rohtash Singh, father of the petitioner & respondent nos.8 to 11. In Khewat 1336 fasli, Village- Sadullapur @ Chandpur plot in dispute was recorded in the name of Chhatar Singh, grandfather of petitioner & respondent nos.8 to 12. In khatauni of 1336 fasli, plot no.589 area 17 biswa situated in Village- Sadullapur @ Chandpur, Tahsil and Pargana Sarawa, District- Meerut. Plot no.606 area 7 biswa plot no.609 area 12 biswa, plot no.625 area 1 bigha 1 biswa, plot no.626 area 8 biswa, plot no.636 area 19 biswa, plot no.641 area 14 biswa, plot no.642 area 2 bigha 12 biswa were recorded as Sir plots and Plot no.42 area 1 bigha 14 biswa, plot no.323 area 1 bigha 13 biswa, plot no.374 area 7 biswa, plot no.318 area 5 biswa, plot no.381 area 6 biswa, plot no.566 area 14 biswa total 6 plots, total area 4 bigha 13 biswa were recorded as Khudkast in the name of Chhatar Singh (grandfather of the petitioner and respondent nos.8 to 12). In Khatauni of 1359 fasli Mahal Sullarh Singh of Village- Sadullapur @ Chandpura, Pargana Saranwa, Tahsil- Hapur, District- Meerut (now new Tahsil-Meerut) was recorded in the name of Babu Ram, Raghubir Singh and Rohtash Singh son of Chhatar Singh as Sir & Khudkast. In the basic year khatauni (C.H. Form 11), the plots have been recorded in the name of Babu Ram, Raghubir Singh and Rohtash Singh son of Chhatar Singh having 1/3 share each. During consolidation proceeding C.H. Form 23 was issued in which 1/3 share has been given in the name of Rohtash Singh son of Chhatar Singh (petitioner's father). In C.H. Form-41 issued during consolidation operation (new no.318) having 1/3 share was issued in the name of Rohtash Singh (petitioner's father). In C.H. Form 45, plot no.318 area 8 bigha 2 biswa 1 biswansi was recorded in the name of Rohtash Singh (petitioner's father). Rohtash Singh died on 16.3.2001 leaving behind five sons, namely, Kulpavitra, Hem Dutt, Daleshwar, Dhirendra and Vipin and one daughter in law, Smt. Rajesh Tyagi wife of Vishwanath (son of Rohtash Singh). During consolidation proceeding petitioner was posted in force, as such, he could not participate in the consolidation proceeding for declaration of his right and title in respect to the plot in dispute, accordingly, share of the petitioner could not be determined by the consolidation authorities. Petitioner's father after retirement from service came to his village home and after enquiry it has been found that his name has not been recorded in the revenue record in respect to the plot in question, accordingly, petitioner filed a suit on 22.4.1996 under Section 229B / 176 of U.P. Zamindari Abolition & Land Reforms Act (hereinafter referred to as "U.P.Z.A. & L.R. Act), which was registered as suit no.165/96. Trial Court/ Additional City Magistrate/ Assistant Collector heard the aforementioned suit and vide order dated 17.9.1998 dismissed the aforementioned suit as barred by Section 49 of U.P.C.H. Act. Against the judgment and order dated 17.9.1998 passed by the trial

Court, petitioner filed an appeal, under Section 331 of U.P.Z.A. & L.R. Act before the Commissioner, which was registered as appeal no.9/98 and the same was heard by the Additional Commissioner, Meerut Division, Meerut. The aforementioned appeal was dismissed vide judgment and order dated 11.4.2000. Petitioner further challenged the impugned judgments of trial Court dated 17.9.1998 as well as appellate Court dated 11.4.2000 before the Board of Revenue, which was registered as Second Appeal No.80/7M 1999-2000, under Section 331 (4) of U.P.Z.A. & L.R. Act. The Board of Revenue, Circuit Court, Meerut vide judgment dated 7.8.2014 dismissed the aforementioned second appeal, hence this writ petition on behalf of the petitioner for the following reliefs:

"i. A writ, order or direction in the nature of certiorari to quash the order dated 17.9.1998 passed by the Additional City Magistrate (Civil Lines)/ Assistant Collector, Meerut in suit no.165/1996 (Kulpavitra vs. State of U.P. and Others) (Annexure No.16 to this writ petition), order dated 11.4.2000 passed by the Additional Commissioner, Meerut Division, Meerut in Appeal No.9/98 (Kulpavitra vs. State of U.P. and Others) (Annexure No.17 to this writ petition) and judgment and order 7.8.2014 passed by Hon'ble Board of Revenue, Uttar Pradesh Circuit Court Meerut in Second Appeal No.80 Z.M. 1999-2000 (Kulpavitra vs. State of U.P. and Others) (Annexure No.19 to this writ petition).

ii. A writ, order or direction in the nature of mandamus restrain the respondents that they may not transfer and change the nature of the land in dispute."

3. This Court vide order dated 10.10.2014 entertained the matter and granted interim order restraining the respondents from selling the property in dispute or creating any third party interest over it.

4. In compliance of the order dated 10.10.2014 parties have exchanged their pleadings.

5. Learned counsel for the petitioner submitted that the petitioner is real son of Rohtash Singh who was born on 25.7.1945 i.e. before date of vesting, as such, he has got birth right in the ancestral property as provided under Section 18 (1) (a) of U.P.Z.A. & L.R. Act but the impugned orders have been passed in illegal manner dismissing the petitioner's suit under Section 229B/176 of U.P.Z.A. & L.R. Act only on the ground of Section 49 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "U.P.C.H. Act"). He further submitted that the property in question is ancestral property, as such, the claim of the petitioner cannot be ignored in any manner. He next submitted that the suit under Section 229B of U.P.Z.A. & L.R. Act is suit of special character, as such, the same cannot be dismissed in arbitrary manner rather the same is to be decided after framing issues and giving opportunity to the parties to lead evidence in accordance with law. He also submitted that in view of the entry of the plot in question (Sir and Khudkasht) as well as in view of the birth of the petitioner before the date of vesting the claim of the petitioner cannot be negatived in view of the reference answered by Division Bench of this Court in ***Writ- B No.52717 of 2013 (Ram Briksha and Another Vs. Deputy Director of Consolidation & three others)*** reported in ***2017 (6) ADJ 356***. He further placed reliance upon the another judgment of this Court rendered in ***Writ- B No.356 of 2013 (Deepak Kumar and Others Vs. Board of***

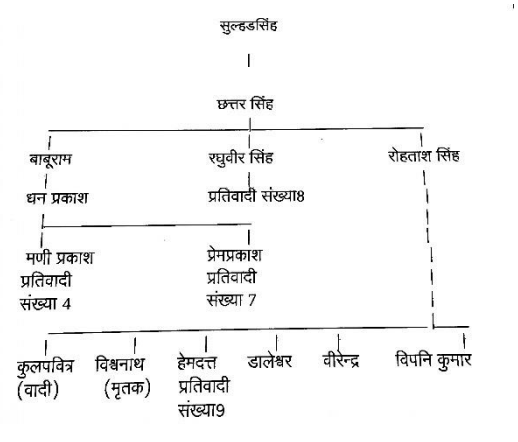
Revenue and Others) decided on 21.10.2022 reported in ***(2023) 158 RD 429.***

6. On the other hand, Mr. W.H. Khan, learned Senior Counsel assisted by Mr. Gulrez Khan, learned counsel for the contesting respondent nos.8 to 12 submitted that no claim was raised by petitioner during consolidation operation (1972 upto 1983), as such, the suit under Section 229B /176 of U.P.Z.A. & L.R. Act filed in the year 1996 has been rightly dismissed by the trial Court in view of the provisions contained under Section 49 of U.P.C.H. Act. He further submitted that since no objection was filed during consolidation operation by the petitioner, as such, the claim of the petitioner cannot be entertained by the revenue Court, under Section 229B / 176 of U.P.Z.A. & L.R. Act. He further submitted that finding of fact has been rightly recorded by all the three Courts while deciding the suit, appeal as well as second appeal, as such, no interference is required in the matter. He next submitted that the death of Chhatar Singh has been disputed by the petitioner but no document has been filed by the petitioner to demonstrate that Chhatar Singh has died in the year 1943. He also submitted that Chhatar Singh has executed sale deed on 5.8.1958, as such, the case of the petitioner that Chhatar Singh has expired in the year 1943 is totally false and the case of contesting respondents that Chhatar Singh has expired in the year 1968 is correct. He further submitted that in respect to Khasra no.527, the sale deed was executed in favour of Hem Dutt on 22.7.1982, which demonstrates that the claim setup by the petitioner in plaint under Section 229B of U.P.Z.A. & L.R. Act is totally false. He further submitted that the petitioner had seperated himself from the family long back and had no share or possession over any portion of disputed property, as such, no right will accrue to the petitioner. He further submitted placed reliance upon the judgment of this Court reported in 2022 (10) ADJ 158 (Mata Shiromani vs. State of U.P. & Others) on the point of Section 49 of U.P.C.H. Act.

7. I have considered the argument advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that the suit under Section 229B / 176 of U.P.Z.A. & L.R. Act filed by the petitioner has been dismissed by the trial Court as barred by Section 49 of U.P.C.H. Act and the judgment of trial Court has been maintained in appeal as well as second appeal by the Court of Commissioner and Board of Revenue.

9. In order to appreciate the controversy involved in the matter, the family pedigree, which is mentioned in Paragraph no.1 of the plaint of suit under Section 229B / 176 of U.P.Z.A. & L.R. Act will be relevant for perusal, the same is as under:



10. It is also relevant to mention that in the aforementioned suit trial court has framed

12 issues which will be relevant for perusal, the same are as under:

"1. क्या विक्रय पत्र दिनांक 11.02.63 एवं 1.8.82 को सन्दर्भ में वादी का वाद कालबाधित है?

2. क्या विक्रय पत्र की वैधता को निर्णित करने का न्यायालय उपरोक्त को क्षेत्राधिकार नहीं है?

3. क्या वाद वादी आवश्यक पक्षकार न बनाये जाने के दोष से दोषित है?

4. क्या वादी का वाद आबादी की भूमि के सम्बन्ध में कानून प्रगतिशील नहीं है जैसा कि प्रतिवाद पत्र की धारा 49 में कहा गया है?

5. क्या वादी का वाद धारा 220बी व 176 का जैड ए एन्ड एल० आर० एक्ट के प्राविधानों से बाधित है?

6. क्या वादी का वाद आवश्यक पक्षकार बनाये जाने के दोष से दूषित है?

7. क्या वाद का वाद 106 पंचायत राज एक्ट का नोटिस न *दिये जाने के कारण खण्डित होने योग्य है?*

8. क्या वादी का वाद धारा 80 सी०पी०सी० के प्राविधानों से दूषित है?

9. ब्यान वाद वादी धारा 49 चकबन्दी अधिनियम से बाधित होने के कारण प्रगतिशील नहीं है एवं निरस्त करने योग्य है?

10. क्या वाद वादी स्टोपल एवं एक्वीसेनस के सिद्धान्त से बाधित है?

11. क्या वादी आराजी निजाई में सह खातेदार है?

12. वादी किस अनुतोष को पाने का अधिकारी है?"

11. The trial Court decided the Issue No.9 relating to bar of Section 49 of U.P.C.H. Act as preliminary issue and dismissed the plaintiff's suit as barred by Section 49 of U.P.C.H. Act without considering the other issues framed in the suit.

12. The entries which are annexed as Annexure Nos.1 to 13 of the instant petition are relevant entry with effect from 1336 fasli upto close of consolidation operation in the village in the form of C.H. Form 45, which are to be examined by trial Court in accordance with law.

13. This matter was entertained on 10.10.2014 when the reference before the Division Bench on the point of Section 49 of U.P.C.H. Act was pending and now the reference has been answered by the Division Bench in ***Writ- B No.52717 of 2013 (Ram Briksha and Another Vs. Deputy Director of Consolidation & three others)*** vide judgment dated 16.5.2017, as such, the perusal of the ratio of law laid down by the Division Bench will be relevant, which is as under:

"The reference in question contains following questions:-

"(i) Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection under Section 9 of the Act for separation of his share?

(ii) Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution?

(iii) Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate

chak in his name, although, there had been no ouster from joint property?"

Issue No.I

Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection under Section 9 of the Act for separation of his share?

A. Because of the words "could or ought to have been taken" in latter part of Section 49 of the Act, same does not compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer whose name is recorded in representative capacity or they were willing to live jointly due to situation of their family and who have not filed an objection under Section 49 of the Act for separation of their share inasmuch as under the provisions of U.P. Consolidation of Holdings Act, 1953, it is the statutory obligation cast upon the authorities and the incumbent, who has been holding the property in question in the representative capacity to get the records corrected and in case in designed manner the obligation in question has not been discharged by Consolidation Authorities as well as by the incumbent holding the property in the representative capacity, then in such a situation Section 49 of the Act would not at all be attracted and such situation would be covered under the contingency of planned fraud to drop the name of other co-sharers from the revenue records.

Issue No.II

Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution?

A. The answer is that a party cannot be thrown in litigation against their will/need and by not raising claim to land of partition and separation of chak, their rights to property cannot be taken away under the protection provided for under Article 19(1)(f)/ Article 300-A of the Constitution of India.

Issue No.III

Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?

A. The rights of the co-sharers will not at all come to an end under Section 49 of the Act, on the notification under Section 52 due to not claiming partition of his share and separate chak in his name and till there is no ouster from the joint property his right in the property will continue to exist.

The reference is accordingly answered. The Writ Petition along with connected matters shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement."

14. Hon'ble Apex Court recently in the case of ***Prashant Singh and others vs. Meena & Others (Civil Appeal No.8743-***

8744/2014) vide judgment dated 25.4.2024 has considered the scope of Section 49 of U.P.C.H. Act after considering the ratio of law laid down by the Apex Court in the case of ***Karbalai Begum vs. Mohd. Sayeed, (1980) 4 SCC 396, Amar Nath Vs. Kewla Devi, (2014) 11 SCC 273 & Attar Singh vs. State of U.P., 1959 Supp (1) SCR 928*** and has held that the suit filed by the co-sharer cannot be dismissed as barred by Section 49 of U.P.C.H. Act.

15. In the instant matter in view of the Khewat entry of the plot in dispute w.e.f. 1336 fasli in the name of petitioner's father-Rohtash Singh, the suit under Section 229B of U.P.Z.A. & L.R. Act filed by the petitioner for declaration of his right as well as partition of his share in respect to the plot in question cannot be dismissed on the ground of Section 49 of U.P.C.H. Act. It is also material that the Khewat entry of 1336 fasli fully demonstrates that the plots in question were recorded as Sir-Khudcast plot in the name of petitioner's father along with other co-sharer. It is also material that the petitioner was born before the date of vesting.

16. Considering the revenue entry from 1336 fasli up to 1359 fasli as well the ratio of law laid down by the Division Bench of this Court in ***Ram Briksha (supra)*** as well as recent law laid down by Hon'ble Apex Court in ***Prashant Singh (supra)***, the suit of the petitioner under Section 229B of U.P.Z.A. & L.R. Act cannot be dismissed on the ground of Section 49 of U.P.C.H. Act without deciding other relevant issues in respect to the plot in question considering the revenue entries of the plot in dispute as well as other evidence in respect to the plot in question.

17. So far as scope of the suit under Section 229B of U.P.Z.A. & L.R. Act is concern this Court in the case reported in ***2005 (99) RD 529 Pan Kumari vs. Board of Revenue, U.P. Allahabad*** has held that the suit under Section 229B of U.P.Z.A. & L.R. Act are suit of special character and no limitation is provided for filing suit under Section 229B of U.P.Z.A. & L.R. Act.

18. The case law cited by learned counsel for the contesting respondents shall not apply in the instant matter as in that case the plot was recorded as navin-parti during consolidation operation and civil suit filed by plaintiff was held to be barred by Section 49 of U.P.C.H. Act but in the instant matter plots were recorded as Sir / Khudcast and later on as bhumidhari in the name of predecessor of both parties.

19. Considering the entire facts and circumstances of the case, the impugned orders dated 17.9.1998 passed by the Additional City Magistrate (Civil Lines)/ Assistant Collector, Meerut in suit no.165/1996 (Kulpavitra vs. State of U.P. and Others), order dated 11.4.2000 passed by the Additional Commissioner, Meerut Division, Meerut in Appeal No.9/98 (Kulpavitra vs. State of U.P. and Others) and order 7.8.2014 passed by Board of Revenue, Uttar Pradesh Circuit Court Meerut in Second Appeal No.80 Z.M. 1999-2000 (Kulpavitra vs. State of U.P. and Others) are liable to be set aside and are hereby set aside.

20. The writ petition stands ***allowed*** and matter is remitted back before the Additional City Magistrate / Assistant Collector 1st Class, Meerut / respondent no.3 to register the suit on its original number and decide the same after affording proper opportunity of hearing to the parties to lead evidence in support of their cases according to issues framed in the suit in accordance with law, expeditiously

preferably within a period of six months from the date of production of certified copy of this order before respondent no.3.

21. No order as to cost.

(2024) 5 ILRA 1521
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.05.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 6856 of 2009

Rajesh Kumar & Anr. ...Petitioners
Versus
U.O.I. ...Opp. Party

Counsel for the Petitioners:
Vikas Singh

Counsel for the Opp. Party:
C.S.C., A.S.G., Murli Manohar Srivastava, Raj Kumar Singh

(A) Medical Law - Ministry of Health and Family Welfare, Government of Health Research, Government of India - right to make Rules and Regulations for practice for Electropathy including Electro Homeopathy vested with the Central Government - practice in electropathy or imparting education should be done within the provisions and parameters of order issued by Central Government - although no institution can confer a diploma or degree in Electro Homeopathy, petitioners can practice it as an alternative therapy - without statutory provisions, there is no bar in issuing a certificate for the study. (Para -10 , 15, 16)

Petitioners obtained certificate from Mattei Association - to practice Electro Homeopathy System of Medicines - quashing of UOI and State of Uttar Pradesh's orders - direction for non-interference and relief - to allow them to practice alternate medicine system in UP until rules are framed by competent authorities. **(Para - 1)**

HELD:- Petitioners can practice Electro Homeopathy in Uttar Pradesh, provided it is not banned by any competent authority. Cannot use the prefix "Doctor" before their name. Direction for non-interference by respondents/authorities and relief for permitting the practice until rules are framed by competent authorities is issued.**(Para - 17)**

Petition disposed of. (E-7)

List of Cases cited:

1. Electro Homeo M.A.O.I. Vs St. of U.P. & ors., Writ Petition No. 3992 of 2004

2. Civil Appeal No. 4642 of 2018 arising out of SLP (C) No.20134/2017 : Sutapa Singh Vs St. of U.P. & ors.

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) The petitioners claiming to have obtained Certificate from the respondent no.5-Count Mattei Association to practice Electro Homeopathy System of Medicines, has approached this Court by way of the present writ, praying inter-alia for quashing the order/circular dated 25.11.2003 (Annexure-1) issued by the Union of India and Government Order dated 01.06.2004 (Annexure-41) issued by the State of Uttar Pradesh. A direction for non-interference by the respondents and consequential relief of permitting them to practice Electro Homoeopathy system of alternate Medicine in the State of Uttar Pradesh, till the rules in that regard are framed by the competent authority, has also been sought by them. Reliance is placed upon a judgment of the Delhi High Court (Annexure-14 and 15), which according to them, stands affirmed by the Supreme Court (Annexure-16 & 17).

(2) Heard Shri Vikas Singh, learned Counsel representing the petitioners, Shri

Raj Kumar Singh, learned Counsel representing the respondent no.1/Union of India, learned Standing Counsel for the State/respondents no. 2 to 4 and Shri Murli Manohar Srivastava, learned Counsel representing the respondent no.5.

(3) During the course of arguments, inviting our attention to the order dated 05.05.2010 issued by the Ministry of Health and Family Welfare, Government of Health Research, Government of India, New Delhi, learned Counsel for the petitioners has submitted that as the order dated 05.05.2010 (supra) clarified the position that the order dated 25.11.2003 does not bar the development and research of Electro Homeopathy and there was no proposal to stop the practice or imparting of education in the field of Electro Homeopathy as long as same was done within the parameters of order dated 25.11.2003 till such time a legislation was enacted, the petitioners do not wish to press for reliefs relating to quashing of Order/Circular dated 25.11.2003 (supra) and Government Order Dated 01.06.2004 (supra) and they have confined their prayer to the other reliefs as mentioned in this writ petition.

(4) Shorn off elaborate factual details of the present case, it would be apt to mention that the petitioners claiming to be resident of District Hardoi and Faizabad, respectively, have obtained Certificate from the respondent no.5-Count Mattei Association to practice Electro Homeopathy System of medicines. According to them, by virtue by the said certificate, the petitioners can practice Electro Homeopathy System of medicine in State of Punjab, State of Delhi, State of Maharashtra, State of West Bengal, State of Kerala and other States. However, the petitioners with the said certificate were not permitted to practice in Electro Homeopathy System of Medicine in the State of U.P. as till date State of U.P. has not made any law in this regard. In this background, they pray for the limited prayer of non-interference by the State/respondents and permitting petitioners to practice Electro Homoeopathy system of Medicine in the State of Uttar Pradesh.

(5) The learned Counsel for the petitioners elaborating their arguments have submitted that

(I) In compliance of the order dated 11.10.2010 passed by this Court in Writ Petition No. 3992 of 2004, the Ministry of Health and Family Welfare (Department of Health Research), Government of India, has issued an order dated 21.06.2011, clarifying that the order dated 25.11.2003 and order dated 05.05.2010 would be treated as instructions of the Government of India, relating to practice, education and research with regard to alternative system of medicine like Electropathy, Electro Homepathy etc. According to the learned Counsel, a bare perusal of the order dated 21.06.2011 reveals that there was no legal impediment in imparting education as long as no degree/ diploma is awarded/issued for that course and that the practitioners of Electro Homeopathy are not allowed to pre-fix 'doctor' before their name.

(II) The Government of Uttar Pradesh had issued an Office Memorandum dated 15.12.2011 in compliance of the order dated 18.03.2011 passed in Writ Petition No. 11691 of 2004 and the order dated 21.04.2011 passed in Civil Misc. Amendment Application No. 101585 of 2011, wherein also it reiterated the order dated 05.05.2010. Thus, it has been argued that even the Government of Uttar Pradesh has also accepted the order dated 05.05.2010 vide Office Memorandum dated 04.01.2012

and has also clarified and taken the same position.

(III) Relying on paras 5 to 8 of the supplementary counter affidavit dated 19.02.2024 filed by the State of Uttar Pradesh, it has been submitted that in para-5 of the said affidavit, the State of Uttar Pradesh by heavily relying on the order dated 05.05.2010 has admitted that there was no proposal to stop the petitioners from practising in Electropathy or imparting education as long as this is done within the parameters as mentioned in the order dated 25.11.2003 and have further stated that once the legislation to recognize new system of medicine is enacted, any practice or education would be regulated in accordance with it. Similarly in para-6 of the said affidavit, it has been mentioned that the order dated 21.06.2011 issued by the Government of India, Office Memorandum dated 15.12.2011 issued by the Government of Uttar Pradesh and the Office Memorandum dated 04.01.2012 reiterated the order dated 05.05.2010. Further, in para-7 of the said affidavit, it has been stated that in absence of any statutory power, the Government of India is not prohibiting anybody from practising Electropathy in spite of the system not having been recognized by the Government. Similarly, in para-8 of the said affidavit, State Government has clarified its stand and relied upon the office memorandum dated 13.04.2023, which says that the right to make rules and regulations for Electropathy is vested in the Central Government and if the Central Government makes rules/regulations regarding the aforesaid, the State Government will follow the same and further the State Government is not authorized to make/enforce rules/regulations regarding the practice, education, development and promotion of electro-homeopathy. In this backdrop, submission of the learned Counsel is that the State Government is bound by the orders passed by the Government of India qua the practice, education and development and that the State Government ought to abide by the orders issued by the Government of India qua Electro Homeopathy.

(IV) Reliance has also been placed on Annexure No. SA-17 of the supplementary affidavit, to submit that Ministry of Health and Family Welfare, Government of India, while replying to RTI application dated 01.08.2017 received by the department on 03.08.2017 vide their reply dated 14.08.2017, has reiterated the stand that the institutions cannot grant degree/diploma in the stream of medicine which have not been recognized and the term ‘doctor’ can only be used by the practioners of the recognized system of medicine.

(6) The learned Counsel for the petitioners after referring to the aforesaid documents has articulated his further argument on a judgment passed by the Delhi High Court in Writ Petition No. 4015 of 1996 (PIL), which was filed in the nature of Pubic Interest Litigation with a prayer to command the respondents to forthwith ban the institutions imparting education in Electro Homeopathy System of Medicines and a probe was also sought into their functioning and also to frame a policy, so that these institution may be prosecuted as per law. According to him, the said writ petition was clubbed with FAO No. 205 of 1992 and was disposed of vide order dated 18.11.1998, wherein the following directions were issued:-

“Considering the nature of the problem as is evident from the aforesaid discussion, we issue the following directions:-

1. The Central/State Governments shall consider making legislation prescribing :

(a) grant of licences to the existing and new institutes conducting courses in Electropathy and other Alternative systems of medicine.

(b) minimum standards of education and check on the functioning of such institutes on the lines set out in Sections 17, 18, 19 & 19A of the Medical Council Act.

(c) minimum qualification for getting admission in such institutes;

(d) conditions entitling these institutes to issue diplomas and certificates; and

(e) right to use the prefix 'Doctor' and to issue medical certificates to the patients by diploma/certificate holders from such institutes.

(2) Respondents 10 to 16 and the like institutes shall not award and degree for the courses conducted by them.

(3) Respondent No. 10 shall forthwith delete the misleading statements printed on pages 47 and 50 of the prospectus issued by it.

(4) Respondent No.12 shall not make misleading claim in regard to its having been recognised by the Medical Council of India/re-spondent No.5 in the advertisements.

(5) Adequate publicity through the media shall be given by the Government(s) informing general public about respondents 10 to 16 and similar other institutes not being recognised and affiliated with any of the Councils under aforesaid Acts of 1956, 1970 and 1973.

The operation of the order dated January 30,1997 as modified by the order dated March 12, 1997 is extended further for a period of six months from today.

Copy of this order be sent by the Registry to the Health Secretary, Govt. of India and the Chief Secretaries of all the States and Union Territories for doing the needful in the matter.

Petition is disposed of in terms of the aforesaid directions."

(7) It has been submitted by the learned Counsel for the petitioners that against the aforesaid judgment/order dated 18.11.1998, the Union of India preferred Special Leave Petition No. 11262 of 2000, which was dismissed by the Hon'ble Supreme Court of India vide judgment/order dated 24.11.2000. According to the learned Counsel, the aforesaid judgment/order dated 18.11.1998 was thereafter circulated to all the State Governments by the Registrar of the Hon'ble Delhi High Court.

(8) Though opportunity has been provided to the learned Counsel representing the Union of India for filing counter affidavit but no counter affidavit has been filed on behalf of the Union of India.. However, learned Counsel representing the Union of India has argued that the system of Electro Homeopathy is to be strictly conducted in terms of the order dated 25.11.2003, 05.05.2010 and 21.06.2011. According to the learned Counsel, the institutions imparting Electro Homeopaty like the respondent no.5, can issue a certificate but cannot issue any degree/diploma while imparting education in the said field of medicine i.e. Electro Homeopathy.

(9) Learned Standing Counsel representing the State has submitted that vide Office Memorandum dated 13.04.2023, State of Uttar Pradesh has clearly stated that the right to make Rules and Regulations for Electropathy is vested in the Central

Government and if the Central Government makes Rules/Regulations regarding the aforesaid, then, the State Government will follow the same and, therefore, the State government is not authorized to make/enforce rules/regulations regarding the practice, education, development and promotion of Electro Homeopathy.

(10) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record, this Court finds that the right to make Rules and Regulations for practice for Electropathy including Electro Homeopathy is vested with the Central Government. The Central Government has not established any council for recognising the Electro Homeopathy system of medicine in the country. From time to time, various orders have been issued by the Central Government in this regard. Pertinently, the Ministry of Health and Family Welfare (Research Desk) had issued order No. R.14015/25/96-U&H (R) (Pt.) dated 25.11.2003, by which the matter regarding grant of recognition to the various streams of alternative medicine including Electropathy/Electro-Homeopathy was considered. A perusal of this order dated 25.11.2003 reveals that for the aforesaid purpose, the Central Government had constituted a Standing Committee of Experts to consider the aforesaid aspect of the matter. The relevant portion of the order dated 25.11.2003 is reproduced as under :-

"The Committee did not recommended recognition to any of these alternative medicines except the already recognized traditional systems of medicines, viz. Ayurveda, Siddha, Unani, Homeopathy and Yoga and Naturopathy, which were found to fulfill the essential and desirable criteria developed by the Committee for recognition of a system of medicine. The Committee has, however, recommended that certain practices as Acupuncture and Hypno therapy which qualified as modes of therapy, could be allowed to be practiced by registered practioners or appropriately trained personnel. The Committee further suggested that all those systems of Medicine not recognized as separate systems should not be allowed to continue full time Bachelor and Master's degree courses and term 'Doctor' should be used only by practitioners of systems of medicine recognized by the Government of India. Those considered as Mode of Therapy can be conducted as Certificate courses for registered medical practioners to adopt these modes of therapy in their practice, whether modern medicine or Indian Systems of Medicine and Homeopathy.]

After carefully examining the various recommendations of the Committee, the Government accepted these recommendations of the Committee. Accordingly, it is requested that the State/UT Govt. may give wide publicity to the decision of the Govt. They may also ensure that institutions under the State/UT do not grant any degree/diploma in the stream of medicine which have not been recommended for recognition and the term 'Doctor' is used by practitioners of recognized system of medicine."

(11) A bare reading of the aforesaid order dated 25.11.2003 reveals that Electropathy/Electro Homeopathy System of medicines was not recommended as an alternative system of medicines and all the State/Union territory Governments were directed to give wide publicity to the said decision of the Government of India and would also ensure that the institutions under the State/Union Territories do not grant any degree/diploma in the various unrecognized streams of alternative medicines including

Electro Homeopathy System of medicines, which have not been recommended for recognition and the term 'Doctor' can be used by the practitioners of the recognized system of medicines. They, however, did not put any restriction on practicing the said alternate method of treatment.

(12) In the meantime, an order dated 03.08.2009 was passed in Miscellaneous Writ Petition No. 31904 of 1991 by this Court at Allahabad, wherein it directed to consider the representation with regard to recognition of the course of Electropathy. The Ministry of Health and Family Welfare, Department of Health Research, Government of India, keeping in view the said order as well as various orders of the High Courts and Supreme Court, issued order No. V25011/276/2009-HR dated 05.05.2010 and clarified that there is no proposal to stop persons like the petitioners from practising in Electropathy or imparting education in the following terms:

"In accordance with Orders of the High Court and Supreme Court quoted here, there is no proposal to stop the petitioners from practising in electropathy or imparting education, as long as this is done within the provision of the Order No.R.14015/25/96-U & H (R) (Pt), dated 25.11.2003. Once the legislation to recognize new systems of medicine is enacted, any practice or education would be regulated in accordance with the said Act. representation of the petitioner dated 28.10.2009 is disposed of accordingly."

(13) In the intervening period, pursuant to an order dated 11.10.2010 passed by this Court in Writ Petition No. 3992 of 2004 : *Electro Homeo Medical Association of India Vs. State of U.P. & others,* the Central Government also considered the representation submitted by the Secretary of Electro Homeo Medical Association of India, Lucknow dated 03.11.2010 and after due consideration, the Ministry of Health & Family Welfare (Department of Health Research) had issued order No. C.30011/22/2010-HR dated 21.06.2011, clarifying that Ministry of Health and Family Welfare order dated 25.11.2003 and the order dated 05.05.2010 would be treated as instructions of the Government of India, related to practice of education and research with regard to alternative systems of medicine like Electropathy, Electro Homeopathy, etc. The relevant portion of the order dated 21.06.2011 reads as under :-

"3. As per the directions of the Hon. Lucknow Bench of the High Court of Judicature at Allahabad, the representation has been considered. It is clarified that the MH & FW Order No. R.14015/25/96-U&H (R) (Pt.) dated 25.11.2003 and No. V.25011/276/ 2009-HR dated 05.05.2010 would be treated as instructions of the Government of India related to practice, education and research with regard to alternative systems of medicine like electropathy, electro homoeopthy etc.

4. A copy of each of the said two orders viz. MH & FW Order No. R.14015/25/96-U&H (R) (Pt.) dated 25.11.2003 and No. V.25011/276/ 2009-HR dated 05.05.2010 is being forwarded herewith to each of the State Government/Uts for information and necessary action. With this your representation is disposed off."

(14) After the aforesaid clarification by the Central Government, even the State Government, in pursuance of the order dated 18.03.2011 passed by this Court in Writ

Petition No. 11691 of 2004 and order dated 22.04.2011 passed in Civil Misc. Revision Application No. 101585 of 20211, while considering the representation of one Dr. Kalsar Ahmad Sheikh issued Office Memorandum dated 15.12.2011, which reads as under :-

"Till the time, there is no proposal to stop the petitioners from practicing in electropathy or imparting education, as long as this is done within the provision of the Order No. R.14015/25/96-U 85 H (R) (Pt) dated 25th November, 2003. Once the legislation to recognize new systems of medicine is enacted, any practice or education would be regulated in accordance with the said Act."

(15) After the clarification by the Central Government and the State Government as has been mentioned herein above, this Court finds that almost identical issue came to engage the attention of the Supreme Court, wherein the Supreme Court, vide an order dated 01.05.2018, passed in Civil Appeal No. 4642 of 2018 arising out of SLP (C) No.20134/2017 : ***Sutapa Singh Vs. State of U.P. and others***, following its earlier order made in SLP (C)No.23572 of 2009, permitted the appellant therein to provide an alternative therapy, i.e., Electro Homeopathy, as there is no ban by any competent authority. Even in the said judgment, the Supreme Court has held that the practice in electropathy or imparting education should be done within the provisions and parameters of the order dated 25.11.2003 issued by the Central Government. It would be profitable to quote the said order dated 01.05.2018 (supra) in extenso, which reads as under :-

"Leave granted.

Heard Mr. Pankaj Bhatia, learned counsel for the appellant and Ms. Aishwarya Bhati, learned Additional Advocate General for the State of U.P. Though many an aspect was urged before the High Court and it has also addressed the same by the impugned order, yet the singular issue that has been canvassed before us pertains to whether there has been ban in practicing Electro Homeopathy as an alternative therapy.

A similar matter had come up before this Court in S.L.P.(C) No.23572 of 2009, wherein a counter affidavit was filed by the Union of India stating that there was no ban on the practice of Electro Homeopathy and on that basis the special leave petition was withdrawn.

Learned counsel for the appellant has also brought to our notice Office Memorandum dated 15th December, 2011 issued by the Uttar Pradesh Government Medicine Section – 6, which states that there is no proposal to stop the appellant from practicing in electropathy or imparting education, as long as the same is done with the provisions of the order No.R.14015/25/96-U 85 H (R) (Pt) dated 25.1.2003. There is no dispute that the said system of therapy has not yet been recognized for the purpose of conferring any diploma or degree.

In view of the aforesaid, no institution can confer a diploma or degree in Electro Homeopathy. However, as this Court has observed on an earlier occasion that there is no ban, the appellant can always practice Electro Homeopathy as an alternative therapy, but no effort can be made to confer diploma or degrees unless there is a statutory provision permitting the same. We may hasten to clarify that there are alternative therapies like aroma therapy, stone therapy, music therapy, hypnotherapy, touch therapy and colour therapy and they are actually non-invasive and in no way relate to administration of medicine. Therefore, we are disposed to think that the Union of India has not banned them.

In view of the aforesaid analysis, we only modify the order passed by the High

Court to the extent that the appellant can provide an alternative therapy so long as it is not banned by any competent authority. Without possessing a degree or diploma recognized by a legislation enacted by the competent legislature, the appellant would not be entitled to practise medicine. We also clarify that no degree or diploma can be conferred otherwise than what is permitted or recognised in law. The undertaking furnished to the High Court shall be complied with.

With the aforesaid modification in the order passed by the High Court, the appeal stands disposed of. There shall be no order as to costs."

(16) Having traced the relevant orders and clarifications issued by the Central Government, State Government as well as the Supreme Court from time to time, this Court arrives at an inescapable conclusion that although no institution can confer a diploma or degree in Electro Homeopathy, however, as there is no ban, the petitioners can always practice Electro Homeopathy as an alternative therapy within the parameters of order dated 25.11.2003. This Court also finds that in the absence of any statutory provisions, there could not be any conferring of diploma or degrees in Electropathy or Electro Homeopathy in India, however, there is no bar in issuance of Certificate for the said study.

(17) In view of the aforesaid, it is held that the petitioners can practice Electro Homeopathy so long as it is not banned by any competent authority. They, however, cannot use the prefix "Doctor" before their name. Accordingly, a direction for non-interference by the respondents/authorities concerned and consequential relief of permitting the petitioners to practice Electro Homeopathy system of medicine in the State of Uttar Pradesh, till the rules in that regard is framed by the competent authority, is also issued.

(18) With the aforesaid directions, the writ petition stands **disposed of**.

(2024) 5 ILRA 1528
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ-C No. 13775 of 2023

Smt. Shivani Chaurasia & Anr.
...Petitioners
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Petitioners:
Sri Sanjay Goswami

Counsel for the Opp. Parties:
Sri Siddharth Singh, S.C.

A. Civil Law - Indian Stamp Act,1899 - Section 47-A - Under-valuation of the instrument – Review / Recall - Once the market value of the property is adjudicated and determined by the Collector under Section 47-A of the Indian Stamp Act, the Collector (Stamp) has no power to reassess, review, or recall the said order.

B. Civil Law - Power of review - Constitutional Courts vs. Quasi-Judicial Authorities - Constitutional courts, being courts of record, enjoy inherent powers to review their own orders and correct errors in the interest of justice - In contrast, quasi-judicial authorities lack inherent powers and can only exercise those powers which have been expressly conferred upon them by the statutes - Quasi-judicial authorities cannot arbitrarily review or recall their orders unless such power is

specifically conferred upon them by their governing statue (Para 9)

C. Civil Law - Indian Stamp Act,1899 - Petitioners purchased agricultural land for a sale consideration of ₹1,20,00,000 - Sub Registrar pointed out a deficiency of ₹4,45,790 in stamp duty, and made reference u/s 47-A, leading to the registration of a stamp case - After hearing, Collector (Stamp) adjudicated the market value and confirmed the deficiency - petitioners deposited the entire amount - However, on complaint by a private individual, the Collector recalled his earlier order and passed a fresh order - subsequent order by which the earlier order was cancelled neither contains any reasons nor records that the previous order was obtained through fraud or misrepresentation – Impugned order quashed (Para 5)

Allowed. (E-5)

List of Cases cited:

1. Milap Chandra Jain Vs St. of U.P. & ors. 1988 All. L.J. 1078

2. Sunil Kumar Vs St. of U.P. & ors. 2016(6) AWC 6522

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

1. In the instant writ petition the order dated February 3, 2023 passed by the District Magistrate/Collector (Stamp), Jaunpur has been assailed on the ground that the Collector (Stamp) lacks the power to recall or review an order by him under Section 47 of the Indian Stamp Act, 1899 (hereinafter referred to as 'the Act').

FACTS

2. The facts of the instant case have been delineated below: -

(a) The petitioners purchased an agricultural land measuring 0.216 hectare (Gata No.176 'Aa') situated in Mauza Jagdishpur (Ramnagar Bhadsara), Pargana Haveli, Tahsil Sadar, District Jaunpur, from one Sandeep Kumar, the bhumidhar of the land, on July 23, 2020 for a sale consideration of Rs.1,20,00,000/- (Circle Rate). Rs.1,25,280/- were paid towards the registration fee. The sale deed was registered on the same day by the Sub Registrar.

(b) The Sub Registrar submitted a confidential report dated September 14, 2020 to the Assistant Inspector General (Registration), Jaunpur. In the said report, a deficiency of Rs.4,45,790/- in stamp duty and Rs.63,690/- of registration fee was pointed out.

(c) A stamp case was registered and notice was issued to the petitioners. They appeared before the Collector (Stamp) and agreed to deposit the amount to avoid the imposition of penalty.

(d) The Collector (Stamp) heard the case, considered the material available on record and after adjudicating the market value of the land, boundary wall and existing trees, it held that there was a deficiency of Rs.4,45,790/- in stamp duty and Rs.63,690/- in registration fee. The Collector also imposed a penalty of Rs.25,000/- vide order dated December 9, 2020. The petitioners deposited the entire amount on December 18, 2020.

(e) One Shiv Prasad, son of Chauthi Singh, filed a complaint on December 23, 2020 seeking recall of the order dated December 9, 2020. Acting on the complaint of the said private person, another notice dated December 31, 2020 was issued by the Collector (Stamp) to the petitioners.

(f) The petitioners filed an objection against the aforesaid second notice on the ground that the order dated December 9, 2020 was a final order which was passed after consideration of the evidence on record

and it is not an ex-parte order. The petitioners assailed the legality of the second notice issued to them.

(g) Thereafter, the Collector passed a fresh order on February 3, 2023 which is now under challenge in the instant writ petition.

SUBMISSION OF THE PETITIONERS

3. Counsel on behalf of the petitioners submits that there is no power conferred on the Collector(Stamp) to recall an order passed under Section 47-A of the Act and subsequently reassess/review his earlier order. The petitioners have relied on the judgment of a Division Bench of this Court in the case of ***Milap Chandra Jain vs. State of U.P. and others reported in 1988 All. L.J. 1078*** and another judgment of a Coordinate Bench of this Court in the case of ***Sunil Kumar vs. State of U.P. and others*** reported in ***2016(6) AWC 6522***.

SUBMISSIONS OF THE RESPONDENTS

4. Counsel on behalf of the respondents submits that based on the complaint filed by one Shiv Prasad, inquiry has been started against the Sub Registrar wherein a show cause notice was issued to the Sub Registrar to explain the allegations made by the complainant with regards to the forgery of certain documents. He further submits that this inquiry is still underway. An explanation was provided by the Sub Registrar in response to the show cause notice. However, counsel on behalf of the respondents failed to explain to this Court or bring forward any material to indicate as to what steps have been taken subsequent to the receipt of the explanation of the Sub Registrar.

ANALYSIS AND CONCLUSION

5. Upon a perusal of the documents and after hearing the learned counsel appearing on behalf of the parties, one has to first examine whether the Collector (Stamp) who acts as a quasi-judicial authority possesses any power, inherent or statutory, to recall/review an order passed under Section 47-A of the Act. Upon a perusal of the Act, it is apparent that no such power seems to be made available to the Collector. The Division Bench of this Court in ***Milap Chandra Jain's*** case (supra) examined this particular issue and made the following observations:-

"6. We have not the slightest doubt that the market value of the property having been adjudicated and determined by the Collector in the exercise of powers expressly conferred upon him under Section 47-A and in accordance with the procedure laid down therein, the same could not be reopened and reviewed except in accordance with law. The powers exercisable by the Collector under S. 47-A are unarguably quasi judicial in nature. There is a procedure laid down for the determination of the valuation which clearly affects the rights of the person who is called upon to pay additional stamp duty in case the adjudication goes against him. That being so, an adjudication made by the Collector under S. 47-A of the Stamp Act could not be disturbed or reopened unless there is an express provision in the enactment conferring power of review by the authority making that order. It is settled law that the power of review on merits is not an inherent power. Such a power must flow from some specific provision in the enactment under which rights of the parties are determined. We are amply fortified here with several decisions of the Supreme Court on this

aspect of the controversy. Thus in Patel Narshi Thakarshi v. Praduman Singhji, (1971) 3 SCC 844 : AIR 1970 SC 1273 at p. 1275 para 4, their Lordships of the Supreme Court observed as follows:

"It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to our notice from which it would be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order."

7. Again in *Chunibhai v. Narayan Rao*, AIR 1965 SC 1457 at pp. 1466-67 para 23, their Lordships reiterated the same view as follows:—

"These orders passed by the Collector in the exercise of his revisional powers were quasi-judicial and were final. The Act does not empower the Collector to review an order passed by him under Section 76-A. In the absence of any power of review, the Collector could not subsequently reconsider his previous decisions and hold that there were grounds for annulling or reversing the Mahalkar's order. The subsequent order dated February 17, 1959 reopening the matter was illegal, ultra vires and without jurisdiction."

8. It is unnecessary to encumber this decision with other authorities as it is now too late in the day to contest the settled legal position that in the absence of a provision for review an authority or even a tribunal for that matter cannot review orders passed in the exercise of quasi judicial functions. It cannot be seriously challenged that proceedings under Section 47-A of the Stamp Act are quasi judicial in nature.

9. With this legal premise we examine the facts of the present case. As mentioned above, the order dated 28-2-83 was passed upon a reference expressly made under Section 47-A by the Sub-Registrar it was the result of a quasi-judicial determination achieved after hearing both the parties in accordance with the procedure laid down under Section 47-A. The order dated 13-9-83 cancelling the order dated 28-2-83 does not disclose any reasons whatsoever in support thereof. It does not state that the earlier order was obtained by fraud or misrepresentation and the like. It was not suggested that the order was passed under any misapprehension. The mere fact, therefore, that Sri Nathulal Tanwar Advocate came forward with a higher offer of Rs. 2,50,000/- could not authorise the ADM to reopen the matter. If this procedure is countenanced, no finality would ever attach to the determination made by the Collector under Section 47-A as someone or the other could always be trusted to come forward with a higher offer, the prices of the real properties spiraling the way they have been these days. It would be setting up a dangerous precedent if orders passed under Section 47-A are reopened on the ground on which they have been done in the present case.

10. The learned Standing counsel was unable to point out any provision whether in the Stamp Act or even in the Registration Act which could disclose the existence of such a power of review upon the Collector. The learned Standing Counsel, however, pointed out sub-section (4) of Section 47-A as conferring such a power of review upon the Collector."

11. The submission cannot be accepted as sub-section (4) comes into play only if the matter had not already been

referred to the Collector under sub-section (1) or sub-section (2) of Section 47-A. In the present case, the dispute had already been specifically referred to and answered by the Collector under Section 47-A of the Stamp Act."

6. A coordinate Bench of this Court in ***Sunil Kumar's*** case (supra) has held as under:-

"10. It cannot be disputed that the impugned order has been passed by a quasi judicial authority and such authority cannot review its order in absence of power of review conferred under the Statute.

11. The power of review of quasi judicial authority in absence of specific provision under the statute has been dealt with in several cases of this Court as well as by the Apex Court. The Apex Court in the case of Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur, U.P. and Ors., reported in MANU/SC/0104/1987 : (1987) 4 Supreme Court Cases 525 : (AIR 1987 SC 2186) has held that unless power of Review is expressly conferred on the authority by any statute under which it derives its' jurisdiction, the authority concerned has no power to Review its' earlier order. In para-11 of the aforesaid judgment following observations has been made:

A quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi-judicial authority. The provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing, his/her earlier order. The review order of the Vice-Chancellor was, therefore, a nullity.

12. In the case of G. Srinivas v. Govt, of A.P. and Ors., reported in MANU/SC/0634/2005 : AIR 2005 SC 4455, Hon'ble Apex Court has observed:

An order passed by mistake and ignorance of the relevant facts indisputably can be reviewed, if inter alia it is found that a fraud was practiced or there was wilful suppression on the part of the appellant.

13. The Full Bench of this Court reported in MANU/UP/1127/1997 : 1997 (31) ALR 680 : (1997 All U 2363) (Smt. Shvraji and Ors. v. Dy. Director of Consolidation, Allahabad and Ors.) has held:

36. Coming to the provisions of the U.P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot reopen any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi judicial authority he has the power to correct any clerical mistake/arithmetical error, manifest error in his order in exercise of his inherent power as a tribunal.

14. In the case of Syed Madadgar Husain Rizvi and Anr. v. State of U.P. and Ors., reported in MANU/UP/1034/2007 : 2007 (9) ADJ 581 (DB) : (2007 (6) ALJ (NOC) 1097 (All) this Court has held:

A quasi judicial authority is not permitted to review its order unless it is so expressly conferred by the Statute itself. ”

7. From an overview of the judgments cited above, it is clear that the Collector (Stamp) cannot recall and/or review his own order as no such power has been conferred under Section 47-A of the Act. A quasi-judicial authority is limited in its functionality in as much as it has to act within the four corners of the statute from which it derives its authority. If the statute does not provide for a particular act, the same cannot be undertaken by that authority. Any such action taken de hors the legislative intent would amount to an overreach and beyond the power of the said authority.

8. Constitutional Courts, such as the High Courts and the Supreme Court, derive their powers and jurisdiction directly from the Constitution of India. These courts are vested with extensive powers, including the authority to interpret the Constitution, adjudicate constitutional matters, and serve as courts of record. On the other hand, quasi-judicial authorities are statutory bodies or officials empowered by specific legislation to adjudicate disputes and make decisions within their defined scope of authority. Unlike constitutional courts, quasi-judicial authorities do not possess inherent powers derived from the Constitution; rather, their jurisdiction and powers are conferred by statutes or delegated legislation.

9. The distinction between constitutional courts and quasi-judicial authorities is significant, particularly when it comes to the exercise of review or recall powers. Constitutional courts, being courts of record under the Constitution, enjoy inherent powers to review their own orders and correct errors in the interest of justice. This inherent power is derived from the constitutional mandate and is essential for maintaining judicial independence and upholding the rule of law. In contrast, quasi-judicial authorities lack inherent powers and can only exercise those powers which have been expressly conferred upon them by the statutes from which they derive their jurisdiction. The absence of inherent powers means that quasi-judicial authorities cannot arbitrarily review or recall their orders unless such power is specifically conferred upon them by their governing statue.

10. The rationale behind limiting the review powers of quasi-judicial authorities lies in ensuring adherence to the principle of separation of powers and preserving the integrity of the legislative scheme. Quasi-judicial authorities, being creatures of statute, must operate within the boundaries set forth by the legislature and therefore they cannot exceed their statutory mandate. Any attempt by quasi-judicial authorities to exercise the power of review or recall outside the bounds of statutory authorization is inherently flawed and constitutes a usurpation of judicial authority. Such exercises of power are void ab initio, meaning they are null and void from the outset, and cannot be sustained in law.

11. The legislature, in its wisdom, may choose to grant limited review powers to certain quasi-judicial authorities based on the nature of the disputes they adjudicate and the need for effective administration of justice. However, any expansion of review powers beyond what is expressly provided by statute undermines the principles of legislative supremacy and judicial independence. Given the absence of inherent powers and the statutory limitations on review, quasi-judicial authorities must exercise prudence and restraint in revisiting their earlier decisions.

12. In the instant case, it is clear that no such power was present with the Collector (Stamp), and therefore, the exercise of review carried out by the Collector (Stamp) is bad in law. In light of the same, the impugned order dated February 3, 2023 is quashed and set-aside and this writ petition is allowed.

EPILOGUE

13. During the course of the hearing, an affidavit was filed by the State-respondents indicating that a show cause notice was issued on January 6, 2021 to the Sub Registrar with regards to the alleged fabricated and forged report. In reply to the said show cause notice, an explanation dated January 14, 2021 was provided by the Sub Registrar. However, the affidavit is incomplete and does not contain any mention as to what steps were taken subsequent to the explanation provided by the Sub Registrar. It appears that the matter was put to rest and the inquiry was not taken forward. The allegations made against the Sub Registrar were quite grave in nature, and therefore, the State Government should have ensured that a proper inquiry is carried out.

14. In the realm of legal proceedings, transparency, accountability, and the pursuit of justice are paramount. The allegations made against the Sub Registrar strike at the core of the trust and integrity expected of public officials entrusted with important responsibilities. It is incumbent upon the State Government to diligently investigate these allegations and take appropriate actions to address any wrongdoing. The affidavit submitted to this court raises concerns regarding the adequacy and thoroughness of the inquiry conducted so far. No individual, regardless of their position or authority, is above scrutiny or immune from accountability. Public officials entrusted with the responsibility of upholding the law and serving the interests of the public must conduct themselves with the utmost integrity and diligence. The State Government, as the custodian of public trust, must demonstrate unwavering commitment to upholding the principles of accountability and transparency. Any laxity or indifference in addressing allegations of misconduct undermines the credibility of the entire administrative machinery and erodes confidence in public institutions.

15. Accordingly, this Courts directs the Principal Secretary, Stamp and Registration, Government of Uttar Pradesh to initiate/continue with the inquiry initiated against the Sub Registrar and bring the same to a logical end. The Principal Secretary is directed to conclude his enquiry within a period of six months from the date of receipt of this order and submit a report to this Court. Registrar (Compliance) is directed to communicate this order to the Principal Secretary, Stamp and Registration, Government of Uttar Pradesh forthwith.

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

(2024) 5 ILRA 1534
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE SIDDHARTH, J.

Writ-C No. 41122 of 2019

Housing Development Finance Corp. Ltd. ...Petitioner

Versus

State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:

Gunjan Jadwani

Counsel for the Opp. Parties:
C.S.C.

Civil Law – Indian Stamp Act, 1899 - Sections 2(14) & 3 - Full Bench Reference- Admission stage of writ petition- - Articles 5 (c), 6 and 40 of Schedule 1-Bof the Stamp Act- UP General Clauses Act, 1904 - Sections 3(18) & 4(13) - Stamp Act- Fiscal Statute- Charging section to be interpreted strictly- Taxing event- no levy, if literal reading leads to non-taxability of transaction- Burden to establish occurrence of taxing event- to be discharged by Revenue- Whether instrument executed by the petitioner- exigible to stamp duty under Article 6(1) of Schedule 1-B- Agreement in writing- condition for deposit of sale deed for securing loan- Absent such agreement- no levy of stamp duty on such instrument- Upheld the Division Bench judgement in HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad- Writ petition to be decided accordingly. (Paras 11, 12, 13, 14, 17, 18, 33 and 34)

HELD:
To define a 'taxing event' falls within the competence of the legislature. It is an artificial legislative construct. It arises upon a levy created by the legislative law, on a person transaction, event, or activity, performed by natural or other persons. Therefore, it (taxing event) may arise strictly in terms of the express words used by the legislature. If literal reading leads to non-taxability of the transaction, no levy may arise. If there exists a doubt/ambiguity about whether a transaction, event or activity falls within the four corners of the charging section, the taxing event does not exist. Consequently, the levy of tax cannot arise. (Para 11)

For a valid levy of a tax to arise, there must exist four components of tax namely, the character of the impost i.e. the description of the taxable event; a clear indication of the person on whom the levy is imposed; the rate of tax; and the measure or value to which the rate of tax is to be applied. The burden to establish the occurrence or existence of a taxing event rests on the revenue. Therefore, unless the revenue first discharges that burden, the taxpayer may not be burdened to prove the negative. (Para 12)

Read in the context of the duty Entry/Article 6(1) of Schedule 1-B to the Stamp Act, that 'instrument' i.e. writing must further fulfill the requirement of being an "agreement relating to deposit of title deeds", etc. For an 'agreement' to exist, it must involve a meeting of minds. Therefore, the writing that must be proved (by the revenue), must show that the parties (that executed the same), had agreed to provide for the deposit of the title deed in any immovable property, etc., by way of security for the repayment of money already advanced or to be advanced by the person receiving such deposit. (Para 18)

In the absence of that written agreement, no 'instrument' less so 'chargeable to duty' - in terms of Section 3 read with Article 6(1) to Schedule 1-B of the Stamp Act may ever exist. In that event, an actual deposit of the title deed with a creditor, to secure any loan availed by the debtor, would not attract any stamp duty liability, since the Stamp Act does not seek to levy stamp duty on oral agreements/transactions. On the contrary, the Stamp Act imposes duty liability only on an 'instrument'14. Those it construes as every document/ written record etc. Unless written words executed by the parties exist to establish the nature of the transaction described under Article 6(1) of Schedule 1-B of the Stamp Act, no taxable event may ever arise or be witnessed under the Stamp Act. (Para 21)

Thus, we conclude: (i) creation of a simple mortgage (through deposit of title deeds), though valid in law and fully enforceable as such, would remain beyond the clutches of the Stamp Act, so long as there is no written agreement executed between the parties or any document that is made part of thereof that evidences the bargain reached between the parties – to deposit the title deed (with the lender) to secure the loan availed by the borrower. (ii) in the present case, as noted above, there is no written evidence yet brought on record, of any bargain reached by the parties requiring the borrower to deposit the title deeds with the lender/petitioner. (Para 33)

Reference answered. (E-14)

List of Cases cited:

1. HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad, 2015:AHC:125281-DB; (2015) 129 RD 208; (2015) 113 ALR 483; (2016) 2 ALJ 87; 2015 SCC Online All 8079

2. District Registrar & Collector Vs Canara Bank (2005) 1 SCC 496

3. Board of Revenue Vs Rai Saheb Sidnath Mehrotra, AIR 1965 SC 1092

4. Commissioner of Sales Tax, U.P. Vs Modi Sugar Mills Ltd., (1960) SCC OnLine SC 118

5. Polester Electronic (P) Ltd. Vs Addl. Com. Sale Tax (1978) 1 SCC 636

6. Rai Ram Krishna & ors. Etc. Vs St. of Bihar (In Both the Appeals), (1963) SCC OnLine SC 31

7. CIT Vs Maharashtra Sugar Mills Ltd., (1971) 3 SCC 543

8. Central India Spg., Wvg. & Mfg. Co. Ltd. Vs Municipal committee, AIR 1958 SC 341

9. Govind Saran Ganga Saran Vs CST, 1985 Supp SCC 205

10. U.O.I. Vs Garware Nylons Ltd., (1996) 10 SCC 413

11. Shree Mohan Chowdhury Vs K.C. Dhulia AIR 1964 SC 173

12. S.N. Mathur Vs Board of Revenue, (2009) 13 SCC 301

13. Govind Rubber Ltd. Vs Louids Dreyfus Commodities Asia (P) Ltd. (2013) 13 SCC 477

14. St. of T. N. Vs M/s Pyare Lal Malhotra & ors., (1976) 1 SCC 834

15. Brij Mohan Vs Sugra Begum (1990) 4 SCC 147

16. United Bank of India Ltd. Vs M/s Lekharam Sonaram and Co. AIR 1965 SC 1591

17. United Bank of India Ltd. Vs Ram Chandra Kapoor, 1967 SCC OnLine All 278

18. Padam Chand Jain Vs C.C.R.A., 1970 SCC OnLine All 106

19. K. J. Nathan Vs S.V. Murthi Rao & ors., 1964 SCC OnLine SC 120

20. Umesh Kumar Gupta Vs St. of UP & ors., AIR 2006 Allahabad 30

21. The Chief Controlling Revenue Authority, Madras Vs M/s Pioneer Spinners Pvt. Ltd., 1968 ILR Madras Series 284

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Present reference (to a full bench) has arisen on a doubt expressed by a learned single judge, to the correctness of the ratio contained in a division bench decision of the Court in **HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad, 2015:AHC:125281-DB; (2015) 129 RD 208; (2015) 113 ALR 483; (2016) 2 ALJ 87; 2015 SCC Online All 8079**. In that, the division bench reasoned as below:

"In the case in hand also, the instrument, namely, agreement executed between the petitioner and its borrowers does not, in itself, evidences or contain terms regarding the deposit of title deed. The loan agreement only provides for a future eventuality requiring the giving of security, which necessarily would not fall within the ambit of Article 6 of Schedule 1-B of the Act. The Stamp Act is a fiscal statute and its provisions are to be strictly construed. No stamp duty is liable to be charged on assumptions and conjectures or surmises. The stamp duty is to be paid on the tenor of instrument and not at any future possibility. The Article meant in the agreement for security does not spell out even the nature of the security that may be required to be furnished sometimes in future. Stamp duty also cannot be charged on an assumptions

that at any future time, the security by creation of equitable mortgage by deposit of title deeds would be executed. An equitable mortgage created by simply depositing the title deed without there being any instrument, letter, note, memorandum or writing evidencing such an agreement relating to deposit of title deeds, is also not subject to payment of stamp duty.

In view of the aforesaid settled legal positing, petitioner cannot be forced to mention in the loan agreement the fact that title document has been deposited with the Bank as it is open in between the Bank and the borrower to either create an oral equitable mortgage by deposit of title deed as provided under Section 58 (F) of the Transfer of Property Act or execute a document in that regard by way of an instrument, letter, note and only in the eventuality of execution of an instrument, memorandum, undertaking, letter, the same would be chargeable with duty under Article 6 of Schedule 1-B. In case, the loan agreement executed between the parties, does not contain stipulation in writing about creation of a mortgage by the deposit of title deed, the stamp duty would not be chargeable under Article 5 of Schedule 1-B of the Act."

2. The reference was made at the admission stage of the writ petition. At that stage, the State had not filed its Counter Affidavit. It had opposed the writ petition on the strength of instructions. Even those are not on record. In such circumstances, relying on the document that may have been produced by the State (at that stage) and referring to Clauses 10.5(f), and 10.5(h) read with Clause 13(d) of the Loan Agreement, the learned single judge observed as below, in the order dated 19.12.2019:

"9. Learned Standing Counsel, who was earlier given time by this Court to seek instructions, on the basis of instructions, has informed this Court that in the loan agreement signed between the bank and the loanee, there is a Clause 10.5(f) and 10.5(h), which was not pointed out at the time of decision of the Court rendered on 31.8.2015. The emphasis is on these two clauses and therefore, they are being quoted hereinbelow:

"10.5(f). The Borrower alone shall be responsible to bear and pay the Stamp Duty, all charges levied by the Central Registry of Securitization Asset Reconstruction and Security Interest of India, as well as all other statutory/regulatory charges/levies/taxes as may be applicable to the Loan, the Security, this Agreement as well as on all other instruments in relation to the Loan/Security (to the extent as may be applicable during the pendency of the Loan).

10.5(h) The Borrower further agrees that the terms and conditions of the Offer Letter, the loan application and the related documents executed/ to be executed shall be read and form part and parcel of this Agreement. In case of any inconsistency, in any of the stated documents, the terms and conditions of this Loan Agreement shall prevail."

10. It has been submitted on the basis of these two clauses that once the loan agreement is signed by the loanee, the title deed to the property mortgaged as security of the loan are also deposited by the loanee with the bank.

11. Learned Standing Counsel has pointed out a clause in the loan agreement which says that such title deed shall only be released after repayment of the entire loan amount i.e. Clause 13(d). It amounts to an equitable mortgage created on the property of which, the loan has been taken. It has been submitted that these clauses of the agreement were not brought to the notice of

the Division Bench when it decided the case on 31.8.2015."

3. Consequently, the following reference was made by the learned single judge:

"In the light of the submissions regarding the loan agreement contained Clause 10.5(f), 10.5(h) and 13(d), whether the agreement signed between the bank and the loanee would be chargeable as an equitable mortgage created on the property for which the loan is taken?"

4. The Chief Justice constituted this full bench to answer that reference. After that, a Counter Affidavit (sworn by Shri. Yogendra Singh, Assistant Registrar, Sadar, Gorakhpur dated 24.09.2020), was filed. It did not bring the Loan Agreement (noticed by the learned single judge), on record. On that being pointed out by us on 05.04.2024, the State craved leave to file a Supplementary Counter Affidavit. We granted that indulgence and adjourned the hearing. Accordingly, a Supplementary Counter Affidavit (sworn by Shri. Pradeep Rana, Assistant Inspector General (Stamp), Gorakhpur), dated 22.04.24 has been filed. Learned counsel for the petitioner proposed, not to file a Rejoinder Affidavit.

5. Since the reference has arisen at the instance of the State, we heard Shri Manish Goel learned Additional Advocate General assisted by Shri A.K. Goyal learned Additional Chief Standing Counsel for the State first, and Shri Anurag Khanna learned Senior Advocate, assisted by Ms. Gunjan Jadwani for the petitioner, in reply.

6. The document described as a true copy of the Loan Agreement (annexed to the Supplementary Counter Affidavit), does not contain Clause 13(d). The learned Additional Advocate General states, there is a typographical error in the reference order. The relevant Clause is Clause 13(iii)(b) of the Most Important Terms & Conditions (hereinafter referred to as MITC). In the absence of any challenge to that statement, we have no reason to doubt its correctness. Accordingly, we read the reference made to us as below:

In the light of the submissions regarding the loan agreement contained in Clause 13(iii)(b) whether the agreement signed between the bank and the loanee would be chargeable as an equitable mortgage created on the property for which the loan is taken?"

7. Article 10.5(f), 10.5(h) of the Loan Agreement, Clauses 7, 10(a), 11, and 13 of the MITC, appended to the Loan Agreement read as below:

"10.5(f). The Borrower alone shall be responsible to bear and pay the Stamp Duty, all charges levied by the Central Registry of Securitization Asset Reconstruction and Security Interest of India, as well as all other statutory/regulatory charges/levies/taxes as may be applicable to the Loan, the Security, this Agreement as well as on all other instruments in relation to the Loan/Security (to the extent as may be applicable during the pendency of the Loan).

10.5(h). The Borrower further agrees that the terms and conditions of the Offer Letter, the loan application and the related documents executed/ to be executed shall be read and form part and parcel of this Agreement. In case of any inconsistency, in any of the stated documents, the terms and conditions of this Loan Agreement shall prevail."

7. Security/Collateral for the loan [*]

Security of the loan would generally be security interest on the property being financed and/or any other collateral/interim security as may be required by HDFC.

(a) Property description : House on Plot on Arazi No. 7Mi, Mouza Dariya Chak, Pargana Haveli, Tappa Kasba, Tehsil Sadar, Bd By: N, W:Road, E: House, S:Plot, situated at Gorakhpur, 273001 and construction thereon present and future.

(b) Guarantee: Names of the Guarantor/s (if any): Not Applicable

(c) Other Security Interest (If any): Not Applicable

10. Conditions for disbursement of the loan

The Borrower shall:

a. submit all relevant documents as mentioned in the Sanction Letter/Loan Agreement.

11. Brief Procedure to be followed for Recovery of overdue:

Customers are explained the repayment process of the loan in respect of, tenure, periodicity, amount and mode of repayment of the loan. No notice, reminder or intimation is given to the customer regarding his/her obligation to pay the EMI or PEMI regularly on due date.

On non-payment of Pre-EMI/EMI by the due dates, HDFC shall remind the customers by making telephone calls, sending written intimations by post and electronic medium or by making personal visils by HDFC's authorized personnel at the addresses provided by the customer. Costs of such calls/communication/visits shall be recovered from the customer.

Notwithstanding what is stated herein, it shall be the liability of the customer to ensure that the Pre-EMI/EMIs are regularly paid on the due dates.

Credit information relating to any customer's account is provided to the Credit Information Bureau (India) Limited (CIBIL) or any other licenced bureau on a monthly basis. To avoid any adverse impact ort the credil history with CIBIL, it is advised that the customer should ensure timely payment of the amount due on the loan amount.

The recovery process of enforcement of mortgage/securities, including but not limited to, taking possession and sale of the mortgaged property in accordance with the procedure prescribed under the Securitisation and Reconstruction of Financial Assels and. Enforcement of Security Interest Act, 2002 (SARFAESI Act) or under any other law, is followed purely as per the directions laid down under the respective low.

Intimation/Reminders/Notice(s) are given to customer prior to inillating steps for res recovery of overdues, under the Negotiable Instruments Act, Civil Suit as well as under the SARFAESI Act.

13. Customer Services

(i) Customer Service Queries including requirement of documents can be addressed to HDFC through the following channels

Write to us through our website:www.hdfc.comor notify us at:

HOFC Lid, HDFC House, HT Parekh Marg, 165-166, Backbay Reclamation, Churchgate, Mumbai 400 020.

(ii) Visiting hours and the details of person to be contacted for customer service with respect to all branches of HDFC are available atwww.hdfc.com.

(iii) Contact HDFC Customer Service Officer at your nearest branch within the working hours as mentioned in the Loan Application form for:

a. Photo Copies of documents, which can be provided in 7 working days from dale of placing request.

Necessary administrative fees shall be applicable.

b. Original documents will be returned within 10 working days from the date of closure of loan. Necessary administrative fee shall be applicable if documents collected beyond due date of release of documents.

c. Loan Account statement (time line) : Within 3 working days of the receipt of request."

8. The reference has arisen in the statutory context of the Indian Stamp Act, 1899 (hereinafter referred to as the 'Stamp Act'), as applicable in the State of Uttar Pradesh. The provisions of sections 2(14) and 3 of the Stamp Act read as below:

"2(14) "Instrument" *- "Instrument" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.*

3. Instruments chargeable with duty. *Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor, respectively, that is to say,-*

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in India; and

(c) every instrument (other than a bill of exchange, or promissory note) mentioned in that Schedule, which not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received in India:

Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clauses (a), (b) and (c) of the section or in Schedule I or I-A, the following instruments shall, subject to the exemptions contained in Schedule I-A or I-B be chargeable with duty of the amount indicated in Schedule I-A or I-B as the proper duty therefor, respectively, that is to say,-

aa) every instrument mentioned in Schedule J-A or B which not having been previously executed by any person was executed in Uttar Pradesh,-

(i) in the case of instruments mentioned in Schedule I-A on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force; and

(ii) in the case of instruments mentioned in Schedule I-B on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force;

(bb) every instrument mentioned in Schedule I-A or I-B which not having been previously executed by any person, was executed out of Uttar Pradesh,-

(i) in the case of instruments mentioned in Schedule I-A on or after the date on which the U.P. Stamp (Amendment).

(ii) in the case of instruments mentioned in Schedule I-B, on or after the date on which the U.P. Stamp (Amendment) Act, 1952, comes into force, and relates to any property situated, or to any matter or

thing done or to be done in Uttar Pradesh, and is received in Uttar Pradesh:

Provided also that no duty shall be chargeable in respect of,-

(1) any instrument executed by or on behalf of, or in favour of, the Government in cases where, but for this exemption Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer of other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act No. XIX of 1838, or the Indian Registration of Ships Act, 1841 (X of 1841), as amended by subsequent Acts;

[(3) Any instrument executed, by, or, on behalf of, or, in favour of, the 'developer', or 'unit' or in connection with the carrying out of purposes of the special economic zone.

***Explanation.-** For the purposes of this clause, the expressions "Developer", "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005.]*

***Explanation**.- Where the amount of duty prescribed in Schedule I-B contains any fraction of a rupee below twenty-five paise, or above twenty-five paise, but below fifty paise, or above fifty paise, but below seventy-five paise, or above seventy-five paise but below one rupee, the proper duty shall be an amount rounded off to the next higher quarter of a rupee as hereinafter appearing in the said Schedule."*

9. Then, Articles 5(c), 6, and 40 of Schedule I-B to the Stamp Act read as below:

Description of Instrument	*Proper Stamp-duty*
5.Agreement or memorandum of an agreement-	
(c) if not otherwise provided for	*One hundred rupees.*
Exemption	
Agreement or memorandum of agreement-	
(a) [Deleted by U.P. Act No. 14 of 1963]	
(b) made in the form of tenders to the Central Government for, or relating to, any loan;	
6. Agreement relating to deposit of title, deeds, pawn or pledge, that is to say, any instrument evidencing an agreement relating to -	
(1) the deposit of title deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security);	
or	
(2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt –	
[(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement-	*Twenty rupees*

For every Rs. 1,000 or part thereof of the amount of loan or debt.	
Explanation	
For the purposes of clause (1) of this Article, any letter, note or memorandum or writing, relating to the deposit of title deeds,whether written or made before, or at the time of, or after, the deposit of title deeds is effected, and whether it is in respect of the first loan or any subsequent loan, such letter, note, memorandum or writing shall, in the absence of any separate agreement relating to deposit of title deeds, be deemed to be an instrument evidencing an agreement relating to the deposit of title deeds.]	*Half the duty payable on a loan or debt under Clause (a) for the amount secured.*
(b) if such loan or debt is repayable not more than three months from the date of such instrument.	
Exemption	
Instrument of pawn or pledge of agriculture produce, if unattested.	
***40. Mortgage-deed** not being an Agreement relating to Deposit of Title-deeds, Pawn or Pledge (No.6), Bottomry Bond (No.16), Mortgage of a Crop (No.41), Respondentia Bond (No.56) or Security Bond (No. 57)-*	*The same duty as a Conveyance [No.23 clause (a)] for a consideration equal to the amount secured by such deed.*
(a) when possession of the property or any part of the property comprised in such deeds is given by the morgagor or agreed to be given	
(b) when possession is not given or agreed to be given as aforesaid	*The same duty as a Bond (No.15) for the amounts secured by such deed.*
Explanation	
A mortgagor who gives to the mortgagee a power of attorney to collect rents or a lease of the property or part thereof, is deemed to give possession within the meaning of this Article.	
(c) when a collateral or auxilliary or additional or substituted security, or by way of further assurance for the abovementioned purpose where the principal or primary security is duly stamped-	*[Ten rupees]*
for every sum secured not exceeding Rs. 1,000	*[Ten rupees]*
and for every Rs. 1,000 or party thereof secured in excess of Rs. 1,000	
Exemptions	
(1) Instruments executed by persons taking advances under the Land Improvement Loans Act, 1883, or undre the Agriculturists' Loans Act, 1884, or by their sureties as securities for the repayment of such advances.	
(2) Letter of hypothecation accompanying a bill of exchange.	

10. The Stamp Act is a fiscal statute1. Therefore, the rule of strict interpretation

must be applied to its charging section - Section 3 read with the Schedules to that Act2. There is no room or permission to interpret/read the charging section, liberally3. The Courts may only look at what is clearly said; there is no room for intendment; there is no equity about tax; there is no presumption as to tax; nothing may be read into, and nothing may be implied to bring a subject to tax4.

11. To define a 'taxing event' falls within the competence of the legislature5.. It is an artificial legislative construct. It arises upon a levy created by the legislative law, on a person transaction, event, or activity, performed by natural or other persons. Therefore, it (taxing event) may arise strictly in terms of the express words used by the legislature. If literal reading leads to non-taxability of the transaction, no levy may arise6. If there exists a doubt/ambiguity about whether a transaction, event or activity falls within the four corners of the charging section, the taxing event does not exist. Consequently, the levy of tax cannot arise7.

12. For a valid levy of a tax to arise, there must exist four components of tax namely, the character of the impost i.e. the description of the taxable event; a clear indication of the person on whom the levy is imposed; the rate of tax; and the measure or value to which the rate of tax is to be applied8. The burden to establish the occurrence or existence of a taxing event rests on the revenue9. Therefore, unless the revenue first discharges that burden, the taxpayer may not be burdened to prove the negative.

13. Section 3 of the Stamp Act seeks to charge stamp duty on an 'instrument'. Thus, the taxing event is the execution of an 'instrument'. The person on whom such duty liability arises is specified under Section 29 of the Stamp Act. The rate and measure of duty to be charged is to be found - as 'indicated' under any of the Schedule to the Stamp Act. Before us, there exists neither any doubt as to the person on whom stamp duty is to be levied nor to the existence of the rate or measure of stamp duty specified by the Stamp Act.

14. The doubt is whether the 'instrument' executed by the petitioner falls under Article 6(1) of Schedule 1-B to the Stamp Act. Unless that 'instrument' exists, the rate and measure of tax prescribed may not come to life. Thus, for any charge of stamp duty to arise there must exist an 'instrument' on which such duty may be charged. Under separate entries (described as Articles), enumerated under each of the Schedules appended to the Stamp Act, the exact rate of stamp duty must be found prescribed on the subject 'instrument'. Under the scheme of the Stamp Act, those have been categorised by nature of the rights and liabilities that an 'instrument' may seek to create, alter or deal with 'indicating' the stamp duty to be charged thereon. Unique rates of tax have been specified for each such 'instrument', together with the method/mode of computation i.e. fixed rate or ad valorem base.

15. Section 2(14) of the Stamp Act includes and thus describes an 'instrument' as 'every document' etc. by which any 'right or liability' is, or purports to be, amongst others 'created' or 'recorded'. The dictionary meaning of the word 'instrument' would commend its construction - a written document of a formal legal kind10. In any case, Section 3(18) of the General Clauses Act, 1897 defines a 'document' thus:

"3(18). "document" shall include any matter written, expressed or described

upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

16. Section 4(13) of the Uttar Pradesh General Clauses Act, 1904 incorporates a pari materia definition of the word 'document'. Similarly, Section 3 of the Indian Evidence Act 1872 defines 'document' thus:

"3. Document. —Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

17. On a conjoint reading of Sections 3 and 2(14) of the Stamp Act read with Section 3(18) of the General Clauses Act, 1897 and Section 4(13) of the U.P. General Clauses Act, 1904, a charge of stamp duty may arise - as to amount 'indicated' in any of the Schedules to the Stamp Act on an 'instrument' i.e. a 'document' that must be writing, expressed or described by letters, figures or marks, etc., placed with an intention to be used or for actual use to record that matter. That may never be anything but writing whether on paper or electronic mode etc. In whatever form it may exist, its visibility to the naked eye (both as to the writing and the intent or use), is a sine qua non, to be fulfilled, before such 'document' may ever be described as an 'instrument'. Therefore, for the charging section to attract and a valid levy of stamp duty to arise, there must not only exist an 'instrument' (as defined), but also a specified rate of tax on such 'instrument', under any one of the Schedules to the Stamp Act11.

18. Read in the context of the duty Entry/Article 6(1) of Schedule 1-B to the Stamp Act, that 'instrument' i.e. writing must further fulfill the requirement of being an "agreement relating to deposit of title deeds", etc. For an 'agreement' to exist, it must involve a meeting of minds12. Therefore, the writing that must be proved (by the revenue), must show that the parties (that executed the same), had agreed to provide for the deposit of the title deed in any immovable property, etc., by way of security for the repayment of money already advanced or to be advanced by the person receiving such deposit.

19. Also, that 'agreement' must be specific. It must satisfy the exact terms of Article 6(1) to Schedule 1-B of the Stamp Act. Thus, to be subjected to stamp duty under that Entry/Article, the 'instrument' must squarely/unequivocally describe the terms of that Article/Entry, read strictly. Such an 'instrument' must 'evidence' an 'agreement' to 'deposit of title deeds' etc. The words 'that is to say' prefixed to that taxing entry is an ancillary clause, enacted to explain the meaning of the principal clause. It makes clear and fixes the meaning of the nature of 'instruments' subjected to Stamp duty, by the legislature13. Therefore, the 'instrument' to be subjected to stamp duty payment under that Article/Entry must specifically provide for "the deposit of title deeds or……".

20. In other words, only when a writing is found executed by the debtor, providing for deposit of any title deed of an immovable property with the creditor - to secure any existing loan or future loan to be advanced by the latter (which would be rights and liabilities dealt with by that document), the taxing event may exist. That alone may give rise to a levy of stamp duty as the rate and

measure of the tax provided under Article 6(1) of Schedule 1-B to the Stamp Act. There cannot be any presumption or inference as to that.

21. In the absence of that written agreement, no 'instrument' less so 'chargeable to duty' - in terms of Section 3 read with Article 6(1) to Schedule 1-B of the Stamp Act may ever exist. In that event, an actual deposit of the title deed with a creditor, to secure any loan availed by the debtor, would not attract any stamp duty liability, since the Stamp Act does not seek to levy stamp duty on oral agreements/transactions. On the contrary, the Stamp Act imposes duty liability only on an 'instrument'14. Those it construes as every document/ written record etc. Unless written words executed by the parties exist to establish the nature of the transaction described under Article 6(1) of Schedule 1-B of the Stamp Act, no taxable event may ever arise or be witnessed under the Stamp Act.

22. Seen in that light, Clause 10(a) of the Loan Agreement only required the borrower to submit documents mentioned in the Sanction Letter/Loan Agreement. Remarkably, the Loan Agreement itself does not require the borrower to deposit the title deed in any immovable property with the petitioner, to secure the loan availed by the borrower. The Loan Agreement does not speak of the deposit of any title deed. Neither the Sanction Letter nor the Loan Application nor any other document (evidencing any bargain reached between the parties requiring the borrower to deposit any title deed, to secure the loan availed by him), has been brought on record. Therefore, the contents of such documents may remain to be speculated, but never admitted, proved, or established. There is no evidence or credible material (shown to exist) with the revenue authorities, to establish the existence of any written bargain reached between the parties that may have obliged the borrower to deposit any title deed with the petitioner - to secure the loan availed by the former. That burden has remained undischarged.

23. Similarly, in the absence of any other document produced, the mere existence of Clauses 10(f), 10(h) of the Loan Agreement, Clauses 7, 10(a), 11, and 13 of the MITC, the terms and conditions of the Offer Letter, the Loan Application, and other documents (that may form part and parcel of the Loan Agreement), on their (own) force did not create any written stipulation or agreement or evidence of a bargain reached by the borrower to deposit any title deed etc., with the petitioner to secure the loan availed by him. Creation of security interest in immovable property, without documentary evidence of bargain, reached - to deposit the title deed in the immovable property (in which such security interest may have been created in terms of Act Number 54 of 2002), may also not be read as evidence of an 'instrument' drawn to deposit the title deed in that property, to secure the loan availed by the borrower.

24. In view of the above, Clause 13(iii)(b) of MITC is extraneous to the issue. Unless an 'instrument' evidencing an 'agreement' to deposit any title deed is executed by the borrower, in favour of the petitioner - to secure a loan availed by the former, mere deposit of such title deed (against an oral agreement) and its return (against a written agreement) would not give rise to any taxing event under Section 3 read with Section 2(14) and Article 6(1) of Schedule 1-B to the Stamp Act. An oral 'agreement' not being a 'document' may

never be described as an 'instrument'. Hence, it may never suffer the impost of stamp duty. Forever, it would remain beyond the reach and clutches of the Stamp Act.

25. As to precedent relied by the learned Additional Advocate General, in **United Bank of India Limited vs M/s Lekharam Sonaram and Co. AIR 1965 SC 1591,** there pre-existed a letter written by Lekharam [Ex-7(a)], authorising his son Babulal to deposit on his behalf certain title deeds to create an equitable mortgage. In turn, Babulal wrote a letter to the lender Bank [Ex-7(b)], authorising his younger brother to deposit the title deeds and to negotiate further in that respect. Since those documents were not registered under Section 17 of the Registration Act, the trial court refused to grant a mortgage decree. That view was maintained by the High Court, in appeal. The Supreme Court reversed that decision and reasoned that the documents in issue created an equitable mortgage. Accordingly, the plaintiff bank was found entitled to a mortgage decree. At the same time, it was not an issue and no finding was reached to infer the existence of an instrument, to deposit the title deeds to secure a loan, in that facts circumstance.

26. In **United Bank of India Limited Vs Ram Chandra Kapoor, 1967 SCC OnLine All 278**, the only issue involved was whether the endorsement made in the main agreement read together with a separate document executed later, could be read as an agreement relating to pawn or pledge. By reading the documents comprehensively, a coordinate bench of this Court opined that such an 'instrument' existed and may be subjected to stamp duty under Article/Entry 6(1) of Schedule 1-B to the Stamp Act. Here, there is no 'document' recording such an 'agreement'.

27. In **Padam Chand Jain Vs C.C.R.A., 1970 SCC OnLine All 106**, a reference made by the Board of Revenue was answered by a three-judge bench of this Court. That reference arose on the following question:

"Whether the document under reference is a memorandum of agreement relating to deposit of title deeds within the meaning of Art.6(1), Schedule 1-B of the U.P. Stamp (Amendment) Act, 1962 or a mortgage deed within the definition of that term in Sec. 2(17) of the Stamp Act and chargeable accordingly with a duty of Rs. 3937.50 under Art. 40(b), Schedule 1-B, ibid".

Reading the document, it was opined thus:

"The deed also records an agreement relating to "a first mortgage by deposit of title deeds" in respect of the land and premises specified in the first Schedule as a collateral security for the said amount. As stated in the deed, the title deeds had already been deposited with the branch of the State Bank of India in Chipitola, Agra. The deed, however, does not purport to create any charge on the specified properties to secure the sum of Rs. 1,75,000/-. The reason is obvious; a mortgage by deposit of title deeds effectuates transfer of a right to the properties and creation, separately, of a charge their own becomes unnecessary".

28. It was concluded that that deed evidenced an agreement to pledge goods and an agreement to create the first charge by deposit of title deeds. Accordingly, it was found - not chargeable to duty under Article 40 to Schedule 1-B of the Stamp Act, but under Article 6 of Schedule 1-B to the Stamp Act. In that case, the title deed of immovable property was deposited with the lender bank

by way of security against an 'instrument'. Here, no 'document' requiring deposit of title deed exists.

29. In **K. J. Nathan Vs S.V. Murthi Rao and Others, 1964 SCC OnLine SC 120**, the issue was regarding enforcement of a mortgage created by deposit of title deeds. The Supreme Court held, a Court may presume under certain circumstances that a loan and deposit of title deed, constitute a mortgage. That was held to be an inference as to the existence of one fact drawn from the existence of some other fact or facts. Yet, it was not an issue whether an instrument to deposit the title deeds may be inferred, in such circumstances.

30. In **Umesh Kumar Gupta Vs State of UP and others, AIR 2006 Allahabad 3**0, the issue involved was whether a mortgage by deposit of title deeds may be created under Section 58(f) of the Transfer of Property Act, 1882. Despite the absence of a written deed, a mortgage was inferred on the strength of the deposit of the title deed. The issue was not whether an oral agreement may be subjected to stamp duty.

31. As discussed by the division bench, more than fifty years ago, a similar reference arose before the Madras High Court in **The Chief Controlling Revenue Authority, Madras vs M/s Pioneer Spinners Pvt. Ltd., 1968 ILR Madras Series 284**. In that, a loan was sanctioned by the Canara Bank by executing an 'instrument' described as the "Articles of Agreement" with related papers accompanied by actual delivery and deposit of certain title deeds (to create security), set out in the Schedule to the loan proposal. That 'instrument', in its annexed Schedule, contained a list of title deeds deposited. Yet, it did not include any clause evidencing an 'agreement' or 'bargain' to deposit the title deeds to secure the loan advanced by the Canara Bank to the borrower. Surely, the "Articles of Agreement" that were the loan agreement also did not contain any clause to that effect.

32. In those facts, a full bench of the Madras High Court, speaking through Justice Natesan reasoned – that there was the absence of any documentary evidence of an 'agreement' reached between the parties requiring the borrower to deposit the title deeds to secure the loan availed by it. Further, absence of any clause in the "Articles of Agreement" (the loan agreement in that case), to include and make part of that written 'agreement' - the "borrower's proposal" (containing an offer to deposit the title deeds), the mere reference made in the "Articles of Agreement" that:

"(a) The borrowers proposal shall be deemed to constitute the basis of this agreement end of the loan to be advanced by the bank; and

(b) that the advance shall be governed by the terms contained in the agreement as well as in security documents listed in the schedule"

also did not constitute documentary evidence that "those parties tacitly considered the writing as the repository and appropriate evidence of the agreement" that could be subjected to stamp duty liability under Article 6 of Schedule 1-B of the Stamp Act. That clause did not make the "Articles of Agreement" a repository of the 'bargain' between the parties to deposit the title deeds. The oral agreement if any to that effect remained beyond the reach of the Stamp Act. With time that principle has got set in hard concrete in our jurisprudence. The division bench in **HDFC Ltd. Vs Assistant Commissioner Stamps,**

Ghaziabad (supra) and we are in unequivocal agreement with the same. No exception is drawn to that.

33. Thus, we conclude:

(i) creation of a simple mortgage (through deposit of title deeds), though valid in law and fully enforceable as such, would remain beyond the clutches of the Stamp Act, so long as there is no written agreement executed between the parties or any document that is made part of thereof that evidences the bargain reached between the parties – to deposit the title deed (with the lender) to secure the loan availed by the borrower.

(ii) in the present case, as noted above, there is no written evidence yet brought on record, of any bargain reached by the parties requiring the borrower to deposit the title deeds with the lender/petitioner.

34. Accordingly, we answer the reference made by the learned single judge thus:

(I) An equitable mortgage may exist in favour of the petitioner, through a deposit of title deed, against an oral agreement. Yet, Clauses 10.5(f), 10.5(h) of the Loan Agreement and Clause 13(iii)(b) of the MITC to the Loan Agreement do not constitute an 'instrument' or documentary evidence of a written 'agreement' or bargain reached between the parties, to thus secure the loan availed by the borrower.

(II) Levy of stamp duty under Article 6 of Schedule 1-B of the Stamp Act may arise only on an 'instrument' that must be a 'document' containing writing (as would never include an oral agreement), to establish the existence of an "agreement relating to deposit of title deeds", to secure the loan availed by the borrower. Since thatcondition is not satisfied, no levy of stamp duty may arise, at present.

(III) Given the above, Clauses 10.5(f), 10.5(h) of the Loan Agreement and Clause 13(iii)(b) of the MITC to the Loan Agreement, do not create any doubt as to the correctness of the division bench pronouncement in **HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad, 2015:AHC:125281-DB.**

35. Let the matter be listed before the appropriate bench.

(2024) 5 ILRA 1548
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Civil Misc. Review Application No. 301926 of 2010
In
Sales/Trade-Tax Revision No. 225 of 2002

M/s Tata Steel Ltd. ...Petitioner
Versus
Commissioner, Trade Tax, U.P., Lko. ...Respondent

Counsel for the Petitioner:
Sri Pratik J. Nagar

Counsel for the Respondent:
Bipin Kumar Pandey,A.C.S.C.

Code of Civil Procedure, 1908 - Section 114, Order XLVII, Rule 1 - Review - Review filed on the ground that important judgments of the Hon'ble Supreme Court could not be submitted before the Court. Held - Mere failure to cite a judgment does not, in and of itself, render the original judgment flawed. Review jurisdiction is not a panacea for addressing every perceived deficiency or oversight in the

original judgment; rather, it is a narrow avenue reserved for rectifying errors glaringly evident on the face of the record. Failure to cite a particular judgment does not automatically invalidate the reasoning or merit of the decision in question. (Para 22)

Dismissed. (E-5)

List of Cases cited:

1. Northern India Caterers (India) Ltd. Vs Lt. Governor of Delhi (1980) 2 SCC 167

2. Aribam Tuleshwar Sharma Vs Pishak Sharma (1979) 4 SCC 389

3. Parsion Devi Vs Sumitri Devi (1997) 8 SCC 715

4. S. Madhusudhan Reddy Vs Narayana Reddy 2022 SCC OnLine SC 1034

5. Shri Ram Sahu (Dead) through Legal Representatives & ors. Vs Vinod Kumar Rawat & ors. (2021) 13 SCC 1

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

Civil Misc. Delay Condonation Application No.301923 of 2010

1. I have perused the affidavit accompanying the delay condonation application and find that sufficient cause has been made out for condoning the delay in filing the review application. Accordingly, the delay in filing the review application is condoned.

2. The delay condonation application is allowed.

Review Application

3. The instant review application preferred by the Commissioner Trade Tax, U.P., Lucknow (hereinafter referred to as the 'Respondent') arises out of an order dated February 15, 2010 passed by this Court in STRE No. – 225 of 2002.

FACT

4. I have outlined the brief facts leading up to the instant review application below:

a. In STRE No. – 225 of 2002, the main question raised by M/S Tata Steel Ltd. (hereinafter referred to as the 'Revisionist') was "whether in view of the definition of 'purchase price' under Section 2(gg) of the Uttar Pradesh Trade Tax Act, 1948 (hereinafter referred to as the 'UPTTA, 1948), the applicant having paid the amount of Rs. 5,56,81,000/- also for the purchase of plant and machinery, apparatus and equipment, the same ought to have been included in the 'Fixed Capital Investment' and the Trade Tax Tribunal was not justified in disallowing the said amount merely on the ground that the amount has been allowed as MODVAT under the Central Excise Act, 1944 (hereinafter referred to as the 'CEA, 1944). Other questions were also raised with regard to MODVAT allowed by the excise department.

b. The aforesaid question was answered by this Court vide its order dated February 15, 2010 in favour of the Revisionist.

c. Against the order dated February 15, 2010 passed by this Court, the Respondent preferred a Special Leave Petition under Article 136 of the Constitution of India before the Hon'ble Supreme Court.

d. The aforesaid Special Leave Petition was dismissed as not pressed by the Hon'ble Supreme Court vide its order dated September 9, 2010.

e. The Respondent filed the instant review application before this Court assailing the order dated February 15, 2010 passed by this Court.

CONTENTIONS OF THE RESPONDENT

5. Shri B.K. Pandey, learned Additional Chief Standing Counsel has made the following submissions:

i. The relevant law which was laid down by the Hon'ble Supreme Court in the case of ***Collector of Central Excise, Pune & Ors. -v- Dai Ichi Karkaria Ltd. reported in 1999 (33) RLT 899 (S.C.)*** could not be pointed out at the time of argument before this Court.

ii. The Hon'ble Supreme Court in the aforesaid case has observed that the expression "actual value" should be construed in a sense which commercial men would understand. In absence of a sttatutory definition for determining the "actual value", the rule of accountancy has to be adopted. MODVAT credit has to be excluded from the value of capital goods as per the guidance note dated March 16, 1995 issued by the ICAI. The same principle also applies in the present case and MODVAT has to be excluded while determining the actual investment made by the dealer in plant and machinery.

iii. A similar controversy came up before the Hon'ble Supreme Cour in ***Commissioner of Trade Tax -v- M/s Kajaria Cements Ltd. reported in (2005) 11 SCC 149***. while considering fixed capital investment for grant of exemption under notification dated February 21, 1996. The Hon'ble Supreme Court relied upon "purchase price" as defined under Section 2(gg) of the UPTTA, 1948.

iv. The law of the land as propounded by the Hon'ble Supreme Court in the aforementioned judgments could not be placed before this Court, hence the present review application is being filed herewith for kind consideration before this Court.

v. On the facts and circumstances stated above, it is absolutely necessary in the interest of justice that the judgment passed by this Court on February 15, 2010 be reviewed, and the present application filed by the Respondent be allowed and the appropriate order be passed in accordance with law, otherwise the Respondent would suffer irreparable loss and injury.

CONTENTIONS OF THE REVISIONIST

6. Shri Devashish Bharuka, learned Senior Counsel assisted by Shri Pratik J. Nagar, learned counsel appearing on behalf of the Revisionist has made the following submissions:

i. The Respondent had challenged the main judgment of this Court dated February 15, 2010 before the Hon'ble Supreme Court in Special Leave Petition (Civil) No. 13259 of 2010. The same was withdrawn by the Respondent on the ground that, the *"the main question of law, which arose from the order passed by the Trade Tax Tribunal, U.P., has not been dealt with in the impugned judgment and, therefore, the petitioner would like to file a review application before the High Court"*. Accordingly, the Special Leave Petition was dismissed by the Hon'ble Supreme Court as '*not pressed'*.

ii. In view of the aforesaid liberty, the Respondent has filed the instant review petition. However, instead of pointing out as to which 'main question of law' has not been dealt with by this Court in the main judgment dated February 15, 2010, the Respondent has taken a completely different stand in the instant review application. It has been averred that, "the relevant law which

could not be pointed out at the time of argument before this Hon'ble Court was the law laid down by the Apex Court". Further, the Respondent also admits that the question of law has been answered by this Court. Thus, the very basis on which liberty was sought from the Hon'ble Supreme Court to file review petition stands obliterated by the averments of the Respondent itself.

iii. The review petition cannot be said to be maintainable on the basis of the sole ground taken by the Respondent. It is well settled that failure to place judgments cannot be a ground for review. Reference in this regard is made to the judgment of the Hon'ble Supreme Court in ***Dokka Samuel -v- Dr Jacob Lazarus Chelly reported in (1997) 4 SCC 478.***

iv. Furthermore, the limited scope of review petition requires 'an error apparent on the face of the record'. It is an admitted position that the two judgments referred to by the Respondent were not even placed before this Court and therefore, are not a part of the record. The basic requirement of 'error apparent on the face of the record', therefore is not even fulfilled in the present review petition.

v. Further, the Hon'ble Supreme Court has in ***Arun Dev Upadhyaya -v- Integrated Sales Service Limited reported in (2023) 8 SCC 11*** has reiterated the well-settled principles of review.

vi. The grounds taken in the present review petition are nothing but an appeal in the guise of a review petition. The attempt of the Respondent to rely upon two judgments of the Hon'ble Supreme Court to reopen issues already decided on merits by this Court is nothing but inviting this Court to sit in appeal over its own order.

vii. In view of the aforesaid, it is submitted that this Court may be pleased to dismiss the review petition with costs.

ANALYSIS AND CONCLUSION

7. I have heard the learned counsel appearing for the parties and perused the materials on record.

8. Before delving into the merits of the instant review petition, it would be prudent on my part to lay thread bare the principles governing the exercise of review jurisdiction.

9. Justice V.R. Krishna Iyer, as eloquent as ever, encapsulated the scope of review jurisdiction in ***Northern India Caterers (India) Ltd. -v- Ltd. Governor of Delhi reported in (1980) 2 SCC 167*** as follows:

"A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result."

10. In its judgment in ***Aribam Tuleshwar Sharma -v- Pishak Sharma reported in (1979) 4 SCC 389,*** the Hon'ble Supreme Court propounded that review power and appellate power are inherently distinct. While the appellate power enables the courts to rectify all manners of errors in the judgment or order under challenge, review power does not. Relevant paragraph is extracted herein below:

"3. The Judicial Commissioner gave two reasons for reviewing his predecessor's order. The first was that his predecessor had overlooked two important documents Exs. A-1 and A-3 which showed that the respondents were in possession of the sites even in the year 1948-49 and that the grants must have been made even by

then. The second was that there was a patent illegality in permitting the appellant to question, in a single writ petition, settlement made in favour of different respondents. We are afraid that neither of the reasons mentioned by the learned Judicial Commissioner constitutes a ground for review. It is true as observed by this Court in Shivdeo Singh v. State of Punjab [AIR 1963 SC 1909] there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

(Emphasis Added)

11. At this juncture, I consider it prudent to refer to Order 47 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC, 1908') which delineates the boundary within which the review jurisdiction is to be exercised: -

"(a) From the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant;

(b) Such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and

(c) On account of some mistake or error apparent on the record or any other sufficient reason."

12. Recently, in ***Arun Dev Upadhyaya (supra),*** the Hon'ble Supreme Court reiterated that review power is to be exercised strictly within the confines of Order 47 Rule 1 of CPC, 1908. Relevant paragraphs are reproduced herein below:

"34. In another case between Shanti Conductors (P) Ltd. v. Assam SEB [Shanti Conductors (P) Ltd. v. Assam SEB, (2020) 2 SCC 677 : (2020) 2 SCC (Civ) 788] , this Court observed that scope of review under Order 47 Rule 1 read with Section 114CPC is limited and under the guise of review, the petitioner cannot be permitted to reagitate and reargue questions which have already been addressed and decided. It was further observed that an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record.

35. From the above, it is evident that a power to review cannot be exercised as an appellate power and has to be strictly confined to the scope and ambit of Order 47 Rule 1CPC. An error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions."

13. In ***Parsion Devi -v- Sumitri Devi reported in (1997) 8 SCC 715***, the Hon'ble Supreme Court espoused that the power

under Order 47 Rule 1 of the CPC, 1908 does not allow for an erroneous decision to be "reheard and corrected." Relevant paragraphs are extracted below:

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P. [AIR 1964 SC 1372 : (1964) 5 SCR 174] (SCR at p. 186) this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

(emphasis ours)

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury [(1995) 1 SCC 170] while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389] this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

(Emphasis Added)

14. In its judgment in ***S. Madhusudhan Reddy -v- Narayana Reddy reported in 2022 SCC OnLine SC 1034,*** the Hon'ble Supreme Court reiterated the limited grounds on which a review petition can be assailed under the provisions of the CPC, 1908. The relevant paragrph reads as under:

"3. The Judicial Commissioner gave two reasons for reviewing his predecessor's order. The first was that his predecessor had overlooked two important documents Exs. A-1 and A-3 which showed that the respondents were in possession of the sites even in the year 1948-49 and that the grants must have been made even by then. The second was that there was a patent illegality in permitting the appellant to question, in a single writ petition, settlement made in favour of different respondents. We are afraid that neither of the reasons mentioned by the learned Judicial Commissioner constitutes a ground for review. It is true as observed by this Court in Shivdeo Singh v. State of Punjab [AIR 1963 SC 1909] there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary

jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

(Emphasis Added)

15. In the cauldron of litigation, where passions run high and stakes are higher still, the temptation to misuse review jurisdiction may be great. Yet, it is a temptation that must be resisted at all costs, for to succumb to it would be to betray the very essence of justice itself. Review jurisdiction is not a tool for the litigious or the disgruntled, it is a mechanism for safeguarding the integrity of the judicial process, for ensuring that justice remains blind to all but the merits of the case. Wielding the power of review jurisdiction carries a weighty burden – one that demands unyielding diligence and meticulousness. Courts must resist the siren call of extraneous influences or the temptation to revisit contentious issues. The realm of review jurisdiction is a realm of perpetual tension – a tension between the imperative of finality and the exigency of correction, between the sanctity of precedent and the call for innovation. It is a tension that demands a delicate balancing act – one that calls for the wisdom of Solomon and the impartiality of Lady Justice herself. And therefore, review jurisdiction is not a weapon to be wielded recklessly but a shield to safeguard the sanctity of the legal process.

16. Unlike the fabled sword of Damocles, review jurisdiction cannot be allowed to be hung precariously above the head of litigants, threatening the delicate balance of legal certainty. Order 47 Rule 1 of the CPC, 1908 stands as a sentinel – a guardian of the gates, permitting entry only to those deemed worthy by the stringent criteria it lays forth. It serves as a bulwark against the tide of caprice and whim.

17. In **Shri Ram Sahu (Dead) through Legal Representatives and Others -v- Vinod Kumar Rawat and Others reported in (2021) 13 SCC 1**, the Hon'ble Supreme Court after examining precedents reiterated and delineated the principles of review –

"7.1. In Haridas Das v. Usha Rani Banik [Haridas Das v. Usha Rani Banik, (2006) 4 SCC 78] while considering the scope and ambit of Section 114CPC read with Order 47 Rule 1CPC it is observed and held in paras 14 to 18 as under :

"14. In Meera Bhanja v. Nirmala Kumari Choudhury [Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170] it was held that :

'8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1CPC. In connection with the limitation of the powers of the court under Order 47 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders

under Article 226 of the Constitution of India, this Court in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389] speaking through Chinnappa Reddy, J. has made the following pertinent observations :

"3. ... It is true ... there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

15. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought : (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

16. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389] , this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under : (SCC p. 390, para 3)

'3. It is true as observed by this Court in Shivdev Singh v. State of Punjab [Shivdev Singh v. State of Punjab, AIR 1963 SC 1909] there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court.'

17. The judgment in Aribam case [Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389] has been followed in Meera Bhanja [Meera Bhanja v.

Nirmala Kumari Choudhury, (1995) 1 SCC 170] . In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long-drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale [Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137] were also noted :

'17. ... An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ.'

18. It is also pertinent to mention the observations of this Court in Parsion Devi v. Sumitri Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715] . Relying upon the judgments in Aribam [Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389] and Meera Bhanja [Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170] it was observed as under:

'9. Under Order 47 Rule 1CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1CPC. In exercise of the jurisdiction under Order 47 Rule 1CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'.'

7.2. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056] , it is observed and held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. It is further observed in the said decision that the words "any other sufficient reason" appearing in Order 47 Rule 1CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram v. Neki [Chhajju Ram v. Neki, 1922 SCC OnLine PC 11 : (1921-22) 49 IA 144 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Mar Poulose Athanasius [Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, AIR 1954 SC 526] .

7.3. In Inderchand Jain v. Motilal [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] in paras 7 to 11 it is observed and held as under :

"7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code mean subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration. Section 114 of the

Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under : (Kamal Sengupta case [State of W.B. v. Kamal Sengupta, (2008) 8 SCC 612 : (2008) 2 SCC (L&S) 735] ,

'17. The power of a civil court to review its judgment/decision is traceable in Section 114CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1CPC, which reads as under:

"1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order." '

8. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajender Kumar v. Rambhai [Rajender Kumar v. Rambhai, (2007) 15 SCC 513 : (2010) 3 SCC (Cri) 584] this Court held :

'6. The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed.'

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056] this Court held :

'56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.'

8. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction

or improvement". It cannot be denied that the review is the creation of a statute. In Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji [Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844] , this Court has held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise.

9. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by this Court in T.C. Basappa v. T. Nagappa [T.C. Basappa v. T. Nagappa, AIR 1954 SC 440] . It is held that such an error is an error which is a patent error and not a mere wrong decision. In Hari Vishnu Kamath v. Syed Ahmad Ishaque [Hari Vishnu Kamath v. Syed Ahmad Ishaque, (1955) 1 SCR 1104 : AIR 1955 SC 233] , it is observed as under : (SCC p. 244, para 23)

"23. ... It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? The learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

18. Nobody is perfect. This timeless adage resonates deeply within the realm of the judiciary, where judges, though addressed with titles like "Your Lordships", are not immune to fallibility. Recognizing this fundamental truth and to prevent miscarriage of justice, High Courts, as Courts of Record under Article 215 of the Constitution of India possess the inherent power to review their own orders. However, in recent times, there has been a misconception that review jurisdiction is tantamount to an appeal – a second chance to argue an already settled matter. At its core, review jurisdiction is a solemn duty bestowed upon the High Courts to rectify errors that may have crept into their judgments. It is not an avenue for re-argument or a platform for dissatisfied litigants to reiterate their grievances. Instead, it serves as a bulwark against miscarriage of justice, providing a mechanism for the correction of judicial fallibility. Judges, like all human beings, are liable to err. Thus, review jurisdiction stands as a sentinel against the tyranny of erroneous judgments, upholding the integrity of the judicial process.

19. Yet, the misconception persists that review jurisdiction offers litigants a second bite at the cherry – a chance to reopen settled matters and re-litigate issues already adjudicated upon. This notion not only undermines the finality of judgments but also erodes the sanctity of judicial pronouncements. As Justice Felix Frankfurter once remarked, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Review jurisdiction, when exercised judiciously, embodies this wisdom – it is a beacon of hope for those aggrieved by manifest injustice, offering solace in the face of adversity. At its core, review jurisdiction is about scrutiny, not re-litigation. It is about examining the record of proceedings with a discerning eye, searching for errors of law, fact, or procedure. It is not a second chance for litigants to present their case anew or to introduce fresh evidence. Rather, it is a solemn duty entrusted to the judiciary, a duty to ensure that justice is not just done, but seen to be done.

20. The jurisprudence surrounding the power of review is as intricate as it is unequivocal. It delineates a stringent

criterion wherein an appellant, desiring to invoke the mechanism of review against a judgment or order, must demonstrate the unearthing of new and pivotal matter or evidence – a revelation that, despite exhaustive and diligent inquiry, remained elusive to the court's purview. This requirement embodies the essence of due diligence, mandating not merely a cursory glance but a thorough excavation into the depths of legal enquiry. Review jurisdiction is not to be misconstrued as a second bite at the proverbial apple, granting aggrieved parties an opportunity to rehash matters already adjudicated upon. In review jurisdiction, courts act as third umpires. Their authority is circumscribed by the confines of the record before them, limiting their purview to errors glaringly evident on the face of record. Should the pursuit of rectifying an alleged error necessitate a deeper and thorough examination, it stands to reason that such an error cannot be deemed 'apparent' in the truest sense.

21. Coming to the merits of the instant review, the ground taken by the Respondent that important judgments of the Hon'ble Supreme could not be submitted before this Court, does not merit the exercise of the power of review since the Respondent failed to establish that despite exercise of proper due diligence, the aforesaid judgments could not be brought to light. In any case, as held by the Hon'ble Supreme Court in ***Dokka Samuel (supra),*** failure to produce a judgment would not tantamount to an error apparent on the face of the record. Relevant paragraph from the aforesaid judgment is extracted herein:

"4. It is seen that by an order passed by this Court on 24-11-1995, liberty was given to the appellant, in the event of the High Court reviewing the order on merits against him, to agitate his rights in this Court. The question is whether the High Court was justified in reviewing the earlier order and reversing the finding recorded by the appellate court. It is not in dispute that the sale deed is for a small sum of Rs 300 and odd and that the property sold commands good market value. The question arises whether the document was a sale deed or is only a document for collateral purpose. The respondent himself in an earlier suit had pleaded that it was an agreement of sale. In view of such an admission, the High Court has wrongly reversed the decree of the appellate court holding the transaction to be a real sale. In the second appeal, the High Court confirmed, in the first instance, the decree of the appellate court. Subsequently, the High Court has reviewed the judgment and reconsidered the matter holding that relevant precedents were not cited. Since this Court had given liberty to raise the questions of reviewability of the judgment of the High Court, the question arises whether the High Court could not have embarked upon appreciation of evidence and considered whether there was an error apparent on the face of the record. It was contended before the learned Single Judge that various decisions were not cited; proper consideration was paid; in fact the sale deed was acted upon; and that there was no proof that the sale was not for valid consideration. The omission to cite an authority of law is not a ground for reviewing the prior judgment saying that there is an error apparent on the face of the record, since the counsel has committed an error in not bringing to the notice of the court the relevant precedents. In fact, since the respondent had claimed that it is not a sale deed but was executed for collateral purpose, it was for the respondent to establish that the sale was for real consideration and he had a valid sale deed

duly executed by the appellant. The High Court wrongly placed the burden on the appellant and reviewed the order and heard the matter on merits. The entire approach of the learned Single Judge is not correct in law."

22. Mere failure to cite a judgment does not, in and of itself, render the original judgment flawed. Review jurisdiction is not a panacea for addressing every perceived deficiency or oversight in the original judgment; rather it is a narrow avenue reserved for rectifying errors glaringly evident on the face of the record. Failure to cite a particular judgment does not automatically invalidate the reasoning or merit of the decision under question.

23. What is also surprising to me is that although the ground taken by the Respondent to withdraw their Special Leave Petition before the Hon'ble Supreme Court was liberty to approach this Court since as per them the main question of law was not decided by this Court in its judgment on February 15, 2010, the said ground does not find any mention in the instant review application. The failure to articulate consistent grounds for seeking review calls into question the bona fides of the Respondent's application. One would expect that if a significant aspect of the case was left unaddressed in a prior judgment, as alleged by the Respondent before the Hon'ble Supreme Court, would be foremost among the reason cited for seeking review. This inconsistent approach adopted by the Respondent could not be explained by them before this Court.

24. At this point, my mind goes back to the elegant words of Justice Krishna Iyer in ***P.N. Eswara Iyer and Ors. -v- Registrar, Supreme Court of India reported in (1980) 4 SCC 680***. Since the instant judgment began with his words of wisdom, it is only fair that it ends with them too:

"..... unchecked review has never been the rule. It must be supported by proper grounds. Otherwise, every disappointed litigant may avenge his defeat by a routine review adventure and thus obstruct the disposal of the 'virgin' dockets waiting in the long queuefor preliminary screening or careful final hearing....."

Justice Krishna Iyer further stated:

"Even otherwise, frivolous motions for review would ignite the 'gambling' element in litigation with the finality of judgments even by the highest court, being left in suspense. If, every vanquished party has a fling at 'review' lucky dip and if, perchance, notice were issued in some cases to the opponent the latter-and, of course, the former, -would be put to great expense and anxiety. The very solemnity of finality, so crucial to judicial justice, would be frustrated if such a game were to become popular."

25. In light of the aforesaid discussion and law, this Court finds no merit in the instant review application preferred against the order dated February 15, 2010. Accordingly, the same is dismissed.

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

(2024) 5 ILRA 1560
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 523 of 2024

Santosh Kumar & Ors. ...Petitioners
Versus
Board of Revenue, U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Anurag Srivastava, Manoj Kumar Rai

Counsel for the Respondents:
C.S.C., Anshuman Singh, Dilip Kumar Pandey, Karan Srivastava

Constitution of India, Article 226 - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Obligations of Litigants - Abuse of Process of Court - Necessity of full disclosure of facts and the duty to approach the court with 'clean hands'. Litigants who mislead or deceive the court are not entitled to any relief. In the instant case, petitioners filed copy of an unregistered will for mutation, which the Tehsildar after highlighting shortcomings rejected it. Petitioners in the revision had not taken this ground that they had not filed any unregistered Will or the unregistered Will which was filed by the petitioners is not the same which was referred in the order of Tehsildar. Petitioners filed a second unregistered will of the same date, rectifying all the shortcomings pointed out by the Tehsildar. Held: This amounts to nothing but cheating, fraud, and misleading the courts, constituting an abuse of process. The writ petition was dismissed with costs of ₹50,000 (Fifty Thousand Rupees) due to their conduct, which misused the legal process. (Para 28, 31, 35)

Dismissed. (E-5)

List of Cases cited:

Kishore Samrite Vs St. of U.P. & ors. reported in Manu/SC/0892/2012

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

1. Shri Anshuman Singh, learned counsel for the respondent no.9 has filed a short counter affidavit bringing on record the copies of the sale deed and the memo of revision filed by the petitioners, which is taken on record.

2. The learned counsels for the parties state that it would not be necessary to file the detailed counter affidavit or the rejoinder affidavit and the matter may be heard finally, at this stage.

3. Learned Counsel for the petitioners has also filed a certified copy of the memo of revision preferred by the petitioners under Section 219 of the U.P. Land Revenue Act, 1901 (hereinafter referred to as, the Act, 1901) against the order of the Tehsildar dated 21.01.2013, the same is taken on record.

4. Heard Shri Anurag Shrivastava, learned Counsel for the petitioners, Shri Hemant Kumar Pandey, learned Standing Counsel for the State and Shri Anshuman Singh, learned counsel for the respondent no. 9.

5. Present petition has been preferred with the following main reliefs:-

"i) To issue a writ order or direction in the nature of certiorari thereby quashing impugned judgment and order dated 28.3.2024 passed by the opposite party no.1 in Second Appeal No.56 of 2015 as contained in Annexure-14 to the writ petition;

ii) To issue a writ order or direction in the nature of certiorari thereby quashing the impugned judgment and order dated 18.12.2014 passed by the Additional Commissioner (Judicial) Second, Lucknow Mandal, Lucknow i.e, opposite party no.2 in Appeal No.C20141000002607, judgment and order dated 13.10.2014 passed by the Sub-divisional Magistrate, Sadar, Rae-bareli i.e. opposite party no.5 in Case No.233, judgment and order dated 11.3.2014 passed by the Additional Commissioner (Administration), Lucknow

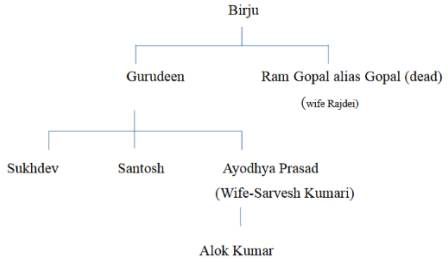
Mandal, Lucknow i.e. opposite party no.3 in Revision No.582/2012-13 as well as judgment and order dated 21.1.2013 passed by the Tehsildar Sadar, Rae-bareli ie, opposite party no.5 in Case No.746 which are contained in Annexure-10, 8, 5 & 3 respectively to the writ petition;

iii) To issue a writ order or direction in the nature of mandamus thereby directing the opposite parties no.1 to 6 not to implement the impugned judgment and orders as contained in Annexure- 14,10, 8, 5 & 3 respectively to the writ petition;"

6. Learned Counsel for the petitioners has submitted that the petitioner no. 1 is the nephew of late Ram Gopal alias Gopal, petitioner no. 2 is the wife of nephew of late Ram Gopal and petitioner no. 3 is son of petitioner no. 2.

7. It is further submitted that the dispute in the present case is with regard to Plot Nos. 242/0.5369, 245M/0.0060, 261M/0.039, 262M/0.0080 and 5/0.264 situated at Village Kisunpur Ram Chandar, Pargana & Tehsil Sadar, District Rae Bareli.

8. It is further submitted that the petitioners belong to the same family which the late Ram Gopal belonged. Dispute is with regard to the property belonging to the late Ram Gopal. For convenience, the pedigree is quoted hereinbelow:-



9. It is further submitted that petitioners had come to know about the unregistered Will dated 25.07.2003 executed by late Ram Gopal in favour of Gurudeen, Santosh Kumar and Ayodhya Prasad. After the demise of Ayodhya Prasad, petitioner nos. 2 and 3 being the wife and son of late Ayodhya Prasad respectively step into the shoes of late Ayodhya Prasad.

10. After getting the copy of unregistered Will dated 25.07.2003, the petitioners moved an application before the Tehsildar under Section 34 of the U.P. Revenue Code, 2006 (hereinafter referred to as, the Code, 2006) for mutation of their names in the revenue records in place of late Ram Gopal. The application preferred by the petitioners was rejected by the Tehsildar by order dated 21.01.2013. Against the said order, petitioners had preferred a revision which was also dismissed by judgment and order dated 11.03.2014. Assailing the said order, petitioners had approached this Court by filing Writ Petition No. 10446 (M/B) of 2012, which was also dismissed by this Court by its judgment and order dated 19.12.2012 with liberty to the petitioners to avail appropriate alternative remedy for the claim of title.

11. It is further submitted that after the judgment of this Court dated 19.12.2012, petitioners had preferred a Suit under Section 229 (B) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as, the Act, 1950), claiming their rights on the basis of unregistered Will dated 25.07.2003. The Suit of the petitioners was dismissed by judgment and order dated 13.10.2014. Against the said order, the petitioners filed a First Appeal under Section 331 of the Act, 1950 with a specific pleading therein that the petitioners had filed only four documents

before the Tehsildar and no unregistered Will was produced before the Tehsildar but the Tehsildar passed the order by referring some unregistered Will. The said Appeal preferred by the petitioners was rejected/dismissed by the judgment and order dated 18.12.2014. Against the judgment and order passed in the First Appeal, the petitioners preferred a Second Appeal under Section 331 (4) of the Act, 1950, which was also dismissed by impugned order dated 28.03.2024 and thus, feeling aggrieved, the present petition has been filed before this Court impugning the orders passed.

12. It is further submitted that the Courts below had failed to appreciate or had ignored the fact that the petitioners had never filed any copy of unregistered Will before the Tehsildar but the findings were recorded by the Tehsildar in his order dated 21.01.2013 regarding the unregistered Will, all the Courts below had decided the cases against the petitioners on the basis of findings given by the Tehsildar in the order dated 21.03.2013 related to the unregistered Will, which was neither filed by the petitioners nor claim was on the basis of any unregistered Will.

13. It is further submitted that the unregistered Will produced by the petitioners in the First Appeal filed under Section 331of the Act, 1950 was never proved and the findings have been given by the Court up to the stage of Second Appeal, whereas it is necessary that if any document had been relied by the petitioners then it should be proved hence, the orders passed against the petitioners are bad in the eyes of law and are liable to be quashed.

14. On the other hand, Shri Hemant Kumar Pandey, learned Standing Counsel and Shri Anshuman Singh, learned Counsel for the respondent no. 9 have submitted that the petitioners since the very beginning playing fraud with the Court by taking different stands before the different Courts or the authorities.

15. It is further submitted that the petitioners had produced two forged unregistered Wills of the same date and when the first unregistered Will was not accepted by the Tehsildar in the proceedings under Section 34 of the Act, 2006 preferred by the petitioners by assigning reasons for not accepting the unregistered Will. Thereafter the petitioners produced a second unregistered Will of the same date removing all the defects and came forward with a case that before Tehsildar they had not filed any unregistered Will on which the findings were given by the Tehsildar and that too, the said objection or ground was taken for the first time at the stage of first appeal preferred against the judgment and order passed under Section 229-B of the Act, 1950 and prior to that, at no point of time, the petitioners had raised such ground or plea in any of the proceedings.

16. It is further submitted that the petitioners have intentionally not enclosed copy of revision preferred against the judgment and order dated 21.01.2013 passed by the Tehsildar and the reason is obvious that in the said revision, the petitioners had not raised any such plea which was taken at the time of filing of first appeal. Copy of revision has been placed by the respondent no. 9 before this Court by filing a short counter affidavit as annexure no. C.A.-2 of the said affidavit.

17. Learned counsel for the petitioners has also produced the certified copy of the revision, which has also been taken on

record as is mentioned in preceding paragraph of the judgment.

18. It is further submitted that the petitioners are trying to grab the property of widow lady i.e. their aunt, aunt-in-law, aunt grandmother of the petitioners respectively.

19. After hearing learned counsel for the parties and going through the record of the case, it is an undisputed fact between the parties that the dispute involved in the present writ petition is with regard to Plot Nos. 242/0.5369, 245M/0.0060, 261M/0.039, 262M/0.0080 and 5/0.264 situated at Village Kisunpur Ram Chandar, Pargana & Tehsil Sadar, District Rae Bareli belonged to late Ram Gopal, who was the uncle of petitioner no. 1, uncle -in-law of the petitioner no. 2 and petitioner no. 3 is the grandson of brother of late Ram Gopal.

20. The issue which is to be adjudicated in the present case is that whether as per petitioners that they had never filed any unregistered Will before the Tehsildar and in absence of any unregistered Will filed by them, how the findings were given by the Tehsildar on the unregistered Will dated 25.07.2003 and on the basis of which, all the courts had drawn inference against the petitioners and not believed the unregistered Will of the same date. For adjudicating these points, it is necessary to reproduce certain documents.

21. Firstly, para no. 5 of the application preferred by the petitioners under Section 34 of the Code, 2006, before the Tehsildar. The said paragraph is quoted hereinbelow:-

"यह कि वादीगण के पिता की मृत्यु के उपरान्त प्रतिपक्षी द्वारा जमीन बेचने की धमकी देने पर वादीगणों ने तहसील आकर इन्तखाब खतौनी ली तो जानकारी हुई कि वादीगण के पिता के नाम संपूर्ण भूमि न दर्ज होकर सहखातेदारी में सरजूदेई पत्नी राम गोपाल का नाम दर्ज है। तब प्रार्थी ने अपने घर में पिता के द्वारा रखे कागजातों को देखा तो पता चला कि चाचा गोपाल पुत्र बिरजू के द्वारा लिखी अपंजीकृत वसीयतनामा दि० 25-07-2003 में वादीगण का नाम था उक्त अपंजीकृत वसीयतनामा के आधार पर कोई वाद न तो श्रीमान् जी के यहाँ दाखिल किया गया था न ही वादीगणों का नाम कागजात सरकारी में दर्ज हुआ।"

22. The revision preferred by the petitioners against the judgment and order of the Tehsildar dated 21.01.2013, which is filed as Annexure No. S.C.A. 2 of the short counter affidavit filed on behalf of respondent no. 9 after tallying with the certified copy of the same provided by learned counsel for the petitioners. The same is quoted hereinbelow:-

"न्यायालय श्रीमान् आयुक्त महोदय, लखनऊ मण्डल, लखनऊ।

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निगरानी संख्या 582 वर्ष 2012-2013

अन्तर्गत धारा 219 भू-राजस्व अधिनियम

जनपद- रायबरेली।

1. सन्तोष कुमार पुत्रगण स्वर्गीय गुरुदीन निवासीगण ग्राम अहियारायपुर,

2. अयोध्या प्रसाद परगना व तहील सदर, जनपद-रायबरेली।

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निगरानीकर्तागण

बनाम

श्रीमती सरजू देई तथा कथित पत्नी गोपाल निवासिनी ग्राम किशुनपुर रामचन्दर, परगना, तहसील व जनपद-रायबरेली।

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निगरानी अन्तर्गत धारा 219 भू-राजस्व अधिनियम

विरुद्ध आदेश दिनांक 21.1.2013 पारित द्वारा श्रीमान् तहसीलदार सदर, जनपद रायबरेली बावत वाद संख्या 746 अ०, धारा 34 भू-राजस्व अधिनियम बमुकदमा सन्तोष कुमार मौर्य बनाम सरजू देई विवादित भूमि गाटा संख्या 242 मि० रकबा 0.5360, 245 मि०/0.0060, 261 मि०/0.0390 व 262 मि०/0.0080 हे० स्थित ग्राम किशुनपुर, रामचन्दर, परगना तहसील व जनपद-रायबरेली।

महोदय,

निगरानीकर्ता उपरोक्त निगरानी श्रीमान् जी के समक्ष निम्नलिखित तथ्यों, तर्कों एवं आधारों पर प्रस्तुत कर रहा हैः-

1. यहकि उपरोक्त निगरानी में प्रश्नगत भूमि के मूल खातेदार गोपाल पुत्र बिरजू थे जिनके कोई औलाद लड़का, लड़की नहीं है।

2. यहकि उपरोक्त गोपाल पुत्र बिरजू ने अपने जीवन काल में दिनांक 25.07.2003 को निगरानीकर्ता के पक्ष में एक वसीयतनामा निष्पादित कर दिया था।

3. यहकि उपरोक्त गोपाल पुत्र बिरजू की मृत्यु दिनांक 16.11.2003 को हो गयी उसके बाद निगरानीकर्तागण ने वसीयतनामें के आधार पर एक नामान्तरण वाद परीक्षण न्यायालय के समक्ष प्रस्तुत किया।

4. यहकि उपरोक्त नामान्तरण वाद में विपक्षिनी द्वारा स्वयं को उपरोक्त गोपाल पुत्र बिरजू की पत्नी बताते हुये एक आपत्ति प्रस्तुत की गयी।

5. यहकि उपरोक्त वाद नायब तहसीलदार पश्चिमी रायबरेली के समक्ष विचाराधीन था तथा दिनांक 2.2.2013 को सुनवाई हेतु नियत था।

6. यहकि विपक्षी द्वारा एक स्थानान्तरण प्रार्थन-पत्र न्यायालय उपजिलाधिकारी सदर, रायबरेली के समक्ष दिनांक 31.12.2012 को प्रस्तुत किया गया जिस पर उपजिलाधिकारी रायबरेली द्वारा उपरोक्त वाद तहसीलदार सदर, रायबरेली के न्यायायलय में स्थानान्तरित कर दिया गया तथा सुनवाई की तिथि 2.2.2013 के स्थान पर दिनांक 17.1.2013 कर दी गयी इसकी कोई समन/सूचना अथवा जानकारी निगरानीकर्ता को नहीं दी गयी।

7. यहकि विद्वान तहसीलदार सदर द्वारा हस्तान्तरित वाद पत्रावली में निगरानीकर्ता को बिना कोई समन/सूचना दिये दिनांक 21.1.2013 की तिथि नियत कर दी गयी।

8. यहकि दिनांक 21.1.2013 को तहसीलदार सदर, रायबरेली द्वारा एकपक्षीय रूप से केवल आपत्तिकर्ता की बहस सुनकर हितवद्ध पक्षकार की भांति व्यवहार करते हुये निगरानीकर्ता का नामान्तरण वाद निरस्त कर दिया तथा विपक्षी की आपत्ति स्वीकार कर लिया।

9. यहकि विद्वान अवर न्यायालय द्वारा पारित आदेश दिनांक 21.1.2013 विधि विरुद्ध तथ्यों से परे तथा क्षेत्राधिकार से बाहर होने के कारण निरस्त होने योग्य है।

:: प्रार्थना ::

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अतः न्यायालय श्रीमान् जी से निवेदन है कि अवर न्यायालय की पत्रावली तलब करके उसके परीक्षणोपरान्त निगरानी स्वीकार करते हुये अवर न्यायालय द्वारा पारित प्रश्नगत आदेश दिनांक 21.1.2013 निरस्त करने की कृपा करें।

अस्तु न्यायालय श्रीमान् जी से अग्रिम निवेदन यह भी है कि दौरान निगरानी अवर न्यायालय द्वारा पारित प्रश्नगत आदेश दिनांक 21.1.2013 का क्रियान्वयन व प्रभाव स्थगित करने की कृपा करें।

लखनऊ

दिनांकः- 23.01.13 अनिल कुमार सिंह

एडवोकेट

अधिवक्ता निगरानीकर्ता"

23. Paragraph no. 8 of the suit filed by the petitioners under Section 229-B of the Act, 1950, which is quoted hereinbelow:-

".यह कि प्रतिवादी संख्या-1 ने फर्जी तथ्यों के आधार पर राजस्व अधिकारियों से साठ-गांठ करके अपने नाम प०क०-11 अंकित करंवा लिया जिसकी जानकारी वादीगण को होने पर वादीगण द्वारा तहसील आकर इन्तेखाब खतौनी हासिल की तब वादीगण को जानकारी हुई कि वादीगण के चाचा मृतक गोपाल के स्थान पर जरिये प०क०-11 सरजूदेई विधवा गोपाल अंकित हो गया था। वादी संख्या-1 वापस घर आया और वादी संख्या-2 से उक्त बाबत बताया तब वादी संख्या-2 ने कहा कि पिताजी का एक बक्शा रखा है, चलो देखते हैं। पिता जी के बक्से को खोलकर रखे कागजात को देखा तो उसमें अन्य कागजातों के साथ एक अपंजीकृत वसीयतनामा दिनांक 25-07-2003 मिला जिसके आधार परं वादीगणों ने दाखिल खारिज व गलत प०क०-11 को निरस्त करने हेतु प्रार्थना-पत्र दिया जो नायब तहसीलदार (दक्षिणी) के यहाँ से स्थानान्तरित होकर तहसीलदार महोदय के यहाँ आयी, जहाँ पर तहसीलदार महोदय ने बिना वादीगण को सुने हुए वाद को एकपक्षीय रूप से निर्णित कर दिया, जिसके विरूद्ध माननीय अपर आयुक्त लखनऊ मण्डल, लखनऊ में दाखिल की, जिसमें अपर आयुक्त महोदय द्वारा दौरान निगरानी मौके पर यथास्थित बनाये रखे जाने का आदेश पारित कर दिया। दौरान मुकदमा प्रतिपक्षी संख्या-1 के हाथ बिना कब्जा दिये भूमि हस्तान्तरण करने की फिराक में है, जो विधि-विरूद्ध है और निरस्त किये जाने लायक है।

24. Uptill this stage, the petitioners had not come with a case before any of the courts that they had not filed any copy of the unregistered Will dated 25.07.2003 before the Tehsildar. For the first time, the plea or the ground was taken in the first appeal preferred by the petitioners against the judgment/order passed under Section 229-B of the Act, 1950 that they had filed only four documents before the Tehsildar. The relevant extract of the appeal preferred by the petitioner is quoted hereinbelow:-

"रेस्पाण्डेण्ट् संख्या-1 के पक्ष में दर्ज किया गया उक्त अवैध इन्द्रराज अपीलाण्ट द्वारा धारा-34 भू० रा० अ० के तहत जरिये अपंजीकृत वसीयतनामा चैलेन्ज किया गया जो सुनवाई हेतु मुन्तकिल होकर के नायब तहसीलदार पश्चिमी तहसील रायबरेली के समक्ष गया। उक्त दाखिल खारिज वाद मे अपीलाण्ट्स की ओर से कुल चार प्रपत्र प्रस्तुत किये गये थे :–

01 इंतेखाब खतौनी खाता संख्या-30 फ० सन 1416-1421 ग्राम छिबलामऊ

02 इंतेखाब खतौनी खाता संख्या-756 फ० सन 1414-1419 ग्राम किशुनपुर रामचन्द्र

03 इंतेखाब खतौनी फ० सन 1414-1419 ग्राम किशुनपुर रामचन्द्र

04 इंतेखाब खतौनी फ० सन 1404-1409 ग्राम छिबलामऊ

उक्त प्रपत्र अपीलाण्ट्स की ओर से फेहरिस्त दिनांक 04.08.2012 को समक्ष न्यायालय तहसीलदार रायबरेली अपीलाण्ट्स की ओर से प्रस्तुत किये गये थे। उक्त प्रपत्रो के अतिरिक्त अन्य कोई भी प्रपत्र दाखिल खारिज प्रार्थना पत्र के साथ अपीलाण्ट्स की ओर से न तो तहसीलदार न्यायालय के समक्ष और न ही नायब तहसीलदार पश्चिमी तहसीलदार रायबरेली के समक्ष वाद मे अपीलाण्ट्स की ओर से प्रस्तुत किये गये थे।"

25. From the above mentioned relevant paragraphs quoted from the application, memo of revision and memo of appeal, it is clear that the petitioners had never ever taken this ground before any authority or the court that no unregistered Will was filed by the petitioners before the Tehsildar in the proceedings under Section 34 of the Act, 2006.

26. The petitioners, when they had come to know that they would not succeed then for the first time in the first appeal had taken a case or ground that before the Tehsildar, no unregistered Will was filed and also mentioned four documents which were filed by the petitioners and produced another unregistered Will of the same date by rectifying the mistakes pointed out in the order of Tehsildar dated 21.01.2013. The relevant extract of the said order passed by the Tehsildar dated 21.01.2013 is quoted hereinbelow:-

"मैंने आपत्तिकर्ता के विद्वान अधिवक्ता के तर्कों को सुना तथा पत्रावली का सम्यक अनुशीलन किया। विद्वान अधिवक्ता का कथन है कि प्रश्नगत अपंजीकृत वसीयत जाली, फर्जी कूट रचित है। उनका यह भी कथन है कि वसीयत में दिखाया गया हासिया गवाह की मृत्यु वसीयत निष्पादन की तिथि से पूर्व हो चुकी थी जिसकी विरासत दि 04.1.xx को राजस्व अभिलेखों में अंकित है। पत्रावली के अवलोकन से स्पष्ट है कि वादी द्वारा अपंजीकृत वसीयतनामा की छाया प्रति, इन्तखाब खतौनी ग्राम छिवलामऊ बाबत 1416-12 फ०खाता सं० 30, ग्राम किशुनपुर रामचन्दर की खतौनी सन 1414-1xx फ० खाता संख्या756 127, इन्तेखाब खतौनी ग्राम छिवलामऊ सन 1404-1409 फ० खाता संख्या 24दाखिल किया है। तथा प्रार्थना पत्र विरुद्ध पक। दि०5-3-04 तथा प्रार्थना पत्र स्थगन दाखिल किया है। पत्रावली पर रक्षित अपंजीकृत वसीयत नामा/छायाप्रति के अवलोकन से स्पष्ट है कि उस पर वसीयतकर्ता का फोटो भी नहीं लगा है। दावे को साबित करने का दायित्व वादी को होता है वादी द्वारा न तो अब तक मूल वसीयत दाखिल की गयी है और न मृतक गोपाल का मृत्यु प्रमाण पत्र ही दाखिल किया गया है। इससे मैं इस निष्कर्ष पर पहुँचता हूँ। वादी अपने दावे/अपंजीकृत वसीयत की पुष्टि न कराकर जानबूझकर न्यायालय से अनुपस्थित हो गये जिससे यही प्रतीत होता है प्रश्नगत अपंजीकृत वसीयत जाली एवं फर्जी है। आपत्तिकर्ता श्रीमती सरजूदेई की आपत्ति दिनांक 29-11-12 स्वीकार किये जाने योग्य है।

आदेश

अतः आपत्तिकर्त्री श्रीमती सरजूदेई की आपत्ति दिनांक 29-11-12 स्वीकार की जाती है। नामान्तरण प्रार्थना पत्र साक्ष्यों द्वारा साबित न किये जाने के कारण निरस्त किया जाता है। पत्रावली बाद अन्य आवश्यक कार्यवाही दाखिल दफ्तर हो।"

27. Even in the revisional order, there is a specific observation of the revisional authority that the petitioners had relied upon an unregistered Will dated 25.07.2003 which had various discrepancies as pointed out by the Tehsildar even that was never disputed by the petitioners. The relevant extract of the revisional order is quoted hereinbelow:-

"3- निगरानीकर्तागण की ओर से प्रस्तुत लिखित बहस में निगरानी मेमो में वर्णित कथनों को दोहराते हुए कहा गया कि वादग्रस्त भूमि के मूल खातेदार गोपाल पुत्र बिरजू थे, जिनके कोई लड़का-लड़की नहीं थे तथा उन्होंने अपने जीवनकाल में दिनांक 25.07 2003 को निगरानीकर्ता के पक्ष में एक वसीयतनामा निष्पादित कर दिया था। गोपाल की दिनांक 16.11.2003 को मृत्यु हो जाने के बाद निगरानीकर्तागण ने वसीयतनामे के आधार पर परीक्षण न्यायालय में नामान्तरण वाद योजित किया, जिसमें विपक्षी द्वारा स्वयं को गोपाल पुत्र बिरजू की पत्नी बताते हुए एक आपत्ति प्रस्तुत की गयी, जो नायब तहसीलदार (पश्चिमी), रायबरेली के समक्ष विचाराधीन था। विपक्षी द्वारा उपजिलाधिकारी, सदर, रायबरेली के न्यायालय में स्थानान्तरण प्रार्थना-पत्र प्रस्तुत करने पर प्रश्नगत वाद को तहसीलवार, सदर, रायबरेली के न्यायालय में स्थानान्तरित किया गया। निगरानीकर्तागण का कथन है कि अधीनस्थ न्यायालय द्वारा उसे बिना कोई सूचना दिये एकपक्षीय रूप से प्रश्नगत नामान्तरण वाद दिनांक 21.01.2013 को निरस्त कर दिया गया। उनका कथन है कि निगरानी स्वीकार करते हुए अधीनस्थ न्यायालय का प्रश्नगत आदेश निरस्त किया जाय।

4- विपक्षी द्वारा प्रस्तुत लिखित बहस में मुख्य रूप से यह कहा गया है कि निगरानीकर्तागण द्वारा अपंजीकृत वसीयतनामा दिनांक 25.07.2003 के आधार पर मूल खातेदार की मृत्यु के बाद लगभग 9 वर्षों के बाद दिनांक 04.08.2012 को नामान्तरण वाद प्रस्तुत किया गया। उक्त वाद में इश्तेहार जारी होने पर सरजू देई द्वारा दिनांक 29.11.2012 को आपत्ति प्रस्तुत की गयी। प्रस्तुत वसीयत में प्रथम पृष्ठ पर वसीयतकर्ता व गवाहों के हस्ताक्षर भी नहीं हैं तथा वसीयत के तथाकथित दूसरे गवाह जगदीश मौर्य पुत्र रघुनन्दन गौर्य की मृत्यु वसीयत की तिथि से पूर्व ही हो गयी थी। प्रस्तुत की गयी इसलिए उक्त तिथि के बाद प्रारम्भिक रूप से अपंजीकृत फर्जी कूटरचित वसीयत के आधार पर नामान्तरण वाद प्रस्तुत किया गया। उनका कथन है कि अधीनस्थ न्यायालय का प्रश्नगत आदेश गुण-दोष के आधार पर पारित किया गया है, जो पूर्णतया विधिसम्मत है। उनके द्वारा 2000-आरडी-पेज-10, 1997-एएलआर-पेज-448 तथा 2012-आरएलटी-पेज-561 व 2007 (103) आरडी-पेज-48 पर मा० राजस्व परिषद एवं मा० उच्च न्यायालय द्वारा दी गयी विधि व्यवस्था का सन्दर्भ दिया गया।

5- अधीनस्थ न्यायालय के प्रश्नगत आदेश एवं पत्रावली के अवलोकन से स्पष्ट है कि नामान्तरण न्यायालय द्वारा नियमानुसार

इश्तेहार जारी किये गये, जो बाद तामील वापस पत्रावली है। इस्तेहार जारी होने के उपरानत श्रीमती सरजू देई पत्नी गोपाल द्वारा आपत्ति दाखिल की गयी। अधीनस्थ न्यायालय द्वारा पत्रावली पर रक्षित अपंजीकृत वसीयतनामा का अवलोकन पर यह पाया गया कि वसीयत पर वसीयतकर्ता का फोटो नहीं लगा है। दावे को साबित करने का दायित्व वादी का होता है। वादी द्वारा न तो मूल वसीयत दाखिल की गयी और न ही मृतक गोपाल का मृत्यु प्रमाण-पत्र दाखिल किया गया। इस प्रकार वादी अपने दावे/अपंजीकृत वसीयत की पुष्टि न कराकर जानबूझकर न्यायालय से अनुपस्थित हो गये, जिससे यह प्रतीत होता है कि प्रश्नगत अपंजीकृत वसीयत जाली एवं फर्जी है। तद्नुसार अधीनस्थ न्यायालय द्वारा अपने आदेश दिनांक 21.01.2013 द्वारा आपत्तिकर्ता श्रीमती सरजू देई की आपत्ति को स्वीकार किया गया तथा नामान्तरण प्रार्थना-पत्र साक्ष्यों द्वारा साबित न किये जाने के कारण निरस्त किया गया। अधीनस्थ न्यायालय द्वारा पारित प्रश्नगत आदेश पूर्णतया विधि, साक्ष्य एवं तथ्यों पर आधारित है, जिसमें किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है। अतएव निगरानी बलहीन होने के कारण निरस्त किये जाने योग्य है।

<u>आदेश</u>

तद्नुसार निगरानी बलहीन होने के कारण निरस्त की जाती है। आदेश की एक प्रति सहित अधीनस्थ न्यायालय की पत्रावली वापस भेजी जाये तथा बाद आवश्यक कार्यवाही इस न्यायालय की पत्रावली अभिलेखागार में दाखिल-दफ्तर हो।

दिनांकः 11-03-2014"

28. The Hon'ble Supreme Court in the case of ***Kishore Samrite Vs. State of U.P. and others*** reported in ***Manu/SC/0892/2012*** has laid down some principles which would govern the obligations of a litigant while approaching the Court for redressal of any grievance and the consequences of abuse of process of Court. The relevant extract of para no. 29 of the said judgment is being reproduced hereinbelow:-

"29. Now, we shall deal with the question whether both or any of the Petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

(i) <u>Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.</u>

(ii) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(iv) Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

(v) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

(vi) The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

(vii) .....

(viii) .....

(emphasis supplied)

29. In view of the facts and circumstances of the present case, it is found that the petitioners had filed false affidavits before the courts just to grab the property of a widow lady and mislead the Courts at every stage, even in the present writ petition.

30. The petitioners are not only cheating or deceiving the widow lady that is the wife of Late Ram Gopal but also misleading the Courts and concealed the relevant facts by not enclosing the copy of revision.

31. Petitioners had filed the copy of unregistered Will dated 25.07.2003 which was duly considered by the Tehsildar and pointed out the shortcomings due to which it was not accepted while rejecting the claim of the petitioners. Petitioners in the revision had not taken this ground that they had not filed any unregistered Will or the unregistered Will which was filed by the petitioners is not the same which was referred in the order of Tehsildar. This shows that the second unregistered Will of the same date by rectifying all the short comings as pointed out by the Tehsildar is nothing but amounts to cheating, playing fraud, misleading the Courts and also amounts to abuse of process of the Court. The unregistered Will which was produced by the petitioners before the Tehsildar was not found to be acceptable by the Tehsildar then there is no question to prove the second unregistered Will prepared by the petitioner afterthought.

32. It is also the petitioners, who had not placed any document or application at the appellate stage for accepting the additional documents as an evidence by filing a second unregistered Will prepared afterthought of the same date under Order XLI Rule 27 C.P.C.

33. It was the duty of the petitioners to prove the unregistered Will which they had not even tried since it appears that the petitioners were aware that the unregistered Will was not genuine and they would not able to prove it.

34. In view of the aforesaid facts, circumstances and discussion made

hereinabove, it is found that there is no illegality in the impugned orders dated 28.03.2024 passed by the respondent no. 1, impugned order dated 18.12.2014 passed by the respondent no. 2, impugned order dated 13.10.2014 passed by the respondent no. 5, impugned order dated 11.03.2014 passed by the respondent no. 3 and judgment and order dated 21.01.2013 passed by the respondent no. 5, thus, no interference is called for.

35. Writ petition is devoid of merits hence, dismissed with a cost of Rs. 50,000/- (Rs. Fifty Thousand), in view of their conduct which resulted in misuse of process of law. The amount of cost is to be deposited before the Senior Registrar of this Court within a period of three months from today. Failing which, the Senior Registrar is directed to require the authorities to recover the same as arrears of land revenue.

(2024) 5 ILRA 1571
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 4483 of 2024

Rajesh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Veerendra Kumar Tiwari, Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Mithila Bakhsh Tiwari

Civil Law –appeal challenging the order of cancellation of fair price shop allowed-petitioner is the subsequent allottee of the fair price shop-subject to the final outcome of any case pending in any court of law-no impleadment application was filed by the petitioner-validity of the cancellation order can very well be decided even if in absence of a person who was allotted the shop subsequent cancellation of the fair price shop agreement of another subsequent allottee-petitioner was not a necessary party- petition dismissed. (Paras 17 to 19)

HELD:
It is relevant to note that in the present case, after cancellation of the fair price shop license of the respondent no. 4, the shop was not allotted to the petitioner, rather it was allotted to one Dharamraj. After cancellation of the Fair Price Shop Agreement of Dharamraj, the shop in question was allotted to the petitioner wherein it was specifically mentioned that the appointment of the petitioner will be subject to the final orders to be passed in any case pending before the Competent Court. (Para 18)

The appeal was filed challenging the legality of the cancellation of the order dated 13.04.2016 and the validity of the cancellation order dated 13.04.2016 can very well be decided even if in absence of a person who was allotted the shop subsequent cancellation of the fair price shop agreement of another subsequent allottee. It was open to the petitioner to have appeared in the appeal and sought a right of hearing, but he did not do so. In such circumstances the impugned order dated 16.04.2024 passed by the Additional Commissioner (Food), Ayodhya Division, Ayodhya cannot be held to be bad in law for want of impleadment of the petitioner as a necessary party to the appeal. (Para 19)

Petition dismissed. (E-14)

List of Cases cited:

1. Ram Kumar Vs St. of U.P. & ors.: 2022 SCC OnLine SC 1312 = AIR 2022 SC 4705

2. Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd., (2010) 7 SCC 417

3. Urmila Devi Vs St. of U.P., 2015 SCC OnLine All 3910

4. Poonam Vs St. of U.P.: (2016) 2 SCC 779

5. Sumitra Devi Vs St. of U.P. & ors. (Civil Appeal Nos. 9363-9364 of 2014) decided on 08.10.2014

6. Pawan Chaubey Vs The St. of U. P. & ors.., Civil Appeal No. 3668 of 2022 (Arising out of SLP (C) No. 15501 of 2021) decided On: 06.05.2022

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

1. Heard Shri R.K. Srivastava, learned counsel for the petitioner, Shri Pratyush Tripathi, learned Additional Chief Standing Counsel and Shri M.B. Tiwari, learned counsel for the respondent No.4.

2. By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged validity of an order dated 16.04.2024 passed by Additional Commissioner (Food), Ayodhya Division, Ayodhya, whereby Appeal No.2400 of 2017 filed by the respondent No.4 under Clause 13(3) of U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order 2016 has been allowed and an order dated 13.04.2013 passed by the SDM, Haidergarh, Barabanki cancelling the Fair Price Shop Agreement of the respondent No.4 has been set-aside.

3. The order dated 16.04.2024 has been challenged on the ground that after cancellation of the Fair Price Shop Agreement of the respondent No.4 on 13.04.2016, the Fair Price Shop in question was allotted to the petitioner by means of an order dated 03.09.2022 passed by the SDM, Haidergarh, Barabanki, yet the appeal was allowed without impleading the petitioner and without giving him an opportunity of hearing.

4. After cancellation of the Fair Price Shop Agreement of the respondent No.4 by means of an order dated 13.04.2016, the Fair Price Shop was allotted to one Dharamraj. The Fair Price Shop Agreement of Dharamraj was cancelled by means of an order dated 30.05.2022 passed by SDM, Haidergarh, Barabanki. Thereafter, the Fair Price Shop in question was allotted to the petitioner by means of an order dated 03.09.2022 wherein it was specifically mentioned that the appointment of the petitioner will be subject to the final orders to be passed in any case pending before the Competent Court.

5. Appeal No.2400 of 2017 filed by the respondent No.4 under Clause 13(3) of the Control Order was pending on the date of allotment of Fair Price Shop in question to the petitioner i.e. 03.09.2022.

6. The petitioner did not file any application for impleadment in pending Appeal No.2400 of 2017. After the appeal was allowed on 16.04.2024, the petitioner has come forward to challenge the aforesaid order passed by the Appellate Authority on the ground that the appeal has been decided without giving an opportunity of hearing to the petitioner.

7. Placing reliance on the decision of Supreme Court in **Ram Kumar Vs. State of U.P. and others**: 2022 SCC OnLine SC 1312 = AIR 2022 SC 4705, the learned Counsel for the petitioner has submitted that the petitioner was a necessary party to the appeal filed against the cancellation order and the order passed without hearing the petitioner is unsustainable in law.

8. Per contra, Shri M.B. Tiwari, learned counsel for the respondent No.4 has submitted that the Fair Price Shop License of respondent No.4 was cancelled way back on 13.04.2016. He had filed an appeal

against cancellation of the order in the year 2017 when the Fair Price Shop in question had not been allotted to the petitioner and, therefore, he was neither a necessary nor a proper party to the appeal and accordingly, the appeal was filed without impleading the petitioner. After cancellation of the license of the respondent No.4, the Fair Price Shop in question was allotted to one Dharamraj, who continued to run the shop till his license was cancelled by means of an order dated 30.05.2022. After cancellation of Fair Price Shop license of Dharamraj, the Fair Price Shop in question was allotted to the petitioner by means of an order dated 03.09.2022, while the appeal of the respondent No.4 was already pending for the past about five years. In these circumstances, the petitioner was not a necessary party to the appeal.

9. In **Ram Kumar** (Supra) the fair price shop granted to Respondent No. 9 was cancelled. While dismissing the appeal, the Appellate Authority observed in its order dated 20.07.2018 that "At present, new dealer Sh. Ram Kumar Singh s/o Chhote Singh has been approved as Fair Price Dealer, village Anta Tehsil Rasoolabad, Kanpur Dehat vide District Magistrate's order dated 15.05.2018.", which shows that the respondent No. 9 was very well aware that during the pendency of the proceedings, the appellant was appointed as a Fair Price Dealer. Yet the respondent No. 9 pleaded in the writ petition that: -

"33. That it is also noteworthy to mention here that during the pendency of the Fair Price Shop, no third party allotment was made and as per the direction of this Hon'ble Court, the shop of the petitioner was attached to another Fair Price Shop Holder."

The same was reiterated in the Grounds also. The Hon'ble Supreme Court held that: -

27. It is thus clear that respondent No. 9 has not only suppressed the fact about the subsequent allotment of the fair price shop to the appellant herein but has also tried to mislead the High Court that the fair price shop of respondent No. 9 (the writ petitioner before the High Court) was attached to another fair price shop holder.

28. This Court, in the case of S.P. Chengalvaraya Naidu (Dead) By LRs. v. Jagannath (Dead) by LRs (1994) 1 SCC 1 has held that non-disclosure of the relevant and material documents with a view to obtain an undue advantage would amount to fraud. It has been held that the judgment or decree obtained by fraud is to be treated as a nullity. We find that respondent No. 9 has not only suppressed a material fact but has also tried to mislead the High Court. On this ground also, the present appeal deserves to be allowed."

11. In **Ram Kumar** (Supra), the Hon'ble Supreme Court referred to an earlier decision in the case of **Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd.,** (2010) 7 SCC 417, in which it was held that: -

"13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

* * *

15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."

12. The Hon'ble Supreme Court also referred to a Full Bench decision of this Court in **Urmila Devi v. State of U.P.,** 2015 SCC OnLine All 3910, in which it was held that: -

"24. ... the authorization granted to a person to conduct a fair price shop only constitutes such a person as an agent of the State Government under Clause 4(2) of the Control Order. If the authorization is suspended or cancelled, a remedy of an appeal is provided in Clause 28(3). During the pendency of an appeal, a provision has been made in Clause 28(5), for seeking a direction that the order under appeal shall not take effect until the appeal is disposed of. If the order of suspension or cancellation has not been stayed pending the disposal of the appeal, the cancellation or suspension, as the case may be, shall continue to remain in effect. The mere filing or pendency of an appeal or an application for stay does not result in a deemed or automatic stay of the order of suspension or cancellation. There is no such deeming provision. In such a situation, the State is at liberty to make necessary administrative arrangements to ensure the proper distribution of scheduled commodities based on the public interest in the proper functioning of the Public Distribution Scheme and on an assessment of local needs and requirements that would sub-serve the interest of the beneficiaries.

13. The Hon'ble Supreme Court also referred to an earlier decision in **Poonam versus State of U.P.:** (2016) 2 SCC 779, wherein the fair price shop license of respondent no. 5 was cancelled and it was allotted to the appellant. The respondent no. 5 filed an appeal, in which the appellant had got herself impleaded on the ground that she had been allotted the shop after cancellation of the license granted in favour of the original allottee. After hearing the appellant and the impleaded party, the appeal was allowed. The subsequent allottee filed a Writ Petition challenging the order passed in appeal. The High Court dismissed the Writ Petition holding that the subsequent allottee

had no right to continue the litigation for she had no independent right. The Hon'ble Supreme Court held that: -

"9. Be it noted, before the appellate authority, the appellant had got herself impleaded after coming to know that the fifth respondent had preferred an appeal challenging the order of cancellation, and the appellate authority had considered the submissions of the original allottee as well as the present appellant. The thrust of the matter is whether the appellant can be regarded as a person who is a necessary party to the lis in such a situation and is entitled under law to advance the argument that the order passed by the appellate forum being legally unsustainable, the writ court was obliged to adjudicate the controversy on merits.

* * *

13. Though the narration of facts is reflective of a different contour of controversy i.e. allotment and grant of licence for a fair price shop, the seminal issue, as noted hereinabove, would hinge on the answer to the question pertaining to right to assail the order passed in appeal. The appellant was not impleaded as a party in the appeal but she herself got impleaded. Assuming the appellate authority would have decided the appeal in favour of the original allottee in her absence, could the present appellant, a subsequent allottee in respect of the same shop, have been allowed in law to make a grievance by invoking the jurisdiction of any statutory forum or for that matter the High Court under Article 227 of the Constitution. In essence, whether she is a necessary party to the litigation and entitled to contest the legal vulnerability of the order of cancellation or in any manner advance the plea that her allotment would not be affected despite the factum that the order of cancellation of the earlier allottee has been quashed. To appreciate the said issue we will dwell upon certain authorities though they may pertain to different jurisprudence.

* * *

49. In the instant case, Shop No. 2 had become vacant. The appellant was allotted the shop, may be in the handicapped quota but such allotment is the resultant factor of the said shop falling vacant. The original allottee, that is, the respondent, assailed his cancellation and ultimately succeeded in appeal. We are not concerned with the fact that the appellant herein was allowed to put her stand in the appeal. ***She was neither a necessary nor a proper party. The appellate authority permitted her to participate but that neither changes the situation nor does it confer any legal status on her. She would have continued to hold the shop had the original allottee lost the appeal. She cannot assail the said order in a writ petition because she is not a necessary party. It is the State or its functionaries who could have challenged the same in appeal. They have maintained sphinx like silence in that regard. Be that as it may, that would not confer any locus on the subsequent allottee to challenge the order passed in favour of the former allottee. She is a third party to the lis in this context.****"*

(Emphasis added)

14. The Hon'ble Supreme Court also referred to the decision in the case of **Sumitra Devi versus State of U.P. and Ors.** (Civil Appeal Nos. 9363-9364 of 2014) decided on 08.10.2014, wherein the Appellant being the subsequent allottee filed an application for impleadment in the writ petition on 17.10.2008. That application was neither entertained nor allowed. The Hon'ble Supreme Court held that the High Court should have heard the Appellant

before restoring the licence of Respondent No. 6 as the Appellant was the subsequent allottee and his rights were affected by the restoration of licence of Respondent No. 6.

15. Another decision relied in **Ram Kumar** (Supra) was of **Pawan Chaubey Vs. The State of Uttar Pradesh and Ors.,** Civil Appeal No. 3668 of 2022 (Arising out of SLP (C) No. 15501 of 2021) decided On: 06.05.2022, wherein it was held that: -

"9. Even if ***a subsequent allottee does not have an independent right,*** *he/she still has a right to be heard and to make submissions defending the order of cancellation.*

10. It is true that the order of appointment of the Appellant reads that the order is subject to the outcome of the proceedings pending in court. This does not disqualify the Appellant from appearing and contesting the proceedings by trying to show that the order of cancellation had correctly been passed against the Respondent No. 4."

16. It is settled law that a judgment is to be read as a whole, in light of the factual background and the issues involved in the case and merely a portion of the judgment cannot be taken out and relied upon as a binding precedent, without looking into the entire judgment. In para 22 of the judgment in **Ram Kumar**(*supra*), the Hon'ble Supreme Court has held that in the background mentioned in the aforesaid judgment, the appellant was a necessary party to the proceedings before the Court but the background leading to the aforesaid conclusion, as apparent from the earlier parts of the judgment, indicates that the Court has merely held that even if a subsequent allottee does not have an independent right, he/she still has a right to be heard and to make submissions defending the order of cancellation.

17. The legal position which can be culled out from a cumulative reading of the aforesaid judgments is as follows: -

17.1 As per the Full Bench decision in **Urmila Devi** (Supra), the appointment of a subsequent Fair Price Shop allottee made during pendency of an appeal filed by the previous allottee against cancellation of his agreement, is merely an administrative arrangement to ensure proper distribution of scheduled commodities based on the public interest in the proper functioning of the Public Distribution Scheme and on an assessment of local needs and requirements that would sub-serve the interest of the beneficiaries. It does not defeat the rights of the previous allottee, whose appeal is pending.

17.2 As per **Poonam** (Supra) 2 SCC 779, although the subsequent alotttee got herself impleaded in an appeal filed against cancellation of previous allotted, she was neither a necessary nor a proper party. The mere fact that the appellate authority permitted her to participate, does not change the situation and it does not confer any legal status on her. She cannot assail the appellate order by filing a writ petition because she is not a necessary party. She is a third party to the lis in this context.

17.3 As per **Sumitra Devi** (Supra) if a subsequent allottee filed an application for impleadment he should have been heard before restoring the licence of as his rights were affected by the restoration of licence.

17.4 As per **Pawan Chaubey** (Supra) ***a subsequent allottee does not have an independent right,*** *but he is not disqualified from appearing and contesting the proceedings by trying to show that the*

order of cancellation had correctly been passed against the Respondent No. 4."

18. It is relevant to note that in the present case, after cancellation of the fair price shop license of the respondent no. 4, the shop was not allotted to the petitioner, rather it was allotted to one Dharamraj. After cancellation of the Fair Price Shop Agreement of Dharamraj, the shop in question was allotted to the petitioner wherein it was specifically mentioned that the appointment of the petitioner will be subject to the final orders to be passed in any case pending before the Competent Court.

19. The appeal was filed challenging the legality of the cancellation of the order dated 13.04.2016 and the validity of the cancellation order dated 13.04.2016 can very well be decided even if in absence of a person who was allotted the shop subsequent cancellation of the fair price shop agreement of another subsequent allottee. It was open to the petitioner to have appeared in the appeal and sought a right of hearing, but he did not do so. In such circumstances the impugned order dated 16.04.2024 passed by the Additional Commissioner (Food), Ayodhya Division, Ayodhya cannot be held to be bad in law for want of impleadment of the petitioner as a necessary party to the appeal.

20. In view of the above discussion, I do not find any illegality in the order dated 16.04.2024 passed by the Additional Commissioner (Food), Ayodhya Division, Ayodhya and hence, the writ petition is hereby ***dismissed***.

(2024) 5 ILRA 1577
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 3000053 of 2005

Dinesh Verma & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Mohd. Arif Khan, Mohammad Aslam Khan

Counsel for the Respondents:
C.S.C.

Civil Law –validity of notice- Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960- redetermination of surplus land-challenged—Sections 4, 5, 12 and 13 of the Act, 1960- U. P. Imposition of Ceiling (Amendment) Act of 1972, being U.P. Act 18 of 1973-Sections 5 and 19-U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 (U.P. Act 2 of 1975)- U. P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (U.P. Act 20 of 1976)-Sections 31 and 38-B-The Act permits redetermination of surplus land-only after a trial of an issue within two years from the date of a Notification under Section 14(4) for rectifying any mistake, as provided in 13-A, or in circumstances mentioned in Section 29 (a) and (b)-redetermination of surplus land only within a period of two years from the date of enforcement of U.P. Act No. 20 of 1976, i.e.10.10.1975-no circumstances exist justifying the redetermination of surplus land of the petitioners- impugned proceedings quashed-Petition allowed. (Paras 27 to 33 and 35)

HELD:
Since Section 38-B of the Act carves out an exception to the general principle of Res Judicata, the provisions of Section 38-B have to be interpreted strictly, keeping in view the other provisions contained in the Principal Act as also U.P. Act No. 20 of 1976, through which Section 38-B was inserted. (Para 27)

Section 38-B of the Act provides that no finding or decision given before the commencement of this section in any proceeding or on any issue (including any order, decree or judgment) by any court, tribunal or authority in respect of any matter governed by this Act, shall bar the retrial of such proceeding or issue under this Act, in accordance with the provisions of this Act as amended from time to time. A bare reading of the entire Section 38-B would indicate that it where a retrial is held in accordance with the provisions of the Act, any finding or decision given in any proceedings before commencement of Section 38-B would not bar the same. The exception to the general principle of Res-Judicata will apply only where a retrial is permissible in accordance with the provisions of this Act. (Para 28)

The Act permits redetermination of surplus land only after a trial of an issue within two years from the date of a Notification under Section 14(4) for rectifying any mistake, as provided in 13-A, or in circumstances mentioned in Section 29 (a) and (b). Section 38-B of the Act would be applicable to the situations covered by the aforesaid provisions of the Act only and it cannot be interpreted in a such a manner as would give a free hand to the authorities to ignore any finding recorded in any proceedings which have attained finality upto the Hon'ble Supreme Court and to initiate proceedings for redetermination of surplus land. (Para 29)

Section 19 (2) of the Amendment Act of 1972 contained a transitory provision permitting redetermination of surplus land of any tenure-holder in relation to whom the surplus land has been determined finally before the commencement of the Amendment Act of 1972. (Para 30)

Section 9 of the U.P. Act No. 2 of 1975 also contained a transitory provision which empowers the prescribed authority to redetermine the surplus land of a tenure-holder at any time within a period of two years from the commencement of Act No. 2 of 1975, determination of surplus land in respect of whom had been made under the principal Act before the commencement of Act No. 2 of 1975. (Para 31)

Section 31 (3) of U.P. Act No. 20 of 1976 also contained a transitory provision providing that where an order determining surplus land in relation to a tenure-holder has been made under the principal Act before 10.10.1975, the prescribed authority may, at any time within a period of two years from the said date, redetermine the surplus land in accordance with the principal Act as amended by Act No. 20 of 1976, at any time within a period of two years from the said date. (Para 32)

Thus it is clear that the intention of the legislature was to permit redetermination of surplus land only within a period of two years from the date of enforcement of U.P. Act No. 20 of 1976, i.e.10.10.1975 and that too, if it was necessitated by the amendments incorporated in the Act. The authorities under the Act have not been given unfettered powers to ignore any finding order passed in earlier proceedings. (Para 33)

Petition allowed. (E-14)

List of Cases cited:

1. Ram Lal Vs State of U.P.: 1978 SCC OnLine All 419 : 1978 All LJ 1197

2. Escorts Farms Ltd. Vs Commr., Kumaon Division: (2004) 4 SCC 281

3. S. Ramachandra Rao Vs S. Nagabhushana Rao, 2022 SCC OnLine SC 1460

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

1. Heard Sri Mohd. Arif Khan, Senior Advocate assisted by Sri Abhishek Mishra, Advocate, the learned counsel for the petitioners and Sri Krishna Kumar Singh, the learned Standing Counsel.

2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioners have challenged the validity of a notice under Section 10(2) of the U.P. Imposition of Ceiling On Land Holdings Act, 1960 (herein after referred to as 'the Ceiling Act'), issued by the Prescribed Authority/Additional Collector (Administration), Lucknow on 06.01.1999,

order dated 14.02.2005 passed by the prescribed authority rejecting the petitioners' objection against the aforesaid notice, an order dated 31.08.2005 passed by the prescribed authority as well as the entire proceedings instituted by the notice issued under Section 10(2) of the Ceiling Act.

3. Briefly stated, facts of the case are that Bindra Prasad, grand father of the petitioners was tenure holder having separate Khata, whereas Randhir Verma, father of the petitioners, was also having his separate holdings. Bindra Prasad had executed various sale-deeds in the year, 1957 transferring an area of 842 Bihgas 18 Biswa 3 Biswansi 9 Kachwansi. The proceedings under the Ceiling Act were initiated against Randhir Verma by issuing a notice under Section 10(2) of the Act to him. Randhir Verma filed objections and by means of an order dated 24.12.1979, the prescribed authority declared 20 Bigha 5 Biswa 10 Biswansi land of Randhir Verma as surplus land.

4. Randhir Verma has filed an appeal against the order dated 24.12.1979 inter alia on the ground that considering the size of his family, he was entitled to retain 44.67 Bighas land and further that he had transferred 10 Bigha 2 Biswa 7 Biswansi land by means of a registered sale-deed executed in favour of his daughter prior to 24.01.1971 and it could not be included in his holdings while determining the ceiling area. The sale-deed executed by Randhir Verma, in favour of his daughter excluded the area of 10 Bigha, 2 Biswa 7 Biswansi from his holdings and, accordingly, the ceiling area was determined and the surplus land was declared.

5. Subsequently, another notice under Section 10(2) of the Ceiling Act was issued to Sri Randhir Verma on 16.12.1979 by clubbing the holdings which have already been transferred by Bindra Prasad through various sale-deeds executed in the year, 1957. By means of an order dated 05.04.1982, the Prescribed Authority declared an area of 842 Bighas 18 Biswa 3 Biswansi 9 Kachwansi in terms of irrigated land to be surplus land of the petitioners' father Randhir Verma.

6. Randhir Verma filed a Miscellaneous Civil Appeal No. 176 of 1982 against the aforesaid order dated 05.04.1982. The appeal was allowed by means of an order dated 11.01.1983 passed by IInd Additional District Judge, Lucknow. The order dated 05.04.1982 passed by the Prescribed Authority was set aside and the matter was remanded for re-determination of surplus land, after giving opportunity of hearing to the transferees of Sri Bindra Prasad. The State of U.P. filed a Writ Petition No. 407 of 1983 against the aforesaid order dated 11.01.1983, which was dismissed in limine by means of an order dated 25.01.1983.

7. The petitioners' father Randhir Verma filed a Writ Petition No. 431 of 1983 and the transferees, who had purchased the land from Bindra Prasad in the year, 1957, filed Writ Petition No.2323 of 1983. Both the writ petitions were decided by a common judgment dated 10.10.1984, whereby both the writ petitions were allowed. The notice dated 26.12.1979 issued by the Prescribed Authority under Section 10(2) of the Ceiling Act and all the proceedings arising therefrom, were quashed. A mandamus was issued commanding the opposite parties to restore the entries in the revenue records in favour of the persons who had purchased the land from Sri Bindra Prasad, as they existed immediately before the passing of the order

dated 05.04.1982 by the Prescribed Authority in the proceedings arising from the notice dated 26.12.1979 issued to Randhir Verma under Section 10(2) of the Ceiling Act.

8. The State filed a Special Leave Petition (Civil) No. 2128 of 1985 changing the aforesaid order dated 10.10.1984 and the aforesaid SLP was dismissed by means of an order dated 12.08.1985.

9. After the SLP had been dismissed by Hon'ble the Supreme Court and the matter attained finality and after Bindra Prasad, grand-father of the petitioners had died and thereafter their father Randhir Verma had also died on 19.05.1996, the notice dated 06.01.1999 was issued to the petitioners under Section 10(2) of the Ceiling Act.

10. After a lapse of about 4 years, the State filed an application dated 10.04.2003, under Order 6 Rule 17 of CPC alleging that the land that had already been transferred by the predecessors of the petitioners, was being held by them as 'Benamidar' and, therefore, the land that had been transferred should also be included in the proceedings and the said application was allowed by means of order dated 17.04.2003.

11. The petitioners filed an application dated 10.04.2003 for recall of the ex-parte order dated 17.04.2003, which was rejected by means of an order dated 14.02.2005.

12. The petitioners again filed an application dated 16.07.2005 for rejection of application under Order 6 Rule 17 of CPC, which too was dismissed by means of an order dated 14.02.2004.

13. Submission of learned counsel for the petitioners is that when the proceedings under the Ceiling Act have been initiated against the petitioners' father Randhir Verma and the same attained finality by dismissal of SLP filed by the State, fresh proceedings could only be initiated under Section 27(3) of the U.P. Imposition of Ceiling on Land Holdings (amendment) Act, 1975. After the proceedings had attained finality, no fresh notice could be issued under Section 10(2) of the Ceiling Act and no fresh proceedings could be drawn against the petitioners.

14. The learned Counsel for the petitioner also submitted that the names of the persons who had purchased various parts of lands from the petitioner's grand-father, had been recorded in revenue records even before commencement of the Ceiling Act and there would be a presumption regarding correctness of the settlement entries and the continuance of long standing entries cannot be rejected without any solid rebutting evidence and good grounds, as has been held by this Court in **Lal Behari and others versus Ram Adhar and others:** 1987 RD 206 : 1985 SCC OnLine All 1197.

15. The U. P. Imposition of Ceiling of Land Holdings Act, 1960 Act is an Act to provide for the imposition of ceiling on land holdings in the State of Uttar Pradesh. A general notice was to be given to the tenure-holders holding land in excess of the ceiling area so that they could submit a statement in respect thereof. A quasi-judicial determination is then to be made of the surplus land, where objections are filed and the prescribed authority, after affording the parties a reasonable opportunity of being heard, and of producing evidence, is then to decide their objections after recording reasons, and then determine the extent of

surplus land. Some relevant provisions of the aforesaid Act, as enacted originally, are being reproduced below: -

*"**4. Ceiling area.**—(1) Subject to the provisions of this Act, the ceiling area applicable to a tenure-holder shall be calculated after taking into account all the land in any holding in the State held by him, in his own right, **whether in his own name or ostensibly in the name of any person.***

* * *

***5. Imposition of ceiling on existing land holdings**.—(1) As and from the date of enforcement of this Act, no tenure-holder shall, except as otherwise provided by this Act, be entitled to hold an area in excess of the ceiling area applicable to him, anything contained in any other law, custom, or usage for the time being in force, or agreement, to the contrary notwithstanding.*

*(2) In determining the ceiling area applicable to a tenure-holder at the commencement of this Act, **any transfer or partition of land made after the twentieth day of August, 1959, which, but for the transfer or partition would have been declared surplus land under the provisions of this Act, shall be ignored and not taken into account.***

(3) The provisions of sub-section (2) shall have no application to—

(a) a transfer in favour of the State Government;

(b) a partition under the U.P. Consolidation of Holdings Act, 1953, or

(c) a partition of the holding of a joint Hindu family made by a suit or proceeding pending on twentieth day of August, 1959.

* * *

***12. Determination of the surplus land by the prescribed authority where an objection is filed.—(**1) Where an objection has been filed under sub-section (2) of Section 10 or under sub-section (2) of Section 11, or because of any appellate order under Section 13, the prescribed authority shall, after affording the parties reasonable opportunity of being heard and of producing evidence, decide the objections after recording his reasons, and determine the surplus land.*

(2) Subject to any appellate order under Section 13, the order of the prescribed authority under sub-section (1) shall be final and conclusive and be not questioned in any court of law.

***13. Appeals.—(**1) Any party aggrieved by an order under sub-section (2) of Section 11 or Section 12, may, within thirty days of the date of the order, prefer an appeal to the District Judge within whose jurisdiction the land or any part thereof is situate.*

(2) The District Judge shall dispose of the appeal as expeditiously as possible and his decision thereon shall be final and conclusive and be not questioned in any court of law.

(3) Where an appeal is preferred under this section, the District Judge may stay enforcement of the order appealed against for such time and on such conditions as may be considered just and proper."

16. By U. P. Imposition of Ceiling (Amendment) Act of 1972, being U.P. Act 18 of 1973, which came into force on 08.06.1973, various Sections of the principal Act were substituted. Section 5 of the Principal Act was substituted by the following new Section 5: -

5. Imposition of ceiling on existing land holdings (1) As and form the date of enforcement of this Act no tenure-holder shall, except as otherwise provided by this Act, be entitled to hold an area in excess of

the ceiling area applicable to him, anything contained in any other law, custom, or usage for the time being in force, or agreement, to the contrary notwithstanding.

(2) In determining the ceiling area applicable to a tenure-holder at the commencement of this Act any transfer or partition of land made after the twentieth day of August, 1959, which but for the transfer or action would have been declared surplus land under the provisions of this Act, shall be ignored and not taken into account.

(3) The provisions of sub-section (2) shall have no application to

(a) a transfer in favour of the State Government,

(b) a partition under the U. P. Consolidation of Holdings Act, 1953 ; or

(c) a partition of the holding of a Joint Hindu Family made by a suit or proceeding pending on twentieth day of August, 1959."

17. The transitory provision contained in Section 19 of the Amendment Act of 1972 provided as follows: -

"19. Transitory provisions.—(1) *All proceedings for the determination of surplus land under Section 9, Section 10, Section 11, Section 12, Section 13 or Section 30 of the principal Act, pending before any court or authority at the time of the commencement of this Act, shall abate and the prescribed authority shall start the proceedings for determination of the ceiling area under that Act afresh by issue of a notice under sub-section (2) of Section 9 of that Act as inserted by this Act:*

Provided that the ceiling area in such cases shall be determined in the following manner—

(a) firstly, the ceiling area shall be determined in accordance with the principal Act, as it stood before its amendment by this Act;

(b) thereafter, the ceiling area shall be redetermined in accordance with the provisions of the principal Act as amended by this Act.

(2) Notwithstanding, anything in sub-section (1), any proceeding under Section 14 or under Chapter III or Chapter IV of the principal Act, in respect of any tenure-holder in relation to whom the surplus land has been determined finally before the commencement of this Act, may be continued and concluded in accordance with the provisions of the principal Act, without prejudice to the applicability of the provisions of sub-section (2) of Section 9 and Section 13-A of that Act, as inserted by this Act, in respect of such land."

18. The U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 (U.P. Act 2 of 1975), came into being on 17.01.1975. This 1974 Amendment Act only added to the new substituted scheme the concept of "single crop land". U.P. Act 2 of 1975 amended Section 5 of the Principal Act and the relevant part of the Act reads as follows: -

"Imposition of ceiling- (1) - On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder shall be entitled to hold in the aggregate, throughout Uttar Pradesh, any land in excess of the ceiling area applicable to him.

Explanation I- In determining the ceiling area applicable to a tenure holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account.

* * *

19. U.P. Act No. 2 of 1975 also contained a transitory provision in Section 9, which is being reproduced below: -

"9. Transitory provision.—*Where an order determining the surplus land in relation to a tenure-holder has been made under the principal Act, before the commencement of this Act, the prescribed authority may, at any time within a period of two years from the commencement of this Act, redetermine the surplus land in accordance with the principal Act as amended by this Act."*

20. An Ordinance, which further amended the Principal Act, came into force on 10.10.1975. After the said Ordinance lapsed, the U. P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (U.P. Act 20 of 1976) was enacted with effect from the date of the Ordinance,10-10-1975. In this Amendment, various other changes were made with which we are not directly concerned, except that the following Explanation II was added to Section 5(1) by Subs. by sec. 6(a) of U.P. Act No. 20, 1976 (deemed to have been substitute from January 17, 1975): -

"Explanation II- If on or before January 24, 1971, any land was held by a person who continues to be in its actual cultivatory possessions and the name of any other person is entered in the annual register after the said date either in addition to or to the exclusion of the former and whether on the basis of deed of transfer or license or on the basis of a decree, it shall be presumed, unless the contrary is proved to the satisfaction of the prescribed authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person."

21. Section 19 of U.P. Act No. 20 of 1976 inserted the following Section 38-B in the Principal Act: -

"38-B. No finding or decision given before the commencement of this section in any proceeding or on any issue (including any order, decree or judgment) by any court, tribunal or authority in respect of any matter governed by this Act, shall bar the retrial of such proceeding or issue under this Act, in accordance with the provisions of this Act as amended from time to time."

22. Section 31 of U.P. Act No. 20 of 1976 contains the following transitory provision: -.

"31. Transitory provisions.—*(1) All proceedings under sub-sections (3) to (7) of Section 14 of the principal Act, as it stood immediately before the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Ordinance, 1976 (U.P. Ordinance 11 of 1976), pending before any court or authority immediately before the date of such commencement shall be deemed to have abated on such date.*

(2) Where an order determining the surplus land in relation to a tenure-holder has been made under the principal Act before 17-1-1975 and the prescribed authority is required to redetermine the surplus land under Section 9 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 (U.P. Act 2 of 1975), then notwithstanding anything contained in sub-section (2) of Section 19 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (U.P. Act 17 of 1973), every appeal under Section 13 of the principal Act or other

proceedings in relation to such appeal, preferred against the said order, and pending immediately before the tenth day of October, 1975, shall be deemed to have abated on the said date.

(3) ***Where an order determining surplus land in relation to a tenure-holder has been made under the principal Act before the tenth day of October, 1975, the prescribed authority (as defined in the principal Act) may, at any time within a period of two years from the said date, redetermine the surplus land in accordance with the principal Act as amended by this Act, whether or not any appeal was filed against such order and notwithstanding any appeal (whether pending or decided) against the original order of determination of surplus land.***

(4) The provisions of Section 13 of the principal Act shall mutatis mutandis apply to every order redetermining surplus land under sub-section (3) of this section or Section 9 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974:

Provided that the period of thirty days shall, in the case of an appeal against the order referred to in Section 9 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974, be computed from the date of such order or 10-10-1975, whichever is later.

(5) The provisions of Section 13-A of the principal Act shall mutatis mutandis apply to every redetermination of surplus land under the section or under Section 9 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974.

(6) Where any assessment roll has become final under sub-section (4) of Section 21 before the sixteenth day of February, 1976, the same shall not be reopened, notwithstanding any amendment made in Chapter III of the principal Act read with the Schedule thereof by this Act."

23. The effect and scope of Section 38-B was explained by this Court in **Ram Lal v. State of U.P.:** 1978 SCC OnLine All 419 : 1978 All LJ 1197 in the following words: -

"21. This provision to our mind was introduced to achieve the object of the various amendments introduced in the principal Act and to give effect to them. Section 38-B, in our view, contemplates that if by the amendments made in the principal Act a certain findings or decisions had become contrary to law, those findings or decisions could be reopened and the principle of res judicata would not bar a retrial of those issues in accordance with the provisions of the principal Act as amended. This provision, in our opinion, did not authorise the Ceiling authorities to ignore the decisions rendered or decrees passed by competent courts, tribunals or authorities in respect of matters which were not affected by the changes made in the principal Act. Such decisions, in our opinion, would continue to be binding on the parties and would operate as res judicata between them…."

24. The principle of Res-Judicata is a long standing basic principle of general application in civil proceedings. In **Escorts Farms Ltd. v. Commr., Kumaon Division**: (2004) 4 SCC 281, the Hon'ble Supreme Court held that: -

"51. Res judicata is a plea available in civil proceedings in accordance with Section 11 of the Code of Civil Procedure. It is a doctrine applied to give finality to "lis" in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and

attaining finality should not be allowed to be reopened and reagitated twice over. The literal meaning of res is "everything that may form an object of rights and includes an object, subject-matter or status" and res judicata literally means: "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment". Section 11 CPC engrafts this doctrine with a purpose that

"a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". (See Black's Law Dictionary at pp. 1304-05.)

25. However, the Hon'ble Supreme Court held in **Escorts** (Supra) that: -

"52. Proceedings under the Ceiling Act are not adversarial as are proceedings in suit. The Ceiling Act is a legislation to give effect to the directive principles contained in clauses (b) and (c) of Article 39 of the Constitution. The State is advised by the directive principles contained in the Constitution to take necessary legislative measures so as to ensure social justice by equitable distribution of ownership and control of material resources and avoid concentration of wealth and means of production in a few hands. The laudable social objective sought to be achieved by the ceiling legislation is to take surplus land from the holders and distribute the same to the landless agricultural labourers and peasants surviving on agriculture. In applying the principles of res judicata, therefore, to the ceiling proceedings, the object of the Act cannot be lost sight of. All principles of res judicata contained in Section 11 CPC cannot be strictly and rigorously made applicable to ceiling proceedings. Section 38-B introduced by the Amendment Act of 1976 with the transitory provisions made both in Amendment Act 18 of 1973 and Act 20 of 1976 is a departure from the provisions of Section 11 of the Code of Civil Procedure and indicates non-applicability of bar of res judicata in ceiling proceedings under the Act."

26. In **S. Ramachandra Rao v. S. Nagabhushana Rao**, 2022 SCC OnLine SC 1460, the Hon'ble Supreme Court explained the principles of Res Judicata as follows: -

22. The doctrine of res judicata, having a very ancient history, embodies a rule of universal law and is a sum total of public policy reflected in various maxims like 'res judicata pro veritate occipitur', which means that a judicial decision must be accepted as correct; and ' nemo debet bis vexari pro una et eadem causa', which means that no man should be vexed twice for the same cause. The ancient history of this doctrine and its consistent recognition could well be underscored with reference to the following statement of law in the case of Sheoparsan Singh v. Ramnandan Prasad Narayan Singh, AIR 1916 PC 78:—

"...But in view of the arguments addressed to them, their Lordships desire to emphasise that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time.

"'It has been well said,' declared Lord Coke, 'interest reipublicoe ut sit finis litium, otherwise great oppression might be done under colour and pretence of law' ".- (6 Coke, 9 A.)

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu

commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who escribes the plea thus:"If a person though defeated at law sue again he should be answered, 'You were defeated formerly. This is called the plea of former judgment." [See "The Mitakshara(Vyavahara)," Bk. II, ch. I, edited by J. R. Gharpure, p. 14, and "The Mayuka," Ch. I, sec. 1, p. 11 of Mandlik's edition.] And so the application of the rule by the Courts in India should be influenced by no technical consideration of form, but by matter of substance within the limits allowed by law."

(emphasis in original)

* * *

25. It hardly needs any over-emphasis that but for this doctrine of res judicata, the rights of the persons would remain entangled in endless confusion and the very foundation of maintaining the rule of law would be in jeopardy. Even if this doctrine carries some technical aspects, as explained by this Court in Daryao (supra), it is in the interest of public at large that a finality should attached to the binding decisions of the Courts of competent jurisdiction; and it is also in public interest that individual should not be vexed twice with the same kind of litigation. As noticed, the Constitution Bench has placed this doctrine on a high pedestal, treating it to be a part of rule of law."

27. Since Section 38-B of the Act carves out an exception to the general principle of *Res Judicata*, the provisions of Section 38-B have to be interpreted strictly, keeping in view the other provisions contained in the Principal Act as also U.P. Act No. 20 of 1976, through which Section 38-B was inserted.

28. Section 38-B of the Act provides that no finding or decision given before the commencement of this section in any proceeding or on any issue (including any order, decree or judgment) by any court, tribunal or authority in respect of any matter governed by this Act, shall bar the retrial of such proceeding or issue under this Act, **in accordance with the provisions of this Act** as amended from time to time. A bare reading of the entire Section 38-B would indicate that it where a retrial is held in accordance with the provisions of the Act, any finding or decision given in any proceedings before commencement of Section 38-B would not bar the same. The exception to the general principle of *Res-Judicata* will apply only where a retrial is permissible in accordance with the provisions of this Act.

29. The Act permits redetermination of surplus land only after a trial of an issue within two years from the date of a Notification under Section 14(4) for rectifying any mistake, as provided in 13-A, or in circumstances mentioned in Section 29 (a) and (b). Section 38-B of the Act would be applicable to the situations covered by the aforesaid provisions of the Act only and it cannot be interpreted in a such a manner as would give a free hand to the authorities to ignore any finding recorded in any proceedings which have attained finality upto the Hon'ble Supreme Court and to initiate proceedings for redetermination of surplus land.

30. Section 19 (2) of the Amendment Act of 1972 contained a transitory provision permitting redetermination of surplus land of any tenure-holder in relation to whom the surplus land has been determined finally before the commencement of the Amendment Act of 1972.

31. Section 9 of the U.P. Act No. 2 of 1975 also contained a transitory provision which empowers the prescribed authority to redetermine the surplus land of a tenure-holder at any time within a period of two years from the commencement of Act No. 2 of 1975, determination of surplus land in respect of whom had been made under the principal Act before the commencement of Act No. 2 of 1975.

32. Section 31 (3) of U.P. Act No. 20 of 1976 also contained a transitory provision providing that where an order determining surplus land in relation to a tenure-holder has been made under the principal Act before 10.10.1975, the prescribed authority may, at any time within a period of two years from the said date, redetermine the surplus land in accordance with the principal Act as amended by Act No. 20 of 1976, at any time within a period of two years from the said date.

33. Thus it is clear that the intention of the legislature was to permit redetermination of surplus land only within a period of two years from the date of enforcement of U.P. Act No. 20 of 1976, i.e.10.10.1975 and that too, if it was necessitated by the amendments incorporated in the Act. The authorities under the Act have not been given unfettered powers to ignore any finding order passed in earlier proceedings

34. The notice under Section 10(2) of the Ceiling Act was issued to Sri Randhir Verma on 16.12.1979 by clubbing the holdings which had already been transferred by his father Bindra Prasad through various sale-deeds executed in the year, 1957. By means of an order dated 05.04.1982, the Prescribed Authority declared an area of 842 Bighas 18 Biswa 3 Biswansi 9 Kachwansi in terms of irrigated land to be surplus land of the petitioners' father Randhir Verma, but that order passed by the Prescribed Authority was set aside by an order dated 11.01.1983 passed by II Additional District Judge, Lucknow in Miscellaneous Civil Appeal No. 176 of 1982. The State of U.P. filed a Writ Petition No. 407 of 1983 against the aforesaid order dated 11.01.1983, which was dismissed in limine by means of an order dated 25.01.1983. The petitioners' father Randhir Verma filed Writ Petition No. 431 of 1983 and the transferees, who had purchased the land from Bindra Prasad in the year, 1957, filed Writ Petition No.2323 of 1983. Both the writ petitions were allowed by a common judgment dated 10.10.1984, the notice dated 26.12.1979 issued by the Prescribed Authority under Section 10(2) of the Ceiling Act and all the proceedings arising therefrom, were quashed and a mandamus was issued commanding the opposite parties to restore the entries in the revenue records in favour of the persons who had purchased the land from Sri Bindra Prasad. The State filed a Special Leave Petition (Civil) No. 2128 of 1985 changing the aforesaid order dated 10.10.1984 and the aforesaid SLP was dismissed by means of an order dated 12.08.1985.

35. In the present case, no circumstances exist justifying the redetermination of surplus land of the petitioners. The proceedings for redetermination of the surplus land of the petitioners has been initiated on 06.01.1999, i.e. long after the period of two years mentioned in Section 31 (3) of U.P. Act No. 20 of 1976, which is not permissible in law. Now it is not open to the State to ignore the aforesaid order dated 11.01.1983 passed by II Additional District Judge, Lucknow in Miscellaneous Civil Appeal No. 176 of 1982, which was affirmed by this Court and

by the Hon'ble Supreme Court and this is not permissible by Section 38-B of the Act.

36. Therefore, the initiation of fresh proceedings and the order for fresh determination is unsustainable in law.

37. Accordingly, the Writ Petition is **allowed**. The notice dated 06.01.1999 issued by the Prescribed Authority/Additional Collector (Administration), Lucknow under Section 10(2) of the Ceiling Act and the entire proceedings initiated by the aforesaid notice are hereby quashed. The parties will bear their own costs of litigation.

(2024) 5 ILRA 1588
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ C No. 2553 of 2024

C/M Ram Dularey Yadav Higher Secondary School & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dileep Kumar Mishra

Counsel for the Respondents:
C.S.C., Suresh Chandra Tiwari

Civil Law – Impugned order renewing the registration certificate-at the behest of respondent-no opportunity of hearing to the petitioner-principles of natural justice violated-opportunity of hearing-major and essential ingredient-test of any decision of an authority-principle of *audi alteram partem*-applicable on all administrative, judicial or quasi-judicial actions-person affected by it-must be heard before a decision is taken-principle not followed-impugned order quashed-petition allowed. (Paras 21, 22 and 23)

HELD:
The Hon'ble Apex Court, time and again has held that the opportunity of hearing is one of the major and essential ingredients so as to make a test of any decision of an authority. The decision might be administrative, judicial or quasi-judicial, but person affected must be heard before a decision is taken. (Para 21)

The issue has rightly been settled in case of Managing Director, ECIL, Hyderabad & ors.vs B. Karunakar & ors.by a Constitutional Bench of the Apex Court reported in (1993) 4 SCC 727 and subsequently, law rendered in State Bank of India & ors.Vs Rajesh Agarwal & ors.reported in (2023) 6 SCC 1 regarding the principle of 'audi alteram partem. (Para 22)

Petition allowed. (E-14)

List of Cases cited:

1. Managing Director, ECIL, Hyderabad & ors.vs B. Karunakar & ors., (1993) 4 SCC 727

2. State Bank of India & ors.Vs Rajesh Agarwal & ors., (2023) 6 SCC 1

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

1. Heard Sri Dileep Kumar Mishra, learned counsel for the petitioners, Sri Shailendra Kumar Singh, learned Chief Standing Counsel and Sri Piyush Kumar, learned Standing Counsel for the State, Sri Suresh Chandra Tiwari, learned counsel for opposite party no. 4 and perused the material placed on record.

2. By means of the present petition, the petitioner has assailed the order dated 12th December 2023 passed by the Deputy Registrar, Firms, Society and Chits,

Lucknow Region Lucknow. Further, a writ in the nature of mandamus is also sought for commanding the respondent to accept the original papers of the petitioner's Committee of Management, for renewal of the registration certificate of the society.

3. Factual matrix of the case is that Sri Ram Dularey Lal Yadav, Higher Secondary School Society (hereinafter referred to as 'society') was got registered in the year 1966. The society has its own by-laws for functioning and managing the affairs of the society, as such the rules and regulation of the Society Registration Act, 1860 (hereinafter referred as 'Act, 1860') are fully applicable on the petitioner's society. As per the by-laws of the society, the term of Committee of Management is three years and it is said that the election of the Committee of Management is regularly held and the list of office bearers of the society including the list of member of the general body was also sent time to time by the Manager of the society.

4. The election of Committee of Management were held in year 2006, 2009 and 2010 and the requisite records/documents were also sent before the Deputy Registrar, in accordance with the provision of Section 4 of the Act, 1860.

5. It is said that in the election held on 20th December 2009, late Laxman Singh Yadav was elected as President of Committee of Management and Bahadur Singh Chandel was the Manager. On, 30 March 2010, Laxman Singh Yadav died, thereafter, Committee of Management, wrote resolution dated 11th May 2010 and proposed the election of President, wherein, Veer Singh Chandel was proposed to be the President and when Raj Bahadur Singh, the then Manager of Committee of Management died on 23rd October 2012, on 16th December 2022, the petitioner no. 2, namely, Veer Singh Chandel was elected as Manager and all the proceedings were submitted, consequently, on 27th December 2022. The petitioner applied for renewal of the registration of society which was renewed on 27th December 2012, whereafter, on 10th January 2013, opposite party no. 4, who was never inducted as a member, made false complaint before opposite party no. 2, with a prayer to deputy registrar, not to proceed on the election proceeding of the petitioners' society held on 20th December 2009 and to cancel the list of office bearers of Committee of Management of year 2012?13 , the Deputy Registrar stayed the implementation of the election of Committee of Management.

6. Being aggrieved with the order dated 11th January 2023, petitioner filed writ petition no. 507 (MS) of 2013 before this Hon'ble Court and vide order dated 24th January 2013, the operation of the order dated 11th January 2013 passed by the Deputy Registrar, Firms, Society and Chits, Lucknow Region Lucknow was stayed. Whereafter, the term of the Committee of Management completed and the new election held on 10th October 2015, as per the procedure prescribed in the by-laws. Thereafter, the petitioner submitted the application on 19th March 2017 for renewal of the registration certificate before the Deputy Registrar, which was prepared on 5th July 2016. It is also submitted that the original copy of the renewal certificate is with the petition no. 2.

7. Election of the Committee of Management was consecutively held after completion of three years of the tenure i.e., on 10 October 2018, and all the papers were sent to the office of the Deputy Registrar and

when on 24th October 2019, the petitioner submitted all the proceeding before the Deputy Registrar for registration of list of office bearers of Committee of Management, no action was taken and therefore, contempt petition was preferred bearing Contempt Petition No. 1644 of 2020, wherein, the notice was issued to the respondent-authority and as soon as the notice was issued, the Deputy Registrar approved the election proceeding dated 10th October 2015 and 10th October 2018.

8. After expiry of term of renewal of registration of the society, the petitioner submitted an application through online on 28.11.2020 for renewal of registration certificate and also submitted the requisite fee as prescribed under Section 3?A of the Act, 1860 and further submitted the requisite papers/documents on 25.11.2021 and 21.12.2021, which was properly furnished in the office of the Deputy Registrar by the petitioner no. 2 and thereafter, on 10th October 2023, and on subsequent dates, the petitioner personally appeared before the Deputy Registrar for submission of original records, but the Deputy Registrar ignored every request of the petitioner, rather the petitioner was misbehaved by the officials of the office of the Deputy Registrar and all of sudden without associating the petitioner, the Deputy Registrar vide impugned order dated 19th December 2023, issued the renewal certificate on the basis of the papers submitted by the opposite party no. 4.

9. Contention of the counsel for the petitioner is that the impugned order dated 19th December 2023 has been passed by the Deputy Registrar without affording proper opportunity of hearing to the petitioners and that too in illegal and arbitrary manner and against the provision of Act, 1860. He further added that as per the by-laws, the term of the Committee of Management is prescribed as three years and the election of Committee of Management has regularly been held and time and again the list of the members as well as the office bearers of the society were sent to the office of Deputy Registrar, as prescribed under the provision of the Act, 1860.

10. Further contention of the counsel for the petitioner is that the opposite party no. 4 has never been inducted as member of society, though, he has fraudulently shown himself to be the member of the society by submitting a forged membership receipt, shown to be issued by the then President of the society, though, no proceeding regarding the induction of membership of the opposite party no. 4 is placed on record and except apart the alleged membership receipt, there is no proof/evidence, that under what circumstances the petitioner is inducted as member of the society?

11. Adding his argument, he summits that the Deputy Registrar while proceeding with the renewal of the registration of society accepted the fabricated document, submitted by the opposite party no. 4 and did not allow the petitioner to submit the original records, which is in custody of the petitioner no. 2. He also added that after concluding the proceeding on 17.07.2023, the Deputy Registrar kept on writing to the petitioner to submit the record as if the proceeding are going on and all these act of the Deputy Registrar is camouflaging and not permissible under the law.

12. Further submission is that the opposite party no. 4 could not substantiate while filing the counter affidavit that how he has been inducted as a member and he has failed to controvert the pleadings of the writ petition, therefore, submission is that the

order impugned passed by the Deputy Registrar is unlawful and erroneous, and the same maybe quashed.

13. Counsel appearing for the opposite parties have opposed the abovesaid contentions and submitted that opposite party no. 4 has been inducted as a member in year 2010 and a membership receipt has also been issued, which is endorsed by the then President, who is the authority to issue such receipt, under the by-laws of the society. He further added that the opposite party no. 4, being the son of the then Manager, is claiming his right as if there is any right of inheritance on the post of Manager of Committee of Management of the society, though, the by-laws specifically speaks about the provision of induction of the members in the society and by adopting those provision, the opposite party no. 4 has been inducted as a member and thereafter, since he was having the original records and thus, he produced the same and on his production of his records, the renewal of the registration of the society is done by the Deputy Registrar in a right and proper way, which is in consonance with the provision of Act, 1860, as well as the by-laws of the society.

14. He further added that since, the disputed question of fact are raised and therefore, the petitioner, if aggrieved, may challenge this order before the Civil Court and it is not amenable to the Writ Jurisdiction under Article 226 of Constitution of India.

15. Concluding his arguments, he submits that since there is no force in the contention and subject matter, raised/preferred by the petitioners and therefore, the petition is liable to be dismissed.

16. Considering upon the submissions of the counsel for the parties and after perusal of the available records, including the original record placed before this Court, it emerges that a dispute arose when one Rakesh Kumar Gupta, i.e., opposite party no. 4, claiming him to be the Manager of Committee of Management of the society, submitted the documents before the Deputy Registrar and sought the renewal of the registration of the society, whereafter, the same was controverted by the petitioners while stating that the opposite party no. 4 has never been inducted as a member of the society and therefore, he is a stranger and the renewal of the society on furnishing the paper by the opposite party no. 4, annexing therewith the list of general body and the expenditure of financial year 2009?10 and 2011?12 is impermissible. The matter went up to the Coordinate Bench of the Court, whereafter, the Deputy Registrar decided the matter vide order dated 19th December 2023, which is under challenge in the instant petition. The petitioner no. 2, claiming him to be the duly inducted member and the Manager of Committee of Management of the society, while outrightly rejecting the claim of the opposite party no. 4, as member of the society, while placing the membership receipt bearing no. 648 dated 23rd October 2010, issued by the then President of society. As per the provisions of by-laws, the President can utilise the power of the treasurer and thus, it is stated that the opposite party No.4 is a validly inducted member of the society.

17. The crux of the issue is that without affording opportunity of hearing to the petitioners, the order dated 19th December 2023 has been passed.

18. When this court examines the above said, in facts and law, it emerges from

the order-sheet of the original record that on 17th January 2023, the then Deputy Registrar heard the matter finally and closed the proceeding, and the judgement was reserved, but, from perusal of the further proceedings, carried out by the present Deputy Registrar, it does not transpires that when the matter was fixed for re-hearing, though, on two occasions a formality is done while calling the original records from the parties, however, by what means the petitioners are communicated, is not evident from the order-sheet. Simply the question arises that once the proceeding was closed and it was not open for further hearing, there was no occasion for calling the original record.

19. It is specific case of the petitioners that proper and fair opportunity has not been afforded to the petitioners, and once the petitioners appeared in person to submit the original records to the Deputy Registrar, the Deputy Registrar has denied to accept, for the reasons best known to him. It is not understandable that why the petitioners would restrain themselves to deposit the original records to the office of Deputy Registrar, if it was in fact called for? and that too in the event that the proceedings were earlier closed vide order dated 17th January 2023; meaning thereby that the present Deputy Registrar was merely doing the formality and nothing else.

20. It is a trite law that if any action/order is of a civil consequence, then opportunity of hearing is must to the affected persons. This court is also not unmindful to the law that if there is disputed question of fact or there can be two possible views, the same is not amenable to the writ jurisdiction, but so far as the present case is concerned, prima facie, there seems to be lack of rules of principle of natural justice as after the hearing was over, and the judgement was reserved by the Deputy Registrar, the records were sought without putting the matter for further hearing and as per the contention of the petitioners, prior to 17th January 2023 also, the proper opportunity of hearing was not accorded to the petitioners.

21. The Hon'ble Apex Court, time and again has held that the opportunity of hearing is one of the major and essential ingredient so as to make a test of any decision of an authority. The decision might be administrative, judicial or quasijudicial, but person affected must be heard before a decision is taken.

22. The issue has rightly been settled in case of **Managing Director, ECIL, Hyderabad and others vs B. Karunakar and Others by a Constitutional Bench of the Apex Court** reported in **(1993) 4 SCC 727** and subsequently, law rendered in **State Bank of India and Others Vs. Rajesh Agarwal and others** reported in **(2023) 6 SCC 1** regarding the principle of 'audi alteram partem'.

23. Paragraph 36 of the abovesaid judgement is quoted hereinunder:-

"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) nemo judex in causa sua, which means that

no person should be a judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi- judicial action must be heard before a decision is taken. The courts generally favor interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power."

24. In view of the aforesaid submissions and discussions, this Court is of considered opinion that the proper and fair opportunity of hearing has not been afforded to the present petitioners, as is evident, from the original records of the society produced before this Court. Further, the settled proposition of law has also materially been ignored. Consequently, the writ petition is hereby **allowed** and the impugned order dated 19.12.2023 is quashed.

25. Matter is relegated back to the Deputy Registrar concerned to proceed with the matter a fresh, after hearing all the stakeholders, while providing them opportunity of hearing and the decision shall be taken within a period of three months.

26. The original certificate shall be submitted by the opposite party No. 4 before the Deputy Registrar, within a week, if he has received it, already.

27. Office is directed to return the original records to counsel for the State.

(2024) 5 ILRA 1593
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.05.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 7368 of 2006

U.P. Power Corporation Ltd. ...Petitioner
Versus
Central Electricity Regulatory Commission & Anr. ...Respondents

Counsel for the Petitioner:
D.D. Chopra, Divyam Krishna, Shailesh Verma

Counsel for the Respondents:
I.B. Singh, Madhumita Bose, Rekha Nigam

(A) Electricity Law - The Electricity Act, 2003 - Section 61 - Tariff regulation , Section 62 - Determination of tariff , Section 63 - Determination of tariff by bidding process , Section 178 - Power of central commission to make regulations - Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment), Regulations, 2006 - Regulation 5A - Provisional Tariff - Law should be consonant with principles of faith and reason - Delegated legislation, including regulations, should not conflict with principal legislation - Regulations should be harmonious with the statutes they are formulated under - The Electricity Act of 2003 provides the statutory framework for regulations. (Para - 9)

(B) Electricity Law - The Electricity Act, 2003 - Section 62(6) - If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest

equivalent to the *bank rate* without prejudice to any other liability incurred by the licensee. (Para -5)

Section 62(6) and Regulation 5A Conflict - Section 62(6) states interest equivalent to *bank rate* chargeable for price or charge exceeding tariff - Regulation 5A stipulates *simple interest at 6% per annum* for adjustment - Regulation 5A contradicts Section 62(6), which equates *interest rate* to *bank rate* - Quashing Regulation 5A of Central Electricity Regulatory Commission - Declares regulation ultra-vires and inconsistent with Electricity Act, 2003. **(Para - 2,7)**

HELD:-Central Electricity Regulatory Commission did not have any power to provide any different rate of interest in its regulations for adjustment which is at variation from the amount payable under Section 62 of the Act of 2003. Regulation 5A to the extent of fixation of payable interest for amounts to be adjusted under Section 62 of the Act of 2003, being in direct conflict with Section 62(6) of the Act of 2003 is declared ultra-vires and is quashed.**(Para - 10,11)**

Petitions allowed. (E-7)

List of Cases cited:

1. Sukhdev Singh Vs Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421

2. General Officer Commanding-in-Chief Vs Subhash Chandra Yadav, (1988) 2 SCC 351

3. St. Johns Teachers Training Institute Vs Regional Director, NCTE, (2003) 3 SCC 321

4. Newspapers Ltd. Vs St. Industrial Tribunal, U.P. & Ors., 1957 SCC Online SC 32

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Heard Sri D.D. Chopra, learned Senior Advocate, assisted by Sri Shailesh Verma, learned counsel representing the UPPCL-petitioner, Ms. Madhumita Bose, learned counsel for respondent no.1-CERC and Ms. Rekha Nigam, learned counsel for respondent no.2-NTPC.

2. Present writ petition is filed by U.P. Power Corporation Limited (UPPCL) against the Central Electricity Regulatory Commission (CERC) and NTPC Limited. Though, number of reliefs are sought in the present writ petition, however, Sri D.D. Chopra, learned Senior Counsel for the petitioner confines his prayer to relief 'ia' of the writ petition only and states that he is not pressing any other relief except the aforesaid relief 'ia'. The relief 'ia' of the writ petition reads under:-

"ia. Issue an appropriate writ, order or direction in the nature of certiorari quashing Regulation 5A of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment), Regulations, 2006 (the impugned regulations) be declaring it to be ultra-vires and not consistent with the provisions of Electricity Act, 2003 only to the extent the same provides for payment of simple interest at 6% per annum."

3. Learned counsel for petitioner states that Regulation 5A of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment), Regulations, 2006 (hereinafter referred to as 'Regulations of 2006') is directly in conflict with Section 62(6) of the Electricity Act, 2003 (hereinafter referred to as 'Act of 2003').

4. Opposing the same, both the counsel for respondents submit that there is no illegality in the regulations.

5. Section 61 of the Electricity Act provides that appropriate commission shall, subject to the provision of this Act, specify

the terms and conditions for the determination of tariff. Section 62 of the Electricity Act, 2003 reads as follows:-

"62. Determination of tariff.—(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—

(a) supply of electricity by a generating company to a distribution licensee: Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

6. Section 178 of the Act of 2003 empowers the Central Commission to make rules for carrying out the provisions of the Act. In exercise of such powers, Central Electricity Regulatory Commission had notified Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (Regulations of 2004). Further, by notification dated 01.06.2006, the Central Electricity Regulatory Commission amended the said regulations by inserting Regulation 5A, after Regulation 5 of the principal Regulations of 2004. Regulation 5A reads as follows:-

"5A. Provisional tariff: Provisional tariff or provisional billing of charges, wherever allowed by the Commission based on the application made by the generating company or the transmission licensee or by the Commission

on its own motion or otherwise, shall be adjusted against the final tariff approved by the Commission.

Provided that where the provisional tariff charged exceeds the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall pay simple interest @ 6% per annum, computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment.

Provided further that where the provisional tariff charged is less than the final tariff approved by the Commission, the beneficiaries shall pay simple interest @ 6% per annum, computed on monthly basis on the deficit amount from the date on which final tariff will be applicable up to the date of billing of such deficit amount.

Provided also that excess/deficit amount along with simple interest @ 6% shall be adjusted within three months from the date of the order failing which the defaulting utility/beneficiary shall be liable to pay penal interest on excess/deficit amount at the rate as may be decided by the Commission."

7. The simple submission made by counsel for petitioner is that while Section 62(6) specifically provides that interest equivalent to bank rate shall be chargeable at the time of recovery of a price or charge exceeding the tariff determining under the said section, while regulation 5A provides that while adjusting the said amount simple interest at the rate 6% per annum shall be payable. On the face of it, Regulation 5A is directly in conflict with the Section 62(6) which specifically provides that the interest rate would be equivalent to the bank rate.

8. In the present case, the regulations are framed under the Act of 2003 and they can not be in conflict with any provision of Act of 2003. Suffice is to refer to the decision in 5 Judges Bench of Supreme Court in case of ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421***. In paragraph-18 the Court held:-

"18. ***The authority of a statutory body or public administrative body or agency ordinarily includes the power to make or adopt rules and regulations with respect to matters within the province of such body provided such rules and regulations are not inconsistent with the relevant law.*** *In America a "public agency" has been defined as an agency endowed with governmental or public functions. It has been held that the authority to act with the sanction of Government behind it determines whether or not a governmental agency exists. The rules and regulations comprise those actions of the statutory or public bodies in which the legislative element predominates. These statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred on the statute to make rules and regulations establish the pattern of conduct to be followed. Rules are duly made relative to the subject-matter on which the statutory bodies act subordinate to the terms of the statute under which they are promulgated. Regulations are in aid of the enforcement of the provisions of the statute. Rules and regulations have been distinguished from orders or determination of statutory bodies in the sense that the orders or determination are actions in which there is more of the judicial function and which deal with a*

particular present situation. Rules and regulations on the other hand are actions in which the legislative element predominates." (emphasis added)

In **General Officer Commanding-in-Chief v. Subhash Chandra Yadav, (1988) 2 SCC 351**. In paragraph-14 the Court held:-

"14. This contention is unsound. ***It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.*** *The position remains the same even though sub-section (2) of Section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act. In other words, in spite of the provision of sub-section (2) of Section 281, any rule framed under the Cantonments Act has to fulfil the two conditions mentioned above for their validity. The observation of this Court in Jestamani Gulabrai Dholkia v. Scindia Steam Navigation Company [AIR 1961 SC 627 : (1961) 2 SCR 811] relied upon by Mr Aggarwal, that a contract of service may be transferred by a statutory provision, does not at all help the appellants. There can be no doubt that a contract of service may be transferred by statutory provisions, but before a rule framed under a statute is regarded a statutory provision or a part of the statute, it must fulfil the above two conditions. Rule 5-C was framed by the Central Government in excess of its rule-making power as contained in clause (c) of sub-section (2) of Section 280 of the Cantonments Act before its amendment by the substitution of clause (c); it is, therefore, void."(emphasis added)*

In ***St. Johns Teachers Training Institute v. Regional Director, NCTE, (2003) 3 SCC 321.*** In paragraph-10 the Court held:-

"10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. ***Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.*** *The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations*

saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature." (Emphasis added)

In **Newspapers Ltd. Vs. State Industrial Tribunal, U.P. And Others, 1957 SCC Online SC 32.** In paragraph-19 the Court held:-

"19....The cardinal rule in regard to promulgation of by-law or making rules is that they must be legi fidei rationi consona, and therefore all regulations which are contrary or repugnant to statutes under which they are made are ineffective..." (Emphasis added)

9. The principle of law is well settled that law should be consonant with principles of faith and reason, delegated legislation such as regulations framed under an Act, cannot be in conflict with its principal legislation. Regulations need to be consistent and harmonious with the statutes under which they are formulated. The Electricity Act of 2003 provides the statutory framework within which regulations are enacted, and any regulations promulgated must be aligned with and not contradict the provisions of the principal legislation.

10. Counsels for the respondents could not explain the said conflict between the regulation and section. Bank rate is variable and is based upon large number of considerations. The legislature in its best wisdom has provided the same to be charged while adjusting the amount, therefore, the respondent no.1 Central Electricity Regulatory Commission did not have any power to provide any different rate of interest in its regulations for adjustment which is at variation from the amount payable under Section 62 of the Act of 2003.

11. Thus, the said Regulation 5A to the extent of fixation of payable interest for amounts to be adjusted under Section 62 of the Act of 2003, being in direct conflict with Section 62(6) of the Act of 2003 is declared ultra-vires and is quashed.

12. The writ petition succeeds and is ***allowed.***

(2024) 5 ILRA 1598
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1348 of 2022

M/s Ace Manufacturing Systems Limited ...Petitioner

Versus

State of UP & Ors. ...Respondents

Counsel for the Peitioner:
Atul Gupta, Prakhar Shukla

Counsel for the Respondents:

(A) Tax Law - Presence of mens rea for evasion of tax is a sine qua non for imposition of penalty - Mens Rea: A Jurisprudential Principle in Taxation - Mens rea, or the presence of a guilty mind, is a

prerequisite for penalty imposition - protects individuals' rights from arbitrary governmental authority - emphasizes procedural fairness in taxation - Balances regulatory enforcement and individual rights, promoting transparency and accountability. (Para -9)

Petitioner's Over Dimensional Cargo (ODC) Case - Cargo declared as ODC - Authorities ruled - faster travel and quick destination disqualify vehicle as ODC - penalty(tax) imposed on ODC goods against the petitioner - aggrieved by seizure order - penalty order - appellate orders - hence petition. **(Para - 1,2)**

HELD:- Petitioner's penalty based on assumptions and conjectures, contradicting a departmental circular that asserts that taxing ODC goods that traveled at a faster speed is not a valid basis for imposing such taxes. Writ of certiorari issued against orders quashed and set-aside. Consequential reliefs to follow. Respondents directed to return security and penalty paid within six weeks. **(Para - 8,10,11)**

Petition allowed. (E-7)

List of Cases cited:

1. Girish & Co. Vs St. of U.P. & ors., Writ Tax No.897 of 2019

2. M/s Hindustan Herbal Cosmetics Vs St. of U.P. & ors., Writ Tax No.1400 of 2019

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

1. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the seizure order dated October 23, 2021, penalty order dated October 29, 2021 and the appellate orders dated April 16, 2022 and July 22, 2022.

2. The case of the petitioner herein is that the cargo being transported had been declared as Over Dimensional Cargo (hereinafter referred to as 'the ODC'). However, the authorities in the instant case concluded that since the goods had travelled at a faster speed and reached the destination quickly, the vehicle cannot be categorised as the ODC.

3. The counsel appearing on behalf of the petitioner submits that the respondent authorities did not undertake the task of calculating the height of the goods which clearly would have indicated that the goods would be classified as the ODC since the same were 13.9 feet above the ground. Counsel on behalf of the petitioner also relied on a circular issued by the Commissioner, State Tax dated January 17, 2024, which states in paragraph 2.4 as follows:-

"2.4 स्पष्ट है कि Over Dimensional Cargo का निर्धारण उपरोक्त प्रावधानों के दृष्टिगत किया जाना अपेक्षित होगा। ब्अमत क्पउमदेपवदंस ब्ंतहव से संबंधित वाहन होने के दशा में केवल इस आधार पर अभिग्रहण किया जाना है कि ऐसे किसी वाहन के नियम 138(10) के अधीन विहित अधिकतम दूरी एवं समय सीमा की तुलना में कम समय से अधिक दूरी तय की है विधिक रूप से उचित नहीं है। अतः उपरोक्त प्रकार के प्रकरणों में माल तथा वाहन का अभिग्रहण किया जाना सिवाय उस स्थिति के जहॉ आलोच्य वाहन द्वारा उपरोक्तानुसार प्राप्त अधिक समयावधि का प्रयोग समान
प्रपत्रों के आधार पर माल के पुनर्परिहवन हेतु किया जा रहा है, उचित नहीं है"

4. In the above circular, it has also been pointed out that a vehicle other than a double decked transport, the vehicle height of which exceeds 3.8 meters, would be classified as the ODC.

5. Counsel on behalf of the petitioner has submitted that 3.8 meters amounts to 12.46 ft whereas in the case of the petitioner the height of the goods was 13.8 ft.

6. Counsel on behalf of the respondents submits that the speed at which

the goods have travelled clearly indicates that the vehicle cannot be categorised as ODC.

7. The above submission of the counsel on behalf of the respondents cannot be accepted as the circular issued by the Commissioner clearly indicates that the speed of a vehicle is not a criterion to decide the nature of the Cargo. It is to be further noted that the other documents in the vehicle i.e. invoice, e-way bill and bilty were all in order and matched with the goods in question. The sole reason for imposing penalty in the present case is the fact that the goods had travelled at a fast speed, and therefore, according to the authorities could not be categorised as the ODC.

8. In my view, the entire premise on the basis of which penalty has been imposed against the petitioner is based on surmises and conjectures and is also against the departmental circular that clearly indicates that imposition of tax on the ODC goods that had travelled at a faster speed is not a tenable ground.

9. In the present case, the entire imposition of penalty is based on surmises and conjectures without there being any basis or finding with regard to intention to evade tax. One may rely upon the judgments of this Court in the case of **Girish and Company vs. State of U.P. and others** (Writ Tax No.897 of 2019, Neutral Citation No.-2024:AHC:9778) and **M/s Hindustan Herbal Cosmetics vs. State of U.P**. and others (Writ Tax No.1400 of 2019, Neutral Citation No.-2024:AHC:209) where it has been held that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty.

9. The imposition of penalties on the petitioner rests on shaky ground, devoid of any substantive basis or findings indicating an intention to evade tax. This deficiency in evidentiary support undermines the legitimacy of the penalties and raises questions about the procedural fairness of the administrative actions taken against the petitioner. In the absence of concrete evidence demonstrating wilful misconduct or deliberate intent to circumvent tax obligations, the imposition of penalties appears arbitrary and unjustified.

9. The jurisprudential principle that mens rea, or the presence of a guilty mind, is a prerequisite for imposition of penalties holds immense significance. It serves as a bulwark against the arbitrary exercise of governmental authority and safeguards the rights of individuals against unwarranted punitive measures. Its application in the realm of taxation underscores the importance of ensuring procedural fairness. By requiring the establishment of mens rea as a prerequisite for penalty imposition, the legal framework strikes a delicate balance between regulatory enforcement and individual rights, thereby fostering transparency and accountability in the administration of tax laws.

9. The mere fact that the goods in question were transported at a faster speed does not constitute sufficient grounds for penalization, in light of the departmental circular explicitly excluding transit speed as a criterion for classification. The reliance on speculative assumptions and conjectural reasoning to justify the imposition of penalties is antithetical to the principles of fairness and equity that underpin the rule of law. Moreover, the arbitrary imposition of penalties without any discernible basis undermines the credibility and integrity of the tax administration system. It erodes public trust in the fairness and impartiality

of governmental actions and fosters a perception of arbitrariness and caprice. Such actions not only prejudice the rights of the affected parties but also undermine the legitimacy of the regulatory framework as a whole, casting doubt on the efficacy and reliability of tax enforcement mechanisms.

10. The rationale behind the mens rea requirement is twofold. Firstly, it serves to preserve the integrity of the legal system by distinguishing between inadvertent errors and intentional misconduct. By requiring evidence of wilful intent, it ensures that penalties are reserved for those who deliberately flout the law, thereby safeguarding against unjust punishment and preserving public confidence in the fairness of the tax regime. Secondly, the mens rea requirement acts as a deterrent against tax evasion, signalling to taxpayers that deliberate non-compliance will be met with severe consequences. The prospect of facing penalties serves as a powerful disincentive for individuals and entities tempted to engage in fraudulent or deceitful conduct, thereby promoting voluntary compliance with tax laws and fostering a culture of accountability and transparency. In the absence of wilful intent, penalties lose their deterrent effect and instead become arbitrary exercises of state power, subjecting innocent taxpayers to undue hardship and injustice. It is imperative that penalty imposition be grounded in sound reasoning and substantive evidence of wilful misconduct.

10. In light of the above, the instant writ petition is allowed. Accordingly, let there be a writ of certiorari issued against the orders dated October 23, 2021, October 29, 2021, April 16, 2022 and July 22, 2022. The said orders are quashed and set-aside. Consequential reliefs to follow.

11. The respondents are directed to return the amount of security and penalty paid by the petitioner within six weeks from the date of this order. There shall be no order as to the costs.

(2024) 5 ILRA 1601
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 1686 of 2019
With
Criminal Misc. Application U/S 372 CR.P.C
(Leave to appeal) No. 106 of 2019

Sajid ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Satish Kumar Tyagi, Nanhe Lal Tripathi, Perdeep Kumar Vishnoi, Ramesh Kumar Pandey, Syed Ahmed Faizan, Zaheer Asghar

Counsel for the Respondent:
G.A., Mohd. Afzal, Satish Kumar Mishra

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 374(2) - Appeal ,Section 372 - No appeal to lie unless otherwise provided , Indian Penal Code, 1860 - Section 498A, 307/34, 323/34 - The Dowry prohibition Act, 1961 - Section 4 - Judicial Propriety and Trial Judge's Pick-and-Choose Decision - Judges should make decisions with an open mind, not preconceived notions - court must ensure compatibility with the accused's financial status. (Para -35,44)

Two criminal appeal - one against conviction - another against acquittal of co-accused persons - to reverse finding - accord suitable sentences - demand of dowry - Appeal Determination - Prosecution's Paradigm Shift - Prosecution's shift towards ulterior motives - Alleged plot purchase not mentioned in FIR or 161 Cr.P.C. statement - Half-hearted introduction of this angle during prosecution witnesses' examination - Shahjad Ali's financial capability for plot purchase questioned - Hyperbole used by prosecution without cogent basis or reason - Trial Judge's Pick-and-Choose Decision - Choosing facts in conflict with pre-determined conclusion - Booked husband causing grave injustice. **(Para - 3, 33,35)**

HELD:- Trial Judge qualitatively selected those part of the testimonies, which suits their legal judicial conscious and book the husband (Sajid) for the offence. Judgement and sentence against husband erroneous and lopsided . Conviction and sentence quashed.**(Para - 45,46)**

Acquittal of Nazakat, Smt. Jaitoon, and Zakir. Trial judge's reasoning correct. No interference in exercise of power under Section 372 Cr.P.C. Application for special leave to appeal rejected. **(Para - 47)**

Criminal Appeal No. 1686 of 2019 ALLOWED

Criminal Appeal No. 106 of 2019 REJECTED (E-7)

List of Cases cited:

1. Ram Das Vs St. of Mahaa. , AIR 1977 (SC) 1164

2. V.L.Tresa Vs St. of Kerala , (2001)3 SCC 549

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

1. Heard Sri S.F.A. Naqvi, learned Senior Counsel assisted by Sri Syed Ahmad Faizan, Zaheer Asghar, Ms. Fatma Anjum and Sri Munawar Hussain, learned counsel for the appellants, Sri Mohd. Afzal, learned counsel for the first informant assisted by Sri Kushagra Srivastava, Sri Shahrukh, Advocates, Sri Ghanshyam Kumar and Satyendra Tiwari, learned AGA-I for the State.

2. Argument heard at length to the satisfaction of learned counsel for the parties.

3. The aforesaid criminal appeals are --- (i) Criminal Appeal No. 1686 of 2019 (Sajid Vs. State of U.P., is only on behalf of the accused Sajid, a convicted accused for the offence under Section 498A, 307/34, 323/34 IPC and Section 4 of the D.P.Act and therefore the present appeal is under Section 374(2) Cr.P.C. assailing the legality and validity of the judgement and order dated 12.02.2019 passed by Additional Sessions Judge/ FTC, Hapur, whereby accused Sajid was sentenced under Section 498A, three years R.I. and a fine of Rs. 3000/- along with default clause, under Section 307/34 IPC for ten years R.I. and a fine of Rs. 10,000/- along with default clause, and Section 4 of the D.P.Act, two years R.I. and a fine of Rs. 3,000/- along with default clause **AND** (ii) Criminal Appeal No. 106 of 2019 on behalf of Shahjad Ali, the informant, who is assailing the aforesaid judgement and order dated 12.02.2019 whereby the learned trial judge has recorded the acquittal of the remaining co-accused persons, namely, Zakir, Smt. Jaitoon and Nazakat under Sections 498A, 307/34, 323/34 IPC and Section 4 of the D.P.Act to reverse the finding and accord suitable sentence to them.

4. Since subject matter of both the appeals, is the judgement and order dated 12.02.2019 passed by Additional Sessions Judge/ FTC, Hapur while deciding the S.T.

No. 1333 of 2013 and the same set of evidence has to be examined & appreciated in both the appeals, therefore for the sake of brevity and convenience, both these appeals are being decided by a common judgement.

5. Needless to mention here, that same set of counsel are assisting the Court in deciding the aforesaid appeals and thus we have heard the learned counsel of both the sides representing their respective parties of the appeals to their satisfaction.

6. The paper book of the appeal is ready and the counsel for both the sides have advanced their submissions and the judgement was reserved.

7. Before appreciating the merit of the case, it is imperative to give a bare skeleton facts of the case to appreciate the controversy involved, which are :-

(i) For the incident of 29.07.2012, the informant Shahjad son of Mushtaq lodged an FIR on 30.07.2012 at 12.15 p.m., which was registered as Case Crime No. 234 of 2012 under Section 498A, 307, 323 IPC and Section 3/4 of D.P.Act against (a) Sajid**(husband)** son of Nazakat Ali, (b) Nazakat Ali (father-in-law), (c) Smt. Jaitoon**(mother-in-law)** w/o Nazakat Ali and (d) Zakir Ali**(Dewar)** son of Nazakat Ali.

(ii) As per the allegation made in the FIR, informant's daughter Nazrana got married about 15 months back with Sajid of Village Vait as per the Muslim Rites and rituals.

(iii) In this marriage the informant has spent Rs. 51,000/- in cash, a motorcycle, ornaments of gold and silver and other household goods of wood and iron.

(iv) Dissatisfied by the dowry given to her daughter, all the family members including Sajid, Nazakat Ali, Jaitoon and Zakir Ali used to target her daughter for bringing scanty dowry and she was constantly subject of cruelty and maltreatment and sometimes they used to manhandle her. This has caused lot of frustration and agony to her daughter. There was a constant demand of a four wheeler and Rs. 2,00,000/- by way of additional dowry. On 29.07.2012, they have committed a maar-peet with her. After getting the information, the informant, Pradhan Nawab and Intezaam went to village Vait, where they were informed that the in-laws have committed maar-peet with her and she has sustained injury over her hand. Informant and others have tried to pacify the situation and came back.

(v) As soon as they came back, they come to know that all the named accused persons after pouring oil upon her set her ablaze. Though she has not died but was taken to Meerut,where she informed that all of them have tried to kill her by burning her. After setting her fire all the accused persons fled away from the place and the informant is engaged in treatment of her daughter and that is how there is delay in lodging the FIR, whereby the FIR was case crime no. 234 of 2012, under Section 498A, 307, 323 IPC and Section 4 of D.P.Act, P.S. Simbhawali, District Hapur.

8. As a natural outcome here, that after registering the FIR the case was entrusted to the police for the investigation and the police after holding a indepth probe into the matter has submitted a charge sheet against all the named accused persons on 19.09.2012 under Section 498A, 307, 323 IPC and Section 3/4 D.P.Act.

9. The learned Magistrate has taken the cognizance of the offence and being a

cognizable offence the case was committed to the court of sessions for its trial.

10. It is worthwhile to mention here that all the accused persons were bailed out, but the learned trial judge have framed charges against all of them them under Section 498A, 307/34, 323/34 IPC and Section 3/4 D.P.Act and explained to them to which they have denied and insisted to be tried.

11. To establish their case, the prosecution have produced PW-1 Shahjad, PW-2 Nazrana (the injured), PW-3 Pushpendra Kumar, PW-4 Dr. Rajkumar, PW-5 S.I.-Tribhuvan and PW-6 Udaiveer Singh. In addition to above from the side of prosecution five documents were produced, which were duly exhibited during trial.

12. Syed Farman Ali Naqvi, learned counsel for the appellant in his introductory argument have stated that this is the exclusive case whereby the prosecution have changed its stand at every step casting the serious doubts about the veracity and authenticity of the prosecution case. The prosecution have magnified the unfortunate incident of burning to manifold just to falsely implicate the accused-appellant by levelling an omnibus and general role to all of them. Since the informant is not an eye witness to the incident, and therefore, driven by instinct of taking revenge from his opponents have collected the materials from various quarters and magnified it and tried to tailor a bogus story of dowry related harassment to his daughter Nazrana. It is also contended by learned counsel for the appellant that these solemn provision of IPC has been grossly misused by the unscrupulous litigants by inserting and adding different angles to any how tangle the accused persons in this dowry related prosecution. It has been further submitted that the injured witness Nazrana/PW-2 was dancing on the tune of her father-informant/PW-1, who cooked up a story after collecting feed back from her.

13. In this regard learned counsel for the appellant have drawn the attention of the Court to the testimony of prosecution witnesses of fact, namely, PW-1 Shahjad Ali, PW-2 Nazrana (the injured) and PW-3 Pushpendra Kumar. Let us discuss the broad features of their testimonies one by one.

14. PW-1 Shahjad is not an eye witness. He states that he is labour by profession, who got her daughter married on 29.05.2011 by spending money according to his capacity but there is demand of four wheeler and Rs. 2 lacs. On this score, her daughter was a constantly a target of tangent and castic remarks by her in-laws. ***Thereafter, in his examination-in-chief, he added yet another angle for the first time that, a demand was made to purchase a plot in the name of her daughter, consequently after 14-15 days of her marriage a 90 yards plot was purchased from Jaywanti Rajesh Kumar costing him Rs. 1.90 lacs by her father-PW-1. After purchase of this plot the in-laws were silent for 5-6 months, but again they have started maltreating her and consequently yet another plot was purchased by him at village Vait ad-measuring 200 yards for Rs. 50,000/- in the name of her daughter, this plot was purchased from Wakila wife of Khilafat. This angle of purchase of two plots came out of Blue without any background, rather abruptly.***

15. After one month on 29.07.2012 again they have started committing maar-peet with her daughter and subsequent narration of the fact, is identically similar to

the FIR. From the aforesaid, it is clear that the role of catching hold was attributed to Nazakat (father-in-law) and Mst. Jaitoon **(mother-in-law)** and pouring the oil was attributed to Zakir Ali **(Dewar)** and Sajid was given a role of setting her ablaze. Since he was busy with her daughter's treatment and therefore he could not come earlier to lodge the FIR, the scribe of this FIR is Intezaam Ali.

16. In cross examination, PW-1 was completely exposed when he states that he was a motor mechanic and earned Rs. 18,000-20,000/- per month as his monthly income and his income was not a regular one. At this juncture, it is worthwhile to mention here that, PW-2 Nazrana (the injured) in her cross examination states that she is having seven brothers and sisters. Thus in fact, the PW-1 has got responsibility to feed ten mounts every day and Nazrana PW-2 is his eldest married daughter.

17. It has been candidly stated in his cross examination that there was no demand of dowry prior to or at the time of marriage. She visited her parent's place for three times during her marital life. But she has never made any complaint to her parent or to the police.

18. At this juncture, it has been candidly argued by Sri S.F.A.Naqvi by drawing the attention of the Court to the PW-1 that, this story of purchasing of two plots in the name of Nazrana came for the first time in the examination-in-chief of PW-1. This story was neither in the FIR nor in the 161 Cr.P.C. statements of the informant or Mst. Nazrana. At this juncture it has been argued by learned counsel for the appellant, a person (PW-1) who claims himself that he is motor mechanic by profession and earns Rs. 18,000-20,000/- per months on irregular basis, it is beyond his capacity and means to purchase two plots in a quite succession in the name of his daughter. This angle is an after thought and just to create more a serious look to the entire prosecution story. It is unthinkable that PW-1 who is father of seven sons and daughters would spend this hefty amount only in the marriage of one daughter, seems to be highly improbable and unrealistic.

19. It is further pointed out by Sri Naqvi, learned Senior Counsel that those two sale deeds dated 14.06.2011 and 16.03.2012 were never produced by the prosecution witness or exhibited during the trial by the prosecution casting a serious doubt about the authenticity and veracity of this submission.

20. During the cross examination, it has been accepted by PW-1 that regarding the alleged incident of fire they have received information around 12 in the day on 29.07.2012 and reached to the hospital at 3.45 p.m. where they met their daughter. She was in the emergency ward but none of her in-laws were present along with her. She remain there in the hospital for three days. PW-1 has denied the suggestion that she has received the thermal injuries while cooking meals. Besides this, he also pleaded ignorance as to who has got her admitted in the hospital.

21. Learned Senior Counsel has drawn the attention of the Court to the injury report which was duly exhibited and annexed as Page-6 of the paper book that as per the doctor opinion that she has sustained a 40% thermal burn injury over anterior part of her her body and it is her own dewar Zakir Ali who has got her admitted in the hospital at the first stroke.

22. From the testimony of PW-4 Rajkumar Agarwal in which he has categorically stated that it was Zakir

(Dewar), who carried his Bhabhi (Mst. Nazrana) to the hospital. Though the injured Mst. Nazrana in her examination-in-chief have categorically stated that Zakir **(Dewar)** has poured oil upon Mst. Nazrana (injured) and her husband (Sajid) has set her ablaze. The allegation upon Zakir and his later conduct to carry her Bhabhi (Mst. Nazrana) to the hospital are incompatible. In this regard, learned counsel for the appellant has relied upon the judgement of Hon'ble Apex Court in the case of **Ram Das Vs. State of Maharashtra** reported in **AIR 1977 (SC) 1164** , The relevant extract of the judgement is quoted herein below:-

"9. The next circumstance on which great reliance was placed by the High Court was the fact that the accused immediately took the deceased to the Civil Hospital which, according to the High Court, was meant merely to cloak his guilt. We are indeed surprised that the High Court should have taken such a perverse view of the matter. If the accused had himself administered the poison to Shantabai he would be the last person to take her to the Hospital and thereby take the chance of the deceased being cured or of regaining consciousness, in which case the deceased would have implicated the appellant The conduct of the accused in rushing her to the hospital is more consistent with his innocence rather than with his guilt. The High Court instead of taking the circumstance as proving the good faith and bona fides of the accused drew the opposite inference. Furthermore, assuming that the High Court was right and that the accused went to the Hospital merely to cloak his guilt this may be one inference possible, but the other inference which is-equally reasonable was that the accused having found that his wife had taken poison and attempted to commit suicide took her to the hospital immediately so that she could be given proper medical aid and her life may be saved. In this state of the evidence, the High Court violated the rule of appreciation of circumstantial evidence in accepting only that inference which went against the accused and not entertaining the inference which proved his innocence and which, in our opinion, was more probable than the other."

In the light of the above observation made by the Hon'ble Apex Court, the past conduct of the accused appellant carries weight and his innocences in the offence cannot be ruled out. It is further submitted that from the testimony of the injured Mst. Nazrana, it is clear that her Dewar (Zakir) has allegedly actively participated in setting her ablaze but as mentioned above her Dewar (Zakir) carried her to the hospital and got her admitted in the Emergency Ward, which clearly indicates that he would be the last person who took her to the hospital and thereby take a chance of injured being cured or of regaining consciousness, in which case, the injured would have implicated the appellants. Towing the aforesaid observation made by Hon'ble Apex Court in the case of **V.L.Tresa Vs. State of Kerala** reported in **(2001)3 SCC 549**. The relevant extract of the judgement is quoted herein below:-

"The learned Sessions Judge however, came to a definite conclusion that the prosecution has not been able to adduce sufficient and reliable evidence that it was the accused and the accused alone who inflicted the fatal injury on Vincent resulting in his death. The Sessions Court reminding itself of the golden principles for having a proof beyond all reasonable doubt recorded: it cannot also be said that the evidence adduced by the prosecution will conclusively show that Vincent was a

person of expensive habits or squandering money or was threatening or ill treating the wife and on a consideration of the totality of the evidence, came to the finding as noticed above against the prosecution. Three decisions of this Court namelyKali Ram v. State of Himachal Pradesh[1973 SCC (Crl.)1048]:Ramdas v. State of Maharashtra [1977 SCC (Crl.)254] andPrem Thakur v. State of Punjab[1983 SCC Crl.) 88] were strongly relied upon in arriving at the opinion that the accused cannot be found guilty of murdering her husband."

23. Now coming to yet another testimony, of Mst. Nazrana, PW-2, who claims herself to be the injured witness. She is now a re-married woman with some other person and mother of two kids. In the examination-in-chief she has reiterated the version of the FIR with the additional allegation of demand of dowry in the shape of Rs. 2 lacs and a four wheeler and thereafter she has underline and reiterated the testimony of her father, that after, 14-15 days of her marriage, her father has purchased a plot of 90 yards costing Rs. 1.90 lacs, thereafter her in-law remained silent for 5-6 months, which they again started demanding Rs. 2 lacs and a four wheeler, again his father has purchased yet another plot of 200 yards at village Vait costing to Rs. 50,000/-. On the fateful day i.e. 29.07.2012, they have committed maar-peet with her around seven in the morning and she has informed her father about the incident. His father responded to the call and thereafter tried to pacify the situation. While she was washing cloths, her fahter-in-law came to her on the false pretext, that her child is crying as soon as she entered into the room Nazakat and Smt. Jaitoon caught her hold of her and Devar Zakir poured kerosene oil upon her and Sajid lit the match to eliminate her. On raising the alarm the co-villagers assembled and extinguished the fire. Thereafter she was extended threat by her in-laws for a dire consequences, if she reveals anything to her father. She has been treated for three days at Meerut Hospital and thereafter shifted to Safdarganj Hospital at Delhi. Her father has taker her to Safdarganj Hospital, Delhi. The entire medical expenses were borne by her father.

24. In her cross-examination, she states that she is seven brothers and sisters and out of which she is eldest one. Her father was a motor mechanic and she is unaware of about his income. She states that there was no demand of any dowry or either prior to or during her marriage, but after the marriage they have started demanding additional dowry. She further states that at her in-laws place there is a manual furnace (Choolha) and during the interruption of electricity Dhibri is being used. The oil was poured anterior side of her body under the neck causing burn to the entire area as well as her hand and neck. After the incident she became unconscious. So far as the purchase of plots are concerned, in her examination-in-chief, she has revealed this fact to the court, for the first time. Neither in the FIR nor in 161 Cr.P.C. statement she has made any whisper about this angle of the story. When I.O. came to her, she was perfectly sound and healthy mental stage but she did not disclose this fact to the I.O.. It is further mentioned that during the subsistence of her marriage neither she has shared any complaint with her parent nor any complaint was lodged in this regard to the police.

25. In her cross-examination, she has denied to the suggestion that she was exerting pressure upon her husband. She is unaware of the fact that Sajid has filed any suit for cancellation of sale deed executed by her regarding her 200 yards of land.

26. PW-4 Dr. Rajkumar Agarwal, who treated the injured in his examination-in-chief states that on 29.07.2012 he was posted as Physician at Arjun Hospital, L-Block, Meerut and at that time around 3.45 p.m. Smt. Nazrana came to her with thermal burn injury of 40% anterior part of the body over her chest and abdomen and he has treated her. In his cross examination, he states that she was carried to Arjun Hospital by her own dever Zakir, one of the accused. There is no reference in the record as to how many days she was in the hospital or she was stinking with the kerosene oil or any other oil. She was not talking and under the semi conscious condition. Her hairs were not burnt and as mentioned above, she was burned about 40%. Responding to the suggestion, if somebody in the stage of heated passion one can pour oil upon her on her own and set herself to fire. Various formal witnesses both the I.Os. were examined and they have narrated the investigation.

27. After closing the prosecution witnesses the accused Sajid has recorded his statement under Section 313 Cr.P.C. in which he states that he is also a labourer and to the question that he has committed the offence of setting her wife ablaze narrating the entire incident about the plot purchase, demand of four wheeler and Rs. 2 lacs and thereafter setting her ablaze. He categorically denied the allegation levelled upon her by making a mention that it is he, who have purchased the plot for her and the entire sale consideration was made by him or by his Sasural. He has further denied that no body has set her ablaze as alleged in the FIR. It was her parent and in-laws got her admitted in the hospital. He and his father Nazakat was not present at the time of incident.

28. Responding to the allegation that after 14-15 days of her marriage, her father has got purchased ad-measuring 90 yards after paying sale consideration of Rs. 1.90 lac/- and second plot of 200 years at village Vait for the amount of Rs. 50,000/-. He has denied point blank that he has ever committed any dowry related harassment with her. Sajid has purchased afore mentioned two plots in the name of his wife after taking the benefit of Govt. Policy that if any immovable property is purchased in the name of his wife, there is a discount of 2% in Stamp Duty in the sale deed. He has not a author of the incident and under the pressure of her father, the present FIR came into existence. It was further revealed by Sajid accused that since the financial condition of her father-in-law was not good and therefore, his wife Nazrana have sold out the plot ad-measuring 200 yards to some other person in a clandestine way. After this fact came to the knowledge he has filed a sale cancellation suit before the competent civil court. Almost on the same lines Nazakat Ali, Mst. Jaitoon and Zakir recorded their respective 313 Cr.P.C. statement.

29. And lastly Sajid Ali, DW-1 son of Wakila and Matloob, DW-2 this statement were recorded. The Court has gone through the testimonies of DW-1 and DW-2, which is literally an eye opener. Sajid in his testimony states that her mother Wakila agreed to sell out a plot over khasra no. 756 with Sajid, the accused for a sale consideration of Rs. 50,000/- and this amount was received to him on behalf of Wakila. Since there is a discount of 2% in the sale deed as p er government policy, if the sale deed is executed in the name of a lady. Under the circumstances Sajid has got the sale deed executed in the name of his wife Nazrana. The original sale deeds were produced which was duly identified by him that he identified the thump impression and

photograph of her mother Wakila. He further states that the sale deed was executed right in front of him and this sale deed was executed on 16.03.2012 in favour of Nazrana by Wakila after taking the sale consideration of Rs. 50,000/- from Sajid.

30. Yet another DW-2 Matloob in his testimony in which he has clearly indicates that the family unit of Sajid and Nazrana is quite distinct and different whereas his father resides in some other court. It is further states Sajid have purchased a plot in the name of his wife Nazrana about 15-20 days after his marriage and second plot was purchased after 6-7 months of marriage. He has never any quarrel between Sajid and Nazrana or by her in-laws. DW-2 Matloob resides in neighbourhood of Sajid. It is also borne out from the testimony of DW-2 that this division of family occurred 15-20 days after the marriage. Though the prior to marriage it was a joint family. He has lend Rs. 30,000/- to Sajid to purchase a plot.

31. After the conclusion of the prosecution witness, 313 Cr.P.C. statement and the testimony of the defence witnesses was over, the judgement under challenge for judicial scrutiny was pronounced on 12.02.2019.

32. We have gone through the every word of the judgement.

33. The moot point of the determination of the present appeal is that, there is paradigm shift in the stand of the prosecution with ulterior motive and purpose. There was not a whisper of the alleged purchase of plot in the FIR nor 161 Cr.P.C. statement. For the first time, this angle was introduced during the examination-in-chief of the prosecution witnesses, that too half heartedly. Neither the sale deed of alleged plot purchased by the informant's Shahjad Ali was produced nor financially he was capable of purchasing two plots successively, keeping in view his meagre earning of Rs. 18,000-20,000/- per month when he has already seven sons and daughter to his responsibility. This fact itself indicate the hyperbole used by the prosecution without any cogent basis or reason.

34. Per contra DW-1 Sajid Ali and DW-2 Matloob were examined and they have produced Paper No.37 and Paper No. 38, their identity card, Paper No. 39 Kha, identity card of Smt. Nazrana and Paper No. 41 original sale deed dated 16.03.2012 and Paper No. 42 Original Sale deed of 14.06.2011 in favour of Nazrana. Besides this, Paper No. 43 Ka was certified copy of sale deed and Paper No. 44 Kha was a certified copy of sale deed dated 06.10.2012 was also produced. In addition to above, Paper No. 45 Kha, the document of OS No. 1 of 2016 (Sajid Vs. Smt. Nazrana) and Suit No. 155 of 2014 (Sajid Vs. Smt. Nazrana) were produced as a defence document. These document itself shows and clearly indicates that these two plots were purchased by Sajid, husband in the name of her wife Smt. Nazrana. There is nothing on record to establish the fact that the amount was given by the first informant Shahjad Ali as claimed by him. The learned trial judge has in paragraph 16 of the judgement have wrongly interpreted that these testimonies and after holding the absurd analysis came to a wrong conclusion.

35. It is a judicial propriety that the judge should decide a case with a open mind and not with a pre-conceived notion and thereafter, twist the testimonies whimsically to justify his conclusion. In the instant case, the learned trial judge has conducted an

exercise of pick and have chosen those facts, which suitable and inconsonance with pre-determined conclusion to book the husband Sajid. This would lead to grave injustice to the husband.

36. In the instant case in paragraph 16, the learned trial judge have elaborately discussed the testimonies of DW's and the sale deed etc. into account but at Page 17 he has concluded that few days after the marriage Nazakat, Smt. Jaitoon and Zakir were separately resided and since they are separately residing, thus there is no question of demanding the additional dowry by them. To this extent, the conclusion given by the trial court is correct but later on, the learned trial court has wrongly interpreted after reading the testimony of DW-1 and DW-1 that these two plots were not purchased by Sajid, the husband ignoring the original sale deed which is on record.

37. In paragraph 17 of the judgement the learned trial judge after thrashing the various prosecution witnesses have come to the wrong conclusion that it was the Sajid, who poured the kerosene oil upon her wife and set her ablaze. This finding is tangent to the testimony of PW-4 Dr. Rajkumar Agarwal as he did not record any smell of kerosene oil upon the body of the injured.

38. Shahjad Ali and his daughter Nazrana dishonestly inserted the story of purchase of plot in the name of his daughter. Neither he has produced any sale deed or money transaction to establish this fact. Since those sale deed in the name of Nazrana by the two different sellers, the informant assumes this credit to him and painted this picture.

39. The entire controversy has erupted that Mst. Nazrana sold out one of the plot purchased by the appellant in her name and the appellant has filed two civil suit before the concerned competent civil court to declare the said sale deed null and void. The O.S. No. 155 of 2015 is pending before Civil Judge (S.D.) Hapur filed on 20.03.2014 and another sale deed dated 09.07.2012 was filed a suit no. 01 of 2016 (Sajid Vs. Nazrana) pending in the court of Civil Judge (S.D.), Hapur was sold by PW-2 to whom the plot in question was purchased by the appellant on 14.06.2012. Except the testimony of Nazrana there is no other supportive evidence against PW-1, who is not an eye witness. At the cost of repetition this theory of sale and purchase of plot has surfaced for the first time in the testimony of father Shahjad Ali, PW-1 and supported by his daughter Mst. Nazrana, PW-2.

40. The prosecution has cleverly hide the subsequent progress in the case when Nazrana sold out both the plots in a clandestine way and her husband have initiated the proceeding for cancellation of those sale deeds executed by Nazrana in favour of subsequent purchaser. Both the suit are pending for consideration. This incident has triggered the deep rooted discord and misunderstanding between husband and wife. Both the father and daughter have tried to twist and turn the facts of the case mercilessly, resultantly the entire testimony seems to be untrustworthy.

41. Admittedly, the only witness is the injured herself. Initially, the theory of a Car & Rs. 2.00 lacs were asked, but thereafter yet another angle of purchase of plots were added for the first time during trial. It is worthwhile to mention here that the lady Nazrana, the injured have conveniently digested the subsequent development i.e. one sold out the plot to some other person without taking her husband (Sajid) into

confidence. This is the sole reason that Sajid have filed two suits for cancellation of those sale-deed, making Nazrana, the injured as defendant. Those proceedings are pending consideration.

42. The possibility of self immolation by Nazrana on account of the said civil proceedings cannot be ruled out completely. Out of sheer disgust, she might have poured oil upon her and set herself ablaze.

43. While deciding the case relating to the dowry harassment or even dowry death, the law courts are facing a novel feature, there is a exorbitant demand of the additional dowry by the accused persons to give a more serious and grim look to the entire incident. While jotting down the FIR the informant often oblivious of his own financial condition as well as the financial condition of his counter part. The Court is flabbergasted to see this new development in the recent days, it is unthinkable rather it would be mockery, that a person would demand a BMW or Audi Car from his counter part, who is a small roadside vendor or have meagre income. There has to be a financial compatibility with the demand made by the accused persons qua with his earning and financial status.

44. In the instant case as mentioned above, Shahjad Ali is a sole bread earner who in his own admission earns Rs. 18,000-20,000/- per month irregularly with ten mouths to feed by him. Under circumstances, he is benevolently purchasing plots after the plots in the name of her daughter, which is unthinkable and cannot be purchase with known source of income.

45. Learned Trial Judge in paragraph 16 and 17 of the judgement qualitatively selected those part of the testimonies, which suits their legal judicial conscious and book the husband Sajid for the offence.

46. Assessing the entirety of the circumstances of the case, we find that the judgement and the sentence awarded to Sajid is perse erroneous and lopsided and thus we have got no hesitation to quash the order of conviction and sentence awarded by the learned trial court vide judgement and order dated 12.02.2019. The appellant Sajid is set at liberty, if not wanted in any other case, the charges against him is hereby discharged and the sureties are also discharged, accordingly, the appeal stands **ALLOWED.**

Criminal Appeal (U/S 372 Cr.P.C.) No. 106 of 2019 (Shahjad Ali Vs. State of U.P. and others)

(Order on Application for Special Leave to Appeal)

47. The aforesaid appeal is concerned, we have elaborately discussed and thrashed the entire evidence material and the judgement and we find that the learned trial judge has rightly arrived the acquittal Nazakat, Smt. Jaitoon and Zakir from the charges under Section 498A, 307/34 IPC and Section 4 D.P.Act., the reasoning adopted by the learned trial judge is correct and do not warrant any interference in exercise of power under Section 372 Cr.P.C., accordingly, the application for special leave to appeal is hereby by **rejected.**

(Order on Memo of Criminal Appeal)

48. Since the special leave to appeal is hereby rejected, the criminal appeal under Section 372 Cr.P.C. also stands **REJECTED.**

(2024) 5 ILRA 1612
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 4188 of 2024

Sunil Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Nipun Singh, Vivek Chaturvedi

Counsel for the Opposite Party:

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 438 - anticipatory bail - Exceptional or Special Circumstances - High Court and Court of Session have concurrent jurisdiction for anticipatory bail under Section 438 Cr.P.C. - strong, cogent, compelling reasons and special circumstances must exist in justification of High Court being approached first - Court must consider these factors in each case, ensuring that the available avenues are exhausted before proceeding - Indian Penal Code, 1860 - Sections420, 467, 468, 47 &, 120B (Para - 24)

Applicant being a public servant - no sanction to prosecute u/s 197 Cr.P.C. - no criminal antecedents to his credit. **(Para - 27)**

HELD:- An exception may be drawn in the instant case to entertain the anticipatory bail application directly by this Court without taking recourse to the provision u/s 438 Cr.P.C. at the District and Sessions Court. Applicant entitled to anticipatory bail in view of law laid down by Supreme Court in case of Sushila Aggarwal Vs. State (NCT of Delhi).**(Para - 26,27)**

Anticipatory bail application allowed. (E-7)

List of Cases cited:

1. Arnesh Kumar Vs St. of Bihar, (2014)4SCC 273

2. Md. Asfak Alam Vs St. of Jharkh. & anr. , (2023)8SCC 632

3. Shivam Vs St. of U.P. & anr. , AIROnline 2021 All 484

4. Vinod Kumar Vs St. of U.P. , (2020) 2 All Cri. R 1562

5. Ankit Bharti Vs St. of U.P., 2020 SCC Online All 1949

6. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri Nipun Singh, learned counsel for the applicant as well as Sri Anit Kumar Shukla, learned A.G.A. for the State and also perused the record.

3. The present anticipatory bail application has been filed on behalf of the applicant in Complaint Case No. 2807 of 2020, under Sections 420, 467, 468, 471, 120B IPC, Police Station Jahangirabad, District Bulandshahr, with a prayer to enlarge him on anticipatory bail.

PROSECUTION STORY:

4. The informant moved an application before the S.S.P., Bulandshahar, alleging that his father Kadam Singh was having an electricity connection of 5 HP with service connection no. 0625/3251. The informant was in possession of the said tubewell and used to deposit the bill of the electricity

consumed for running the said tubewell. The named accused persons Shyamveer and Dabbu @ Tirvesh, in collusion with the officials of the electricity department, got the said electricity connection transferred in the name of Smt. Shashi Kanta w/o Shyamveer and on 15.10.2019 at about 1.30 pm got the electricity line of the said tubewell disconnected. The informant is a practising advocate. He moved a Memorandum before the Executive Engineer, Vidyut Vitaran Khand Khand on 14.10.2019. The co-accused person Shyamveer is stated to be declared in village that he has got the said connection permanently disconnected in collusion with the employees of the Electricity Department. The crop of the informant is stated to have been destroyed as a result of the lack of irrigation. On 15.10.2019, the Executive Engineer, Jahangirabad, is stated to have asked the informant to move an application before the police.The FIR was instituted at Police Station Jahangirabad on 18.10.2019 at 4.00 pm.

ARGUMENTS ON BEHALF OF THE APPLICANT:

5. Learned counsel has stated the informant herein is a practising advocate in the District Court Bulandshahar and the applicant has apprehension of being mistreated and manhandled at Sessions Court, that is why, he has moved the anticipatory bail application before this Court directly. It is next stated that there is no likelihood of him absconding.

6. Learned counsel for the applicant has stated that the applicant is maliciously being prosecuted in the present case due to ulterior motive and has the apprehension of his arrest. The applicant has nothing to do with the said offence as alleged by the prosecution. Learned counsel has next stated that opposite party no. 2, being the renowned advocate at District and Sessions Court, Bulandshahar, practising since 1981, therefore, the renowned Advocates practising at District and Sessions Court, Bulandshahar, have refused to contest and pursue the case on behalf of the applicant.

7. The enmity of informant with the applicant stands established from the fact that the applicant had passed the order of disconnecting the electricity connection of the opposite party no. 2 on 19.10.2019. It is next stated that the applicant is not named in the FIR. His name has come up later on during investigation, that too, at the behest of opposite party no. 2. The instant criminal proceedings have just been initiated against the applicant to harass him and to threaten him to get his service terminated by instituting other criminal cases against him. It is stated that he is being threatened by the opposite party no. 2 of dire consequences, whenever he appears in the present matter before the trial court.

8. Learned counsel has further stated that Smt. Shashi Kanta, the named accused person, had purchased 0.402 hectares of land in Gata no. 151, 115, 209, 147 from Rajeev Singh and Kapil Kumar S/o Mahendra Kumar of the several village through registered sale deed dated 2.6.2009. The co-accused person Smt. Shashi Kanta, had paid Rs. 15 thousand for the said tubewell, which fell in Gata no. 209, which stands mentioned in the aforesaid sale deed. The said sale deed has been annexed as Annexure-2 to the affidavit. The name of Smt. Shashi Kanta was mutated in Revenue records over the aforesaid Gate nos. 151, 115, 209, 147 without any objection, in which the tubewell finds mention in Khasra of 1425 Fasli year. A copy of the Khasra No.

1425 fasli year has been filed as Annexure-3 to the affidavit.

9. It is further argued that the named accused person Smt. Shashi Kanta had regularly paid bill of the said tubewell. The payment details of the tubewell connection has been filed as Annexure-4 to the affidavit.

10. It has been vehemently argued that the aforesaid tubewell connection was originally in the name of one Kadam Singh, who was engaged in the agricultural work at Khasra no. 209 on contractual basis. Thereafter, the said land situated in Khasra no. 209 was sold alongwith tubewell to the named accused person Smt. Shashi Kanta, by his owner Rajeev Singh and Kapil Singh, as such, Smt. Shashi Kanta moved an application before the Executive Engineer, Electricity Supply Khand, Jahangirabad, Bulandshahar, for transfer of the said tubewell connection in her name on account of her title. A copy of the application moved by the Smt. Shashi Kanta has been filed as Annexure-5 to the affidavit.

11. Pursuant to the said application, the electricity connection was transferred in the name of Smt. Shashi Kanta vide order dated 6.2.2019, which has been filed as Annexure-6 to the affidavit.

12. Learned counsel has further placed much reliance on the provisions of the Electricity supply Code, 2005, which are being reproduced as follows:-

"4.44 Transfer of Connection and Mutation of Names–

(a) A connection shall be transferred in the name of another person upon the death of the consumer or in case of transfer of ownership or occupancy of the premises, upon an application of the consumer.

(b) Application for mutation shall be filed, in the prescribed format, alongwith prescribed fee by the transferee or the legal heir or successor of the deceased consumer with the local office of the Licensee.

(c) The application shall be accompanied by documentary evidence of transfer or legal heir-ship or succession and proof of no arrears on account of electricity charges on that connection."

13. The said connection has been transferred in the name of Smt. Shashi Kanta after due procedure as prescribed in the Electricity Supply Code 2005. Smt. Shashi Kanta moved an application on 10.10.2019 seeking permanent disconnection of the aforesaid tubewell connection, as such, it was disconnected by the orders of the applicant dated 19.10.2019. The investigating officer had recorded the statement of the informant u/s 161 Cr.P.C. and there is no whisper of a single word against the applicant in the said statement.

14. It is further argued that the Assistant Engineer, Sub station Charora, has submitted a report in respect of the allegations made in the FIR stating therein that the land of the Gata no. 209 alongwith tubewell situated therein, has been transferred in favour of the aforesaid Smt. Shashi Kanta on 1.11.2019. The said report is filed as Annexure-10 to the affidavit.

15. Subsequent to it, the Lekhpal concerned had also submitted a report in respect of the allegations made in the FIR on 7.11.2019 thereby corroborating the statement of the Assistant Engineer, Sub station Charora. The said report of the Lekhpal has been filed as Annexure 11. The revenue inspector, Anoopshahr, has also confirmed the said report the same day i.e. 7.11.2019.

16. The opposite party no. 2 (informant) has filed a Civil Misc. Writ Petition No. 2733 of 2020 before this Court for getting the electricity connection restored. The said writ petition was disposed of vide order dated 13.7.2023 with liberty being granted to the informant to file a fresh representation before the concerned authority and the authorities were directed to decide the same within three weeks vide order dated 13.7.2023. The representation was made by the informant before the Executive Engineer, Paschimanchal Vidyut Vitran Nigam Limited, Jahangirabad, Bulandshahar, which was rejected after examining the grievances made by the informant vide order dated 11.12.2023.

17. The investigating officer filed a closure report in the said case, as such, the informant herein filed a protest petition before the C.J.M. concerned, who, vide order dated 16.3.2020 allowed the protest petition by treating it as a Complaint Case No. 2807 of 2020. After recording the statements of the witnesses u/s 200 and 202 Cr.P.C., the C.J.M., in a mechanical and arbitrary manner, summoned the applicant and others to face criminal trial vide order dated 2.1.2021. The applicant had challenged the said summoning order by filing a petition u/s 482 Cr.P.C. No. 7639 of 2022, which is still pending before this Court.

18. Learned counsel has further argued that the applicant has been summoned without taking recourse to Section 197 Cr.P.C., as there is no sanction to prosecute the applicant on record. The instant proceedings are, thus, abuse of the process of law and have been maliciously initiated in order to fulfil the nefarious designs of the informant. It is stated that the applicant being a public servant, has apprehension of his arrest and his unblemished career is at stake.

19. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. In case, the anticipatory bail application of the applicant is allowed, he will not misuse the liberty and shall cooperate with trial. He has even cooperated during investigation, as such, he shall not be arrested during investigation.

20. Relying on its judgement passed in ***Arnesh Kumar Vs. State of Bihar1,*** the Supreme Court in ***Md. Asfak Alam Vs. State of Jharkhand and another2***, has stated that once the charge-sheet was filed and there was no impediment, at least on the part of the accused, the court having regard to the nature of the offences, the allegations and the maximum sentence of the offences they were likely to carry, ought to have granted the bail as a matter of course. However, the court did not do so but mechanically rejected and, virtually, to rub salt in the wound directed the appellant to surrender and seek regular bail before the trial court. Thus, the High Court fell into error in adopting such a casual approach.

21. Learned counsel has further stated that the applicant was transferred from Jahangirabad, Bulandshahar on 3.1.2022 and is presently posted at District Ghaziabad and no notice of summons has been served to him, as such, he had no knowledge of the said summoning order dated 2.1.2021. The petitioner herein was never the title holder of the land or the tubewell connection in question herein, as such, the instant prosecution is an abuse of process of Court.

ARGUMENTS ON BEHALF OF STATE:

22. On the other hand, learned A.G.A. has vehemently opposed the prayer for grant of anticipatory bail on the ground that the applicant is not co-operating in trial and he has agitated the provisions of Section 482 Cr.P.C, as such, is not entitled for anticipatory bail in light of the judgement of this Court passed in ***Shivam Vs. State of U.P. and Another3.***

23. In rebuttal, learned counsel for the applicant has stated that the petition u/s 482 Cr.P.C. qua the applicant is still pending. A copy of the order sheet and the status report of the said application u/s 482 Cr.P.C. have been filed as Annexure-21 to the affidavit, as such, the applicant is entitled for anticipatory bail.

CONCLUSION:

24. Dealing with the issue of exceptional or special circumstances to invoke the provisions of Section 438 Cr.P.C. directly before High Court, this Court in ***Vinod Kumar vs. State of Uttar Pradesh4***, has opined as follows:

37. On a conjoint reading of the aforesaid two decisions, it is manifest that all that was intended was to put in place a rule of abstinence and require the individual to establish the existence of special and compelling circumstances constraining him to move the the High Court in the first instance. On an overall analysis of those decisions, it may, therefore, be conclusively held that while there exists no fetter or restriction upon the High Court entertaining an application under Section 438 Cr.P.C. directly it would ultimately depend upon the discretion of the Judge available to be exercised in the facts and circumstances of each case and upon finding special circumstances which warrant this Court to invoke its jurisdiction in the first instance rather than relegating the party to the Court of Sessions.

…

QUESTION D - Exceptional or Special Circumstances

39. Regard must be had to the fact that the Constitution Bench in Sibbia had an occasion to deal with the correctness of the restrictions as formulated by the Full Bench of the Punjab and Haryana High Court on the exercise of power under Section 438 Cr.P.C. Dealing with that aspect the Constitution Bench clearly held that the exercise of discretion as statutorily conferred cannot be confined in a straitjacket. This simply since it would be impossible to either prophesize or foresee the myriad situations in which the jurisdiction of the Court may be invoked. It was for the aforesaid reasons that the Constitution Bench held that this aspect must be left to the judgment and wisdom of the Court to evaluate and consider whether special circumstances exist or are evidenced by the facts of a particular case. The Court deems it apposite to extract the following paragraphs from the decision rendered by the Constitution Bench:-

"13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the Court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The

controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute condition which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn, L. C. said in Hyman v. Rose : "I desire in the first instance to point out that the discretion given by the section is very wide..... Now it seems to me that when the Act is so express to provide a wide discretion,... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their

decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law..

.....…

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficient provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein"

40. On an overall consideration of the above the Court is of the considered view that Harendra Singh when interpreted and understood in the manner indicated above, rightly balances the issues that arise. While it was urged that the aforesaid decision would be per incuriam the views expressed by our Full Bench in Onkar Nath Agarwal and the decision of the Constitution Bench in Sibbia, this Court finds no merit in that submission since as noted above, even Onkar Nath Agarwal had envisaged situations where the High Court may relegate parties to the Court of Sessions and refuse to invoke its jurisdiction. Insofar as Sibbia is concerned, it becomes relevant to bear in mind that the Constitution Bench was not dealing with the issue that arises for our consideration directly. The observations with regard to the exercise of discretion as

appearing therein were entered in the context of the principles formulated by the Full Bench of the Punjab and Haryana High Court relating to the exercise of power under Section 438 itself. The issue of a self imposed restraint exercised by the High Court in light of the contemporaneous jurisdiction conferred on the Court of Session was not a question directly in issue. The argument of per incuriam is thus liable to be and is consequently rejected.

41. The legal position which consequently emerges is that notwithstanding the concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling reasons and special circumstances must necessarily be found to exist in justification of the High Court being approached first and without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a particular case must necessarily be left for the Court to consider in each case.

42. What would constitute "special circumstances" in light of the nature of the power conferred, must also be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would perhaps be imprudent to exhaustively chronicle what would be special circumstances. As noticed above, it would be impossible to either identify or compendiously propound what would constitute special circumstances. Sibbia spoke of the "imperfect awareness of the needs of new situations". It is this constraint which necessitates the Court leaving it to the wisdom of the Judge and the discretion vested in him by statute. Without committing the folly of attempting to exhaustively enunciate what would constitute special circumstances or being understood to have done so, the High Court would be justified in entertaining a petition directly in the following, amongst other, circumstances:-

(A) Where bail, regular or anticipatory, of a coaccused has already been rejected by the Court of Sessions;

(B) Where an accused not residing within the jurisdiction of the concerned Sessions Court faces a threat of arrest;

(C) Where circumstances warrant immediate protection and where relegation to the Sessions Court would not subserve justice;

(D) Where time or situational constraints warrant immediate intervention. These and other relevant factors would clearly constitute special circumstances entitling a party to directly approach the High Court for grant of anticipatory bail.

...

...

55. In light of what has been held above, the Court records its conclusions on the questions formulated as under:-

A. Section 438 Cr.P.C. on its plain terms does not mandate or require a party to first approach the Sessions Court before applying to the High Court for grant of anticipatory bail. The provision as it stands does not require an individual first being relegated to the Court of Sessions before being granted the right of audience before this Court.

B. Notwithstanding concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling and special circumstances must necessarily be found to exist in justification of the High Court being approached first without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a

particular case must necessarily be left for the Court to consider in each individual matter.

C. The words "exceptional" or "extraordinary" are understood to mean atypical, rare, out of the ordinary, unusual or uncommon. If the jurisdiction of the Court as conferred by Section 438 Cr.P.C. be circumscribed or be recognised to be moved only in exceptional situations it would again amount to fettering and constricting the discretion otherwise conferred by Section 438 Cr.P.C. Such a construction would be in clear conflict of the statutory mandate. The ratio of Harendra Singh must be recognised to be the requirement of establishing the existence of special, weighty and compelling reasons and circumstances justifying the invocation of the jurisdiction of this Court even though a wholesome avenue of redress was available before the Court of Sessions

D. What would constitute "special circumstances" in light of the nature of the power conferred, must be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would be imprudent to exhaustively chronicle what would be special circumstances. It is impossible to either identify or compendiously postulate what would constitute special circumstances. Sibbia spoke of the "imperfect awareness of the needs of new situations". It is this constraint which necessitates the Court leaving it to the wisdom of the Judge and the discretion vested in him by statute.

E. While the Explanation may have created an avenue for an aggrieved person to challenge an order passed under Section 438(1), it cannot be construed or viewed as barring the jurisdiction of the High Court from entertaining an application for grant of anticipatory bail notwithstanding that prayer having been refused by the Court of Sessions.

F. Till such time as the question with respect to the period for which an order under Section 438 Cr.P.C. should operate is answered by the Larger Bench, the Court granting anticipatory bail would have to specify that it would continue only till the Court summons the accused based on the report that may be submitted under Section 173(2) Cr.P.C. whereafter it would be open for the applicant on appearance to seek regular bail in accordance with the provisions made in Section 439 Cr.P.C.

25. The aforesaid view has been affirmed by the Constitution Bench of this Court in ***Ankit Bharti v. State of U.P.5,*** and the following order was passed:

"20. We would consequently answer the Reference by holding that the decision in Vinod Kumar does not merit any reconsideration or explanation. As rightly held in that decision, there can be no exhaustive or general exposition of circumstances in which an applicant may be held entitled to approach the High Court directly. The Court would clearly err in attempting to draw a uniform code or dictum that may guide the exercise of discretion vested in the Court under Section 438 of the Criminal Procedure Code. The discretion wisely left unfettered by the Legislature must be recognised as being available to be exercised dependent upon the facts and circumstances of each particular case. The contingencies spelled out in Vinod Kumar as illustrative of special circumstances may, where duly established, constitute a ground to petition the High Court directly.

21. The special circumstances the existence of which have been held to be a sine qua non to the entertainment of an application for anticipatory bail directly by

the High Court must be left for the consideration of the Hon'ble Judge before whom the petition is placed and a decision thereon taken bearing in mind the facts and circumstances of that particular cause. However special circumstances must necessarily exist and be established as such before the jurisdiction of the High Court is invoked. The application must rest on a strong foundation in respect of both the apprehension of arrest as well as in justification of the concurrent jurisdiction of the High Court being invoked directly. The factors enumerated in Vinod Kumar including (A) and (B) as constituting special circumstances do not merit any review except to observe that the existence of any particular circumstance must be convincingly established and not rest on vague allegations.

22. In light of the aforesaid, we answer the Reference as follows:-

Question (i) and (iv) clearly do not merit any elucidation for it is for the concerned Judge to assess whether special circumstances do exist in a particular case warranting the jurisdiction of the High Court being invoked directly. We answer Questions (ii) and (iii) in the negative and hold that Vinod Kumar does not merit any reconsideration or further explanation. It would be for the concerned Judge to form an opinion in the facts of each particular case whether special circumstances do exist and stand duly established."

26. Applying the judgements of this Court passed in ***Vinod Kumar*** *(supra)* and ***Ankit Bharti*** *(supra)*, an exception may be drawn in the instant case to entertain the anticipatory bail application directly by this Court without taking recourse to the provision u/s 438 Cr.P.C. at the District and Sessions Court.

27. On due consideration to the arguments advanced by the learned counsel for the parties, the case of the applicant being a public servant and coupled by the fact that there is no sanction to prosecute u/s 197 Cr.P.C. and also taking into consideration the fact that the applicant has no criminal antecedents to his credit, being a public servant, and at present being posted at Ghaziabad, and the case laws referred above and in view of the law laid down by the Supreme Court in the case of ***"Sushila Aggarwal Vs. State (NCT of Delhi)6,*** the applicant is entitled to be granted anticipatory bail in this case.

28. Without expressing any opinion upon ultimate merits of the case either ways which may adversely affect the trial of the case, the anticipatory bail application of the applicant is **allowed.**

29. In the event of arrest of the applicant, **Sunil Kumar** involved in the aforesaid case crime number, shall be released on anticipatory bail till the conclusion of trial on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Presiding Officer/Court Concerned, with the conditions that:-

i. that the applicant shall make himself available for interrogation by a police officer as and when required;

ii. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

iii. that the applicant shall not leave India without previous permission of the court;

iv. that the applicant shall not tamper with the evidence during the trial;

v. that the applicant shall not pressurize/ intimidate the prosecution witness;

vi. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

30. In case of breach of any of the above conditions, the court concerned shall have the liberty to cancel the bail granted to the applicant.

31. It is made clear that observations made in granting anticipatory bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2024) 5 ILRA 1622
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 8279 of 2022

Pramila Tiwari ...Petitioner
Versus
Anil Kumar Mishra & Ors. ...Respondents

Counsel for the Petitioner:
Anand Kumar Singh, Dinesh Kumar Singh, Rahul Sahai, Vinod Kr. Pandey

Counsel for the Respondents:
Rituvendra Singh Nagvanshi, Uday Bhan Mishra

(A) The Constitution of India, 1950 - Matters under Article 227 - Supervisory jurisdiction - Reference to answer - The Uttar Pradesh Zamindari Abolition and Land Reforms *Act, 1950 - (U.P. Amended Act , 27 of 2004) - Section 169(3)* - compulsory registration of Will, The Indian Registration Act, 1908 - Section 17 - registration of documents and deeds , Section 40 - Persons entitled to present wills and authorities to adopt - The Government of India Act, 1935 - The Constitution of India, 1950 - Article 245(2) , 246, 249 ,252 , 253 ,251 & 254 - Every legislation must ensure certainty as to its application and exercise of power under it - Object of 2004 Amendment - to prevent forged wills and promote justice, economic stability, and rule of law - Agriculture reforms are influenced by socio-economic conditions of villagers in remote areas.(Para -25,34)

Two contradictory views by two Co -ordinate benches - regarding compulsory registration of wills under the U.P.Z.A. & L.R. Act 1950 - Reference to answer - whether compulsory registration of will , introduced in Section 169(3) of the U.P.Z.A. & L.R. Act, 1950 by the Amendment Act namely U.P. Act No. 26 of 2004, is prospective or retrospective in nature.

HELD:- Amendment of Section 169(3) of the U.P.Z.A.L.R. Act, which requires a Will to be compulsorily registered, is void to the extent it provides for registration of Will as it is repugnant to Section 17 read with Section 40 of the Indian Registration Act, 1908. Wills in Uttar Pradesh are not required to be registered. Petition be laid before Bench concerned for decision on merits.(Para - 36, 37,38)

Reference answered. (E-7)

List of Cases cited:

1. Sobnath Dube, In the Matter of: Late Kashinath Dube , 2015 (0) SCC (All) 674

2. Jahan Singh Vs St. of U.P. & ors , (Writ Petition No.1570 of 2017)

3. Rani Purnima Devi & anr. Vs Kumar Khagendra Narayan Dev & anr , AIR 1962 567

4. Babu Ram Vs Santokh Singh (deceased) , 2019 (14) SCC 162

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

1. These proceedings are in pursuance to the reference order of Hon'ble the Chief Justice dated 25.04.2023 to answer the reference framed by Hon'ble Vivek Chaudhary, J. on 14.10.2022 which is as under:

"whether the provision of compulsory registration of will, as introduced in the form of Section 169(3) of U.P.Z.A. & L.R. Act, 1950 by the Amendment Act namely U.P. Act No. 26 of 2004, is prospective or retrospective in nature ?"

2. The learned Single Judge was faced with two contradictory views taken by two Co-ordinate Benches of this Court: one in the matter of ***Sobnath Dube, In the Matter of: Late Kashinath Dube; reported in 2015 (0) SCC (All) 674*** wherein it was held that with the amendment of UP Zamindari Abolition & Land Reforms (U.P.Z.A. & L.R.) Act, 1950 (hereinafter referred to as 'the Act of 1950') incorporating the new provisions as Section 169(3) in it by the State legislature, making registration of Will compulsory, will be prospective and Will executed prior to the date giving effect to the amendment by the State Government will not require to be registered compulsorily, whereas in ***Jahan Singh v. State of UP & ors (Writ Petition No.1570 of 2017)***, another Co-ordinate Bench in its judgment dated 18.05.2017 disagreed with the view taken in ***Sobnath Dube*** *(supra)* on the ground that unregistered Will taking effect after the date of amendment stands hit by amended provisions of 169(3) of the Act, 1950. In ***Sobnath Dube's*** case *(supra)* a view was taken, since a Will becomes effective only upon the death of the testator, every such Will which may come into effect after the amendment of Act of 2004, is required to be compulsorily registered.

3. At the initial stage, when we heard the matter, we re-framed the reference as under:

"whether a Will reduced into writing prior to 23.08.2004 is required to be compulsorily registered in the event the testator dies after the said date:"

4. Thereafter, when we further examined the matter there arose an issue as to whether State legislature without President's assent could have made registration of Will compulsory by incorporating a provision to this effect in law, as Will, intestacy and succession under the Constitution fell as subject matter in the Concurrent List and Central Legislation was already there touching the subject of registration of Will under the Registration Act, 1908.

5. We further noticed that in the judgment of ***Jahan Singh*** *(supra)* while holding that those Wills which would take effect after 23.08.2004, were required compulsorily to be registered, had made an observation that *"the nuances of law for holding that unregistered Will was not hit by the provisions of Section 169(3) of the Act, have not been examined"* and this was taken as a reason to disagree with the view taken in the judgment of ***Sobnath Dube*** *(supra)*. We in our order dated 31.11.2023 had even invited arguments on the above points.

6. Two questions are thus posed to us for an effective decision on the reference framed as above:

(1) Whether the State legislature was competent in amending the Act of 1950 in the matterof wills, intestacy and successions qua agricultural holdings in the face of the fact that the Registration Act, 1908 makes registration of will only optional at the end of the testator and even provides a registration posthumously. Whether then to that extent the U.P. Amendment Act, having not received the presidential assent was an incompetent piece of legislation.

2) What nuances of law, relating to the rights in agricultural holdings and incidental issues, can be said to be in favour of agricultural holdings when the occupied field of registration governed by a Central Legislation, was being undone by the Amendment Act of Uttar Pradesh by Act No.27 of 2004 making the registration of Wills compulsory.

7. Accordingly, we split up the reference in two parts as under:

A) Whether U.P.Z.A. & L.R. Amendment Act, 2004 to the extent of amending 169(3) of the Act, 1950 is void being repugnant to the Registration Act, 1908?;

B) Whether, if the Amendment Act of Uttar Pradesh i.e. Act No.27 of 2004 is upheld, a Will reduced into writing prior to 23.08.2004 is required to be compulsorily registered in the event the testator dies after the said date?

8. The scheme of legislative relations under the Constitution has an inbuilt tone of supremacy of union legislature even in respect of the areas/subjects where it has exceeded its legislative territorial limits [vide Article 245(2)] or where it does make enactments concerning the State subject matters so reserved, in national interest (vide Article 249). The Union legislature has also exclusive power to make enactments in the areas not covered in any of the lists provided under the Constitution. It has also exclusive right to legislate for giving effect to international agreements and treaties (vide Article 253) and also to make laws concerning the State with the consent of two or more States to make them applicable to those very states (vide Article 252).

9. Within the scheme of legislative relations, the Constitution underlines its federal feature by prescribing for separation of powers in legislative fields reserved for Union and States and also areas/subjects where both Union and State can exercise legislative functions. These three lists, namely the Union List, State List and the Concurrent List as conceived and contemplated under the Constitution (vide Article 246), are provided under its 7th Schedule. These lists contain a number of subjects upon which (and the areas connected therewith) the competent legislature can make laws. While the Union List and the State List reserve subjects exclusively for Union and the State respectively, the concurrent list provides for subjects where both Union and State can legislate but supremacy vests with the Union legislature if already occupying a field. Of-course a Central Act in its operation and application to the State can be modified/amended with the assent of the President of India (vide Article 254). Still further, a State law being found contrary to the law made by Union would be void to the extent of such repugnancy, if any (vide Article 251 & 254).

10. Looking to the above scheme of legislative relations under the Constitution, we now proceed to examine the relevant provision of UP Zamindari Abolition of

Land Reforms Act, 1950 (Act of 1950) and competence of the State legislature to legislate in that regard. The object with which Act of 1950 was enacted has been to remove intermediaries between the tiller of the land and the State. The zamindars who were intermediaries were chiefly responsible for the oppression of farmers whose status got reduced to bonded labours, with the passage of time,even in respect of their own land holdings and private money lending resulted in enriching the money lenders by occupying the land of the farmers bit by bit. Several provisions of the Act of 1950 are aimed at revolutionary agricultural reforms to ensure that poor farmers be no further defrauded at the end of the rich private money lenders and so also provisions were made relating to transfer of land by sale, succession and devolution of rights in agricultural holdings.

11. On 08.08.1946, when United Provinces Legislative Assembly passed a resolution for removal of zamindari in the State, the Government of India Act, 1935 was in force. List-I under the said Act included taxes on income other than the agricultural income (vide Entry-54), taxes on capital value of assets to the exclusion of agricultural land of the individuals and companies (vide Entry-55) and succession to property other than agricultural land (Vide Entry-56), whereas List-II contained subject matters relating to agriculture and its allied and related fields, and research and development including the field of veterinary science and also cattle trespass etc (vide Entry-20). Entry-21 of the State list exclusively provided for rights relating to agricultural land including by way of devolution. Entry-21 ran as under:

"21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

12. Further Entry-27 of the State List provided for trade and commerce within the Province; markets and fairs; money lending and money lenders. Entry-41 provided for taxes on agriculture income, Entry- 43 provided for duties in respect of succession to agriculture list. Entry-43(A) provided for estate duty in respect of agricultural land.

13. List-III of the Government of India Act, 1935 (in short, 'the Act, 1935') provided for marriage and divorce, infants and minors, adoption (Vide Entry-6); Wills, intestacy and succession, save as regards agricultural land (Vide Entry-7); and transfer of property other than agricultural land, registration of deeds and documents (Vide Entry-8).

14. From the above referred and quoted entries as contained in three different lists of the Act, 1935, it is clear that devolution of agricultural land fell in the subjects of the State List but Wills, intestacy and succession in general fell in List-III (save agricultural land). This shows that agriculture and its related subjects like succession, transfer, devolution were earlier exclusively assigned to the provincial legislature to exercise its power.

15. The Indian Registration Act, 1908 was enacted by the then British Imperial Government and stands saved and was saved both under the Government of India Act, 1935 and also saved by Article 244 (1) of the Constitution of India.

16. The Registration Act did not enlist the document of Will in the list of documents (vide Section 17) that are required to be registered and instead, made its registration optional at the discretion of the testator and even made provisions for registration of Wills posthumously by virtue of Section 40 of the said Act. This was the only enactment in force for the purposes of registration of deeds and documents and was applicable to the then united provinces and no provincial act provided a document of Will to be registered compulsorily by exercising power vide Entry-7 of the Act, 1935.

17. Intestacy refers to a condition of any person dying without executing a Will and thus leaving his/her estate to devolve upon legitimate heirs as per the hierarchy set by a law enacted, whereas Wills are such legal documents that outline a person's wish as to the distribution of his/her estates after his/her death. This right to provide for distribution would be an exception to the general rule of succession and so Wills may devolve property of the testator as per his/her wish upon any individual, body or trust to the exclusion of natural and legal heirs.

18. Thus, a document of Will, acquires importance for devolution of estate but the law never required it to be registered whether the property was an agricultural land or whether it was a property or an estate other than agriculture. When people of India adopted the Constitution, the Constitutional provisions made a departure in assigning subjects of rights qua agricultural land by deleting words and expressions "devolution of agricultural land" in Entry-18 of the State List. Entry-18 runs as under:

"18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer of alienation of agricultural land; land improvement and agricultural loans; colonization."

19. Interestingly, Wills and Intestacy continued to be subject in the concurrent list vide Entry-5 that corresponds to Entry-6 & 7 of the List III of the Act, 1935 but words and expressions "save as regards agricultural land" were deleted. Entry-5 of the concurrent list under Schedule-7 of the Constitution runs as under:

"5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

20. Will denotes devolution of property by the testator as per his/her desire. Indian Registration Act continues to occupy the field qua subject matter of registration i.e. deeds and documents provided under Entry-8 of the List III of the Act, 1935 with the corresponding Entry-6 of the Concurrent List under the Constitution of India. The enactment stands, thus, saved under Article 254(2) of the Constitution. This Article in its entirety is reproduced hereinunder:

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by

Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

(emphasis added)

21. The Act of 1950 was enacted and was reserved for consideration of President and was assented to and came into operation w.e.f. 26.01.1951. The Act of 1950 having presidential nod, shall have overriding effect over and above all State laws and Central laws touching the subject matters provided under the Act of 1950, by virtue of provisions contained under Article 254 *(supra)*.

22. The newly amended provision of 169(3) vide amending Act No.27 of 2004 makes registration of Will compulsory. While the original provision under sub-section (3) of Section 169 of the Act of 1950 provided for aWill to "be in writing and attested by two persons" the words and expressions "and registered" were further added. Thus, new sub-section (3) of Section 169 runs as under:

"169. Bequest by a Bhumidhar-

(1) [* *]*

(2) [* *]*

(3) Every will made under provisions of sub section (1) shall, not withstanding anything contained in any law, custom or usage, [be in writing, attested by two persons ***and registered]?"***

(emphasis added)

23. Law relating to registration of documents and deeds being provided under the Registration Act, 1908 vide its Section 17 refers to "certain documents" to be registered. So, in the first instance, it is this act that required amendment by the State to make its modified application in the State for getting document of registration ofWill enlisted under Section 17 as there exists no pre-existing State law touching the subject matter. Accordingly, the provisions as incorporated under the ZA Act vide 169(3) of the Act of 1950 after its amendment in 2004 became contrary to the pre-existing Central Act. In other words, the provisions contained under Section 169(3) of the Act of 1950 and Section 17 read with Section 40 come in conflict with each other. This makes the State Act provision to be repugnant to the pre-existing Central Act and State Amendment Act, 2004 having no presidential assent is liable to be rendered void.

24. One of the arguments was that instead of striking down the concerned provision of law we could read it down and bring it to the vicinities of the provisions of Section 17 and Section 40 of the Registration Act that make registration of Will optional and that it would be even registered posthumously. But looking to the objects and nuances of law that have guided the learned Single Judge in ***Jahan Singh***'s case *(supra)* to hold that every Will

becoming effective after 2004 Amendment would be void if not registered, makes it mandatory for us to navigate these nuances through socio-economic background of the citizenry of the State of Uttar Pradesh.

25. The object with which 2004 Amendment had been introduced was to avoid proliferation of forged wills. Law reforms are always aimed at ensuring access to justice and promoting economic stability and enhancing rule of law. What laws may be helpful to people, must always be seen in the background of ground realities of life of common man. Enactments regarding agriculture reforms are particularly seen in the background of socio-economic conditions of villagers living largely in remote areas.

26. India's NITI Ayog's report released just two and a half years ago in November, 2021 states 38% of total population in U.P. is multidimensionally poor, meaning thereby people lack good health, education and standard of living. We sitting in Kaval towns and metropolis with multiplexes, Star hotels and high rise buildings, cannot even imagine in what condition majority of State population lives in small towns and villages. We have in fact no idea as to the magnitude of monetary poverty and the lack of basic education and health infrastructure in our rural areas.

27. Our state has largely an agrarian economy and all farmers are not literate. There are areas in remote villages in Uttar Pradesh without motorable roads and people are not aware of the outside world. Whatever material is necessary to have healthy crops at least twice a year does not reach to them and resources of irrigation are not catering the need of every farmer. Many farmers in the State still depend upon rain water and are barely getting two square meals. They are still oppressed by rich money lenders and if their children leave villages to study in cities, the poor farmers very often not only borrow money but even on getting ill are not properly getting good health care.

28. It is quite possible that a poor farmer having bhumidhari rights may be an illiterate person who can be easily fooled or mislead. A marginal farmer owing to his pity condition may get so circumstanced to be easily mislead by unscrupulous elements of the village to execute a Will in favour of a third party to the exclusion of natural heirs. It was, therefore, considered appropriate to devise a mechanism to minimize this fraud. It was thought that forgery would be minimised and, therefore, the law was brought in for compulsory registration of Wills. However, one cannot ignore the flip-side of this as there can equally be a case where a registered document is executed in suspicious circumstances, which if proved, would ultimately render the registered document void. The observations made by the Supreme Court in ***Rani Purnima Devi & anr v. Kumar Khagendra Narayan Dev & anr; AIR 1962 567*** is worth mentioning hereinunder:

"There is no doubt that 'if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of

his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will Was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. ***Law reports are full of cases in which registered wills have not been acted upon..... Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting."***

(emphasis added)

29. Thus, a poor farmer may be compelled to knock the door of Courts of law and undergo the agony of a long drawn litigation where rich may have an upper hand. This is not only there for villagers but equally may be seen in well developed townships and cities where rich are eyeing at nicely located properties.

30. There could equally be a case where a person in his last days of life may change his mind and may decide a different distribution of his assets and properties from what he had decided sometime ago. A Will or wish that operated last in the mind of the testator is definitely to prevail and that is why the rule is that the last Will prevails. So in the event non registration of Will is rendered void then a person executing a 'Will' will be denied of his right to have his/her "wish" or desire changed. His will to subject his property to be succeeded as per his wish would be denied to him. We can take an instance, though hypothetical, where a person gets a Will registered and this fact gets disclosed to the beneficiaries under the Will. They may get possession of the document by force or otherwise and then start ignoring the testator by leaving him in a condition where he may not be able to survive for want of proper care and medicines. Such lust for property at the end of beneficiaries cannot be ruled out. To deny a person the right to change his Will by an unregistered document in his last days would not only be inhuman but would be an arbitrary denial of his fundamental right to create a Will of his assets and properties. There could be a condition where a person wishes in the last days of his/her life to distribute his/her property as per his last desire or wish which might be very different from the last registered Will. This, according to us, would never be the intention of the legislation.

31. In so far as judgment in ***Jahan Singh*** *(supra)* applies the rule of interpretation to justify the Amending Act providing for compulsory registration of Will even without the assent of the President, we proceed to test the ratio of the judgment as under.

32. Interpretation of a provision and applying the legal principles, as the learned Single Judge had in mind, within specific legislative areas so as to hold that State

Legislature had competence, in our considered view, amounts to stretching of principle of purposive interpretation too far and reading more than the concept of legislative relationship as is conceived of under Chapter-11 of the Constitution to justify a provision of law. There is no quarrel to the principle that exercise of power entails the grant of that power in every possible way, but the question remains where to draw that laxman rekha/line to render exercise of power by State vis-a-vis the powers of the Union. It should be in consonance with the principles enshrined under the relevant provisions of the constitution providing for separation of powers under the Scheme of Constitution.

33. Subject matter in issue being of Concurrent List, it was open for the State to get the pre-existing Central Act amended before its application to the State and that too by getting such an act the assent of the President. The Wills, intestacy, succession and transfer being in the Concurrent List, without drawing any exception to the agricultural land, the Act of 1950 was rightly reserved for consideration of the President and it also had the presidential assent. But now by the Amending Act of 27 of 2004, the State of Uttar Pradesh was seeking an amendment in the U.P.Z.A.L.R. Act, which in effect was amending the Registration Act, 1908. Such an Act by which the amendment was being sought definitely required a presidential assent.

34. Every legislation must ensure certainty as to its application and exercise of power under it. So to ensure this, when subject matter falls within competence of both the Union and the State Legislatures, the provision of Article 251 will come into play.

35. Our above view also finds support in the judgment of Supreme Court in the case of ***Babu Ram v. Santokh Singh (deceased); 2019 (14) SCC 162.*** Paragraphs 18, 19 & 20 relevant for the case in hand are being reproduced hereinunder:

"18. We now turn to the next stage of discussion. Even if it be accepted that the provisions of Section 22 would apply in respect of succession to agricultural lands, the question still remains whether the preferential right could be enjoyed by one or more the heirs. Would that part also be within the competence of the Parliament? The "right in or over land, land tenures ...." are within the exclusive competence of the State legislatures under Entry 18 of List II of the Constitution. Pre-emption laws enacted by Staet legislatures are examples where preferential rights have been conferred upon certain categories and classes of holders in cases of certain transfers of agricultural lands. Whether conferring a preferential right by Section 22 would be consistent with the basic idea and principles is the question.

19. We may consider the matter with following three illustrations:

a) Three persons, unrelated to each other, had jointly purchased an agricultural holding, whereafter one of them wished to dispose of his interest. The normal principle of pre-emption may apply in the matter and any of the other joint holders could pre-empt the sale in accordance with rights conferred in that behalf by appropriate State legislation.

b) If those three persons were real brothers or sisters and had jointly purchased an agricultural holding, investing their own funds, again like the above scenario, the right of pre-emption will have to be purely in accordance with the relevant provisions of the State legislation.

c) But, if, the very same three persons in illustration b) had inherited an agricultural holding and one of the them was desirous of disposing of his or her interest in the holding, the principles of Section 22 of the Act would step in.

The reason is clear. The source of title or interest of any of the heirs in the third illustration, is purely through the succession which is recognized in terms of the provisions of the Act. Since the right or interest itself is conferred by the provisions of the Act, the manner in which said right can be exercised has also been specified in the very same legislation.

Therefore, the content of preferential right cannot be disassociated in the present case from the principles of succession. They are both part of the same concept.

20. When the Parliament thought of conferring the rights of succession in respect of various properties including agricultural holdings, it put a qualification on the right to transfer to an outsider and gave preferential rights to the other heirs with a designed object. Under the Shastrik Law, the interest of a coparcener would devolve by principles of survivorship to which an exception was made by virtue of Section 6 of the Act. If the conditions stipulated in Section 6 were satisfied, the devolution of such interest of the deceased would not go by survivorship but in accordance with the provisions of Act. Since the right itself in certain cases was created for the first time by the provisions of the Act, it was though fit to put a qualification so that the properties belonging to the family would be held within the family, to the extent possible and no outsider would easily be planted in the family properties. In our view, it is with this objective that a preferential right was conferred upon the remaining heirs, in case any of the heirs was desirous of transferring his interest in the property that he received by way of succession under the Act."

36. In view of the above exposition of law and in view of what we have discussed above in this judgment, we hold sub-Section (3) of Section 169 of Act of 1950, in so far as it requires a Will to be compulsorily registered, to be repugnant to Section 17 read with Section 40 of the Indian Registration Act, 1908 and hence we hold the amendment of Section 169(3) of the U.P.Z.A.L.R. Act to that extent void.

37. Thus, our answer, to the question framed, is that sub-Section (3) of Section 169 having been declared as void to the extent it provides for registration of Will, the Wills in State of Uttar Pradesh are not required to be registered and a Will for its non registration will not be void whether before or after the U.P. Amendment Act, 2004.

38. Let petition be laid before the Bench concerned for decision on merits of the case, accordingly.

(2024) 5 ILRA 1631
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.05.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Criminal Misc. Bail Application No. 10920 of 2023

Abbas Ansari ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Pranjal Krishna, Arun Sinha, Pranjal Krishna, Siddhartha Sinha

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Bail - Indian Penal Code, 1860 - Sections 387, 222, 186, 506, 201, 120-B, 195-A & 34 - Prevention of Corruption Act, 1988 - Sections 7, 8 & 13 - Prisons Act, 1894 - Section 42 (b) & 54 - Criminal Law (Amendment) Act, 2013 - Section 7 - Applicant who is a member of the Legislative Assembly is a responsible representative of the public and must maintain a higher standard of conduct than other common individuals - Not seen as lawbreakers - Misuse of law procedures due to power - Not entitled to bail under these circumstances. (Para - 22,32,33,34)

Applicant - Legislative Assembly Member and National Level Rifle Shooter - Criminal history of ten cases - expected higher standard of conduct - earned laurels for country - ingraining discipline and respect for rules - law maker seen as a law breaker - applicant's complicity evident from CCTV footage and witness statements - indicating a person with knowledge of his jail stay and his wife's meetings - recovery of two mobile phones from wife of applicant - who couldn't access the jail premises unless authorities turned a blind eye. **(Para - 32,33)**

HELD:- Applicant and his wife are accused of dereliction of duty and violating rules at the behest of jail authorities. Allegations may not be solely monetary, but also based on the applicant's background and family antecedents. Bail rejected for applicant due to lack of evidence and witness examinations. Trial court ordered to expedite trial. **(Para - 34)**

Bail application rejected. (E-7)

List of Cases cited:

1. Harjit Singh Vs Inderpreet Singh @ Inder & anr., (2021) 19 SCC 355

2. Brijmani Devi Vs Pappu Kumar, (2022) 4 SCC 497

3. Munnilaxmi Vs Narendra Babu & anr. , 2023 SCC Online SC 1380

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The applicant before this Court is a sitting Member of Legislative Assembly from Mau Assembly Seat no. 356. He has been arraigned as an accused in Case Crime No. 88 of 2023 under Sections 387, 222, 186, 506, 201, 120-B, 195-A and 34 I.P.C. and Sections 7, 8 and 13 of Prevention of Corruption Act, 1988 and Section 42 (b), 54 of Prisons Act, 1894 and Section 7 of Criminal Law (Amendment) Act, 2013, P.S. Karvi Kotwali Nagar, District Chitrakoot along with other named persons and some other unknown persons.

2. However, a charge sheet bearing No. 1 of 2023 dated 10.04.2023 has been filed wherein the applicant has been charged under Sections 387, 506, 201, 120-B, 195-A, 186, 511 and 34 I.P.C. and Section 8 of P.C. Act, 1988, Sections 42 (b) and Section 54 of Prisons Act and Section 7 of Criminal Law Amendment Act as stated in para 5 of the affidavit in support of the bail application.

3. A supplementary affidavit filed on behalf of the applicant on 24.04.2024 is taken on record.

4. The genesis of the instant matter is lodging of the First Information Report on 11.02.2023 at 04:20 hours stating that the present applicant who is a member of the Legislative Assembly was lodged in District Jail, Chitrakoot. His wife for the past several days has been visiting the applicant in the Jail along with her driver and co-accused

Niyaz. She is said to spend 3 to 4 hours inside the Jail without any restrictions. The applicant is alleged to have used the mobile phones of his wife to threaten the witnesses and officials who were connected with the prosecution of the applicant. From the very same mobile, the applicant is alleged to have threatened various persons to extort money and posse of men who are loyal to the applicant would collect the money and bring it to the applicant.

5. It has further been alleged that the wife of the applicant frequently visited the jail without complying with the formalities and the prescribed restrictions and the applicant was being provided all sorts of benefits during his incarceration for which the officials of the jail were paid both in cash and kind. It is also alleged that the driver of the applicant's wife namely Niyaz along with the officials of the Jail were planning to stage an escape the applicant from the Jail.

6. Upon the information received from the informant, the District Magistrate and the Superintendent of Police in civil clothes and in a private vehicle made a surprise inspection of the Jail. The applicant was not found in his barrack rather he is said to be in the room right adjacent to the room of the Jail Superintendent along with his wife. Upon opening and entering the said room, the District Magistrate and the Superintendent of Police found applicant's wife but the applicant was not there.

7. The police personnel posted on the Gate of the jail informed that the applicant had moved from the said room to his barrack a few minutes ago. However, the wife of the applicant was searched and from her bag, two mobile phones, certain ornaments, cash of Rs. 21,000/- and foreign currency of 12 Riyals was recovered.

8. The police authorities required the applicant's wife to give the passwords to open the two phones which were confiscated, however, she did not cooperate and rather gave incorrect passwords which resulted in the two phones being locked.

9. It is further alleged that upon further questioning, it was informed that the applicant's wife along with the other accused and police officials were planning to stage an escape for the applicant. Certain witnesses were threatened and in case if they did not cooperate with the applicant i.e. if they did not turn hostile, they were to be eliminated.

10. It is also alleged that on the applicant's instructions, his posse of loyalist were to create an atmosphere of terror so that the said alleged witnesses may not give their testimony and they would abide by the demands for money made by the applicant as extortion money.

11. Sri Arun Sinha, learned counsel for the applicant duly assisted by Sri Pranjal Krishna has submitted that from the bare perusal of the First Information Report, it would primarily indicate that no offence has been made out against the applicant. A meaningful reading of the FIR would indicate that primarily the allegations are against the wife of the applicant and the other co-accused Niyaz. Most of the other co-accused are all police personnel or jail authorities.

12. It has further been pointed out that the police has already filed a charge sheet and apparently no evidence could be unearthed by which it could be remotely suggest that the applicant was involved in any sort of extortion. There has been no evidence nor the call detail report could pin

point any call made by the applicant to any witness whom it is alleged that the applicant had threatened.

13. It is further pointed out that all the co-accused including the wife of the applicant have been enlarged on bail. The bail orders of the co-accused Faraz, Navneet, Ashok, Shahbaz, Santosh, Jagmohan, Chandrakala and Nikhat have been placed on record as Annexure Nos. RA-1 to RA-8 with the rejoinder affidavit dated 08.11.2023.

14. Sri Sinha has further submitted that the applicant has a criminal history of ten cases and except for a case filed by the Enforcement Directorate under Section 3/4 of the PMLA Act, 2002, in all the other cases, the applicant has been enlarged on bail including in the Case Crime no. 431 of 2019 wherein the bail has been granted by the Apex Court on 18.03.2024 and the copy of the said bail order has been brought on record as Annexure no. SA-1 with the supplementary affidavit dated 24.04.2024.

15. Sri Sinha has further urged that merely because the applicant has a criminal history does not necessarily means that he is guilty of an offence especially in the case as the present, at hand. The applicant apart from being a member of the Legislative Assembly is also a National Level Rifle Shooter and has earned laurels for his country. The applicant is in Jail since 11.02.2023 and in so far as the present case emanating from Case Crime No. 88 of 2023 is concerned, it would reveal that certain Sections which have been invoked in the said case are primarily directed against the public servants, however, in so far as the present applicant is concerned, he has been charged under Section 387, 506, 186 I.P.C and they are all punishable with a maximum sentence up to 7 years. In so far as Section 201, 120-B, 195-A, 511 and Section 34 I.P.C. is concerned, they can only be invoked if any contingency mentioned in the said section is proved in trial. In so far as the provisions of the Prevention of Corruption Act are concerned, they are punishable up to 7 years and Section 42 (b) and Section 54 of the Prisons Act also carry a sentence up to maximum two years.

16. On the aforesaid strength it is urged that the charge sheet has already been filed and it discloses a list of 46 proposed witnesses out of which three are eye-witnesses, apart from the complainant, and then there are various other formal and police witnesses. In the aforesaid circumstances, the applicant is not in a position either to tamper with the evidence or influence any witness. In the said circumstances, where the applicant has been in Jail since 11.02.2023, the instant bail application deserves to be allowed.

17. Sri Vinod Shahi, learned Additional Advocate General ably assisted by Sri Anurag Verma, learned A.G.A has opposed the bail application.

18. It has been submitted that during the course of investigation, ample material was collected which clearly indicated the complicity of the Jail Authorities and Sri Niyaz, the co-accused who is the driver of the wife of the applicant who along with the applicant and the other Jail Authorities were staging an escape.

19. It has also been pointed out that the CCTV footage has been recovered which reveals that the wife of the applicant used to visit the Jail after making entries in the register and thereafter she had unrestricted entry and access to the applicant lodged in

the said jail including entering and exiting the Jail without being searched. As per the statement of the Deputy Jailor which was recorded before the Magistrate it indicated that the wife of the applicant and her driver used to visit the Jail frequently without any restriction and search, he attempted to raise an objection against this practice and conduct, but he was advised not to do so and the applicant could get free access inside the Jail roaming freely.

20. It has further been submitted that the applicant yields enormous influence both in terms of money power as well as muscle power and under this circumstances, the applicant, if released at this stage, would influence the witnesses and this would turn the tide of the course of trial which would adversely impact the case of the prosecution.

21. The learned State Counsel has also pointed out that in so far as the bail order of Nikhat who is the wife of the applicant is concerned, she has been enlarged on bail by the Apex Court, as shall be evident by the order itself, on the sole consideration of being a nursing mother with one year old child, apart from the fact that she did not have any criminal history, however, the same is not referable to the present applicant.

22. It is also submitted that even though the applicant may have been enlarged on bail in various cases where he is involved but the fact remains that in the instant case, the applicant has misused the process and the procedure established by law on the strength of his sheer muscle and money power. If the applicant being lodged in Jail could yield influence over the Jail Authorities, it can be well imagined how the applicant would react once he is enlarged on bail. In the aforesaid circumstances, the applicant is not entitled for bail and in support of their submissions, the learned Additional Advocate General and Sri Verma have relied upon the decision of the Apex Court in **Harjit Singh v. Inderpreet Singh Alias Inder and Another, (2021) 19 SCC 355 ; Brijmani Devi v. Pappu Kumar, (2022) 4 SCC 497 and Munnilaxmi Vs. Narendra Babu and Another; 2023 SCC Online SC 1380.**

23. The Court has heard the learned counsel for the parties and also perused the material on record.

24. The facts on record as they unfold is that the applicant does have a criminal history of ten cases. The earliest case in point of time is Case Crime no. 431 of 2019 and the instant case is the latest, thus, indicating that between 2019 to 2023, the applicant has been involved in ten cases including one lodged under the PMLA Act. It is also not disputed that in all the cases except the case under the PMLA, the applicant has been enlarged on bail by the coordinate Bench of this Court and including in the case Crime No. 431 of 2019 by the Apex Court vide order dated 18.03.2024.

25. It is also a matter of fact that in the instant case, apart from the applicant, five other named persons and certain other unnamed all have been enlarged on bail by the coordinate Bench of this Court including the other co-accused Nikhat who is the wife of the applicant who has been enlarged by the Apex Court by means of order dated 11.08.2023.

26. The record further reveals that a Coordinate Bench of this Court by means of its order dated 12.09.2023 had quashed the charge sheet and the cognizance order

emanating from Criminal Case No. 11762 of 2023 arising out of Case Crime No. 106 of 2022. It is also not disputed that the applicant is a member of the Legislative Assembly and a public figure.

27. During the course of submissions, the State had referred to a decision of a Coordinate Bench dated 20.11.2023 relating to the present applicant where he had sought bail in Case Crime No. 431 of 2019 which came to be rejected by a Coordinate Bench of this Court by means of order dated 20th November, 2023 and it was urged that certain observations made by the Coordinate Bench while rejecting the said bail application be considered for the purposes of ascertaining the kind of influence, the present applicant is capable of exercising. In this regard, suffice to state that in the said Case Crime No. 431 of 2019, the applicant has been enlarged on bail by the Apex Court vide order dated 18.03.2024, thus, for the aforesaid reasons, the said observations may not have much persuading effect on the instant case.

28. In ***Harjit Singh (Supra)***, the Apex Court while considering the discretionary power for grant of bail it referred to earlier decisions and held that while considering the grant of bail, the following factors need to be kept in mind inter-alia are:-

(i) Whether there is any prima facie or reasonable ground to

believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

29. In the said case, what was noticed by the Apex Court was that the said applicant who had obtained bail after being released committed another offence and went to the Jail. The Apex Court noticed that there was high possibility of threat and danger to the life and safety of the appellant before the Apex Court and in the aforesaid circumstances, the antecedents were such that the Apex Court while allowing the appeal before it cancelled the bail.

30. In **Brijmani (Supra)**, the Apex Court once again considering the issue of bail while dealing with the parameters required to be noticed by the Court, it has also noticed one more aspect while exercising its discretion in paragraph nos. 37 and 38 as under:-

"37. Ultimately, the court considering an application for bail has to exercise discretion in a judicious manner and in accordance with the settled principles of law having regard to the crime alleged to be committed by the accused on the one hand and ensuring purity of the trial of the case on the other.

38. Thus, while elaborating reasons may not be assigned for grant of bail, at the same time an order dehors reasoning or bereft of the relevant reasons cannot result in grant of bail. It would be only a non-speaking order which is an

instance of violation of principles of natural justice. In such a case the prosecution or the informant has a right to assail the order before a higher forum."

31. In **Munnilaxmi (Supra)**, the Apex Court in paragraph nos. 19 to 21 have held as under:

"19. We have given our thoughtful consideration to the rival submissions and perused the material on record. It appears that the sudden change of stance shown by the most vital witnesses, namely, the family members of the Deceased within 20 days of their examination-in-chief cannot be a mere coincidence. The Appellant has been vigorously pursuing this appeal seeking cancellation of bail given to Respondent No. 1. In her examination-in-chief, she has specifically named Respondent No. 1 as the main conspirator in the murder of her daughter. Her sudden somersault, therefore, cannot be easily detached from the chain of allegations made against Respondent No. 1 in the past, of influencing the police, hiring goons, repeatedly assaulting the Deceased, and various attempts to take away her life. All these accusations, for the limited purpose of these proceedings, do suggest that Respondent No. 1 has the potential to influence the investigation or the witnesses who were slated to depose against him. The seriousness of allegations levelled against Respondent No. 1 by the Deceased during her lifetime or by the Appellant before the Police or in this appeal ought to be evaluated against this backdrop.

20. This Court undoubtedly has a narrow scope of interference in an order granting bail while exercising its power of judicial review and will be invariably reluctant to interfere in such order even if it has a different opinion. The Courts often grapple with balancing the most precious right to liberty embodied in Article 21 of the Constitution on one hand and the right of the orderly society, which is committed to the rule of law, on the other. The delicate balance in the case of long incarceration is drawn by releasing a suspect on bail on such terms and conditions that will ensure that a fair and free trial is not hampered. However, if it is found that an undertrial has attempted to misuse the concession of bail either by influencing the witnesses or tampering with the evidence or trying to flee from justice, such person can be committed to custody by withdrawing the concession of bail.

21. The Courts are under an onerous duty to ensure that the criminal justice system is vibrant and effective; perpetrators of the crime do not go unpunished; the witnesses are not under any threat or influence to prevent them from deposing truthfully and the victims of the crime get their voices heard at every stage of the proceedings."

32. Considering the aforesaid parameters and applying it to the facts of the instant case, it would be seen that the applicant is a Member of Legislative Assembly. He is a person who holds a responsible position and is a representative of the public. His conduct has to be of a higher standard, than other common persons of the society. The members of the Legislative Assembly are also the law makers and in juxtaposition, it is not appropriate that a law maker may be seen as a law breaker. The applicant is a National Level Rifle Shooter and as stated by the learned counsel for the applicant, he has earned laurels for his country and that being so it would be explicitly clear that any sport ingrains two habits in a person i.e. discipline and the other is respect, for rules. A person with the aforesaid backdrop knowing fully well that he was lodged in the Jail and his

wife had been repeatedly meeting the applicant and from the CCTV footage as well as statements of the witnesses elicited during investigation it prima facie reflects towards the complicity of the applicant.

33. In normal circumstances and even as per the law, the Jail Authorities do not and could not grant such unrestricted access to any person which has been allegedly extended to the wife of the applicant, obviously at the asking of the applicant. The recovery of two mobile phones from the wife of the applicant who was found in the Jail premises in a room where she could not have access unless the Jail Authorities turned a blind eye.

34. Allegedly such dereliction of duty /violation of rules and regulations at the behest of the Jail Authorities, frequently and selectively for the applicant and his wife may not have been possible merely for monetary gains. Considering the profile and the background of the applicant and his family antecedents, the allegations may not be completely without substance. If such influence whether for monetary reason or under threat or coercion, if can be exercised over police and prison authorities so effectively who are basically enforcers of law then it can be well imagined how the applicant can effectively garner power to influence any witness or to persuade him to change his stand and this aspect if seen in light of the fact that the evidence is yet to commence. In the aforesaid facts and circumstances where the evidence is yet to commence and there are eye-witnesses and certain police authorities who were to be examined, hence, at this stage, this Court is not inclined to grant bail to the applicant which is accordingly **rejected**. The Trial Court shall expedite the trial and endevour be made to decide the same as expeditiously as possible. The prosecution State shall also ensure that they do not seek any unnecessary adjournments for examining of the witnesses. It is also made clear that any observations made by this Court in the instant order may not be taken as an expression of opinion on merits and the Trial Court shall proceed strictly in accordance with law.

(2024) 5 ILRA 1638
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 1005292 of 2006

Ibney Hasan ...Petitioner
Versus
Special Judge E.C. Act Faizabad & Ors. ...Respondents

Counsel for the Petitioner:
Pushpila Bisht

Counsel for the Respondents:
C.S.C., Haider Abbas, Ishtiaq Ahmad, M.M.Salam, Mohd.Yasin, Rakesh Kumar Srivastava, S.A.A.Rizvi, S.M.Munish Jafri

(A) Muslim Waqf law - U. P. Muslim Waqf Act, 1960 - Section 57-A - Recovery of possession of waqf property from un-authorized occupants , Section 58 - Powers of inquiring authority, The Waqf Act, 1995 - Section 112(3) - repeal and savings - U.P. Muslim Waqf Act 1960 stood repealed immediately upon enactment of the Waqf Act, 1995 (with effect from 01.01.1996) , after 01.01.1996, no action could be taken or proceedings could be continued under U.P. Muslim Waqf Act, 1960 , Section 83(2) - alternative remedy before Tribunal - U.P. Muslim Waqf Rules - Rule 5 - Controller's order and subsequent proceedings are without jurisdiction under Section 57-A of

the U.P. Muslim Waqf Act, 1960, after enactment of the U. P. Muslim Waqf Act 1995 - Availability of an alternative remedy does not prevent the exercise of jurisdiction under Article 226 of the Constitution of India. (Para - 7, 11)

Petitioner's Waqf Property Ownership Case - Petitioner claims ownership of part of waqf property - construction of shop by someone over land in 1995 - Shops were recorded in petitioner's and his predecessors' names in town records - later becoming Nagar Palika Parishad - Impugned orders were passed after repeal of U.P. Muslim Waqf Act, 1960 - in exercise of powers conferred by repealed Act - not under powers conferred by the Waqf Act, 1995 - petitioner cannot avail remedy under Section 83(2).**(Para - 3, 12)**

HELD:- Impugned order and consequential requisition are without any authority of law. Proceedings initiated against petitioner prior to repeal of U.P. Muslim Waqf Act and enactment of Waqf Act, 1995 transferred to competent authority under Waqf Act, 1995. Board shall proceed in accordance with law from the stage that had been achieved prior to 01.01.1996 i.e. date of enforcement of Waqf Act, 1995. Petition filed on 06.11.2006, pending for 18 years, should not be relegated to alternative remedy. Impugned order quashed. **(Para - 14,15)**

Petition allowed. (E-7)

List of Cases cited:

1. Sahibzada Moinuddin Siddiqui Vs U.P. Sunni Central Board of Waqfs, 2017 SCC OnLine All 3659

2. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1

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

(C. M. Application No.51889 of 2015)

1. Heard Ms. Pushpila Bisht, the learned counsel for petitioner, Sri Umesh Srivastava, learned Standing Counsel for the opposite party no.5-Collector, Faizabad and Sri S.A.A. Rizvi, learned counsel for the opposite party nos.2 & 3.

2. Sri Adnan Rafiq Hasan had filed an application for impleadment through Sri M. M. Salam, Advocate. Name of Sri M. M.Salam has been shown in the cause list but neither he is present to assist the Court nor has he sent any request for adjournment of the case.

3. In the affidavit filed in support of the application for impleadement, it has been stated that the applicant was Managing Mutawalli of Waqf Masjid and Rauza Hazrat Qasim, (opposite party no.4) and being Mutawalli, he is a necessary party to the writ petition.

4. The Waqf Masjid and Rauza Hazrat Qasim is already impleaded as opposite party no.4 in the writ petition and therefore, the Mutawalli of Waqf Masjid and Rauza Hazrat Qasim is not a necessary party.

5. Accordingly, the impleadment application is rejected.

Order on Memo of Writ Petition

1. By means of the instant writ petition filed under Article 226/227 of the Constitution of India, the petitioner has challenged the validity of an order dated 26.03.1996 passed by the Controller, Shia Central Waqf Board, U.P. Lucknow under Section 57-A of U. P. Muslim Waqf Act, 1960 directing issuance of a requisition for taking possession of a property bearing no.277, which is bounded in the East by a Road, in the West by land of waqf, in the North by a shop of waqf and in the South

also by another shop of the waqf, for taking possession of the aforesaid property from the petitioner and to hand it over to the Mutwalli of Waqf Maszid Rauza Hazrat Kasim (the opposite party no. 4). The petitioner has also challenged the validity of a requisition dated 21.06.1996 issued by the Collector, Faizabad in furtherance of the aforesaid order dated 26.03.1996 passed by the Controller.

2. The petitioner has also challenged the validity of a judgment and order dated 12.10.2006 passed by the Special Judge, E.C. Act, Faizabad in Misc. Civil Appeal No.9 of 1996, whereby the petitioner's appeal filed against the aforesaid orders 26.03.1996 passed by the Controller and the requisition dated 21.06.1996 issued by the Collector Faizabad, was dismissed.

3. Briefly stated facts of the case are that the petitioner claims to be the owner of a part of waqf property bearing plot no.277 and he claims that Sri Sageer Husain had constructed a shop over the land in the year 1955 under an Ijazatnama granted by the erstwhile Taluqdar of Lorepur Estate on 13.09.1944. Subsequently another Ijazatnama was issued by the Chairman, Nagar Palika Parishad of Jalalpur on 27.09.1955. Sri Sageer Husain had constructed some shops over plot no.277 in furtherance of the Ijazatnama. The shops were recorded in the name of the petitioner and his predecessors in the records of town area Jalalpur which has subsequently become Nagar Palika Parishad, Jalalpur.

4. The Controller, Shia Central Waqf Board U.P., Lucknow had initiated an enquiry under section 58 of U. P. Muslim Waqf Act, 1960 and a report was submitted in furtherance of the enquiry on 22.05.1992. On 27.02.1995, a notice under Section 58 of the U.P. Muslim Waqf Act, 1960 was issued against the petitioner and other persons. The petitioner filed his reply to the notice claiming that plot no.277 had been leased out to Sri Sageer Husain in the year 1944 and the shops had been constructed thereon in the year 1955 and the same are not waqf property. Opposite party no.4 claims that plot no.277 is the property of Waqf Maszid Rauza Hazrat Kasim.

5. On 26.03.1996, the Shia Central Waqf Board, U.P. passed an order under Section 57-A of the U.P. Muslim Waqf Act, 1960 holding that the property in question is the property of Waqf Maszid Rauza Hazrat Kasim and ordering ejectment of the petitioner from waqf property and its requisition under section 57-A of the Act of 1960. In furtherance of the aforesaid order dated 26.03.1996 passed by the Controller of Shia Central Waqf Board, U.P., the Collector Lucknow issued a requisition dated 21.06.1996 for delivery of possession of the property to the Waqf under Rule 5 of U.P. Muslim Waqf Rules. The petitioner filed Misc. Civil Appeal No.9 of 1996 against the aforesaid order which has been dismissed by means of the judgment and order dated 12.10.2006 passed the Special Judge, E.C. Act, Faizabad holding that the petitioner ought to have filed a reference to the Tribunal constituted under U.P. Muslim Waqf Act, 1960 and the petitioner should agitate the question of title before the Tribunal. The appeal filed by the petitioner regarding his title could not be decided by the District Judge as only the Tribunal has power to decide the title of the parties. Accordingly, the appeal was dismissed as not maintainable.

6. Assailing the validity of the aforesaid three orders, Ms. Pushpila Bisht, the learned counsel for the petitioner has

submitted that the Waqf Act, 1995 was enacted by the Parliament with effect from 01.01.1996. Section 112 of the Waqf Act, 1995 provides as follows: -

"112. Repeal and savings- (1) The Waqf Act 1956 (29 of 1954) and the Waqf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act.

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken."

7. A bare perusal of Section 112(3) of the Act of 1995 makes it clear that U.P. Muslim Waqf Act 1960 stood repealed immediately upon enactment of the Waqf Act, 1995 i.e. with effect from 01.01.1996 and after 01.01.1996, no action could be taken or proceedings could be continued under U.P. Muslim Waqf Act, 1996.

8. Ms. Pushpila Bisht, learned counsel for the petitioner has relied upon a judgment rendered by a Division Bench of this Court in the case of **Sahibzada Moinuddin Siddiqui v. U.P. Sunni Central Board of Waqfs,** 2017 SCC OnLine All 3659, wherein it was held that: -

"19. Accordingly, savings provision contained in section 112 of 1995 Act saves only previous operation of 1960 Act and provides that the things done or action taken under 1960 Act will be deemed to have been taken in exercise of the powers conferred under 1995 Act, ***however, any action taken or anything done under the old 1960 Act will be valid and will be deemed to have been taken under the new Act 1995 only and only if such thing was done or such action was taken before the Waqf Act, 1995 came into force i.e., before 1.1.1996."***

(Emphasis in original)

9. Sri S.A.A. Rizvi, learned counsel representing the opposite parties no.2 and 3 has submitted that the petitioner has an alternative remedy of challenging the aforesaid orders of the Controller and Collector before the Tribunal under section 83(2) of the Waqf Act, 1995. However, hecould not dispute the legal position and the affect of section 112(3) of the Waqf Act, 1995.

10. The learned counsel for the petitioner submitted that in the case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others,** reported in **(1998) 8 SCC 1,** Hon'ble Supreme Court has held that: -

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not

normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

11. As in the present case, after enactment of the Waqf Act 1995, the Controller had no jurisdiction under Section 57-A of the U. P. Muslim Waqf Act, 1960, the order passed by the Controller and the consequential proceedings are wholly without jurisdiction and in such circumstances, the availability of an alternative remedy will not be a bar against exercise of jurisdiction under Article 226 of Constitution of India. Further, when the writ petition was filed way back on 06.11.2006 and the pleadings have been exchanged and the petition is pending for the last about 18 years, it would not proper to relegate the petitioner to any other alternative remedy at this belated stage.

12. Moreover, Section 83(2) of the Waqf Act, 1995 provides remedy to a person aggrieved by "an order made under this Act or Rules made thereunder". The impugned orders have been passed after repeal of U.P. Muslim Waqf Act, 1960 in exercise of powers conferred by the repealed Act and not under powers conferred by the Waqf Act, 1995. Therefore, the petitioner cannot avail the remedy under Section 83(2) of the Waqf Act, 1995.

13. Accordingly, keeping in view the entire facts and circumstances of the case, it would not be proper to relegate the petitioner to the matter being decided on merits.

14. The proviso appended to Section 112(3) merely saves anything done or any action taken in exercise of any power conferred by U.P. Muslim Waqf Act, 1960 till the aforesaid enactment was in existence i.e. prior to 01.01.1996. The order dated 26.03.1996 was passed by the Controller under Section 57-A of U.P. Muslim Waqf Act, 1960, whereas of U.P Muslim Waqf Act, 1960 stood repealed with effect from 01.01.1996. Therefore, the order dated 26.03.1996 passed by the Controller and the consequential requisition dated 21.06.1996, are without any authority of law.

15. Accordingly, the writ petition is **allowed.** The impugned order dated 26.03.1996 passed by the Controller, Shia Central Waqf Board, U.P. Lucknow under Section 57-A of U. P. Muslim Waqf Act, the requisition dated 21.06.1996 issued by the Collector, Faizabad in furtherance of the aforesaid order dated 26.03.1996 passed by the Controller and the order dated 12.10.2006 passed by the Special Judge, E.C. Act, Faizabad in Misc. Civil Appeal No.9 of 1996, are hereby **quashed.**

16. The proceedings that were initiated by the opposite party no.4 against the petitioner prior to repeal of U.P. Muslim Waqf Act and enactment of Waqf Act, 1995 shall stand transferred to the competent authority under the Waqf Act, 1995 i.e. Waqf Board which shall proceed in accordance

with law from the stage that had been achieved prior to 01.01.2006 i.e. date of enforcement of Waqf Act, 1995.

(2024) 5 ILRA 1643
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ - C No. 2403 of 2024

Durga Khadi Evam Gramodyog Seva Sansthan, Lko. ...Petitioner
Versus
Additional Commissioner, Administration, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Pradeep Kumar

Counsel for the Respondents:
C.S.C.

Civil Law –transfer of a land belonging to a Scheduled Case land owner to the petitioner society-without prior permission of the Collector- Sections 157A and 157AA of the UPZA&LR Act,1950-Parliament does not confer the status of scheduled caste- any Institution/Society or company or an association or a body of individuals or upon any artificial person-such a transfer without prior approval of Collector is invalid-impugned orders upheld- petition dismissed. (Paras 11 and 12)

HELD:

In the aforesaid judgment, it has clearly been held that the Society/ Institution has not been conferred the status of a scheduled caste and by necessary implication even if it is assumed that any institution or a Society is a person, it would not be a person specified and notified to be scheduled caste hence, the prior approval from the Collector/Assistant Collector is necessary before the sale of property. (Para 12)

Petition dismissed. (E-14)

List of Cases cited:

Civil Misc. Writ Petition No. 44098 of 2014 (Committee of Management, Randhir Singh U.M. Vidayala Vs St. of U.P. & ors.) decided on 10.04.2019

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

1. Heard Shri Pradeep Kumar, learned counsel for the petitioner and Shri Hemant Kumar Pandey, learned Standing Counsel for the State.

2. Present petition has been preferred for quashing of the impugned order dated 17.10.2023 passed by the respondent no. 1-Additional Commissioner, Administration, Lucknow Mandal, Lucknow in Case No. 503/2014 (Computerized Case No. C2014100000503) (Durga Khadi Vs. U.P. Ziladhikari) under Section 333 (3) of the U.P.Z.A. & L.R. Act, 1950 (hereinafter referred to as, the Act, 1950) and the impugned order dated 03.08.2013 passed by the respondent no. 2 Deputy Collector (Revenue), District Lucknow in Case No. 02/02/2008-09 (State Vs. Durga Khadi Evam Gramodyog Seva Sansthan and other) under Section 166/167 of the Act, 1950.

3. Learned counsel for the petitioner i.e. Durga Khadi Evam Gramodyog Seva Sansthan (hereinafter referred to as, the Society) has submitted that land of Khata No. 554 was purchased by respondent no. 4-Munishwar from respondent no. 3-Sanjay Kumar by registered sale deed dated 20.09.2003 and both the parties belong to the Scheduled Caste. Thereafter, the petitioner Society through Smt. Pushpa Devi, Secretary/Manager, Durga Khadi Evam Gramodhyog Seva Sansthan has purchased the said property from respondent

no. 4-Munishwar by registered sale deed dated 29.09.2007.

4. It is further submitted that Smt Pushpa Devi has been holding the post of Secretary/ Manager Durga Khadi Evam Gramodhyog Seva Sansthan since the execution of sale deed and she belongs to the Scheduled Caste category also hence, there was no requirement to obtain prior permission from Collector under Section 157 A of the Act, 1950.

5. It is next submitted that since respondent no. 4-Munishwar and Smt Pushpa are belong to the category of Scheduled Caste so there is no illegality in the execution of sale deed dated 29.09.2007 thus, case of the petitioner does not fall under Section 157 A of the Act, 1950, hence, the impugned orders are bad in the eyes of of law and are liable to be set aside.

6. On the other hand, Shri Hemant Kumar Pandey, learned Standing Counsel has submitted that the property i.e. Khata No. 554 was sold by Shri Munishwar-respondent no. 4 to the petitioner society through Smt. Pushpa Devi. Sale deed was executed in favour of petitioner-Society and the petitioner being a Society does not belong to any caste or category and no such status have been conferred to the petitioner Society thus, the transaction is hit by sub Section 1 of Section 157 A of the Act, 1950 and in support of his submission, he placed reliance upon the judgment of this Court dated 10.04.2019 passed in ***Civil Misc. Writ Petition No. 44098 of 2014 (Committee of Management, Randhir Singh U.M. Vidayala Vs. State of U.P. and others).***

7. After hearing learned counsel for the parties and going through the record of the case, it is found that Respondent no.-4-Shri Munishwar executed a sale deed in favour of the petitioner-Society through Smt. Pushpa Devi-wife of respondent no. 4 as Secretary/Manager of the petitioner Society and under this misconception, learned counsel for the petitioner is pressing hard that sale deed dated 29.09.2007 was executed by a person belonging to Scheduled Caste to another person belonging to Scheduled Caste category, hence, the prior approval of Collector, as required under Section 157 A of the Act, 1950 is not required in the present case and thus, there is no illegality in the present transaction.

8. For convenience, the relevant extract of Section 157 A of the Act, 1950 is quoted hereinbelow:-

" 157-A. Restrictions on transfer of land by members of Scheduled Castes- (1) Without prejudice to the restrictions contained in Sections 153 to 157, no bhumidhar or asami belonging to a Scheduled Caste shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector.

Provided that no such approval shall be given by the Collector in case where the land held in Uttar Pradesh by the transfer on the date of application under this section is less than 1.26 hectares or where the area of land so held in Uttar Pradesh by the transferor on the said date is after such transfer, likely to be reduced to less than 1.26 hectare. "

9. As regards the judgment relied by learned Standing Counsel, it has been submitted by the learned counsel for the petitioner that the said judgment is not applicable as the said judgment was passed

considering the Section 157 AA of the Act, 1950. The said submission of learned counsel for the petitioner is also not acceptable. For convenience, the relevant extract of Section 157 AA of the Act, 1950 is being reproduced hereinbelow:-

"157 AA. Restrictions on transfer by member of Scheduled Castes becoming bhumidhar under Section 131-B (1) Notwithstanding anything contained in Section 157 A and without prejudice to the restrictions contained in Sections 153 to 157, no person belonging to scheduled caste having become a Bhumidhar with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a Scheduled Caste and such transfer, if any, shall be in the following order of preference

(a) land less agricultural labourer;

(b) marginal farmer;

(c) small farmer; and

(d) a person other than a person referred to in Clauses (a), (b) and (c):-

10. The issue which is to be adjudicated in the present case is whether a person belonging to Scheduled Caste category can transfer any property/land by way of sale, gift, mortgage or lease to a person not belonging to Schedule Caste category, except with prior approval by the Collector, whereas sub Section 4 of 157 AA of the Act, 1950 provides that no transfer shall be made except with the previous approval of the Assistant Collector concerned. The said section is reproduced hereunder for convenience :-

" 157 AA (4) No transfer under this Sections shall be made except with the previous approval of the Assistant Collector concerned.

11. This Court in the case of Committee of Management, Randhir Singh U.M. Vidayala (supra) has considered the same issue whether a person belonging to Scheduled Caste category can transfer the land in favour of a Society without prior approval of the Collector/Assistant Collector wherein it has been held by this Court that a Society is not a person belonging to Scheduled Caste category. The relevant extract of the said judgment is being reproduced hereunder :-

" 13. In compliance with the above Article the list which has been notified by the President for the State of U.P. and by the Parliament does not in any manner confer the status of a scheduled caste to any Institution/Society or a Company or an association or an body of individuals or upon any artificial person. Therefore, by necessary implication even if it is assumed that any institution or a Society is a person, it would not be a person specified and notified to be scheduled caste."

12. In the aforesaid judgment, it has clearly been held that the Society/ Institution has not been conferred the status of a scheduled caste and by necessary implication even if it is assumed that any institution or a Society is a person, it would not be a person specified and notified to be scheduled caste hence, the prior approval from the Collector/Assistant Collector is necessary before the sale of property.

13. It is an admitted case of the petitioner that there was no prior approval from the Collector before the execution of sale deed by Munishwar belonging to the Scheduled Caste to the petitioner society,

which is required under Section 157 A of the Act, 1950.

14. In view of the facts, circumstances and discussion made hereinabove, the present petition is devoid of merit hence, ***dismissed***.

(2024) 5 ILRA 1646
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Special Appeal Defective No. 9 of 2024

Basic Shiksha Adhikari ...Appellant
Versus
Laxmi Shakya & Ors. ...Respondents

Counsel for the Appellant:
Manvendra Singh, Prabhakar Awasthi, Vijay Kumar Maurya

Counsel for the Respondents:
C.S.C., Siddharth Khare

(A) Service Law - Assistant Teacher Recruitment Examination, 2018 - Intermediate Education Act, 1921 - Chapter XII Part - II- B (General Regulation Regarding Exam) - Clause 17 (1), (2), (3), (4) & (5) - Regulation 5 - Guidelines for Pursuing Two Academic Programmes Simultaneously - New Education Policy 2020 Guidelines - Allows two academic programmes under certain conditions - Programs must not overlap and have different class times - One full-time course on physical mode and the other in open and distance learning or online mode - No retrospective benefit can be claimed for students who have already pursued two academic programmes simultaneously - Prior to April 2022, no person could pursue two full-time academic programmes in physical modes simultaneously. (Para - 34, 35)

(B) Service Law - The U.P. Intermediate Education Act, 1921 - prohibits simultaneous examinations of High School and Intermediate courses, either as regular or private students - If a candidate appears in two simultaneous exams, their results are declared nullity - Only Examination Board can declare a candidate's result nullity - Higher education courses cannot be undertaken simultaneously - employment cannot be terminated unless certificates are forged, fabricated, or declared nullity by the Examination Board. (Para -37)

Petitioner's services were terminated - due to his multiple certificates, including High School and Intermediate, B.A, B.Sc., B.T.C., and M.Sc., and his overlapping degrees - No courses declared null by competent Examination Board - Certificates verified as genuine - Services cannot be terminated unless declared null and void by Examination Body. **(Para - 4,38)**

HELD:- Appellant/respondents are directed to permit petitioner/respondent no.1 to discharge her duties on the post on which petitioner was appointed. Petitioner entitled for payment of salary with continuity in service and all consequential benefits.**(Para - 41)**

Appeal dismissed. (E-7)

List of Cases cited:

1. Kuldeep Kumar Pathak Vs St. of U.P. & ors. , (2016) 3 SCC 521

2. Board of Basic Education & anr. Vs Arvind Prakash Dwivedi & ors.., Special Appeal Defective No. 898 of 2020

3. Laxmi Shanker Yadav Vs St. of U.P. & ors. , Writ-A No. 5394 of 2021

4. The Basic Eduction Board, U.P. Prayagraj & anr. Vs Laxmi Shekhar Yadav, Special Appeal No. 37 of 2022

5. Shilpa Saroha Vs St. of U.P. & ors., Writ A No. 13888 of 2019

6. A. Dharmraj Vs The Educational Officer Puddukkottai & ors. , (2022) 11 SCC 692

7. Rao Mohammad Arif Vs St. of U.P. & ors. , Special Appeal No. 124 of 2023

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

1. Heard Mr. Manvendra Singh, learned counsel for the appellant, Mr. Ambrish Shukla, learned Additional Chief Standing Counsel for the State respondent, Mr. Siddharth Khare, learned counsel appearing for the contesting-respondent and perused the record.

Order on Delay Condonation Application

2. Delay in filling the present appeal has been explained to the satisfaction of the Court. Learned counsel for the respondent has no objection if the delay condonation application is allowed. Accordingly delay in filing the appeal is condoned.

3. The delay condonation application stands allowed.

Order on Appeal

4. The instant special appeal has been preferred against the judgement and order dated 10.04.2023, passed by the learned Single Judge in Writ A No. 1111 of 2023 (Laxmi Shakya vs. State of U.P. and 3 Others) whereby the learned Single Judge has allowed the writ petition and set-aside the order dated 31.12.2022, passed by the District Basic Education Officer, Mainpuri, whereby the services of the respondent no.1/petitioner, Laxmi Shakya, were terminated on the ground that the petitioner has obtained the certificate of High School and Intermediate, twice and has also obtained overlapping degrees of B.A, B.Sc. and also the overlapping degree of B.T.C. and M.Sc.

5. The brief facts of the case are that the State Government has notified the vacancies for recruitment on the post of Assistant Teacher in the year, 2018, known as "Assistant Teacher Recruitment Examination, 2018". The petitioner/respondent no.1 having possessed the requisite qualifications, participated in the examination and qualified the same. In terms of the said qualifications, on passing of the said examination the petitioner was issued an appointment letter dated 05.09.2018. On the basis of the aforesaid appointment letter dated 05.09.2018, she has joined Prathmik Vidyalaya, Nagla Ahir Block Kisni, District Mainpuri on the post of Assistant Teacher on 07.09.2018 and was discharging her duties. In the meantime, the petitioner/respondent was married to one Sandeep Kumar s/o Sughar Singh. When her matrimonial relationship with Sandeep Kumar became strained, Sughar Singh, the father of Sandeep Kumar and father-in-law of the petitioner/respondent no.1, made an online complaint on Jansunwayi Portal (IGRS) on 31.07.2021 alleging therein that the petitioner has obtained the certificates and passed the High School, Intermediate examination twice on the overlapping years and she has also obtained the overlapping degrees of B.A./B.Sc. It is also alleged that she had also completed the degree of M.Sc. and B.T.C. simultaneously. On such complaint being made the District Basic Education Officer had issued a notice dated 13.08.2021 to the petitioner/respondent no.1. Thereafter, another notice was issued on 01.10.2021 by the District Basic

Education Officer, Mainpuri and by the said notice, payment of salary to the petitioner was stopped. The petitioner/respondent has submitted her reply to the aforesaid notice dated 01.10.2021 on 18.10.2021.

6. Relying upon the judgement of ***Kuldeep Kumar Pathak Vs. State of U.P. & others (2016) 3 SCC 521*** and the another judgement of this Court in passed in ***Special Appeal Defective No. 898 of 2020 (Board of Basic Education and Another vs. Arvind Prakash Dwivedi and 2 Others)***, the said notice dated 01.10.2021 was challenged by the petitioner/respondent in Writ A No. 18268 of 2021 (Laxmi Shakya Vs. State of U.P. and 2 others). The said writ petition was disposed of vide order dated 17.12.2021 directing the District Basic Education Officer, Mainpuri to take a decision in the matter most expeditiously and preferably within a period of two weeks from the date of production of a certified copy of the order. Thereupon, on 23.12.2021, the petitioner/respondent submitted a copy of the order dated 17.12.2021 alongwith her reply and claimed to set-aside the notice dated 01.10.2021 and to restore her salary. Pursuant to the aforesaid representation dated 23.12.2021, the District Basic Education Officer, Mainpuri, directed the Block Education Officer to conduct an inquiry with regard to the allegations levelled against the petitioner and thereafter on 29.01.2022, the District Basic Education Officer, Mainpuri, withdrew the order of stoppage of payment of salary after completion of the inquiry by the Block Education Officer. The petitioner/respondents also submitted the reply dated 02.03.2022 before the Block Development Officer wherein she has categorically stated that she has submitted the following documents for appearing in the Assistant Teacher Recruitment Examination, 2018, which are as under:-

क्रम सं०	परीक्षा का नाम	वर्ष	अनुक्रमांक	श्रेणी	शिक्षण संस्था का नाम	बोर्ड/ विवि का नाम
1	हाईस्कूल	2010	1558864	प्रथम	ऋषिभूमि इं०को० सौरिख कन्नौज	यू०पी० बोर्ड
2	इण्टर	2012	1134721	प्रथम		
3	बी०एस० सी०	2015	6055893	प्रथम	गंगा सिंह महाविद्यालय हुसैनपुर कन्नौज	छत्रपति शाहूजी महाराज वि०वि० कानपुर
4	बी०टी० सी०	2017	18410351	प्रथम	देवांशू समाज कल्याण सेवा महाविद्यालय महादेव नगर सौरिख कन्नौज	परीक्षा नियामक प्राधिकारी उत्तर प्रदेश
5	टेट.	2017	1810402656	उत्तीर्ण	-	

7. The original copies of the above documents were also produced by the respondent/petitioner at the time of the counselling which were duly verified by the Department and having found the documents genuine, she was selected and appointed on the post of Assistant Teacher. She has also stated with regard to the strained relationship with her husband due to which the instant complaint has been lodged by the father-in-law of the respondent/petitioner.

8. In response to the clarification sought for by the Block Education Officer vide its letter dated 07.03.2022, the petitioner/respondent has further submitted her explanation on 10.3.2022 to the effect that except the B.Sc. Examination, she has no concern with any other documents nor she has any knowledge about the same. However, she has admitted that before taking admission in B.T.C. course, she has

taken the admission in M.Sc. And after taking the admission in B.T.C., she has not attended the classes in M.Sc. course. However, she has appeared in the examination of M.Sc. as well but she has not utilized her M.Sc. Mark sheet or certificate at any stage. She has also submitted application for surrendering the mark sheet and degree of M.Sc. before the University concerned, which is under process.

9. The said Block Education Officer has submitted an inquiry report dated 23.03.2022. After submission of the said inquiry report, the District Basic Education Officer, Mainpuri, vide order dated 11.04.2022, has further directed the Block Education Officer, Mainpuri to conduct a fresh inquiry with regard to the overlapping degrees obtained by the petitioner/respondent in the year, 2014 B.A. Part - I and B.Sc. Part-II, in the year, 2015 B.A. Part - II and B.Sc. Part-III, in the year, 2016 B.A. Part - III, M.Sc. Part-I and B.T.C. Part- I and in the year, 2017 M.Sc. Part - II and B.T.C. Part-II.

10. In pursuance of the aforesaid order dated 11.04.2022, the Block Education Officer again submitted his report on 06.05.2022 whereby the Block Education Officer has informed that with regard to the Educational qualification of Laxmi d/o Sri Ashok Kumar, she has obtained the record from Swargiya Mahadev Prasad Smarak Mahila Mahavidyalaya, Husainpur Saurikh, Kannauj and Ganga Singh Mahavidyalaya, Sultanpur Saukhik, Kannauj and has found as under:-

"1. जिसमें स्व० महादेव प्रसाद स्मारक महिला महाविद्यालय हुसैनपुर सौरिख जनपद कन्नोज द्वारा शैक्षिक अभिलेख प्रमाणित कर उलब्ध कराये गये है जिसमें आपके द्वारा वर्ष 2011 में हाईस्कूल अनुक्रमांकः 1579885, परिणाम उत्तीर्ण जतिथि-15.07.1995 अंकित की गयी है, और इण्टरमीडिएट में वर्ष 2013 अनुक्रमांकः 1137929 परिणाम प्रथम श्रेणी ओनर्स तथा बी०ए० प्रथम वर्ष, द्वितीय वर्ष तृतीय वर्ष अनुक्रमाकः 6157728 परिणाम प्राप्तांक / पूर्णांकः 677/900 प्रथम श्रेणी।

2 गंगा सिंह महाविद्यालय सुल्तानपुर, सौरिख, जनपद कन्नौज द्वारा शैक्षिक अभिलेख प्रमाणित उपलब्ध कराये गये है जिसके आपके द्वारा हाईस्कूल परीक्षा-2010 अनुकनायकः 1558864 परिणान पास, इण्टरमीडिएट—2012 अनुक्रमांकः 1134721 परिणाम प्राप्तांक / पूर्णांक 361/500 प्रथम श्रेणी, बी०एस०सी० प्रथम वर्ष, द्वितीय वर्ष तृतीय वर्ष-2015, अनुक्रमांक-6055893, प्राप्तांक / पूर्णांक 1197/1000 उत्तीर्ण श्रेणी प्रथम श्रेणी, एम०एस०सी० प्रथम, द्वितीय, वर्ष 2017- अनुक्रमांकः 2033264, परिणाम- प्राप्तांक / पूर्णांक-335/1000 उत्तीर्ण श्रेणी प्रथम तथा उपस्थिति विवरण प्राचार्य द्वारा उपलब्ध नही कराया गया है।"

11. On the basis of the aforesaid report submitted by the Block Education Officer, the report from the University and the Secretary Education Board Allahabad, were also obtained and in the meantime on 21.12.2022, a show cause notice was further issued to the petitioner/respondent and in response to the aforesaid show cause notice, the petitioner respondent has submitted a detailed reply wherein she has categorically stated that she has passed the High School vide Roll No. 1558864 in the year, 2010 and her date of birth being 15.09.1995, Intermediate Roll No. 1134721 in the year 2012, B.Sc. Roll No. 6055893 in the year 2015, B.T.C. Roll No. 18410351 in year, 2017 and TET Roll No. 1810402656 in the year, 2017. She submits that in addition to the aforesaid degree, she has also obtained the degree of M.Sc. which was erroneously taken in the same session alongwith B.T.C. Realizing her mistake, she has already made an application for surrender of the degree of M.Sc. before the University concerned and she has not used that M.Sc. Degree in any

selection process. She has reiterated with regard to the strained relationship with her husband and her in-laws and has submitted the copies of the aforesaid degrees of High School, Intermediate, B.Sc., B.T.C. and T.E.T. However, she has stated that she has no concern with the other marksheet and certificate of High School, Intermediate and the B.A. degree. As she has no connection with the said documents therefore the same were denied.

12. The said show cause notice dated 21.12.2022 also required the petitioner to appear before the District Selection Committee on 28.12.2022 for personal hearing, failing which her services would be terminated. In response thereto the petitioner appeared before the District Selection Committee on 28.12.2022 and submitted her reply, as aforesaid. The Selection Committee was not satisfied with the reply submitted by the petitioner and on the basis of the records found that the petitioner has obtained appointment by concealing the material fact for the High School and Intermediate Certificate as well as degree of Graduation and has also altered her date of birth. Thereupon, the District Selection Committee recommended her termination from the date of her initial appointment. Thereafter, vide order dated 31.12.2022, the services of the petitioner/ respondent no.1 were terminated by the District Basic Education Officer, Mainpuri, holding that the petitioner/respondent has passed the High School and Intermediate examination twice and has obtained two degrees of Graduation and has passed the B.T.C. course alongwith the M.Sc. The said order dated 31.12.2022 was challenged in Writ A No. 1111 of 2023, which has been allowed by the impugned order dated 10.04.2024, against which the present Special Appeal has been filed.

13. Learned Single Judge relying upon the judgement of ***Kuldeep Kumar Pathak(supra)*** and **Laxmi Shanker Yadav vs. State of U.P. and 4 Others in Writ-A No. 5394 of 2021** and the judgement dated 19.11.2022 passed by the Division Bench of this Court in ***Special Appeal No. 37 of 2022 (the Basic Eduction Board, U.P. Prayagraj and Another vs. Laxmi Shekhar Yadav)*** has allowed the said writ petition, holding that appellant/respondent could not place any regulation for the statutory requirement to demonstrate that obtaining two degrees simultaneously is prohibited.

14. Learned counsel for the appellant submits that the Judgement of ***Kuldeep Kumar Pathak (supra)*** is distinguishable as the same was on different facts where the appellant therein had got the second degree in one subject in the same year which was permissible under law but in the instant case two degrees of two regular courses were simultaneously obtained twice mentioning different date of births, which is not permissible.

15. Learned counsel for the appellant has further relied upon of Regulation regarding the examination issued under Intermediate Education Act, 1921. The Clause 17(4) and (5) reads as under:-

"Part-2 Chapter XII (General Regulation Regarding Exam)

Clause-17(4) & (5)

(4) परीक्षार्थी इस विनियम के अन्तर्गत एक बार में केवल एक ही परीक्षा (हाईस्कूल अथवा इण्टरमीडिएट) में प्रविष्ट हो सकेंगे।

(5) हाईस्कूल तथा इण्टरमीडिएट की सम्पूर्ण परीक्षा में सम्मिलित होने वाले परीक्षार्थी इस विनियम के अन्तर्गत परीक्षा में बैठने के पात्र नहीं होगें।"

16. Relying upon the aforesaid provisions, learned counsel for the appellant submits that there is a clear bar to obtain overlapping degrees of High School and Intermediate in the same session. Likewise, learned counsel for the appellant submits that the petitioner/respondent has obtained overlapping degrees of B.A. and B.Sc. as well as the overlapping degrees of B.T.C. and M.Sc. which are regular courses and cannot be obtained in one session in view of the U.G.C. Regulation. Clause 4 of the Ordinance relating to examination creating bar on students to obtain two degrees and also containing guidelines issued by the U.G.C., has been placed on record.

17. Learned counsel for the appellant further submits that as per report dated 06.05.2022, submitted by the Block Education Officer, Kishni, the petitioner/respondent no.1 has obtained the following degrees as per the record received from Swargiya Mahadev Prasad Smarak Mahila Mahavidyalaya, Husainpur Saurikh, Kannauj, which reads as under:-

क्रम	परीक्षा का नाम	वर्ष	अनुक्रमांक	श्रेणी	परीक्षा संस्था का नाम	जन्मतिथि
1	हाईस्कूल परीक्षा प्रमाण पत्र	2011	1579885	पास	मा०शि०प०उ०प्र०	15.07.1995
2	इण्टरमिडिएट परीक्षा प्रमाण पत्र	2013	1137929	पास	तदैव	
3	बी०ए०प्रथम रेगुलर अंकपत्र	2014	4187947	पास	सी०एस०जे०एम०वि०वि० कानपुर	
4	बी०ए० द्वितीय रेगुलर अंकपत्र	2015	2176284	पास	तदैव	
5	बी०ए० तृतीय रेगुलर अंकपत्र	2016	6157728	प्रथम	तदैव	

18. The petitioner has obtained the following degrees as per the record received from Ganga Singh Mahavidyalaya, Sultanpur Saukhik, Kannauj, which reads as under:-

क्रम	परीक्षा का नाम	वर्ष	अनुक्रमांक	श्रेणी	परीक्षा संस्था का नाम	जन्मतिथि
1	हाईस्कूल परीक्षा प्रमाण पत्र व अंकपत्र रेगुलर	2010	1558864	पास	मा०शि०प०उ०प्र०	15.09.1995
2	इण्टरमिडिएट परीक्षा प्रमाण पत्र व अंकपत्र रेगुलर	2012	1134721	पास	मा०शि०प०उ०प्र०	
3	बी०एस०सी० प्रथम रेगुलर अंकपत्र	2013	0758949	पास	सी०एस०जे०एम०वि०वि० कानपुर	
4	बी०एस०सी० द्वितीय रेगुलर अंकपत्र	2014	2058848	पास	तदैव	
5	बी०एस०सी० तृतीय रेगुलर अंकपत्र	2015	6055893	पास	तदैव	
6	एम०एस०सी० प्रथम रेगुलर अंकपत्र	2016	5033315	पास	तदैव	
7	एम०एस०सी० प्रथम रेगुलर अंकपत्र	2017	2033264	पास	तदैव	

19. Learned counsel for the appellant therefore submits that it is categorically clear that petitioner/respondent no1. has maintained two parallel certificates of High School, Intermediate and Graduation degrees mentioning different date of births and has obtained the selection by concealing one set of educational certificates. With regard to the aforesaid submissions, learned counsel for the appellant further relied upon the report received from the U.P. Secondary Education Board dated 07.10.2022, which reads as under:-

क्रम	हा०/ इण्टर	वर्ष	अनुक्रमांक	नाम	माता का नाम	पिता का नाम	जन्म तिथि	पूर्णांक	प्राप्तांक	श्रेणी	अभ्युक्ति
01	H. S.	2010	1558864	Laxmi Shakya	Shashi Kumari	Ashok Kumar	15.09.1995	600	GRADE	PASS	पुष्टित
02	Int.	2012	1134721	Laxmi Shakya	Shashi Kumari	Ashok Kumar	-	500	361	Ist	पुष्टित
03	H. S.	2011	1579885	Laxmi	Shashi Prabha	Ashok Kumar	15.07.1995	600	GRADE	PASS	पुष्टित
04	Int	2013	1137929	Laxmi	Shashi Prabha	Ashok Kumar	-	1000	871	Ist-H	पुष्टित

20. Learned counsel for the appellant further submits that as per Regulation 5 of Chapter XII issued under the Intermediate Education Act, 1921, 75 % attendance is required. Similarly, as per the University guidelines as available on the website of the Chhatrapati Shahu Ji Maharaj University, Kanpur, as contained in General and Miscellaneous Ordinances and Chapter XXVIII-B, the minimum requirement for appearing in any University Examination is 75 % attendance. Unless, that requirement is fulfilled, the candidate cannot be permitted to appear in the examination.

21. Learned counsel for the appellant further submits that the judgement as were pronounced by the Apex Court in ***Kuldeep Kumar Pathak (supra)*** as well as in ***Laxmi Shanker Yadav (Supra)***, were passed on the basis that there is no regulatory framework available prohibiting two simultaneous degrees. However, as per the aforesaid regulations issued under the Intermediate Education Act as well as the Ordinance available in the website of the University, there is sufficient prohibition that no person can simultaneously obtain two degrees of regular courses as there is a requirement of 75 % attendance prior to appearing in the examination. Therefore, the aforesaid judgement passed by the Apex Court in ***Kuldeep Kumar Pathak (supra)*** and Division Bench by this Court in ***Laxmi Shanker Yadav (Supra)***, are not the good law as the same were passed in ignorance of the aforesaid regulatory framework available on record.

22. *Per contra*, learned counsel for the petitioner/respondent no.1 submits that as per the report of U.P. Secondary Education Board, Allahabad dated 07.10.2022, the first two items relate to the petitioner/respondent no. 1 herein, which have been duly verified by the Board. However, the other two items with regard to the High School in the year, 2011 and Intermediate in the year 2013 did not belong to the petitioner herein. They are of some other persons and she has not obtained the High School and Intermediate Certificates as stated in item nos. 3 and 4 in the report dated 07.10.2022 of the Board. It has been further submitted that she is not aware of the degrees of B.A. as has been relied upon by the appellant to contend that the petitioner has simultaneously obtained these degrees of B.A. alongwith B.Sc. The said degrees does not belong to the petitioner Inasmuch as the said High School, Intermediate and B.A. degrees were of one Laxmi d/o Ashok Kumar and mother's name is Shashi Prabha whereas in her case her name is Laxmi Shakya and her mother's name is Shashi Kumari and father's name is Ashok Kumar. Therefore, the petitioner cannot be connected with the aforesaid

certificates of High School and Intermediate of 2011-13 as well as the B.A. Degrees of 2014, 2015 and 2016. The counsel for the petitioner/respondent has placed reliance on the reply of the petitioner wherein she has categorically stated that though she has taken admission in the M.Sc. Course, prior to taking admission in the B.T.C. course and after taking admission in B.T.C. course she has not attended any of the classes of M.Sc. Course. However, she has appeared in the M.Sc. Examination and when she has realized her mistake, she has already surrendered her M.Sc. degree to the University concerned and she has never utilized the same in any selection process or anywhere else for getting any benefit of the said degrees. The documents which she has submitted at the time of appearing in the examination as well as her selection and at the time of counselling, the same were duly verified and after due verification she was given appointment and none of the authorities have ever found that the documents submitted by the petitioner were forged, fabricated and are not genuine. Therefore, merely because due to a matrimonial dispute, her father-in-law has made a false complaint based on some irrelevant documents, which have no connection with the petitioner, hence her services cannot be terminated. The judgement passed by the learned Single Judge is based on settled principles of law as has been laid down in ***Kuldeep Kumar Pathak (supra)*** and ***Laxmi Shanker Yadav (Supra)*** by the Division Bench of this Court. Therefore, no interference is called for against the judgement and order dated 10.04.2022 passed by the learned Single Judge.

23. The first question which arose before this Court is that whether a person can be permitted to pursue two regular courses of the High School and Intermediate as well as at the Graduation and Post Graduation level in one session. Before considering this issue, it will be relevant to note down the relevant portion of the judgement of the Apex Court in ***Kuldeep Kumar Pathak (supra)*** which reads as under:-

".....7. We are of the opinion that both the submissions of the learned Senior Counsel are valid in law and have to prevail. The High Court has been influenced by the argument of the respondents that simultaneous appearance in two examinations by the appellant in the same year was "contrary to the Regulations". ***However, no such Regulation has been mentioned either by the learned Single Judge or the Division Bench. Curiously, no such Regulation has been pointed out even by the respondents. On our specific query to the learned counsel for the respondents to this effect, he expressed his inability to show any such Regulation or any other rule or provision contained in the U.P. Intermediate Education Act, 1921 or Supplementary Regulations of 1976 framed under the aforesaid Act or in any other governing Regulations. Therefore, the entire foundation of the impugned judgment of the High Court is erroneous.***

8. It is also pertinent to note that the appellant's intermediate examination and result thereof was not in question before the U.P. Board. No illegality in the admission in that class has been pointed out by the respondents. The alleged charge of simultaneously appearing in two examinations, one of the U.P. Board and other of the Sanskrit Board, was with respect to Class X and equivalent examination which did not relate to admission in intermediate course. The only provision for cancelling the said admission is contained in

Regulation 1 of Chapter VI-B. It details the procedure for passing the order of punishment cancelling intermediate results and, inter alia, prescribes that a committee consisting of three different members is to be constituted and entrusted with the responsibility of looking into and disposing of cases relating to unfair means and award appropriate penalty as specified in the Regulations itself. However, there is no allegation of any unfair means adopted by the appellant in the instant case and, therefore, that Regulation has no applicability. Even otherwise, no such committee was constituted. Therefore, having taken admission in intermediate on the basis of past certificate issued by a separate Board, which was recognised, and not on the basis of the result of Class X of the U.P. Board, the appellant derived no advantage from his examination of the U.P. Board while seeking admission in intermediate course. Thus, from any angle the matter is to be looked into, the impugned orders dated 20-4-2011 and 10-5-2011 passed by the respondents are null and void, apart from the fact that they are in violation of the principles of natural justice....."

24. Relying upon the aforesaid judgement of ***Kuldeep Kumar Pathak (supra)***, Coordinate Bench of this Court has also decided the ***Special Appeal Defective No. 898 of 2020 (Board of Basic Education and Another vs. Arvind Prakash Dwivedi and 2 Others)*** on 21.10.2020, wherein this Court has observed as under :-

".....It is not in dispute that at the relevant time the respondent-petitioner could have obtained two qualification simultaneously and the respondent-petitioner as such possessed requisite qualification to hold the post of Assistant Teacher as well as the further promotional post....."

25. A similar view has taken by the Division Bench of this Court in ***Special Appeal 37 of 2022 (The Basic Education Board, U.P. Prayagraj and Another vs. Laxmi Shankar Yadav*** on 19.11.2022 wherein this Court has observed as under:-

".....10. Having perused the record and considered the rival submissions, we may observe that no doubt it may appear improbable as to how a person could obtain two degrees simultaneously but that cannot be taken as a ground to annul both the degrees. There has to be an exercise to annul either one or both the degrees on the basis of material collected, after giving opportunity of hearing to the holder of such a degree. Such an exercise has to be on case to case basis. Here, what is important is that neither the B.A. degree obtained from Awadh University, Faizabad, nor the Shastri degree obtained from Sampurnanand Sanskrit Vishwavidyalaya, has been cancelled. Importantly, the petitioner had sought appointment by relying on the Shastri degree and on the basis of the marks obtained therein the petitioner was placed in the select list and was ultimately selected and appointed. At this stage, it be noticed that the learned single Judge has returned a specific finding that the opposite party counsel could not place any regulation/ statutory enactment or even an order having statutory flavour to demonstrate that obtaining of two degrees simultaneously is prohibited. The learned standing counsel despite our request could not demonstrate that the said finding is incorrect.The U.G.C. clarificatory letter dated 15th January, 2016 on which the appellant has placed reliance only deprecates obtaining of two degrees simultaneously, but it does not mandate the University to annul the degree so obtained. In so far the clarificatory letter dated 4th December, 2020 is concerned that also does

not mandate the authorities to cancel the candidature of a candidate who has set up such degrees but requires a case to case examination. In the instant case, the petitioner has set up Shastri degree obtained from Sampurnanand Sanskrit Vishwavidyalaya, Varanasi for the purposes of selection in the recruitment process undertaken by the appellants. ***This degree has admittedly not been cancelled. In our view, therefore, unless the professed qualification is annulled or is found in the teeth of statutory regulation or order, rendering the same ineffective or null, it would not be permissible to overlook or discard the same. "****(Emphasis Supplied)*

26. From the perusal of the judgements as noted hereinabove, it is amply clear that all those judgements were passed primarily on the ground that learned counsel for the parties could not bring on record any of the regulations prohibiting a person from obtaining Degrees/Certificates of two parallel, overlapping, simultaneous courses. As per the Chapter XII of the Regulation issued under the Uttar Pradesh Intermediate Education Act, 1921, Clause 19 -क, specifically prohibits as under:-

"19-क. हाईस्कूल (कक्षा 9 एवं 10) तथा इण्टरमीडिएट परीक्षा में अभ्यर्थी केवल एक ही माध्यम (संस्थागत अथवा व्यक्तिगत) से आवेदनपत्र भर कर परीक्षा में सम्मिलित हो सकता है। ***किसी भी दशा में अभ्यर्थी को एक परीक्षावर्ष में एक से अधिक संस्था / संस्थाओं से संस्थागत अथवा व्यक्तिगत अथवा दोनों प्रकार से आवेदन-पत्र भरने अथवा परीक्षा में सम्मिलित होने की अनुमति नहीं होगी। तथ्यों को छिपाना अपराध होगा। इस विनियम के उल्लंघन का दोषी पाये जाने वाले अभ्यर्थियों की अभ्यर्थिता निरस्त कर दी जायेगी तथा उनके विवरण यदि परिषदीय अभिलेखों में अंकित हो गये हैं, तो उन्हें विलुप्त करा दिया जायेगा अथवा अभ्यर्थी के परीक्षा में, अनियमित रूप से सम्मिलित होने की दशा में परीक्षाफल निरस्त कर दिया जायेगा,*** *जिसका सम्पूर्ण उत्तरदायित्व अभ्यर्थी का होगा।"*

(Emphasis Supplied)

27. Similarly, Clause 5 of the Chapter XII of the aforesaid Regulation mandates as under:-

"5. (1) मान्यता प्राप्त संस्था, प्रत्येक शैक्षिक वर्ष में कम से कम 220 कार्य दिवसों में खुली रहेगी जिसमें परीक्षाओं तथा पाठ्यानुवर्ती कार्य-कलाप के दिवस भी सम्मिलित हैं. प्रतिबन्ध यह है कि "पत्राचार शिक्षा सतत् अध्ययन सम्पर्क योजना"] के अन्तर्गत पंजीकृत छात्र के सम्बन्ध में कार्य दिवसों की उपर्युक्त ***संख्या 75 कार्य दिवस होगी तथा इसके साथ सम्बन्धित छात्र को*** *पत्राचार शिक्षा संस्थान द्वारा प्रेषित पाठ्य सामग्री को निर्धारित प्रक्रिया के अनुसार अध्ययन करना होगा।"*

(Emphasis Supplied)

28. From the plain reading of the aforesaid provisions, by no stretch of imagination it can be concluded that a person can appear in High School and Intermediate Examination twice simultaneously. The only liberty granted under Clause 17 (1) and (2) is that a person who has passed High School and Intermediate Examination may appear in one subject or maximum five subjects and again can get a certificate of passing of the said subjects. However, no separate certificate with regard to the same examination shall be issued to such a person. Clause 19-कwhich came into force with effect from 28.07.2021 provides that no person can appear in the same academic year in the High School or Intermediate examination from two different institutions and concealment of such facts will be treated as a violation of these rules and candidature of such candidate shall be cancelled. If any documents have been recorded in the Board's Examination, the same shall be deleted and if any candidate appears in

violation of such condition, his/her result shall be cancelled and the candidates shall be wholly responsible for the same. In view of the aforesaid statutory regulatory framework with regard to High School and Intermediate examination no candidate can appear simultaneously in two examinations from two different institutions. If he/she appears in such a manner, the result thereof even if declared shall be cancelled. Clause 17 (1), (2), (3), (4) and (5) of Chapter XII Part - II- B of the Regulations under the Intermediate Education Act, 1921, reads as under:-

"17. इन विनियमों की शर्तों के होते हुए भी निम्नलिखित श्रेणी के परीक्षार्थी भी व्यक्तिगत परीक्षा के रूप में प्रविष्ट हो सकते हैं-

(1) कोई परीक्षार्थी जिसने हाईस्कूल अथवा उसके समकक्ष परीक्षा उत्तीर्ण की है, बाद की हाईस्कूल परीक्षा में एक अथवा अधिकतम पांच विषयों में (कम्प्यूटर विषय छोड़कर) प्रविष्ट हो सकता है और ऐसा परीक्षार्थी यदि सफल हो जावे तो वह अतिरिक्त लिए उत्तीर्ण विषय अथवा विषयों में परीक्षा उत्तीर्ण होने का प्रमाण-पत्र पाने का अधिकारी होगा और उसे कोई श्रेणी नही दी जायेगी।

(2) कोई परीक्षार्थी जिसने इण्टरमीडिएट अथवा समकक्ष कोई परीक्षा उत्तीर्ण की है बाद की इण्टरमीडिएट परीक्षा में एक अथवा अधिकतम चार विषयों (कम्प्यूटर वर्ग तथा व्यवसायिक वर्ग के विषयों को छोड़कर) बैठ सकता है और वह परीक्षार्थी यदि सफल हो जाय तो उसके द्वारा उपहृत किये गये विषय अथवा विषयों में उत्तीर्ण होने का प्रमाण-पत्र पाने का अधिकारी होगा और उसे कोई श्रेणी नहीं दी जायेगी। प्रतिबंध यह है कि विषय अथवा विषयों का चुनाव केवल एक वर्ग तक ही सीमित हो।

(3) इस विनियम के अन्तर्गत सम्मिलित होने वाले परीक्षार्थी उन विषय अथवा विषयों का

चयन नहीं कर सकेंगे, जो उनके द्वारा पूर्व की हाईस्कूल तथा इण्टरमीडिएट परीक्षा में जिसमें वह उत्तीर्ण हुए थे, लिए गये थे साथ ही परीक्षार्थी आधुनिक भारतीय, विदेशी तथा शास्त्री भाषा समूहों के प्रत्येक समूह में से केवल एक ही भाषा का चयन कर सकेंगे।

(4) परीक्षार्थी, इस विनियम के अन्तर्गत एक बार में केवल एक ही परीक्षा (हाईस्कूल अथवा इण्टरमीडिएट) में प्रविष्ट हो सकेंगे।

(5) हाईस्कूल तथा इण्टरमीडिएट की संपूर्ण परीक्षा में सम्मिलित होने वाले परीक्षार्थी इस विनियम के अन्तर्गत परीक्षा में बैठने के पात्र नहीं होंगे।"

29. With regard to the Higher Education, the University Grants Commission (U.G.C.) in its regulation with regard to the U.G.C. (Minimum Standards of Instructions for the Grant of the First Degree through Formal Education) Regulation, 2003, and UGC (Minimum Standard of Instruction for the Grant of the Master's Degree through Formal Education) Regulation 2003 have categorically provide that:-

"5.8 The minimum number of letures, tutorials, seminars and practicals which a student shall be required to attend for eligibiility to appear at the examination shall be prescribed by the University, which ordinarily shall not be less than 75% of the total number of lectures, tutorials, seminars, practicals, and any other prescribed requirement."

30. In view of the aforesaid Regulations, 2003, no person could have been able to obtain two parallel simultaneous degrees in the same session from different institutions as he/she will be lacking 75% attendance in either of the courses as both cannot be attended by the same person with 75% attendance, as required under the guidelines.

31. On 15.01.2016, the U.G.C. has issued a clarification on allowing the students to pursue two degrees simultaneously, which reads as under:

"विश्वविद्यालय अनुदान आयोग

University Grants Commission

(मानव संसाधन विकास मंत्रालय, भारत सरकार)

(Ministry of Human Resource Development, Govt. of India)
बहादुरशाह ज़फ़र मार्ग, नई दिल्ली-110002
Bahadur Shah Zafar Marg, New Delhi-110002
Ph: 011-23239337, 23236288,
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15th January 2016

F. No.: 1-6/2007(CPP-II)

PUBLIC NOTICE

SUBJECT: CLARIFICATION ON ALLOWING STUDENTS TO PURSUE TWO DEGREES SIMULTANEOUSLY.

The Commission had sought the comments of the Statutory Councils. ***The responses, so far, received do not endorse the idea of allowing the students to pursue two degree simultaneously.*** *Therefore, the universities shall conduct their programmes in accordance with the First Degree and Master Degree Regulations, 2003 prescribed by the UGC and also follow the norms and parameters prescribed by the Statutory Council concerned, wherever relevant.*

(Jaspal S. Sandhu)
Secretary"

32. The aforesaid clarification was considered by the learned Single Judge of this Court in ***Writ A No. 13888 of 2019 (Shilpa Saroha vs. State of U.P. and 2 Others)*** and held that it is not possible for a common human to remain present for two courses at the same time or even score minimum required attendance as a regular student in both institutions simultaneously. Therefore, it is nothing but a fraud.

33. Subsequently, in the month of April, 2022, first time, the U.G.C. has issued guidelines enabling students for pursuing two academic programmes simultaneously, which reads as under:-

"Guidelines for Pursuing Two Academic Programmes Simultaneously

Background

The National Education Policy NEP 2020 states that pedagogy must evolve to make education more experiential, holistic, integrated, inquiry-driven, discovery-oriented, learner- centred, discussion-based, flexible, and, of course, enjoyable. The policy envisions imaginative and flexible curricular structures to enable creative combinations of disciplines for study, that would offer multiple entry and exit points, thus, removing currently prevalent rigid boundaries and creating new possibilities for life-long learning and centrally involve critical and interdisciplinary thinking.

With the rapid increase in demand for higher education and limited availability of seats in regular stream, several Higher Education Institutions (HEIs) have started a number of programmes in Open and Distance Learning (ODL.) mode to meet the aspirations of students. It has also led to the emergence of online education programmes which a student can pursue within the comforts of her/his home. The issue of allowing the students to pursue two academic programmes simultaneously has been examined by the Commission keeping in view the proposals envisaged in the National Education Policy - NEP 2020 which emphasizes the need to facilitate multiple pathways to learning involving both formal and non-formal education modes.

In view of above, UGC has framed the following Guidelines.

Objectives

To allow the students to pursue two academic programmes simultaneously *keeping in view the following objectives envisaged in NEP 2020:*

▪ *recognizing, identifying, and fostering the unique capabilities of each student, by sensitizing teachers as well as parents to promote each student's holistic development in both academic and non-academic spheres;*

• *no hard separations between arts and sciences, between curricular and extra-curricular activities, between vocational and academic streams, etc. in order to eliminate harmful hierarchies among, and silos between different areas of learning;*

• *Multidisciplinarity and a holistic education across the sciences, social sciences,*

• *arts, humanities, and sports for a multidisciplinary world in order to ensure the*

• *unity and integrity of all knowledge; enabling an individual to study one or more specialized areas of interest at a deep level, and also develop character, ethical and constitutional values, intellectual*

• *curiosity, scientific temper, creativity, spirit of service.*

• *offering the students, a range of disciplines including sciences, social sciences, arts, humanities, languages, as well as professional, technical, and vocational subjects to make them thoughtful, well-rounded, and creative individuals.*

• *preparing students for more meaningful and satisfying lives and work roles and enable economic independence.*

Guidelines

1. ***A student can pursue two full time academic programmes in physical mode provided that in such cases, class timings for one programme do not overlap with the class timings of the other programme.***

2. A student can pursue two academic programmes, ***one in full time physical mode and another in Open and Distance Learning (ODL)/Online mode; or up to two ODL/Online programmes simultaneously.***

3. Degree or diploma programmes under ODL/Online mode shall be pursued with only such HEIs which are recognized by UGC/Statutory Council/Govt. of India for running such programmes.

4. Degree or diploma programmes under these guidelines shall be governed by the Regulations notified by the UGC and also the respective statutory/professional councils, wherever applicable.

5. These guidelines shall come into effect from the date of their notification by the UGC. ***No retrospective benefit can be claimed by the students who have already done two academie programmes simultaneously prior to the notification of these guidelines.***

The above guidelines shall be applicable only to the students pursuing academic programmes other than Ph.D. programme.

Based on the above guidelines, the universities can devise mechanisms, through their statutory bodies, for allowing their students to pursue two academic programmes simultaneously as mentioned above."

(Emphasis Supplied)

34. From the plain reading of the aforesaid guidelines, it appears that in pursuance of the New Education Policy in 2020 the Government enables a person to pursue two academic programmes subject to the aforesaid guidelines to the effect that such academic programmes are not overlapping to each other and timing of classes at different times or one full time course on physical mode and the other course is by way of open and distance learning mode or online mode. The aforesaid guidelines specifically provides

that no retrospective benefit can be claimed by the students who have already done two academic programmes simultaneously prior to the notification of these guidelines which categorically indicates that prior to the aforesaid guidelines issued in the month of April, 2022, no person was allowed to pursue two full time academic programmes in physical modes simultaneously.

35. From the aforesaid discussion, it is crystal clear that as per the guidelines issued by the U.G.C., no person could undergo two full time academic programmes simultaneously and it is only after April, 2022, with certain restrictions as provided in the guidelines, it has been provided to a student for pursuing two academic programmes simultaneously. The U.G.C. has permitted the persons to undergo two academic programmes simultaneously subject to the conditions as laid down in the aforesaid guidelines.

36. Coming back to the present case, it has been alleged in the instant case that the petitioner/respondent no.1 has undergone the course narrated in paragraph '17' hereinabove alongwith courses narrated in paragraph '18'. However, the petitioner/respondent no.1 has categorically denied to have undergone the courses narrated in paragraph '17' hereinabove. She has only admitted the High School and Intermediate Marksheets and Certificates which have been verified by the U.P. Secondary Education Board, Allahabad, as mentioned in paragraph '18' hereinabove. There is also a doubt as to whether Laxmi Shakya referred in SN. 1 and 2 in the table or Laxmi referred in SN. 3 and 4 of the said table are the same persons?

37. Though, in the light of the provisions of 19-क, of Chapter XII of the Regulations issued by the U.P. Intermediate Education Act, 1921 no person could have undergone the examination of High School,(IX to X), and Intermediate, (XI to XII) simultaneously either as a regular student or a private student and it is also provided that if any person is found to have appeared in two simultaneous examinations, his result shall be declared a nullity. However, the exercise of declaring result as a nullity of a candidate who appeared in two simultaneous examinations, is to be done by the Examination Board concerned. Likewise, in the case of higher education though a person was prohibited from undertaking two regular courses simultaneously prior to April, 2022, however, if any such person has undergone such examination the same could be cancelled only by the Examination Body and merely because a person is having two degree and certificates simultaneously, on the basis of the same his/her employment cannot be terminated on this ground unless the certificates, which have been produced by such candidate at the time of his/her appointment are found to be forged, fabricated or declared a nullity by the competent Examination Board.

38. In the instant case, though in the inquiry conducted by the Block Education Officer under the dictate of the District Basic Education Officer, it is found that the petitioner/respondent no.1 has undergone two educational courses simultaneously. However, none of them have been declared a nullity by the competent Examination Board. Rather, the certificates which have been used by the petitioner/respondent no.1 have been found to be genuine on verification by the concerned Examination Body. Unless, the same is declared, null and void by the competent Examination Body, the services of petitioner/respondent no.1

cannot be terminated on the aforesaid ground as has been observed by the Co-ordinate Bench of this Court in ***Laxmi Shanker Yadav (Supra)***.

39. Similarly, relying upon judgements of the Division Bench of this Court in ***Kuldeep Kumar Pathak (supra)*** and ***Laxmi Shanker Yadav (Supra)***, ***A. Dharmraj vs. The Educational Officer Puddukkottai & Others :*** (2022) 11 SCC 692, this Court has passed the judgement on 21.3.2023 in **Special Appeal No. 124 of 2023 (Rao Mohammad Arif vs. State of U.P. and 4 Others)**, which reads as under:-

"24. Since the learned counsel for the appellant had not pointed out a single provision, which ***puts an embargo in possession of two degrees obtained in the same academic year, thus, this Court finds its inability to hold the selection and appointment of the writ petitioner illegal.*** *Our view further gathers support from the fact that it is neither the case set out in the order impugned of the second respondent / Joint Director of Education, Saharanpur Region, Saharanpur nor from the arguments so advanced before us that the* ***writ petitioner did not possess the minimum necessary qualifications for being selected and appointed as Assistant Teacher (Science).***

25. More so, it is also the case of the writ petitioner as pleaded in the paragraphs-'10' and '11' of the writ petitioner that ***the writ petitioner had surrendered the BUMS degree, thus, we do not find any error committed by the learned Single Judge in allowing the writ petitioner while quashing the order dated 05.04.2014 of the second respondent. Additionally, it has not been demonstrated before us that the degrees in question have been either withdrawn or cancelled. "***

(Emphasis Supplied)

40. Thus, in view of the aforesaid observations, the appeal fails and the same is ***dismissed*** without any orders to the cost.

41. Consequently, the appellant/respondents are directed to permit the petitioner/respondent no.1 herein to discharge her duties on the post on which the petitioner was appointed and the petitioner shall also be entitled for payment of salary with continuity in service and all consequential benefits.

Impleadment Application No. 1 of 2024.

42. Since the special appeal filed by the Department has already been dismissed, the impleadment application filed by Sughar Singh, father-in-law of the petitioner/respondent no. 1 requires no consideration and is hereby **rejected.**

(2024) 5 ILRA 1660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.05.2024
BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ C No. 219 of 2024

Divyanshu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajeev Kumar Dwivedi, Rama Raman Mishra

Counsel for the Respondents:
C.S.C.

(A) Education Law - The UP intermediate Education Act, 1921 - Regulation 7 -

Secretary issues a certificate of passing the Council examination to successful candidates - Corrections are made to entries if errors are due to clerical errors or omissions - Corrections can only be made if the candidate submits the certificate within three years and sends a copy to the Council of Secretaries.(Para - 6)

Petitioner made application before Board - application sent on 5.9.2023 - mark-sheet issued on 27.6.2020 - application was sent after passing of the prescribed period of three years - not allowed, as per provisions of Regulation 7 - Board rejects petitioner's claim for correction of date of birth in mark sheet-cum-certificate - order of Regional Secretary, Madhyamik Shiksha Parshad (Board) under challenge .**(Para - 3,17,19)**

HELD:- Court restricts three-year limitation period for moving an application for correction of date of birth in mark-sheet-cum-certificate before Board. Clarified in Anand. Singh's case. Petitioner not entitled to relief. **(Para - 22)**

Petition dismissed. (E-7)

List of Cases cited:

1. Akash Sharma Vs St. of U.P. , 2015 (8) ADJ 693

2. N. Balakrishnan Vs M. Krishnamurthy, (1998) 7 SCC 123

3. Babu Ram Vs St. of U.P. & anr., Special Appeal No.1202 of 2010

4. Anand Singh Vs U.P. Board of Secondary Education & ors., (2014) 2 UPLBEC 1330

5. Anand Singh Vs U.P. Board of Secondary Eduction & ors., 2014 (3) ADJ 443

6. Chandra Kishore Jha Vs Mahavit Prasad & ors., (1999) 8 SCC 266

7. Cherukuri Mani Vs Chief Secy., Govt. of A.P. & ors., (2015) 13 SCC 722

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

1. Heard learned counsel for the petitioner and Mr. Shailendra Kumar Singh, learned Chief Standing Counsel and Mr. Pankaj Patel and Mr. Vivek Shukla, learned Additional Chief Standing Counsels for the State.

2. Since a legal question is involved to be adjudicated, therefore, notice to opposite party no.5 is hereby dispensed with.

3. By means of the instant petition, the petitioner has assailed the order dated 30.9.2023 passed by the opposite party no.3, i.e., Regional Secretary, Madhyamik Shiksha Parshad, Varanasi (hereinafter referred to as 'Board") whereby the claim of the petitioner with respect to correction of date of birth of the petitioner in the mark sheet-cum-certificate is rejected.

4. Brief factual matrix of the case is that on 3.9.2005, petitioner took admission in the institution, namely, Patiraji Montessori School, Badhupur, Pratappur Kamaicha and he remained over there till class Vth, whereafter school leaving certificate was issued in which date of birth of the petitioner is mentioned as 30.9.2005. After completion of class VIIIth standard, the petitioner took admission in High School at J.B.I.C., Mathura Nagar, Ramgarh, Sultanpur, and he has submitted his school leaving certificate of class VIII, wherein also, his date of birth is mentioned as 30.9.2005 and further in class IXth, at the time of pre-registration, the date of birth of the petitioner is mentioned as 30.9.2005. Further after passing of class IXth, the petitioner took admission in class Xth and also passed the examination with role number 1813634 in the year 2022 but once he received the mark sheet-cum-certificate, he found that his date of birth is wrongly mentioned as 30.5.2005, in place of

30.9.2005. Being aggrieved, he moved an application before the Regional Secretary of the Board, who passed the order on 30.9.2023, thereby rejecting the request of the petitioner for correcting date of birth in the mark-sheat -cum- certificate of class Xth.

5. Contention of the learned counsel for the petitioner is that the petitioner from very inception of his admission, mentioned the date of birth as 30.9.2005, which is evident not only from the school leaving certificate, but, that too, from the pre-registration for class IXth. He submits that there is no fault on the part of the petitioner so as to incorrectness in the date of birth mentioned in the mark sheet-cum-certificate of High School standard and as soon this came into his knowledge, he objected the same with a request to the Secretary Board to correct it, but the same was rejected on the wrong premise that the application is made after passing of three years which is impermissible as per the Regulation 7 of the Regulations made under the UP intermediate Education Act, 1921 (hereinafter referred to as 'Regulation').

6. Regulation 7 is extracted as under:-

"विनियम-7

सचिव परिषद की ओर से सफल उम्मीदवारों को परिषद की परीक्षा में उत्तीर्ण होने का प्रमाण पत्र विहित प्रपत्र में देगा और बाद में उसकी प्रविष्टियों में कोई शुद्वि करेगा, बशर्ते कि प्रमाण पत्र में किसी ऐसी गलत प्रविष्टि किसी अविचारित लिपिकीय भूल या लोप के कारण या किसी ऐसी लिपिकीय भूल के कारण की गयी हो, जो असावधानी से परिषद के स्तर के या उस संस्था के, जहां से अन्तिम बार शिक्षा प्राप्त की हो, स्तर पर अभिलेख में हो गयी हो। यह शुद्वि सचिव द्वारा उसी स्थिति में की जा सकेगी जबकि अभ्यर्थी ने संबंधित परीक्षा के प्रमाण पत्र को परिषद द्वारा निर्गमन की तिथि से तीन वर्ष के अन्दर ही लिपिकीय त्रुटि की ओर ध्यान आकृष्ट करते हुए संबंधित प्रधानाचार्य/अग्रसारण अधिकारी को त्रुटि के संशोधन हेतु प्रार्थना पत्र प्रस्तुत कर दिया हो और उसकी प्रति पंजीकृत डाक से सचिव परिषद को भी प्रेषित की हो।

प्रतिबंध यह है कि अभ्यर्थी के अंक पत्र तथा प्रमाण पत्र में अभ्यर्थी के नाम पिता के नाम अथवा माता का नाम में यदि कोई वर्तनी त्रुटि है तो अभ्यर्थियों द्वारा यथासमय आवेदन करने पर उसे परिषद के संबंधित क्षेत्रीय कार्यालय के क्षेत्रीय सचिवों द्वारा प्रमाणित साक्ष्यों के आधार पर तत्काल शुद्व कर दिया जायेगा।"

7. He argued that from bare reading of Regulation 7, it is evident that the same prescribes the provision regarding the correction in the entries of the certificate issued by the Board in case of any clerical mistake or omission, which has occurred on the part of the Board. So for the present matter is concerned, the submission is that here entries were rightly done in the records by the petitioner, but it is the fault on the part of the Board and, therefore, the Board is under an obligation to correct the same. He also added that while passing the impugned order dated 30.9.2023, the Board has not taken care of that so far as the incorrectness in the certificate is concerned, that was not intimated by the Board, and later on, when it came into knowledge of the petitioner, he, at once, written a letter to the Secretary Board for correction of the same.

8. Further contended that the date of issue of the certificate, is 27.6.2020 and the petitioner moved the application on 10.9.2022, that too, within the time prescribed under Regulation 7, though, subsequently, the petitioner moved an application on 5.9.2023, and the order dated 30.9.2023 has been passed considering petitioner's application dated 5.9.2023, ignoring the earlier application of the petitioner dated 10.9.2022, and thus, the observation of the Secretary Board is inconsistent to the fact which he himself has mentioned in the order dated 30.9.2023.

9. In support of his contentions, learned counsel for the petitioner has placed reliance on the judgement reported in **2015 (8) ADJ 693, Akash Sharma Vs. State of U.P**. and has referred paragraph 16 and 18 of the said judgement, which are quoted as under:-

"16. The law of limitation is founded on public policy so as to limit the life span of a litigation or the legal remedy. It does not aims to defeat the rights of the parties. In the case of N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123 the Supreme Court of India observed if the remedy availed by the party who has been wronged does not smack of malafides or is not by way of dilatory tactics, the Courts must show utmost consideration to the suitor. In other words, a bona fide delay may not by itself be treated as sufficient to debar the remedy particularly where the record ex facie shows miscarriage of justice.

18. The limitation of two years provided in applying for rectification of the certificate is applicable to the candidates but there is no limitation for the Board to exercise its inherent power to correct the certificate issued by it. Thus, the Board certainly in exercise of its suo motu inherent power is authorised to correct a clerical mistake or error appearing in the High School Certificate once it is brought to its notice. It is incumbent duty of the Board to ensure that the certificates issued by it are correct and does not suffer from any error or mistake. Therefore, in order to put its records straight, the Board is under an obligation to correct all certificates issued by it irrespective of the limitation placed under Regulation-7 of Chapter- III of the Regulation in exercise of its inherent power in the particular facts and circumstances of the each case. The law of limitation cannot be pressed into service by the Board while exercising its inherent power so as to defeat the right of the petitioner to have his incorrect date of birth recorded in the High School Certificate rectified."

10. Referring the aforesaid, he submits that the co-ordinate Bench of this Court, while opting the ratio of the judgement in the case of N. Balakrishnan Vs. M. Krishnamurthy, (1998) 7 SCC 123, has held that bona fide delay may not by itself be treated to be sufficient to debar the remedy, particularly where the record ex-facie shows miscarriage of justice. He further submits that so far as the present matter is concerned application of the present petitioner has been rejected outrightly ignoring the settled proposition of law and without application of mind on the issue that whether the delay which occurred is on the part of the petitioner or the Board itself.

11. He has further placed reliance on the judgement of the Division Bench of this Court in **Special Appeal No.1202 of 2010 Babu Ram Vs. State of UP and another** and has referred para 4 of the above said judgement, which is quoted as under:-

"4. IN the petition filed by the appellant, that plea was also taken before the learned single Judge. However, the learned Judge held that as the application was filed beyond the time and was not maintainable, and that the appellant herein may file a civil suit for declaration of his Date of Birth.

In the instant case, we find that Regulation 7, referred to above, refers to correction in the certificate of passing. There is no mistake in the certificate of passing. The mistake is in the records maintained by the Board. Therefore, the said Regulation would not be applicable so far as the case of the appellant is concerned. Once

the respondents themselves had issued the certificate showing the Date of Birth of the appellant as 1st September, 1949, the respondent No.2 was bound to correct the clerical mistake in the record of the Board."

12. Drawing attention the above-said Judgment, he submits that considering the Regulation 7, the Court has held that the records are maintained by the Board, therefore, if there is any incorrectness in the record of the Board, that is the fault on the part of the Board and the student cannot be thrown to suffer so as to any fault done by the Board.

13. Concluding his arguments, he submits that since the petitioner from very beginning has transcribed/intimated his date of birth as 30.9.2005, therefore, he is not at fault and further he has also moved an application on 1.9.2022, i.e., within three years, prescribed in the Regulation and, therefore, submission is that the order dated 30.9.2023 is unsustainable and the same may be quashed and further the authorities may be directed to re-consider the matter with respect to correction of date of birth of the petitioner in the record.

14. Refuting the aforesaid contentions of the learned counsel for the petitioner, the counsel appearing for the State submits that it is evident from the record that the High School certificate-cum- mark-sheet is issued to the petitioner on 27.6.2020, and therefore, as per the provision of Regulation 7, the application for correction is admissible uptil 26.6.2023 but the petitioner has sent the application on 5.9.2023, and, therefore, the same was rejected. He further added that in fact, the law position, which has been referred by the counsel for the petitioner, is not applicable in the case of the petitioner as the petitioner has sought correction in the mark-sheet and not in the record of the Board and further correction is particularly with respect to the date of birth, which is not permissible as per the mandate of the Regulation 7.

15. In support of his contention, he has placed reliance on a judgement reported in **(2014) 2 UPLBEC 1330, Anand Singh Vs. U.P. Board of Secondary Education and others,** and referred paras 6 to 8, which are extracted as under:-

"6. It would be useful to examine the particulars of the candidate that are contained in a certificate issued by the Board. They include the year of the examination, the name of the candidate, the names of the parents, date of birth, subjects opted, division obtained, name of the School/Centre, certificate number, appearance as a regular/private candidate and the date of issue of the certificate. Of these, the date of birth, the subjects opted, the year of examination and the division obtained by the candidate are particulars which have an important bearing when admission to higher classes or employment is sought by the candidate. While making any correction in the entries relating to these matters, the requirement of moving the application within three years has to be adhered to as any correction ction in regard to these entries would have on impact on the rights of other candidates when they seek admission to higher classes or employment. However, the other particulars contained in the certificate, like the name of the candidate or the names of the parents of the candidate are not that relevant and any correction made in regard to these particulars would have no impact on the admission or employment ither candidates. When so considered, we feel persuaded to hold that the of time limit of three years

prescribed in the substantive part of Regulation 7 for submission of an application for making correction in the certificate issued by the Board in regard to the name of the candidate or the names of the parents of the candidate should not be insisted upon, particularly when the Board itself has considered it appropriate to have no time limit under the proviso for making correction in regard to any spelling mistake in the name of the candidate or his parents. The applicant must, however, explain to the Board the reasons on the basis of which the application could not be submitted earlier and if it is found that the claim is bona fide and is otherwise justified, there is no reason to reject the application, as in the present case, merely on the ground of delay. Undoubtedly, the Board has to examine whether any genuine ground has been made out for correcting the name and it would be open to the Board to consider all the relevant materials pertaining to the request for correction of the name.

7. In the circumstances, we are of the view that the impugned order of the first respondent, rejecting the application submitted by the the a appellant for correction of the name of his mother in the High School and Intermediate examinations only on the ground of delay, is unsustainable. We, accordingly, direct the first respondent to re-consider the application having due regard to all the documentary evidence which may be produced by the appellant. The first respondent would also be at liberty to summon all the relevant records from the concerned Institution for the purpose of deciding the application of the appellant. We clarify that the interpretation which we have laced in the aforesaid terms governs only the mistakes in the certificate in the name of the candidate or in the names of his parents. The first respondent shall now pass a fresh order in accordance with law within a period of four months from the date of receipt of a certified copy of this order. In order to facilitate this exercise, the impugned order dated 11.10.2013 is set aside. The order of the learned Single Judge shall, in consequence, be set aside and be substituted by the aforesaid directions.

8. The appeal is, accordingly, allowed to the extent indicated above. There shall be no order as to costs."

16. Referring the aforesaid, he submits that Hon'ble Division Bench has held that so far as the correction in the date of birth of student in mark-sheet cum certificate is concerned that is permissible within a period of three years as prescribed under the Regulation 7 and, therefore, any application after the period prescribed is not entertainable and, thus, the Secretary Board has rightly passed the order on 30.9.2023, while rejecting the claim of the petitioner with respect to the correction in the mark-sheet-cum-certificate.

17. Considering upon the submissions of the learned counsel for the parties, and after perusal of the material placed on record, it transpires that the controversy arose when the petitioner made an application before the Secretary Board, on 5.9.2023 and that was rejected, vide order dated 30.9.2023, while observing that the application is preferred after the prescribed period of time and is not permissible.

18. Sheet anchor of the arguments of the learned counsel for the petitioner is that there is no fault on the part of the petitioner as the petitioner has sent letter on 1.9.2022 and, subsequently, on 5.9.2023, then it was incumbent upon the Board to take a decision, but the petitioner has failed to

demonstrate that what is the mode of sending the application dated 1.9.2022? whereas, the subsequent application dated 5.9.2023 was sent through the registered post, as per the procedure prescribed under the Regulation 7 and, therefore, it seems that the Secretary Board has rightly taken the decision while considering the application dated 5.9.2023.

19. The second question which engaged the attention of this Court is that whether as per the nature of the correction, which involves in the present matter, can be done after the limitation period of three years prescribed under the Regulation 7, is over. The fact remains that the application was sent on 5.9.2023 as per the prescribed procedure and the mark-sheet was issued on 27.6.2020 and, therefore, undisputedly, the application was sent after passing of the prescribed period of three years, which could not have been allowed, as per provisions of Regulation 7.

20. The identical controversy has already been settled in the case of **Anand Singh Vs. U.P. Board of Secondary Eduction and two others, 2014 (3) ADJ 443**, while holding that the date of birth, the subjects opted, year of examination and the division obtained by the candidate are particulars, which have an important bearing, when admission to the higher classes or employment is sought by the candidate and, therefore, the correction in the above said, are not permissible, if it is sought after the period of three years as prescribed under the Regulation 7. Further, the correction in the name of the mother and father regarding spelling, can be allowed after the period of three years. In this view of the matter, so far as the present case is concerned, undisputedly, the application for correction is made after the period of three years in the date of birth of the petitioner and, therefore, the same is not permissible under the law.

21. Having at glance the judgement and order passed in Special Appeal No.1202 of 2010, wherein it has been held that the correction in the record of the Board is permissible after the period of three years as prescribed in the proviso of the Regulation 7, but so far proviso of Reguulation 7 is concerned that does not contemplate the provision of limitation and undisputedly the petitioner is not seeking the benefit of the proviso of regulation7, therefore, the case of the present petitioner is different than the case which has been decided by the Division Bench as, here, the correction is sought with respect to the date of birth in the mark-sheet-cum-certificate and, therefore, the law settled in case of Special Appeal No.1202 of 2010 would not be attracted in the present matter.

22. This Court finds that there is reasonable restriction of limitation period of three years for moving an application for correction of the date of birth in the mark-sheet-cum-certificate before the Board and this has been clarified finally in the judgement and order in Anand Singh's case, therefore, the petitioner is not entitled for any relief.

23. It is trite law that if a statute provides a thing to be done in a particular manner, then it has be done in that manner and not otherwise as this has been settled by the Apex Court in the case of Chandra Kishore Jha Vs. Mahavit Prasad & others, (1999) 8 SCC 266 and in the case of Cherukuri Mani Vs. Chief Secretary, Government of Andhra Pradesh & others, (2015) 13 SCC 722. Therefore, the time

period prescribed in the Regulation 7 cannot be ignored.

24. In view of the aforesaid submissions and discussions, this Court is of the considered opinion that the writ petition is devoid of merits, hence, **dismissed.**

25. No order as to costs.

(2024) 5 ILRA 1667
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/S 37 of Arbitration & Conciliation Act 1996 No. 41 of 2021

National Highways Authority of India. ...Appellant

Versus

Musafir & Ors. ...Respondents

Counsel for the Appellant:

Counsel for the Respondents:

(A) Arbitration Law - The Arbitration and Conciliation Act, 1996 - Section 33 - Correction and interpretation of award ; additional award , Section 34 - Application for setting aside arbitral awards , Section 37 - Appeal , Principle of *kompetenz-kompetenz* - empowers arbitral tribunals to rule on their own jurisdiction - not a carte blanche for unlimited authority - Principle of *functus officio* - once an award is rendered, the tribunal's jurisdiction is terminated - it cannot revisit or modify its decision without specific statutory provisions. (Para -8)

(B) Arbitration Law - principles of arbitration law - Judicial Role in Arbitral Proceedings - Courts oversee arbitral proceedings and ensure arbitration law compliance - Courts oversee arbitral proceedings and ensure arbitration law compliance - Courts defer to arbitral tribunals and uphold arbitral awards' finality - Duty to intervene when arbitrators exceed authority or act improperly. (Para - 11)

Arbitrator erred in passing awards dated December 27, 2019, May 19, 2020 and May 28, 2020 - no statutory authority empowers arbitral tribunal to review/modify its award - orders are void ab initio -deserve to be set aside - hence appeal. **(Para - 9)**

HELD:-Section 34 court's dismissal of the application without addressing the arbitrator's improper actions may be seen as a missed opportunity to uphold the arbitral process's integrity. Court sets aside order passed by District Judge and awards.**(Para - 11)**

Appeal allowed. (E-7)

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

1. Heard Sri Divakar Rai Sharma, counsel appearing on behalf of the appellant and Sri Ashish Kumar Singh, counsel appearing on behalf of the respondent Nos.1, 2, 3, 15, 16, 28, 32, 34 and 38 and Sri Dharamveer Singh, counsel appearing on behalf of the respondent No.53.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") arises out of an order passed by the District Judge, Mau dated November 5, 2020.

3. The facts of the case are briefly provided below:

i. A notification under Section 3A(1) of the National Highways Act, 1956 (hereinafter referred to as "the Act") was

issued on January 23, 2015 for acquiring the land for the purposes of widening of the road NH-29 (now NH-24) between Varanasi – Gorakhpur.

ii. The aforesaid notification was published in two daily newspapers on March 6, 2015 seeking objection from the persons interested in the land within a period of 21 days under Section 3C(1) of the Act. Thereafter, the Competent Authority passed an award on August 17, 2016.

iii. Being aggrieved by the award, the opposite parties filed their objections under Section 3G(5) of the Act before the Arbitrator.

iv. The Arbitrator, after considering the objections, vide its order dated March 15, 2018 set aside the award dated August 17, 2016 and remitted the matter to the Competent Authority directing to form a Joint Committee including the officers of the National Highways Authority of India (hereinafter referred to as "the NHAI") to get the land re-valued by conducting a spot inspection and determine the compensation as per Act No.30 of 2013.

v. Pursuant to the order of remand dated March 15, 2018, the Competent Authority passed a fresh award on June 4, 2018.

vi. On November 15, 2018, before the Arbitrator, the NHAI agreed to make the payment in three slabs depending upon area at the rate of Rs.3600/-, Rs.1400/- & Rs.800/- per square metre.

vii. Later on, the Arbitrator passed another award on December 27, 2019 fixing the rate as per three slabs in terms of the order dated November 15, 2018.

viii. The Arbitrator passed another award dated May 19, 2020 recalling the earlier award dated December 27, 2019 and directed to make the payment in terms of the amended award dated March 25, 2018.

ix. The Arbitrator passed another award dated May 28, 2020 in the name of amended award and fixed only one slab, that is, at the rate of Rs.3600/- per square metre.

x. Being aggrieved, the NHAI preferred objection under Section 34 of the Arbitration Act by impleading 53 persons/land holders in one case.

xi. District Judge, Mau rejected aforesaid objection of the NHAI by holding that the objection is devoid of merit and the same deserves to be rejected.

4. It is to be noted that the award dated March 15, 2018 passed by the Arbitrator remanding the matter to the Competent Authority directing the land to get re-valued by conducting the spot inspection and determining the compensation as per Act No.30 of 2013 was never challenged by either of the parties. This order has, accordingly, attained finality.

5. Counsel appearing on behalf of the appellant and the counsel appearing on behalf of several respondents in this matter have fairly submitted that the Arbitrator may be directed to once again decide the matter *de novo* basing the same upon the spot inspection and re-valuation carried out by the Joint Committee including the officers of the NHAI as per the order dated March 15, 2018.

6. At this juncture, it is pertinent to refer to Section 33 of the Arbitration Act,

which deals with Correction and interpretation of award, and making of an additional award:

"33. Correction and interpretation of award; additional award*.—(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—*

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

7. What is clear from the aforesaid provision is that the arbitral tribunal can only correct and interpret an award. An additional award can be made, only in respect of claims which have been omitted from the arbitral award. Interpretation of the award and additional award can be made only upon a request received by a party. However, correction can be done by the arbitral tribunal on its own within thirty days from the date of the arbitral award. However, none of these provisions, give arbitral tribunal the power to recall and modify its award. Arbitral tribunals are not courts of law which are bestowed with inherent powers. Arbitrators are required to act within the confines of the arbitration agreement, and the framework enshrined in the Arbitration Act. Any act which the arbitral tribunal is not empowered to do under the Arbitration xzAct is void ab initio.

8. The principle of *kompetenz-kompetenz* which empowers arbitral tribunals to rule on their own jurisdiction, is not a carte blanche for unlimited authority. Rather, it underscores the tribunals' duty to

determine its jurisdiction within the confines of the arbitration agreement and applicable law. The authority of arbitral tribunals to correct, interpret, or supplement their awards does not extend to revisiting the merits of the dispute or reconsidering substantive issues that have already been decided. Arbitral tribunals are bound by the principle of functus officio, which holds that once an award has been rendered, the tribunal's jurisdiction over the dispute is terminated, and it lacks authority to revisit or modify its decision in absence of specific statutory provisions to the contrary.

9. The Arbitrator in the instant case erred in passing the awards dated December 27, 2019, May 19, 2020 and May 28, 2020 since no statutory authority empowers the arbitral tribunal to review/modify its award. Therefore, the said orders are void ab initio and deserve to be set aside.

10. Section 34 Court despite noting that such recall and modification by the Arbitrator was beyond the statutory confines and improper, proceeded to dismiss the application:

"From the above provisions, it is amply clear that the learned Arbitrator has got no power to review his award. The learned Arbitrator/District Magistrate, Mau firstly reviewed the award date 15.03.2018 by passing the order dated 27.12.2019 without hearing the opposite parties and on the application filed by the opposite parties, the learned Arbitrator/District Magistrate, Mau has recalled the order dated 27.12.2019 by his order dated 28.05.2020, which is improper, but the net result is that award dated 15.03.2018 is revived."

11. This raises important questions regarding the role of judiciary in overseeing arbitral proceedings and ensuring compliance with the principles of arbitration law. While courts generally afford deference to arbitral tribunals and uphold the finality of arbitral awards, they also have a duty to intervene when arbitrators exceed their authority or act improperly. In this case, the Section 34 court's decision to dismiss the application without addressing the arbitrator's improper actions may be seen as a missed opportunity to uphold the integrity of the arbitral process.

12. For the reasons discussed above, this Court, in exercise of its power under Section 37 of the Arbitration Act sets aside the order dated November 5, 2020 passed by the District Judge, Mau and the awards dated December 27, 2019, May 19, 2020 and May 28, 2020.

13. Furthermore, this Court directs the Arbitrator appointed by the Central Government under the Act to decide the matter de novo within a period of six months from the date of production of a certified copy of this order before him. The Arbitrator is directed to take into account the order dated March 15, 2018 and the report submitted pursuant to the same.

14. With the aforesaid direction, the appeal is allowed.

(2024) 5 ILRA 1670
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

Writ Tax No. 1256 of 2023
with other connected cases

M/S Graziano Trasmissioni ...Petitioner
Versus
Goods & Services Tax & Ors.
...Respondents

Counsel for the Petitioner:
Vinayak Mithal

Counsel for the Respondents:
A.S.G.I., C.S.C., Gaurav Mahajan, Naveen Chandra Gupta

A. Law of Taxation– Section 168A of the Central Goods and Service Tax Act, 2017 and the U.P. Goods and Service Tax Act, 2017- Notification issued under these provisions- extending the time granted to Adjudicating Authorities to pass adjudication orders challenged - Sections 44, and 73 of the Act- Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (hereinafter referred to as 'TOLO').

B. Section 168A of both Acts- conditional legislation to arise at the hands of the delegate of the principal legislature- Central Government and/or St. Government- Power under Section 168A is legislative and not administrative or executive- Discretion to extend limitation vested in the Principal Legislature- Delegation made canalised- Strict conditions laid down for exercise of special powers- Impugned notifications issued after due deliberation on the material on record- existence of circumstance validating the exercise of power cannot be ruled out- All tests necessary for exercise of power under Section 168A stood satisfied.(Para 96, 97, 103. 111, 116, 117 and 119)

Held:
Coming to the submissions, we note, broadly the submissions have been advanced as to the validity of the action taken. Though worded differently by two Senior counsel for the petitioners, principally, it has been contended, the Central Government and the St. Government could not have acted independent to the conditions of the delegation made under Section 168A of the Central Act and the St. Act. To the extent the nature of power vested thereunder is concerned, we find ourselves in agreement with the principle that the said sections provide for conditional legislation to arise at the hands of the delegate of the principal legislature i.e. the Central Government and/or the St. Government. (para 96)

Also, as to the submission that the said provision authorizes the delegate to act in special circumstances and not by way of general power to be exercised to remove difficulty, we find ourselves in agreement with that submission advanced by learned counsel for the petitioners. Thus, in contrast to Section 172 of the Central Act and the St. Act, powers under Section 168A of the Act, may be exercised: (i) On the recommendation made by the Council; (ii) By issuance of notification to extend the time limitation specified or prescribed or notified under the Central Act and the St. Act; (iii) In respect of actions which cannot be completed or complied, (iv) Due to "force majeure". (Para 97)

In the first place, the powers under Section 168A of the Act is legislative and not an administrative power. While submissions have been advanced by some of learned counsel for the petitioners suggesting, the power under Section 168A of the Act was an administrative or executive power, at the same time, as submitted by Sri Mahajan, there can be no doubt as to the true nature of that power. Prescription of limitation to perform an action is a pure legislative function. In absence of any doubt thereto, the extension of limitation prescribed by law also remains legislative. The power to condone delay may be granted both to the executive and the judicial bodies, at the same time, the prescription in law, as to limitation remains exclusively, a legislative function. (Para 103)

Next, we have to examine, if that consideration was enough and if it satisfied any further test laid down in Section 168A of the Central Act and the St. Act. Here, we are unable to accept the submission advanced by learned counsel for the petitioner that there were mere difficulties faced by the revenue authorities in conducting scrutiny and audit. The period 15.03.2020 to 28.02.2022 remains the darkest period of our recent past, arising after the second World War. No calamity of equal magnitude has disrupted human life since then. In the context of a global village, that our world has become, the pandemic COVID-19 disrupted all human activities across all continents and left no strata of the society,

organisation or institution or other entity, unaffected over a long duration of time. The full impact of the COVID-19 is still to be assessed. (Para 111)

It is equally admitted and undeniable to the petitioners that the time kept ticking and hard as the times were and despite continuance of the extreme circumstances and disablement accompanying, caused by COVID-19, life moved on. Economic activity was witnessed. Businesses continued to exist, resulting in Monthly and Annual Returns being filed both for the entire duration of time through which COVID-19 pandemic spread (in waves), and continued to disable human activity. Thus, Annual Returns came to be filed for the subsequent F.Ys. 2018-19 and 2019-20 as well. All such returns remained subject to scrutiny and audit. It is that volume of work that has been taken note of and considered in the 47th and 49th meetings of the Council. With reference to that work, legislative decisions have been made, in the backdrop of the disruption caused by the pandemic COVID-19. (Para 116)

Also, we are also unable to accept the submission advanced by learned counsel for the petitioners that the process of framing adjudication order is independent of scrutiny and audit of Annual Returns. To offer that construct to the language of Section 73(1) would be over-simplistic. It is true that Central Act and the St. Act specifically do not contemplate existence of limitation for prior scrutiny and audit, at the same time Section 61 of Central Act and the St. Act provides that a Proper Officer may scrutinise the return, verify its correctness and, inform the registered person of the discrepancies noticed. If the explanation thereto is found acceptable, no further action is contemplated. (Para 117)

To us, the above discussion is enough to persuade us to the conclusion that scrutiny and audit of Annual Returns is inherently linked to and is not independent of adjudication proceedings under Section 73 of the Central Act and the St. Act. Though the Proper Officer may remain authorised to act under Section 73 of the Central Act and the St. Act independent of an audit and scrutiny at the same time that outcome would be dictated by facts of an individual case but not by way of a principle in law. In the entire scheme of the Central Act and the St. Act, by way of procedure, steps contemplated under Section 61 and 65 would remain a normal occurrence. By very nature and by virtue of specific provisions of the Central Act and the St. Act, those would have to precede action under Section 73 of those enactments. (Para 119)

C. Force majeure- as used in Section 168A of the Act- depends on the subjective satisfaction of the legislative body- no judicial review possible-no illegality in the impugned notifications- Petition dismissed. (Paras 124, 129, 132 and 138)

HELD:

What then requires consideration is – if the words due to "force majeure" would include the period of time during which no lockdown may have been declared or during which human/economic activities may not have been specifically disrupted, by issuance of appropriate orders under the Disaster Management Act, 2005 etc. First, in the context of a legislative function, the writ Court sitting in judicial review may not look to test the subjective satisfaction of the legislative body or its delegate to see if the law made had the exact/measurable fact justification, for its enactment. The legislative wisdom must remain insulated from that judicial query. Under the Constitutional scheme of division of powers, Courts may never be enthusiastic and may remain disinclined to test the subjective satisfaction of legislatures in enacting laws. In fact, the Courts are neither equipped nor they are expected to undertake that exercise. (Para 124)

The submission that the issuance of the impugned notifications are pre-judicial to the rights and interest of the tax payers does not find our acceptance in the context of the discussion made above. A legislative action cannot be complained of as being prejudicial on account of extension of limitation. Limitation, though statutory, is not a pre-existing vested right of any party. It gets created and extinguished in accordance with the statutory law. Insofar as the statutory law prescribes a limitation, no argument may arise against such prescription made. Further, in the case of conditional legislation, the submission that it is not peripheral but substantive also looses its relevance in face of conditions seen fulfilled. (Para 129)

We also are not convinced that there was any statutory mandate to provide for only short extensions of time or limited extensions of times. Suffice to note, if the COVID-19 pandemic had continued beyond the third wave (as experienced in our country), that argument would never arise. To the extent that argument arises on hindsight wisdom, and past actions were dictated by nature as were beyond the control of human beings, it would be erroneous to infer a legislative intent based on the experience gained on the strength of initial remedial actions taken by the executive and the legislative bodies, in response to the spread of the pandemic COVID-19. The argument is neither sustainable in law nor on the facts. As to the submission of repeated notifications being issued, again that fell within the domain of legislative wisdom. How the legislature perceived the situation at a given time, and what response it offered may never be a justiciable issue. Suffice to conclude, inherent indication exists that initially the legislature treated the COVID-19 pandemic circumstance to be temporary as may pass in a short while. 64 of 70 However on its continuance, further extensions may have been felt desirable. Insofar as the power vested under Section 168A is not shown to be a power that may be exercised once as get exhausted upon that exercise made, the legislative wisdom to issue a further notification, would always survive. (Para 132)

Seen in that light the decisions cited by learned counsel for the petitioners are found to be distinguished. The writ petitions challenging the issuance of the impugned notifications must fail. Hearing of all cases where adjudication proceedings are pending may recommence and be concluded, after excluding the duration of stay of the extended limitation to frame the adjudication order. Wherever adjudication orders have been passed and recovery stayed by this Court, the petitioners shall have 45 days from today to file appropriate appeals. (Para 138)

Petition dismissed. (E-14)

List of Cases cited:

1. Re: Cognizance for Extension of Limitation (Miscellaneous Application No. 408 of 2022 and connected matter)

2. S. Kasi Vs St. through Inspector of Police, Samaynallur Police Station, Madurai District; (2021) 12 SCC 1

3. M/s Rungta Mines Ltd. Vs St. of Jharkhand, (2023)VIL-525-JHR

4. U.O.I. & anr. Vs Mohit Minerals Pvt. Ltd. (2022) 10 SCC 700

5. Energy Watchdog Vs Central Electricity Regulatory Commission & ors., (2017) 14 SCC 80

6. Eastern Coalfields Limited Vs Sanjay Transport Agency & anr., (2009) 7 SCC 345

7. Satyendra Kumar Mehra alias Satendera Kumar Mehra Vs St. of Jharkhand, (2018) 15 SCC 139

8. St. of Uttar Pradesh Vs Sudhir Kumar Singh & anr., AIR (2020) SC 5215

9. Independent Schools' Association, Chandigarh (Regd.) & ors. Vs U.O.I. & ors., (2022) 14 SCC 387

10. Lachmi Narain & ors. Vs U.O.I. & ors., (1976) 2 SCC 953

11. Tata Housing Development Com. Ltd. Vs Aalok Jagga & ors., (2020) 15 SCC 784

12. Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & anr. Vs U.O.I. & ors., AIR 1960 SC 554

13. St. of T. N. Vs K. Sabanayagam & anr., (1998) 1 SCC 318

14. S.R. Bommai Vs U.O.I., AIR 1994 SC 1918

15. Shayara Bano Vs U.O.I., (2017) 9 SCC

16. Geeta Vs St. of U.P. & ors., (2010) 13 SCC 678

17. Dhanrajamal Gobindram Vs Shamji Kalidas & Co., AIR 1961 SC 1285

18. Dwarika Prasad Sahu Vs St. of Bihar & ors., AIR 1975 SC 134

19. St. of Mysore Vs P.R. Kulkarni & ors., AIR 1972 SC 2170

20. D.C. Wadhwa & ors. Vs St. of Bihar & ors., (1987) 1 SCC 378

21. Krishna Kumar Singh & anr. Vs St. of Bihar & ors., (2017) 3 SCC

22. Collector (District Magistrate), Allahabad Vs. Raja Ram Jaiswal, AIR 1985 SC 1622

23. St. of Punjab Vs Gurdial Singh & others, (1980) 2 SCC 471

24. Kalabharati Advertising Vs Hemant Vimalnath Narichania & ors., AIR 2010 SC 3745

25. Writ-Tax No. 330 of 2024 (M/S Tata Projects Limited Vs U.O.I. & ors.

26. St. of Tamil Nadu Vs P. Krishnamurthy & ors., (2006) 4 SCC 517

27. All India Bank Officers Configuration Vs Regional Manager, C.B.I., Neutral Citation (2024) INSC 389

28. Naresh Chand Agarwal Vs Institute of Chartered Accountants of India, Neutral Citation 2024 INSC 94

29. Reckitt Benckiser India Pvt. Ltd. Vs U.O.I. (2024) GSTL 113 (Del),

30. Faizal Traders Pvt. Ltd. Vs Deputy Commissioner Central Tax & anr., Neutral Citation: 2024 KER10314

31. Super Agrotech Ltd. Vs St. of U.P. & ors., (2006) 9 SCC 203

32. Vivek Narayan Sharma & ors. Vs U.O.I. & ors. (2023) 3 SCC 1

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Donadi Ramesh, J.)

1. Heard Sri Rakesh Ranjan Agarwal learned Senior Counsel assisted by Sri Suyash Agarwal, Sri Divyanshu Agarwal and Sri Vinayak Mittal, Sri Shambhu Chopra learned Senior Counsel assisted by Sri Rajnish Tripathi, Sri Praveen Kumar, Sri Nishant Mishra, Sri Atul Gupta, Sri Abhinav Mehrotra, Sri Venkat Prasad Pasupaleti (through video conferencing) and Sri Ayush Mishra, learned counsel for the petitioner, Sri S.P. Singh, learned ASGI assisted by Sri N.C. Gupta and Sri Gopal Verma, Sri Anant Tiwari, Sri O.P. Mishra, Sri K.J. Shukla, Sri Chandra Prakash Yadav and Sri Arvind Kumar Goswami learned counsel for the Union of India and Goods & Service Tax Council, Sri Gaurav Mahajan learned Senior Standing Counsel, Sri Amit Mahajan learned Senior Standing Counsel, Sri Krishna Agarwal learned Senior Standing Counsel and Sri Parv Agarwal learned Senior Standing Counsel for the Central Board of Indirect Taxes and Customs, Sri Nimai Das, learned Additional Chief Standing Counsel and Sri Ankur Agarwal learned Standing Counsel for the State-GST authorities.

2. Challenge has arisen to Notification No. 09/2023-Central Tax (CGST) dated 31.3.2023 issued by the Government of India and Notification No. 515/XI-2-23-9 (47)/17-T.C.215-U.P.Act-1-2017-Order-(273)-2023 dated 24.4.2023 issued by the State Government under Section 168A of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as 'the Central Act') and the U.P. Goods and Service Tax Act, 2017 (hereinafter referred to as 'the State Act') respectively, insofar those Notifications seek to extend the time granted to the Adjudicating Authorities to pass adjudication orders with reference to proceedings for the F.Y. 2017-18. That challenge is involved in the following writ petitions:

Sl. No.	Writ Tax Number	Party Name	Financial Year

1.	132 of 2024	Ms MJ Corporation Vs. Goods And Service Tax Council And 4 Others	2017-18
2.	134 of 2024	Ms Rki India Limited And Another Vs. Union Of India And 3 Others	2017-18
3.	1393 of 2023	U.P. Ceramics Potteries Pvt Ltd Vs. Good and Service Tax and 5 Others	2017-18
4.	1450 of 2023	M/s Savi Interiors and Another Vs. Union of India and 2 Others	2017-18
5.	177 of 2024	Devendra Pratap Singh Vs. Goods And Service Tax And 4 Others	2017-18
6.	224 of 2024	Atul Tyre House Vs. Goods And Service Tax Council And 4 Others	2017-18
7.	375 of 2024	M/D New Manish Surgical K 61/115 Saptsagar Vs. Goods And Service Tax Council Through The Secretary Gst Council And 4 Others	2017-18
8.	456 of 2024	M/S Haji Nabi Bakash Mohd Saleem Vs. Goods And Service Tax Council And 4 Others	2017-18
9.	46 of 2024	Civil Lines E. K. Road Meerut, Meerut Uttar Pradesh 250001	2017-18

		Through Its Finance Controller Mr Ramesh Chandra Vs. Goods And Service Tax Council And 4 Others	
10.	460 of 2024	M/S Vinod Kumar Rai Vs. State Of Up And 2 Others	2017-18
11.	80 of 2024	Ms Lg Electronic India Pvt Ltd Vs. State Of Up And 2 Others	2017-18
12.	825 of 2024	M/S Yuvaan Enterprises Vs. Goods And Service Tax Council And 4 Others	2017-18
13.	522 of 2024	M/S Tara Products And Services Private Limited Vs. Goods And Service Tax Council And 4 Others	2017-18
14.	548 of 2024	M/S Vds Contractor Vs. Goods And Service Tax Council And 5 Others	2017-18
15.	597 of 2024	M/S Mani Electricals Vs. Goods And Service Tax Council And 4 Others	2017-18
16.	841 of 2024	M/S Neptune Suppliers Private Limited Vs. Goods And Service Tax Council And 4 Others	2017-18
17.	897 of 2024	M/S Subhash Infraengineers Pvt. Ltd. Vs. Union Of India And 4 Others	2017-18

18.	902 of 2024	M/S Subhash Infraengineers Pvt Ltd. Vs.Union Of India And 4 Others	2017-18

3. By earlier order, we had consolidated the above described and other petitions raising same and/or similar challenge. Since, only legal issues are involved, Counter Affidavits were required to be filed by the respondents in the lead case i.e. Writ Tax No. 1256 of 2023 (M/S Graziano Trasmissioni India Pvt. Ltd. Vs. Goods And Services Tax And 5 Others). Copy of those Counter Affidavits were directed to be circulated to all counsel for the petitioners, in individual petitions. Also, permission was granted to individual counsel for the petitioners-to serve their Rejoinder Affidavits, treating the Counter Affidavit circulated in the lead case to be the Counter Affidavit filed in their individual cases. Thus, pleadings have been exchanged between the parties, on deemed basis.

4. During the course of hearing, it was pointed out that other challenges are also involved in some of the other petitions. Thus reference has been made to challenge raised to adjudication proceedings/orders for F.Y. 2017-18, on other grounds including ground as to adjudication order exceeding the show cause notice; principles of natural justice having been violated; rectification/correction of GSTR-3B etc. Yet other petitions have laid challenge to similar Notifications issued for the F.Y. 2018-19. In those cases, legal grounds of challenge have been described to be different. Another petition has been filed involving challenge to the validity of Section 168A of the Central Act.

5. In view of the varied challenge raised in some individual petitions, at the suggestion of the bar, we have confined the hearing (at present), to writ petitions involving challenge to Notification No. 09 of 2023 dated 31.03.2023 issued by the Central Government and Notification No. 515 issued by the State Government on 24.04.2023 (hereinafter collectively described as the time extension Notifications) issued for the F.Y. 2017-18. Petition raising challenge to validity of Section 168A has been segregated. Those may be heard later. Also, petitions involving challenge to the time extension Notifications relevant to the F.Y. 2018-19, may be heard separately.

6. Insofar as present batch of petitions is concerned, earlier Section 44 (of the Central Act and the State Act) prescribed that the Annual Return may be filed by 31st day of December following the end of the relevant Financial Year. Thus, for the F.Y. 2017-18 the Annual Return could be filed till 31 December 2018. By virtue of Section 73(10) of the Central Act and the State Act, the Proper Officer could issue an order of adjudication under sub-Section (9) of that Section, within three years from the due date of furnishing of Annual Return. For F.Y. 2017-18 such order order could be passed upto 31 December 2021. Also, under Section 73(3) of the Central Act and the State Act, the mandatory notice preceding an adjudication order [contemplated under Section 73(10) of the Act], could be issued not later than three months prior to the last date on which the Adjudication Order may be passed. Therefore, for the F.Y. 2017-18 such notice could be issued not later than 30 September 2021.

7. It is a fact, F.Y. 2017-18 (July, 2017 to March, 2018) was the first year under the GST regime. It is a matter of common knowledge that the revenue authorities and the tax payers alike, faced numerous difficulties in complying the new law. Therefore, the time for making compliances was extended and relaxations were granted by the Government, from time to time. It is on record - vide Notification dated 03.2.2020 issued under Section 44 (as it then existed) read with Rule 80 of the Rules framed under the Central Act, the last date for filing Annual Return for the F.Y. 2017-18 was extended - for the State of Uttar Pradesh, till 07 February 2020. Similar Notification No. 509 dated 05.02.2020 was issued by the State Government under the State Act. Correspondingly by operation of law, the time limitation contemplated under Section 73(10) of the Central Act and the State Act stood extended upto 06 February 2023. Also, correspondingly the time period for issuance of notice, by the Proper Officer (for that F.Y.), stood extended upto 08 November 2022. It is also a fact, just after the expiry of the last date for filing return for F.Y. 2017-18 expired on 07.2.2020, the country was hit by the first wave of the pandemic COVID-19, resulting in complete lockdown being declared, from 25 March 2020.

8. While the Parliament was not in session, the President promulgated Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (hereinafter referred to as 'TOLO'). It was published in the Gazette of India on 31.03.2020. In the first place, by virtue of Section 3 of TOLO, the time limits specified, prescribed or notified under specified Acts (under that Section) were relaxed. However, the Central Act and the State Act were not included therein. Then, by Section 8 of TOLO, a new Section 168A was introduced to the Central Act, granting powers to the Central to issue appropriate notification, on the recommendations of the Goods and Service Tax Council (hereinafter referred to as 'the Council'), to extend the time limit specified, prescribed nor notified under the Central Act (as the case may be) in respect to 'actions' that 'cannot' be 'completed' or 'complied', 'due to force majeure' circumstance. The Explanation to the new section explained the meaning of 'force majeure'. It is also a fact that TOLO was replaced with Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (hereinafter referred to as 'the TOLA'), enforced with effect from 31 March 2020. It contained provisions similar to TOLO. For our purpose, in material parts, TOLA is the mirror image of TOLO. Similar amendments were made to the State Act.

9. Acting under Section 168A of the Central Act, first, Notification No. 35/2020 was issued by the Central Board of Indirect Taxes and Customs (hereinafter referred to as 'the CBIC'), dated 03 April 2020. In short, it provided, amongst others, extension of time upto 31.08.2020 with respect to actions for which the time limit for completion or compliance by any authority fell during the period 20 March 2020 - 30 August 2020. A similar Notification was issued by the State Government being Notification No. 445 dated 11.05.2020. Later, another Notification No. 14/2021-Central Tax, dated 01 May 2021 was issued under Section 168A of the Central Act providing for similar extension of time, to perform acts that were required to be performed during 15 April 2021-29 June 2021 upto 30 June 2021. It was complemented by similar Notification No.

496 dated 28.06.2021, issued by the State Government, under the State Act.

10. Later, vide Notification No. 13/2022-Central Tax dated 05 July 2022, issued by the Government of India, (acting through the CBIC) under Section 168A of the Central Act, extended the time limit specified under Section 73(10) of the Central Act for F.Y. 2017-18, upto 30 September 2023. Parallel notification was issued by the State Government being Notification No. 596, dated 21.7.20222 providing for similar extension of time. These notifications have not been challenged.

11. Last, vide Notification No. 9/2023 dated 31.03.2023 issued by the Government of India through the CBIC, the time limitation prescribed under Section 73(10) of the Central Act for F.Y. 2017-18, was extended upto 31.12.2023. A parallel notification came to be issued by the State Government Notification No. 515 of 2023 dated 24.04.2023, granting similar extension of time under the State Act. These notifications have also arisen under Section 168A of the Central Act and the State Act. Challenge has been laid only to this last set of Notifications dated 21.03.2023 (issued by the Central Government) and 24.04.2023 (issued by the State Government).

12. In the context of the above, Sri Rakesh Ranjan Agarwal, learned Senior Advocate has first pointed out that all petitioners had filed their Annual Returns before the last extended date for filing annual returns for F.Y. 2017-18 i.e. 07.02.2020. The marginal note appended to Section 168-A of the Act reads: "Power of Government to extend time limit in special circumstances." Thus, it has been pointed out that blanket extension of time was not contemplated to be granted. The legislature did not intend to grant blanket power to the Government to extend the limitation of time. Contrasting the newly added provision with Section 172 of the Central Act and the State Act, it has been submitted, the general power to grant such extension conferred in Section 172 is subject to the direct check of the legislature, inasmuch as the Government seeking to exercise that power would have to lay and thus seek approval of its 'general order' by the respective legislative body. Thus, it was neither contemplated by the legislatures nor it could be construed that there was any extension of time contemplated or permitted to be granted to file either the Annual Return for F.Y. 2017-18 beyond the date 07.02.2020, or to pass an adjudication order beyond 06.02.2023.

13. Second, it has been pointed out, Notification No. 14 of 2021 dated 01.05.2021 did not cause any effect on the limitation to pass the adjudication order for F.Y. 2017-18, inasmuch as the period of limitation that was extended upto 30.06.2021 was only with respect to acts that could not be completed or complied during the period 15.03.2020 to 20.08.2020. Even the requirement of filing of e-way bill was not relaxed. Benefits were contemplated and granted with respect to completion of other proceedings (by the revenue authorities) and filing of appeals (by the assessees).

14. Third, it has been pointed out that Notification No. 13 of 2022 and 596 of 2022 have not been challenged as despite that extension of time granted under Section 168-A of the Central Act and the State Act qua adjudication proceedings for F.Y. 2017-18, no action was initiated against the petitioners, during that extended period of limitation.

15. Coming to the challenge raised to Notification No. 9 of 2023 (issued by the

Central Government) and Notification No. 515 of 2023 (issued by the State Government) hereinafter collectively referred to as the impugned notifications, it has been submitted, first, the time extension notifications have not arisen on an independent exercise but only by way of partial modification of the first time extension granted.

16. Second, it has been asserted that on 31.03.2023, there did not exist any COVID-19 circumstance at the time of issuance of the impugned notifications. The staff attendance at government and non-government offices stood regularised. Pre-existing office working restrictions were done away. Referring to the impugned time extension clause in Section 168-A of the Central Act and the State Act, it has been submitted that there did not exist any *'force majeure'* circumstance. Referring to the order of the Supreme Court passed in **Re: Cognizance for Extension of Limitation (Miscellaneous Application No. 408 of 2022 and connected matter)**, the Supreme Court itself granted exemption/relaxation of limitation for a limited period 15.03.2020 to 28.02.2022 only. Thus, according to him, in absence of any 'force majeure' circumstance existing on 31.03.2023, the exercise of power by the Central Government and the State Government to extend the limitation to frame the adjudication order for F.Y. 2017-18 upto 31.12.2023, did not exist. The exercise of power is patently ultra vires the Act.

17. Here, he has also referred to Clause 5 of Circular dated 20.07.2021 to submit that the CBIC itself was cognizant of the order passed by the Supreme Court dated 27.04.2021. Therefore, it was the shared understanding of the executive authorities that the COVID-19 circumstance had come to an end on 28.02.2022. Referring to **S. Kasi Vs. State through Inspector of Police, Samaynallur Police Station, Madurai District; (2021) 12 SCC 1**, it has been asserted, the Supreme Court itself clarified its order to imply that - the order dated 23.03.2020 cannot be read to mean that it ever intended to extend the period of filing Charge-Sheet by police authorities as contemplated under Section 167(2) Cr.P.C.

18. To elaborate his submission that no general extension of time had been granted to State authorities by the Supreme Court, he has also referred to a decision of the Jharkhand High Court in **M/s Rungta Mines Ltd. Vs. State of Jharkhand, (2023)VIL-525-JHR** wherein that Court had the occasion to consider whether under the suo motu extension of limitation orders passed by Supreme Court, the limitation to initiate re-assessment proceedings also stood extended. Referring to the Circular dated 20 July 2021 that reflects the own understanding of the revenue authorities, it was noted that the actions of scrutiny of returns, issuance of summons, search, enquiry or investigations and even consequential arrests (under the GST law), were not covered by the order of the Supreme Court. It was taken note that in the meeting of the Goods and Service Tax Council (hereinafter referred to as the 'Council') itself, that apex body under the scheme of the Central Act and the State Act, was cognizant that the order of the Supreme Court would apply to other quasi judicial and judicial proceedings but not to adjudication proceedings. Applying that principle, it has been emphasised that the process of scrutiny of returns, audit etc., was not covered. The fact that the revenue authorities failed to perform those functions may not be now protected by seeking extension of limitation to pass adjudication order.

19. Third, it has been submitted, no compliance has been made to the statutory requirements of Section 168A of the Act. Since the ingredients of '*force majeure*'

circumstance did not exist on the relevant date i.e. issuance of the impugned notifications, they are wholly ultra vires. By way of another limb of this submission, it has been further asserted that the Central Government and the State Government should have acted independent of the opinion or advise of the Council. Power to issue the time extension notifications being delegated to the Government, no blind or mute compliance may have been offered by the delegate to the opinion of the Council. Reference has been made to the impugned notifications and also to the resolution of the Law Committee considered by the Council, to submit that both are silent to the existence of 'force majeure' circumstance relevant to the impugned notifications.

20. To clarify, he would submit, unless such circumstance was shown to exist on the date of issuance of time extension notifications and unless due application of mind had been made by the Central Government to that effect, inconceivable situation may arise where the Council may continue to resolve to extend the limitation of time to frame adjudication orders, indefinitely. The Central Government and the State Government may continue to offer blind compliance to such opinions and resolutions of the Council as may remain wholly contrary to the spirit of the Central and the State Act. Reliance has been placed on another decision of the Supreme Court in **Union of India and Another Vs. Mohit Minerals Private Limited (2022) 10 SCC 700** to submit that the recommendations of the Council are of persuasive value and that they do not create the law. In any case, the in context of delegated legislation arising under Section 168A of the Act, the Central Government and the State Government had to offer independent application of mind to the existence of 'force majeure' circumstance. In the present case, contrary to that, both the Central Government and the State Government have offered mechanical compliance to the recommendation of the Council.

21. Further, it has been submitted, in face of the plain language of Section 168A of the Central Act and the State Act, the burden to establish the existence of 'force majeure' circumstance remained undischarged on the Central Government and the State Government. Neither in the impugned notifications nor in the recommendation of the Council nor in the report of the Law Committee nor through the Counter Affidavit filed in these petitions, any fact has been shown to exist as may have allowed the delegated legislative body to act under Section 168A of the Central Act or the State Act. Mere, difficulties or existence of onerous conditions would never survive the test of Section 168A of the Act. The legislature, in its own wisdom contemplated absolute impossibility in performance of certain actions as the only permissible reason to exercise the power delegated under Section 168A of the Central Act and the State Act. Referring to the **Energy Watchdog Vs. Central Electricity Regulatory Commission & Ors., (2017) 14 SCC 80**, it has been asserted, for any event to describe as a '*force majeure*', it must have wholly or partly caused an unavoidable delay on the affected party on the performance of its obligations. Referring to the circumstances that existed viz-a-viz the challenge brought before us and referring to the documents and pleadings, it has been shown, inspections (on 25.2.2022); audit (on 3.2.2022); audit notice (on 14.10.2022); audit order (on 13.12.2022) and various other actions were performed. In such circumstances, it has been submitted, there were no 'force majeure' circumstance as may

have prevented the revenue authorities from initiating adjudication proceedings before the cut-off date 30.6.2023. Merely because there may have existed certain difficulties, those may not have been cited as an impossibility. Thus, it has been contended, the issuance of the impugned notifications falls foul with the power vested with the Central Government and the State Government under Section 168A of the Central Act and the State Act.

22. Next, it has been submitted, limitation is a substantive right. It impacts the right of the tax-payers. Referring to the marginal note to TOLA, emphasis has been laid to the words "special circumstance" appearing in the marginal note. Thus, it has been emphasized, the power vested under Section 168A of the Act is not a general power to be exercised for completion of certain actions but an exceptional power vested in the delegate to be exercised, in special circumstances.

23. Referring to **Eastern Coalfields Limited Vs. Sanjay Transport Agency & Anr., (2009) 7 SCC 345 and Satyendra Kumar Mehra alias Satendera Kumar Mehra Vs. State of Jharkhand, (2018) 15 SCC 139**, it has been submitted, any doubt or ambiguity in the interpretation of the legislative clause may always be cleared by looking at the marginal note. Thus, it has been submitted, the impugned notifications are invalid as the power under Section 168A of the Act may only be exercised in special circumstances i.e. during the continuance of the spread of the pandemic COVID-19. That special circumstance having passed, the exercise of power with reference to COVID-19 is thereafter, wholly ultra vires the Act.

24. Next, Shri Shambhu Chopra, learned Senior Counsel has offered a slightly different perspective to the dispute brought before the Court. In his submission, the impugned notifications are ultra vires to Section 168A of the Central Act and the State Act. Yet, first, according to him also, a valid notification under Section 168A of the Act may have been issued, if necessary, due to 'force majeure' circumstance existing. In its absence, no such notification may have been issued. It is a matter of common knowledge that the 'force majeure' circumstance i.e. COVID-19 did not exist on the date of issuance of the impugned notifications i.e. 30.3.2023 and 24.4.2023. Therefore, the exercise of the power is perverse.

25. Second, uniquely he would submit, the impugned notifications issued subsequent to the pandemic are prejudicial to the rights and interests of the tax-payers because they exposed the tax-payers to the consequences of show-cause notices, adjudication orders, recoveries and prosecutions etc. wholly outside the period of limitation prescribed by the principal legislature. Relying on **State of Uttar Pradesh Vs. Sudhir Kumar Singh & Anr., AIR (2020) SC 5215**, he would submit, the issuance of the impugned notifications has caused prejudice to the petitioners and that procedural or substantive protection granted by the principal legislature by incorporating strict conditions under Section 168A has been diluted and thus abused.

26. Third, it has been submitted, the impugned notifications are discriminatory to the extent they partially modified the earlier Notifications dated 1.5.2021 and 28.6.2021 issued by the Central Government, and State Government respectively. That part of the earlier notifications which were in favour of the petitioner, has been done away. At the same time, the revenue has taken undue

benefit by seeking extension of limitation to initiate adjudication proceedings.

27. Fourth, it has been submitted, the impugned notifications are not peripheral but substantive. Time prescription is essential for the purpose of issuance of proceedings in the nature of reassessment and/or adjudication. Wherever extension of time is required, the primary legislation provides for the same. In the present case, that function has been circumscribed by the conditions enumerated under Section 168A of the Act. Therefore, unless the 'force majeure' circumstance (of continuance of COVID-19) was a fact in existence, the primary legislative function cannot be seen to be validly exercised by the delegate - either the Central Government or the State Government. Reliance has been placed on **Independent Schools' Association, Chandigarh (Regd.) & Ors. Vs. Union of India & Ors., (2022) 14 SCC 387** to submit that a notification requiring substantive change to be made may neither be described as peripheral nor that power may be lightly exercised by the delegate. In the present case, the delegate having acted outside the scope of the delegation made, the impugned notifications are acts of excess. Essential legislative function was not and could not be delegated to the Central Government, or the State Government.

28. Referring to **Lachmi Narain & Ors. Vs. Union of India & Ors., (1976) 2 SCC 95**3, it has been elaborated, the express inbuilt legislative policy contained in a legislative act cannot be violated by the delegate by abrogating to itself plenary legislative function. While the Parliament and the State legislature had plenary powers to legislate, yet, the delegate may only offer strict compliance to the limited power vested on it. Unless the pre-condition for exercise of that power is shown to exist, the action taken by the delegate would remain an act of excess and therefore ultra vires of the principal enactments.

29. Again uniquely, Sri Shambhu Chopra has also invoked principle of violation of doctrine of public trust/public interest. Referring to **Tata Housing Development Company Ltd. Vs. Aalok Jagga & Ors., (2020) 15 SCC 784**, he would submit, though the traditional scope to apply the doctrine of public trust was confined environmental issues, at the same time the doctrine now stands extended to other spheres as well. In a society governed by rule of law, the betrayal of public trust by the Central Government and the State Government may remain amenable to judicial review.

30. Further, it has been submitted, Section 168-A of the Central Act and the State Act do not bind the Central Government and the State Government to offer mute compliance to the recommendation made by the GST Council. On the contrary it remains with the Central Government and the State Government to accept or to not accept any recommendation made by Council. Though the Central Government and the State Government may not act independent of the recommendation made by the Council, at the same time, it would be wrong to say that the Central Government and the State Government are bound to comply the recommendation made by the Council.

31. Referring to Article 279-A(4)(h), it has been described as residuary clause or the default clause. In absence of any power vested in the Council to make such recommendation, merely because under Article 279-A(6), the Council may

determine its procedure in the performance of its functions, may not give rise to any other power or sphere for exercise of such power to make any recommendation. Thus, it has been suggested, the provision of Section 168-A of the Central Act and the State Act, are not wholly inconsistent to Article 279-A. Any recommendation made by the Council to the Central Government and the State Government that is not in consonance with the Constitutional and/or statutory law, would remain unenforceable.

32. Next, Sri Praveen Kumar offered a clarification at the very beginning. He would submit, Section 168-A is a piece of conditional legislation. The conditions on which delegate may act are specifically prescribed therein. There can be no doubt or imagination as to that. Thus, only when an 'action' for which time limit may have been prescribed, specified or notified, cannot be completed or complied within that time, only then, the Central Government and/or the State Government may act, to provide for time extension. Having laid that premise, he would proceed to submit, therefore, the recommendation of the Council must be seen to have considered and identified actions that were not complied or which could not be complied within the pre-existing prescription of time, that too for 'force majeure' circumstance existing. In the present facts, according to him, that consideration is completely lacking rather, it is absent.

33. Relying on the **Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr. Vs. Union of India & Ors., AIR 1960 SC 554,** he would submit, there can be no doubt that Section 168-A of the Central Act and the State Act are pieces of conditional legislation. Thus, the occasion for the delegate to act is not only hinged to the recommendation of the Council but that such recommendation may not arise and in any case, may not be acted upon unless the exact circumstance contemplated for its exercise, pre-exist. Referring to **State of Tamil Nadu Vs. K. Sabanayagam & Anr., (1998) 1 SCC 318**, he would submit, in the context of conditional legislation, it is a valid ground to challenge that the mandatory conditions required to be fulfilled before the delegated legislation may arise, did not exist.

34. Applying that principle, Sri Praveen Kumar would further submit, the impugned notifications only enumerate difficulties and challenges that may have been faced by the revenue authorities, in completing the adjudication proceedings for F.Y. 2017-18. It has not been shown that action of framing adjudication orders within prescribed time limit could not be completed or complied. As a fact, he would submit, to begin with, by virtue of Section 73(10) of the Central Act and the State Act, the revenue authorities had three year limitation from the last date of submission of annual return for F.Y. 2017-18. Vide Notification No. 5 of 2020, that date was extended to 07.02.2020.

35. Consequently, by virtue of Section 73(10) of the Central Act and the State Act, the limitation to frame the adjudication order for F.Y. 2017-18 stood extended upto 06.02.2023. Then, with respect to first exercise of power under Section 168-A of the Central Act and the State Act, it has been submitted, Notification Nos. 13 of 2022 dated 05.07.2022 and 5 of 1996 dated 21.07.2022, extended the period of limitation to frame the adjudication order upto 30.09.2023. Those notifications were issued, even though six months' time was available from before to complete or comply

with the timelines to perform specified actions. Since those notifications were never assailed, more than enough time was made available to the revenue authorities to initiate and complete action that had yet not been initiated. In that regard, he would submit, the words “cannot be completed or complied” refer to an impossibility in fact and/or in law. In absence of notices issued to initiate any adjudication proceeding, the stage was not set to record any satisfaction that the action to pass adjudication orders could not be completed or complied.

36. Referring to **P. Ramanatha Aiyar's, The Law Lexicon, Second Edition 1997**, he would elaborate that word 'cannot' includes a legal inability, as well as a physical impossibility. (The Newbattle, 54 LJPD & A 16). Further, referring to the said law lexicon, he would elaborate that the word ‘complete' may only mean to finish; accomplish that which one starts out to do. *(Black's Law Dictionary).* He has also referred to and relied on Article 356 (1) of the Constitution of India and the decision of the Supreme Court in **S.R. Bommai v. Union of India, AIR 1994 SC 1918**, to submit that strict meaning of the word 'cannot' must arise to the words used by the legislature in Section 168A of the Central and the State Act. Thus, it has thus been stressed that the period of actual national lockdown - from 25.3.2020 to 31.5.2020, alone offered a circumstance when no action may have been completed or complied. Even then, it is a fact that during that period as well, notices came to be issued; proceedings were conducted and completed. Since, no action had been initiated at the relevant time, the legal basis to invoke the conditional legislation under Section 168A of the Central Act and the State Act - to obtain extension of limitation, did not exist. Unless a proceeding was first initiated, there may never arose a circumstance for its completion or compliance. In short, it has been submitted, the extension of limitation has been invoked not to complete or comply any action that was already underway, but to initiate fresh actions. Therefore, the exercise of power by the delegate falls foul with the delegation made.

37. Referring to the agenda of the 47th and 49th meeting of the GST Council, it has been submitted, wholly vague terms have been used to recommend the issuance of notification for time extension. Thus, without referring to any specific 'force majeure' circumstance existing or period for which it may have operated or any factual or legal impossibility that it may have generated, the minutes disclose a loose discussion of 'COVID period', 'initial period' etc. Further reference to the difficulties faced during the initial period of GST regime are described to be extraneous to the issue. 'Force majeure' circumstance having been described by the Explanation under Section 168A of the Central and the State Act, those difficulties would remain irrelevant to the issue. Further, scrutiny of returns is not an enforcement action. Therefore, on the own showing of the respondents that processing of returns had never been been stayed by any authority or law. Reference to the same as a circumstance to justify the extension is extraneous to the exercise of conditional legislation. In the context of the first extension of time granted and much time having survived before that extended period of limitation may have come to an end, the second extension of time granted is described to have been obtained only for the sake of convenience of the revenue authorities.

38. Referring to the words 'due to force majeure' used under Section 168A of the Act, he would submit, the legislature clearly

intended, conditional legislation may arise only as direct consequence of a 'force majeure' circumstance existing for which reason, any action may remain from being completed or complied. Insofar as it cannot be disputed that the COVID-19 circumstance came to an end in the year 2021 itself, and in any case did not extend beyond January and February, 2022, exercise of that conditional legislation after expiry of the 'force majeure' circumstance, is ultra vires the Central Act and the State Act.

39. Shri Atul Gupta has offered another hue to the submissions advanced in these proceedings. He would submit, the impugned notifications are discriminatory. By virtue of the language used in Section 73 and Section 74 of the Central and the State Act, a clear demarcation exists between a registered person from whom tax may have remained to be collected, for reasons other than the fraud and those from whom due tax may remain to be collected for reason of fraud. Legislative wisdom remains, to treat the two categories of persons differently, inasmuch as lesser period of limitation of three years (from the last date of filing of return) exists for the first category of persons and a longer period of limitation of five years exists for persons who may be alleged to have committed fraud. By seeking to enlarge the limitation for the first category of persons without valid reasons, that legislative distinction has been destroyed. To that extent, the impugned notifications are wholly discriminatory, besides being in violation of the statutory scheme. Also for the same reason, he would contend that the impugned notifications are wholly arbitrary as there exists no valid or justifiable reason to destroy the pre-existing limitation that distinguishes a person who may have committed fraud and registered person such as the petitioners who are not alleged to have committed any fraud. Though the principal legislature may have prescribed a larger as period of limitation for persons not involved in any fraud, yet, through arbitrary action of the Central and the State Governments, cannot achieve that end.

40. Third, he would submit, evidence exists in the shape of initial notifications issued at the time of the spread of COVID-19 - to only grant short extensions of time. Therefore, the power vested under Section 168A of the Act must also be read to grant short extensions of limitation only, for a limited period during which 'force majeure' circumstance may exist. On the contrary, the impugned notifications seek to indefinitely enlarge the limitation of time, contrary to the inherent statutory scheme to conclude the adjudication proceedings in limited timeframe.

41. Fourth, it has been submitted, the impugned notifications do not refer to any circumstance of ‘force majeure’, prevailing. On the contrary, on the date of issuance of the impugned notifications the 'force majeure' circumstance did not exist. Therefore, there was no legal basis to exercise delegated legislative power to grant extension of time, at that stage.

42. Last, he would submit that scrutiny and audit are linked to adjudication proceedings. The revenue authorities should have completed those actions irrespective of extension of time granted under Section 168A of the Act. Since the revenue authorities failed to perform those acts, they cannot seek any extension of time, for that reason and purpose. In short, it is his submission, the entire action of issuance of the impugned notifications is wholly discriminatory and arbitrary. Therefore, it falls foul of Article 14 of the Constitution of

India. He has referred to and relied on **Shayara Bano v. Union of India, (2017) 9 SCC**, to submit, even a principal legislation is not immune to the test of manifest arbitrariness. Here, the challenge is to delegated legislation. In absence of any justifiable 'force majeure' circumstance shown to exist as may have allowed for such delegated power to arise or to be exercised, the unjust and arbitrary result growing from it, clearly establishes its invalidity.

43. Shri Nishant Mishra would first submit, repeated extensions granted in a routine way are contrary to the legislative intent and object expressed in the language of Section 168A of the Central Act and the State Act. That provision contemplates a limited intervention to be made by the Central or the State Government for reason of 'force majeure' circumstance having obstructed any action that was required to be completed or complied during the existence of continuance of 'force majeure' circumstance. Referring to UP Goods and Services Tax (Second Amendment) Act, 2020 and the statement on objections and reasons thereto, it has been submitted, Section 168-A of the State Act was incorporated only to overcome the difficulties faced by the tax-payers arising from lockdown declared due to COVID-19. Thus, the provision of Section 168-A may have been utilised only for that special circumstance, arising from that eventuality.

44. The *non obstante* clause appearing by way the opening words used in Section 168-A of the Central Act and the State Act must therefore be read strictly, to confine it to the object for which the said provision was enacted. Relying on **Geeta Vs. State of U.P. & Ors., (2010) 13 SCC 678**, it has been asserted, the non obstante clause attached to the Section 168-A of the Central Act and the State Act may not be read to enable general power to grant extensions of time to initiate and conclude the adjudication proceedings. The extreme circumstance permitting exercise of that power existed only during the complete lockdown enforced by the Central Government, under the Disaster Management Act.

45. As to the '*force majeure*' circumstance, he has referred to **Dhanrajamal Gobindram Vs. Shamji Kalidas & Co., AIR 1961 SC 1285**, to convey the legislative intent - to save the performing party from the consequences of anything over which it may have no control. Inasmuch as filing of Annual Return was complete before the issuance of the impugned notifications and since there was no lockdown during that period or immediately preceding the issuance of those notifications, there is no basis to accept that the performing party i.e. revenue authorities were prevented from performing any act, for reasons beyond their control.

46. He would further submit, the power vested under Section 168-A has to remain distinct and different in scope and ambit from the general power of time extension vested under Section 172 of the Central Act and the State Act. While that power may be exercised to ease the difficulties that may be faced in giving effect proceedings of the Central Act and/or State Act. Power under Section 168-A of the Central Act and the State Act may be exercised only during the currency of '*force majeure*' circumstance, only.

47. Also, the general power to grant extension of time created under Section 172 of the Central Act and the State Act remains subject to direct legislative check inasmuch

as any order thereunder must be approved by the respective principal legislative body, in contrast, under Section 168-A of the Central Act and the State Act, power may be exercised within the confines of the self limitations of that section. The general power was exercised by the Central Government and the State Government whereby the date of filing of Annual Return for the period 01.07.2017 to 01.07.2018 had been extended to 31.12.2019 and again to 31.01.2020, respectively.

48. Second, the reason given in the minutes of the 49th meeting of the GST Council only establish difficulty. They do not refer to existence or continuance of a 'force majeure' circumstance. To that extent, those recommendations are contrary to the express provisions of Section 168A of the Central Act and the State Act. Further, it has been submitted, the consideration of reasons in the 49th Meeting of the Council do not constitute or give rise to appreciation of any 'force majeure' circumstance. At best, the Council discussed the difficulties faced by some of the “tax administrations”.

49. Even in the agenda considered by the Council, the discussion exists only with respect to delays observed in issuance of show cause notice for F.Ys. 2017-18, 2018-19 and 2019-20, for reason of COVID-19 pandemic. It has been further noted, the Law Committee considered the delay in scrutiny and audit due to COVID-19 restrictions and had thus recommended extension of time. Merely because the revenue authorities may have faced certain difficulties in performing certain actions preceding issuance of adjudication notices, may never be described as an impossibility to complete and comply any action.

50. By way of another limb of the submission, Sri Mishra would submit, scrutiny and audit are independent activities. Adjudication proceedings do not hinge on and are not dependent on the same. Referring to Section 73(1) of the Central Act and the State Act, it has been submitted, the Proper Officer may issue a show cause notice where "it appears" that tax has not been paid or short paid etc. That legislative satisfaction of the Proper Officer has not been made dependent on the prior scrutiny or audit of the Annual Return etc.

51. Under Section 61(1) of the Act, the Proper Officer may scrutinise the Annual Return and again under Section 61(3) of the Act, if not satisfied the Proper Officer may proceed against the registered person under Section 65 or 66 or 67 or 73 or 74 of the Central Act and/or State Act. Thus, the consequences for scrutiny are provided elsewhere. Therefore, the Proper Officer is not bound to scrutinise the Annual Returns and thereafter proceed on issuance of adjudication notice.

52. Third, it has been submitted, no government may act in exercise of powers vested under Section 168A of the Central Act and the State Act, except upon prior recommendation made by the Council. Recommendation was made by the Council in its 49th meeting to the Central Government but not to the State Government. Therefore, besides the general challenge raised to the impugned notifications issued under the Central Act and the State Act, it has been submitted, the same is wholly without jurisdiction. In absence of recommendation made by the State Government, such notification may never arise.

53. Fourth, as to the fact justification, reference has been made to paragraph 7, 9 and 10 of the Counter Affidavit filed in these proceedings to submit that no effort has been made by the respondents to justify their action.

54. Sri Abhinav Mehrotra has submitted that the impugned notifications must satisfy twin conditions of 'force majeure' circumstance existing and also the impossibilities (both legal and factual), in the completion of actions. Unless the twin conditions are specifically satisfied, the action taken to issue the impugned notifications may not be valid. According to him, issuance of the impugned notifications which is an executive action is based on mixed reasons. He has relied on **Dwarika Prasad Sahu Vs. State of Bihar & Ors., AIR 1975 SC 134** and **State of Mysore Vs. P.R. Kulkarni & Ors., AIR 1972 SC 2170** to submit, it is not possible to cull out with any certainty, which reason prevailed with the Council and which part of the recommendation made by the Council prevailed with the Central Government or the State Government, especially because the reasons contained in the minutes of 48th Meeting of the Council refer to extraneous circumstance i.e. facts and measures falling outside twin test of ‘force majeure’ circumstance existing and impossibility to perform due action, for that reason.

55. In his submission, by lapse of time especially after the second/Delta Wave of the pandemic COVID-19 got over, no 'force majeure' circumstance existed as may have prompted or persuaded the Central or the State Government to act on such recommendations. To the extent, the action to issue the impugned notifications is based on extraneous considerations, those would fall within the scope of judicial review.

56. Relying on **D.C. Wadhwa & others v. State of Bihar & others, (1987) 1 SCC 378**, he would submit that power exercised by the executive was a colourable exercise to achieve a different object than that contemplated by Section 168A of the Central Act and the State Act. He has also placed reliance on **Krishna Kumar Singh & another v. State of Bihar & others, (2017) 3 SCC 1, Collector (District Magistrate), Allahabad v. Raja Ram Jaiswal, AIR 1985 SC 1622, State of Punjab v. Gurdial Singh & others, (1980) 2 SCC 471 and Kalabharati Advertising v. Hemant Vimalnath Narichania & others, AIR 2010 SC 3745.**

57. By way of another limb of his submission, Shri Mehrotra would submit, Section 168A of the Central Act and the State Act is a provision to overcome a temporary circumstance that may arise for reasons beyond the control of the parties. Only to overcome the immediate and direct hardship caused by such exceptional circumstance, the legislature has given the discretion to the executive to take appropriate measures to deal with it. Once that temporary circumstance had passed inasmuch as COVID-19 pandemic and the lockdown arising therefrom were over, the power vested by the legislature under Section 168A of the Central Act and the State Act, could not be exercised.

58. Mr. Venkat Prasad Pasupaleti (through video conferencing) appearing along with Shri Shubham Agarwal, learned counsel for the petitioner in **Writ-Tax No. 330 of 2024 (M/S Tata Projects Limited v. Union of India and 3 others)** has made reference to different actions of scrutiny, issuance of DRC-01, filing of replies, submission of replies and issuance of show cause notices and replies thereto, all before

the issuance of the impugned notifications. Thus, it has been submitted, reply had been furnished to the Show Cause Notice dated 23.06.2023 on 28.06.2023. Limitation of time existed up to 30.09.2023. Only because the Proper Officer may have failed to complete the proceedings within time, it can never be claimed that there existed a 'force majeure' circumstance in the present case, as may justify the issuance of the impugned notification.

59. Also, it has been asserted that the power vested on the Central and the State Government, is not a general power. It has been used most casually, multiple times. Referring to Circular No. 157 of 2021, dated 20.7.2021, it has been submitted that on the own understanding of the revenue, the order passed by the Supreme Court in **Re: Cognizance for Extension of Limitation (supra)** did not apply to adjudication proceeding. In any case the present is not a case where no proceeding may have been initiated. However, admittedly the order dated 8.12.2023 passed in this case travels beyond the issue raised in the Show Cause Notice. To that extent, the order is wholly unsustainable.

60. Next, Shri Ayush Mishra, learned counsel appearing for the petitioner in Writ-Tax No. 437 of 2023 has also adopted the submissions advanced by the other counsel of the petitioner. In addition, he has laid emphasis on the letter written by the Secretary to Chief Secretaries of all the States dated 22.03.2022 wherein it was informed, considering the overall improvement in the situation and preparedness of the government in dealing with the pandemic, the National Disaster Management Authority had decided that there was no need to invoke the provisions of the Disaster Management Act (to contain COVID-19), any further. Accordingly, it was provided, after expiry of the then existing order dated 25.2.2022, no further order may be issued by the Ministry of Home.

61. Second, referring to another letter written by the Union Home Secretary dated 25.2.2022, he has emphasised that by virtue of contents of paragraph-6(i), (vi), (vii) and (viii) thereof, all restrictions that had been created during the spread of pandemic COVID-19, stood withdrawn. Thus, public transport, inter-State movement and working of at all offices, (private and government), was restored without capacity restrictions. That step having been taken almost a year before issuance of the impugned notifications, there existed no justification or fact circumstance that may be remotely described on the 'force majeure' circumstance as may have informed the Council to make a recommendation or as may have enabled the Central and or the State Government to issue the impugned time extension notifications under Section 168A of the Central Act and the State Act.

62. Shri Gaurav Mahajan appearing for the CBIC would submit, in none (except one) challenge has been raised to the validity of Section 168A of the Act. Referring to the Central Act and the State Act, he would submit that both enactments contemplate a self-assessment mechanism. Unlike pre-existing law which was based on the principle of regular assessment to follow (almost by way of a necessary consequence), the filing of Annual Return, the GST regime is based on self-assessment arising as a consequence of filing of Annual Return. Only where tax may not have been paid or short paid or erroneously refunded etc., adjudication proceeding may arise, to recover such tax not paid or short paid etc.

63. For that process to be activated, the Central Act and the State Act are dependent on the process of scrutiny and audit of the Annual Returns. Unless audit and scrutiny of the returns is first made, no occasion may arise to initiate adjudication proceeding under Section 73 of the Act. Here, it has been emphasised, none of the present cases involve proceeding under Section 74 of the respective Acts. Then referring to the Prefatory note attached to TOLO, it has been submitted that amendment was made to the law, as a direct result of the spread of COVID-19. The Ordinance followed by the Act/TOLA were enacted merely to deal with the consequences arising from the spread of COVID-19, amongst other on the Central Act and the State Act.

64. While a general relaxation was granted under Section 3 of TOLO, with respect to Act Nos. 27 of 1957, 22 of 2021, 17 of 2013, 22 of 2015, 28 of 2016, 3 of 2020, the Central Act is conspicuous by its absence in that list of enactments appearing in Section 2(1)(a) of the TOLO. Insofar as the Central Act is concerned, TOLO/TOLA made special mention by incorporating Section 168A to the Central Act. Relying on the same, he would submit, there is a clear legislative understanding discernible from a plain reading of the said provision to deal with and provide differently all taxation and other laws in one way and the Central Act in another. In the Central Act, a separate section 168A, was incorporated.

65. Referring to the Explanation thereto, it has been submitted, the provisions of Constitution of India, he would submit, the Central Act and the State Act would take effect from the date to be recommended by the Council. Thus, in his submission, Constitution has given primacy to the Council in matters of Central Act and the State Act. Referring to the Resolution recorded in the 49th Meeting of the Council, a requirement was felt to further extend the limitation for reason of reduced staff, staggered timing and exemption to certain categories of employees from attending offices. This occurrence though referable to the period prior to the date of issuance of the impugned notifications., yet, that had led to much delays in processing of Annual Returns involving procedures of scrutiny and audits. That task could only be attempted after the COVID restrictions were lifted. By that time, not only the Annual Returns for F.Y. 2017-18 had been filed upon expiry of the extended last date but the last date to file the Annual Returns for the F.Y. 2018-19, 2019-20 and 2020-21 had also expired. Here, it may be noted, the last date of filing of the return for F.Y. 2017-18 was extended to 7.2.2020 (as noted above) whereas last date for filing returns for F.Y. 2019-20 and thereafter was never extended.

66. Then, it has been submitted, the earlier extension of time granted under Section 168A of the Act, that expired on 30.9.2022, was insufficient. The words - "due to force majeure" i.e. due to COVID-19 would also include within the plain meaning the after effects that spring directly from the occurrence of the spread of the pandemic COVID-19. Thus, Shri Mahajan has resisted the submissions advanced by learned counsel for the petitioners that the words - "due to force majeure" would refer to the period co-terminus with the spread of pandemic COVID-19. Since various Annual Returns had already been filed in the meantime and so to say life had moved on, multitude of transactions and work got piled in revenue offices. That piling of work and slow down of revenue activity was attributable directly to the COVID circumstance. Therefore, according to him,

Section 168A of the Act enabled the Central and State governments to issue appropriate notifications, to deal with the situation that had been caused "due to force majeure". Other than the COVID-19 circumstance existing, due action would have been taken, at the relevant time. Thus, no other fact circumstance exists for the issuance of the impugned notifications. Here, he has also referred to the recommendation of the Law Committee noted in the Minutes of the 49th GST Council, taking note of such facts.

67. To buttress his submission, Shri Mahajan would submit, challenge has arisen in the context of legislative function and not an administrative action. So long as the delegate of the principal legislature was vested with the authority to issue the impugned notifications and insofar as relevant circumstances are clearly seen to exist - that prompted the exercise of delegated function and further inasmuch as the procedural requirements, of prior recommendation of the Council did exist, the test of reasonableness stands satisfied.

68. Here, he has referred to **State of Tamil Nadu Vs. P. Krishnamurthy & Ors., (2006) 4 SCC 517** to submit that there exists a presumption in favour of constitutionality and validity of a subordinate legislation and the burden to prove otherwise remains on the challenger i.e. the petitioners before this Court. Further, as to the grounds on which subordinate legislation may be struck down, amongst others, it may be either for lack of legislative competence or violation of fundamental rights or violation of another statute or failure to conform to the statute or repugnancy to other laws of the land or manifest arbitrariness. In considering the challenge raised to the subordinate legislation, the Court may consider if the impugned subordinate legislation is directly consistent with the mandatory provisions of the statute under which it had been issued. But where the inconsistency or non-conformity is not with respect to any specific provision but the object and scheme of the parent Act, the Court would proceed with caution before reaching the conclusion of invalidity.

69. Therefore, in his submission, the action by the Central Government and the State Government in issuing the impugned notifications is to be examined in the context of the Central Act and the State Act. That inconsistency may not be reached solely on the strength of the language of Section 168A of the Central Act and the State Act but by examining the context in which that section has been incorporated.

70. Referring to the Explanation of Section 168A of the Central Act and the State Act, he would submit besides the specific circumstances enumerated therein of war, epidemic, flood, drought, cyclone and earthquake and other calamity caused by nature, a residuary clause exists to include an event that may otherwise affect of the implementation of any of the provisions of the Act. In his submission, the last appearing words in the Explanation enlarge the scope of applicability under Section 168A of the Act to other circumstances not attributable directly to unforeseen and clearly definable events identified as "force majeure" circumstance. Thus, disruption of the revenue functioning over a long period of time itself is a circumstance that may fall within the description "otherwise affected the implementation of the provisions of the Act" appearing in Section 168A of the Act. That discussion also exists in the minutes of the Council.

71. Resisting the submissions advanced by learned counsel for the petitioners of colourable exercise, reliance has been placed on **All India Bank Officers Configuration Vs. Regional Manager, C.B.I., Neutral Citation (2024) INSC 389**. It has thus been submitted, no colourable exercise may be attributed to State and Central Governments inasmuch as, Section 168A of the Central Act and the State Act lays down the legislative policy but leaves the circumstance to be appreciated by the Executive - its delegate, to exercise that power on the existence of those circumstances. Thus essential legislative function cannot be described to have been left to the imagined appreciation of the Executive.

72. Reliance has been placed on **Naresh Chand Agarwal Vs. Institute of Chartered Accountants of India, Neutral Citation 2024 INSC 94**, to emphasize that the Court may first determine and consider the source of power which is relatable to the rule and second, it must determine the meaning of subordinate legislation itself. Finally, it must decide whether the subordinate legislation is consistent to the scope of power delegated. Then, relying on **Reckitt Benckiser India Private Limited Vs. UOI (2024) GSTL 113 (Del)**, it has been submitted, the words - *"with respect to"* are similar to the words "in respect of" used under Section 168A of the Central Act and the State Act. Those are words of wide amplitude and thus the power delegated to the Central Government and the State Government under that provision of law must be interpreted to include ancillary, incidental and necessary matters. It may not be confined to the direct actions as propounded by learned counsel for the petitioners. Therefore, the words "in respect of" though used in conjunction with the words "actions" do not restrict the exercise of power under Section 168A of the Central Act and the State Act to pending adjudication proceedings, only. The circumstances would have to be looked at holistically i.e. in the scheme of the Act in which the adjudication proceedings may arise.

73. Thus, in the first place the legislature and its delegate were conscious of the fact that arising from COVID-19 circumstances, resulting in reduced staff at government offices with restricted timings and exemption to certain class of employees - all directly attributable to COVID-19 circumstance, scrutiny and audit of annual returns had been impeded. That work of scrutiny and audit being the necessary preparatory work before initiating adjudication, it cannot be gainsaid that the revenue authorities are at fault in not carrying out the audit and scrutiny during the period of complete lockdown or during the period of enforcement of the restrictions with respect to travel, office attendance and office timings. It also cannot be ignored that during the continuance of such measures Annual Returns for subsequent years also came to be filed. Hence, as a circumstance necessitating the exercise of legislative power under Section 168A of the Central Act and the State Act, sufficient material existed. In the context of challenge raised to a legislative action, the revenue authorities or the respondents may not be burdened to establish the exact volume of work that may have arisen or may have been pending on the date of issuance of the impugned notifications. Insofar as existence of circumstance cannot be disputed and its consequence is not denied, it cannot be said that the delegate had acted outside the scope or channel of delegation made under Section 168A of the Central Act and the State Act.

Directly on the issue, the Kerala High Court in **Faizal Traders Pvt. Ltd. Vs. Deputy Commissioner Central Tax and Another, Neutral Citation: 2024 KER 10314** has repelled a similar challenge raised to the impugned notifications.

74. Last, Sri Mahajan has laid emphasis on the undeniable fact of the COVID-19 pandemic having spread in the country soon after expiry of the extended date of filing of Annual Return for the F.Y. 2017-18. Thus, according to him, no scrutiny or audit of Annual Return for the F.Y. 2017-18 may have taken place prior to the date of filing of Annual Return. In normal circumstance that would could have started soon after expiry of the last date being 07.2.2020. That work was completely disabled occasioned by the spread of the pandemic COVID-19. The lockdown itself was declared on 25.3.2020. It was followed by extreme measures taken by the Central Government under the Disaster Management Act, 2005 restricting the movement of citizens, curtailing their activities and resulting in staggered attendance at government offices with restricted timings and exemption to certain class of employees. Only minimum/necessary works were being performed at government offices, including by the revenue authorities. Therefore, the action taken by the Central and the State Governments/delegates is in conformity to the provisions of Section 168A of the Central Act and the State Act. Sri Mahajan would submit, neither the Council nor the Government have acted mechanically.

75. Besides the discussion offered to the circumstances and the 'force majeure circumstance' and their consequences resulting in non-initiation/completion of the preliminary steps that were required to be undertaken before any valid adjudication may have arisen i.e. steps involving scrutiny and audit, both, the Council as well as the Central Government were mindful of the fact that such circumstance may only affect proceedings that may arise under Section 73 of the Act not involving allegations of fraud etc. Thus, contrary to the request of certain tax administrations to extend the time limits to initiate proceedings under Section 74 of the Central Act, the recommendation made by the Council and the action taken by the Central Government were to deny that request. Extension of limitation was granted only to actions contemplated in Section 73 of the Act i.e. proceedings arising from filing of regular Annual Returns and proceedings as may arise upon due scrutiny and audit of such returns. Since, in the opinion of the Council as found approval of the Central Government, only those proceedings had been obstructed for reasons beyond the control of the revenue authorities upon spread of pandemic COVID-19, that extension was granted. Even there the recommendation makes it plain that the same would be done by way of one last measure. Therefore, the tax administrations were impliedly advised to act with diligence or face consequence of adjudication proceedings (under Section 73) being rendered time barred.

76. Sri S.P. Singh learned Additional Solicitor General of India assisted by Sri N.C. Gupta appearing for the Union of India has additionally submitted that the Supreme Court in **re:Cognizance for extension of limitation (supra)** had clearly provided that the period 15.3.2020-28.2.2022 would stand excluded for the purposes of limitation that may be prescribed under any general or special law in respect of judicial and quasi judicial proceedings. Therefore, though it may not be completely wrong on part of the

learned counsel for the petitioners to contend that the own appreciation of the CBIC remained that the said order was not applicable to adjudication proceedings inasmuch as by separate circular issued, that position of fact was stated by the CBIC, at the same time it can never be denied that as a fact, the period 15.3.2020-28.2.2022 was a period of disability suffered by the judicial and quasi judicial authorities. Read strictly, no appeal or other proceeding before a judicial or quasi judicial authority could ever be rendered time barred for reason of the limitation of time having expired during that disabling period 15.3.2020-28.2.2022. That judicial notice having been taken by the highest Court of the land and it having been thus recognised that no judicial or quasi judicial proceeding could be conducted for reason of disablement occasioned by spread of the pandemic COVID-19, the similar appreciation made by the Council while making a recommendation though couched differently, cannot be faulted for the reasons and circumstances pressed by the petitioners. In the present case, the period during which a scrutiny or audit or adjudication may have arisen for F.Y. 2017-18, began on 08.2.2022. Barely a month thereafter it got disabled, on 15.3.2020. It remained disabled till 28.2.2022. He has also referred to and relied on the decision of the Supreme Court in **Dhanrajamal (supra) and Super Agrotech Ltd. Vs. State of U.P. and Others, (2006) 9 SCC 203**. Also, he has relied on the decision of the Supreme Court in **Vivek Narayan Sharma and Others Vs. Union of India and Others (2023) 3 SCC** 1 to rely on the principle that a judicial review being claimed may not extend to test the fairness of the decision but only to the manner in which it may have been taken. Decisions that arise on consideration of numerous factors may never be tested on the merits of the decision made.

77. Last, it has been submitted that the impugned notifications are not original. Those are notifications to modify the principal notification being Notification Nos. 35/2020 dated 03.4.2020 and 445 dated 11.5.2020. Only because the time extension granted by the original notifications required revision/enhancement, the impugned notifications came to be issued. The petitioners having failed to raise any challenge to the original notifications, they may never be heard to challenge the modification notifications.

78. Sri Nimai Das learned Additional Chief Standing Counsel appearing for the State Government has also relied on the decision in **Vivek Narayan (supra).** Then referring to the words of the legislature "due to force majeure" he has laid great emphasis that the legislative words do not indicate or contain a legislative policy limiting the delegate i.e. Central or the State Government to act only during the subsistence of a 'force majeure' circumstance. According to him, the Explanation to Section 168A itself makes it plain that contrary to the submissions advanced, the legislative intent never required the delegate to act during the occurrence of 'force majeure'. By very nature an earthquake may last only for a few seconds or minutes. It may never last for even an hour, in continuation. Therefore, it would be wholly impossible to issue a notification during that short occurrence that too after the recommendation of the Council in that short time. If issued for that duration, it would be of no use. In his submission, the words "due to force majeure" clearly refer to the after-effects of a 'force majeure'

occurrence whether epidemic or earthquake or cyclone. Those being acts over which humans may have no control, yet carry potential to disrupt human activity for an indefinite period of time, depending upon place, time, intensity and duration of their occurrence, the after effects caused by such occurrences would remain a circumstance to be considered by the legislative body. To the extent the principal legislature has delegated that evaluation/function to the Central and the State Governments and the issuance of the impugned notifications had been made upon the recommendation made by the Council, no defect may be found.

79. He has also referred to the advisory issued by the World Health Organisation dated 05.5.2023. Though that document is not part of the case record, it has been submitted, the issuance of that document cannot be denied. He would thus submit, the World Health Organisation first declared the pandemic COVID-19, not a Global Health Emergency, as late as on 05.5.2023. Therefore, the contention advanced by learned counsel for the petitioners that the COVID-19 circumstance came to an end in the year 2022, has been resisted. He would submit, it has clearly recognised that the COVID-19 pandemic and the circumstances arising therefrom continued to exist till May 2023.

80. As to the submission advanced by Sri Nishant Mishra that the impugned notification (by the State Government), was not issued on the strength of the recommendation made by the Council, that has been objected. In his submission, that Notification was also issued on the strength of the recommendation of the Council.

81. Then referring to the period of disruption recognised by the Supreme Court being 15.3.2020-28.2.2022 which is 01 year 11 months and 15 days, it has been submitted, if that period is to be excluded from the period of limitation that was otherwise available to the revenue authorities to pass adjudication orders for the F.Y. 2017-18 and that period were to be added to the normal period of limitation that existed from the date 07.2.2020 (last date of filing of return) for F.Y. 2017-18, the time limitation to make adjudication order for the F.Y. 2017-18 would exist practically upto 22.1.2025. The impugned notifications only seek to extend that limitation upto 31.12.2023 i.e. the extended period of limitation is short by one year than may otherwise be availed on the principle recognised by the Supreme Court.

82. Sri Ankur Agarwal learned Standing Counsel has laid great emphasis on the decision of the Supreme Court in **Vivek Narayan (supra)** to submit that the scope of judicial review has to be kept confined within the well recognised parameters of law. Neither, the Courts may interfere in policy decisions generally nor the Courts may seek to venture to sit in judgment over economic policy matters. If the action is not palpably arbitrary, the same may never be interfered. As to the palpable arbitrariness, it has been submitted, there is none. The desirable extension of time is per se not measurable. It is a matter of perception. Individual petitioners may only remain concerned with their individual facts. They neither have the role to make an overall assessment nor they may have the capacity to make that consideration. Consideration to extension of limitation is essentially a legislative policy decision. Insofar as it is not the case of the petitioners, that there existed no material whatsoever and insofar as it cannot be denied that the extension of time limitation was granted in the context of

COVID-19 circumstance, there is no palpable arbitrariness in the action taken by the respondents. He would further contend that the World Health Organisation declared the end of Global Health Emergency, after issuance of the impugned notifications. Therefore, upto that time, material existed of continuance of the pandemic COVID-19.

83. Before we proceed to deal with the submissions advanced, it would be useful to take note of relevant provisions of the statutory law, notifications and statutory actions, relevant to the dispute brought before us, as they existed at the relevant time. First, Section 44 (1) of the Central Act and State Act read as below:

"Section 44 (1) Annual Return

(1) Every registered person other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year.

Provided that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual return for such class of registered persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

84. Notification No.6 of 2020 dated 03.02.2020 issued by CBIC and Notification No.509 dated 05.02.2020 issued by the Commissioner Commercial Tax, extended the last date of filing of Annual Return for FY 2017-18 for the State of U.P., to 07.02.2020. Then, Section 73 of the Central Act and the State Act (1), (2) (9) (10) reads as below:

Section 73 - *Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts*

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order…..

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years

from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

85. The Prefatory note appended to TOLO reads as below:

Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020

(No. 2 of 2020)

Promulgated by the President in the Seventy-first Year of the Republic of India.

An Ordinance to provide relaxation in the provisions of certain Acts and for matters connected therewith or incidental thereto.

WHEREAS, in view of the spread of pandemic COVID-19 across many countries of the world including India, causing immense loss to the lives of people, it has become imperative to relax certain provisions, including extension of time limit, in the taxation and other laws.

AND WHEREAS, Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now therefore, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

86. Since provisions of TOLO & TOLA are pari-materia, for the sake of brevity, the provisions of Section 7 of TOLA read as below:

7. After section 168 of the Central Goods and Services Tax Act, 2017, the following section shall be inserted, namely:

168A. Power of Government to extend time limit in special circumstances:

(1) Notwithstanding anything contained in this Act, the Government may, on the recommendations of Council, by notification, extend the time limit specified in, or prescribed or notified under, this Act in respect of actions which cannot be completed of complied with due to force majeure.

(2) The power to issue notification under sub-section (1) shall include the power to give retrospective effect to such notification from a date not earlier than the date of commencement of this Act.

Explanation-For the purposes of this section, the expression "force majeure" means a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of this Act.

87. The final order passed by the Supreme Court in **Re: Cognizance for Extension of Limitation (supra)** (paragraph nos.1, 2 5 and 6) reads as below.

(1). In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/suits/ appeals/all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.

(2) On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order

dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.....

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi- judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

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

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

6. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn"

88. At the same time, first extensions of time were provided invoking the general power to remove difficulties, enacted under Section 172 of the Central Act and the State Act. However, those extensions were granted arising from different circumstances namely, teething problems faced by all stake holders upon introduction of Central Act and the State Act. We find those are not relevant. Therefore, no reference is being made to the same.

89. Acting under the new provision - Section 168A of the Act, the first action emerged by issuance of Notification No. 35 of 2020 dated 03.04.2020 by the Central Government and a parallel/pari materia Notification No. 445 dated 11.05.2020 issued by the State Government. For ready reference, we extract the relevant portion of the Notification No. 35 of 2020. It reads as below :

"Notification-GST-Central GST (CGST)
MINISTRY OF FINANCY
(Department of Revenue)
(CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS)

NOTIFICATION No. 35/2020-Central Tax
"New Delhi, the 3rd April, 2020

G.S.R. 235(E). *In exercise of the powers conferred by section 168A of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), read with*

section 20 of the integrated Goods and Services Tax Act, 2017 (13 of 2017), and section 21 of Union Territory Goods and Services Tax Act, 2017 (14 of 2017), in view of the spread of pandemic COVID-19 across many countries of the world including India, the Government, on the recommendations of the Council, hereby notifies, as under,-

(i) where, any time limit for completion or compliance of any action, by any authority or by any person, has been specified in, or prescribed or notified under the said Act, which falls during the period from the 20th day of March, 2020 to the [30th day of August, 2020], and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended up to the [31st day of August, 2020], including for the purposes of –

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the Acts stated above; or

(b) filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record, by whatever name called, under the provisions of the Acts stated above;

but, such extension of time shall not be applicable for the compliances of the provisions of the said Act, as mentioned below-

(a) Chapter IV;

(b) sub-section (3) of section 10, sections 25, 27, 31, 37, 47, 50, 69, 90, 122, 129;

(c) section 39, except sub-section (3), (4) and (5);

(d) section 68, in so far as e-way bill is concerned; and

(e) rules made under the provisions specified at clause (a) to (d) above;"

90. Then, action was taken under the new law vide issuance of Notification No. 14 of 2021 dated 01.05.2021 issued by the Central Government and a parallel/pari materia Notification No. 496 dated 28.06.2021 issued by the State Government.

91. Thereafter, the following agenda item arose at the 47th Meeting of the GST Council held on 28/29 June 2020.

"1. Section 73 of the CGST Act, 2017 provides that the proper officer shall issue the order demanding any tax that has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

2.1 Some of the members of the Law Committee highlighted the problem being faced by the taxpayers as well as tax administration in respect of demands and refunds getting time barred due to long period of lockdown/restrictions on account of Covid-19 pandemic. A request was made to consider extension of timelines in respect of proceedings under:

i. Section 73 and 74

ii. Section 54 and 55

2.2 The issue was deliberated by the Law Committee in its meeting held on 11.04.2022 and 07.05.2022. The Law Committee observed that centre as well as state governments were working with

reduced staff, along with staggered timings and exemption to certain categories of employees from attending offices, from time to time during COVID period. Further, it was a conscious policy decision not to do enforcement actions in the initial period of implementation of GST law, thereby no action for scrutiny, audit etc. could be undertaken during initial period of GST implementation. Since the due date of filing Annual Return for FY 2017-18 was 5th/7th February, 2020, based on which limitations for demand under the Act are linked, and since the onset of COVID happened immediately after that, thereby, audit and scrutiny for FY 2017-18 were impeded due to various restrictions during COVID period.

2.3 The Law Committee, accordingly, recommended that ***limitation under section 73 for FY 2017-18 for issuance of order in respect of demand linked with due date of annual return, may be extended till 30th September, 2023 under the powers available under section 168A of CGST Act.*** *Law Committee further took a view that no such extension is required for timelines under section 74 of the Act, as the Act provides for sufficient limitation time of 5 years in respect of such cases, i.e. much beyond the period affected by COVID-19.*

2.4 Law Committee also observed that taxpayers may also have faced difficulties in timely filing of the refund claims during the COVID period. Besides, the tax officers were also hampered in issuing SCN during COVID period, in respect of erroneous refunds sanctioned. Therefore, the Law Committee also recommended that time period from 01.03.2020 to 28.02.2022 may be excluded from the limitation period for filing refund claim by an applicant under section 54 and 55 of CGST Act, as well as for issuance of order / demand in respect of erroneous refunds under section 73, by exercising power under section 168A of CGST Act.

3. A draft notification under section 168A of CGST Act, as per the above recommendations of the Law Committee, is placed at Annexure A.

4. In view of the above, the agenda, along with the draft notification, is placed before the GST Council for deliberation and approval."

92. The third action taken under Section 168A of the Act was witnessed by issuance of Notification No. 13 of 2022 dated 05.07.2022 issued by the Central Government and Notification No. 596 dated 21.07.2022 issued by the State Government. Again those are pari materia. For ready reference, we take note of the contents of Notification No. 13 of 2022. It reads as below :

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
NOTIFICATION No. 13/2022-Central Tax

"New Delhi, the 5th July, 2022

G.S.R.....*(E).- In exercise of the powers conferred by section 168A of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereinafter referred to as the said Act) read with section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) and section 21 of the Union Territory Goods and Services Tax Act, 2017 (14 of 2017) and in partial modification of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), No. 35/2020-Central Tax, dated the 3rd April, 2020, published in the Gazette of India,*

Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 235(E), dated the 3rd April, 2020 and No. 14/2021-Central Tax, dated the 1st May, 2021, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 310(E), dated the 1st May, 2021, the Government, on the recommendations of the Council, hereby,-

(i) extends the time limit specified under sub-section (10) of section 73 for issuance of order under subsection (9) of section 73 of the said Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilized, in respect of a tax period for the financial year 2017-18, up to the 30th day of September, 2023;

(ii) excludes the period from the 1st day of March, 2020 to the 28th day of February, 2022 for computation of period of limitation under sub-section (10) of section 73 of the said Act for issuance of order under subsection (9) of section 73 of the said Act, for recovery of erroneous refund;

(iii) excludes the period from the 1st day of March, 2020 to the 28th day of February, 2022 for computation of period of limitation for filing refund application under section 54 or section 55 of the said Act.

2. This notification shall be deemed to have come into force with effect from the 1st day of March, 2020."

93. Taking note of the interim order passed by the Supreme Court during the pendency of that matter, and the suspension of limitation provided therein, the CBIC issued Circular No. 157/13/21-GST dated 20.07.2022. After taking note of the order dated 27.04.2021, it records that legal opinion was sought and period of extension of limitation under Section 168A was considered. Based on that opinion, it was observed as below :

"On the basis of the legal opinion, it is hereby clarified that various actions/compliances under GST can be broadly categorised as follows :-

(a) ***Proceedings that need to be initiated or compliances that need to be done by the taxpayers :-*** *These actions would continue to be governed only by the statutory mechanism and time limit provided/extensions granted under the statute itself. Various Orders of the Hon'ble Supreme Court would not apply to the said proceedings/compliances on part of the taxpayers.*

(b) ***Quasi-Judicial proceedings by tax authorities*** *:- The tax authorities can continue to hear and dispose off proceedings where they are performing the functions as quasi-judicial authority. This may interalia include disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc. Similarly, appeals which are filed and are pending, can continue to be heard and disposed off and the same will be governed by those extensions of time granted by the statutes or notifications, if any.*

(c) ***Appeals by taxpayers/tax authorities against any quasi-judicial order*** *:- Wherever any appeal is required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the time line fo*r the same would stand extended as per the Hon'ble Supreme Court's order.

5. In other words, the extension of timelines granted by Hon'ble Supreme Court vide its Order dated 27.04.2021 is applicable in respect of any appeal which is required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under Central Act and the State Act."

94. The fourth action witnessed upon enforcement of Section 168A and the one which is impugned in these proceedings arose pursuant to the 49th Meeting of the Council held on 29.02.2023. In that at agenda item 4(vii), the following discussion emerged:

"5.7 Principal Commissioner: (GSTPW) informed that there have been requests from tax administrations for further extension of time limit under Section 73 of CGST Act for issuance of Show Cause Notices (SCN) and Orders for financial year 2017-18, 2018-19 and 2019-20, considering that the scrutiny and audit were delayed because of Covid-19 pandemic. He informed that the issue was discussed by the Law Committee and it was observed that earlier, such extension was given for the F.Y. 2017-18. It was felt by the Law Committee that while there may be a need to provide additional time to the officers to issue notices and pass orders for FY 2017-18, 2018-19 and 2019-20 considering the delay in scrutiny, assessment and audit work due to COVID-19 restrictions, however, the same need to be made in a manner such that there is no bunching of last dates for these financial years as well as for the subsequent financial years. After detailed deliberations, Law Committee recommended that such time limits may be extended for another three months each for the FY 2017-18, 2018-19 and 2019-20. It was discussed in detail in officers meeting where one view was that extension for FY 2017-18 had already been given and further extension may create a perception that it is not a tax friendly measure and against the interest of taxpayers.

5.7.1 The Secretary stated that the Law Committee has recommended the extension of time limit for issuance of SCN and orders. However, the time period for issuance of notices and passing orders for these financial years has already been extended considerably due to extension in due dates of filing annual returns for the said financial years. Further, for FY 2017-18, the date of passing order has already been extended till September 2023. It has been proposed to extend it further from September 2023 to December 2023. He mentioned that while the request of some of the tax administrations was to extend the time limit for a longer period, however, keeping the taxpayers' interest in mind, the Law committee has recommended an extension of only three months for these three financial years. Since all the States have agreed, the said time limits could be extended.

5.7.2 Hon'ble Member from Bihar stated that while this proposal could be considered, however, it should be decided that such an extension in timelines for these financial years under sub-section (10) of section 73 of CGST Act is being made for the last time.

The Council agreed with the recommendation of the Law Committee made in agenda item 4(vii), along with the proposed notification."

95. Consequently, the Central Government issued the impugned Notification No. 9 of 2023 dated 31.3.2023 and the State Government issued impugned Notification No. 519 dated 24.4.2023. They are pari materia. In material part, Notification No. 9 of 2023 reads as below:

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE

DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
New Delhi: 31.03.2023

Notification No. 09/2023 - Central Tax

S.0.1564(E). In exercise of the powers conferred by section 168A of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereinafter referred to as the said Act) read with section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), and section 21 of the Union territory Goods and Services Tax Act, 2017 (14 of 2017) and in partial modification of the notifications of the Government of India, Ministry of Finance (Department of Revenue), No. 35/2020-Central Tax, dated the 3rd April, 2020 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 235(E), dated the 3rd April, 2020 and No. 14/2021-Central Tax, dated the 1st May, 2021 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (1), vide number G.S.R. 310(E), dated the 1st May, 2021 and No. 13/2022-Central Tax, dated the 5th July, 2022, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 516(E), dated the 5th July, 2022, the Government, on the recommendations of the Council, hereby, extends the time limit specified under sub-section (10) of section 73 for issuance of order under sub-section (9) of section 73 of the said Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilised, relating to the period as specified below, namely:-

(1) for the financial year 2017-18, up to the 31st day of December, 2023;

(ii) for the financial year 2018-19, up to the 31st day of March, 2024;

(iii) for the financial year 2019-20, up to the 30th day of June, 2024.

96. Coming to the submissions, we note, broadly the submissions have been advanced as to the validity of the action taken. Though worded differently by two Senior counsel for the petitioners, principally, it has been contended, the Central Government and the State Government could not have acted independent to the conditions of the delegation made under Section 168A of the Central Act and the State Act. To the extent the nature of power vested thereunder is concerned, we find ourselves in agreement with the principle that the said sections provide for conditional legislation to arise at the hands of the delegate of the principal legislature i.e. the Central Government and/or the State Government.

97. Also, as to the submission that the said provision authorizes the delegate to act in special circumstances and not by way of general power to be exercised to remove difficulty, we find ourselves in agreement with that submission advanced by learned counsel for the petitioners. Thus, in contrast to Section 172 of the Central Act and the State Act, powers under Section 168A of the Act, may be exercised:

(i) On the recommendation made by the Council;

(ii) By issuance of notification to extend the time limitation specified or prescribed or notified under the Central Act and the State Act;

(iii) In respect of actions which cannot be completed or complied,

(iv) Due to *"force majeure"*.

98. As to the nature of *"force majeure*", the Explanation to the said section offers an inclusive definition namely - war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by the nature. The words "otherwise affected" take colour from the terms and expressions appearing earlier.

99. In addition to the four conditions noted in the preceding paragraph, the Explanation also suggests that the power may be exercised in a situation where in the presence of a "*force majeure*" circumstance, the implementation of any of the provisions of Central Act and the State Act may have been impaired, to the extent it may necessitate extension of time limits, referred to Section 168A(1) of the Act.

100. Tested on the above principle, as a fact, the recommendation of the Council to issue the impugned notifications - to extend the time limit, exist. Also, the occurrence of the "force majeure" circumstance i.e. epidemic COVID-19 is undisputed. Therefore, it is required to be considered is whether:

(i) that power was exercised in respect of actions which could not be "completed or complied" and,

(ii) due to "force majeure".

101. The action with respect to which the challenge has arisen is issuance of adjudication notices under Section 73(2) of the Central Act and the State Act and passing of orders under Section 73(9) of the Central Act and the State Act. Clearly, for both purposes, limitation of time prescription exists inasmuch as adjudication order is required to be passed within three years from the last date of filing of an Annual Return. Also, with respect to issuance of show cause notice, Section 73(2) requires such notice to be issued at least three months prior to expiry of time limitation to pass the adjudication order. Therefore, by way of a special power vested under Section 168A of the Central Act and the State Act, the Central Government and the State Government were authorized to issue necessary notifications.

102. The submission advanced by learned Senior counsel and other counsel for the petitioners that since adjudication notices were not issued, the period of limitation never started running and that there was no requirement to conduct scrutiny or audit/before issuance of those and therefore, the revenue authorities were not disabled from conducting that exercise, requires serious consideration.

103. In the first place, the powers under Section 168A of the Act is legislative and not an administrative power. While submissions have been advanced by some of learned counsel for the petitioners suggesting, the power under Section 168A of the Act was an administrative or executive power, at the same time, as submitted by Sri Mahajan, there can be no doubt as to the true nature of that power. Prescription of limitation to perform an action is a pure legislative function. In absence of any doubt thereto, the extension of limitation prescribed by law also remains legislative. The power to condone delay may

be granted both to the executive and the judicial bodies, at the same time, the prescription in law, as to limitation remains exclusively, a legislative function.

104. Seen in that light, discretion existed with the principal legislature to prescribe such limitation as it may have considered proper. In fact, it is the submission advanced by some of the learned counsel for the petitioners that if the prescription of limitation is provided by the impugned notification had been made by the principal legislature, there may not have arisen any valid challenge thereto.

105. Therefore, the narrow compass in which the present issue is to be examined is: if the delegation made is uncanalised and/or if the delegate had acted contrary to the conditions and stipulations of the principal legislation. On the first issue, there is no doubt. In fact, it is the submission of Shri Praveen Kumar and learned Senior counsel and the other counsel for the petitioners that the principal legislature has laid down strict conditions for exercise of special powers to extend the limitation. As to the second issue, we need to examine the manner in which such extension may have been granted.

106. The occurrence of the pandemic COVID-19 is an admitted fact. Further, arising therefrom, **Re:Cognizance for Extension of Limitation (supra)**, the Supreme Court took cognizance of that occurrence and relaxed the period of limitation (in all), beginning 15.03.2020 to 28.02.2022. Besides, consideration of the same also exists in the minutes of meeting of the Council at its 47th meeting dated 28-29.06.2022 and at its 49th meeting dated 18.02.2023. The agenda item at those meeting has also been relied by all learned counsel. In the minutes of the 47th meeting of the Council, it had been clearly noted that the scrutiny and audit of Annual Returns for F.Ys. 2017-18, 2018-19 and 2019-20 was delayed because of "COVID-19 pandemic". Then, those minutes further record "considering the delay in scrutiny, assessment and audit work due to COVID-19 restrictions", it was desired to avoid "bunching" of last dates for those three Financial Years. On that consideration, the Law Committee recommended to the Council for appropriate time extensions for the F.Ys. 2017-18, 2018-19 and 2019-20. The Law Committee further took note of the concern expressed that such extension may not be a "tax-friendly" measure and may work against tax payers. The Council further took note of the fact that by virtue of earlier extensions granted, time stipulation had been considerably extended. Thereafter, all States/Member of participants of the Council agreed to the time extension for three months for the three Financial Years. Accordingly, the Council accepted the recommendation and proposed the draft notification.

107. That recommendation and issuance of the consequent notification, are not under challenge. It appears, another request arose before the Council for another time extension to be granted with respect to proceedings contemplated under Section 73 of the Central Act and the State Act, for the F.Ys. 2017-18, 2018-19 and 2019-20. In that regard, the discussion at the 49th meeting of the Council further reveals - representations had arisen before the Council from some tax administrations, seeking further extension of timelines. The basis for such representations have been noted in the minutes as "difficulties were faced by the government department during COVID period", (i) due to reduced staff; (ii) staggered timing; (iii) exemption to certain

categories of employees and; (iv) leading to delay in process of scrutiny and audit. For those reasons, it was represented to the Council that the proper functioning could arise only after COVID restrictions, were lifted. Further, it was represented that the earlier time extension granted was not sufficient, specifically considering the delay in scrutiny and audit process.

108. Upon that representation and its consideration, the Law Committee vide its meeting dated 8.2.2023 opined that it may not be desirable to extend the timelines as may lead to "bunching" of last dates of issuance of Show Cause Notices and passing of orders under Section 73 of the Act. At the same time, the Law Committee formed an opinion favourable to grant a limited extension of time. Accordingly, time extensions were granted for F.Y. 2017-18 up to 31.12.2023, for F.Y. 2018-19 up to 31.03.2024 and for F.Y. 2019-20 up to 30.06.20204.

109. Thus, in the context of a conditional legislative function exercised by the Central Government and the State Government on the recommendation made by its expert i.e., Council, we find it difficult to hold that there was no application of mind by the delegate in issuing the impugned Notifications. The material existed as has been discussed above. The application of mind is writ large on the face of the agenda and minutes relied by learned counsel for the petitioners and admitted to the respondents.

110. Once we have held that issuance of the time extension application was a legislative function and there existed material and due deliberation/consideration over/of to that material, before the legislative function was performed, the first condition of existence of circumstances for exercise of the said power described as conditional legislation, stood fulfilled. Therefore, the ratio of the decision of the Supreme Court in **Mohit Minerals Private Limited (supra)** is also of no avail. By way of principle it may not be doubted that the recommendations of the Council remained persuasive. The Central Government and the State Government were not duty bound to conform thereto. However, in absence of any fact shown to exist, the Central Government and the State Government have exercised their conditional legislative function in accordance with law. No palpable illegality or arbitrariness has been shown to exist as may warrant any deeper examination by the Court.

111. Next, we have to examine, if that consideration was enough and if it satisfied any further test laid down in Section 168A of the Central Act and the State Act. Here, we are unable to accept the submission advanced by learned counsel for the petitioner that there were mere difficulties faced by the revenue authorities in conducting scrutiny and audit. The period 15.03.2020 to 28.02.2022 remains the darkest period of our recent past, arising after the second World War. No calamity of equal magnitude has disrupted human life since then. In the context of a global village, that our world has become, the pandemic COVID-19 disrupted all human activities across all continents and left no strata of the society, organisation or institution or other entity, unaffected over a long duration of time. The full impact of the COVID-19 is still to be assessed.

112. Then, directly material to our discussion before the Council it had been specifically represented to provide for suitable extensions of time keeping in mind the fact that the scrutiny and audit work with

respect to Annual Returns for the F.Ys. 2017-18, 2018-19 and 2019-20 could not be done for reason of reduced working staff, staggered timings and exemptions granted to various category of employees, to attend office establishments, during the spread of the pandemic COVID-19. It was specifically included through the agenda item material that no action for scrutiny and audit etc. could be undertaken during the initial period of the GST implementation. That recital may not be cited as a self-disabling act of the revenue authorities. It is undisputed to the petitioners that the last date of filing of Annual Return for the F.Y. 2017-18 was extended up to 7.2.2020. Consequently, no scrutiny or audit for the F.Y. 2017-18 may have been (effectively) undertaken, before that day. That function may have arisen only within a reasonable time thereafter.

113. As to the construction of reasonable time, in the context of the legislative policy providing for a three year time (to frame an adjudication order), from the last date of filing of Annual Return and further keeping in mind the legislative policy providing for issuance of Show Cause Notice up to two years and nine months from the last date of filing of Annual Return, that reasonable period of time extended up to November, 2022.

114. While the order of the Supreme Court in **Re : Cognizance for Extension of Limitation (supra)** may not per se apply to an adjudication proceeding and it is not the case of the respondents that they claim direct benefit of that relaxation of limitation granted for the period 15.03.2020 to 28.02.2022, at the same time, we must remember that judicial notice was taken of the disabling events triggered by the spread of the pandemic COVID-19, by the highest Court of the land. That judicial recognition of that fact, was commonly known to all, itself is irrebuttable evidence of both - the extent of disablement and the length of time for which such disablement continued to exist, unabated. In face of that recognition and established truth, no use or purpose may be served in offering any deliberation. Therefore, we conclude, the revenue authorities were visited with a circumstance that was not of their making. It was not a mere difficulty of the usual kind. It was not a wholly temporary or transient impairment caused to their functioning. Beginning 15.03.2020, it had disabled the working of the revenue authorities, over a long period, occasioned by a *'force majeure*' circumstance..

115. The decision in **S. Kasi (supra)** is of no application to the present facts in view of distinction arising on the own strength of language of Section 168A of the Central Act and the State Act. Similarly the decision of the Jharkhand High Court in **M/s Rungta Mines Ltd. (supra)** is also of no application for the same reason. Though in that case the issue involved was with respect to adjudication and re-assessment proceedings under Jharkhand VAT Act, the opinion in that case is confined to the direct applicability of the order passed by the Supreme Court in **Re: Cognizance for Extension of Limitation (supra).**

116. It is equally admitted and undeniable to the petitioners that the time kept ticking and hard as the times were and despite continuance of the extreme circumstances and disablement accompanying, caused by COVID-19, life moved on. Economic activity was witnessed. Businesses continued to exist, resulting in Monthly and Annual Returns being filed both for the entire duration of time through which COVID-19 pandemic

spread (in waves), and continued to disable human activity. Thus, Annual Returns came to be filed for the subsequent F.Ys. 2018-19 and 2019-20 as well. All such returns remained subject to scrutiny and audit. It is that volume of work that has been taken note of and considered in the 47th and 49th meetings of the Council. With reference to that work, legislative decisions have been made, in the backdrop of the disruption caused by the pandemic COVID-19.

117. Also, we are also unable to accept the submission advanced by learned counsel for the petitioners that the process of framing adjudication order is independent of scrutiny and audit of Annual Returns. To offer that construct to the language of Section 73(1) would be over-simplistic. It is true that Central Act and the State Act specifically do not contemplate existence of limitation for prior scrutiny and audit, at the same time Section 61 of Central Act and the State Act provides that a Proper Officer may scrutinise the return, verify its correctness and, inform the registered person of the discrepancies noticed. If the explanation thereto is found acceptable, no further action is contemplated. Failure to comply with those conditions may invite action under Section 65, 66, 67 and even Section 73 of the Act. In that regard, provisions of Section 61 of the Central Act and the State Act read as below:

"Scrutiny of returns

61(1) The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74."

118. Again, under Section 65(7) of the Act, where an audit is conducted to tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised may result in action under Section 73 of the Act. For ready reference, Section 65(7) reads as below:

"Audit by tax authorities.

65.(1) ...

(7) Where the audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74."

119. To us, the above discussion is enough to persuade us to the conclusion that scrutiny and audit of Annual Returns is inherently linked to and is not independent of adjudication proceedings under Section 73 of the Central Act and the State Act. Though the Proper Officer may remain authorised to act under Section 73 of the Central Act and the State Act independent of an audit and scrutiny at the same time that

outcome would be dictated by facts of an individual case but not by way of a principle in law. In the entire scheme of the Central Act and the State Act, by way of procedure, steps contemplated under Section 61 and 65 would remain a normal occurrence. By very nature and by virtue of specific provisions of the Central Act and the State Act, those would have to precede action under Section 73 of those enactments.

120. The upshot of the above discussion is that the consideration offered by the Council in its 47th and 49th meetings, as has been extracted and discussed above was relevant to the exercise of power under Section 168A of the Central Act and the State Act. Neither the existence of material on which the discussion had arisen nor the discussion itself may be described as extraneous or irrelevant to the statutory requirement of Section 168A of the Act.

121. Again, we may remain reminded that the discussion and the decision made by the Central Government and the State Government on the advise/recommendation of the Council was not an administrative action but a legislative action. To the extent any legislature may have acted to provide for a law having nexus to the circumstance or the mischief sought to be addressed, to the extent it may be authorised to act in the manner it did, no fault may be found with the same. In exercise of judicial review, we may remain ever reluctant to explore the validity of that action beyond this point.

122. The decision in **S.R. Bommai (supra)** is not found applicable. In the first place, the issue arose in completely different law context of emergency provision under the Constitution of India. Even otherwise for reasons noted above, we find that the action that could not be completed or complied was adjudication function. The impossibility arose for reason of obstruction caused by the 'force majeure' circumstance to the preparatory action of scrutiny and audit. Once that obstruction had been caused and time lost to COVID-19, the legal and factual impossibility to conduct and conclude adjudication proceedings within the normal period of limitation of three years from the last date of filing of Annual Return, arose by way of a necessary consequence.

123. In the context of legislative action taken, upon a holistic consideration of the representations made by different tax administrations, the opinion of the Law Committee as also the own appraisal made by the Council, all of which is duly reflected in the agenda and the discussion relevant to the 47th and 49th meeting of the Council, the true test laid down in **Dwarika Prasad Sahu (supra)** is found inapplicable. That was a case of detention under Maintenance of Internal Security Act, 1971. It was the administrative order of detention that was in issue. Therefore, the test laid down in that case is wholly inapplicable and foreign to the challenge laid to legislative action, in the present case. In face of the discussion noted above, the decision in **D.C. Wadhwa (supra), Krishna Kumar Singh (supra), Raja Ram Jaiswal (supra), Gurdial Singh (supra) and Kalabharati Advertising (supra)** are all wholly irrelevant.

124. What then requires consideration is – if the words due to *"force majeure"* would include the period of time during which no lockdown may have been declared or during which human/economic activities may not have been specifically disrupted, by issuance of appropriate orders under the Disaster Management Act, 2005 etc. First, in the context of a legislative function, the writ Court sitting in judicial review may not look

to test the subjective satisfaction of the legislative body or its delegate to see if the law made had the exact/measurable fact justification, for its enactment. The legislative wisdom must remain insulated from that judicial query. Under the Constitutional scheme of division of powers, Courts may never be enthusiastic and may remain disinclined to test the subjective satisfaction of legislatures in enacting laws. In fact, the Courts are neither equipped nor they are expected to undertake that exercise.

125. Then as Sri Nimai Das, learned Additional Chief Standing Counsel has rightly submitted, there is intrinsic evidence in the provision of Section 168A of the Central Act and the State Act that clearly recommends to the Court that the exercise of that power is not intended to be made only during the sufferance of *"force majeure"* circumstance. Different *"force majeure"* events may visit the society and may impair its economic functioning for different durations with different intensities. By its very nature of "force majeure" circumstance as advanced by learned Senior Counsel for the petitioners and other learned counsel for the petitioners, remains unpredictable. Both as to its occurrence, duration of its continuance and the impact that it may leave, a *"force majeure"* event remains a mystery or atleast unpredictable to the human mind and perception, in real time. Only hindsight wisdom, that is so unique to a humans may give rise to a discussion or discourse as to what may have been done and what could have been done and what should have been done in the past. In the context of enacted laws, neither the petitioners nor the Courts may have a say. It would remain a subject best preserved to the legislature, to deal with in real time.

126. As submitted by Sri Mahajan, the words *"due to force majeure"* are preceded with a general expression *"in respect of"*. Thus besides intrinsic evidence existing in the Explanation to Section 168A of the Act (as discussed above), there is equally convincing evidence available in the use of the words *"in respect of"*. The legislature clearly did not intend to provide for additional limitation only to complete actions that had been already undertaken. The words *"in respect of"* are clearly used to enlarge the scope of exercise of the conditional legislation function. Thus, anything directly linked to the performance of action for which time limitation may have been specified, prescribed or notified under the Central Act and the State Act and which action is perceived *"cannot be completed or complied"*, the delegated/conditional legislation in the shape of Section 168A, may arise.

127. As discussed above, scrutiny and audit of returns was directly linked to framing of adjudication orders. To the extent that scrutiny and audit work was obstructed directly for reason of spread of the pandemic COVID-19, as was judicially noted in the order passed by the Supreme Court in **Re: Cognizance for extension of limitation (supra)** for the duration 15 March 2020 to 28 February 2022, it is not for this Court to reach another conclusion in that regard. Thus, the decision of the Supreme Court in **Energy Watchdog (supra)** and **Dhanrajamal Gobindram (supra)** are therefore not decisive of the issue involved in the present case. In view of judicial notice taken as to existence of *"force majeure"* circumstance upto 28.2.2022, there is no reason to conduct any further/deeper enquiry – as to its exact duration, in the context of challenge laid to a legislative action.

128. Submission that the resolution of the 49th meeting of the Council offered only a partial modification of the first time extension, also cuts no ice. The impugned notifications remains referable to exercise of legislative power, under Section 168A of the Central Act and the State Act. It was exercised in the manner prescribed. The fact that the Council chose to make a partial modification remains within the insulated realm of legislative wisdom.

129. The submission that the issuance of the impugned notifications are pre-judicial to the rights and interest of the tax payers does not find our acceptance in the context of the discussion made above. A legislative action cannot be complained of as being prejudicial on account of extension of limitation. Limitation, though statutory, is not a pre-existing vested right of any party. It gets created and extinguished in accordance with the statutory law. Insofar as the statutory law prescribes a limitation, no argument may arise against such prescription made. Further, in the case of conditional legislation, the submission that it is not peripheral but substantive also looses its relevance in face of conditions seen fulfilled. Once the conditions for exercise of delegated legislative function stood fulfilled, no further test or scrutiny may arise, in that regard. Therefore, the decision of the Supreme Court in **Sudhir Kumar Singh (supra)** and I**ndependent Schools' Association (supra)** are also of no avail. Here, conditional legislation arose in accordance with law. Therefore, no fault is found therein. Accordingly, the decision in **Lachmi Narain (supra)** is also not applicable to the present facts.

130. The submission based on doctrine of public trust is found to be wholly foreign to the scope of specific challenge raised to an act of conditional legislation. In face of conditions fulfilled we find no merit in that submission. Therefore, the decision in **Tata Housing Development Company Ltd. (supra)** is also inapplicable.

131. Reference to Article 279A (4)(h) of the Constitution of India is equally mis-placed. In absence of any fact circumstance or legal compulsion shown to exist, no defect is found in the conduct of the Central Government and the State Government in having acted on the recommendation of the Council. In the context of the conditional legislation that Section 168A is, in our opinion the conditions were wholly fulfilled. Therefore, no benefit may be drawn on the strength of the decisions of the Supreme Court in **Hamdard Dawakhana (Wakf) Lal Kuan, Delhi (supra) and K. Sabanayagam (supra).**

132. We also are not convinced that there was any statutory mandate to provide for only short extensions of time or limited extensions of times. Suffice to note, if the COVID-19 pandemic had continued beyond the third wave (as experienced in our country), that argument would never arise. To the extent that argument arises on hindsight wisdom, and past actions were dictated by nature as were beyond the control of human beings, it would be erroneous to infer a legislative intent based on the experience gained on the strength of initial remedial actions taken by the executive and the legislative bodies, in response to the spread of the pandemic COVID-19. The argument is neither sustainable in law nor on the facts. As to the submission of repeated notifications being issued, again that fell within the domain of legislative wisdom. How the legislature perceived the situation at a given time, and what response it offered may never be a

justiciable issue. Suffice to conclude, inherent indication exists that initially the legislature treated the COVID-19 pandemic circumstance to be temporary as may pass in a short while. However on its continuance, further extensions may have been felt desirable. Insofar as the power vested under Section 168A is not shown to be a power that may be exercised once as get exhausted upon that exercise made, the legislative wisdom to issue a further notification, would always survive.

133. The submission as to disability of the performing party, while attractive in first place, the same does not require any deeper consideration in view of the discussion made above. In the context of a legislative action, as noted above the level of disability suffered is not justiciable. Unless shown to be manifestly unreasoned or palpably arbitrary or plainly opaque, judicial power may remain to be exercised to examine such issues, any further. Suffice to note that the pleadings made in the Counter Affidavit are not to be seen to test the validity of the law. The burden to establish the invalidity existed on the petitioners. As noted above, we find that burden has remained from being discharged. The fact that the Central Government lifted the measures enforced by it under the Disaster Management Act in the year 2022, lead us to nowhere. They do not militate and they may not ever militate against the judicial notice taken to the effect of the spread of the pandemic COVID-19, remained constant during the period 15 March 2020 to 28th February 2022.

134. The other principle submission advanced by Shri Mehrotra that the entire action taken by the respondents was a colourable exercise of power also cannot be accepted in view of the discussion made above. The power to issue the impugned notifications existed. It is undisputed. In view of our discussion, that power was exercised both within the confines of the legislative conditions and occasioned by circumstances confronted by the legislature. The extent to which the power may have been exercised i.e. the length of time extension granted would also remain outside the scope of judicial review. Suffice to note, no excessive extension of time is seen to have been granted. If the period beginning 15th March 2020 to 28th February 2022 were to be excluded, a similar result would have arisen in terms of limitation extension. However we make it clear that the above has been noted only to deal with submission of colourable exercise power and not by way of independent reason to uphold the exercise of legislative power.

135. The reliance placed on the marginal note appended to Section 168A is misconceived. The language of that section being clear and free from doubt or ambiguity, there does not exist the necessary pre-condition to look at the marginal note to interpret the true meaning of words used in the said section. To read the marginal note in face of clear language of Section 168A of the Central Act and the State Act, is impermissible. The decision of the Supreme Court in **Eastern Coalfields Limited (supra) and Satyendra Kumar Mehra alias Satendera Kumar Mehra (supra) are therefore in-apposite. Geeta (supra)** is also not applicable to the present facts inasmuch as the language of Section 168A being unequivocally clear, there is less room to read Object and Reasons of its incorporation, to limit its natural scope and extent. In any case there is no inconsistency seen between the object and reasons of TOLO and the provision of Section 168A of the Act.

136. Last, in **P. Krishnamurthy (supra)**, it has been held as below :

"Whether the rule is valid in its entirety?

15.There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16.The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

17.InIndian Express Newspapers (Bombay) (P) Ltd.v.Union of India[(1985) 1 SCC 641 : 1985 SCC (Tax) 121] this Court referred to several grounds on which a subordinate legislation can be challenged as follows: (SCC p. 689, para 75)

"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned.In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute.That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

(emphasis supplied)

18. ....

***19**.InShri Sitaram Sugar Co. Ltd.v.Union of India[(1990) 3 SCC 223] a Constitution Bench of this Court reiterated: (SCC pp. 251-52, para 47)*

"47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be 'reasonably related to the purposes of the enabling legislation'. SeeLeila Mourningv.Family Publications Service[411 US 356 : 36 L Ed 2d 318 (1973)] . If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say,

'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires': per Lord Russel of Killowen, C.J. inKrusev.Johnson[(1898) 2 QB 91 : (1895-99) All ER Rep 105] ."

20.InSt. John's Teachers Training Institutev.Regional Director, NCTE[(2003) 3 SCC 321] this Court explained the scope and purpose of delegated legislation thus: (SCC p. 331, para 10)

"10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations.The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes."

(emphasis supplied)

137. Also, in **Vivek Narayan Sharma (supra)**, it has been observed as below :

227.This Court inSmall Scale Industrial Manufactures Assn.[Small Scale Industrial Manufactures Assn.v.Union of India, (2021) 8 SCC 511] observed that the Court would not interfere with any opinion formed by the Government if it is based on the relevant facts and circumstances or based on expert's advice. The Court would be entitled to interfere only when it is found that the action of the executive is arbitrary and violative of any constitutional, statutory or other provisions of law. It has been held that when the Government forms its policy, it is based on a number of circumstances and it is also based on expert's opinion, which must not be interfered with, except on the ground of palpable arbitrariness. It is more than settled that the Court gives a large leeway to the executive and the legislature in matters of economic policy. A reference in this respect could be made to the judgments of this Court inP.T.R. Exports (Madras) (P) Ltd.v.Union of India[P.T.R. Exports (Madras) (P) Ltd.v.Union of India, (1996) 5 SCC 268] andBajaj Hindustan Ltd.v.Sir Shadi Lal Enterprises Ltd.[Bajaj Hindustan Ltd.v.Sir Shadi Lal Enterprises Ltd., (2011) 1 SCC 640]

252.It has been held inMetropolis Theater Co.[Metropolis Theater Co.v.City of Chicago, 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913)] that if the action of the Government has a basis with the objectives to be achieved, it cannot be declared as palpably arbitrary. It has been held that, to be able to find fault with a law is not to demonstrate its invalidity. It has been held that the result of the act may seem unjust and oppressive, yet be free from judicial interference. The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. It has been held

that what is best is not always discernible, and the wisdom of any choice may be disputed or condemned. It has been held that mere errors of the Government are not subject to judicial review. It is only the palpably arbitrary exercises which can be declared void.

253.We may gainfully refer to the following observations of this Court inR.K. Garg[R.K. Gargv.Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , wherein this Court observed that it should constantly remind itself of what the Supreme Court of the United States said inMetropolis Theater Co.[Metropolis Theater Co.v.City of Chicago, 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913)] : (R.K. Garg case[R.K. Gargv.Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , SCC p. 706, para 19)

"19. ...The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ.The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States inMunnv.Illinois[Munnv.Illinois, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 13 (1877)] , namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies".The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary."

(emphasis supplied)

254.The Constitution Bench inR.K. Garg[R.K. Gargv.Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] holds that the Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. It has been held that it would be wise for the Court not to hazard an opinion where even economists may differ. It has been held that while examining the constitutional validity of such a legislation, the Court must "be resilient, not rigid, forward looking, not static, liberal, not verbal".

258.Therefore, while adjudging the illegality of the impugned notification, we would have to examine on the basis as to whether the objectives for which it was enacted has nexus with the decision taken or not. If the impugned notification had a nexus with the objectives to be achieved, then, merely because some citizens have suffered through hardships would not be a ground to hold the impugned notification to be bad in law.

138. Seen in that light the decisions cited by learned counsel for the petitioners are found to be distinguished. The writ petitions challenging the issuance of the impugned notifications must fail. Hearing of all cases where adjudication proceedings are pending may recommence and be concluded, after excluding the duration of stay of the extended limitation to frame the adjudication order. Wherever adjudication orders have been passed and recovery stayed

by this Court, the petitioners shall have 45 days from today to file appropriate appeals.

139. The writ petitions are thus **dismissed**. No order as to costs.

(2024) 5 ILRA 1717
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

Writ-A No. 10665 of 2021

Umesh Kumar Sirohi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Siddharth Khare, Sr. Adv.

Counsel for the Respondent:
Ashish Mishra, C.S.C.

A. Service Law – Judicial officer assailed the penalty order passed by the St. Government removing him from service- Article 311(2) of the Constitution of India- Rule 9(4) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999- Rule 34 of the Uttar Pradesh Higher Judicial Service Rules, 1975- allegation of abusing his position as a Judge- tried to influence judicial officer junior to him for personal benefits.

B. No requirement of recording reasons under Rule 9(4)- Where Disciplinary Authority intends to agree with the inquiry report – concluding the guilt of a delinquent- Disciplinary Authority may proceed with procedure prescribed under Article 311 of the Constitution of India- Disciplinary Authority/Full Court was not obligated to record its express reasons-to reject the representation made by the delinquent or to accept the Inquiry Report or to award particular penalty. (Paras 44, 45 and 64)

Held:
Therefore, there is no basis to the submission being advanced by learned Senior Counsel for the petitioner that the requirement of recording reasons under Rule 9(4) of the Rules exists and may be enforced, independent of Rule 9(2) of the Rules. The submission is misconceived. It is rejected. (Para 44)

Having taken that view, we are further not inclined to accept the submission of Sri Khare that unless Rule 9(4) is read as suggested (by him), there would exist no requirement to furnish a copy of the Inquiry Report to the delinquent and/or to grant him opportunity to represent thereagainst. Though attractive in first blush, the submission must fail. Those requirements arise, sustain and are enforced in law, on the pure strength of Article 311 of the Constitution of India, as interpreted in Mohd. Ramzan Khan (supra). In view of that higher law existing, lack of statutory law (either by principal legislature or its delegate) would make no difference. Consequently, where the Disciplinary Authority intends to agree with the Inquiry Report – concluding the guilt of a delinquent, the Disciplinary Authority may proceed in accordance with procedure prescribed under Article 311 as interpreted by the Supreme Court in Mohd. Ramzan Khan (supra). That circumstance not provided by Rule 9 of the Rules would remain governed by the Constitutional provision (Article 311), as interpreted by the Supreme Court. (Para 45)

Thus, both in the context of the Rules and the binding law, we are of the view that the Disciplinary Authority / Full Court was not obligated to record its express reasons-to reject the representation made by the delinquent or to accept the Inquiry Report or to award particular penalty. (Para 64)

C. Domestic Inquiry- reasonable opportunity given to the delinquent- fair and proper- conclusions drawn by Judge 'A' based on relevant material- conduct of the delinquent officer incorrigible and unbecoming of the judicial office- Petition dismissed. (Paras 105 and 110)

HELD:
Thus, we find, no good ground is made out to offer any interference. The scope of judicial review has to remain limited. The disciplinary inquiry in Departmental Inquiry No. 21 of 2015 is found to be fair and proper and conclusions drawn by the Inquiry Judge 'A', based on material and evidence collected during that Inquiry, with which the petitioner had been confronted. Also, that material cannot be described as extraneous or irrelevant. (Para 105)

Once the petitioner admitted having called the learned ACJM (who was seized with the case proceeding involving his close family members), that too, using the mobile phone of his wife's lawyer – ostensibly to check the ACJM regarding his working, every other detail referred to by learned Senior Counsel for the petitioner - to point certain deficiencies in the conduct of that Inquiry, pales into insignificance. For the guilt of the petitioner -a a judicial officer to be established, the above quoted passage was enough. Clearly, the petitioner had not called the ACJM in his capacity as a senior officer. (Para 110)

Petition dismissed. (E-14)

List of Cases cited:

1. U.O.I. & ors. Vs Mohd. Ramzan Khan, (1991) 1 SCC 588

2. Punjab National Bank & ors. Vs K.K. Verma, (2010) 13 SCC 494

3. Hari Om Gupta Vs St. of Bihar, 2015 SCC OnLine Patna 4511

4. Umesh Chandra Vs St. of U.P. & ors., 2005 SCC OnLine All 2370

5. Madhav Prasad Vs Deputy Managing Director, (2004) (4) LLN 857

6. Ram Kumar Versus St. of Hary., 1987 Supp SCC 582

7. Indian Institute of Technology, Bombay v. U.O.I. & ors., 1991 Supp 2 SCC 12

8. Boloram Bordoloi Vs Lakhimi Gaolia Bank & ors., (2021) 3 SCC 806

9. Sanjeev Kumar Vs St. of U.P. & ors., (2008) SCC OnLine All 1089

10. Nishith Ranjan Tiwari Vs St. of U.P. & ors., (2013) SCC OnLine 11768

11. St. of U.P. & ors. Vs Neeraj Verma, 2021 SCC OnLine All 422

12. Shailendra Kumar Srivastava Vs St. Public Services Court, Lucknow & ors., 2023 SCC OnLine All 1896

13. St. of Har. & anr. Vs Rattan Singh, (1977) 2 SCC 491

14. U.O.I. & ors. Vs P. Gunasekara, (2015) 2 SCC 610

15. St. of Karn. & anr. Vs Umesh, (2022) 6 SCC 563

16. R.R. Parekh VsHigh Court of Gujarat & anr., (2016) 14 SCC 1

17. Registrar General High Court of Patna Vs Pandey Gajendra Prasad & ors., (2012) 6 SCC 357

18. Desh Bhushan Jain Vs St. of U.P. & anr., 2007 SCC OnLine All 1568

19. Satya Pal Narang Vs St. of U.P. & and Another ors., 2015 SCC OnLine All 8365

20. Punjab National Bank & ors. Vs K.K. Verma, (2010) 13 SCC 494

21. Hari Niwas Gupta Vs St. of Bihar (2015) SCC OnLine Pat 4511

22. Hari Niwas Gupta Vs St. of Bihar (2020) 3 SCC 153

23. D.K. Agrawal Vs Council of the Institute of Chartered Accountants of India, 2021 SCC OnLine SC 903

24. Dr. Anurika Vaish Vs U.O.I., 2015 SCC OnLine All 9599

25. Chairman Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs Jagdish Sharan Varshney & ors., (2009) 4 SCC 240

26. Institute of Chartered Accountant of India Vs L.K. Ratna & ors., 1986(4) SCC 537

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Donadi Ramesh, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate, assisted by Sri Aditendra Singh, learned counsel for the petitioner; Sri Ashish Mishra, learned counsel for the High Court and Sri Nimai Das, learned Additional Chief Standing Counsel for the State-respondents.

2. The present writ petition has been filed to assail the penalty order passed by the State Government dated 16.04.2021, communicated to the petitioner by the Registrar(J)(Confidential), High Court Allahabad vide letter dated 28.05.2021. Thereby, the petitioner - then serving as Additional District & Sessions Judge, Lalitpur has been removed from service, with immediate effect. The petitioner was appointed to the U.P. Civil Service (Judicial) in the year 2001. In 2013, he was promoted and thus appointed to the U.P. Higher Judicial Service. While serving as Additional District & Sessions Judge, Meerut, first Charge Sheet dated 08.08.2016 was issued to the petitioner. Again, on 20.03.2017 a second Charge Sheet was issued to the petitioner.

3. The first Charge Sheet dated 08.08.2016 led to institution of Departmental Inquiry No. 21 of 2015, on the following four charges :

"1. That you with the help of your younger brother Sri Raj Kumar Sirohi, the then Civil Judge (Junior Division)/Judicial Magistrate, Meerut and other family members demanded dowry as a condition for your brother's marriage with Dr. Muskan Sirohi D/o Ummed Singh (W/o Sri Raj Kumar Sirohi). Part of the demand for dowry was also fulfilled. You and your brother continued to press the demand of dowry even after marriage so much so that Sri Raj Kumar Sirohi deserted his wife for non-fulfillment of dowry demand. The demand and receipt of dowry for marriage of your brother with Dr. Muskan Sirohi is a misconduct within the meaning of Rule 11-A of the U.P. Government Servant Rules, 1956.

Thus, you have committed misconduct within the meaning of Rule 11-A read with Rule 3 of the U.P. Government Servants Conduct Rules, 1956.

2.That on 26.06.2014, during the course of reconciliation meeting between the family members of Dr. Muskan Sirohi with you and your younger brother Sri Raj Kumar Sirohi, you self inflicted an injury on your left hand, as a conspiracy to involve Dr. Muskan Sirohi and her family members in a criminal case. In furtherance thereof your wife Smt. Meghana Sirohi lodged an FIR against Dr. Muskan Sirohi and her family members being Case Crime No. 472 of 2014, U/s 395, 397 IPC at P.S. Medical College, Meerut.

Thus, you have acted in a manner which is unbecoming of a Judicial Officer. Further, you have misused your authority as a Judicial Officer and failed to maintain absolute integrity. Thus, you have committed misconduct within the meaning of Rule 3 of the U.P. Government Servants Conduct Rules, 1956.

3. That you and your younger brother Sri Raj Kumar Sirohi, the then Civil Judge (Junior Division)/Judicial Magistrate, Meerut have tried to influence the Investigating Officer by misusing your official position during the course of investigation of the aforesaid Case Crime No. 472 of 2014.

Thus, you have acted in a manner which is unbecoming of a Judicial Officer. Further, you have misused your authority as a Judicial Officer and failed to maintain absolute integrity. Thus, you have committed misconduct within the meaning of Rule 3 of the U.P. Government Servants Conduct Rules, 1956.

4. That you and your younger brother Sri Raj Kumar Sirohi, the then Civil Judge (Junior Division)/Judicial Magistrate, Meerut have tried to influence the Additional Chief Judicial Magistrate, Court No. 5, Meerut and thus interfered in the judicial proceeding arising our of Case Crime No. 472 of 2014.

Thus, you have committed misconduct within the meaning of Rule 3 of the U.P. Government Servants Conduct Rules, 1956."

4. The second Charge Sheet dated 20.03.2017 led to institution of Departmental Inquiry No. 24 of 2016, on the following three charges. They read as below :

"(1) That while posted as Additional District Judge, Meerut you misused your position and tried to influence Sri XXXXX, Additional Chief Judicial Magistrate-V, Meerut in your personal case No. 93650 of 2015 (Crime No. 472 of 2014) State Vs. Rama Singh and Others U/s 452, 324 IPC, P.S. Medical, Meerut in which your wife Smt. Meghna Sirohi is complainant. Firstly, in November 2015 you asked Sri XXXXX, ACJM-V to summon the Circle Officer in connection with filing of charge-sheet and thereafter in December 2015 you asked Sri XXXXX to take cognizance under Section 307 IPC in the said case.

*(2) That while posted as Additional District Judge, Meerut you made false allegation against Sri ******, the then District Judge, Meerut that his behaviour towards you was prejudicial, which allegation was found to be false in the Vigilance Enquiry Report dated 26.10.2016. (3) That your another allegation against the then District Judge, Meerut that he submitted a false report dated 02.03.2016 to the High Court in respect of your effort to influence the concerned Magistrate, was again found to be false in the Vigilance Enquiry Report dated 26.10.2016."*

5. Both inquiries were conducted simultaneously. Inquiry No. 21 of 2015 was conducted at Prayagraj, by Judge 'A' while Inquiry No. 24 of 2016 was conducted at Lucknow, by Judge 'B'. The Inquiry Judge 'A' submitted the report in Inquiry No. 21 of 2015, dated 26.04.2019 whereas Inquiry Judge 'B' submitted their report in Inquiry No. 24 of 2016, dated 03.07.2019. Upon such Inquiry Reports submitted, the matter went (to the Full Court) through the Administrative Committee. Upon submission of the two Inquiry Reports and appraisal by the Administrative Committee, both Inquiry Reports (in Inquiry Nos. 21 of 2015 and 24 of 2016) were made available to the petitioner vide further communications dated 26.04.2019 and 03.07.2019, to obtain his comments.

6. The petitioner submitted his comments/representation to the two Inquiry Reports on 6.8.2019 and 19.8.2019, respectively. Thereafter, the matter was considered by the Full Court on 11.12.2020. Therein, the Full Court resolved to accept the two Inquiry Reports and inflict major penalty of removal from service, with immediate effect. That decision has been approved by the State Government and has been communicated to the petitioner. Hence this challenge.

7. Submissions advanced by learned Senior Counsel for the petitioner are:

(i) Petitioner being a Government Servant, he is fully protected under the umbrella of Article 311 of the Constitution of India. Relying on Rule 9 (4) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the 'Rules') read with Rule 34 of the U.P. Higher Judicial Service Rules, 1975, it has been submitted, even after substitution of Article 311(2) of the Constitution of India, the petitioner is entitled to a reasonable opportunity of being heard and to a reasoned order dealing with his representation/comments - offered to the two Inquiry Reports, referred to above.

8. Insofar as the Full Court made no mention of such comments/representation and further insofar as it has offered no reason whatsoever to deal with the representations made against the two Inquiry Reports, the penalty order is wholly contrary to the law. Reliance has been placed on **Union of India and others Vs. Mohd. Ramzan Khan, (1991) 1 SCC 588** as followed in **Punjab National Bank and others Vs. K.K. Verma, (2010) 13 SCC 494.** In **Hari Om Gupta Vs. State of Bihar, 2015 SCC OnLine Patna 4511**. Thus, it has been submitted, notwithstanding the substitution of Article 311(2) of the Constitution of India, the obligation remained on the Appointing Authority/Disciplinary Authority, to act with reason. That has been violated.

9. Specific to the Rules, it has been submitted, Rule 9(4) of the Rules clearly mandates that the Disciplinary Authority must not only give opportunity to the delinquent - to represent against the Inquiry Report, but it must also record its reasons to award the penalty. In that regard, it has been urged, the decision of a coordinate bench of this Court, in **Umesh Chandra Vs. State of U.P. and others, 2005 SCC OnLine All 2370**, insofar as it does not notice or deal with the mandatory statutory requirement of Rule 9(4) of the Rules, is not good law. At the same time, responding to the counter submission advanced by learned counsel for the High Court on the strength of the another decision of the coordinate bench of this Court in **Madhav Prasad Vs. Deputy Managing Director, (2004) (4) LLN 857**, it has been urged that that decision supports the submission of the petitioner - that the Appointing Authority/Disciplinary Authority or even the Appellate Authority, must record its reasons to reject the objections raised by the delinquent, to the Inquiry Reports, and it must give reasons to support its order.

10. Second, it has been submitted, at the Full Court meeting dated 11.12.2020, the Inquiry Judge 'A', and the District Judge (at whose instance the complaint was lodged against the petitioner and who in the meantime had been elevated to the bench of this Court), participated. By their mere participation, the decision of the Full Court became tainted and untenable in law. Here, as has already been recorded in the earlier order dated 15.4.2023, the relevant record was produced on 16.4.2024. The same was allowed to be examined by the learned counsel for the petitioner. We had perused the same and retained its photocopy on the record. It so transpires that Inquiry Judge 'A' had not attended the Full Court meeting dated 11.12.2020. As to the participation of the learned District Judge who had by then been elevated to the bench of this Court, his specific abstention is recorded in the original record. Though it is handwritten, in absence of any further challenge or doubt

raised to the authenticity or genuineness of the original record produced during these proceedings, that issue must rest here.

11. Third, it has been submitted, Charge no. 4 of Inquiry No. 21 of 2015 and Charge No. 1 of Inquiry No. 24 of 2016, overlapped. Thus, the the same alleged misconduct was twice inquired into. That itself is cited as a ground to vitiate the inquiries.

12. Fourth, it has been submitted, Domestic Inquiry No. 21 of 2015 was wholly vitiated as (i) the Inquiry Report is conjectural; (ii) it has been prepared in complete violation of principles of natural justice; (iii) it has been prepared upon denial of any opportunity to the petitioner to cross-examine the Employers' Witnesses; (iv) the Inquiry Judge 'A' had, for no reason, denied to recall of Employers' Witnesses for cross-examination; (v) the forced absence of the petitioner in the Inquiry proceedings, occasioned by his prolonged illness was completely ignored, for no good reason given and (vi) the material relied by the petitioner was not considered in the Inquiry Report.

13. Similarly, the Inquiry Report in the Domestic Inquiry 24 of 2016 was vitiated for reason of non-consideration of essential facts. Here, it has been submitted, the first date in the proceeding in Case No. 93650 of 2015 arising from Case Crime No. 472 of 2014, was 16.1.2016. This fact was proven by the petitioner through oral evidence of D.W.4, the then System Officer, District Judgeship, Meerut. That witness was not cross-examined by the Presenting Officer. Yet, the Inquiry Judge 'B' inferred (contrary to the record), that the above described case was heard by Sri XXXXX, the then ACJM on 18.12.2015, when the alleged occurrence took place.

14. Also, the documents relied upon in the Charge Sheet leading to institution of Departmental Inquiry 24 of 2016 were never proven. Neither the letter of Sri XXXXX learned ACJM, dated 18.12.2015, nor the Report/complaint of the then learned District Judge dated 2.3.2016, nor the Vigilance Report dated 26.10.2016, were proven in those proceedings. Yet, those documents have been referred to and relied upon by the Inquiry Judge 'B'. In that regard, it has been further submitted that the Charge Sheet that led to that inquiry had referred to only two documents namely, the report submitted by the District Judge dated 2.3.2016 and the letter written by the learned ACJM, Sri XXXXX to the learned District Judge, dated 12.1.2016.

15. Next, it has been submitted, the specific application moved by the petitioner before the Inquiry Judge 'B' - to be permitted to confront the employer witness D.W.4 with certain documents was denied by adopting wholly erroneous procedure. The cross-examination of the said witness was closed on 3.7.2018 whereas the documents were summoned on 16.4.2019. Further, it has been submitted, no evidence was led to prove charge nos. 2 and 3.

16. Responding to the above, Sri Ashish Mishra learned counsel for the High Court would submit, the penalty order has been passed wholly in accordance with law. After substitution of Article 311(2) of the Constitution of India, the only mandatory requirement in law remains - to conduct the departmental inquiry with respect to charges that may lead to award of major penalty.

That compliance has been made. Further, in view of the existing provision of Article 311 (2) of the Constitution of India, read with Rule 9 of the Rules, the High Court was obligated to serve on the petitioner the two Inquiry Reports and to call for his comments. That requirement was also fulfilled, on an admitted case basis. Upon due consideration of the same, the Full Court has accepted the two Inquiry Reports and has awarded due penalty.

17. As to the requirement to furnish reasons, the position in law (being claimed by the learned Senior Counsel for the petitioner), has been hotly contested. Sri Mishra would submit, after the Constitutional Amendment (42nd amendment), the constitutional requirement stood fulfilled upon due Inquiries made and upon opportunity granted to the delinquent to furnish his representations against both Inquiry Reports. Those were considered by the Full Court - the Disciplinary Authority. Since the Full Court accepted the Inquiry Reports and concurred with the findings recorded therein, after appraisal of the objections raised thereto, neither any further consideration was required to be made by the Full Court in its capacity as the Disciplinary Authority nor it was required to record its own/separate reasons, either to accept the Inquiry Reports or to award the penalty of removal from service. In that regard, first, he has referred to and heavily relied on the coordinate bench decision in **Umesh Chandra (supra).**

18. On **Mohd. Ramzan Khan (supra)**, it has been submitted, the said decision no where lays down the law that the Disciplinary Authority must record its independent reasons either to accept the Inquiry Report or to award the punishment. The only requirement in law enforced by **Mohd. Ramzan Khan (supra)**, is the furnishing of Inquiry Report to the delinquent and calling for his comments thereto. As to the requirement of reasons to be given by the Disciplinary Authority, he would submit, the law in that regard has remained consistent that the Disciplinary Authority need not record its separate reason where it proposes to accept the Inquiry Report and the findings of the Inquiry Officer (here Judge). Thus, reliance has been first placed on **Ram Kumar Versus State of Haryana, 1987 Supp SCC 582** and **Indian Institute of Technology, Bombay v. Union of India and others, 1991 Supp 2 SCC 12**. Also, reliance has been placed on a coordinate bench decision of the Court in **Madhav Prasad Vs. Deputy Director (supra)**. Doubt, if any, is stated to have been removed upon the recent decision of the Supreme Court in **Boloram Bordoloi Vs. Lakhimi Gaolia Bank and others, (2021) 3 SCC 806.**

19. Dealing with Rule 9(4) of the Rules, it has been submitted, the said Rule has no application to the facts of the present case. In any case, it does not postulate an independent requirement on the Disciplinary Authority, to record its reason - to either accept an Inquiry Report or to award punishment. In his submission Rule 9(4) of the Rules would come to life only where Rule 9(2) of the Rules first applies. Thus, only where the Disciplinary Authority disagrees with the findings of the Inquiry Officer (here Judge), it would be first obligated to offer his own/ex-parte consideration and record its own finding and reasons therefor. That reasoning of the Disciplinary Authority would arise, first at the stage of disagreement being expressed to the findings of the Inquiry Officer and second, at the stage of award of penalty under Rule 9(4) of the Rules. In the facts of

the present case, the Disciplinary Authority i.e. Full Court did not disagree with either of the two Inquiry Reports submitted by the two Inquiry Judges. On the contrary, the Full Court accepted both the Inquiry Reports. Therefore, the trigger to activate Rule 9(4) of the Rules (that exists by way of of Rule 9(2) of the Rules), was not activated. Consequently, the Full Court was not obligated in law, to give any further reasons. He has relied on coordinate bench decisions of the Court in **Sanjeev Kumar Vs. State of U.P. and others, (2008) SCC OnLine All 1089, Nishith Ranjan Tiwari Vs. State of U.P. and others, (2013) SCC OnLine 11768, State of U.P. and others Vs. Neeraj Verma, 2021 SCC OnLine All 422 and Shailendra Kumar Srivastava Vs. State Public Services Court, Lucknow and others, 2023 SCC OnLine All 1896.**

20. Merely because certain other High Courts, may have opted for another procedure and merely because on a subjective opinion that approach may appear to be better, may never be a ground either to apply the Rules contrary to the legislative intent or to vitiate the penalty order, for reason of that approach not taken.

21. Responding to the submission of duplication of charge, it has been vehemently urged, there is none. While Charge no. 4 in Domestic Inquiry No. 21 of 2015 was of the delinquent (petitioner) having tried to influence the learned ACJM in a judicial proceeding arising out of Case Crime No. 472 of 2014, the charge no. 1 in the Domestic Inquiry 24 of 2016 was of misuse of position to try influence the learned ACJM in Case No. 93650 of 2015, arising out of Case Crime No. 472 of 2015 - to summon the Circle Officer, to submit a Charge Sheet and to take cognizance under Section 307 IPC.

22. The challenge raised to the two Inquiry Reports - being in violation of rules of natural justice and being otherwise vitiated in law, has been rebutted with vehemence, by relying on various order sheet entries of the two Inquiry proceedings; applications received, entertained and dealt with by the two Inquiry Judges; the evidence received in the two inquiries as also the conduct offered by the petitioner in the course of the two inquiries. Reference has also been made to the fact that the other delinquent whose conduct was jointly inquired into in the course of the Domestic Inquiry No. 21 of 2015, was none other than the real younger brother of the petitioner. He too being a judicial officer, his conduct was similarly inquired into. He had cross-examined the Employers' Witnesses, on many dates. As to the ex parte nature of Inquiry No. 21 of 2015, relying on the Inquiry record, it has been assertively urged that the petitioner left the Inquiry Judge 'A' with no option but to proceed ex parte in terms of Rule 7(10) of the Rules. More than enough opportunity was granted to the petitioner to participate in those proceeding and allow them to conclude, in a time bound manner. However, repeated adjournments were sought and the conduct of non-appearance (without seeking adjournment), was also continued, despite long pendency of the Inquiry proceeding. It has been stated, all documents and evidence led at the Inquiry proceedings were made available to the delinquent petitioner. His rights were not prejudiced.

23. While both Inquiries commenced in the year 2017, they continued over a long period of almost two years. Even if the petitioner may contend and try to justify that he could not appear on certain dates for reasons, however, the continuous unabated conduct of absence offered - over a long

period of time in the course of two Inquiry proceedings, may not be overlooked. Both, in the Disciplinary Inquiry No. 21 of 2015 and 24 of 2016, the petitioner habitually absented himself and participated on certain dates of his choice, without making any bona fide effort to let those proceedings conclude. Thus, in a nutshell, it has been submitted, the rules of natural justice may not be read as iron cast rules. Insofar as sufficient and reasonable opportunity of hearing was given to the petitioner during the course of both Inquiry proceedings, no breach of that fundamental requirement of law, was committed.

24. As to the proof of the charges and the objections thereto, it has been urged, here strict rule of evidence would not apply. Insofar as balance of evidence rule would allow for conclusions to arise (in the disciplinary proceedings), and be sustained on a preponderance of possibilities, such conclusions may not be interfered with even by appeal authorities, less so by a Writ Court. Thus, reliance has first been placed on the decision of the Supreme Court in **State of Haryana and Another Vs. Rattan Singh, (1977) 2 SCC 491, Union Of India and others vs. P. Gunasekara, (2015) 2 SCC 610 and State of Karnataka and Another Vs. Umesh, (2022) 6 SCC 563.**

25. Then, specific to the case of disciplinary proceedings against a judicial officer, reliance has been placed on **R.R. Parekh Vs.High Court of Gujarat and Another, (2016) 14 SCC 1, Registrar General High Court of Patna Vs. Pandey Gajendra Prasad and Others, (2012) 6 SCC 357, Desh Bhushan Jain Vs. State of U.P. and Another, 2007 SCC OnLine All 1568 and Satya Pal Narang Vs. State of U.P. and 2 Others, 2015 SCC OnLine All 8365.** Thus, it has been submitted, in the case of judicial officers, the concept of misconduct acquires a different shade. Misconduct of having tried to influence another judicial officer, had to be dealt with most seriously,with an iron hand.

26. Having heard learned counsel for parties and having perused the record, in the first place, we may deal with the ground of challenge raised on the strength of Article 311 of the Constitution of India read with Rule 9(4) of the Rules. Article 311 of the Constitution of India, as it stands, reads as below:

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State-(1) *No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.*

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—]

(a) where a person is dismissed or removed or reduced in rank on the ground of

conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

27. Also, Rule 9 of the Rules reads as below:

"9. Action on Inquiry Report- (1) *The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.*

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own finding thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly.

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

28. In **Mohd. Ramzan Khan** (supra), the following issue had arisen for consideration by the Supreme Court:

"2. The short point that falls for determination in this bunch of appeals is as to whether with the alteration of the provisions of Article 311(2) under the Forty-second Amendment of the Constitution doing away with the opportunity of showing cause against the proposed punishment, the delinquent has lost his right to be entitled to a copy of the report of enquiry in the disciplinary proceedings."

29. Taking note of the Constitutional Amendment whereby clause 2 of Article 311 was substituted, the Supreme Court observed as below:

"11.The question which has now to be answered is whether the Forty-second Amendment has brought about any change in the position in the matter of supply of a

copy of the report and the effect of non-supply thereof on the punishment imposed.

12.We have already noticed the position that the Forty-second Amendment has deleted the second stage of the inquiry which would commence with the service of a notice proposing one of the three punishments mentioned in Article 311(1) and the delinquent officer would represent against the same and on the basis of such representation and/or oral hearing granted the disciplinary authority decides about the punishment. Deletion of this part from the concept of reasonable opportunity in Article 311(2), in our opinion, does not bring about any material change in regard to requiring the copy of the report to be provided to the delinquent.

13.Several pronouncements of this Court dealing with Article 311(2) of the Constitution have laid down the test of natural justice in the matter of meeting the charges. This Court on one occasion has stated that two phases of the inquiry contemplated under Article 311(2) prior to the Forty-second Amendment were judicial. That perhaps was a little stretching the position. Even if it does not become a judicial proceeding, there can be no dispute that it is a quasi-judicial one. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. As this Court rightly pointed out in theGujarat case[(1969) 2 SCC 128 : (1970) 1 SCR 251] , the disciplinary authority is very often influenced by the conclusions of the Inquiry Officer and even by the recommendations relating to the nature of punishment to be inflicted. With the Forty-second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected. Prof. Wade has pointed out: [Administrative Law, 6th edn., p. 10]

"The concept of natural justice has existed for many centuries and it has crystallised into two rules: that no man should be judge in his own cause; and that no man should suffer without first being given a fair hearing…. They (the courts) have been developing and extending the principles of natural justice so as to build up a kind of code of fair administrative procedure, to be obeyed by authorities of all kinds. They have done this once again, by assuming that Parliament always intends powers to be exercised fairly."

...

15.Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent

against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position.

...

18.We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

30. Thus, the Supreme Court enunciated the law in **Mohd. Ramzan Khan (supra)** - despite substitution of Article 311(2), wherever the Inquiry Officer may have submitted a report to the Disciplinary Authority recording finding/s of guilt of the delinquent, the latter would remain entitled to a copy of that Inquiry Report and would be further entitled to represent thereagainst. The consequence of non-compliance of that essential requirement would amount to violation of rules of natural justice and would vitiate the final order of the Disciplinary Authority. Yet, that law was enforced prospectively.

31. Applying the law laid down by the Supreme Court in **Mohd. Ramzan Khan (supra)** may only require us to examine if the two Inquiry Reports submitted by the two Inquiry Judges 'A' and 'B' were supplied to the petitioner and whether he was given a right to represent thereagainst. The answer to the same is in the affirmative and undisputed. As noted above, the two Inquiry Reports dated 26.04.2019 and 03.7.2019 were served on the petitioner. He made representations thereagainst on 06.08.2019 and 19.08.2019. Therefore, it cannot be gainsaid that there was violation of **Mohd. Ramzan Khan (supra).**

32. That said, it is also not the Constitutional law that legislative law could not provide for a higher test to be met by the Disciplinary Authority. Thus, despite substitution of Article 311(2) of the Constitution of India, it remained open to the State legislature to enact a law to provide that the Disciplinary Authority may generally/in all cases, record its reasons - to reject the objections that may be received from the delinquent employee (against an adverse Inquiry Report), and/or to further record reasons to inflict any particular punishment/penalty. That requirement, if

provided, would not fall foul of the bench mark Constitutional law requirement, enforced by the amended Article 311 of the Constitution of India. Insofar as the Constitution of India does not prohibit recording of such reasons, it may remain open to the legislative bodies to enact appropriate law to prescribe that higher test - of reasons to be recorded by the Disciplinary Authority. However, such a requirement may be pressed/claimed specifically on the strength of legislative law, and not otherwise.

33. Here, we consider the true import of Rule 9 of the Rules: (i) In the first place, Rule 9 of the Rules comes into play upon submission of the Inquiry Report by the Inquiry Officer. Under Rule 9(1) of the Rules, after perusing the Inquiry Report, the Disciplinary Authority may remit the case for re-Inquiry, either to the same Inquiry Officer or another. However, if such a course is to be adopted by the Disciplinary Authority, he would be obligated to first record his reasons to do so, in writing. That requirement flows, not on any pre-existing principle of law, but only in view of that mandatory requirement incorporated in the Rule 9(1) of the Rules.

(ii) Second, under Rule 9(2) of the Rules, if on perusal of the Inquiry Report, the Disciplinary Authority disagrees with the findings of the Inquiry Officer on all or any charge and proposes to impose penalty, without directing a re-Inquiry under Rule 9(1), he may record his own findings with respect thereto. If he so acts, he would be further obligated to record his reasons in support of such findings. Again, that requirement flows only from the plain reading of Rule 9(2) of the Rules, only.

(iii) Thus, read together, Rule 9(1) and (2) provide for two alternative eventualities/courses, either of which may be adopted by the Disciplinary Authority, if he disagrees with the Inquiry Report exonerating the delinquent of all or any charge. In either case, he would be obligated to record his reasons to do so i.e. whether he proposes a re-Inquiry or to impose punishment, on existing material.

(iv) Third, upon submission of an Inquiry Report - exonerating a delinquent of all charges, the Disciplinary Authority, if he agrees with the findings of the Inquiry Officer, he may (in terms of Rule 9(3) of the Rules), accept that Inquiry Report and conclude the disciplinary proceedings, without issuing any notice to the delinquent.

34. In either of the three eventualities, the legislature has not contemplated any opportunity of hearing to the delinquent, at that stage. Thus, we conclude, the proceedings under Rule 9(1), (2) and (3) remain wholly ex parte, to the delinquent.

35. What follows is Rule 9(4) of the Rules. The said sub-Rule is clearly in three parts:

(a) The first part contains the pre-condition for its exercise. Thus, Rule 9(4) of the Rules may come into play when, in the light of the ex parte 'findings' recorded by the Disciplinary Authority under Rule 9(2) of the Rules, it is of the further view that any of the penalties specified under Rule 3 of the Rules, may be imposed i.e. without first requiring a re-inquiry. Explicitly, that is referable only to Rule 9(2) of the Rules, and not otherwise.

(b) The second part of Rule 9(4) prescribes the procedural compliance to be made by the Disciplinary Authority - to proceed under that sub-Rule. It provides, the Disciplinary Authority may at that stage, grant to the delinquent employee (i) copy of

the Inquiry Report; (ii) his own findings (ex parte), recorded under sub-Rule (2) and (iii) reasonable opportunity to represent against his ex parte 'findings'.
(c) The third part of the Rule 9(4) confers the decision making power on the Disciplinary Authority. Here, the legislature mandates the Disciplinary Authority to record his fresh/second set of reasons i.e., his reasons to reject the objections that he may have received from the delinquent employee (to his own ex parte 'findings' recorded under Rule 9(2) of the Rules). Only then, the Disciplinary Authority is enabled to pass "a reasoned order" imposing any of the penalties specified in Rule 3 of the Rules.

36. Rule 9(2) of the Rules lays the mandatory pre-condition to be satisfied, to invoke Rule 9(4) of the Rules. Only where the Disciplinary Authority first disagrees with the Inquiry Officer and further, where (upon such disagreement), the Disciplinary Authority proposes - to himself impose any of the penalties on the delinquent (on the strength of the material contained in the Inquiry Report) after rejecting the conclusions drawn by the Inquiry Officer and without seeking a re-Inquiry under Rule 9(1) of the Rules – first, the provisions of Rule 9(2) of the Rules would have to be strictly complied i.e. ex parte 'findings' and 'reasons' would have to be first recorded by the Disciplinary Authority. Those would be in the nature of a tentative/provisional opinion formed by the Disciplinary Authority on the strength of the material contained in the Inquiry Report, itself. Once that opinion would have been formed by the Disciplinary Authority, Rule 9(4) of the Rules would get activated, and not before. It would obligate the Disciplinary Authority to issue further notice to the delinquent and to supply him a copy of the Inquiry Report together with 'its own' [Rule 9(2)] 'its findings'/'his findings' [Rule 9(4)] and 'reasons' recorded in terms of Rule 9(2) of the Rules.

37. Consequently, further requirement would arise–to pass a reasoned order on all or any one charge that may have been inquired into. The legal mandate/requirement (on the Disciplinary Authority), to pass a 'reasoned order' created under Rule 9(4) of the Rules - to award any particular punishment to the delinquent arises only by way of a necessary consequence or sequel to Rule 9(2) first invoked by the Disciplinary Authority, and not otherwise.

38. That view had been taken by the coordinate bench of this Court in **Sanjeev Kumar (supra)**, wherein it was observed as below:

"6. Rule 9, sub-rule (2) clearly provides that if the disciplinary authority disagrees with the findings of the Inquiry Officer on any charge, it shall record its own finding thereto with the reasons. Sub-rule (4) further requires that if the disciplinary authority is of the opinion that the Government servant deserves imposition of some penalty under rule 3, he shall furnish a copy of the inquiry report along with his findings recorded, if any, under sub-rule (2) of Rule 9 to the delinquent employee and would allow him reasonable time to submit a reply/representation. After receiving the representation, again the disciplinary authority shall consider the aforesaid material along with the reply if any, and pass a reasoned order imposing one or more penalty mentioned in rule 3 and communicate the same to the delinquent employee.

7.Therefore, there are two stages at which the disciplinary authority has to

*pass reasoned orders, one under sub-rule (2) and the other under sub-rule (4). Under sub rule (2) it has to record its reasons for disagreement with inquiry report in respect to findings on certain charges and thereafter communicate the same to the latter. Under sub-rule (4) it has to pass a reasoned order for imposing penalty after the re*presentation of the delinquent employee is received.

8.The punishment order dated 9-6-2004. impugned in this writ petition, ex facie shows that after noting down facts pertaining to communication of disagreement and receipt of reply of the delinquent employee, in para 3, respondent No. 1 has recorded his conclusion that charges No. 1, 3 and 4 are proved and the petitioner is liable to pay Rs. 6,837.14 besides censure entry and withholding of increment. The aforesaid order by no means satisfy the requirement of a reasoned order as contemplated under rule 9(4) of 1999 Rules.

...

14.We do not however, agree to the above submission. When the rule framing authority itself has made separate provision making it obligatory upon the disciplinary authority to record reasons at two different stages, one, when it disagrees with the findings of the inquiry officer and, secondly, when it decides to pass an order of punishment after considering the reply given by the delinquent employee against the findings of disagreement of the disciplinary authority, then it is obligatory upon the disciplinary authority to follow such-procedure strictly. This Court would not read the aforesaid provision in such a manner so as to make one or the other exercise nugatory by reading the order in the manner as suggested by learned Standing Counsel. The reasons contained in the disagreement note constitute the ex parte view taken by the disciplinary authority against the findings recorded by the inquiry officer. When it is communicated to the delinquent employee and he submits its reply, the disciplinary authority is benefited with the explanation given by the delinquent employee. In order to find out as to whether it would like to stick to its earlier view of disagreement with the finding of the inquiry officer or the same needs to be changed, modified, partly or wholly in the light of explanation given by the delinquent employee, it has to apply its mind again.

The reasons, therefore, are required to be recorded by the disciplinary authority as to why the explanation given by the delinquent employee is or is not satisfactory. The purpose and objective of reasons to be recorded under sub-rule (2) and (4) of Rule 9 are different. They are to be recorded at different stages with slightly different material inasmuch as at the former stage, the stand of the delinquent employee is not available to the disciplinary authority while in the later case it is available. We, therefore, are clearly of the view that non-observance of Rule 9(4) is fatal since its compliance is mandatory. If the delinquent employee after communicating its disagreement note and inquiry officer's finding to the delinquent employee and after receiving the reply failed to pass a reasoned order imposing punishment upon the delinquent employee, such order would not be tenable in law and has to be set aside.

18.In the circumstances, the writ petition is allowed and the impugned order dated 9-6-2004 is quashed. However, it will be open to the disciplinary authority to pass a fresh order in accordance with law keeping in view the observations made hereinabove. There shall be no order as to costs."

39. It was followed by another coordinate bench of this Court in **Nishith**

Ranjan Tiwari (supra), wherein it was observed as below:

"In the case ofSanjeev Kumar(supra), the Court has held that Rule 9(2) are mandatory in nature, providing two stages where reasons are required to be provided by the disciplinary authority. In Rule 9(2) when the disciplinary authority disagrees with the inquiry report, reason has to be assigned and the same has been interpreted requiring them to be communicated to the delinquent employee. Admittedly, there is no defence available to the delinquent employee before the disciplinary authority at that stage. Therefore, Rule 9(4) provides that having regard to the findings on all or any of the charges by the disciplinary authority, penalty is specific in Rule 3 should be imposed on the charged government servant for which he shall provide a copy of the inquiry report along with his findings recorded under Sub Rule 2 of rule 9 to him and further required him to submit his representation if he so desires within a reasonable specified time.

In this back drop this rule has been interpreted that consideration of explanation of the petitioner should be made in such a manner that if the disciplinary authority disagrees with the explanation, he has to assign reasons for disagreement with the explanation offered by the delinquent employee failing which the impugned order of punishment shall become illegal."

40. Again, in **Neeraj Verma (supra)**, that view was followed by yet another coordinate bench. It was observed as under:

"12. Sub-rule 2 of Rule 9 of the 1999 Rules clearly provides that if the disciplinary authority disagrees with the findings of the Inquiry Officer on any charge, it shall record its own finding thereto with the reasons. Sub-rule (4) of Rule 9 of the 1999 Rules further requires that if the disciplinary authority is of the opinion that the Government servant deserves imposition of some penalty under Rule 3, he shall furnish a copy of the inquiry report along with his findings recorded, if any, under Sub-rule 2 of Rule 9 to the delinquent employee and would allow him reasonable time to submit a reply/representation. After receiving the representation, the disciplinary authority shall again consider the aforesaid material along with the reply, if any, and pass a reasoned order imposing one or more penalty mentioned in Rule 3 and communicate the same to the delinquent employee.

13. From the aforesaid, it transpires that when the rule framing authority itself has made separate provision, making it obligatory upon the disciplinary authority to record reasons at two different stages, one, when it disagrees with the findings of the inquiry officer and, secondly, when it decides to pass an order of punishment after considering the reply given by the delinquent employee against the findings of disagreement of the disciplinary authority, then it is obligatory upon the disciplinary authority to follow such procedure strictly. The reasons contained in the disagreement note constitute the ex parte view taken by the disciplinary authority against the findings recorded by the inquiry officer. When it is communicated to the delinquent employee and he submits its reply, the disciplinary authority is benefited with the explanation given by the delinquent employee. In order to find out as to whether it would like to stick to its earlier view of disagreement with the finding of the inquiry officer or the same needs to be changed, modified, partly or wholly in the light of explanation given by the delinquent employee, it has to apply its

mind again. The reasons, therefore, are required to be recorded by the disciplinary authority as to why the explanation given by the delinquent employee is or is not satisfactory. The purpose and objective of reasons to be recorded under Sub-rule 2 and 4 of Rule 9 are different. They are to be recorded at different stages with slightly different material inasmuch as at the former stage, the stand of the delinquent employee is not available to the disciplinary authority while in the later case it is available. We, therefore, are clearly of the view that non-observance of Rule 9(4) is fatal since its compliance is mandatory. If the delinquent employee after communicating its disagreement note and inquiry officer's finding to the delinquent employee and after receiving the reply failed to pass a reasoned order imposing punishment upon the delinquent employee, such order would not be tenable in law and has to be set aside."

41. We are not inclined to accept the submission advanced by Sri Khare that in the last noted decision, the coordinate bench had ruled that the Disciplinary Authority would be required to record its reason to reject the representation, even in a case where no earlier order may have been passed in terms of Rule 9(2) of the Rules. The words used in a judgement by an author judge are not to be interpreted as words of a statute. The words "if any" used in conjunction with the words "his finding recorded" (with reference to the findings recorded under Rule 9(2) of the Rules), do not suggest or convey that the Disciplinary Authority was enjoined to record its reasons to reject the representations even where he agreed with the conclusions drawn by the Inquiry Officer. Neither any statutory indication nor any discussion exists, to infer such reasoning.

42. The ratio of the decision is contained in the later paragraph where in no unclear terms, it has been held that the requirement to record the reasons in two stages exists where a Disciplinary Authority first disagrees with the finding of the Inquiry Officer and second, where he decides to pass an order of punishment after considering the reply given by the delinquent. It is that procedure that has been held to be obligatory. In the facts of that case, procedure under Rule 9(2) of the Rules had been adopted. In that context the discussion had emerged.

43. To complete the discussion, we may also note, similar view had also been taken by yet another coordinate bench of this Court in **Shailendra Kumar Srivastava (supra).** There, it was observed as below:

"20. Sub-Rule (2) of Rule 9 of 1999 Rules contains a provision in respect of a situation where there is disagreement with the Inquiry Officer on any charge, by the Disciplinary Authority. According to the said provision, in case the Disciplinary Authority disagrees with the findings of the Inquiry Officer he shall record its own finding thereon for the reasons to be recorded. Once the Disciplinary Authority records reason for disagreeing with the findings of the Inquiry Officer on any charge, the Disciplinary Authority shall thereafter proceed either to exonerate the delinquent officer if charges are not proved or to impose the penalties as specified in Rule 3 of 1999 Rules.

21. It is thus incumbent upon the Disciplinary Authority in terms of Rule 9(2) of the 1999 Rules that in case of disagreement, he has to give reasons while recording his own finding. Sub-Rule (4) of Rule 9 of 1999 Rules provides that the penalty shall be imposed on the delinquent

officer only once he is provided with a copy of inquiry report and the finding of the Disciplinary Authority recorded under Sub-Rule (2) of Rule 9 requiring him to submit his representation if he so desires. Thus a careful reading of Rules 9 (2) and 9(4) of the 1999 Rules as discussed here-in-above, makes it clear that in case the Disciplinary Authority does not disagree with the findings of the Inquiry Officer he shall furnish a copy of the Inquiry Report to the Delinquent Officer requiring him to submit his representation to the same and then, he will pass appropriate orders. However, in a situation where the Disciplinary Authority disagrees with the findings of the Inquiry Officer, he has to record his own finding, that too with reasons for disagreement, and thereafter he has to serve the findings and the reasons for disagreement with the findings of the Inquiry Officer to the Delinquent Officer. The requirement as given in Rules 9(2) and 9(4) of 1999 Rules is to provide adequate opportunity to the Charged Officer to rebut the findings of the Disciplinary Authority and the reasons for his disagreement. Such a course as available in Rules 9(2) and 9(4) of the 1999 Rules is in conformity with the principles of natural justice."

44. Therefore, there is no basis to the submission being advanced by learned Senior Counsel for the petitioner that the requirement of recording reasons under Rule 9(4) of the Rules exists and may be enforced, independent of Rule 9(2) of the Rules. The submission is misconceived. It is rejected.

45. Having taken that view, we are further not inclined to accept the submission of Sri Khare that unless Rule 9(4) is read as suggested (by him), there would exist no requirement to furnish a copy of the Inquiry Report to the delinquent and/or to grant him opportunity to represent thereagainst. Though attractive in first blush, the submission must fail. Those requirements arise, sustain and are enforced in law, on the pure strength of Article 311 of the Constitution of India, as interpreted in **Mohd. Ramzan Khan (supra).** In view of that higher law existing, lack of statutory law (either by principal legislature or its delegate) would make no difference. Consequently, where the Disciplinary Authority intends to agree with the Inquiry Report – concluding the guilt of a delinquent, the Disciplinary Authority may proceed in accordance with procedure prescribed under Article 311 as interpreted by the Supreme Court in **Mohd. Ramzan Khan (supra)**. That circumstance not provided by Rule 9 of the Rules would remain governed by the Constitutional provision (Article 311), as interpreted by the Supreme Court.

46. As to the ratio relied upon by learned Senior Counsel for the petitioner in the decisions of the Supreme Court in **Punjab National Bank and Others Vs. K.K. Verma, (2010) 13 SCC 494, Hari Niwas Gupta Vs. State of Bihar (2015) SCC OnLine Pat 4511, Hari Niwas Gupta Vs. State of Bihar (2020) 3 SCC 153, D.K. Agrawal Vs. Council of the Institute of Chartered Accountants of India, 2021 SCC OnLine SC 903, Dr. Anurika Vaish Vs. Union of India, 2015 SCC OnLine All 9599, Chairman Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharan Varshney and Others, (2009) 4 SCC 240 and Institute of Chartered Accountant of India Vs. L.K. Ratna and Others, 1986(4) SCC 537**, we find the same to be distinguishable and/or not applicable, to the present facts.

47. In **Punjab National Bank and Others (supra)**, the ratio of **Mohd.**

Ramzan Khan (supra) had been considered and it was ruled that the right to represent against the findings of the Inquiry Report remained undisturbed by the 42nd Constitutional Amendment. As to facts, Regulation 7(2) of the Punjab National Bank, considered in that decision read as below:

"...

(2) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

..."

48. The above Regulation was read to imply that it mandates the employer to furnish the Inquiry Report to the delinquent in case the Disciplinary Authority chose to record its reason to disagree with the same. In paragraph-24 of the report, it was held as below:

"24.Regulation 7(2) requires the disciplinary authority to record its reasons for disagreement wherever it disagrees with the findings of the enquiry officer. Regulation 9 provides for communicating to the employee concerned, the orders passed under Regulation 7, apart from providing him with a copy of the enquiry report. These Regulations will have to be read as laid down only with a view to provide an opportunity to the employee to represent against the findings to the extent they are adverse to him. Then only will they become meaningful."

49. Clearly, that Regulation 7(2) may be comparable to Rule 9(2) of the Rules. As to facts involved, in that case, the Disciplinary Authority disagreed with the Inquiry Report. Relying on the ratio of the Supreme Court in an earlier decision with respect to the same regulation, in **Punjab National Bank and Others Vs. Kunj Behari Mishra, (1998) 7 SCC 84,** it was first concluded that the requirement to supply a copy of the Inquiry Report was mandatory. Then as to the requirement of recording of reasons, the Supreme Court found that there was no dispute that though the Disciplinary Authority had differed from the Inquiry Officer, failure to provide copy of the Inquiry Report and failure to afford opportunity to represent thereagainst amounted to critical breach of the procedure. In those facts and on that reasoning, the order of the High Court allowing the writ petition (on that ground), was sustained. As discussed above, that situation would arise under the Rules where the Inquiry Officer would have furnished a report exonerating the delinquent of the charge, yet, the Disciplinary Authority may choose or propose to take a different view on that Inquiry Report itself, to punish the delinquent. Such is not the case here.

50. The decision of the Patna High Court as affirmed by the Supreme Court in **Hari Niwas Gupta (supra)** arose on entirely different facts and applicable law. There, the inquiry contemplated by law was waived by invoking Article 311(2)(b). In that context, the requirement of recording of reasons was found mandatory. Insofar as specific requirement exists to record reasons to dispense with the domestic inquiry and those reasons had not been recorded by the Disciplinary Authority, completely different legal issue had arisen, in that case. Suffice to note, in the present case, the domestic inquiry was not dispensed. Rather, the disciplinary action has been taken on strength of two Inquiry Reports.

51. In **D.K. Agrawal (supra)** the procedure before the Council for the purpose of award of penalty was regulated. There existed Chartered Accountant Regulations, 1964. Regulation 15 read as below:

"15. Procedure in a hearing before the Council.

(1) If the Council, in view of its findings, is of opinion that there is a case for passing one of the orders specified in clauses (a) or (b) of sub-section (4) of Section 21, is shall—

(a) furnish to the respondent a copy of the report of the Disciplinary Committee and a copy of its findings : and

(b) give him a notice indicating the order proposed to be passed against him and calling upon him to appear before it on a specified date or if he does not wish to be heard in person, to send within a specified time, such representation in writing as he may wish to make against the proposed order.

(2) The scope of the hearing or of the representation in writing, as the case may be, shall be restricted to the order proposed to be passed.

(3) The Council shall, after hearing the respondent, if he appears in person, or after considering the representation, if any, made by him, pass such orders as it may think fit.

(4) The orders passed by the Council shall be communicated to the complainant and the respondent."

52. In that context of the law, the Supreme Court observed as below:

"21.Needless to say that, the power exercised by the Council under Section 21 is quasi-judicial in nature. Perusal of the recommendations of the Council shows that it did not discuss the report of the Disciplinary Committee, the written statement and the oral submissions of the appellant while coming to the conclusion that he is guilty of misconduct. However, the concluding portion of the recommendations of the Council made an incorrect statement that the Council had considered all the materials on record and the written and oral submissions of the appellant. The observations of the Disciplinary Committee cannot by any stretch of imagination be treated as findings. At best, they may be termed as the material which falls within the domain of consideration by the Council. The Council has failed to give its own independent findings. The recommendations made by the Council are not supported by independent reasons. The recommendations, in our opinion, have been made mechanically by the Council.

22.Recording of reasons is a principle of natural justice and every judicial/quasi-judicial order must be supported by reasons to be recorded in writing. It ensures transparency and fairness in the decision-making process. The person who is adversely affected wants to know as to why his submissions have not been accepted. Giving of reasons ensures that a hearing is not rendered as a meaningless charade. Unless an adjudicatory body is required to give reasons and make findings of fact indicating the evidence upon which it relied, there is no way of knowing whether the concerned body genuinely applied itself to and evaluated the arguments and the evidence advanced at the hearing. Giving reasons is all the more necessary because it gives satisfaction to the party against whom a decision is taken. It is a well-known principle that justice should not only be done but should also be seen to be done. An unreasoned decision may be

just, but it may not appear to be so to the person affected. A reasoned decision, on the other hand, will have the appearance of fairness and justice."

53. Again, in the absence of any requirement under the Rules, comparable to the Regulation 13 of the Chartered Accountant Regulations, 1964 (considered by the Supreme Court), the ratio being relied is not applicable to the facts of the present case.

54. At the same time, in **Dr. Anurika Vaish (supra)**, a coordinate bench of this Court observed as under:

"142.There is yet another aspect namely where a collective decision is taken by a body of people, a decision of a policy matter or a declaration of the manner of functioning or any other administrative matter may not necessarily require giving of reasons but where a decision making process which deals with the individual rights of a person and is governed by rules, regulations and statutes, then the power to decide is conferred by law and regulated by it. In such, a situation, even a collective decision by a body cannot afford to be subjective and it has to record reasons. A debate between recording of brief reasons and reasons in detail is always a matter of adjudication. In our opinion, even in a collective decision the reasons even if brief should contain the material on the basis whereof such a reason is being recorded. Any form of vagueness or just cryptically mentioning the conclusion would not suffice to show that reasons have been discussed even while forming a collective opinion. A mere recital of vague reasons would not be sufficient nor a matter like the present one where, the aggrieved party has a right to know the reasons for the decision being taken either for or against him."

55. While it cannot be disputed that such observation was made, it would be premature and inappropriate to conclude that the said ratio is applicable to the instant case involving disciplinary proceedings governed by Rule 9 of the Rules. Suffice to note, the general principle considered by the coordinate bench did not arise in the context of any pari materia provision in law. Thus, what has been laid down by the coordinate bench is a sound principle to be applied in appropriate case. However, it would remain subject to just exceptions arising from specific statutory provisions, that may commend otherwise. Since the present proceedings arise from Rule 9 of the Rules, we may not rush to apply the principle considered by the coordinate bench in the above noted decision, in preference to the statutory rule that otherwise applies. As noted above, specifically Rule 9 has been considered in **Sanjeev Kumar (supra)**. That principle has been consistently applied. Therefore, there is no reason to depart from that consistent reasoning accepted and applied by this Court, to apply a general principle of law laid down by another coordinate bench of the Court in **Dr. Anurika Vaish (supra),** especially since that principle of law did not arise with reference to Rule 9 of the Rules.

56. Also, the decision of the Supreme Court in **Chairman Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank (supra)**, laid down that an order of affirmation need not contain elaborate reasons like an order of reversal but it does not mean that the order of affirmation need

not contain any reason whatsoever. At the same time, it may not be forgotten that the said observation was made in the context of exercise of appellate power to affirm an order or punishment. In the present case, the issue has arisen not on the appellate authority having affirmed the order passed by the Disciplinary Authority and thus confirmed the penalty. On the contrary, in the present case affirmation is not to an order passed by a lower authority but it is the order passed by the original authority itself i.e. the Disciplinary Authority accepting the Inquiry Reports containing findings of the Inquiry Officers (here Judges). For that reason, the principle invoked by learned Senior Counsel for the petitioner would remain inapplicable to the facts that are wholly dissimilar.

57. In **L.K. Ratna and Others (supra**), the ratio arose in the context of Regulation governing the disciplinary proceedings against a Chartered Accountant. That ratio would not apply to the present case inasmuch as detailed procedure for inquiry into misconduct of members of the Institute of Chartered Accountant existed in the shape of Section 21 of the Chartered Accountant Act, 1949. Section 21(3) of the Act clearly provided for recording of reasons by the Disciplinary Authority itself - to support the findings of misconduct. Therefore, that decision is also wholly distinguishable.

58. Coming to the exact proceeding before us, in **Umesh Chandra (supra)**, another coordinate bench of the Court had the occasion to consider a similar objection. The objection as to lack of reasons given by the Full Court was specifically examined in the context of penalty handed out to a Judicial Officer, by this Court. It was observed as below :-

"27.It has further been submitted by Sri Rajvanshi that the Administrative Committee as well as the Full Court had not recorded any reason while passing the impugned order and rejecting the representation of the petitioner, therefore, the order impugned stands vitiated. This contention lacks merit for the reason that this is a matter of common knowledge that inquiry report is accepted first by the Administrative Committee after full deliberations and only then it is being made available to the delinquent officer for making comments. It is reconsidered after receiving the comments of the delinquent officer and having deliberations. The matter is then placed before the Full Court wherein the further deliberations take place. Thus a very cumbersome procedure is prescribed to have the check and balance and to rule out the possibility of arbitrariness, as deliberations take place in Full Court. An order does not become bad merely because reasons have not been recorded unless the delinquent succeeds in establishing that such a decision was not permissible on the report submitted by the Inquiry Judge or the inquiry report itself was perverse being based on no evidence or contrary to the evidence on record. (VideRam Kumarv.State of Haryana,1987 Supp SCC 582:AIR 1987 SC 2043;Somduttav.Union of India, AIR 1989 SC 414;S.N. Mukherjiv.Union of India,(1990) 4 SCC 594;Union of Indiav.E.G. Nambodiri,(1991) 3 SCC 38:AIR 1991 SC 1216;State Bank of Bikaner & Jaipurv.Prabhu Dayal Grover,(1995) 6 SCC 279;State of U.P.v.Yamuna Shanker Mishra,(1997) 4 SCC 7:AIR 1997 SC 3671;Badri Nathv.Government of Tamil Nadu,(2000) 8 SCC 395; andState of U.P.v.Narendra Nath Sinha, AIR 2001 SCW 3380).

28.InNational Fertilizers Ltd.v.P.K. Khanna, AIR 2005 SCW 4333, the

Apex Court reiterated the same view observing as under:—

"The concurrence of the Disciplinary Authority with the reasoning and conclusion of the Inquiry Officer means that the Disciplinary Authority has adopted the conclusion and the basis of the conclusion as its own. It is not for the Disciplinary Authority to restate the reasoning."

29.Recording of reasons is warranted necessarily in case the Disciplinary Authority does not agree with the findings recorded by the Inquiry Officer. Therefore, we find no substance in the aforesaid submission at all."

59. In absence of any requirement under the Rules to obligate the Disciplinary Authority i.e. Full Court to record its express reasons to accept the Inquiry Report and award penalty, it commends to us that the general principal in law governing award of penalties in service matters as laid down by the Supreme Court in **Ram Kumar (supra)** is good law. In paragraph 8 of the said report it was held as below:

"8.In view of the contents of the impugned order, it is difficult to say that the punishing authority had not applied his mind to the case before terminating the services of the appellant. The punishing authority has placed reliance upon the report of the enquiry officer which means that he has not only agreed with the findings of the enquiry officer, but also has accepted the reasons given by him for the findings. In our opinion, when the punishing authority agrees with the findings of the enquiry officer and accepts the reasons given by him in support of such findings, it is not necessary for the punishing authority to again discuss evidence and come to the same findings as that of the enquiry officer and give the same reasons for the findings. We are unable to accept the contention made on behalf of the appellant that the impugned order of termination is vitiated as it is a non-speaking order and does not contain any reason. When by the impugned order the punishing authority has accepted the findings of the enquiry officer and the reasons given by him, the question of non-compliance with the principles of natural justice does not arise. It is also incorrect to say that the impugned order is not a speaking order."

60. That principle has been reiterated in **Boloram Bordoloi (supra)** wherein it has been observed as below :-

"11.We are of the view that the judgment of this Court inECIL[ECILv.B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] is not helpful to the case of the appellant. Further, it is well settled that if the disciplinary authority accepts the findings recorded by the enquiry officer and passes an order, no detailed reasons are required to be recorded in the order imposing punishment. The punishment is imposed based on the findings recorded in the enquiry report, as such, no further elaborate reasons are required to be given by the disciplinary authority. As the departmental appeal was considered by the Board of Directors in the meeting held on 10-12-2005, the Board's decision is communicated vide order dated 21-12-2005 in Ref. No. LGB/I&V/Appeal/31/02/2005-06. In that view of the matter, we do not find any merit in the submission of the learned counsel for the appellant that the orders [Boloram Bordoloiv.Lakhmi Gaolia BankWrit Appeal No. 361 of 2008, order dated 3-4-2009 (Gau)],[Boloram Bordoloiv.Lakhimi Gaonlia Bank, WP (C) No. 219 of 2006, order dated 8-6-2007 (Gau)] impugned are devoid of reasons. "

61. To the same effect (though in different facts), it has been reasoned by another coordinate bench of this Court in ***Madhav Prasad (Supra)***. To keep the our discussion limited, amongst others the following question was considered by that coordinate bench:

"Whether the disciplinary/appointing authority and the appellate authority are required to record detailed/separate reasons, even if they agree with the findings of the inquiry report."

62. The same was answered in the following terms:

"63. We have already held that it is not necessary to record detailed/ separate reasons in case the appointing/disciplinary authority or the appellate authority agrees with the findings of the inquiry officer but this does not mean that the reasons may not be recorded. It is advisable that the reasons be recorded in order to show fairness and the fact that the case has been considered.

64. Separate reasons may not be necessary for agreeing with the findings of the inquiry report however this does not mean that in case any other point, apart from the finding of the inquiry report-for example that no opportunity has been afforded or bias-is taken then it should not be dealt by a reasoned order.""

63. Ultimately, it was recorded as below:

"(v) The appointing/disciplinary or the appellate authority is not required to record detailed/separate reasons in case they agree with the inquiry report containing valid reasons. However in case questions-other than finding of the inquiry officer-are involved then the appointing/disciplinary J or the appellate authority is required to record its reasons on those questions. In this case some such questions were involved but most of them were raised for the first time in the writ petition. We have also rejected all of them; there is no necessity to send the case back."

64. Thus, both in the context of the Rules and the binding law, we are of the view that the Disciplinary Authority / Full Court was not obligated to record its express reasons-to reject the representation made by the delinquent or to accept the Inquiry Report or to award particular penalty.

65. Coming to the further submissions advanced by learned Senior Counsel for the petitioner, it must be recognized – to sustain a challenge raised to a Domestic Inquiry it must be shown to be vitiated. If the Domestic Inquiry was fair and proper, the punishment awarded by the Disciplinary Authority may not be interfered with, even by an appellate authority, if there had been one. In the context of judicial review proceeding that have arisen before us, exercise of our jurisdiction may remain confined to examine if the procedural requirements had been complied with and if the two Domestic Inquiries were fair and proper.

66. Fact conclusions drawn on appraisal of material, quantum of penalties awarded may not (per se) warrant our consideration. Only in very exceptional cases, where grossly punishment is seen awarded (to the proven misconduct), limited room may exist - to examine that issue. If charges levelled against the petitioner, a senior judicial officer are seen duly proven at the Domestic Inquiries and a charge being (amongst others), to try influence another judicial officer in the course of a judicial

proceeding, it may itself eclipse any further consideration to the quantum of punishment awarded. Therefore, the first issue to be examined is fairness and completeness of the two domestic inquiries.

67. During the course of hearing, we had required learned counsel for the parties to make available to us date charts of the two inquiry proceedings. Both sides have provided us the same. We consider it proper to make reference to the details of the two inquiries. The first inquiry i.e. the Departmental Inquiry No.21 of 2015 commenced with the issuance of Charge Sheet on 08.08.2016. On that the petitioner filed his written statement on 12.07.2017. The next date was fixed on 09.08.2017. On that date the petitioner absented whereas the other delinquent (hereinafter referred to as second delinquent), was present. He pressed for permission to be assisted by a retired judicial officer. It was allowed. On that date, statement of E.W.-1 (wife of the second delinquent), was partly recorded and its copy provided to the second delinquent. On the next date 10.08.2017 also, the petitioner remained absent. The statement of E.W.-1 was continued to be recorded in the first half. The inquiry was postponed for 6:30 p.m. The petitioner remained absent in those proceedings as well. The statement of E.W.-1 continued to be recorded on the next date fixed, 18.09.2017. Also, part statement of E.W.-1 was recorded on 10.08.2017. Its copy was provided to the second delinquent.

68. Before the next date fixed (18.09.2017), on 12.09.2017, the petitioner moved an adjournment application. It was rejected on that date itself. Consequently, on the next date fixed on 18.09.2017, the second delinquent appeared before the Inquiry Judge 'A' whereas the petitioner continued to absent himself. For that continued absence, the inquiry was directed to proceed ex parte against the petitioner. The statement-in-chief of E.W.-1 was completed and the Inquiry fixed for 30.10.2017 - for cross-examination of E.W.-1.

69. On that date, the petitioner presented himself at the inquiry and raised objections as to the preparation of charge sheet and rejection of (certain) applications. He also prayed for stay of the inquiry proceedings. At the same time, he applied for recall of E.W.-1. Since E.W.-1 had not been cross-examined till then, the application for her recall was rejected. Copy of statement of E.W.-1 recorded 09.08.2017, 10.08.2017 and 18.09.2017 was provided to the petitioner. E.W.-1 was offered for cross-examination. At that stage, the petitioner refused to cross-examine the E.W.-1, expressing his inability. At the same time, E.W.-1 prayed to make further statement. That prayer was accepted and her further statement was recorded. On that date, second delinquent remained absent. Accordingly, the inquiry was fixed for 07.12.2017 for the cross-examination of E.W.-1

70. Before the next date (7.12.2017), on 25.11.2017, the petitioner again moved an application seeking adjournment. It was rejected on 27.11.2017 with the observation that inquiry would proceed ex parte against the petitioner, if he failed to appear on the date fixed. The petitioner filed yet another application on 30.11.2017 - to be provided copies of the earlier orders passed by the Inquiry Judge 'A' and also copy of the orders requiring him to remain present on the next date.

71. On the date fixed 07.12.2017, the second delinquent moved application to

refer to the matter to the Mediation Centre attached to the High Court. It was rejected and the second delinquent was offered to cross-examine E.W.-1. At the same time, the present petitioner now moved application seeking assistance of a practising lawyer. That application was also rejected. However, the Inquiry Judge 'A' again granted opportunity to the petitioner to cross examine E.W.-1 on 11.12.2017.

72. On 11.12.2017, the petitioner as also the second delinquent were present. The petitioner pressed his application dated 08.12.2017, seeking adjournment. It was rejected and at that stage the Inquiry Judge 'A' directed the Inquiry to proceed on day-to-day basis. Also, the Inquiry Judge 'A' dealt with further applications moved by second delinquent to drop the charges and to adjourn the Inquiry proceedings till conclusion of criminal proceedings. Faced with that consequence, the second delinquent began and on 12.12.2017, he completed the cross examination of E.W.-1. Thereafter, the petitioner began the cross-examination of E.W.-1. However, it could not conclude till 7:45 P.M. on 12.12.2017. Accordingly the matter was fixed for the next date i.e. 13.12.2017. On that date the petitioner again absented himself and moved an adjournment application of the same date. It was rejected by the Inquiry Judge 'A' and opportunity earlier granted to the petitioner to cross examine E.W.-1, was closed. The next date fixed in inquiry on 23.01.2018. However, on that date Inquiry Judge 'A' was not available. Therefore, the next date was fixed for 06.02.2018.

73. On 06.02.2018 also the petitioner remained absent. Since the Inquiry had been directed to proceed ex parte against him, it was continued. On 06.02.2018, 07.02.2018, 09.02.2018 statements of E.W.-2, E.W.-3, E.W.-4 and E.W.-5 were recorded. Those, witnesses were cross-examined by the second delinquent. However, the petitioner remained absent, without any application for adjournment etc. Next date was fixed for 20.02.2018 to 22.02.2018.

74. On 19.02.2018, the petitioner moved another adjournment application dated 15.02.2018. It was also rejected, in view of the earlier order of Inquiry Judge 'A' to proceed on a day-to-day basis.

75. On 20.02.2018, 21.02.2018 and 22.02.2018, E.W-6, E.W-7, E.W-8 and E.W-9 were examined by the Presenting Officer. They were cross-examined by the second delinquent. However, the petitioner remained absent. At that stage, the Presenting Officer informed the Inquiry Judge 'A' that no further evidence was to be led by the employer. The Inquiry was then fixed for 16.03.2018, for defence evidence.

76. Two days prior to the date fixed, the second delinquent filed an application providing a list of 45 defence witnesses. He was required to state the relevancy of the witnesses named by him. On the date fixed, 16.03.2018, while the petitioner remained absent, the second delinquent moved another application seeking adjournment for one week. The matter was thus adjourned to 27.03.2018. On 27.03.2018, orders were passed on the application of the second delinquent regarding relevancy of Defence Witnesses and the next date was fixed in the inquiry, for 16.04.2018. However, the present petitioner remained absent on that date also and did not make any application or furnish list of Defence Witnesses.

77. On 16.04.2018, the Defence Witnesses (of the second delinquent), were present but both delinquent absented. At the

same time, it may also be noted, the second delinquent moved an adjournment application on which request, Inquiry proceeding was fixed for 07.05.2018. Yet, the petitioner neither remained present nor moved any application. Later, on 04.05.2018 an adjournment application was moved by the present petitioner. It was allowed and the Inquiry proceeding adjourned for the date 14.05.2018. It was also made clear that the application moved by the petitioner dated 02.04.2018 seeking recall of Employer Witness would be considered on the next date.

78. The present petitioner then moved another adjournment application on 04.05.2018 and another application to inquire about the status of his earlier application dated 02.04.2018. The Inquiry Judge 'A' fixed the date on 14.05.2018.

79. Though it was made very clear to the petitioner that no further adjournment would be granted, yet again, adjournment was sought. It was granted for the date 16.05.2018.

80. On another application made by the second delinquent the Inquiry had been fixed for 23.07.2018. On that date fixed, amongst others, again an adjournment was granted to the petitioner for the date 08.08.2018 - to decide the petitioner's application dated 02.04.2018 seeking recall of Employer Witness. Also, on 23.7.2018, upon adjournment sought by the second delinquent, next date fixed was 11.08.2018. Also, 08.08.2018, the petitioner, moved another set of adjournment applications dated 31.07.2018 and 01.08.2018. Those were rejected and the order communicated to the petitioner. Instead of appearing on the next date fixed (08.08.2018), the petitioner again moved an adjournment application, this time through e-mail. At that stage, after having granted repeated and continued opportunities (to the petitioner to participate in the Inquiry and also to press his application for recall of witness), after a very long period of time, the Inquiry Judge 'A' finally proceeded to reject the application seeking recall of E.W.-1. Also, having rejected the application moved through e-mail, the Inquiry was fixed for 11.08.2018, for opportunity to lead Defence Evidence.

81. On 11.08.2018 also, the petitioner and the second delinquent did not appear. Besides seeking repeated adjournments and thus delaying the inquiry proceedings, the petitioner did not file any application disclosing his desire to lead any evidence. In any case, the petitioner did not appear on the date fixed. Therefore, in such circumstances, the Inquiry Judge 'A' closed his opportunity to lead Defence Evidence and Inquiry was fixed for oral hearing, on 31.08.2018.

82. After the opportunity to lead the defence evidence stood closed, the petitioner filed another application dated 21.08.2018 to seek permission to lead the Defence Evidence. Objections were invited thereon, on 24.08.2018. The application itself was fixed for disposal on the date already fixed in Inquiry i.e., 31.08.2018.

83. On 31.08.2018, the second delinquent appeared and sought legal assistance. It was granted. At the same time, the petitioner remained absent. Consequently, his applications dated 21.08.2018, 23.08.2018 and 28.08.2018 were disposed of, first. The application dated 23.08.2018 to be supplied copies was rendered infructuous whereas his application dated 21.08.2018 to lead defence evidence and his further application dated

28.08.2018 came to be rejected. At the same time in view of the order passed on the separate application made by the second delinquent, the Inquiry was fixed for 04.09.2018.

84. On 04.09.2018, the petitioner again absented whereas the second delinquent remained present and led defence evidence. The Defence Witness was cross-examined by the Presenting Officer. Next date was then fixed for 05.09.2018.

85. On that date, the petitioner as also the second delinquent remained absent. Neither filed any application to seek adjournment. Even the Defence Witness remained absent. Accordingly, the Inquiry Judge 'A' closed the defence evidence and the Inquiry was fixed for 12.09.2018.

86. Having thus got time, predictably, on 11.09.2019, the petitioner filed another adjournment application and on this occasion stated that on his application an agenda item had been placed before the Administrative Committee of the Court. Therefore, the matter may be adjourned to another date. The learned Inquiry Judge 'A' adjourned the Inquiry for 26.09.2018. However, on that date the matter had to be further adjourned for 03.10.2018 as the Presiding Officer was on another official duty.

87. On 03.10.2018, the matter had to be adjourned as Inquiry Judge 'A' was on leave. Accordingly, the matter was fixed for 10.10.2018, for submissions and disposal of applications dated 07.09.2018 and 11.09.2018 moved by the petitioner. On the date fixed i.e., 10.10.2018, the petitioner again remained absent. Accordingly, the Inquiry was fixed for the next date 11.10.2018.

88. On 11.10.2018, both delinquent remained absent. Accordingly, the applications of the petitioner were rejected for non-prosecution and the Presenting Officer was heard. The Inquiry Report was reserved.

89. After that stage had been crossed, the petitioner again moved an application dated 16.10.2018 requesting for opportunity for hearing to be granted to him before preparation of Inquiry Report. Even at that stage, the Inquiry Judge ‘A’ allowed that application and fixed the matter for 14.11.2018. By further order dated 25.10.2018 the Inquiry was fixed for 14.11.2018. On that date though the petitioner remained present however, he refused to advance submissions. Considering such conduct of the petitioner, the Inquiry Report was reserved.

90. Seen in that light, there is no procedural defect noted in the Inquiry proceeding in Departmental Inquiry No. 21 of 2015. Admittedly, the charge sheet was served on the petitioner alongwith a copy of the documents etc. He was given much more than fair or deserved or warranted opportunity to furnish his reply, cross examine the witnesses, lead evidence and present defence.

91. As noted above, the Inquiry lingered and in any case remained pending over a long period from 08.08.2016 (when the charge sheet was issued), for almost after three years, owing solely to the erring conduct offered by the petitioner. Innumerable adjournments were sought by him. More than reasonable opportunities were granted to the petitioner to participate in the inquiry proceedings, at each stage. The petitioner, absolutely abused the opportunity of hearing granted to him. He

made all efforts to defeat the fair conduct of the Inquiry and made a mockery of the law.

92. On several occasions, despite it being known to the petitioner that the proceedings would not be adjourned any further and would proceed ex parte against him, he continued to maintain his conduct of deliberate non-participation. It appear to be the most conscious act on part of the petitioner to wilfully avoid the disciplinary proceedings. Yet, preserving him from any harm that he otherwise deserved (for reason of his conduct), the Inquiry Judge 'A' took a lenient view and allowed the petitioner to participate in the inquiry proceedings. Yet, the conduct of the petitioner remained defiant to the extent he failed to participate. In the present facts, the repeated opportunities granted to the petitioner (despite his conduct to consciously absent therefrom), were not deserved in law, rather, they may have been occasioned by indulgence granted by the Inquiry Judge 'A'.

93. The petitioner offered an unrepentant conduct that may only be described – in one word, as 'incorrigible'. Therefore, the petitioner may never claim that he was not heard - on one date or another. No order passed by the Inquiry Judge 'A' may be read in isolation and the petitioner may not be permitted to falsely exaggerate the alleged adverse consequence visited on him by such order. On the whole and consistently as also on purpose, the petitioner is seen wholly and solely responsible for the consequence of ex parte Inquiry Report that came to be visited on him.

94. What then requires our consideration is, if sufficient evidence was led to prove the charge of misconduct. Before we may take note of the evidence led to prove the charge of misconduct, it would be relevant to consider the law with respect to the scope of disciplinary proceedings and misconduct alleged against an employee. In **State of Haryana & Anr. Vs. Rattan Singh, (1977) 2 SCC 491, Justice V. R. Krishna Iyer** in his inimitable and unique style expressed the principle thus:

"4.It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case-law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is,

was theresomeevidence or was therenoevidence — not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence ofany evidencein support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record."

95. Then, applying that test to cases involving misconduct by a judicial officer, the law on the subject was considered by a coordinate bench of this Court in **Umesh Chandra (supra)**, wherein it was observed as under :

"14.InHigh Court of Judicature at Bombayv.Udaysingh,(1997) 5 SCC 129:AIR 1997 SC 2286the Hon'ble Apex Court while dealing with a case of judicial officer held as under:—

"Since the respondent is a judicial officer and the maintenance of discipline in the judicial service is a paramount matter and since the acceptability of the judgment depends upon the creditability of the conduct, honesty, integrity and character of the officer and since the confidence of the litigant public gets affected or shaken by the lack of integrity and character of the judicial officer, we think that imposition of penalty of dismissal from service is well justified."

15.This Court inRam Chandra Shuklav.State of U.P., (2002) 1 ALR 138 held that the case of judicial officers has to be examined in the light of a different standard that of other administrative officers. There is much requirement of credibility of the conduct and integrity of judicial officers. InHigh Court of Judicature at Bombayv.Shirish Kumar Rangrao Patil,(1997) 6 SCC 339:AIR 1997 SC 2631, the Supreme Court observed as under:—

"The lymph nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of the judiciary and the need to stem it out by judicial surgery lies on the judiciary itself by its self-imposed or corrective measures or disciplinary action under the doctrine of control enSrined in Articles 235, 124 (6) of the Constitution. It would, therefore, be necessary that there should be constant vigil by the High Court concerned on its subordinate judiciary and self-introspection.

When such a constitutional function was exercised by the administrative side of the High Court any judicial review thereon should have been made not only with great care and circumspection, but confining strictly to the parameters set by this Court in the aforesaid decisions. ---------"

…

17.InAll India Judges' Associationv.Union of India,(1992) 1 SCC 119:AIR 1992 SC 165, the Hon'ble Supreme Court observed that Judges perform a "function that is utterly divine" and officers of the subordinate judiciary have the responsibility of building up of the case appropriately to answer the cause of justice. "The personality, knowledge, judicial restrain, capacity to maintain dignity" are the additional aspects which go into making the Courts functioning successfully.

18.InTarak Singhv.Jyoti Basu,(2005) 1 SCC 201, the Hon'ble Supreme Court observed as under:—

"Today, the judiciary is the repository of public faith. It is the trustee of the people. It is the last hope of the people. After every knock of all the doors fail, people approach the judiciary as a last resort. It is the only temple worshipped by every citizen of this nation, regardless of religion, caste,

sex or place of birth because of the power he wields. A Judge is being judged with more strictness than others. Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary must take utmost care to see that the temple of justice does not crack from inside which will lead to a catastrophe in the justice delivery system resulting in the failure of public confidence in the system. We must remember woodpeckers inside pose larger threat than the storm outside."

96. Then, in **R. R. Parekh (supra)**, the Supreme Court observed as below :

"16. ...The issue which arises in such cases is whether there are circumstances from which an inference that extraneous considerations have actuated a judicial officer can legitimately be drawn. Such an inference cannot obviously be drawn merely from a hypothesis that a decision is erroneous. A wrong decision can yet be a bona fide error of judgment. Inadvertence is consistent with an honest error of judgment. A charge of misconduct against a judicial officer must be distinguished from a purely erroneous decision whether on law or on fact. The legality of a judicial determination is subject to such remedies as are provided in law for testing the correctness of the determination. It is not the correctness of the verdict but the conduct of the officer which is in question. The disciplinary authority has to determine whether there has emerged from the record one or more circumstances that indicate that the decision which forms the basis of the charge of misconduct was not an honest exercise of judicial power. The circumstances let into evidence to establish misconduct have to be sifted and evaluated with caution. The threat of disciplinary proceedings must not demotivate the honest and independent officer. Yet on the other hand, there is a vital element of accountability to society involved in dealing with cases of misconduct. There is on the one hand a genuine public interest in protecting fearless and honest officers of the District Judiciary from motivated criticism and attack. Equally there is a genuine public interest in holding a person who is guilty of wrongdoing, responsible for his or her actions. Neither aspect of public interest can be ignored. Both are vital to the preservation of the integrity of the administration of justice."

97. Applying that principle, we note, Charge no. 4 in Departmental Inquiry No. 21 of 2015 was with respect to efforts made by the petitioner to influence a junior judicial officer - the learned Additional Chief Judicial Magistrate, Court No. 5, Meerut in a judicial proceeding arising out of Case Crime No. 472 of 2014 - the case in which the petitioner and his close family members were directly involved and interested. The FIR had been lodged by none other than the wife of the present petitioner, making allegations that EW-1 (her sister-in-law) had inflicted serious injuries to the petitioner.

98. In support of that Charge, documentary evidence in the shape of order sheet dated 18.12.2015 prepared by the learned Additional Chief Judicial Magistrate, in his own handwriting, was proved. It established that the wife of the petitioner had pressured the learned Additional Chief Judicial Magistrate to allow her application dated 14.12.2015 or to keep the matter pending at the stage of cognizance and issue of summons to the accused persons. No material was brought before the Inquiry Judge 'A' to doubt that order sheet entry. Also, the learned Additional Chief Judicial Magistrate and the

learned District Judge at whose complaint Departmental Inquiry No. 21 of 2015 had been initiated, were examined by the Inquiry Judge 'A'. They were extensively cross-examined by the second delinquent. The Inquiry Judge has considered that evidence and observed, that no evidence existed to dislodge the statements of EW6 and EW7, namely the learned District Judge and the learned Additional Chief Judicial Magistrate. It was thus found proved that the misconduct alleged, occurred and was reported.

99. On a holistic consideration of that objective and relevant material, the Inquiry Judge 'A' reached the subjective conclusion that the petitioner had tried to influence a judicial officer - in the course of a judicial proceeding involving the petitioner and his family members. The most serious misconduct had been made out against the petitioner, a senior judicial officer. It needs no emphasis that a judicial office may remain distant and pure – unaffected and immune to personal gain and/or loss. Any transgression committed by a judicial officer to extract any benefit for the self or for the benefit of those to whom the judicial officer may be closely related, would always be dealt with most severely. Once the 'bad fish' is identified, it may not be retained in the 'tank'. No room may ever exist and no margin of error may be permitted as may allow any possibility for a judicial officer to seek to influence another judicial officer, in exercise of judicial function. If there exists a temple of justice, judicial officers must act like its high priests who must not only conduct the rituals involving discharge of their duties on the dias but they must zealously guard the purity of the temple itself. A judicial officer who defiles his office, merits no mercy.

100. With respect to charge no. 2 of false injury to his person, it was noted - an FIR was lodged alleging offences under Section 395 and 397 IPC. With respect to the same, the Inquiry Judge 'A' found that EW1, the wife of the second delinquent had elaborately described the occurrence to the effect that she along with her close family members had visited the petitioner's residence to resolve her matrimonial discord. In that process, when EW1 along with her close family members reached the residence of the petitioner, they were first locked up inside a room. Thereafter, the petitioner inflicted injuries to his person, using a shaving blade. He then ran out - shouting that he had been injured by EW1. Thus, at his instance, the situation was falsely escalated. Thereupon, police personnel visited the place of occurrence. They were pressured by the petitioner to arrest the complainant/EW1. Though the said witness was elaborately cross-examined by the second delinquent and was partly cross-examined by the present petitioner, no material has been shown to exist (on the Inquiry record), to doubt the truthfulness of the statement of EW1, before the Inquiry Judge 'A'. Similar facts were stated by EW3, the father-in-law of the second delinquent. EW5, a brother officer of the petitioner (who was residing in the same residential colony as the petitioner), also testified as to the occurrence that had taken place at the petitioner's official residence on 26.06.2014. In that, he described that the petitioner had some altercation at his residence. He further admitted knowledge as to existence of matrimonial discord in the marriage of the second delinquent. At the same time, he further stated that he had not heard of any incident involving robbery committed by the complainant/EW1, at the residence of the petitioner. Seen in that light, no material had arisen before the Inquiry

Judge 'A' to doubt the allegation of exaggeration of the real occurrence. Less so, no evidence was led to establish occurrence involving ingredients of serious offences under Section 395 and 397 IPC.

101. Other charges alleging efforts to influence the Investigating Officer and demand of dowry, were also found proved.

102. That being the status of evidence and findings recorded on the strength of the material and evidence, we are unable to accept the submission being advanced by learned Senior Counsel for the petitioner that the findings recorded by the Inquiry Judge 'A', were conjectural. In paragraph-2 of **R.R. Parekh (supra)**, it has been observed as below :

"20.A disciplinary inquiry, it is well settled, is not governed by the strict rules of evidence which govern a criminal trial. A charge of misconduct in a disciplinary proceeding has to be established on a preponderance of probabilities. The High Court while exercising its power of judicial review under Article 226 has to determine as to whether the charge of misconduct stands established with reference to some legally acceptable evidence. The High Court would not interfere unless the findings are found to be perverse. Unless it is a case of no evidence, the High Court would not exercise its jurisdiction under Article 226. If there is some legal evidence to hold that a charge of misconduct is proved, the sufficiency of the evidence would not fall for re-appreciation or re-evaluation before the High Court. Applying these tests, it is not possible to fault the decision of the Division Bench of the Gujarat High Court on the charge of misconduct. The charge of misconduct was established in Disciplinary Inquiry No. 15 of 2000."

103. Then, in **Pandey Gajendra Prasad & Ors. (supra)** with respect to the scope of judicial review in such proceedings, the Supreme Court observed as below :

"18.It is trite that the scope of judicial review, under Article 226 of the Constitution, of an order of punishment passed in departmental proceedings, is extremely limited. While exercising such jurisdiction, interference with the decision of the departmental authorities is permitted, if such authority has held the proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence on the merits of the case, or if the conclusion reached by the authority, on the face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. (SeeShashikant S. Patil[(2000) 1 SCC 416 : 2000 SCC (L&S) 144] .)

19.Explaining the scope of jurisdiction under Article 226 of the Constitution, inState of A.P.v.S. Sree Rama Rao[AIR 1963 SC 1723 : (1964) 3 SCR 25] , this Court made the following observations: (AIR pp. 1726-27, para 7)

"7. ... The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the

conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence."

20.Elaborating on the scope of judicial review of an assessment of the conduct of a judicial officer by a committee, approved by the Full Court, inSyed T.A. Naqshbandiv.State of J&K[(2003) 9 SCC 592 : 2003 SCC (L&S) 1151] this Court noted as follows: (SCC p. 600, para 7)

"7. ... As has often been reiterated by this Court, judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions of administration of justice with which we are concerned in this case, by going into the correctness as such of ACRs or the assessment made by the Committee and approval accorded by the Full Court of the High Court."

104. Then, in **P. Gunasekaran (supra)**, the principle governing the exercise of discretionary jurisdiction under Article 226 and 227 of the Constitution of India, was summarised as below :

12.Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

(a) the enquiry is held by a competent authority;

(b) the enquiry is held according to the procedure prescribed in that behalf;

(c) there is violation of the principles of natural justice in conducting the proceedings;

(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(i) the finding of fact is based on no evidence.

13.Under Articles 226/227 of the Constitution of India, the High Court shall not:

(i) reappreciate the evidence;

(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based.

(vi) correct the error of fact however grave it may appear to be;
(vii) go into the proportionality of punishment unless it shocks its conscience.

105. Thus, we find, no good ground is made out to offer any interference. The scope of judicial review has to remain limited. The disciplinary inquiry in Departmental Inquiry No. 21 of 2015 is found to be fair and proper and conclusions drawn by the Inquiry Judge 'A', based on material and evidence collected during that Inquiry, with which the petitioner had been confronted. Also, that material cannot be described as extraneous or irrelevant.

106. Though the above discussion itself is enough to reach the result of the dismissal of the writ petition, yet in view of the further submissions advanced we may note that the conduct of the petitioner in the second inquiry, being Domestic Inquiry no. 24 of 2016, was no better. All efforts were made by Inquiry Judge 'B' to allow the petitioner every opportunity to participate in those proceedings, as well. In that, charge-sheet was issued to the petitioner on 20.3.2017. On 23.5.2017, the petitioner was granted time to submit reply to the charge-sheet, by 30.5.2017. On 13.6.2017, two weeks further time was granted to the petitioner to furnish his reply and the inquiry was fixed for 7.7.2017. The petitioner failed to appear on the date fixed. Yet, time was granted till 24.7.2017. The inquiry proceeding was adjourned on 10.8.2017 and 5.9.2017. On the next date fixed i.e. 10.10.2017, the petitioner appeared before the Inquiry Judge 'B'. Direction was issued to make available to the petitioner copies of all documents demanded. Similar direction was again issued on 2.11.2017. On 29.11.2017, the Presenting Officer was directed to lead Employers' Evidence. On 13.12.2017, a weeks' further time was granted to the petitioner, to inspect the record and to obtain copies of documents.

107. In view of the further request made by the petitioner, on 16.01.2018, the Presenting Officer was directed to supply copies of specified documents. The inquiry remained adjourned on the next dates 12.01.2018 and 19.02.2018. Repeated adjournment sought by the petitioner was refused and the inquiry proceeding directed to proceed ex parte on 19.03.2018. Statement of EW-1 – the learned ACJM, was recorded. He was allowed to be cross-examined by the petitioner on 30.05.2018. That cross-examination was concluded on 03.07.2018. On 07.08.2018, 05.09.2018, 11.10.2018, 30.11.2018, the inquiry was adjourned. On the next date 14.12.2018, the inquiry was fixed for 19.1.2019. Petitioner was given opportunity to produce his witnesses and the next date fixed for 14.2.2019. On that date, further opportunity was granted to the petitioner to produce list of his witnesses, by 05.4.2019. On 05.04.2019, petitioner moved an application to recall E.W-1 for further cross examination. That application was rejected. After dealing with further applications regarding summary of documents etc., on 15.05.2019, the Presenting Officer concluded the cross examination of the petitioner.

108. Seen in that light, again it has to be accepted – more than reasonable opportunity (to defend his case), was granted to the petitioner in the course of second inquiry by the Inquiry Judge 'B'. The petitioner was in no way prejudiced or prevented from setting up his defence. He examined DW-4, the then System Officer posted at District Court, Meerut. On the strength of that examination, petitioner

sought to doubt the correctness of the charge allegation that the petitioner had tried to influence the ACJM on 18.12.2015. However, the petitioner could not dislodge the basic fact existence of ordersheet entry 18.12.2015 recorded by the learned ACJM. What may have transpired on 16.01.2016 was not the subject matter of the charge levelled and it was not the subject matter to be inquired into in the course of the Domestic Inquiry proceedings. The misconduct with which the petitioner was charged was found proven. The misconduct being, his effort to influence another judicial officer in the course of a judicial proceeding, in which he was personally interested, enough material was brought on record. The petitioner was confronted with all adverse material that were being relied against him and the Inquiry Judge 'B' reached the conclusion of his guilt as to that misconduct, based on material and evidence gathered in the course of that inquiry.

109. It must be recorded that in the course of his cross examination, the petitioner admitted having called the ACJM on telephone, through 'I' the lawyer representing the petitioner's wife in the case giving rise to the misconduct. In this regard, the Inquiry Judge 'B' has observed as under:-

"At this juncture, it would be relevant to point out that in his cross-examination, Sri Sirohi has stated that he never met Sri xxxx (the ACJM) and he has no grudges against him. In order to remove certain doubts, as certain advocates were not happy with his way of working, he had a telephonic conversation with Sri xxxx through Sri 'I', Advocate. Thus, there was a telephonic conversation between Charged Officer and EW-1. When confronted with the question that Sri 'I', Advocate, who has been produced by him as DW-6, is an interested witness, the Charged Officer has stated that he has no relation with Sri 'I', Advocate as he is Advocate for the complainant, Dr. Meghna Sirohi."

110. Once the petitioner admitted having called the learned ACJM (who was seized with the case proceeding involving his close family members), that too, using the mobile phone of his wife's lawyer – ostensibly to check the ACJM regarding his working, every other detail referred to by learned Senior Counsel for the petitioner - to point certain deficiencies in the conduct of that Inquiry, pales into insignificance. For the guilt of the petitioner -a a judicial officer to be established, the above quoted passage was enough. Clearly, the petitioner had not called the ACJM in his capacity as a senior officer but as the husband of the complainant that too using the phone of her lawyer. The inviolable code of conduct and self-restraint to be always maintained by any human being who may ever come to occupy a judicial office, is seen clearly and irreparably violated, by the petitioner. In committing that transgression, the petitioner earned absolute demerit. It rendered him unfit to hold judicial office, any further. As with the mythological 'Shishupal', so with the petitioner, he made that 'one' transgression that could not be spared.

111. In view of the above, writ petition fails and is accordingly **dismissed.** No order as to costs.

(2024) 5 ILRA 1752
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ - C No. 3750 of 2024

Shakeel Ahmad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Chandra Pal Singh, Pankaj Kumar Gupta

Counsel for the Respondents:
Arun Kumar Pandey, C.S.C.

Civil Law –Revenue law- name of the petitioner along with his relatives struck of land-land in question restored as Gram Sabha land-allotted in favour of private respondents-order under Section 176(A) of UPZA&LR Act, 1950 under challenge-ascertainment of nature of land under Section 132 of the Act- core issue- Sections 76(1)(dd), 77 of the U.P. Revenue Code, 2006- Asami in possession of land entitled to be recorded as Bhumidhar- name of petitioner could not have been recorded over the land on the basis of inheritance after expiry of lease period-benefit of Section 76(1)(dd) cannot be provided-Proviso to sub rule (1) of the Rule 176 (A) of the UPZA& LR Rules, 1952- no lease shall be made in favour of Asami for a period exceeding 5 years- no benefit can accrue to petitioner-on strength of his entry in CH Form no. 45-vailidity of a *patta* cannot be ascertained by consolidation authorities-Petition dismissed. (Paragraphs 12 and 14 to 18)

HELD:
The legislative intent of Section 76(1) (dd) of the U.P. Revenue Code, 2006 is that even Aasami in possession of the land is entitled to be recorded as Bhumidhar, if the land is not covered under Section 77 of the U.P. Revenue Code, 2006. Admittedly, the Plot No. 315 area 1.061 hectare in 1359 Fasli is recorded as 'Banjar Category-5'. Banjar Land may belong to the Gaon Sabha but is not covered under 132 of the U.P.Z.A. & L.R. Act or 77 of the Code. In the opinion of the Court, the name of the petitioner could not have been recorded over the land on the basis of inheritance after expiry of lease period. The petitioner is thus not entitled to the benefit of Section 76(1) (dd) more so on the ground that no such plea had been taken before the Revenue Authorities and has been argued by learned counsel for the petitioner for the first time without there being and pleading or foundation in that regard in the writ petition. (Para 12)

The proviso to sub-Rule (1) of the Rule 176(A) of the U. P. Zamindari Abolition and Land Reforms Rule, 1952 provides that no lease shall be made to an Aasami for a period exceeding 5 years. The justification for grant of Aasami leases for a period of 5 years was considered in the case of Hari Ram Vs Collector reported in 2004(97) RD 360, wherein it was laid down that the object of provisions contained in Chapter VII pertaining to the grant of lease by the Land Management Committee is a provision enacted to give effect to the Constitutional mandate as contained in Article 39(b) of the Constitution of India. The object contained in Article 39(b) is distribution of material resources of the community to best sub-serve the common hood. The restriction of 5 years of an Aasami lease is only for the purpose that lease be again granted after 5 years to best sub-serve the common hood. The sub-Rule (2) of the Rule 176-A empowers the Assistant Collector to determine the lease even before the expiry of the lease. (Para 14)

Learned counsel for the petitioner has laid much emphasis on the fact that during the consolidation operations that had intervened during the subsistence of the lease in favour of the father of the petitioner, the name of the father came to be recorded as Bhumidhar with transferable rights and the same was also reflected in CH Form-45. Once the Bhumidhari Rights had been acquired the proceedings under Section 176-A of the U.P.Z.A. & L.R. Act, 1950 was completely unwarranted. The learned counsel for the petitioner has failed to satisfy the query of the Court as to how the Bhumidhari rights stood accrued to the father of the petitioner who had been granted Aasami Patta. In the opinion of the Court no benefit can accrue to the petitioner on the fact that the name of the father of the petitioner was recorded as Bhumidhar in CH Form-45 in view of the Full Bench decision of this Court reported in AIR 1977 Alld. 360 wherein it has been held that Consolidation Authorities are not vested with any power, authority or jurisdiction to adjudicate upon the validity of the patta except in certain special circumstances which admittedly do not exist in the present case nor has been pleaded or any foundation laid in the writ petition. (Para 18)

Petition dismissed. (E-14)

List of Cases cited:

1. Gangadeen Vs St. of U.P. & ors.reported in 2018(138) RD 68

2. Writ-B No. 24167 of 2017 (Karamjeet Singh & ors. Vs Board of Revenue, U.P., Lucknow & ors.) (Neutral Citation No. 2024 AHC 48683)

3. Hari Ram Vs Collector reported in 2004(97) RD 360

4. Parabdin Vs Board of Revenue, U.P at Lucknow & ors. (Writ-B No.38209 of 2016)

5. Ali Jaan & ors. Vs Additional Collector (Judicial) & ors. (Writ-B No.5596 of 2018) decided on 19.11.2018

6. Vijay Kumari Vs Consolidation Officer, Sawayajpur, Hardoi & ors. (Consolidation No. 6946 of 2019) decided on 13.03.2019

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

1. Heard Sri Pankaj Kumar Gupta, learned counsel for the petitioner, Sri Abhishek Shukla, learned Additional Chief Standing Counsel for the State Respondents and Sri Arun Kumar Pandey, learned counsel for the Respondent No. 3.

2. The instant writ petition has been filed questioning the orders dated 16.01.2009 passed by the Respondent No. 2, Sub Divisional Magistrate, Dhampur, Bijnor under Section 176 (A) of the U.P.Z.A. & L.R. Act, 1950 whereby and whereunder the name of the petitioner and his brothers Khalid Ahmad, Naeem Ahmad and mother Akhtari wife of Tasleem Ahmad as Aasami Patta holder (Category-3) over Plot No. 315 area 1.061 hectares lagan 109 contained in Khata No. 244 (1412 to 1417 Fasli) has been struck off and land has been restored as Gram Sabha land category 6 as also the order dated 31.05.2022 whereby and whereunder the land contained in the above mentioned Plot No. 15 has been allotted in favour of the Respondent Nos. 4, 5 & 6 and the allotment has also been approved.

3. It is the case of the petitioner that the Plot No. 576 area 3.13 hectare and Plot No. 624 area 1.52 hectare were leased out in favour of Tasleem Ahmad the father of the petitioner under the resolution of the Gram Sabha dated 25.12.1977 and the allotment was duly approved by the Sub Divisional Magistrate, Dhampur and the father of the petitioner was put in possession over the land allotted as is evident from ZA Form No. 58 dated 25.12.1977 filed as Annexure No. 3 to the writ petition. The dispute in the present writ petition is confined to Plot No. 576 area 3.13 hectares. During the subsistence of the lease the consolidation operations intervened in the village and the plot number allotted changed from 576 to 315. After close of the consolidation operations the name of the father of the petitioner namely Tasleem Ahmad was reflected in CH Form-45 as Bhumidhar of Plot No. 315. A Kishan Bahi bearing No. 420855 was issued by the Tehsildar Nagina, Bijnor on the basis of the entry in CH Form-45. The father of the petitioner Tasleem Ahmad, the original allottee expired and consequent to his death the names of the petitioner, his brothers and mother were recorded over the Plot No. 315 under PA-11. The petitioner is stated to be in possession over the plot and performing agricultural operations thereon since then.

4. This Court vide order dated 22.04.2024 after recording the submissions made by learned counsel for the petitioner as also the learned Additional Chief Standing Counsel appearing for the State Respondents and also noting that the core question to test the validity of the impugned

order would be to ascertain the nature of the land in dispute, whether it was covered by Section 132 of the U.P.Z.A. & L.R. Act, as stated in the impugned order, at the time of allotment of lease in question or otherwise, as the records filed along with the writ petition did not clarify the said position, had required the learned Additional Chief Standing Counsel to obtain specific instructions in this regard and appraise the Court as to the exact nature of the land allotted to the father of the petitioner way back in the year 1977.

5. Pursuant to the order aforesaid, instructions have been received which are taken on record.

6. Sri Abhishek Shukla, learned Additional Chief Standing Counsel on the basis of the instructions submits that the plot in question i.e. Plot No. 315 area 1.061 hectare was recorded as 'Banjar' Category-5' in 1359 F and was Gram Sabha Property. An Asami Patta (Category-3) was executed in favour of Sri Tasleem Ahmad late father of the petitioner Sakeel Ahmad. At the relevant time the land was recorded as 'Banjar' Category-5' and since period of lease had not expired the name of Tasleem Ahmad was recorded over the land. Tasleem Ahmad expired on 04.10.2006 and the name of the petitioner and other heirs of Tasleem Ahmad came to be recorded over the land on the basis of PA-11 entry.

7. Learned counsel for the petitioner submits that the Respondent No. 2, the Sub Divisional Magistrate, Dhampur District Bijnor passed the impugned order dated 16.01.2009 under Section 176(A) of the U.P.Z.A. & L.R. Act behind the back of the petitioner relying upon an ex-parte report of the Tehsildar concerned. Thereafter, the Sub Divisional Magistrate has proceeded to allot the land to the Respondent Nos. 4 to 6.

8. Learned counsel for the petitioner has argued that the impugned order proceeds on the erroneous assumption that the land belonged to reserved category land covered by Section 132 of the U.P.Z.A. & L.R. Act and was Gaon Sabha property whereas admittedly the land is 'navin-parti' which had been leased out to the father of the petitioner Tasleem Ahmad, who was subsequently declared Bhumidhar. The land as such was Bhumidhari land and could not be allotted to the Respondent Nos. 4 to 6. It is also argued that the impugned order is entirely ex-parte and has been passed on total non application of mind, barred by Section 49 of the U.P.C.H. Act. It is also argued that the petitioner is entitled to the benefit of Section 76(1) (dd) of the U.P. Revenue Code, 2006 which has not been considered by the authorities. Reliance has been placed upto the decision of a Coordinate Bench of this Court in the case of ***Gangadeen Vs. State of U.P. and others*** reported in ***2018(138) RD 68*** and ***Writ-B No. 24167 of 2017 (Karamjeet Singh and 2 others Vs. Board of Revenue, U.P., Lucknow and 2 others) (Neutral Citation No. 2024 AHC 48683)*** to emphasize the point that as per Clause (dd) of sub Section (1) of the Section 76, every person who was an Asami in possession of land not covered by Section 77 of the Code, immediately before the commencement of the Code and has been recorded as such in Class-3 of the Annual Register (Khatauni) of 1407 Fasli shall become Bhumidhar with non-transferable rights and shall have all the rights and be subject to all the liabilities conferred or imposed upon such Bhumidhar by or under the Code. It is argued that the land in question is not covered by Section 77

of the Code. The name of the father of the petitioner was recorded in the Khatauni till 1412-1417 Fasli and after his death the name of the petitioner stood recorded under PA-11 as heir of Tasleem Ahmad and as such the petitioner is entitled to the benefit of Clause (dd) of Sub Section (1) of Section 76 of the Code.

9. Reliance is also placed upon a decision of this court in the case of ***Ram Swaroop Vs. State of U.P. and others***, decided on 15.04.2019, ***Neutral Citation No. 2019:AHC 63918*** to buttress the proposition that cancellation of the lease could be done only after serving notice which admittedly was not done and as such the impugned order is unsustainable. Based upon the above submissions it is prayed that the impugned orders be set aside and the writ petition allowed.

10. Sri Abhishek Shukla, learned Additional Chief Standing Counsel for the State Respondents in opposition to the writ petition at the very outset submits that the impugned order is revisable and the petitioner has an effective alternative remedy and the writ petition is not liable to be entertained.

11. Sri Shukla further submits that the Commissioner and Secretary Board of Revenue, U.P., Anubhag-5, Lucknow issued an order dated 01.08.2006 to all District Magistrates, U.P. to identify all Aasami Category-3 and Category-4 as also illegal occupants over Government Land and take measures against such persons whose leases have expired and are in illegal occupation of the land. Since the tenure of the lease in favour of the father of the petitioner had already expired, the petitioner cannot continue in possession over the land. The original allottee i.e. Tasleem Ahmad has already expired. The land is Gaon Sabha Land and the petitioner is not entitled to the benefit of 76(1) (dd) of the Code. The Aasami leases granted under Section 195 are not heritable and no right can be said to flow to the petitioner after the death of his father the original allottee after the expiry of the period of 5 years of the Aasami lease as per Rule 176-A(2). After expiry of the lease, the land shall stand automatically vested in the Gaon Sabha. It is also submitted that the plea of the benefit of Section 76(1) (dd) has been taken for the very first time before this Court during the course of arguments and there is no ground/pleadings made in this regard in the writ petition. No such ground was ever raised before the Authority below. It is, accordingly, prayed that the writ petition deserved to be dismissed on merits as also on the ground of alternative remedy.

12. I have heard learned counsel for the petitioner as also the learned Additional Chief Standing Counsel for the State Respondents. I have also perused the case laws cited by the learned counsel for the petitioner. The legislative intent of Section 76(1)(dd) of the U.P. Revenue Code, 2006 is that even Aasami in possession of the land is entitled to be recorded as Bhumidhar, if the land is not covered under Section 77 of the U.P. Revenue Code, 2006. Admittedly, the Plot No. 315 area 1.061 hectare in 1359 Fasli is recorded as 'Banjar Category-5'. Banjar Land may belong to the Gaon Sabha but is not covered under 132 of the U.P.Z.A. & L.R. Act or 77 of the Code. In the opinion of the Court, the name of the petitioner could not have been recorded over the land on the basis of inheritance after expiry of lease period. The petitioner is thus not entitled to the benefit of Section 76(1)(dd) more so on the ground that no such plea had been taken before the Revenue Authorities and has been argued by learned counsel for the petitioner

for the first time without there being and pleading or foundation in that regard in the writ petition.

13. Admittedly, Tasleem Ahmad the original allottee had been granted Aasami lease of the land in question under Resolution of the Land Management Committee dated 25.12.1977. The period of such Aasami lease is only 5 years. The lease in favour of the Allottee Tasleem Ahmad could not travel beyond 24.12.1982. There is no material on record to establish the fact tht the period of lease was extended nor any such plea has been taken before the Authorities below or in the writ petition itself.

14. The proviso to sub Rule (1) of the Rule 176(A) of the U. P. Zamindari Abolition and Land Reforms Rule, 1952 provides that no lease shall be made to an Aasami for a period exceeding 5 years. The justification for grant of Aasami leases for a period of 5 years was considered in the case of ***Hari Ram Vs. Collector*** reported in ***2004(97) RD 360***, wherein it was laid down that the object of provisions contained in Chapter VII pertaining to the grant of lease by the Land Management Committee is a provision enacted to give effect to the Constitutional mandate as contained in Article 39(b) of the Constitution of India. The object contained in Article 39(b) is distribution of material resources of the community to best sub-serve the common hood. The restriction of 5 years of an Aasami lease is only for the purpose that lease be again granted after 5 years to best sub-serve the common hood. The sub Rule (2) of the Rule 176-A empowers the Assistant Collector to determine the lease even before the expiry of the lease.

15. A Coordinate Bench of this Court in the case of ***Parabdin Vs. Board of Revenue, U.P at Lucknow and 4 others (Writ-B No.38209 of 2016)*** decided on 02.09.2016 while considering a similar situation as the present case observed as under in Para 8 of the judgment.

"8. A perusal of the patta as well as revenue record shows that the petitioner was not granted sirdari patta rather he was granted asami patta from the very beginning. Under the provisions of Rule 176 A of UP Z.A. & L.R. Act, 1952 patta for asami right could be granted for maximum period of five years. Admittedly, the patta was granted to the petitioner on 7.2.1976. Thus the period of patta has already come to an end and due efflux of time on the date of impugned order dated 30.12.2009. The petitioner left with no substantive right over the land in dispute and his name was rightly deleted from the revenue record. In any case in the absence of any right over the land in dispute this Court in exercise of writ jurisdiction cannot direct for restoring the name of the petitioner over the land in dispute."

16. Likewise, another Coordinate Bench of this Court in the case of ***Ali Jaan and 9 others Vs. Additional Collector (Judicial) and 3 others (Writ-B No.5596 of 2018)*** decided on 19.11.2018 observed as under:-

"It is settled law that an assami patta can be granted for a maximum duration of five years. Therefore, the period of allotment automatically came to an end in the year 1970. Under the circumstances, there was absolutely no justification for the Consolidation Officer for granting bhumidhari rights to the petitioners on the basis of an allotment, which had come to an end, at least 20 years before the order was passed by him.

Besides, on a pointed query by the Court, as to the provision of law whereunder an asami can become a bhumidhari with transferable rights, counsel for the petitioner has relied upon Section 131 of the U.P. Zamindari Abolition and Land Reforms Act.

In my considered opinion, this submission is without merit because Section 131 of the U.P. Zamindari Abolition and Land Reforms Act specifies as to who is a bhumidhari with non transferable rights.

Admittedly, the lease granted to the petitioners or their predecessor-in-interest in the year 1965 was of asami rights as defined in Section 133 of the Act. There exists no provision of law whereunder an asami can become either a bhumidhari with transferable or non transferable rights of the land allotted to him.

Moreover, the proviso to Rule 176-A of the U.P. Zamindari Abolition and Land Reforms Rules states that no lease shall be made to an asami for a period exceeding five years."

17. Yet again another Coordinate Bench of this Court in case of ***Vijay Kumari Vs. Consolidation Officer, Sawayajpur, Hardoi and 2 others (Consolidation No. 6946 of 2019)*** decided on 13.03.2019 along with 34 others, writ petitions observed as under:-

"The only Patta which is permissible to be granted by the Land Management Committee in a land referable to Section 132 is the Asami Patta in terms of the provision contained in Section 133(c). However, such Asami Patta which is permissible to be granted over a land referable to Section 132 cannot be granted in perpetuty; rather term of Asami Patta is restricted to a period of 5 years in terms of the provision contained in Rule 176-A of the U.P. Z.A. & L.R. Rules. Admittedly, the nature of pattas on which the petitioners place reliance in this case are not Asami Patta. Even if, it is presumed that pattas said to have been granted in favour of the petitioners on 31.10.1992 were Asami Pattas, their term itself has come to an end in terms of the provisions contained in Rule 176-A of the U.P. Z.A. & L.R. Rules."

18. Learned counsel for the petitioner has laid much emphasis on the fact that during the consolidation operations that had intervened during the subsistence of the lease in favour of the father of the petitioner, the name of the father came to be recorded as Bhumidhar with transferable rights and the same was also reflected in CH Form-45. Once the Bhumidhari Rights had been acquired the proceedings under Section 176-A of the U.P.Z.A. & L.R. Act, 1950 was completely unwarranted. The learned counsel for the petitioner has failed to satisfy the query of the Court as to how the Bhumidhari rights stood accrued to the father of the petitioner who had been granted Aasami Patta. In the opinion of the Court no benefit can accrue to the petitioner on the fact that the name of the father of the petitioner was recorded as Bhumidhar in CH Form-45 in view of the Full Bench decision of this Court reported in ***AIR 1977 Alld. 360*** wherein it has been held that Consolidation Authorities are not vested with any power, authority or jurisdiction to adjudicate upon the validity of the patta except in certain special circumstances which admittedly do not exist in the present case nor has been pleaded or any foundation laid in the writ petition.

19. In the instructions brought on record by the learned counsel representing

the State Respondents it has been clearly mentioned that after passing of the impugned order dated 16.01.2009 and restoration of the land as Gram Samaj and the same has been allotted to the Respondent Nos. 4, 5 & 6 vide order dated 31.05.2022 and the allottees i.e. the Respondent Nos. 4, 5 & 6 have already been put in possession thereof and their names stand recorded over the Plot No. 315 as Bhumidhars with non transferable rights. Besides the petitioner is not landless and Plot No. 316 area 0.877 hectare stand recorded in the name of his mother and other co-sharers.

20. In view of the above, the Court is not inclined to grant any indulgence to the petitioner. The writ petition is devoid of merits and is, accordingly, ***dismissed***. However, the dismissal of the writ petition shall not come in the way of the petitioner to establish his rights over the plot in dispute by taking recourse to filing suit for declaration of his rights over the land in appropriate proceedings.

21. No order as to costs.

(2024) 5 ILRA 1759
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ - C No. 7417 of 2024

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

Counsel for the Petitioner:
Abhishek Mishra, Jai Shanker Misra, Vijai Shanker Shukla

Counsel for the Respondents:
Anjali Upadhya, C.S.C., Vineet Pandey

Civil Law –revenue law- proceedings under Section 24 of the U.P. Revenue Code, 2006 challenged- impugned orders passed on the basis of incorrect report of Revenue Inspector- Alternative remedy- revision under Section 210 of U.P. Revenue Code, 2006-High Court will not entertain a petition under Article 226 of the Constitution of India-effective alternative remedy available to the aggrieved person-statue itself contains a mechanism for redressal of grievance- Petition dismissed.

HELD:
Having considered the rival submissions of the learned counsels for the parties, the Court is of the opinion that several factual aspects as submitted by counsels for the parties, need to be ironed out before the writ petition can be decided on merits. Moreover, a statutory remedy to assail the order of the Commissioner passed under Section 24 (4) has been provided in the statute book itself which in the opinion of the Court may not be bypassed.

The Apex Court in the case of PHR Invent Education Society case (supra) relied upon by the learned counsel for the petitioner, itself in Para 30 of the decision has clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action is complained of has been taken itself contains a mechanism for redressal of grievance.

In view of the above, this Court is not inclined to entertain the writ petition in the wake of availability of a statutory alternate remedy of filing a revision under Section 210 of the U.P. Revenue Code, 2006 against the impugned order dated 19.12.2023 passed by the Addl. Commissioner (Administration) 2nd, Meerut Division, Meerut. (Para 12)

Petition dismissed. (E-14)

List of Cases cited:

PHR Invent Educational Society versus UCO Bank & ors., Civil Appeal No. Nil of 2024 (arising out of SLP (c) No. 8867 of 2022) decided on 10th April, 2024

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

1. Heard Shri Jai Shanker Mishra, learned counsel for the petitioner, Shri Abhishek Shukla, learned Addl. Chief Standing Counsel for State-respondent Nos. 1 to 3. Smt. Anjali Upadhyay and Shri Vineet Pandey, learned counsels have accepted notice of the writ petition on behalf of respondent Nos. 26 and 27, respectively. However, they did not appear when the case was heard.

2. The writ petition arises out of proceedings under Section 24 of the U.P. Revenue Code, 2006 i.e. disputes regarding boundaries and is directed against the order dated 19.12.2023 passed by the Addl. Commissioner (Administration) 2nd, Meerut in appeal under Section 24 (4) of the Code registered as Case No. 1691 of 2023 whereby and whereunder the appeal has been rejected and the order dated 4.7.2023 passed by the Sub Divisional Officer, Dadri in Case No. 24060 of 2021 (Heere and others versus Devindra and others) under Section 24 of the U.P. Revenue Code, 2006 directing the demarcation of the plot No. 436 situate in village Haibatpur, Tehsil Dadri, District Gautam Budh Nagar, has been upheld.

3. A supplementary affidavit dated 2.5.2024 has been filed by learned counsel for the petitioner, which is taken on record.

4. It is the case of the petitioner that proceedings under Section 24 of the U.P. Revenue Code, 2006 were initiated at the instance of the respondent Nos. 4 to 7 for the demarcation of Plot No. 436M, area 0.3467 hectare and Plot No. 287M area 0.900 hectares. The petitioner and the respondent No. 17 to 24 are the owners of Plot Nos. 285M, 253M, 290/3 and 433/2. The respondent Nos. 8 to 16 are the recorded owners of Plot Nos. 434 and 290/1. The plot Nos. 285, 253, 290 and 433 are not adjacent to plot No. 436 of which the demarcation was sought. The Revenue Inspector is stated to have submitted his report on 8.1.2023 which was forwarded by the Tehsildar on 9.1.2023 to the Sub Divisional Officer concerned mentioning that the area of Plot No. 436 is 5.7990 hectares whereas the area was only 0.3467 hectares as reflected in the Khatauni pertaining to 1427-1432 Fasli filed on record as Annexure-3. The Sub Divisional Officer on the basis of an incorrect report passed the order dated 4.7.2023 directing the demarcation of the Plot No. 436. The order dated 4.7.2023 was challenged in appeal which too has met with the same fate.

5. Learned counsel for the petitioner has assailed the impugned orders by submitting that both the orders dated 4.7.2023 passed by the Sub Divisional Officer, as also the order dated 19.12.2023 passed by the Addl. Commissioner in appeal under Section 24 (4) of the U.P. Revenue Code, 2006 have been passed on incorrect report of the Revenue Inspector, no physical division of Plot No. 436, area 5.7990 hectare and 436M area 0.3467 hectare has not been done and no demarcation could be done without physical division, the provisions contemplated under Section 24 and Rule 22 of the Rules, 2016 have not been complied with. The Greater Noida Authority as also the U.P. State are the co-tenure holders of Khasra plot No. 436M but the area possessed by them has not been given in the report forming the basis of the impugned

orders, the co-tenure holders of Khasra Plot No. 436 as recorded in the Khatauni were not made party to the proceedings.

6. In the supplementary affidavit dated 2.5.2024 in Para 12 thereof, it has been stated that Plot No. 436, area 5.7990 hectare has already been acquired under Notification under the Land Acquisition Act and the compensation of the acquired land has already been received by the father of the respondent Nos. 4 to 7 being area 5.4523 hectares and the remaining area of Plot No. 436 i.e. area 0.3467 has been sold by the tenure holders to the irrigation department through registered sale deeds. The total area of plot No. 436 as well as 287 are in the name of the Greater Noida Development Authority and the Irrigation Department of the State of U.P. and the same is not under the ownership of the respondent Nos. 4 to 7. It is contended that the respondent Nos. 4 to 7 did not have locus to initiate the proceedings for demarcation under Section 24 of the Act to demarcate the plot No. 436 which has either been acquired or sold. It is thus contended that the entire proceedings under Section 24 are vitiated and liable to be set aside and the writ petition allowed as prayed.

7. Shri Abhishek Shukla, learned Addl. Chief Standing Counsel, in opposition to the writ petition, submits that the petitioner has an alternate remedy to assail the order dated 19.12.2023 in revision under Section 210 of the U.P. Revenue Code, 2006 since the order passed by the Commissioner under Section 24 (4) of the Code has been made subject to the provisions of Section 210 of the Code by the U.P. Act No. 7 of 2019. He submits that the writ petition may not be entertained in the wake of availability of an effective alternate remedy.

8. Refuting the above submission, learned counsel for the petitioner submits that existence of an alternate remedy is not an absolute bar rather is a self imposed restriction and the present case is a fit case where the power under Article 226 of the Constitution of India can be exercised as the orders impugned have been passed in the utter disregard of the procedures prescribed besides at the instance of persons who had no locus to maintain the proceedings under Section 24 of the U.P. Revenue Code, 2006 having sold the land contained in the Plot No. 436 demarcation of which was sought.

9. Reliance has been placed upon a decision of the Apex Court in the case of ***PHR Invent Educational Society versus UCO Bank and others, Civil Appeal No. Nil of 2024 (arising out of SLP (c) No. 8867 of 2022)*** decided on 10th April, 2024, particularly to Para 29 thereof, where the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them being:-

i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

ii) it has acted in defiance of the fundamental principles of judicial procedure;

iii) it has resorted to invoke the provisions which are repealed; and

iv) when an order has been passed in total violation of the principles of nature justice.

10. Based on the above, learned counsel for the petitioner submits that the objection taken by the learned Addl. Chief Standing Counsel may not be sustained and

the writ petition be entertained and decided on merits.

11. I have heard the learned counsel for the parties and have perused the records.

12. Having considered the rival submissions of the learned counsels for the parties, the Court is of the opinion that several factual aspects as submitted by counsels for the parties, need to be ironed out before the writ petition can be decided on merits. Moreover, a statutory remedy to assail the order of the Commissioner passed under Section 24 (4) has been provided in the statute book itself which in the opinion of the Court may not be bypassed.

13. The Apex Court in the case of ***PHR Invent Education Society*** case (supra) relied upon by the learned counsel for the petitioner, itself in Para 30 of the decision has clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action is complained of has been taken itself contains a mechanism for redressal of grievance.

14. In view of the above, this Court is not inclined to entertain the writ petition in the wake of availability of a statutory alternate remedy of filing a revision under Section 210 of the U.P. Revenue Code, 2006 against the impugned order dated 19.12.2023 passed by the Addl. Commissioner (Administration) 2nd, Meerut Division, Meerut.

15. This Court finds that the limitation for filing revision under Section 210 of the U.P. Revenue Code, 2006 is 60 days from the date of the order sought to be revised. The 60 days have since expired. The writ petition was presented in the Registry of this Court on 31.1.2024. Learned counsel for the petitioner submits that if a revision is now filed, the same would be rejected on the ground of limitation and there would be no adjudication on merits.

16. Taking note of the above, the writ petition is permitted to be ***dismissed as withdrawn*** with liberty to the petitioner to prefer a revision against the impugned order dated 19.12.2023 passed by the Addl. Commissioner (Administration) 2nd, Meerut Division, Meerut under Section 210 within three weeks from today.

17. In the eventuality of a revision being filed by the petitioner within the time allowed along with an application to condone the delay, the Board of Revenue is expected to condone the delay taking note of the fact that the petitioner had been pursuing the writ petition before this Court and entertain the revision consider and decide the same on merits ignoring the point of limitation.

18. The certified copies of the impugned orders shall be returned to the petitioner after retaining a photocopy of the same on record.

(2024) 5 ILRA 1762
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ - C No. 8626 of 2024

Ghaziabad Development Authority ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mahesh Narain Singh

Counsel for the Respondents:
C.S.C., Kripa Shankar Shukla

Civil Law – land acquisition- whether the Collector, while making award under Section 28-A of the Land Acquisition Act, 1894- competent to award interest on the compensation amount re-determined by him thereunder-Sections 4, 11, 11A, 16, 17, 23(1),23 (1A), 25, 28, 28A, 31, 34 of the Act, 1894-determination of compensation for land-market value of land on the date of publication of notification under Section 4(1)- both the Court and Collector vested with the power to award interest-conjoint reading of Sections 28 and 34 of the Act-award of interest-entire period-starting from the date of dispossession until the amount is deposited in the Court or paid to the person entitled-object of inserting Section 28-A-do away with inequality in payment of compensationto land owners covered by the same notification-Collector shall have fill power to award interest on the enhanced compensation awarded by him under Section 28-A of the Act-petition dismissed . (Paras 9, 18, 19, 20, 23 and 26)

HELD:
A combined reading of the aforesaid provisions shows that the compensation for land acquired is determined by the Court taking into consideration the market value of the land on the date of the publication of the notification under Section 4, sub-section (1). In the interval between the date of publication of notification under Section 4(1) and making of the award, there would be enhancement in the market value of the land. The purpose of inserting sub-section (1A) is to adequately compensate the land owners for rise in market value during the said period. (Para 9)

In case the Court enhances the compensation, it is invested with power to award interest on enhanced amount by virtue of Section 28. A conjoint reading of Section 28 and 34 reveals that the intent of the legislature is to ensure award of interest for the entire period starting from the date of dispossession until the amount is deposited in the Court or paid to the person entitled. The award of interest on the amount originally awarded by the Collector under Section 11 is taken care of by Section 34 by investing the power with the Collector who at that stage is in seisin over the matter. The power to award interest on the excess sum of compensation awarded in a reference by a Court is conferred on the Court before whom only such an eventuality may arise. There was no occasion to confer such a power on the Collector, before whom such situation would never arise. (Para 18)

Thus, there are two mandates of the legislature. First, to award interest on the compensation amount to the land owners without any break, except for the period during which any delay had occurred on account of stay of proceedings. Second, the rate of interest should be 9% for the first year from the date of dispossession and 15% for the subsequent period. (Para 19)

The object of inserting Section 28-A by Act No. 68 of 1984 w.e.f. 24.9.1984 was to do away with inequality in payment of compensation to land owners covered by the same notification. The purpose of grant of interest is to compensate an unpaid land owner who had been deprived of possession of his land in pursuance of the power of compulsory acquisition by the State Government. The liability to pay interest is incurred on the date Government takes possession, or in other words, the tenure holder is dispossessed. The rationale behind the same is plain and simple. The dispossession of the owner of the land by the State Government in exercise of its power of eminent domain, deprives him of the usufructs and benefits accruing to him from the acquired land. While the compensation determined is the value of land, in case compensation is not paid before depriving him of his land, the interest is recompense for depriving a person of the income from his property/compensation amount. (Para 20)

Once it is established that the legislative intent is to ensure award of interest on the compensation amount from date of dispossession until it is paid or deposited, it inheres in an award envisaged under Section 28-A(1) that an affected person taking recourse to such provision, inserted with the sole object of ensuring equality, cannot be deprived of the interest. The mere fact that no separate provision has been made under Section 28-A would not denude the Collector of the power to award interest which he automatically derives on the strength of the award which forms the foundation of the proceedings. (Para 23)

In our opinion, viewed from any angle, the irresistible conclusion is that the Collector shall have full power to award interest on the enhanced compensation amount awarded by him under Section 28-A of the Act. (Para 26)

Petition disposed of. (E-14)

List of Cases cited:

1. U.O.I. & anr.Vs Pushpavathi & ors., (2018) 3 SCC 28

2. Shree Vijay Cotton & Oil Mills Ltd. Vs State of Guj., (1991) 1 SCC 262

3. U.O.I.& anr. Vs Pradeep Kumari & ors., (1995) 2 SCC 736

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

1. The moot question which arises for consideration in the instant petition is whether the Collector, while making award under Section 28-A of the Land Acquisition Act, 1894 is competent to award interest on the compensation amount re-determined by him thereunder.

Facts

2. The factual matrix of the case lies in a narrow compass. The land of the third respondent was acquired by the State under the provisions of the Land Acquisition Act, 1894 (for short, hereinafter referred to as "the Act") for planned development of the area by the petitioner. The award under Section 11 of the Act was declared on 20.9.1986 at uniform rate of Rs. 3.47 per sq. yard. Some of the tenure holders, feeling aggrieved by the award, sought reference under Section 18 of the Act. The Court decided Reference No. 71 of 1987 and 64 of 1988 by a common order dated 28.8.1998 and the compensation for the acquired land was enhanced to Rs. 90 per sq. yard apart from 30% solatium. The Court also granted 12% interest from the date of preliminary notification, i.e. 7.7.1984, till the date of taking possession as per Section 23(1A) of the Act and interest at the rate of 9% per annum for period of one year from the date of possession and 15% per annum for the subsequent period till the date of actual payment as per Section 28 of the Act. The third respondent, who had not sought reference under Section 18 of the Act, on basis of the award of the Court dated 28.2.1998, sought enhancement of the compensation by invoking Section 28-A of the Act. The application was filed on 22.5.1998, well within three months from the date of award of the Court dated 28.2.1998. The Collector, by impugned order dated 2.5.2022, has passed award in favour of the third respondent, enhancing the compensation amount to Rs. 90 per sq. yard, along with other benefits as had been granted by the Court in the aforementioned references. Resultantly, the award of the Collector also includes interest for the period post taking over of the possession. Aggrieved thereby, the instant petition has been filed.

Submissions of Counsel for the Parties

3. Sri G.K. Singh, learned Senior Counsel, assisted by Sri Mahesh Narain Singh, appearing for the petitioner, contended that the Collector, while deciding application under Section 28-A of the Act, is not competent to award interest. The said power is vested solely in the Court by virtue of Section 28 of the Act. In support of his contention, he has placed various provisions of the Act to emphasize that under the scheme of the Act, the Collector has power to award interest only under Section 34. It is confined to cases where the compensation

amount determined by the Collector under Section 11 while passing the award is not paid or deposited on or before taking possession of the land. It does not extend to award made by the Collector under Section 28-A of the Act. It is also urged that it is only the Court which could award interest in case any reference is made to it under Section 28-A(3), as in such an eventuality, it can take recourse to the powers conferred upon it under Section 28, but which is not available to the collector.

4. On the other hand, learned counsel for the third respondent submitted that the purpose of inserting Section 28-A was to ensure award of compensation at uniform rate to all persons who are deprived of their land by the State exercising its power of eminent domain. The object of the said provision inserted through amendment was to remove discrimination in grant of award for lands acquired under the same notification. The Collector under Section 28-A of the Act is required to re-determine the compensation amount on basis of the amount of compensation awarded by the Court under Section 18 of the Act. Resultantly, all benefits which have been given by the Court while passing the award would also be admissible to the person invoking Section 28-A of the Act. The contention that although the Collector would not have such power, but the Reference Court while deciding reference under Section 28-A(3) would have such power, would not advance the object with which Section 28-A was inserted. Such an interpretation would also lead to multiplicity of litigations which is not in public interest and should be avoided.

Analysis

5. The award of the Collector is made under Section 11 of the Act. Section 11A was inserted in the Act w.e.f. 24.9.1984 and it mandates that award under Section 11 shall be made within a period of two years from the date of publication of the declaration, failing which, the acquisition proceedings would lapse. Section 12 contemplates that as soon as the award is made, the Collector shall give immediate notice of his award to the persons interested as are not present personally or by their representatives when the award is made. Section 16 empowers the Collector to take possession after making award under Section 11 and whereupon the land vests absolutely in the Government free from all encumbrances. Section 17(1) of the Act empowers the Collector, in cases of urgency, to take possession on expiration of fifteen days from the publication of notice under Section 9(1) of the Act. Such land shall thereupon vest absolutely in the Government free from all encumbrances.

6. Section 17(3A) mandates that the Collector, before taking possession of any land in exercise of emergency power, shall ensure payment of 80% of the compensation for such land as estimated by him to the persons interested entitled thereto and pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31(2) of the Act.

7. Any person aggrieved by the award can seek reference of the dispute relating to the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation amongst the persons interested, by moving a written application to the Collector. Such application has to be made by person present or represented before the Collector at the time of making of award, within six weeks from the date of the Collector's award and, in other cases, within six weeks of receipt of notice from the Collector under Section 12(2) or within six

months from the date of Collector's award, whichever period shall first expire.

8. The factors to be considered by the Court while determining compensation are provided under Section 23 of the Act. Under sub-section (1A), the Court shall, in every case, award an amount calculated @ 12% per annum on such market value for the period commencing on or from the date of publication of notification under Section 4, sub-section (1) in respect of such land to the date of award of the Collector or the date of taking of the possession, whichever is earlier. In addition to the market value of the land as provided above, the Court shall, in every case, award a sum of 30% on such market value in consideration of the compulsory nature of the acquisition. Section 23(1A) which enjoins the Court to award interest @ 12% per annum on the market value determined by him under the forgoing provisions, is extracted below: -

23(1A) In addition to the market value of the land, as above provided, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Explanation.- In computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded.

9. A combined reading of the aforesaid provisions shows that the compensation for land acquired is determined by the Court taking into consideration the market value of the land on the date of the publication of the notification under Section 4, sub-section (1). In the interval between the date of publication of notification under Section 4(1) and making of the award, there would be enhancement in the market value of the land. The purpose of inserting sub-section (1A) is to adequately compensate the land owners for rise in market value during the said period.

10. Section 25 stipulates that the amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under Section 11. The award is declared as per the procedural requirements stipulated under Section 26 and it is deemed to be a 'decree' within the meaning of Section 2 Clause (2) and Section 2 Clause (9), respectively, of the Code of Civil Procedure, 1908. Section 27 empowers the Court to award costs incurred in the proceedings by any person.

11. Section 28 empowers the Court to award interest on excess amount of compensation as is determined by him. Section 28 is as follows:

28. Collector may be directed to pay interest on excess compensation.- If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the collector shall pay interest on such excess at the rate of nine per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court:

Provided that the award of the Court may also direct that where such excess

or any part thereof is paid into Court after the date of expiry of a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of such excess or part thereof which has not been paid into Court before the date of such expiry.

12. Section 28-A of the Act, which was invoked by the third respondent in seeking enhancement of compensation, is extracted below:

28-A. Re-determination of the amount of compensation on the basis of the award of the Court.- (1) Where in an award under this part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.

13. Section 31 requires the Collector to ensure payment of the compensation awarded by him under Section 11 to the persons entitled thereto according to the award, unless prevented by one or more of the contingencies mentioned in the next sub-section.

14. Section 32 requires the Collector to invest the money deposited in respect of lands belonging to persons incompetent to alienate in government securities as the Court shall think fit. In certain other cases stipulated under Section 33, the same course has to be followed.

15. The payment of interest by the Collector on the amount of compensation awarded by him is regulated by Section 34 which stipulates as follows: -

34. Payment of interest. - When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of nine per centum per annum from the time of so taking possession until it shall have been so paid or deposited:

Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken,

interest at the rate of fifteen per centum per annum shall be payable from the date or expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry.

16. Section 34 was amended by Act No. 68 of 1984 w.e.f. 24.9.1982 and the rate of interest was increased from 6% to 9% per annum for the first year and by inserting a proviso, the rate of interest has been further enhanced to 15% per annum beyond one year from the date on which possession is taken. By the same Act, similar amendments were made in Section 28 prescribing the same rates of interest.

17. The scheme of the Act reveals that both the Court and the Collector are invested with the power to award interest. The power of the Collector to award interest, as noted above, is contained in Section 34 of the Act. He is enjoined with the duty to award interest on the compensation amount determined by him under Section 11, if it is not paid or deposited on or before taking possession of the land. The rate of interest is 9% for the first year and 15% beyond one year from the date on which possession is taken until it shall have been so paid or deposited.

18. In case the Court enhances the compensation, it is invested with power to award interest on enhanced amount by virtue of Section 28. A conjoint reading of Section 28 and 34 reveals that the intent of the legislature is to ensure award of interest for the entire period starting from the date of dispossession until the amount is deposited in the Court or paid to the person entitled. The award of interest on the amount originally awarded by the Collector under Section 11 is taken care of by Section 34 by investing the power with the Collector who at that stage is *in seisin* over the matter. The power to award interest on the excess sum of compensation awarded in a reference by a Court is conferred on the Court before whom only such an eventuality may arise. There was no occasion to confer such a power on the Collector, before whom such situation would never arise.

19. Thus, there are two mandates of the legislature. First, to award interest on the compensation amount to the land owners without any break, except for the period during which any delay had occurred on account of stay of proceedings. Second, the rate of interest should be 9% for the first year from the date of dispossession and 15% for the subsequent period.

20. The object of inserting Section 28-A by Act No. 68 of 1984 w.e.f. 24.9.1984 was to do away with inequality in payment of compensation to land owners covered by the same notification. The purpose of grant of interest is to compensate an unpaid land owner who had been deprived of possession of his land in pursuance of the power of compulsory acquisition by the State Government. The liability to pay interest is incurred on the date Government takes possession, or in other words, the tenure holder is dispossessed. The rationale behind the same is plain and simple. The dispossession of the owner of the land by the State Government in exercise of its power of eminent domain, deprives him of the usufructs and benefits accruing to him from the acquired land. While the compensation determined is the value of land, in case compensation is not paid before depriving him of his land, the interest is recompense for depriving a person of the income from his property/compensation amount.

21. The Supreme Court, in **Union of India and Another vs. Pushpavathi and Others**1, held that the liability of the State to pay interest on the compensation amount is statutory in character and can be claimed at any stage of the proceedings under the Act. The award of interest is not bound by rules of procedure and limitation. The remedy of reference under Sections 18 is limited to the measurement of the land or to the amount of compensation or as to the person(s) to whom the compensation is payable and lastly, regarding the apportionment of compensation amongst the persons interested in claiming compensation. The simpliciter dispute relating to non-award of interest is not capable of being referred by the Collector to the Civil Court under Section 18 of the Act as payment of interest is statutory in character and once the conditions specified under the statute are fulfilled, it acquires a mandatory character. The relevant extract from the said judgment in relation to the statutory character of the interest payable under the Act is as follows: -

"29. There are two sections, which deal with the payment of interest, namely, Section 28 and Section 34. So far as Section 28 is concerned, it deals with the payment of interest on excess compensation. It empowers the Civil Court to award interest on the excess amount awarded over and above the amount by the Collector. It empowers the Court to direct the Collector to pay interest at the rate of 9% p.a. on such excess amount awarded by the Court from the date on which the Collector took possession of the land to the date of payment of such excess amount into Court. The proviso to Section 28 further enables the Court to award interest on such excess amount if the conditions specified in the proviso are fulfilled in any acquisition proceedings in relation to the land.

30. So far as Section 34 is concerned, it deals with another mode of payment of interest to the landowners. It provides that if compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay interest at the rate of 9% per annum from the time of so taking possession until it shall have been so paid or deposited. Proviso to this section, however, empowers the Collector to pay interest at the rate of 15% p.a., if the conditions specified therein are fulfilled in any acquisition case.

31. Section 28-A provides for re-determination of the amount of compensation on the basis of the award of the Court. It enables the landowners to approach the Collector to re-determine the amount of compensation payable to them on the basis of the award passed by the Court in the cases of other persons alike them whose lands were also acquired under the same notification of Section 4 and who approached the Court for re-determination of the amount of compensation payable to them whereas other landowners did not approach the Court along with them. Such landowners are given a right to make an application within 3 months from the date of such award of the Court to the Collector and claim therein the same compensation which was awarded to other landowners by the Court. Sub-section(2) of Section 28-A empowers the Collector to conduct an inquiry and make an award determining the amount of compensation payable to such landowners. Sub-section(3) of Section 28-A empowers the landowners to approach the Collector to refer his/their case to the Court in case he/they is/are aggrieved by the award passed by the Collector under sub-section(2) of Section 28-A of the Act.

36. A dispute relating to non-award of interest payable to the landowners under Section 28 or/and Section 34 of the Act is not specified under Section 18 and hence it is not capable of being referred by the Collector to the Civil Court under Section 18 of the Act. It is also for the reason that payment of interest is statutory in character and being statutory, it is mandatory for payment once conditions specified under Section 28 or/and 34 are fulfilled."

22. The Supreme Court in the said judgment relied on its previous judgment in **Shree Vijay Cotton & Oil Mills Ltd. vs. State of Gujarat**2. For ready reference, the same is extracted below: -

"16. There is inherent evidence in the wording of Sections 28 and 34 to show that the framers of the Act intended to assure the payment of interest to the person whose land was acquired and it was not the intention to subject the said payment to procedural hazards. Section 34 lays down that "the Collector shall pay the amount awarded with interest at 6 per cent per annum….". The legislative mandate is clear. It is a directive to the collector to pay the interest in a given circumstance. Section 34 nowhere says that the interest amount is to be included in the award-decree as prepared under Section 23(1) read with Section 26 of the Act. Similarly Section 28 provides "the award of the court may direct that the Collector shall pay interest". Here also the award under Section 23(1) read with Section 26 has been kept distinct from the payment of interest under the section. The interest to be paid under Section 34 and also under Section 28 is of different character than the compensation amount under Section 23(1) of the Act. Whereas the interest, if payable under the Act, can be claimed at any stage of the proceedings under the Act, the amount of compensation under Section 23(1) which is an award-decree under Section 26, is subject to the rules of Procedure and Limitation. The rules of procedure are hand-maiden of justice. The procedural hassle cannot come in the way of substantive rights of citizens under the Act."

23. Once it is established that the legislative intent is to ensure award of interest on the compensation amount from date of dispossession until it is paid or deposited, it inheres in an award envisaged under Section 28-A(1) that an affected person taking recourse to such provision, inserted with the sole object of ensuring equality, cannot be deprived of the interest. The mere fact that no separate provision has been made under Section 28-A would not denude the Collector of the power to award interest which he automatically derives on the strength of the award which forms the foundation of the proceedings.

24. If the situation is viewed in the context of the argument advanced on behalf of the petitioner that interest could be awarded by Court only in reference under Section 28-A(3) as Section 28 has been specifically made applicable for Court only, it would be self-defeating and paradoxical. The legislature never countenanced a situation where the Collector would not have power to award interest on the compensation amount re-determined by him under Section 28-A and for getting the said relief, a person should approach the Court by invoking Section 28-A(3) of the Act.

25. A Three-Judge Bench of Supreme Court in **Union of India and Another vs. Pradeep Kumari and Others**3 held that at the stage of proceedings under Section 28-A, the Collector would act under Section 34

in awarding interest on the additional amount of compensation awarded by him. Para 13 of the Law Report is quoted below: -

"Shri Goswamy has next contended that while re-determining the amount of compensation under Section 28-A it is not permissible for the Collector to award interest on the additional amount of compensation awarded by him for the reason that under Section 28 of the Act only the court can direct payment of interest on the excess amount awarded as compensation and no such power is conferred on the Collector and, therefore, interest cannot be awarded by the Collector on the additional amount of compensation determined under Section 28-A. It is no doubt true that under Section 28 only the court can direct payment of interest on the excess amount awarded as compensation and the Collector is not competent to award interest on the additional amount of compensation under the said provision. But sub-section (2) of Section 28-A provides that after an application has been submitted under sub-section (1) of Section 28-A the Collector after conducting an inquiry makes an award determining the amount of compensation payable to the applicants and under sub-section (3) of Section 28-A any person who has not accepted the award under sub-section (2) may move the Collector requiring that the matter be referred for determination to the court and the provisions of Sections 18 to 28 have been made applicable to such reference. This would show that after an application has been submitted under Section 28-A(l) for re-determination of the amount of compensation the process of such re-determination results in making of an award by the Collector and a person not accepting the said award can move the Collector to refer the matter to the Court for determination and such reference is governed by Sections 18 to 28. If that is so, Section 34 of the Act would be applicable to the award that is made by the Collector under sub-section (2) of Section 28-A and it would be permissible for him to award interest under Section 34 on the additional amount of compensation awarded by him. The second contention urged by Shri Goswamy is, therefore, rejected."

26. In our opinion, viewed from any angle, the irresistible conclusion is that the Collector shall have full power to award interest on the enhanced compensation amount awarded by him under Section 28-A of the Act.

27. In view of the foregoing discussions, the contention on behalf of the petitioner does not merit acceptance and, consequently, the writ petition is dismissed.

28. No order as to costs.

(2024) 5 ILRA 1771
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ - C No. 18495 of 2021

Arun Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. S.K. Tyagi, Advocate

Counsel for the Respondents:
Mr. Rishi Kumar, Addl. Chief Standing Counsel

Civil Law –stamp deficiency-correct stamp duty payable for a property transaction-classification of the land as commercial or non-agricultural-sale deed initially mentioned the property as commercial-later on correction deed executed stating property to be non-agricultural- spot verification carried out by the authorities of utmost relevance-description of the property as given by vendor/vendee in a registration deed- cannot be accepted as ultimate truth *de hors* spot inspection report—property in the instant case was non-commercial as per spot inspection-impugned order quashed- petition allowed. (Paras 8 and 9)

HELD:

The approach of the authorities below is without any basis in law as they have imposed the deficient stamp duty only for the reason that the petitioner had initially in the sale deed mentioned the property as commercial land. The authorities below have not considered the fact that this mistake of mentioning the land as commercial was rectified by the petitioner. (Para 8)

It is to be noted that the relevance of the spot verification carried out by the authorities themselves is paramount in nature and it is from such verification that the assessment was carried out by the authorities with regard to the nature of the land. For example, if a person in a deed of sale St.s that the land, that is being sold, is agricultural land containing a water body and on the spot verification it is found out that the land is actually being used for the purpose of running a factory, it is the spot verification that has to be taken into consideration by the authorities concerned. The description of the property as given by the vendor/vendee in a registration deed cannot, under any circumstances, be accepted as the ultimate truth de hors the inspection carried out by the authorities. (Para 9)

Petition allowed. (E-14)

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

1. This is a writ petition under article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a writ of certiorari quashing the impugned order dated June 8, 2021 passed by Deputy Commissioner Stamps, Kanpur Region, Kanpur/the respondent No. 2 and the impugned order dated December 4, 2020 passed by Collector Stamps, Etawah/the respondent No.3

FACTS

2. Factual matrix of the present case is delineated below:

a) The case pertains to payment of deficient stamp duty while registering a sale-deed bearing Document No.2266 of 2017, dated April 7, 2017, whereby the petitioner had purchased Plot No.388, area 162.63 square meters in Mohalla Manikpur Vishu, Etawah at the rate of Rs.18000/- per square meter and paid stamp duty of Rs. 2,05,100 at a rate of 7 percent.

b) On February 22, 2018, a report was submitted by the office of the Accountant General, Lucknow to the respondent No.3 that there is deficiency in the stamp duty on the aforesaid sale-deed. Subsequently, a case was registered against the petitioner by issuing notice to him.

c) On August 5, 2019, the petitioner submitted his objection with a prayer that in order to ascertain the correct fact as to whether the plot in question is commercial or non-commercial, the competent authority is required to get the spot inspected.

d) The respondent No.3 directed the the Deputy Registrar, Etawah/the respondent No.4 to make a spot inspection of the land in question. The respondent No.4 made the spot inspection on January 6, 2019 and submitted his report on January 7, 2019.

e) On December 4, 2020, the respondent No.3 passed an order directing the petitioner to pay the deficit stamp duty of Rs.6,03,190/- along with a penalty of Rs.1,000/-, totaling Rs. 6,04,190/-, with respect to the sale deed bearing Document No.2266/2017. He also directed the petitioner to pay interest at the rate of 1.50 percent per month on the deficit stamp duty from the date of execution of the instrument i.e. April 7, 2017 till the date of deposit of the stamp duty.

f) Against the order passed by respondent No.3, the petitioner filed an appeal under Section 56 of the Indian Stamps Act, 1899 before the respondent No.2 who, vide order dated June 8, 2021, rejected the appeal filed by the petitioner and upheld the order dated December 4, 2020 passed by the respondent No.3.

g) It is to be noted that the petitioner made an application before the Competent Authority for rectification of the sale deed indicating the nature of the land to be agricultural. Such application was allowed on March 8, 2021.

h) Being aggrieved by the orders dated December 4, 2020 and June 8, 2021 passed by the authorities below, the petitioner has preferred the instant writ petition before this Court.

CONTENTIONS OF THE PETITIONER

3. Sri S.K. Tyagi, learned counsel appearing for the petitioner has made the following submissions in the matter:

i. Initially there was an error in the sale deed in question as in the sale deed the land was described as commercial instead of non-agricultural. This mistake was subsequently rectified and the word 'commercial' was substituted by the word 'non-agricultural'. The rectification was duly approved by the registration authority and the stamp duty was paid accordingly.

ii. The authorities below have passed the impugned orders in violation of established legal procedures. This includes non consideration of important evidence such as the spot inspection report submitted by the the respondent No. 4 which should have been given due weightage in the decision making process.

iii. The impugned orders are arbitrary and illegal since they are based on non-existing grounds. This is evident from the fact that the land in question was determined to be agricultural in nature, not commercial, as per the spot inspection report.

iv. The petitioner corrected the mistake in the sale-deed promptly upon discovering it. The correction deed clearly states that the land is non-agricultural and not commercial. Therefore, any penalty or deficiency imposed based on the initial mistake should not apply after the correction.

v. The petitioner paid stamp duty based on the correct valuation of Rs.18,000/- per square meter for agricultural land. The authorities incorrectly valued it at the rate of Rs.71,000/- per square meter for commercial land, leading to the alleged deficiency.

vi. The respondent No.4 in the spot inspection found no construction on the land and recommended valuation at Rs.18000/- per square meter. However, the respondent No.3 and the respondent No.2 relied on the report submitted by the office of the Accountant General, which is based on non-existing grounds.

vii. The authorities failed to consider crucial evidences, such as the Khasra showing the land as agricultural, the correction made in the sale-deed and the

spot inspection report confirming the nature of the land as non-agricultural.

viii. The petitioner deposited a sum to satisfy the revenue authorities and avoid coercive measures such as arrest. This action was taken under duress and does not validate the legality of the orders passed.

CONTENTIONS OF THE RESPONDENTS

4. Sri Rishi Kumar, Additional Chief Standing Counsel, has made the following submissions in the matter:

I. The petitioner did not pay the required stamp duty on a commercial land as per the prevailing rates.

II. The orders passed by the authorities are neither unreasoned nor unlawful and have been passed after due consideration of the rules and the regulations, without any illegality.

III. The circle rates are set annually by the District Magistrate and the deficiency in stamp duty was correctly identified and imposed.

IV. In the sale deed itself, it has been mentioned by the petitioner that the land in question is commercial, and therefore, as per Column 5, Serial No.8 Page 72 of the prevalent rate list dated June 8, 2016, the total valuation was calculated to Rs. 1,15,46,730/- on which stamp duty of Rs. 8,08,290/- was required to be paid, whereas the petitioner has paid Rs.2,05,100/- only against the stamp duty. So, there is a clear deficiency of stamp duty of Rs. 6,03,190/-.

ANALYSSIS

5. I have heard the counsel appearing on behalf of the parties and perused the materials on record.

6. The present case involves a dispute with regard to correct stamp duty payable for a property transaction due to the classification of the land as commercial or non-agricultural. The petitioner argues that the rectification was promptly made upon discovering the initial mistake and that the authorities failed to consider the crucial evidences supporting the non-commercial classification. On the other hand, the respondents assert that the deficiency in the stamp duty was correctly identified based on prevailing rates and the petitioner's own declaration in the sale-deed.

7. Upon a perusal of the order passed by the respondent No.3, it can be seen that he has relied upon the objections of the Accountant General with respect to the sale deed in question and came to the conclusion that the sold land was shown to be of commercial nature at the time of the registration of the sale deed. Hence, the sale deed shall be subjected to the calculation of stamp fee at the commercial rate of Rs.71,000/- per square meter.

7. It can be further noted from the perusal of the appellate order passed by the respondent No.2 that he also made the same finding that on the date of the registration of the sale deed, the land was shown as the commercial land by the parties and in light of this fact, the spot inspection report submitted by the respondent No.4 can not be accepted and the order passed by the respondent No.3 was upheld.

8. The approach of the authorities below is without any basis in law as they have imposed the deficient stamp duty only for the reason that the petitioner had initially in the sale deed mentioned the property as commercial land. The authorities below have not considered the fact that this mistake

of mentioning the land as commercial was rectified by the petitioner.

9. It is to be noted that the relevance of the spot verification carried out by the authorities themselves is paramount in nature and it is from such verification that the assessment was carried out by the authorities with regard to the nature of the land. For example, if a person in a deed of sale states that the land, that is being sold, is agricultural land containing a water body and on the spot verification it is found out that the land is actually being used for the purpose of running a factory, it is the spot verification that has to be taken into consideration by the authorities concerned. The description of the property as given by the vendor/vendee in a registration deed cannot, under any circumstances, be accepted as the ultimate truth *de hors* the inspection carried out by the authorities.

10. In the present case, it is clear that the spot verification carried out by the authorities indicated that the property was non commercial in nature. The rejection of such spot verification without assigning any reason to the same only on the basis that the deed that was registered, indicated that the property was commercial in nature, is clearly arbitrary and illegal in law.

11. In light of the same, the impugned orders dated December 4, 2020 and June 8, 2021 are quashed and set-aside. The authorities are directed to refund the deficient stamp duty, if any, paid by the petitioner within a period of six weeks from date.

12. Accordingly, the writ petition is allowed.

(2024) 5 ILRA 1775

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 3000007 of 2015

Anand Kishor Devacharaya & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Karunakar Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law – ceiling proceedings challenged-Sections 10 (2) & 13 of U. P. Imposition of Land Holdings Act, 1960-impugned order-declaration of surplus land-land recorded in the name of ancestors also included-U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (U.P. Act 18 of 1973)- Section 19 of the Amendment Act-proceedings initiated under unamended Act stood abated on 08.06.1973-fresh proceedings could only be initiated by issuing a fresh notice-under Section 9(2) of the Act-impugned orders quashed-petition allowed. (Paras 18 to 21)

HELD:
In view of the provisions contained in Section 19(1) of the Amendment Act, 1972, all the proceedings initiated under the unamended Act stood abated on 08.06.1973. The Prescribed Authority could have initiated fresh proceedings by issuing a notice under Section 9 (2) of the Act. (Para 19)

Therefore, the proceedings instituted on the basis of notice issued to Maharaja Dharmendra Pratap Singh, stood abated in view of the provisions contained in Section 19 of the amendment Act. Fresh proceedings could only be initiated by issuing a fresh notice under Section 9

(2) of the Ceiling Act, which was not done in the present case. (Para 20)

The order passed by the Appellate Authority stating that the proceedings against Maharaja Pateshwari Prasad Singh and his heir Maharaja Dharmendra Pratap Singh had been issued under the old Ceiling Act (which is a misnomer, as there was no old Ceiling Act and it was merely the unamended Ceiling Act, as it was originally enacted) and that the same proceedings shall be deemed to be continuing, has been passed in ignorance of the provisions of Section 19 of the U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (U.P. Act 18 of 1973) and the same is unsustainable in law. (Para 21)

Petition allowed. (E-14)

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

1. Heard Shri Karunakar Srivastava, Advocate, the learned counsel for the petitioner and Shri Sarvesh Kumar Mishra, the learned Standing Counsel.

2. By means of the instant Writ Petition filed under Article 226 of the Constitution of India, the petitioners have sought quashing of an order dated 29.07.1999 passed by the Additional District Magistrate/Prescribed Authority under the Ceiling Act, Balrampur, in Case No.7/8 under Section 10 (2) of U. P. Imposition of Land Holdings Act, 1960 (hereinafter referred as Ceiling Act). The petitioners have also sought quashing of an order dated 15.04.2015 passed by Additional Commissioner (Judicial), Devi Patan Division, Gonda dismissing Appeal No.5/43 under Section 13 of the Ceiling Act, which was filed against the aforesaid order dated 29.07.1999 passed by the Prescribed Authority.

3. It has been stated in the writ petition that proceedings under the Ceiling Act had been initiated against Maharani Rajlaxmi Kumari and Maharaja Dharmendra Pratap Singh and some of their lands had been declared surplus by means of an order dated 26.04.1990 While declaring surplus lands of Maharani Rajlaxmi Kumari and Maharaja Dharmendra Pratap Singh, land bearing Gata No.1788/1.86 acre (New Gata No.774/1.671 acre) was also included in their surplus lands whereas this land had already been recorded in the name of ancestors of the petitioners by means of an order dated 27.01.1968 passed by the Consolidation Officer.

4. The petitioners' ancestors filed objections against the order declaring their land as surplus land of Maharani Rajlaxmi Kumari and Maharaja Dharmendra Pratap Singh but Prescribed Authority rejected the same by means of an order dated 26.07.1997. Appeal No.197 was filed under Section 13 of the Ceiling Act against the order dated 26.07.1997, which was allowed by means of a judgment and order dated 28.11.1998 passed by the Additional Commissioner (Administration), Faizabad Division, Faizabad.

5. The Appellate Court held that the name of Devadi Dev was ordered to be mutated in place of Kuwar Dharmendra Pratap Singh by means of an order dated 27.1.1968 passed by Consolidation Officer in Case No.1944 under Section 9(2) of the Consolidation of Holdings Act and this order was passed much earlier than the reference date i.e. 24.01.1971. The name of Devadi Dev was recorded in CH Form No.23 and 45 also in respect of disputed Gata No.774. In the relevant extracts of Khatuni relating to year 1399 to 1404 Fasli, the disputed land was entered in the name of Shanti Devi, widow of Devadi Dev and by means of an order dated 03.03.1994 passed

by Tehsildar, Balrampur in Case No.374, the names of Tihuti Dev Acharya S/o Ganesh Dutt Acharya, Anand Dev Acharya, Nand Kishor Acharya and Anand Kishor Dev Acharya all sons of Bindhar Dev Achary were mutated in place of Shanti Devi W/o Devadi Dev.

6. From the aforesaid facts, the Appellate Court found that the land in dispute was recorded in the name of Devadi Dev and after him, it was recorded in the name of his widow. The finding of the Prescribed Authority that the petitioners were not recorded as tenure holders of the land in dispute and, therefore, there was no need to issue a notice under Section 8 to them, was against the facts evident from the record. The Appellate Court further held that the trial Court has wrongly stated in the impugned order that the petitioners had not adduced any evidence, whereas copies of relevant extracts of Khataunies and CH Forms No.23 and 45 were available on the record of the Prescribed Authority. Accordingly, the Additional Commissioner (Administration) allowed the Appeal, set aside the order dated 26.07.1997 and remanded the matter to the Prescribed Authority for being decided afresh.

7. After remand, the Prescribed Authority again passed a non-speaking and cryptic order dated 29.07.1999 and the ancestors of the petitioners again filed an Appeal bearing No.43 before the Commissioner, Devi Patan Division, Gonda but the Appeal was dismissed as time barred by means of an order dated 30.05.2001. The petitioners challenged the order dated 30.05.2001 by filing Writ Petition No.64 (Ceiling) of 2001, which was disposed of by means of an order dated 08.03.2010 whereby the order dated 30.05.2001 passed by the Additional Commissioner dismissing the petitioners' Appeal as time barred, was quashed and the matter was remitted for decision afresh on merits.

8. The petitioner filed a copy of the aforesaid order dated 08.3.2010 passed by this Court in Writ Petition No.64 (Ceiling) of 2001 before the Commissioner, Devi Patan Division, Gonda and thereafter, the Commissioner, Devi Patan Division, Gonda dismissed the Appeal by means of the impugned order dated 15.04.2015.

9. It is stated in the appellate order that the Appeal against an order dated 29.07.1999 had been filed on 23.05.2001, which is time barred but the appellant has submitted an application under Section 5 of the Limitation Act and the cause shown in the affidavit filed in support of the application appears to the sufficient and, therefore, the application under Section 5 of the Limitation Act was allowed.

10. It is strange that the Appellate Authority did not make any reference of the order dated 08.03.2010 passed by this Court in Writ Petition No.64 (Ceiling) of 2001 whereby the order dismissing the appeal as time barred had been quashed and this Court has remanded the matter to the Appellate Authority for deciding it afresh on merits.

11. The Appellate Authority held that the proceedings against Maharaja Pateshwri Prasad have been initiated under the old Ceiling Act and after his death, the name of Maharaja Dharmendra Pratap Singh was substituted and a notice had been issued to him under the old Ceiling Act. Therefore, the proceedings shall be deemed to be continuing against Maharani Rajlaxmi Kumari Devi and Maharaja Dharmendra Pratap Singh, under the old Ceiling Act.

12. The Appellate judgment states that the following provision is contained in the old Ceiling Act: -

"In accordance with Article 39 of Constitution, the State Legislate enacted the U.P. Imposition of Land Holding Act, 1960, which came into force on January 3, 1961"

13. The Appellate court held that the old Ceiling Act came into force with effect from 03.01.1961 with reference year 1958. As proceedings against Maharaja Pateshwari Prasad Singh and his heir Maharajaa Dharmendra Pratap Singh had been instituted under the old Ceiling Act, they will be governed by the old Ceiling Act.

14. The order dated 27.01.1968 for recording the name of the appellant's husband, had been passed by the Consolidation Officer on the basis of a compromise and this order had been passed 10 years after the reference date. Therefore, the order dated 27.01.1968 passed by the Consolidation Officer is liable to be neglected and no relief can be granted to the appellant on the basis of the aforesaid order.

15. On 22.07.2021, this Court had passed the following order in this case:

"Counsel for the petitioners has argued that the appellate order has been passed on an entirely different ground that was not there before the Prescribed Authority. The Appellate Court has referred to Old Ceiling Act and cut off as mentioned therein whereas the admitted position between the parties is that the proceedings that were initiated against the Maharaja Dharmendra Pratap Singh and his mother Maharani Raj Laxmi Kumari Devi was under the New Ceiling Act on 26.04.1990 and therefore the compromise of 1968 which was entered into between the parties before the cut off date of 1971, should be respected and the petitioners predecessor in interest should be declared as an independent tenure holder and his land could not have been declared as the land of Majaraja Dharmendra Pratap Singh.

Shri V.P. Nag, prays for and is granted a week's time to find out the current position of the land in question as it has come in the papers filed alongwith the writ petition that Collectorate building was to be constructed on such land and also to bring case laws with regard whether the proceedings under Old Ceiling Act would continue even after New Ceiling Act came into being."

16. Thereafter, the State has filed a supplementary counter affidavit wherein it has inter alia been stated that as per the report of the Tehsildar Balrampur dated 28.07.2021, Plot No. 774 area 0.676 Hectares and Plot No. 775 area 0.061 Hectares are recorded for construction of District Office and on the spot 25 Mango, 01 Jamun and 01 Tamrind tree was found. Plot No. 774 and 775 are grove lands and are vacant. It is further stated in the supplementary affidavit that the notice to Maharaja Dharmendra Pratap Singh have been sent under the old Ceiling Act and the basis of this averment made in the supplementary counter affidavit is the impugned order dated 15.04.2015 passed by the Additional Commissioner (Judicial), Devi Patan Division, Gonda.

17. Section 5 of the Ceiling Act, as it was originally enacted, provided as follows: -

5. Imposition of ceiling on existing land holdings.*—(1) As and from the date of enforcement of this Act, no*

tenure-holder shall, except as otherwise provided by this Act, be entitled to hold an area in excess of the ceiling area applicable to him, anything contained in any other law, custom, or usage for the time being in force, or agreement, to the contrary notwithstanding.

(2) ***In determining the ceiling area applicable to a tenure-holder at the commencement of this Act, any transfer or partition of land made after the twentieth day of August, 1959, which, but for the transfer or partition would have been declared surplus land under the provisions of this Act, shall be ignored and not taken into account.***

(3) The provisions of sub-section (2) shall have no application to—

(a) a transfer in favour of the State Government;

(b) a partition under the U.P. Consolidation of Holdings Act, 1953, or

(c) a partition of the holding of a joint Hindu family made by a suit or proceeding pending on twentieth day of August, 1959.

***

18. U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (U.P. Act 18 of 1973) made large-scale amendments in the U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1961 with effect from 08.06.1973. Section 19 of the Amendment Act, 1972 provides as follows: -

"19. Transitory provisions.*—(1) All proceedings for the determination of surplus land under Section 9, Section 10, Section 11, Section 12, Section 13 or Section 30 of the principal Act, pending before any court or authority at the time of the commencement of this Act, shall abate and the prescribed authority shall start the proceedings for determination of the ceiling area under that Act afresh by issue of a notice under sub-section (2) of Section 9 of that Act as inserted by this Act:*

Provided that the ceiling area in such cases shall be determined in the following manner—

(a) firstly, the ceiling area shall be determined in accordance with the principal Act, as it stood before its amendment by this Act;

(b) thereafter, the ceiling area shall be redetermined in accordance with the provisions of the principal Act as amended by this Act.

(2) Notwithstanding, anything in sub-section (1), any proceeding under Section 14 or under Chapter III or Chapter IV of the principal Act, in respect of any tenure-holder in relation to whom the surplus land has been determined finally before the commencement of this Act, may be continued and concluded in accordance with the provisions of the principal Act, without prejudice to the applicability of the provisions of sub-section (2) of Section 9 and Section 13-A of that Act, as inserted by this Act, in respect of such land."

19. In view of the provisions contained in Section 19(1) of the Amendment Act, 1972, all the proceedings initiated under the unamended Act stood abated on 08.06.1973. The Prescribed Authority could have initiated fresh proceedings by issuing a notice under Section 9 (2) of the Act.

20. Therefore, the proceedings instituted on the basis of notice issued to Maharaja Dharmendra Pratap Singh, stood abated in view of the provisions contained in Section 19 of the amendment Act. Fresh proceedings could only be initiated by issuing a fresh notice under Section 9 (2) of

the Ceiling Act, which was not done in the present case.

21. The order passed by the Appellate Authority stating that the proceedings against Maharaja Pateshwari Prasad Singh and his heir Maharaja Dharmendra Pratap Singh had been issued under the old Ceiling Act (which is a misnomer, as there was no old Ceiling Act and it was merely the unamended Ceiling Act, as it was originally enacted) and that the same proceedings shall be deemed to be continuing, has been passed in ignorance of the provisions of Section 19 of the U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (U.P. Act 18 of 1973) and the same is unsustainable in law.

22. Accordingly, the writ petition is **allowed**. The order dated 15.04.2015 passed by Additional Commissioner (Judicial), Devi Patan Division, Gonda dismissing Appeal No.5/43 under Section 13 of the Ceiling Act is quashed. The matter is remanded to Additional Commissioner (Judicial), Devi Patan Division, Gonda for being decided afresh in accordance with the law, keeping in view the observations made in this judgment.

(2024) 5 ILRA 1780
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 3000102 of 1994

Bhanvi Saran Singh & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
B.K. Saxena

Counsel for the Respondent:
P. Mahapatra, Waseem Uddin Ahmad

Civil Law –ceiling proceedings against the predecessor in interest of the of the petitioner challenged- he had died before the initiation of proceedings-Section 9 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960-Rule 19 (2) of Uttar Pradesh Imposition of Ceiling on Land Holdings Rules, 1961-rule has been declared *ultra vires* by the Division Bench-tenure holder dead on the date of notification under Section 9 of the Act-no proceedings can be initiated against him-furthermore-State asserts some land liable to be declared surplus under the Ceiling Act-burden to prove the relevant fact lies on the State-both these legal propositions not followed-impugned orders quashed-petition allowed. (Para 14, 15 and 16)

HELD:
When the Division Bench has already held sub Rule 19 (2) of Rules of 1961 to be ultra vires and has declared that this cannot be relied upon for any purpose, the provisions contained in Rule 19 (2) cannot be relied upon by the opposite party-State. The Division Bench has specifically held that no proceedings for declaring the land of the tenure holder who is dead on the date of notification under Section 9 of the Ceiling Act can be taken. (Para 14)

As in the present case this factual assertion made in the writ petition that the tenure holder Hanuman Singh had died prior to issuance of the notice under Section 9 (2) of the Ceiling Act has not been denied in the counter affidavit, in view of the law laid down by the Division Bench in Horam Singh (supra) no proceedings under the Ceiling Act could continue on the basis of notice under Section 9 (2) issued in the name of a dead person. (Para 15)

Moreover, the approach of the Prescribed Authority and the Appellate Court declaring in any land to be surplus for the sole reason that the petitioners could not provide copies of the records, which ought to have been maintained by

the State authorities, is against the basic principle of dispensation of justice, which requires the person asserting a claim to prove the facts which form the basis of the claim. If the State asserts that some land is liable to be declared as surplus under the provisions of the Ceiling Act, the burden to prove the relevant facts lies on the State. The land cannot be declared surplus only because the tenure holder could not provide copies of some records, the liability to maintain which records rests on the State authorities. (Para 16)

Petition allowed. (E-14)

List of Cases cited:

1. Surendra Pratap Singh Vs State of U.P. & ors.: 2024:AHCLKO:3082

2. Horam Singh & ors.Vs District Judge, Moradabad & ors.: 1978 SCC OnLine All 682 = 1979 All LJ 85

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

Order on IA-08/24:

This is an application seeking amendment of the writ petition, whereby the petitioners have sought to amend the prayer clause. The learned Standing Counsel has also formally opposed the application without filing any written objection. As the amendment is formal in nature and it does not change the nature of the petition, the application for amendment is allowed. The learned counsel for the petitioners may incorporate necessary corrections in the memo of writ petition forthwith.

Order on Writ Petition:

1. Heard Sri Utkarsh Srivastava and Sri Rakshit Raj Singh Advocates, holding brief of Sri B.K. Saxena Advocate, the learned counsel for the petitioners and Sri S.K. Khare, the learned Standing Counsel for the State.

2. By means of the instant Writ Petition filed under Article 226 of the Constitution of India the petitioners have sought quashing of the entire ceiling proceedings initiated against Sri Hanuman Singh, the predecessor in interest of the petitioners, who had died before initiation of the proceedings.

3. It has inter alia been submitted in the writ petition that a notice under the Proviso appended to Section 9 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the Ceiling Act) was issued in the name of Hanuman Singh, whereas Hanuman Singh had died in May, 1975, prior to issuance of the notice. The petitioners submitted a reply to the notice stating that the notice had been issued in the name of a dead person. It was further stated in the objection that Hanuman Singh had already transferred 35 bigha of his land through a registered sale deed as far back as in the year 1963 and, therefore, he was not holding any surplus land.

4. The matter was decided ex-parte on 18.02.1976, whereby 35 bigha land of Hanuman Singh was declared surplus. An application for setting aside the ex-parte order dated 18.02.1976 was filed, which was rejected by means of an order dated 20.08.1976. An appeal no.244/80 was filed under Section 13 of the Ceiling Act, which was allowed by means of a judgment and order dated 18.07.1984, passed by the District Judge, Lucknow and the matter was remanded to the Prescribed Authority for being decided afresh.

5. After remand, the learned Prescribed Authority has decided the matter by means of an order dated 02.05.1985 stating that the petitioners had been directed to file a copy of the recall application but they did not file the same and had sought adjournment of the case on the ground that their counsel had gone out of station. The Prescribed Authority rejected the adjournment application and held that as the tenure holder has not brought on record the restoration/revision or objection against the notice which had been filed within limitation, the earlier order dated 18.07.1976, by which 22 bigha 5 biswa 6 biswanshi and 17 kachhwanshi land of the petitioners mentioned in Forms 3 A, B and C was declared surplus, was confirmed.

6. The sole reason assigned for declaring the petitioners' land to be surplus was that the petitioners had not filed copy of the restoration application or reply to the notice filed within limitation. The prescribed authority did not advert to the plea of the petitioner that the proceedings under the Ceiling Act had been initiated against a dead person.

7. The petitioners filed Appeal No. 13/85-86 under Section 13 of the Ceiling Act against the aforesaid order dated 02.05.1985, which was dismissed by means of the impugned judgment dated 13.09.1994, passed by the learned Additional Commissioner (Judicial), Lucknow Division, Lucknow, on the ground that while remanding the matter by means of the order dated 14.08.1976, the District Judge had directed the prescribed authority to decide the matter on its merits but this application dated 14.08.1976 (which was an application for recall) was not available on record and the petitioner did not produce its copy before the Prescribed Authority and, therefore, there was no need for any interference in appeal.

8. The State has filed a counter affidavit in response to the writ petition and the averments made in paras 2 and 3 of the writ petition that the original tenure holder Hanuman Singh had died prior to issuance of notice under the proviso appended to Section 9 (2) of Ceiling Act have not been denied in the counter affidavit. Therefore, the aforesaid averments are deemed to be admitted by implication.

9. The learned Standing Counsel has submitted that even if the notice was issued after death of Hanuman Singh the original tenure holder, the notice published under Section 9 shall be deemed to apply to heirs of deceased tenure holder as per the provisions contained in Rule 19 (2) of Uttar Pradesh Imposition of Ceiling on Land Holdings Rules, 1961 (hereinafter referred to as the Rules of 1961).

10. Sub Rule (2) and (3) of Rule 19 (2) of Rules of 1961 provide as follows:

"19. .....(2)Where a tenure-holder dies before the publication of the general notice under Section 9, such publication shall be deemed to apply to his executor, administrator, or other legal representatives and the Prescribed Authority may proceed to determine the ceiling area applicable to the deceased person as if such executor, administrator or other legal representatives were the tenure holder, for the purposes of service of such notice.

(3)Where a tenure-holder dies before he is served with a notice under sub-section (2) of Section 10, the Prescribed Authority may serve such notice on his executor, administrator or other legal

representatives, and may proceed to determine the ceiling area applicable to the deceased person as if such executor, administrator or other legal representatives were the tenure-holder for the purposes of service of such notice."

11. The learned Standing Counsel has relied upon a decision rendered by a coordinate bench of this court in the case of **Surendra Pratap Singh Vs. State of U.P. and others**: 2024:AHC-LKO:3082, wherein the following observations have been made:

"10. It is to be noticed that in case a person dies before service of notice under Section 10, the proceedings do not abate but only the persons who can contest the said case are the legal representative of the recorded tenure holder and it is only after service of notice as prescribed under Rule 19 (3) of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961 the proceedings may continue thereon."

12. Per contra, the learned counsel for the petitioners has relied upon a decision of a Division Bench of this Court in the case of **Horam Singh and others Vs. District Judge, Moradabad and others**: 1978 SCC OnLine All 682 = 1979 All LJ 85, wherein following questions were referred to the Division Bench: -

"1. When a tenure-holder dies after 8th June, 1973, and before the publication of notice under section 9 of the U.P. Imposition of Ceiling on Land Holdings Act what should be the date for determining the surplus area of a tenure-holder for the purposes of determining the surplus area in view of Rule 19 of the Act?

2. Whether Rule 19 read with its sub-clauses (2-4) are within the powers of rule making authority or they are against the provisions of sections 9 and 10 of the Act which speak about the tenure-holder i.e. the real and living tenure-holder on the date when the notice is to be issued?

3. Can determination of surplus area of a tenure-holder who is dead on the date of notification under section 9 of the U.P. Imposition of Ceiling on Land Holdings Act be made ignoring the right of the heirs of the deceased tenure-holder on that date?

4. If the notice under: section 9 has been issued when the tenure-holder was no more in this world can notice under section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act be issued without publishing general notice calling upon the heirs of the tenure-holder to submit the statement contemplated by law under section 9 of the Act?

5. If the recorded tenure-holder dies soon after the publication of general notice in the official gazette (e.g. before the expiry of 30 days), is it necessary for the Prescribed Authority to re-issue notices under section 9(1) and (2) of the Act to tenure-holder to comply with the provisions of the Act?"

13. The Division Bench answered the questions as follows:

"1. Where a tenure-holder dies after 8th of June, 1973, and before the publication of notice under section 9 of the Act, the Act does not contemplate taking of any proceedings for determining the surplus land of such tenure-holder and as such no question of considering any one as tenure-holder in his place arises. ***Sub-rule (2) of Rule 19 therefore is ultra vires and cannot be relied upon for any purpose.***

2. Sub-rules (3) and (4) of Rule 19 are within the powers of rule-making

authority and they are not repugnant to the provisions under sections 9 and 10 of the Act.

3. As ***we are of the opinion that no proceedings for declaring the land of a tenure-holder who is dead on the date of notification under section 9 of the Act****, can be taken, question no. 3 does not arise.*

4. In view of our opinion that ***no proceedings under sections 9 and 10 can be taken in respect of holding of a tenure-holder who dies before the publication of general notice under section 9****, question no. 4 does not arise.*

5. In case, when a recorded tenure-holder dies soon after publication of general notice in the official Gazette, it is not necessary for the Prescribed Authority to reissue a notice under sections 9(1) and 9(2) of the Act. It will be sufficient, if the Presented Authority proceeds to serve the notice on an executor, administrator or other legal representative of the tenure-holder with the statement prepared by him under section 10(2) of the Act in accordance with Rules 19(3) and 19(4) of the Rules framed under the Act."

14. When the Division Bench has already held sub Rule 19 (2) of Rules of 1961 to be *ultra vires* and has declared that this cannot be relied upon for any purpose, the provisions contained in Rule 19 (2) cannot be relied upon by the opposite party-State. The Division Bench has specifically held that no proceedings for declaring the land of the tenure holder who is dead on the date of notification under Section 9 of the Ceiling Act can be taken.

15. As in the present case this factual assertion made in the writ petition that the tenure holder Hanuman Singh had died prior to issuance of the notice under Section 9 (2) of the Ceiling Act has not been denied in the counter affidavit, in view of the law laid down by the Division Bench in **Horam Singh** (supra) no proceedings under the Ceiling Act could continue on the basis of notice under Section 9 (2) issued in the name of a dead person.

16. Moreover, the approach of the Prescribed Authority and the Appellate Court declaring in any land to be surplus for the sole reason that the petitioners could not provide copies of the records, which ought to have been maintained by the State authorities, is against the basic principle of dispensation of justice, which requires the person asserting a claim to prove the facts which form the basis of the claim. If the State asserts that some land is liable to be declared as surplus under the provisions of the Ceiling Act, the burden to prove the relevant facts lies on the State. The land cannot be declared surplus only because the tenure holder could not provide copies of some records, the liability to maintain which records rests on the State authorities.

17. The prescribed authority and the appellate authority have not taken into consideration the aforesaid fact and the position of law and have passed the impugned orders against the petitioners, without application of mind to these facts, which makes the impugned orders unsustainable in law.

18. Accordingly, the writ petition is ***allowed***. The impugned order dated 02.05.1985, passed by the Prescribed Authority (Ceiling), Tehsil Malihabad, District Lucknow in Case No. 7, whereby 22 bigha 5 biswa 6 biswanshi and 17 kachhwanshi land of the petitioners mentioned in Forms 3 A, B and C was declared surplus and the order dated 13.09.1974, passed by the learned

Additional Commissioner (Judicial), Lucknow Division, Lucknow are hereby quashed.

19. However, it will be open for the authorities to institute fresh proceedings under the Ceiling Act against the petitioners, in accordance with law.

20. The parties will bear their own costs of litigation.

(2024) 5 ILRA 1785
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 3996 of 2024

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

Counsel for the Petitioner:
Pawan Kumar Pandey, Shashank Singh

Counsel for the Respondents:
C.S.C., Mohan Singh

Civil Law – order rejecting the representation of the petitioner on compassionate ground upon death of his grandfather-under challenge-GO dated 05.08.2019 deals with allotment of fair price shops-definition of family-same as in Cluase 2(p) of the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016-Government policy amended to include daughter-in-law in the definition of family-grandson not included-policy not arbitrary-no illegality in the impugned order-petition dismissed. (Paras 15, 16, 18 and 21)

HELD:

This Court can make any interference in policy laid down by the Government for compassionate appointment of the dependants of deceased fair price shop holders, only on the limited grounds recognized by law in this regard. (Para 18)

As the Government has framed a policy for compassionate appointment of dependants of deceased fair price shop licensees by issuing the Government Order dated 05.08.2019 and it has decided to adopt the same definition of family for the purpose of compassionate appointments as is mentioned in Clause 2(p) of the Control Order, 2016, and when this Court interfered in some matters to enlarge the scope of this definition, the Government decided to amend the policy and issued another Government Order dated 28.02.2022 so as to modify the definition of family to the extent of including a daughter-in-law, who is wholly dependent on the head of the family and the Government did not think it proper to include a Grand-son of the deceased also to be eligible for compassionate appointment, this policy of the Government cannot be said to be arbitrary or unreasonable. In these circumstances, this Court finds no good ground to interfere in the Government's policy to as to issue a direction for appointment of the Grand-son of the deceased fair price shop owner on compassionate ground. (Para 21)

Petition dismissed. (E-14)

List of Cases cited:

1. Writ Petition No.2899 (MS) of 2015 (Ashok Kumar Vs St. of U.P. through Principal Secretary, Food & Rasad Department and two others

2. Kusumlata Vs St. of U.P., 2022 SCC OnLine All 1025

3. Shri Sitaram Sugar Co. Ltd. Vs Union of India, (1990) 3 SCC 223

4. M.P. Oil Extraction Vs St. of M.P., (1997) 7 SCC 592

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

1. Heard Shri Pawan Kumar Pandey, learned counsel for the petitioner, Shri S.K.

Khare, learned Standing Counsel for the opposite parties no.1 to 4 and Shri Mohan Singh, learned counsel of the opposite party no.5.

2. By means of the instant petition, the petitioner is seeking quashing of an order dated 21.03.2024 passed by the opposite party no.4- Sub-Divisional Magistrate, Tehsil-Alapur, District - Ambedkar Nagar, whereby the petitioner's representation for being allotted Fair Price Shop of Village-Manapur, Semra on compassionate ground due to death of Srinath Pandey - the licensee of the shop, has been rejected on the ground that the petitioner being a grandson of the deceased licensee, is not entitled to be granted the license on compassionate ground.

3. Earlier the petitioner had filed Writ - C No.1280 of 2024 which was disposed of by means of an order dated 12.02.2024 giving liberty to the petitioner to move a representation to the opposite party no.4 and in case such a representation was made, the opposite party no.4 was directed to consider and decide the same expeditiously by passing a reasoned and speaking order.

4. While rejecting the petitioner's representation, the Sub-Divisional Magistrate, Alapur has stated in the impugned order dated 21.03.2024 that consequent to death of the fair price shop owner Shri Srinath Pandey, his fair price shop license was cancelled by means of an order dated 04.04.2023. Shri Om Prakash Pandey, son of Late Srinath Pandey, had applied for allotment of the shop a as dependent of the deceased fair price shop owner, in accordance with the Government Order dated 05.08.2019. The aforesaid Government Order provides that in case of death of a fair price shop owner, his dependent may given an application for allotment of the shop within 30 days of death of the deceased fair price shop owner, along with no objection certificate issued by other adult members of the deceased family, provided the applicant fulfills the eligibility conditions for allotment of fair price shop. The definition of family for this purpose would include the following persons:-

(i) Head of the family;

(ii) Husband/wife and legally adopted children;

(iii) Children fully dependent on the head of the family;

(iv) Unmarried, judicially separated and widowed daughter;

(v) Mother/Father, who are wholly dependent on the Head of the Family.

5. The eligibility conditions for allotment of a fair price shop is that the candidate must have passed at least High School or equivalent examination.

6. Shri Om Prakash Pandey son of the deceased-licensee, did not possess this eligibility qualification of having passed the High School examination and, therefore, his application could not be accepted.

7. Meanwhile, the petitioner filed Writ - C No.1665 of 2004 in this Court which was disposed of by means of the aforesaid order dated 12.02.2024 and thereafter the petitioner has applied for grant of a fair price shop license under the provisions the Government Order dated 05.08.2019, which provides for grant of fair price shop license to dependents of deceased fair price shop licensee.

8. The petitioner's application has been rejected on the ground that he is a grandson of the deceased fair price shop licensee and

the grandson is not included in the definition of family given in the Government Order dated 05.08.2019. Therefore, the applicant is not entitled to be allotted a fair price shop as dependent of the deceased fair price shop licensee under provisions of the Government Order dated 05.08.2019.

9. While challenging the validity of the aforesaid order, learned counsel for the petitioner has stated that in the judgment of order dated 03.09.2020 passed by a coordinate Bench of this Court in Writ Petition No.13015 (MS) of 2020, this Court had relied upon an earlier order dated 20.07.2016 passed in **Writ Petition No.2899 (MS) of 2015 (Ashok Kumar vs. State of U.P. through Principal Secretary, Food & Rasad Department and two others**), wherein the Court had observed that son of the deceased, fair price shop licensee had predeceased him, the definition of family can be enlarged and had directed the competent authority to consider the claim of a grandson of the deceased fair price shop licensee. The learned counsel for the petitioner has also placed reliance an order dated 10.01.2022 passed by this Court sitting at Allahabad in Writ - C No.32392 of 2021, wherein this Court relied on the decisions of **Ashok Kumar and Sunil Kumar Yadav (supra)** and held that grandson was included in the definition of family. The learned counsel for the petitioner has also placed reliance on an order dated 24.01.2024 passed by this Court in Writ - C No.336 of 2024, wherein this Court has followed the earlier order passed in the case of **Sunil Kumar Yadav (supra)**.

10. A supplementary affidavit has been filed by the petitioner stating that during life time of the fair price shop licensee, the petitioner, who is grandson, used to work along with him and assist him running the shop.

11. Per contra, the learned Standing Counsel has submitted that the State Government has framed a policy for grant of fair price shop license to dependents of deceased fair price shop owners on compassionate ground, by issuing a Government Order dated 05.08.2019. As a matter of policy, the Government decided that in case of death of a fair price shop licensee, son of dependents, who are members of his family and who fulfill the other eligibility conditions, may be considered for allotment of fair price shop on compassionate basis. The family members include head of the family, husband/wife; children, including adopted children, who are wholly dependent on head of the family, unmarried, judicially separated or widowed daughter and parents, who are wholly dependents on the head of the family. This does not include any other person. Subsequently, numerous orders were passed by this Court enlarging the scope of family given in the Government Order dated 05.08.2019.

12. The learned Standing Counsel has placed before this Court a copy of the Government Order dated 28.02.2022, whereby besides the members of family already mentioned in the earlier Government Order dated 05.08.2019, the daughter-in-law, who is wholly dependent on the head of the family, has also been included in the definition of the family.

13. The learned Standing Counsel has submitted that after taking into consideration various orders passed by this Court, the State Government thought it proper to modify its policy only to the extent of inclusion of wholly dependent daughter-

in-law definition of family and the State Government did not include grandson of the deceased fair price shop owner in the definition of family. He further submitted that neither the petitioner has challenged validity of the Government Order dated 05.08.2019 or the subsequent Government Order dated 28.02.2022, wherein the grandson of the deceased fair price shop owner have not been included in the definition of family for the purpose of grant of fair price shop license on compassionate basis consequent to death of the fair price shop licensee, nor can the policy be challenged in absence of the same being suffering from unreasonableness. He has placed reliance on decision rendered by a Division Bench of this Court sitting at Allahabad in Special Appeal No.89 2022, decided on 21.02.2022, wherein the Division Bench found that the policy does not suffer from any Wednesburry unreasonableness.

14. The learned Standing Counsel further submitted that the definition of family given in the Government Order dated 05.08.2019 is the same as given in Essential Commodities (Regulation of Sale & Distribution Control) Order, 2016.

15. The Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter referred to as 'the Control Order, 2016') was framed by the State Government in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 with the object of maintaining the supplies of foodgrains and other essential commodities and for securing its equitable distribution at fair prices under the targetted Public Distribution System. Clause 2(p) of the Control Order, 2016 defines the word 'family' as under:

"Family" means group of following persons—

- Head of the family

- Husband/wife, including legally adopted children.

- Adult children, who are fully dependent on the head of the family.

- Unmarried, legally separated and widow daughters; and

- Fully dependent mother/ Father, of the head of the family.

16. In **Kusumlata v. State of U.P.**, 2022 SCC OnLine All 1025, the petitioner, who was a married daughter of the deceased fair price shop holder, had prayed for being appointed in place of her father under the dying in harness rule prescribed under U.P. Essential Commodities Act (Rules and Distribution Order, 2016). Subsequently, by means of an amendment application, challenge to the constitutional validity of Clause IV(10) of the Government Order dated 05.08.2019 defining the word 'family', was also made. The Single Judge had dismissed the Writ Petition holding that the petitioner being a married daughter, was not residing in the village and she was not eligible for being appointed in place of her deceased father on compassionate ground.

17. While upholding the decision of the Single Judge, the Division Bench held in Special Appeal that *"Neither the word 'unmarried' used in the definition of the word 'family' as defined under the Government Order, 2019 is discriminatory nor the petitioner is eligible for appointment as fair price shop agent inasmuch as she is not resident of the locality where the Fair Price Shop in question is established and thus, she does not even fulfil basic eligibility criteria provided in Clause IV(5) of the Government Order, 2019"*

18. This Court can make any interference in policy laid down by the Government for compassionate appointment of the dependants of deceased fair price shop holders, only on the limited grounds recognized by law in this regard.

19. In **Shri Sitaram Sugar Co. Ltd. v. Union of India**, (1990) 3 SCC 223, the Hon'ble Supreme Court held that: -

"59.…What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute, viz., supply and equitable distribution of essential commodity at fair prices in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review."

20. In **M.P. Oil Extraction v. State of M.P.**, (1997) 7 SCC 592, it was laid down that: -

"41.…The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

21. As the Government has framed a policy for compassionate appointment of dependants of deceased fair price shop licensees by issuing the Government Order dated 05.08.2019 and it has decided to adopt the same definition of family for the purpose of compassionate appointments as is mentioned in Clause 2(p) of the Control Order, 2016, and when this Court interfered in some matters to enlarge the scope of this definition, the Government decided to amend the policy and issued another Government Order dated 28.02.2022 so as to modify the definition of family to the extent of including a daughter-in-law, who is wholly dependant on the head of the family and the Government did not think it proper to include a Grand-son of the deceased also to be eligible for compassionate appointment, this policy of the Government cannot be said to be

arbitrary or unreasonable. In these circumstances, this Court finds no good ground to interfere in the Government's policy to as to issue a direction for appointment of the Grand-son of the deceased fair price shop owner on compassionate ground.

22. There is no illegality in the impugned order dated 21.03.2024 passed by the opposite party no. 4 rejecting the petitioner's claim for compassionate appointment as a fair price shop licensee consequent to the death of the petitioner's grand-father.

23. The Writ Petition lacks merits and the same is **dismissed**.

(2024) 5 ILRA 1790
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ - C No. 4036 of 2024

Smt. Binu Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vivek Kumar Verma, Shalini Gupta

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

Civil Law – revenue law-fisheries lease executed between husaban dof the petitioner and revenue authorities for a period of 10 years- husband of the petitioner died-authorities refused to accept payment of rent by the petitioner-Section 108 of U.P. Revenue Code, 2006-Rules 58 and 59 of Rule 2016-every lease conferred under Rule 58 shall be deemed to be an agricultural lease-succession order under Section 108 of the Code applicable-husband of the petitioner being a government lessee-covered under section 108 of the Code-petitioner being his widow is entitled to succeed his leasehold rights-section 4(2) of the U.P. Revenue Code-Agriculture includes pisciculture-direction issued to grant benefits of succession to the petitioner-Petition allowed. (Paras 7, 8, 11 and 12)

HELD:

This Court has gone through section 108 which provides for general order of succession to male bhumidhar, asami, Government lessee and a widow has a right for such succession. Under Rule 59 of the Rules of 2016 also every lease conferred under Rule 58 shall be deemed to be a lease for agricultural purpose. Therefore, if such lease is considered to be a lease for agricultural purposes, then the general order of succession mentioned under Section 108 could apply. (Para 7)

In Smt. Gyan Mati & Others Vs St. of U. P. & ors., bearing Misc. Bench No. 27765 of 2016 a Division Bench of this Court while considering the relevant provisions of the U.P. Revenue Code and the Rules framed thereunder referred to Section 108 of the Code which provides the general order of succession to a male bhumidhar, asami and Government lessee and observed that under Section 108 there are three categories of persons whose rights in land holdings are to devolve upon their heirs in terms of the provisions contained therein and these categories are; (i) bhumidhar, (ii) asami and (iii) Government lesseet. (Para 8)

The petitioner's late husband being covered under Section 108 of the Revenue Code, being an allottee of a Government lease, the order of succession as given thereunder needs to be followed. The petitioner being a widow is entitled to succeed to the leasehold rights of her dead husband. (Para 11)

We are fortified in our view also by the definition given of "agriculture" in Sub-Section 2 of Section 4 of the U.P. Revenue Code, 2006 where agriculture is defined to include horticulture,

animal husbandry, pisciculture(fisheries), flower farming, beekeeping and poultry farms. (Para 12)

Petition allowed. (E-14)

List of Cases cited:

Smt. Gyan Mati & ors. Vs St. of U. P. & ors., bearing Misc. Bench No. 27765 of 2016

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Brij Raj Singh, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel who appears for the State Respondents and Sri Dilip Kumar Pandey, learned counsel for the respondent no. 4.

2. This writ petition has been filed with the following main prayers:-

"(i) Issue a writ, order or direction in the nature of mandamus thereby commanding and directing the respondents no.2 to 4 not to interfere in peaceful functioning of the petitioner over the pond gata no.763 area 1.4700 hectare, situated at village- Baheriya, Pargana- Godwa, Tehsil- Sandila, District- Hardoi at the place of her husband who died for balance term of lease.

(ii) Issue a writ, order or direction in the nature of mandamus thereby commanding and directing the respondent no.3 i.e. Sub Divisional Magistrate, Sandila, Hardoi to allow the petitioner to deposit the rent of year of 2023 and 2024 in respect of pond in question as per the lease deed.

(iii) Issue a writ, order or direction in the nature of mandamus thereby commanding and directing the respondent no.3 i.e. Sub Divisional Magistrate, Sandila, Hardoi to consider the case of petitioner and decide the representation dated 01.04.2024, sent by the petitioner, contained as Annexure No.5 to this writ petition, within the period as fixed by this Hon'ble Court."

3. It is the case of the petitioner that her husband had taken fisheries lease over Gata No. 763 area 1.4700 hectare, situated at Village - Baheriya, Pargana-Godwa, Tehsil-Sandila, District- Hardoi on 03.01.2019. The lease deed was executed between the husband of the petitioner and the Revenue Authorities on 22.01.2019 for a period of ten years (03.01.2019 to 02.01.2019) and the said fisheries lease is also registered in the office of the Sub-Registrar, Sandila. The possession of the aforesaid pond was delivered to the petitioner's husband and he started do fishing therein, but he died unfortunately on 01.06.2022 leaving the petitioner and three sons & two daughters as dependents. The petitioner went to the office of the Sub-Divisional Magistrate, Hardoi for paying rent for the year 2023 but the concerned official has refused to accept the rent saying that the lease was allotted to her husband and after the death of the allottee, the lease is likely to be cancelled. The petitioner has approached the respondents no. 2 by sending an application on 01.04.2024 by registered post, but no heed has been paid, and therefore, this writ petition has been filed with the aforesaid prayers.

4. Learned counsel for the petitioner has placed reliance upon several orders passed by the Hon'ble Single Judges in various writ petitions of similarly situated persons. The judgements rendered by Hon'ble Writ Court have been collectively filed as annexure-6 to the petition.

5. Learned Standing Counsel for the State on the basis of instructions sent by Sub-Divisional Magistrate, Hardoi states

that there is no provision in the Rules framed under the U.P. Revenue Code for giving succession rights on fisheries lease allotted on ponds of Gaon Sabha under Section 106 of the U.P. Revenue Code. The consequences of the transfer made by an asami in contravention of the Code are mentioned and the petitioner's husband was a lease holder/asami and since there is no provision for succession the petitioner is liable for eviction from Gram Sabha property.

6. The instructions further mention Section 148 of the U.P. Revenue Code which prescribes that an allottee has to strictly follow the conditions of allotment and since there is no such condition in the allotment letter or transfer of lease on the basis of succession, the petitioner cannot be treated as successor of her husband. Reference has also been made of Section 108 of the U.P. Revenue Code which relates to general order of succession to male bhumidhar or asami or Government lessee.

7. This Court has gone through section 108 which provides for general order of succession to male bhumidhar, asami, Government lessee and a widow has a right for such succession. Under Rule 59 of the Rules of 2016 also every lease conferred under Rule 58 shall be deemed to be a lease for agricultural purpose. Therefore, if such lease is considered to be a lease for agricultural purposes then the general order of succession mentioned under Section 108 could apply.

8. In Smt. Gyan Mati & Others Vs. State of U. P. and Others, bearing Misc. Bench No. 27765 of 2016 a Division Bench of this Court while considering the relevant provisions of the U.P. Revenue Code and the Rules framed thereunder referred to Section 108 of the Code which provides the general order of succession to a male bhumidhar, asami and Government lessee and observed that under Section 108 there are three categories of persons whose rights in land holdings are to devolve upon their heirs in terms of the provisions contained therein and these categories are; (i) bhumidhar, (ii) asami and (iii) Government lessee.

9. The Division Bench was considering a writ petition filed by a widow and her sons for right of succession to the fisheries lease on a pond owned by the Gram Sabha. The lease was executed in favour of their predecessor in interest for a period of ten years and there was no violation of the conditions of the lease, after the predecessor in interest died and the lease was not being transferred in their favour and they had approached this Court. The Division Bench observed that their predecessor in interest, namely, Late Chhedi Ram died on 27.07.2009 and fisheries on the pond and being admitted as a lessee, his succession would be governed by Section 108 of the Code.

10. We find in the case of the petitioner that her late husband was a lesee of Fisheries Rights of the pond and the lease deed is valid upto 2029. There is no mention in the instructions sent by the Sub-Divisional Magistrate of any violation of conditions of the lease deed. There is also no mention of any order of cancellation of lease deed after affording opportunity of hearing to the affected parties.

11. The petitioner's late husband being covered under Section 108 of the Revenue Code, being an allottee of a Government lease, the order of succession as given thereunder needs to be followed. The petitioner being a widow is entitled to

succeed to the leasehold rights of her dead husband.

12. We are fortified in our view also by the definition given of "agriculture" in Sub-Section 2 of Section 4 of the U.P. Revenue Code, 2006 where agriculture is defined to include horticulture, animal husbandry, pisciculture(fisheries), flower farming, beekeeping and poultry farms,

13. The instructions sent by the S.D.M. are kept on record.

14. We find that the view taken by the Sub-Divisional Magistrate, Sandila, Hardoi in the instructions is against the law settled by this Court and also against the provisions of Section 108 of the U.P. Revenue Code read with Rule 59 of the Rules of 2016.

15. The writ petition is ***allowed***. We further issue a direction to the Sub-Divisional Magistrate to grant the benefits of succession to the petitioner on the fisheries rights of her late husband and pass an appropriate orders within a period of three weeks from the date a certified copy of this order is produced before him. If any order has been passed cancelling such lease only on the grounds of death of the lessee, the said order is set aside.

16. Till such a decision is taken no coercive steps shall be taken against the petitioner.

17. Learned Standing Counsel shall inform of the order passed today of the Sub-Divisional Magistrate concerned through Fax without waiting such order to be uploaded on the online portal.

(2024) 5 ILRA 1793
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 14.05.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 10709 of 2024

Aditya Vikram Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Rai, Sri Pawan Giri, Sri Rishabh Srivastava

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Kumar Chand, Sri Santosh Kumar Singh, Sri Puneet Agarwal

Civil Law –candidature for retail outlet dealership of BPCL cancelled-lease of the land concerned executed by only of the co-owners-violation of Clause 4 (vi) (a) of the Dealer Selection Guidelines, 2023 violated-successful application of the award of retail dealership outlet-a lease deed duly executed by all the co-sharers of the offered land on the date of application-necessary-Petition dismissed. (Paragraphs 9 to 12)

HELD:
From all that has been narrated hereinabove, it is clear that law on the issue regarding the lease of the offered land is well settled, i.e., for the successful application of the award of retail dealership outlet, it is incumbent upon the applicant that he/she must have a lease deed duly executed by all the co-sharers of the offered land on the date of the application. (Para 11)

In view of the facts as narrated hereinabove, it is abundantly clear that the petitioner was not having the lease in respect of the offered land in terms of clause 4(vi)(a) of the Dealership Selection Guidelines, 2023 and as such, in the light of the judgment rendered by this Court in the case of Rahul Singh (Supra), he was not

eligible for being considered for the allotment/award of the retail dealership outlet. The impugned rejection of the candidature of the applicant/petitioner vide E-mail/order dated 01.03.2024 does not suffer from any illegality or infirmity. Therefore, the decision of BPCL/respondent no. 3 in rejecting the candidature of the applicant/petitioner needs no interference. (Para 12)

Petition dismissed. (E-14)

List of Cases cited:

1. Rahul Singh Vs Indian Oil Corporation Ltd. & ors. having writ number as Writ C No. 7354 of 2024

2. Bharat Petroleum Corporation Ltd. Vs Swapnil Singh reported in 2015 SCC OnLine SC 1922

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Pawan Giri along with Sri Rishabh Srivastava, learned counsel for the petitioner; Sri Gaurav Kant Chand, learned counsel appearing for the Union of India and Sri Puneet Agarwal, learned counsel for respondent nos. 2 and 3.

2. By means of the present writ petition, the petitioner has prayed for the following reliefs:

"I. Issue a writ, order, or direction in the nature of Certiorari quashing the impugned order dated 01.03.2024 (Annexure no.1) passed by the respondent no.3, wherein the respondent no.3 has declared the Petitioner ineligible and also cancelled the candidature of the petitioner for the allotment of the Retail Outlet Dealerships Petrol Pump for the Territory- Deoria, District- Maharajganj, Location Description-FROM CHIUTAHA BAZAR CHURAHA UPTO 2KMS EITHER SIDE ON PARTWAL-NICHLAUL ROAD, with regard to the Appointment of Retail Outlet Dealerships in the State of Uttar Pradesh by Bharat Petroleum Corporation Ltd. (BPCL).

II. Issue a writ, order, or direction in the nature of Mandamus commanding the respondent authorities to allot the Retail Outlet Dealerships Petrol Pump to the petitioner for the Territory- Deoria, District-Maharajganj, Location Description-FROM CHIUTAHA BAZAR CHURAHA UPTO 2KMS EITHER SIDE ON PARTWAL- NICHLAUL ROAD.

III. Issue a writ, order, or direction in the nature of Mandamus restraining the respondent no.3 from issuing fresh notification for conducting fresh draw of lots for the allotment of the Retail Outlet Dealerships Petrol Pump for the Territory- Deoria District-Maharajganj, Location Description-FROM CHIUTAHA BAZAR UPTO CHURAHA 2KMS EITHER SIDE ON PARTWAL-NICHLAUL ROAD, with regard to the Appointment of Retail Outlet Dealerships in the State of Uttar Pradesh by Bharat Petroleum Corporation Ltd. (BPCL).

IV. Issue any other writ, order, or direction, which this Hon'ble Court may deem just and proper in the facts and circumstances of the case; and

V. To award the cost of the Writ Petition in favour of the Petitioner."

3. Brief facts of the case that are relevant for the adjudication of the instant writ petition are that Bharat Petroleum Corporation Ltd ((hereinafter referred to as BPCL) / respondent no. 2 issued an advertisement dated 28.06.2023 inviting applications for the appointment/award of Retail Outlet Dealership Petrol Pump for the Deoria, District Maharajganj, Location Description— from Chiutaha Bazar, Churaha upto 2 kms, either side on Partwal-

Nichlaul Road. The petitioner applied for the award of the said retail outlet dealership and received a confirmation of the same from BPCL / respondent no. 2 via E-mail dated 25.11.2023. The date for the draw of lots was fixed as 07.12.2023, in which, the petitioner participated. On the same day, the petitioner was informed via E-mail that he has been declared as provisionally selected for the award of Retail Outlet Dealership Petrol Pump. The petitioner was required to pay a sum of ₹30,000/- towards initial security deposit and to submit the set of documents as specified in the email for processing of his application for the aforesaid award of retail outlet dealership. Accordingly, the petitioner, made the aforementioned payment of ₹30,000/- and submitted the requisite documents.

4. Thereafter, the petitioner received another E-mail from BPCL-respondent no.2 to upload Khasra/Khatuani or any other equivalent document confirming the status of his ownership of the 'land' as on the date of application in respect of which the petitioner intends to open the Retail Outlet Dealership Petrol Pump, as on the date of application. However, on 17.12.2024, the petitioner received an E-mail from BPCL / respondent no. 3 through which he was informed that the documents uploaded by him were found 'NOT OK' as the lease of the 'land' is executed by only one of the co-owners of Khasra No. 110 which is not in consonance with the Clause 4 (vi) (a) of the 'Dealer Selection Guidelines 2023' and his candidature was found to be ineligible.

5. Aggrieved by the cancelation of his candidature, the petitioner approached the BPCL/respondent No. 3 and posted his representation through speed post and E-mail. However, vide E-mail/order dated 01.03.2024, his representation was rejected by the Territory Manager (Retail) BPCL, Gorakhpur /respondent no. 3 on the ground that as per the 'Dealer Selection Guidelines, 2023', it is necessary that all the co-sharers of the offered land must execute the lease in favour of the petitioner. As the petitioner does not have the lease from all the co-sharers of the offered land, his candidature is not acceptable.

6. Challenging the said order dated 01.03.2024, the learned counsel for the petitioner argued that the land bearing Plot/Gata No.110 situated at Mauza Agaya, Tehsil Nichlaul, District Maharajganj, belongs to one Pritihvi Pal Tiwari, who has leased the same out of his individual share. The portion of the land falling in the share of Prithvi Pal Tiwari is adjacent to petitioner's leased plot and in such scenario there was no need to obtain consent from the other co-sharers. It has further been argued that as the petitioner has submitted a valid lease deed along with the report by the revenue authority prepared in pursuance of the proceedings under section 116 of the U.P. Revenue Code, 2006. Therefore, there was no need of other co-sharer, who happen to be the brother of Prithvi Pal Tiwari, to execute lease of his share of land. Furthermore, the co-sharers have no objection with the present lease executed in favour of the petitioner.

7. Per contra, the learned counsel appearing for the BPCL vehemently opposed the writ petition and submitted that as per clause 4 (vi) (a) of the Brochure for 'Selection of Dealers for Regular and Rural Retail Outlets 2023', in the case of the petitioner, the lease deed should have been executed by all the co-owners of the offered plot. Since the lease deed produced by the petitioner was not executed by all the co-

owners, his application has rightly been cancelled. He has further submitted that since the partition of the land in question is said to have taken place on 10.02.2024, which is subsequent to the date of submission of application, i.e. 28.06.2023; he was not found qualified for the allotment of Retail Outlet Dealership.

8. Having heard the submissions made by the learned counsels for the respective parties and perusing the material available on record, it would be apt to refer to Clause 4 (vi) (a) of the Brochure for 'Selection of Dealers for Regular and Rural Retail Outlets 2023'. The relevant portion of the same is extracted hereinbelow,

"……(vi) Land (Applicable to all categories):

The applicants would be classified into three groups as mentioned below based on the land offered or land not offered by them in the application form: -

Group 1: Applicants having suitable piece of land in the advertised location/area either by way of ownership / long term lease for a period of minimum 19 years 11 months or as advertised by the OMC.

Group - 2: Applicants having Firm Offer for a suitable piece of land for purchase or long-term lease for a period of minimum 19 years 11 months or as advertised by the OMC.

Group-3: Applicants who have not offered land in the application. Only applicable for locations advertised under SC/ST category.

Applications under Group - 3 would be processed/advised to offer land (Annexure - D) only in case no eligible applicant is found or no applicant get selected under Group-1& Group-2.In case land offered by all the applicants under Group 1 & Group 2 is found not suitable/not meeting requirements, then these applicants under Group 1 & Group2 along with applicants under Group - 3 (who did not offer land along with application) would be advised by the OMCs to provide suitable land in the advertised location / stretch, within a period of 90 days from the date of issuance of intimation letter to them through SMS/e-mail. In case the applicant fails to provide suitable land within the prescribed period, or the land provided is found not meeting the laid down criteria, the application would be rejected.

The other conditions with respect to offering of land are as under:

(a) The land should be available with the applicant as on the date of application and should have minimum lease of 19 years and 11 months (as advertised by respective oil company) from the date or after the date of advertisement but not later than the date of application. If the offered land is on Long-term lease and there are multiple owners, then lease deed should be executed by all co-owners of the offered plot. In case lease deed is not executed by all co- owners; such lease deed shall be treated as invalid……." (emphasis supplied)

9. From the perusal of the records, it is apparent that the petitioner did not have the lease in his favour duly executed by all the co-shareres of the offered land. It is relevant to note that a Coordinate Bench of this Court in the case of **Rahul Singh versus Indian Oil Corporation Ltd. and 3 others** having writ number as **Writ C No. 7354 of 2024** observed that,

"9. In view of the above, we find that the Brochure stipulates amongst others two contingencies (discussed here namely), one where the land may be owned by a person other than the applicant or his family members, second, where the land may be owned by the applicant alongwith others or others alongwith his family members or both. Considering the present facts land is owned by third parties to the exclusion of the applicant and his family members. That situation is dealt with in terms of Clause 4 (vi) (a).

10. The situation were the land may be owned by the applicant either in his own name or alongwith his family members and/or other persons has been dealt with in Clause 4 (vi) (m) under situations 1, 2 and 3 dealt with in the tabular chart under the heading "GROUP 1" appearing in that Clause.

11. Then, without reference to Clause (a), (m) or any Sub-Clause of Clause 4 (vi) of the Brochure, Note - 3 thereto only provides- whereever consent letter is required, it may be submitted on form Appendix III.

12. As noted above, in the present facts, the land offered in the allotment is not owned by the petitioner/applicant or the petitioner/applicant alongwith his family members or by the petitioner/applicant alongwith other owners and his family members. Therefore, Clause 4 (vi) (m) would not apply to the present facts.

13. On the contrary, the only Clause applicable to such facts would be Clause 4 (vi) (a). That Clause clearly stipulates that the land offered for allotment should be available to the applicant on the date of submission of his application against a long term lease executed by "all co-owners". The consequence of non execution of such lease deed is also provided in the said Clause. Thus it has been stipulated, in case such lease deed is not executed by all co- owners, the same shall be invalid. Once invalid that ineligibility attaches to the application submitted by the petitioner on the date of submission of his application.

14. For the purpose of application of the said Clause the requirement remains- execution of lease deed by all co-owners, therefore, consent letters cannot fulfil that stipulation. In face of the consequences of invalidity of the lease deed having been specified, there survives no occasion to consider if the defect in such application could ever been cured, after its submission.

15. Consequentially, the method of curing the defect considered under Note-3 (noted above) would remain confined to the cases falling under Clause 4 (vi) (m), only.

16. For the reasons noted above, we conclude, the petitioner's case would remain covered by Clause 4 (vi) (a) of the Brochure. It is admitted that the lease deed relied by the petitioner was not executed by all co-owners before the date of submission of the application. Therefore, there is no error on the part of the respondent in rejecting the application submitted by the petitioner."

10. It is also relevant to observe from 4 (vi)(a) of the said Brochure that the offered land of the applicant must be leased to him on the date of the application. In this regard, the Hon'ble Supreme Court in the case of **Bharat Petroleum Corporation Ltd. versus Swapnil Singh** reported in **2015 SCC OnLine SC 1922** has been pleased to observe that,

"……We are unable to accept this contention of learned counsel for the respondent. The brochure and the application form clearly require the applicant to have a registered lease deed in

her name. What is shown to us is a notarized document and admittedly this document, even though it may have been in existence, was formalised into a lease agreement only on 20th December, 2012 and that was registered on 21st December, 2012. The notarized document, therefore, does not advance the case of the respondent any further. Therefore, it is quite clear that the respondent was not eligible on the date of application, i.e., 13th September, 2011. Under the circumstances, we allow these appeals and set aside the order passed by the Division Bench of the Calcutta High Court. No costs……"

11. From all that has been narrated hereinabove, it is clear that law on the issue regarding the lease of the offered land is well settled, i.e., for the successful application of the award of retail dealership outlet, it is incumbent upon the applicant that he/she must have a lease deed duly executed by all the co-sharers of the offered land on the date of the application.

12. In view of the facts as narrated hereinabove, it is abundantly clear that the petitioner was not having the lease in respect of the offered land in terms of clause 4(vi)(a) of the Dealership Selection Guidelines, 2023 and as such, in the light of the judgment rendered by this Court in the case of **Rahul Singh** *(Supra)*, he was not eligible for being considered for the allotment/award of the retail dealership outlet. The impugned rejection of the candidature of the applicant/petitioner vide E-mail/order dated 01.03.2024 does not suffer from any illegality or infirmity. Therefore, the decision of BPCL/respondent no. 3 in rejecting the candidature of the applicant/petitioner needs no interference.

13. The writ petition lacks merit and is accordingly **dismissed**.

14. Parties shall bear their own costs.

(2024) 5 ILRA 1798
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 27068 of 2017

Jagdish ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Awadhesh Kumar Singh

Counsel for the Respondents:
C.S.C.

Civil Law –order cancelling fair price shop licence-under challenge-alternative statutory remedy under Section 13(3) of The Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016-adequate opportunity of hearing given to the petitioner-not availed by him- Petition dismissed. (Paras 14 and 19)

HELD:

It has categorically been St.d in para 7 of the counter affidavit that ins spite of giving repeated opportunities, the petitioner did not submit any reply / explanation or the records and this fact remains uncontroverted, as the petitioner has not filed any rejoinder affidavit. In view of the aforesaid factual position, the allegation of the petitioner that no opportunity of hearing was provided to him is not acceptable. It appears that adequate opportunity of hearing was provided to the petitioner but the petitioner deliberately failed to avail the same. (Para 14)

In these circumstances, the impugned order dated 12.10.2017 does not suffer from any such illegality as may warrant any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition lacks merit and the same is hereby dismissed. (Para 19)

Petition dismissed. (E-14)

List of Cases cited:

1. N. P. Ponnuswami Vs Returning Officer, Namakkalconstituency & Ors: 1952 SCR 218

2. M/s Mahatma Gandhi Upbhokta Samiti Vs St. of U.P. & ors: 2001 19 LCD 513

3. Lokman Singh Vs Deputy General Manager, Western Zone, UPSRTC, Meerut & ors: 2006 (8) ADJ 646

4. Whirlpool Corpn. Vs Registrar of Trade Marks: (1998) 8 SCC 1

5. Harbanslal Sahnia Vs Indian Oil Corpn. Ltd., (2003) 2 SCC 107

6. Radha Krishan Industries Vs St. of H.P.: (2021) 6 SCC 771

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

Order on I.A. No. 4 of 2023 and I.A. No. 5 of 2023

I.A. No. 4 of 2023 has been filed seeking condonation of delay in filing application for recall of the order dated 26.09.2022. I.A. No. 5 of 2023 has been filed seeking recall of the order dated 26.09.2022 whereby the writ petition was dismissed due to non-appearance of the learned counsel for the petitioner. The reason assigned in the affidavits filed in support of the applications is that the clerk of the petitioner's Counsel mistakenly failed to mark the case in the cause list of 26.09.2022 and for this reason, the petitioner and his Counsel were not aware about the listing of the case on that date. The cause shown for recall of the order and for non appearance of the learned counsel for the petitioner is sufficient. The applications are ***allowed***. The delay in filing the application for recall of order dated 26.09.2022 is condoned and order dated 26.09.2022 is recalled. The writ petition is restored to its original number.

Order on Writ Petition

1. Heard Sri Awadhesh Kumar Singh, the learned counsel for the petitioner and Sri Rajeev Ranjan Chaudhary, the learned counsel for the respondents.

2. By means of the instant petition filed under Section 226 of the Constitution of India, the petitioner has challenged validity of an order dated 12.10.2017 passed by the Sub-Divisional Magistrate, Tulsipur, District Balrampur whereby the fair price shop license of the petitioner was cancelled.

3. A counter affidavit was filed in this case on 31.02.2018 after serving a copy thereof on the learned counsel for the petitioner on 30.03.2018 but no rejoinder affidavit has been filed till date in spite of time having been sought and granted repetitively on 17.08.2018, 18.05.2018 and 24.08.2022, but the petitioner did not file a rejoinder affidavit. Therefore, the averments made in the counter affidavit remained uncontroverted.

4. The learned Standing Counsel has raised a preliminary objection that the petitioner has a statutory remedy of filing an appeal under Section 13(3) of The Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016.

5. The learned Standing Counsel has relied upon a decision of the Hon'ble Supreme Court in **N. P. Ponnuswami v. Returning Officer, Namakkalconstituency & Ors**: 1952 SCR 218, wherein the Hon'ble Supreme Court has held that *"It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."*

6. Replying to the aforesaid preliminary objection, the learned counsel for the petitioner has relied upon a decision of this Court in **M/s Mahatma Gandhi Upbhokta Samiti v. State of U.P. & Ors:** 2001 19 LCD 513 and **Lokman Singh v. Deputy General Manager, Western Zone, UPSRTC, Meerut & Ors**: 2006 (8) ADJ 646.

7. In **M/s. Mahatma Gandhi Upbhokta Samiti**, this Court had entertained the writ petition on the ground that if there is a violation of principles of natural justice, alternative remedy shall not stand as a bar.

8. In **Lokman Singh** (supra), this Court had declined to relegate the petitioner to alternative remedy for the reason that the writ petition had been entertained in the year 1997 and counter and rejoinder affidavit have been exchanged and, therefore, it would not be proper to relegate the petitioner to an alternative remedy after the writ petition having remained pending for almost 10 years.

In **Whirlpool Corpn. v. Registrar of Trade Marks**: (1998) 8 SCC 1, a two-Judge Bench of the Hon'ble Supreme Court had held that: -

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. ***But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged****. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."* (Emphasis in original)

Following the dictum of this Court in Whirlpool, in **Harbanslal Sahnia v. Indian Oil Corpn. Ltd.**, (2003) 2 SCC 107, the Hon'ble Supreme Court held that: -

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to

be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. ***In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged****. [See Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1]. The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."* (Emphasis in original)

In **Radha Krishan Industries v. State of H.P.**: (2021) 6 SCC 771, a three Judge Bench of the Hon'ble Supreme Court considered the judgments of **Whirlpool Corporation** and **Harbanslal Sahnia** (Supra) and culled out the following principles in this regard: -

"27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. ***When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution.*** *This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.*

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with." (Emphasis added)

9. I proceed to examine whether the aforesaid principles laid down in the cases cited by the learned counsel for the petitioner are applicable to the facts of the present case.

10. It is recorded in the impugned cancellation order dated 12.10.2017 that the petitioner's fair price shop agreement was

suspended by means of an order dated 15.04.2017 and the petitioner was directed to submit his explanation regarding the charges, along with the distribution register and stock register for the period of past six months.

11. When the petitioner did not submit his explanation within the time provided to him, a reminder notice dated 24.07.2017 was sent to him. It was tendered to the petitioner by supply inspector, Gaisdi on 25.07.2017 but the petitioner declined to receive the same. Thereafter, the notice was pasted on the house of the petitioner and its photograph was taken and put on the file along with a report of the Supply Inspector, Gaisdi.

12. The petitioner had filed Appeal No. 34 under Section 28(3) of The Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, which was allowed and the matter was remanded by means of an order dated 29.08.2017 passed by the Deputy Commissioner (Food), Devi Patan Mandal, Gonda providing that a fresh order be passed within 15 days and the petitioner was directed to cooperate in the inquiry.

13. After remand of the matter, a final reminder dated 02.09.2017 was sent to the petitioner asking him to submit his explanation and requisite documents in furtherance of the earlier letter dated 24.07.2017. The reminder was sent through registered post and it was tendered to the petitioner by the Supply Inspector, Gaisdi by visiting the petitioner's house but the family members of the petitioner present there declined to accept the notice. Upon this, the supply inspector again pasted the notice upon the house of the petitioner, took its photograph and attached it to the file.

14. It has categorically been stated in para 7 of the counter affidavit that ins spite of giving repeated opportunities, the petitioner did not submit any reply / explanation or the records and this fact remains uncontroverted, as the petitioner has not filed any rejoinder affidavit. In view of the aforesaid factual position, the allegation of the petitioner that no opportunity of hearing was provided to him is not acceptable. It appears that adequate opportunity of hearing was provided to the petitioner but the petitioner deliberately failed to avail the same.

15. The learned counsel for the petitioner next submitted that the petitioner had filed Writ Petition No. 21310 (M/S) of 2017 challenging validity of the suspension order and the cancellation order has been passed during pendency of that Writ Petition.

16. While entertaining Writ Petition No. 21310 (M/S) of 2017, on 11.09.2017 this Court had passed an order directing the Standing Counsel to file counter affidavit in the matter. However, it was specifically provided in that order that the licensing authority may proceed in the matter in question in accordance with the law. Therefore, it appears that the licensing authority proceeded with the matter under directions of this Court contained in the order dated 11.09.2017 passed in Writ Petition No. 21310 (M/S) of 2017 and the order cannot be held to be bad in law on the ground that it has been passed during pendency of the writ petition.

17. The learned counsel for the petitioner lastly submitted that a copy of the inquiry report was not provided to him.

18. A notice was sent to the petitioner through registered post and the

Supply Inspector himself repetitively went to the petitioner's house himself to serve a notice asking him to show cause and the petitioner declined to receive the notice. Had he appeared in response to the notice, a copy of the enquiry report could have been provided to him or he could have demanded the same. In view of this conduct of the petitioner in deliberately avoiding participation in the enquiry, he cannot complain of denial of a proper opportunity of hearing to him.

19. In these circumstances, the impugned order dated 12.10.2017 does not suffer from any such illegality as may warrant any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition lacks merit and the same is hereby **dismissed**.

(2024) 5 ILRA 1803
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

First Appeal No. 394 of 2024

Shatakshi Mishra ...Appellant
Versus
Deepak Mahendra Pandey (Deceased) & Ors. ...Respondents

Counsel for the Appellant:
Shailendra Kumar Ojha, Shyam Surat Shukla

Counsel for the Respondent:
Rakesh Dubey

Family Law - Hindu Marriage Act, 1955 – Section 5 r/w Section 11 - Respondent (Husband) filed petition under Section 11 – Ground - Marriage was an outcome of fraud - Appellant (Wife) was already married - During marriage, she projected herself as unmarried - she has not converted into Hinduism and marriage be declared - Husband died in road accident - Application filed by parents after the respondent's death - Said application was allowed – Held, provisions of Order 22 of CPC are applicable in view of provisions of the Family Court Act - parents were made party to the proceedings to pursue the petition – Impugned order challenged in appeal (Para - 2, 3, 4)

Held: The provisions of Order 22 CPC are applicable in the proceedings pending before the Family court under Section 11 of the Act. Legal Representative who is not "either of the parties" and was not one of the spouse to the marriage in question can pursue the petition filed under Section 11 of the Hindu Marriage Act, 1955 that marriage should be declared void and therefore, their application filed under Order 22 Rule 3 CPC would be maintainable. It is clear that in such matters the declaration would have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person. Hence, no illegality or infirmity in the order impugned. (Para - 17, 27, 29, 32)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Garima Singh Vs Pratima Singh & anr., 2023 (9) ADJ 101 (DB)

2. Maharani Kusumkumari & anr. Vs Smt. Kusumkumari Jadeja & anr., (1991) 1 SCC 582

3. Samar Kumar Roy (Dead) through Legal Representative (Mother) Vs Jharna Bera, (2017) 9 SCC 591

4. Yallawwa Vs Shantavva, (1997) 11 SCC 159

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Shri Shyam Surat Shukla, learned counsel for the appellant and Shri Rakesh Dubey, learned counsel appearing for the respondent.

2. The present appeal has been filed against the judgement and order dated 10.01.2024 passed by Additional Principal Judge, Family Court No.3, Kanpur Nagar, in Case no.893 of 2022 (Deepak Mahendra Pandey Versus Shatakshi Mishra), under Section 11/5 of Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act').

3. One Deepak Mahendra Pandey filed a petition, under Section 11 of the Act on 05.04.2022 on the ground that the marriage was an outcome of fraud as he has come to know that Shatakshi Mishra (the wife, appellant herein) was already married whereas at the time of marriage, she projected herself as unmarried and even produced various documents showing herself as unmarried girl and that she has also not converted into Hinduism and therefore, the marriage be declared void after filing of the petition. Unfortunately, the husband, Deepak Mahendra Pandey died on 24.02.2023 in a road accident.

4. By the impugned order dated 10.01.2024 , the application filed by the parents after the death of their son was allowed holding that the provisions of Order 22 of the Civil Procedure Code (hereinafter referred to as the 'CPC') are applicable in the present case in the light of the provisions of the Family Court Act and the parents were made party to the proceedings to pursue the petition.

5. It is submitted by learned counsel for the appellant that the dispute cannot continue after death of one of the spouse during the pendency of the litigation. He submits that after the death of the husband on 24.02.2023, the petition would stand abated.

6. It is further submitted that the Court below has committed a gross mistake of law in holding that the provisions of Order 22 CPC would be applicable in view of Section 10 of the Family Courts, Act, 1984.

7. Per contra, learned counsel for the respondent has supported the impugned order and submits that the Court below has not committed any mistake in allowing the aforesaid application as the property rights would certainly be get affected from the outcome of the present petition filed under Section 11 of the Hindu Marriage Act, if the marriage is declared void. He has placed reliance on a judgement of Hon'ble Division Bench judgement of this Court in ***Garima Singh Vs. Pratima Singh and another, 2023 (9) ADJ 101 (DB)*** by making reference to paragraphs 37 to 48 of the judgement.

8. We have considered the rival submissions and have perused the record.

9. Before proceeding further, it would be appropriate to take note of the relevant provisions of law.

10. Sections 5 and 11 of the Hindu Marriage Act reads as under:-

"5. Condition for a Hindu Marriage

" A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-

1.neither party has a spouse living at the time of the marriage;

2. at the time of the marriage, neither party-

i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children;

or

iii) has been subject to recurrent attacks of insanity;

3. the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

4. the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

5. the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

11. Void Marriage

"Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i) , (iv) and (v) of section 5."

11. *Sections 7 and 10 of the Family Courts Act, 1984 reads as under -*

"7. Jurisdiction- *(1) Subject to the other provisions of this Act, a Family Court shall -*

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be , such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation - The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

10. Procedure generally.-

"(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

(Emphasis Supplied)

12. Order 22 Rule 3 CPC reads as under-

Order 22, Rule 3 of CPC

Rule 3 deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff. It states that?

"(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

(Emphasis Supplied)

13. It is not in dispute that the petition under Section 11 of the Act was filed by the husband and he unfortunately died during pendency of the petition.

14. Two questions arise for consideration in the present case: (1) whether the provisions of CPC particularly Order 22 CPC are applicable in the proceedings before the Family court or not?; and (2) whether the parents can be substituted as legal representatives of the deceased to pursue the proceedings pending before the Family Court under Section 11 of the Act?

15. Insofar as the first question is concerned, a bare reading of the provisions quoted above would clearly reflect that the provisions of CPC other than the proceedings under Chapter IX of the Cr.P.C. would be applicable in all proceedings pending before the Family Court and that for the purpose of the said provision of the Code, a family court shall be deemed to be a Civil Court.

16. Learned counsel for the appellant could not dispute the legal position.

17. Accordingly, the question no. 1 is answered in affirmative and it is held that

provisions of Order 22 CPC are applicable in the proceedings pending before the Family court under Section 11 of the Act.

18. Insofar as the second question is concerned, learned counsel for the respondent has placed heavy reliance on the judgement of this Court in *Garima Singh* (supra) and submitted that the parents who are legal representatives of the deceased husband Deepak Mahendra Pnadey are entitled to be made a party to pursue the proceedings under Section 11 of the Act.

19. The question involved in *Garima Singh* (supra) was that as to whether the first wife has a right to seek declaration under Section 11 of the Act that the marriage performed by the husband with second wife was a void marriage, in other words, whether she is entitle to file a petition for obtaining such declaration.

20. After considering various provisions of Sections 5, 9 and 11 of the Act and Section 7 of the Family Court Act, it was held that the Family Court has rightly granted the right to the first wife to file an application under Section 11 of the Act.

21. Learned counsel for the respondent has referred to paragraphs 37 to 48 of *Garima Singh* (supra). We have gone through the entire judgement carefully.

22. Relevant paragraphs 37, 44 to 48 of *Garima Singh* (supra) are quoted as under:

"37. The term "either party thereto" shall be interpreted in harmony with "against the other party". The inclusion of the phrase "against the other party" was intended to provide a clear and purposeful understanding of the section's scope. The provision aims to ensure that anyone aggrieved by the solemnization of a second marriage has the option to file a suit in the family court, aligning with the objectives for which the Family Courts Act, 1984, was established. The underlying intention behind enacting the Family Courts Act, 1984 was to consolidate all litigation pertaining to marital disputes, including matters related to marriage, divorce, custody, guardianship, property partition, maintenance, and other familial suits, under one comprehensive platform. This consolidation was aimed at facilitating the efficient resolution of such cases.

44. The narrow interpretation given to the phrase "either party thereto" should not apply in cases where provisions of social welfare legislation are invoked. Such a restrictive interpretation would affect the principle of equal protection of laws and equality before the law, guaranteed under Article 14 of the Constitution. It would also negatively impact the rights of the first wife, as guaranteed under Article 14 and the provisions of the Family Courts Act, 1984.

45. If the first wife is deprived of seeking a remedy under Section 11 of the Hindu Marriage Act, it would defeat the very purpose and intent of the Act. The protection offered to legally wedded wives under sections 5, 11, and 12 of the Hindu Marriage Act would become insignificant in such a scenario.

46. Even if the meaning of the phrase "either party thereto" is considered to be unclear or ambiguous, the principle of beneficial construction should be applied to determine its intent. There is no justification for interpreting section 11 in a way that restricts its scope or narrows down its meaning. The purpose of granting a decree of nullity is to identify flaws in the marriage and subsequently declare it as void.

47. In the process of beneficial construction, the Court should lean towards an interpretation that serves the interests of

justice and aligns with the broader objectives of the law. By doing so, the Court can ensure that the remedies available under section 11 are not unduly limited, and individuals seeking relief are not unjustly deprived of their rights. The ultimate aim of granting a decree of nullity is to annul a marriage that is found to be invalid from its inception, effectively treating it as if it never existed. Therefore, it is essential to interpret the relevant provisions in a manner that facilitates a fair and just outcome for the parties involved.

48. In conclusion, we uphold the family court's decision, which grants the first wife, the respondent in this case, the right to file an application under section 11 of the Hindu Marriage Act. This application seeks the declaration of the second marriage as illegal and void. The Court affirms the validity of the impugned ruling, allowing the first wife to pursue legal recourse to nullify the second marriage on the grounds of its illegality. Accordingly, appeal is dismissed."

(Emphasis Supplied)

23. In *Garima Singh* (supra) the Court was mainly considering the terms "either party thereto" and it was held that the narrow interpretation given to the phrase "either party thereto" should not apply in cases where provisions of social welfare legislation are invoked. It was also observed that if the first wife is deprived of seeking a remedy under Section 11 of the Act, it would defeat the very purpose and intent of the Act. The protection offered to legally wedded wives under Sections 5, 11 and 12 of the Act would become insignificant in such a scenario. It was also observed that the Court should lean towards an interpretation that serves the interprets of justice and aligns with the broader objectives of the law and by doing so, the Court can ensure that the remedies available under Section 11 are not unduly limited and the individuals seeking relief are not unjustly deprived of their rights.

24. It is needless to say that ultimately the aim of granting a decree of nullity is to annul a marriage that is found to be invalid from its inception effectively treating it as if it never existed. In *Garima Singh* (supra), the first wife has claimed that her marriage was subsisting when second marriage was performed by the husband and as such, in the light of the provisions of Section 5 of the Act, the second marriage performed by the husband with the appellant-*Garima Singh* was void ab initio. Indisputably, the property rights are always involved in such cases when the marriage itself is being claimed as void ab initio. Therefore, clearly, the rights of the parties who are legal representatives of the deceased husband are also affected. Hence, in the present case, the parents have a right to get a declaration that the marriage between Shatakshi Mishra, the appellant herein and their son was in violation of provisions of Section 5 of the Act as their property rights are directly affected and they have a right to be made a party to the petition under Section 11 of the Act after the death of their son.

25. To draw further strength to our reasoning and conclusion we would also like to refer to certain other judgements of Hon'ble Apex Court. In **Maharani Kusumkumari and another vs. Smt. Kusumkumari Jadeja and another**, (1991) 1 SCC 582, the second wife was permitted to file the petition under Section 11 of the Act as the property rights of the family members including the legitimacy of children of void and voidable marriage (section 16 of the Act) would also be involved in a case of claim for property. While interpreting Section 11 of the Act (as

it stood prior to amendment in 1976), it was held that the petition filed after death of other spouse was maintainable. The legislative intent was gathered from reading of Section 16 and 1976 amendment as well as Law Commission's report. It was also held that beneficent construction is required insofar as the interpretation of statute is concerned. In the aforesaid case, the appellant-Maharani Kusumkumari married in the year 1960, however, due to strained relationship couple started living separately. Subsequently, the husband re-married the respondent-Smt. Kusumkumari Jadeja therein without legally separating from the appellant and the couple had several issues. The husband died in the year 1974. The appellant-Maharani Kusumkumari filed an application for grant of Letters of Administration and the respondent applied for probate on the basis of an alleged Will, which was denied by the appellant. During the pendency of the proceedings, the respondent filed a petition under Section 11 of the Act for declaring her marriage as a nullity. The appellant had challenged the maintainability of the petition under Section 11 of the Act on the ground that the marriage could not be declared nullity after death of Maharaja. The trial Court and the High Court have rejected the appellant's plea. After discussions, in paragraph 10 of the said judgement, it was held as under;

"10. Even if it be assumed that the meaning of the section was not free from ambiguity, the rule of beneficial construction is called for in ascertaining its meaning. The intention of the legislature in enacting Section 16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955. There is no reason to interpret Section 11 in a manner which would narrow down its field. With respect to the nature of the proceeding, what the court has to do in an application under Section 11 is not bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flaw in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void. we, therefore, hold that an application under section11 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse. Accordingly, this appeal is dismissed with costs."

(Emphasis Supplied)

26. The appeal was dismissed and the maintainability of petition filed by the respondent-second wife under Section 11 of the Act was held to be maintainable.

27. It can, therefore, be safely concluded from bare perusal of the aforesaid judgement that the Legal Representative who is not "either of the parties" and was not one of the spouse to the marriage in question can pursue the petition filed under Section 11 of the Act that marriage should be declared void and therefore, their application filed under Order 22 Rule 3 CPC would be maintainable.

28. We would also like to refer to another judgement. Although the facts of that case are different, however, a perusal of the same also reflects that such proceedings can be pursued by the legal representatives of the deceased plaintiff. In the case of **Samar Kumar Roy (Dead) through Legal Representative (Mother) vs. Jharna Bera,** (2017) 9 SCC 591, the plaintiff sought declaration that the defendant was not his legally married wife and that she had no right to claim him as her husband as his alleged marriage with defendant was not

legal and valid, and thus, claimed a permanent injunction restraining defendant from claiming plaintiff as her husband and temporary injunction. It is noticeable that the suit was not based on any ground specified under Section 11 or Section 12 of the Act or under the provisions of Special Marriage Act. In the aforesaid case, after the death of the plaintiff, his mother applied under Order 22 Rule 3 of CPC to be added as a legal representative of the plaintiff. The civil suit was filed on the regular side and was not filed under the provisions of Hindu Marriage Act or the Special Marriage Act. It was held that the suit was not barred either under Section under Section 34 of the Specific Relief Act or under the provisions of Sections 7 and 8 of the Family Court Act. It was held that the High Court erred in setting aside the order allowing the application for substitution of legal representative on the ground that after death of the plaintiff no right to sue survived in favour of the plaintiff's mother. In the aforesaid case, provisions of Section 34 of the Specific Relief Act, Sections 7 and 8 of the Family Court Act and Sections 11 and 12 of the Hindu Marriage Act were considered. While interpreting such provisions, Hon'ble Apex Court has referred to another judgment in the case of **Yallawwa vs. Shantavva,** (1997) 11 SCC 159. Paragraph 17 of Samar Kumar Roy (supra) is quoted as under:

"17. This Court has referred to personal causes of action and held in Yallawwa v. Shantavva which reads as follows: (SCC pp. 168-69, para 6)"

"6??. Save and except the personal cause of action which dies with the deceased on the principle of actio personalis moritur cum persona i.e. a personal cause of action dies with the person, all the rest of the causes of action which have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person."

(Emphasis Supplied)

29. In this background, it is clear that in such matters the declaration would have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person.

30. In view of the discussions made hereinabove, it can safely be concluded that after death of the husband who has filed a petition under Section 11 of the Act the parents have a right to be substituted as legal representatives under Order 22 Rule 3 CPC to pursue the proceedings. The second question is also accordingly answered in affirmative.

31. In such view of the matter, it is clear that if it is being claimed that the marriage is void, legal representative can be impleaded / substituted to pursue the petition filed under Section 11 of the Act.

32. In view of the above, we find no illegality or infirmity in the order impugned.

33. The appeal is devoid of merit and is accordingly, dismissed.

(2024) 5 ILRA 1810
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 4729 of 2024

Suresh Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rudra Kant Mishra, Sri Satya Prakash Pandey

Counsel for the Respondents:
G.A.

Art. 226 of the Constitution of India- F.I.R. quashing-Allegation-Petitioner in connivance of the staff and officers of the ARTO-released 304 vehicles against forged receipts-caused massive loss to the government treasury-ramifications of fraud by the court staff are far –reaching and detrimental to justice system-allegations clearly constitute a cognizable offence-Petitioner is not cooperating with the Investigation Officer

W.P. dismissed. (E-9)

List of Cases cited:

1. Karnataka SRTC Vs M.G. Vittal Rao, (2012) 1 SCC 442

2. Ajit Kumar Nag Vs Indian Oil Corpn. Ltd (2005) 7 SCC 764

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

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. The petitioner has approached this Court through the instant writ petition to issue a writ, order or direction in the nature of mandamus to quash the impugned F.I.R. dated 27.4.20223 bearing Case Crime No.236 of 2023, under sections 419, 420, 467, 468, 471, 120B I.P.C., registered at Police Station Robertsganj, District Sonebhadra, and further not to take any coercive action against the petitioner.

3. On examination of the impugned F.I.R., it reveals that a written complaint was made to the S.H.O., P.S. Sonebhadra by the petitioner, who was working as Senior Assistant Clerk in the Court of learned Chief Judicial Magistrate, Sonebhadra- subsequently, the petitioner turned to be the main accused in the instant F.I.R.- *inter-alia* stating, in brief, a list of 629 case registered under Motor Vehicles Act by the ARTO Mirzapur for various violations was received in the Court of learned Chief Judicial Magistrate, Sonebhadra for conducting the proceeding in accordance with the provision of Motor Vehicles Act. As per the instructions from the Court, he matched the list of 629 cases with the fine register, receipt book and other records of the Court and found that 304 cases had not been dealt with by the Court and the Challan/fine receipts were found to be forged. On further examination, in seven cases, clerical mistakes were observed; in the rest of the cases, it was revealed that a forgery had been committed in the original receipt, and the amount of the fine was found to be altered/modified clandestinely. In most cases, such forged receipts were issued on public holidays, during the pandemic, when the Court was in recess, or when the Presiding Officer was on leave.

4. On receipt of the written complaint by the petitioner, the police registered the impugned F.I.R. and started the investigation. On perusal of the case diaries produced by the State counsel, it's revealed that the roles of the eight persons have surfaced during the investigation, including the petitioner, and therefore, all of them have been arrayed as accused. Out of eight, two persons have been arrested by the police; two have got interim bail; one has died, and three accused persons' arrest is yet to be effected. The three accused, including the petitioner, are absconding and not cooperating with the investigation.

Therefore, police are conducting raids at their residence and other places of possible hide-outs.

5. The gist of the allegation is that while working as Senior Assistant in the Court of Chief Judicial Magistrate, Sonebhadra, from October, 2020 till March, 2023, the petitioner, in connivance with the staff and officers of the ARTO, released 304 vehicles against forged receipts, and caused massive loss to the government treasury by playing fraud upon the court proceedings.

6. The co-accused Prabhat Kumar Sharma, who was working under the supervision of the petitioner, was arrested on 13.12.2023 and on his statement role of the petitioner has surfaced. In the account of accused Prabhat Sharma through e-banking, *phone-pe*, and *google-pe*, numerous truck owners and Advocates have deposited a considerable amount to the extent of Rs.20 lacs. It is further revealed that after depositing the cash in his account, it was withdrawn on the same day and handed over to the petitioner. The forged challan receipts used to release the vehicle by the office of ARTO were used as genuine and uploaded on the R.T.O. website by the petitioner and his staff in collusion with the staff/employee of the ARTO office.

7. A disclosure statement of the accused, Virendra Kumar @ Guddu Patel, was also recorded; he *inter-alia* confessed his role in the commission of a crime and stated that he has worked as a Clerk in the R.T.O. during 2020-2022, as he had good knowledge of the computer. Therefore, he assisted Vinod Srivastava, Harish Chandra, Ajit Mishra and Pankaj Patel, who also worked in the ARTO office. Ajit Mishra's work was to bring documents from the courts; on Vinod Srivastava and Harish Chandra's instruction, he collected fine from the vehicles' owners, and the same was distributed among the accused persons inter-se. A significant share was deposited with Suresh Mishra, the petitioner working in the C.J.M. court. After receipt of his share, the petitioner issued forged duplicate receipts to release the vehicles.

8. The Investigating Officer also recorded Jitendra Maurya's statement, which revealed the Petitioner's Specific Role. Mr. Jitendra Maurya was the owner of the motorcycle bearing UP-64-S-4904, along with other truck and bike owners, and in his statement, the petitioner’s role has also been revealed.

9. Learned counsel for the petitioner *inter-alia* submits (i) the petitioner is a complainant in the present case; therefore, he cannot be implicated as an accused; (ii) the petitioner has been exonerated in the Departmental Inquiry conducted by Smt. Niharika Chauhan, learned Special Judge, POCSO Act, Sonbhadra and relied upon a letter dated 26.7.2023 issued by the Confidential Section of this Court; (iii) there is no incriminating evidence come forth during the investigation against the petitioner; (iv) the petitioner has been falsely implicated in the instant case merely on the statement of co-accused Prabhat Sharma, who was working under the control and supervision of petitioner; (v) it is a case of malicious prosecution and there is no criminal history of any kind against the petitioner; (vi) petitioner is working as Central Nazir in the Judgeship of District Sonbhadra and undertakes to cooperate with the investigation.

10. Learned counsel for the petitioner has heavily relied upon a letter dated 26.7.2023 in which he was exonerated from

all the charges in the administrative inquiry; therefore, sensing the seriousness of the issue, this Court deemed it appropriate to look into the inquiry report and summoned the proceedings of the inquiry vide order dated 15.4.2024 from the District Court, Sonbhadra, to reach a just and logical conclusion.

11. On examination of the record, it's revealed that the petitioner has been exonerated from the charges levelled by Shri Anil Kumar Singh, practising Advocate in District Court, Sonebhadra, on whose complaint the Hon'ble Administrative Judge, District Sonebhadra, directed the District Judge, Sonebhadra, to initiate inquiry against the petitioner. Needless to mention, Shri Anil Kumar Singh, Advocate, who was examined as CW-1 on 29.3.2023, resiled from his earlier statement dated 29.3.2023 and "not pressed" his complaint in his supplementary statement recorded on 27.4.2023.

12. The law is settled in this regard, and the Supreme Court has taken a consistent view in a series of judgments that it is beyond debate that criminal proceedings are distinct from civil proceedings. It is possible in disciplinary matters to establish charges against a delinquent official by a preponderance of probabilities and consequently terminate his services. But the same set of evidence may not be sufficient to take away his liberty under our criminal law jurisprudence1. Such distinction between standards of proof amongst civil and criminal litigation is deliberate, given the differences in stakes, the power imbalance between the parties and the social costs of an erroneous decision. Thus, in a disciplinary enquiry, strict rules of evidence and procedure of a criminal trial are inapplicable, like, statements made before enquiry officers can be relied upon in certain instances2.

13. The nagging question before this Court is whether the petitioner's case falls under the category of cases illustrated by ***State of Haryana and others v. Bhajan Lal and others3*** case for exercising the extraordinary power of the High Court under Article 226 of the Constitution of India.

14. We have gone through the entire materials placed before us scrupulously, but we are not persuaded to hold that the allegations made in the impugned F.I.R. and the material collected during the investigation lacks *bonafide* making the entire proceedings vitiated under law. The petitioner is on the run, and the police are conducting raids at the possible hide-outs of the petitioner. Such a large-scale organized fraud can't be executed without the active connivance of the office of the Chief Judicial Magistrate, Shonbhadra. As the investigation is at the pre-mature stage and the role of the petitioner has surfaced as a kingpin in executing the crime, therefore, it's not possible to anticipate the result of the investigation and render a finding on the question of malate ideas on the material at present available. Therefore, we are unable to see any force in the contentions of the learned counsel for the petitioner. Moreover, there are serious allegations which have to be weighed after the evidence is collected. It is a well-established proposition of law that a criminal investigation, if otherwise justifiable, does not become vitiated on account of the departmental inquiry.

15. In the backdrop of the material collected by the Investigating Officer *qua* petitioner, we are not persuaded to hold that the investigation is manifestly attended with malafide and/or the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the petitioner and with a view to spite him due to private and personal grudge. At this stage, we cannot embark upon a roving

inquiry as to the reliability, genuineness, or otherwise correctness of the allegations made in the F.I.R., and the extraordinary and inherent powers do not confer an arbitrary jurisdiction on this Court to act to its whim or caprice.

16. The ramifications of fraud by the court staff are far-reaching and detrimental to the justice system and erode the public trust in the judiciary. When court staff abuse their authority for personal gain, it compromises the integrity of judicial decisions and raises questions about the legitimacy of legal proceedings.

17. Reverting to the materials placed before us, which surfaced during the investigation, in our considered opinion, the allegations against the petitioner do clearly constitute a cognizable offence justifying the registration of F.I.R. and the investigation thereon, this case does not fall under any of the categories of the cases formulated in ***Bhajan Lal's case (supra)*** calling for the exercise of extraordinary jurisdiction to the High Court to quash the F.I.R. itself.

18. As the petitioner is not cooperating with the Investigating Officer, the police are conducting raids on his hide-outs; there is serious apprehension to the police that the petitioner may tamper with the evidence and influence the witnesses to be conversant with the proceedings of the criminal case, as had worked in the Court of Chief Judicial Magistrate and presently working/posted as Central Nazir in District Court, Sonebhadra; therefore, the prayer for a stay on arrest is hereby declined.

19. As delineated herein above, *prima-facie*, the allegations are serious, and the potential accused are resourceful. Therefore, a thorough and unbiased investigation shall be conducted without being influenced by external influences for extraneous reasons. The I.G. Police, Varanasi Zone shall supervise the overall investigation, and the Superintendent of Police, Sonebhadra in co-ordination with DIG Police, Mirzapur Range shall supervise the day-to-day investigation.

20. The instant writ petition is dismissed, with the direction to complete the investigation at the earliest. Furthermore, it is directed that the I.G. Police, Varanasi Zone shall ensure that the Investigating Officer avails all available scientific and forensic assistance in collecting evidence, as permissible under law. If allegations of corruption and criminal breach of trust by a government servant emerge during the investigation, all relevant aspects shall be thoroughly examined by the police.

21. The observations made herein above shall have no bearing on an ongoing investigation.

22. Let a copy of this order be transmitted to the I.G. Police, Varanasi Zone and SSP Sonebhadra for immediate and effective compliance.

(2024) 5 ILRA 1814
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Misc. Writ Petition No. 13460 of 2023

Manoj Kumar Gupta & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Baleshwar Chaturvedi, Sri Mukesh Kumar Singh

Counsel for the Respondents:
Sri Anwar Hussain, Sri Avinash Mani Tripathi, G.A.

Criminal Law – Constitution of India,1950 – Article 226, 261-(3) - Criminal Procedure Code, 1973 - Section - 482 - Indian Penal Code, 1860 - Sections 386, 406, 409, 419, 420, 464, 467, 468 & 471 - Indian Evidence Act, 1872 - Section - 3 - Writ Petition – assailing the legality and validity of the FIR – lodged by respondent no. 4, in his personal capacity, being posted as Chief Judicial Magistrate, alleging offence of fraud, cheating, fabrication of documents & extortion of money against the petitioners to teach them a bitter lesson whom are Govt. servants in the electricity department – when respondent no. 4 purchase a residential premises from one Smt. Vandana Pathak there were no any Electricity dues upon said premises – but, when respondent no. 4 moved an application for mutation of his name in the record of the Electricity connection, he apprised that there were Rs, 1,66,916/- is outstanding against the said premises – complaint case - summoning order – the court below, being not find any complicity of proposed accused govt. servants, drooped their names from summoning order – respondent no. 4 filed criminal revision – order of remand back - court below pass a fresh summoning order – Criminal Revision - summoning order was set-aside against Executive Engineer, SDO & junior Engineer – on the other hand, the owner of the premises has also challenged the same proceeding and finally said proceedings were stands quashed by this court – apart from this, in a parallel proceedings, respondent no. 4 also filed a complaint before the District Consumer Dispute Redressal Forum which was dismissed and the appeal thereafter before the Electricity Ombudsman was also dismissed – court finds that, it is clear that respondent no. 4 was trying hard to any how launch a criminal proceedings against the petitioners so as to harass them and when he failed to attain his objective at Lucknow then he decided to took up fake story and after auctioning his chair and position as CJM, Banda any how managed to lodge the FIR – The report of the SIT have completely exposed the conduct of the CJM – Held, The judges are also public servant and under the gaze of public at large and they should always remember that they are to serve the public and not for their personal gains or objective - the present FIR is driven by *malafides* and in the colourable exercise of power vested in respondent no. 4 – thus, this court have no hesitation to quash the FIR – further, this court has deprecated and reprehended the conduct of the CJM in the strongest term and directed to the Registrar General of this Court to keep the copy of this judgment in the dossier/service record of CJM-respondent no. 4 and also circulate to all sessions divisions of the St. of UP apprising the District judges and judicial officers not to permit any FIR by Judge/Judicial officer in their personal capacity – Application allowed. (Para - 8, 23, 24, 26, 27, 29, 30)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. All India Judges Association Vs U.O.I., 1992 (1) SCC 119,

2. Md. Idrisur Rahman, Government of 4 of 25 Bangladesh and Ors. Vs Syed Shahidur Rahman and Ors, 2016(24) BLT (AD) 178,

3. Daya Shankar Vs High Court of Allahabad & ors., 1987 (3) SCC 1,

4. R.C. Chandel Vs High Court of Madhya Pradesh, 2012 (8) SCC 58,

5. Tarak Singh Vs Jyoti Basu, 2005 (1) SCC 201,

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

1. Heard Shri Mukesh Kumar Singh, learned counsel for the petitioners namely (i) Manoj Kumar Gupta, Executive Engineer, LESA Trans, Sitapur Road, Lucknow; (ii) Deependra Singh, Sub Divisional Officer at 33/11 KV Sub Station Faizullaganj, Aliganj, Lucknow; (iii) Rakesh Pratap Singh, contractual employee at 33/11 KV Sub Station GSI, Aliganj, Lucknow and Shri Avinash Mani Tripathi

and Shri Anwar Hussain, learned counsel for respondent no.4 Bhagwan Das Gupta, presently posted as C.J.M., Banda and Shri Baleshwar Chaturvedi, learned *Amicus Curiae* for the Electricity Department and also Shri Ghanshyam Kumar, learned A.G.A.-I for the State of U.P.

• Pleadings have been exchanged between the parties as well as the written submissions were also furnished by the respective counsels. The matter is ripe for final adjudication of the case.

• The matter was heard by this Court at length on 05.10.2023 and the judgment was reserved. In the intervening period, while drafting of judgment was about to complete, the Court came across certain issues which need further clarification. Under the circumstances, on 10.5.2024 the case was ordered to be listed on 21.5.2024 for further hearing. After having clarifications, hence this judgment.

• From the array of the parties, it is evident that the F.I.R. was lodged by respondent no.4 Dr. Bhagwan Das Gupta, in his personal capacity and on his own name, as an informant of Case Crime No.606 of 2023, u/s 406, 409, 419, 420, 464, 467, 468, 471 and 386 I.P.C., Police Station Kotwali, District Banda, against the petitioners, who are the serving officials of the Electricity Department of the government.

Hence, this petition by the petitioners, who are jointly assailing the legality and validity of the F.I.R. lodged by respondent no.4 who is a judicial officer at Banda Judgeship and posted as Chief Judicial Magistrate.

• Before coming to the merit of the case, this Court would like to **enucleate** the level of standard expected from the Judges or even from the magistrates and thereafter deal with the merit of the case.

PREFACE :

"My son, do not forget my law, but let your heart keep my commands; Let not justice and truth forsake you, bind them around your neck, write them on the tablet of your heart."

As per the provisions of Article 261(3) of the Constitution of India the Judges while discharging their duties in the district courts enjoy constitutional authorities. Their position and authority cannot be compared with the position of other civil servants, discharging their duties their peace, law and order in the society, that's the reason this Court is in favour of calling them as "Judges" and not as a Judicial Officer. They are not officers but Judges. This position was reiterated by the Hon'ble Apex Court in the case of ***All India Judges Association vs. Union of India, 1992 (1) SCC 119,*** holding that the Judges of the district judiciary are exercising the sovereign function of the State. Their status and position cannot be compared with the officers of the district administration or the police administration. If there can be any comparison, their position is at par with the political executives because going by the nature of duties they are supposed to discharge, they are the decision makers and such decision by way of judgments and orders are binding on all throughout the territory in which they exercise their jurisdiction. Accordingly their behaviour, conduct, temperament, tolerance should also be at par with their constitutional position and the same cannot be compared with other officers discharging their duties for implementing the policies in the society.

Justice R.C. Lahoti, the then Chief Justice of India, in "Canons of Judicial Ethics" says that who talks ethics in these days? and who listens to ethics?, Justice Lahoti by way of giving a beautiful example states that;

A patient visited a doctor's clinic and asked the receptionist -

"I want to see a specialist of eyes and ears."

The receptionists said "There are doctors of ears, nose and throat and there are doctors of eyes; There is no specialist who treats both the eyes and ears." But then why are you in need of such a doctor?"

The patient replied "These days I do not see what I hear and I do not hear what I see."

Thus, the last lines of above message, that I do not see what I hear and I do not hear what I see, really are the guidelines for every Judge. His conduct, behaviour and approach should be such, which is suave and soothing to eyes and ear.

In this regard, in our oldest cultural lessons it has been emphatically mentioned as under:

"स्वस्तिप्रजाभ्यः परिपालयन्तां न्यायेन मार्गेण महीं महीशाः।

गोब्राह्मणेभ्यः शुभमस्तु नित्यं लोकाः समस्ताः सुखिनो भवन्तु॥

May the well-being of all people be protected by the powerful and mighty leaders be with law and justice.

May the success be with all divinity and scholars, May all (samastāḥ) the worlds (lokāḥ) become (bhavantu) happy (sukhino)."

In simple words we can say that the judicial ethics, morals, judicial behaviour are the basic principles of the right action for the Judges to ensure their impeccable, spotless and see through image in the society. They consist of or relate to the moral action, conduct, motive, character of a Judge, what is right or befitting to the individual. It can also be said that judicial ethics consists of such values as belongs to the system of the judiciary without regard to the time or place and are preferred for justice dispensation.

A passage for the writings of Sir Winston Churchill generally quoted by Law Commission of India in several reports and recommendations holds a lot of relevance in this regard. This Court is mentioning the passage of Winston Churchill because it is very much relevant for judicial ethics and judicial conduct;

"A form of life and conduct for more severe and restricted than that of ordinary people is required from judges and though unwritten has been most strictly observed. They are at once privileged and restrictive; they have to present a continuous aspect of dignity and conduct".

The aforesaid passage shows that judges has to lead a restricted life. Austerity is a quality to be practised by every Judge-personally as also in the public functioning.

This necessarily gives rise to a situation where the Judges must have a passion perseverance and pain taking habit. He should administer justice according to law and deals with his appointment as public trust, he should not allow other affairs to his private interest to interfere with from and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambition or increasing the popularity.

In a Full Bench judgment of Supreme Court of Bangladesh (Appellate Division) in ***Md. Idrisur Rahman, Government of Bangladesh and Ors. vs. Syed Shahidur Rahman and Ors, 2016(24) BLT (AD) 178*** while deciding the constitutional issue involved in the aforesaid appeal having public importance. The point is directly related to code of conduct of the Judges of higher echelons. The code of conduct relates to upholding the integrity and independence of judiciary. It reminds that the Judges to maintain "highest standards of conduct" so that the integrity and independence of the judiciary are

preserved. It is expected that the judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow family, social, or other relationships to influence judicial conduct. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the Judge. Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office.

A couplet of Urdu by an Urdu poet would be mauzu (postulate) herein under:

"मुंसिफ़-ओ-मुद्दई से कैसे रू-ब-रू होंगे,
तमाशबीन कल रक़ीब कू-ब-कू होंगे।
लड़ेंगे कैसे कल तलक वो मेरे बाज़ू थे,
जीत जायेंगे अगर हम बे-आबरू होंगे।"

In yet another judgment in the case of **Daya Shankar vs. High Court of Allahabad and others, 1987 (3) SCC 1,** held thus :

"Judicial officers cannot have two standards, one in the court and other outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy."

The first and foremost quality required in a Judge is his integrity. The need of integrity in the judiciary is much higher than other institution. The judiciary is an institution whose foundation is based on honesty, impartiality and integrity of sterling quality. Judges must remember that they are not merely an employee but they hold a high public office. The standard of conduct expected of a Judge is much than that of an ordinary person. The following is the relevant extracts from the judgment of ***R.C. Chandel vs. High Court of Madhya Pradesh, 2012 (8) SCC 58 :***

"Judicial service is not an ordinary government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty."

On the similar lines, in the judgment of ***Tarak Singh vs. Jyoti Basu, 2005 (1) SCC 201*** the Hon'ble Apex Court has held that :

"Integrity is the hall-mark of judicial discipline, apart from others. It is high time the judiciary must take utmost care to see that temple of justice do not crack from inside, which will lead to catastrophe in the justice delivery system resulting in the failure of Public Confidence in the system.

We must remember that woodpeckers inside pose a larger threat than the storm outside."

If a person is holding prestigious judicial office, there is nothing wrong in a Judge having an ambition to achieve something, but if the ambition to achieve is rightly to cause a compromise with his divine judicial duty, better not to pursue it, because if a Judge is too ambitious to achieve something materially, he becomes timid. When he becomes timid, there will be tendency to make a compromise between his divine duty and his personal interest. There will be conflict between the interest and duties.

It has been taught in Bible that :

"Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye?"

In the instant case which would be discussed by this Court, this exactly happened when Dr. Bhagwan Das Gupta occupying a position of Chief Judicial Magistrate at Banda lodges an F.I.R. against the petitioners who are the government servants to teach a bitter lesson to them, so that they may understand the power and position of a C.J.M. These government servants (the petitioners) are of the Electricity Department, were not serving his interest or dancing on his tune, thus by initiating a criminal prosecution against them after levelling bogus and wild allegations, the respondent no.4 wants to kneel down them, before him.

We have extracted the above observations from the various authorities who time and again have underlined the high standards of morals, ethics, integrity, impartiality, see through honesty and selfless service towards society by a judicial officer, who is different and distinct from the rest of the government officers and is being entrusted to do a divine job to perform judicial work with best of his ability, integrity, impartiality and to give up his personal ego, material gains and interest, so that he may pave path for free flow of justice to the common men of the society.

2. We have to test the present case with the above mentioned higher standards of judicial propriety and discipline and the conduct of an individual Judge i.e. Respondent no.4 in the present case.

FACTS OF THE CASE :

3. As mentioned above, the petitioners Manoj Kumar Gupta, Executive Engineer, LESA Trans, Sitapur Road, Lucknow; (ii) Deependra Singh, Sub Divisional Officer at 33/11 KV Sub Station Faizullaganj, Aliganj, Lucknow; (iii) Rakesh Pratap Singh, contractual employee at 33/11 KV Sub Station GSI, Aliganj, Lucknow have jointly invoked the powers of this Court under Article 226 of the Constitution of India with the follow prayers :

"(a) issue a writ, order or direction in the nature of certiorari quashing the First Information Report dated 27.07.2023 in Case Crime No.605 of 2023, under Sections 406, 409, 419, 420, 464, 467, 468, 471, 386 I.P.C., Police Station Kotwali, District Banda (Annexure No.1 of Petition).

(b) issue a writ, order or direction in the nature of mandamus commanding the respondent no.2 and 3 not to arrest the petitioners in Case Crime No.605 of 2023, under Sections 406, 409, 419, 420, 464, 467, 468, 471, 386 I.P.C., Police Station-Kotwali, District Banda."

It is worthwhile to mention here that this FIR was lodged against the accused-petitioners by the respondent no.4 Dr. Bhagwan Das Gupta, posted as C.J.M., Banda in his personal capacity, levelling

wild and tailored allegations of fraud, cheating, fabrication of documents, extortion of money against the petitioners who themselves are the government officials of Electricity Department. This F.I.R. is nothing but tissue of utter falsehood, drafted by Dr. Bhagwan Das Gupta, Respondent No.4.

4. The brief skeleton facts of the case which has given rise to the present controversy are;

(i) a residential premises No.ES-1B/ 239-A, Sitapur Road Yojna (SRY), Aliganj, Lucknow was earlier owned by one Vandana Pathak wife of Atul Awasthi, having Electricity Connection No.4104390000 (from Madhyanchal Vidyut Vitran Nigam Limited) was allowed on 15.7.2005 in the name of Vandana Pathak in her above residential premises.

5. Respondent no.4 Dr. Bhagwan Das Gupta has purchased the above premises vide sale deed dated 3.8.2009 from Vandana Pathak, and thereafter moved an application to the concerned electricity department for entering his name in place of Vandana Pathak. S.D.O., 33/11 KV Sub Station, G.S.I., Aliganj vide letter dated 17.6.2013 apprised respondent no.4 that Rs.166916/- is outstanding against the above electricity connection (Annexure No.2).

Shocked by this, the respondent no.4 filed a complaint on 20.8.2013 before the Additional Civil Judge, Court No.37, Lucknow for initiating a prosecution u/s 420, 464, 467, 468, 504, 506 I.P.C. against Vandana Pathak, Atul Awasthi (her husband), A.K. Jaiswal (Executive Engineer), Electricity Distribution Division, LESA, Rahim Nagar Sector-6, Jankipuram Extension, Lucknow; Krishna Avatar Vishwakarma and Rajendra Kumar, Junior Engineers, LESA.

In fact, these officials of Electricity Department (the petitioners) have got no concern with inter-se dealing between Vandana Pathak/Atul Awasthi on one hand and Mr. Bhagwan Das Gupta, C.J.M., Banda on the other hand. S.D.O. has only raised the demand of the outstanding sum over the said residential premises, since Dr. Bhagwan Das Gupta, Respondent No.4 has now become new owner of the premises in question after 03.8.2009.

6. The court of Additional Civil Judge, Court No.37, Lucknow on 14.2.2014 have summoned Vandana Pathak and her husband Atul Awasthi also u/s 406, 504, 506 I.P.C. in Complaint Case No.88 of 2013 but did not find any complicity of proposed accused no.3, 4 and 5 i.e. Executive Engineer, S.D.O. and Junior Engineer in this tangle, accordingly dropped their names from summoning order dated 14.2.2014.

It seems that aggrieved by this order and with ill motive, Respondent no.4 Dr. Bhagwan Das Gupta challenged the order dated 14.2.2014 by filing a Crl. Revision 690 of 2014 in the court of Special Judge, C.B.I., Court no.4, Lucknow who vide judgment and order dated 30.7.2014 allowed the revision and directed the court below to pass a fresh order in the light of the observation in the revisional court's judgment. Accordingly, the concerned Magistrate have again passed a fresh order on 15.5.2015 summoning all the accused in complaint dated 20.8.2013 u/s 504, 506, 406, 420, 467, 468, 120-B I.P.C. including officials of Electricity Department, who have acted in the discharge of official duty, apprising Respondent no.4 about the

outstanding sum from the electricity connection installed in the residential premises now owned by Respondent No.4.

This summoning order was challenged by the proposed accused no.3, 4 and 5 by filing Crl. Revision No.124 of 2016 before the revisional court, who vide judgment and order dated 29.01.2021 have allowed the revision and set aside the summoning order dated 15.5.2015, so far as the revisionist are concerned i.e. the Executive Engineer, S.D.O. and Junior Engineer.

7. It was further argued by learned counsel for petitioners that Vandana Pathak and Atul Awasthi too have filed a Criminal Revision before Special Judge, E.C. Act, Lucknow assailing the legality and validity of summoning order dated 15.5.2015. Though the said revision was eventually rejected by the learned revisional court. Aggrieved by the revisional court's order, they have preferred Misc. Single Case No.31368 of 2018 (Vandana Pathak and others vs. State of U.P.), Lucknow Bench of this Court while disposing of the aforesaid 482 application on 13.11.2019 passed the following observation :

"It is undisputed that House No. ES 1B 239/A, EWS, Sitapur Road Scheme, Lucknow was sold by the petitioners to respondent no. 2 vide registered sale deed dated 03.08.2019. In para 3 of the sale deed, it has categorically been mentioned that if any liability, upto the date of execution of the sale deed, is found on the property in question, then the seller (petitioners) shall be responsible to pay the same. In paragraph 5 of the petition, it has specifically been pleaded that petitioners have deposited the last electricity bill on 30.07.2009 and no electricity bill was due on the date of execution of the sale deed, i.e., on 03.08.2019. Para 5 of the petition reads as under:

"That on the date of aforesaid sale deed, there were no electricity dues on the house. The last electricity bill on the said house was Rs.6941/- which was paid on 30.7.2009 by the petitioners i.e. prior to date of registry in favour of complainant.?

Further, if at all, any electricity bill was due, as alleged by respondent no. 2 in the complaint, on the date of execution of the sale deed, i.e., 03.08.2009, petitioners are liable for payment of the same and by any stretch of imagination, no criminal complaint is maintainable, as no alleged offence under Sections 504, 506, 406, 420, 467 and 468 read with Section 120B I.P.C. is made out."

In view of above facts and circumstances, the proceedings against the applicants Vandana Pathak and her husband stands quashed subject to above condition by the Bench of this Court.

8. It is apposite to mention that a parallel to the aforesaid criminal prosecution the respondent no.4 -Dr. Bhagwan Das Gupta, C.J.M. in order to mount pressure upon the petitioners, filed a complaint before the 'District Consumer Disputes Redressal Forum, Lucknow', registered as Complaint Case No.01 of 2013 and said complaint was dismissed vide order dated 17.2.2014. This order was challenged by the Respondent no.4 before the 'Electricity Ombudsman Lucknow', registered as Representation No.85 of 2014. The said 'Electricity Ombudsman' vide order dated 7.8.2014 dismissed the representation as he has failed to comply with the mandatory provision to deposit certain percentage of total outstanding amount.

Thus, it is clear that the C.J.M.-Respondent no.4 was trying hard to any how

launch a criminal prosecution against the petitioners so as to harass them, though they themselves are government servants. But when Respondent No.4 failed to attain his objective at Lucknow, then he decided to cook up fake story and after auctioning his chair and position as C.J.M., Banda any how managed to lodge the F.I.R. against the petitioners, whose informant was Dr. Bhagwan Das Gupta, C.J.M., Banda as Case Crime No.606 of 2023 at P.S. Kotwali, Banda u/s 406, 409, 419, 420, 464, 467, 468, 471, 386 I.P.C. This fact itself speaks volumes about the hidden objective, design and ill motive of Respondent no.4. It is not expected from a C.J.M. that he would use his office and the chair to subserve his personal interest against the petitioners. It is unheard off, that a sitting Chief Judicial Magistrate is acting as an ordinary litigant so as to trap the officials of Electricity Department by initiating a criminal proceeding against them, who probably have declined the Respondent No.4 to serve his interest. Now by twisting their arms, Shri Bhagwan Das Gupta, C.J.M. (Respondent no.4) wants to kneel down these petitioners before him so that the petitioners should ignore the outstanding bill accrued over the previous electricity connection and order new electricity connection on his residential premises owned by him. It means, by extending the threats of proposed criminal case, the petitioners should betray the department and cheat the coffers of State. This seems to be sole motive and objective of Respondent no.4 for initiating the criminal case against them.

9. In paragraph 12 of the petition the petitioners have spelled out the various applications, site inspection report, queries raised by the department, outstanding dues and the steps taken by the department on the application made by respondent no.4. At the end, it has been mentioned that the demand made on 24.6.2023 by the department, the electricity dues were swelled from Rs.1,66,916/- to Rs.2,19,063/- for the intervening period. The said executive engineer has conducted site inspection of aforesaid premises on 17.7.2003 and found that the electricity meter installed for connection no.4104390000 was missing from the place where it was originally installed.

10. Most shocking and startling feature of the case, the Respondent no.4, after loosing legal battle at Lucknow, stoop down to the level when he started hobnobbing and conniving with Dan Bahadur Pal, S.I., P.S. Kotwali, Banda so that he should lodge an F.I.R. at Banda, where Respondent no.4 is posted as C.J.M. This is per se unholy and unethical relationship between a C.J.M. on one hand and Sub Inspector on the other hand. After loosing the legal battle at Lucknow, thereafter District Consumer Forum, Lucknow and denying any relief from the Electricity Ombudsman, the Respondent no.4 C.J.M., Banda has came down to the level whereby he has virtually auctioned his chair and position as C.J.M. while prevailing upon the S.H.O., Kotwali Banda to lodge an F.I.R. against the petitioners. Annexure-9 and Annexure-10 are the glaring example of such type of sub-standard activity on the part of Respondent no.4. The screen shot of whatsapp messages between the concerned Sub Inspector and petitioner no.1, annexed as Annexure-9, speaks volume about the pressure exerted by the Respondent no.4 C.J.M. on the concerned S.I. This is the exceptional example of misuse of one's office and position to extend the threats of criminal prosecution against the petitioners.

This Court is constrained to deprecate, reprimand and condemn this practice in the strongest term to this conduct

of Respondent no.4, C.J.M., Banda for exerting pressure upon the concerned S.I. so as to lodge the F.I.R.

This is an unbecoming of a C.J.M. of the district. When the concerned C.J.M., as mentioned above, lost his case at Lucknow, then in its second innings, he has successfully prevailed upon the S.I. named above to lodge the F.I.R., making all sorts of wild and venomous allegations against the petitioners for alleged act of fraud, cheating, fabricating the documents and extortion of money against the petitioners.

11. The Court has perused the contents of F.I.R. in which it has been stated that on 17th June, 2023 the informant has applied for electricity connection vide application no.1013441101. It is alleged that after 5-6 days he has received a call from one Rakesh projecting him as employee of Electricity Department from Lucknow on informant's mobile number 9450095802, demanding from him Rs.20,000/- for the electricity connection at the behest of Executive Engineer and S.D.O., GSI Aliganj, Lucknow. On this, he asked his younger brother Anand Kumar Gupta to hand over Rs.20,000/- but instead of giving a regular connection the petitioners has produced a forged electronically generated document demanding Rs.2,19,063/- as outstanding sum from his old connection.

At this juncture Shri Baleshwar Chaturvedi, learned *Amicus Curiae* and permanent counsel for the Electricity Department, submits that no second connection as desired by Respondent no.4 would be allowed on the same residential premises, till the outstanding sum for the earlier connection is not cleared-off.

It seems that the respondent no.4 is mixing two different issues:- unless and until the outstanding amount on the earlier electricity connection no.4104390000 is not cleared off, how a new connection would be allotted to the same residential premise?

12. Learned counsel for petitioners has drawn attention of the Court to inter office communication written by Superintendent Engineer to the Executive Engineer on 5.8.2023, a relevant excerpt of the communication reads thus :

''अधोहस्ताक्षरी को अवगत हुआ कि डा० भगवान दास गुप्ता, सी०जे०एम०, बांदा ने पुनः अधोहस्ताक्षरी पर बिना बकाया का पैसा जमा कराये, बकाया परिसर पर विद्युत कनेक्शन देने हेतु दबाव बनाने के लिए अपने सरकारी शक्ति का दुरुपयोग करते हुए गलत आरोप लगाते हुए कोतवाली बांदा में दिनांक 27.07.2023 को अधिशासी अभियन्ता, उपखण्ड अधिकारी, अवर अभियन्ता, लाईन मैन के विरुद्ध विभिन्न धाराओं में मुकदमा पंजीकृत कराया है तथा अपने कार्यरत जनपद पर ही स्थापित कोतवाली थाने के उपनिरीक्षक पर यह दबाव बना रहे है कि इन सब को गिरफ्तार कर लिया जाये एवं दिनांक 04.08.2023 को उपनिरीक्षक कोतवाली बांदा श्री दान बहादुर पाल इस कार्यालय में पड़ताल हेतु आये भी थे।''

This communication speaks volume about the Respondent no.4, Dr. Bhagwan Das Gupta who was out and out to exert duress, threat and coercion upon the petitioners, after auctioning his own dignity, honour and reputation with sole objective to compel the petitioners to serve his financial interest and wife-off the outstanding and issue an order for fresh connection.

13. In paragraph 20 of the petition regarding the allegation of paying Rs.20,000/- is concerned, is false and fabricated just to create a false criminal case against the petitioners as argued by the counsel for petitioners. Neither any date nor place has been mentioned in the F.I.R. Who is this Rakesh Kumar and under what capacity he was demanding the amount is a million dollar mystery. The C.J.M. has fasten a wild allegation against senior officials of the electricity department.

14. So far as the electricity dues of Rs.2,19,063/- is concerned, it relates to the aforementioned electricity connection which is genuine and electronically generated from the computerized system and the query dated 26.4.2023 on the application is perfectly valid and genuine. The petitioners have raised this demand of outstanding sum in the discharge of their official duty. On these grounds, it is contended by learned counsel for petitioners, that no offence under Sections 406, 419, 420, 464, 467, 468, 471, 386 I.P.C. is made out against the petitioners.

15. It is further argued by learned counsel for petitioners that the C.J.M. misusing the powers as such has prevailed upon the poor Sub Inspector of Police Station Kotwali, Banda and succeeded in lodging the F.I.R. which is nothing but a gross, blatant and naked misuse of power. The action of the petitioners is protected under Section 168 of the Electricity Act, 2003 that anything done in good faith purporting to be done in this Act or Rules, regulations made underunder by any public servant would not be subjected for criminal prosecution.

16. Per contra, a counter affidavit was filed and signed by the respondent no.4 himself in which he has spelled out number of factual aspects of the issue and letter correspondence with the department which cannot be adjudicated in exercise of power under Article 226 of the Constitution of India. By these correspondences with the department, the Respondent no.4 wants to impress upon the Court, that he has been cheated by the hands of petitioners who are officials of Electricity Department.

17. During argument, it has been surfaced that from the date of purchase of said premises i.e. 3.8.2009 till date the Respondent no.4 has paid a meagre sum of around Rs.5,000/- only in last 14 years. This *per se* is own admission of Respondent no.4 during argument. This is indeed shocking and surprising that in this period of 14 years the respondent no.4 has paid only Rs.5000/- (approx). On making a query during argument, learned counsel for respondent no.4 states that he is using solar power for his daily consumption. It is unswallowable that Respondent no.4, who is C.J.M., has paid Rs.5000/- only without having any Permanent Disconnection of the electricity connection and has paid only Rs.5000/- on the false pretext that he is using solar panel for his daily use. Without having Permanent Disconnection (P.D.C.) or giving application in this behalf asking for P.D.C., the Electricity Department is well within their rights to levy minimum electricity bill on the old connection. Respondent No.4, as mentioned above, has paid Rs.5000/- from the date of purchase of the house till forced P.D.C. was done by the Department in 2021. It is simply amusing that a consumer has paid Rs.5000/- without any P.D.C. for more than a decade.

18. During argument this Court, on 24.8.2023 has given a direction for constituting a S.I.T. to hold a preliminary investigation into the matter. Accordingly, S.I.T. led by (i) Mr. Abdul Hameed, D.I.G., A.N.T.F., U.P. Lucknow; and (ii) Shri Atul Sharma, Senanayak, 24 Battalion P.A.C., Moradabad and (iii) Shri Ram Kishun, S.P. Vigilance Lucknow are the members of the said S.I.T. While passing the Court have formulated following queries for which the probe was supposed to be required, they are :

(a) whether any cognizable offence is made out against the petitioner or not;

(b) whether respondent no.4 has misused his power and position as the C.J.M., Banda;

(c) whether alleged transaction of Rs.20,000/- was ever given by the respondent to a person named as Rakesh and its receipt as alleged in the F.I.R.;

(d) whether demand notice of Rs.2,10,063/- is forged document;

(e) what are the past credentials of respondent no.4 as judicial officer?

(f) whether the respondent no.4 has taken into confidence or taken prior permission from the learned District Judge, Banda before lodging of the F.I.R.

19. The said S.I.T. during threadbare investigation have recorded the statement of Shri Dan Bahadur, I.O. of Case Crime No.605 of 2023 (State vs. Manoj Kumar Gupta), in which he states before the S.I.T. :

"श्री दानबहादुर पुत्र स्व० प्रभुनाथ पाल निवासी ग्राम ढेढरा थाना माण्डा जनपद प्रयागराज पीएनओ-882310277 मो०नं०-8400874647 हाल पता ओपी सिविल लाइन्स थाना कोतवाली नगर जनपद बाँदा-

साक्षी ने बताया कि मैं पंजीकृत मु०अ०सं० 605/2023 बनाम मनोज गुप्ता का विवेचक हूँ। उक्त अभियोग की विवेचना में दिनांक 29.07.2023 को बयान वादी अंकित करने के दिन वादी मुकदमा श्री भगवानदास गुप्ता द्वारा विवेचना में पदीय दबाव बनाते हुये इनके द्वारा कहा गया कि पहले मुलजिम को गिरफ्तार कर कोर्ट में पेश करो। कल रविवार है, कोर्ट मेरी है, रिमाण्ड मजिस्ट्रेट बैठेगें। पुनः दिनांक 07.08.2023 को न्यायालय में बुलाया और कहा कि गिरफ्तारी करिये वरना अभियुक्तगण हाईकोर्ट चले गये तो तुम्हारे लिये ठीक नही होगा तब मैने अपनी वापसी में दिनांक 07.08.2023 के रोजनामचा आम में तस्करा अंकित किया।"

This statement of Mr. Dab Bahadur has completely exposed the nature and conduct of the C.J.M., Banda to its hilt.

20. The S.I.T. after thrashing the material collected during investigation has given a candid report to the queries made by this Court pointwise, which is quoted herein under :

"मा० उच्च न्यायालय द्वारा पारित आदेश दिनांक 24.08.2023 के क्रम में वांछित 06 बिन्दुओं पर अन्तरिम आख्या निम्नवत् हैः-

बिन्दु संख्या-1 : ***(a) whether any cognizable offence is made out against the petitioners or not;***

(क्या याचिकाकर्ता के विरुद्ध कोई संज्ञेय अपराध घटित हो रहा है कि नहीं।)

विशेष अनुसंधान दल द्वारा अब तक लिये गये अभिलेखीय एवं मौखिक साक्ष्य के विश्लेषण से सादर अवगत कराना है कि श्री भगवानदास गुप्ता द्वारा दिनांक-27.07.2023 को मु0अ0सं0-605/2023धारा-406, 409, 419, 420, 464, 467, 468, 471, 386 भा० दं० वि० कोतवाली बाँदा में पंजीकृत कराया था। मुकदमा वादी ने अपने अभिकथन में दिनांक-18.09.2023 को अवगत कराया गया कि उनके द्वारा विद्युत संयोजन हेतु दिनांक 17 जून 2023 को आनलाइन आवेदन किया था तथा उनके मोबाईल पर दिनांक-20.06.2023 को राकेश नाम के व्यक्ति का फोन आया कि उक्त आवेदित संयोजन पर भवन निरीक्षण किया जाना है तथा संयोजन शुल्क 20 हजार रूपयें बताया गया। वादी द्वारा बताया गया कि दिनांक-23/24.06.2023 को राकेश लेसा कर्मचारी द्वारा फोन किया गया कि भवन निरीक्षण हेतु आना है एवं संयोजन शुल्क 20 हजार रूपयें की मांग की गयी जिसके सम्बन्ध में मैने अपनी पत्नी को फोन किया कि आनन्द से कहो 20 हजार रूपया देकर राकेश से रसीद ले ले। आनन्द ने अपने पास से 20 हजार रूपये राकेश लेसा कर्मचारी को दिनांक-23/24.06.2023 मकान नंबर उपरोक्त पर देना बताया है। कूट रचित इलेक्ट्रानिक दस्तावेज एवं मनोज गुप्ता अधिशाषी अभियन्ता द्वारा अपने पत्र के माध्यम से बिल की मांग कर उद्यापन करने के आरोप के सम्बन्ध में अब तक की विवेचनात्मक कार्यवाही में साक्षियों के बयान एवं अभिलेखों के सत्यापन एवं स्थलीय निरीक्षण एवं सीडीआर के विश्लेषण से पाया गया कि-

1- उक्त अभियोग में प्रतिवादी राकेश सिंह के द्वारा अपने मो0नं0-9452202530 से वादी मुकदमा श्री भगवानदास गुप्ता के मो0नं0-9450095882 पर दिनांक 20.06.2023 को वार्ता का होना नहीं पाया गया।

2- वादी मुकदमा द्वारा अपने भाई आनन्द से राकेश नाम व्यक्ति को विद्युत संयोजन के लिये 20000/-रू० दिनांक 23/24.06.2023 को देना बताया गया है जब कि राकेश प्रताप

सिंह के मो0नं0-9452202530 के सीडीआर का विश्लेषण किया गया तो उक्त तिथि को राकेश प्रताप सिंह कथित घटनास्थल की सेल आईडी में मौजूद नहीं थे।

3- श्री आनन्द गुप्ता ने कथन में अंकित कराया है कि दिनांक-23/24.06.2023 को मेरी पत्नी ने मेरे मो0नं0-8115526929 पर समय लगभग 18:00 से 19:00 बजे के बीच में मेरे भाई शुभम गुप्ता के मो0नं0-8299440809 पर बात कर बताया कि बिजली वाले आये हैं एवं उपरोक्त आनन्द गुप्ता एवं शुभम गुप्ता के मोबाईल डिटेल सीडीआर का विश्लेषण किया तो उभयपक्षों के बीच दिनांक-22.06.2023 से दिनांक-24.06.2023 तक कोई वार्ता नहीं हुई है और आनन्द गुप्ता के मोबाईल की सेल आईडी कथित घटनास्थल से काफी दूर थी। एवं शुभम गुप्ता के मोबाईल की लोकेशन कथित घटना के समय घटनास्थल से लगभग 15-20 किमी दूर थी।

4- आरोपी राकेश प्रताप सिंह के बयान में आया है कि वह दिनांक-22.06.2023 को समय लगभग 18:00 से 19:00 बजे के बीच सर्वे करने के लिये उपरोक्त आवास पर गया था तथा मकान नम्बर ईएस-1-बी/23ए सीतापुर रोड योजना अलीगंज थाना मड़ियांव कमिश्नरेट लखनऊ का पता न मिलने पर आवेदक के नंबर-9450095802 पर वार्ता कर पता पूछकर गया था और वहाँ एक मात्र महिला मिली थी। उक्त कथन की पुष्टि हेतु राकेश प्रताप सिंह के मो0नं0-9452202530 से वादी मुकदमा के मो०नं०-9450095802 के सीडीआर के विश्लेषण से पाया गया कि उपरोक्त नंबर से उपरोक्त तिथि में समय 18:26 मिनट पर वार्ता हुयी है। जिसकी सर्वे के लिये आने की पुष्टि पूंछतांछ में आनन्द की पत्नी रचना ने भी की है।

इस प्रकार विवेचना के क्रम में आये साक्ष्यों से यह प्रमाणित हो रहा है कि विद्युत संयोजन के लिये सर्वे के समय राकेश प्रताप सिंह, संविदाकर्मी (लाइनमैन) जो दिनांक-22.06.2023 को गया था उस समय राकेश को रचना गुप्ता पत्नी श्री आनन्द गुप्ता मिली थी। मौके पर आनन्द गुप्ता, शुभम गुप्ता आदि कोई मौजूद नहीं थे इसलिए वादी के भाई श्री आनन्द गुप्ता द्वारा रू0 20,000/- विद्युत संयोजन हेतु देने के औचित्य के पुष्टिकारक साक्ष्य प्राप्त नहीं हुए है।

वादी द्वारा आरोपित किया गया है कि श्री मनोज गुप्ता, अधिशाषी अभियन्ता, लखनऊ आदि द्वारा कूट रचित इलेक्ट्रानिक दस्तावेज पर रू0 2,19,063-00 की मांग की जा रही है एवं अपने पत्र दिनांक-18.07.2023 के माध्यम से बिल की भिन्न-भिन्न राशि मांग कर उद्यापन करने विषयक आरोप के सम्बन्ध में अब तक की विवेचनात्मक कार्यवाही में साक्षियों के बयान, अभिलेखों के सत्यापन, स्थलीय निरीक्षण एवं सीडीआर के विश्लेषण से पाया गया कि तथाकथित कूटरचित इलेक्ट्रानिक अधोलिखित दस्तावेज जो वादी मुकदमा द्वारा संदीप तिवारी, निरीक्षक थाना गिरवां के मो0नं0-9454403038 से मो0नं0-9450095802 पर जरिये व्हॉट्स-अप द्वारा श्री संदीप तिवारी, निरीक्षक के आग्रह पर अधिशाषी अभियन्ता, लखनऊ श्री मनोज गुप्ता से प्राप्त हुआ था। मनोज गुप्ता, अधिशाषी अभियन्ता के पत्र दिनांक 18.07.2023 का सत्यापन एसआईटी टीम द्वारा विवेचना के दौरान लेसा कार्यालय जाकर किया गया तो उपरोक्त इलेक्ट्रानिक अभिलेख लेसा कार्यालय के आनलाइन पोर्टल पर मूलरूप में मौजूद हैं जो कथित कूटरचित इलेक्ट्रानिक दस्तावेज उपरोक्त से मिलान करने पर कूटरचित नहीं होना पाया गया, बल्कि पूर्णतया सत्य पाये गये एवं अधिशाषी अभियन्ता के पत्र उपरोक्त का सत्यापन किया गया तो पत्र भी मूलरूप में पत्रावली पर कार्यालय प्रति के रूप में पाया गया। ***जिसमें अंकित विद्युत बिल की धनराशियों उनके आनलाइन पोर्टल पर वर्षवार अंकित पायी गयी एवं अधिशाषी अभियन्ता द्वारा पदीय दायित्वों के निर्वहन में पत्र जारी किया गया था। अतः अभिलेख सत्य पाये गये जिसमें किसी भी तरीके की कूटरचना का होना नहीं पाया गया है। इस प्रकार वादी मुकदमा द्वारा पंजीकृत मु0अ0सं0-605/2023 धारा-406/409/419/420/464/467/468/471/386 भादवि थाना कोतवाली नगर जनपद बाँदा में अब तक की गयी विवेचनात्मक कार्यवाही में प्रथम दृष्टया किसी संज्ञेय अपराध का होना नहीं पाया जा रहा है। साक्ष्य संकलन हेतु विवेचना प्रचलित है।***

बिन्दु संख्या-2 : (b) whether respondent no.4 has misused his power and position as the C.J.M. Banda;

(उक्त रिट याचिका में प्रतिवादी नं0-4 के द्वारा सी०जे०एम० बांदा रहते हुए अपनी शक्ति व पद का दुरूपयोग किया है कि नहीं।)

मा० उच्च न्यायालय इलाहाबाद के आदेश के बिन्दु उपरोक्त के सम्बन्ध में जॉच की गयी तो सी०जे०एम० प्रायोजित तरीके से निम्न अवैधानिक कृत्य कराये गये है- बाँदा के पद पर रहते हुये श्री भगवानदास गुप्ता द्वारा अपने पद व शक्ति का दुरूपयोग करते हुये योजनाबद्ध एवं प्रायोजित तरीके से निम्न अवैधानिक कृत्य कराये गये हैं-

1-इनके द्वारा मु०अ०सं०-605/2023 धारा-406/409/419/420/464/467/ 468/471/386 भादवि थाना कोतवाली नगर जनपद बाँदा विरूद्ध अधिशाषी अभियन्ता, लखनऊ आदि 2 नफर पंजीकृत कराया गया था।

2-उपरोक्त पंजीकृत अभियोग में बगैर साक्ष्य संकलन के विवेचक श्री दानबहादुर पाल उ०नि० कोतवाली नगर बॉदा को

धमकाकर आरोपीगणों की गिरफ्तारी हेतु पदीय दबाव बनाया जिसका तस्करा विवेचक द्वारा **रो०आ० दिनांक-07.08.2023 समय 20:06 बजे निम्न प्रकार अंकित है- "दौरानें विवेचना थाना स्थानीय के मु0अ0सं0-605/2023 धारा-406/409/419/420/ 464/467/468/471/386 भादवि के वादी मुकदमा डॉ० भगवानदास गुप्ता द्वारा अपने कोर्ट मोहर्रिर के मोबाईल से मुझ विवेचक को बुलाकर दबाव बनाया जा रहा है कि अभियुक्तगणों की तत्काल गिरफ्तारी करो अगर गिरफ्तारी नही हुई और अभियुक्तगण हाईकोर्ट चले गये तो मैं तुम्हारे विरूद्ध कठोर से कठोर सजा लिखूँगा। आज पुनः सीजेएम महोदय द्वारा चेम्बर में बुलाकर कहा गया कि अभियुक्तों की गिरफ्तारी क्यों नही कर रहे हो तुम मुझे जानते नही हो मैं तुम्हे एवं तुम्हारे थाने व कोतवाल को ठीक कर दूँगा। तथा अपने प्रभारी निरीक्षक को अवगत कराओ कि तत्काल आकर मुझसे सम्पर्क करो मैं पूर्व में भी कई बार प्रभारी कोतवाली नगर को बता चुका हूँ फिर भी मेरे मुकदमें में कार्यवाही क्यो नही हो रही है। और सीजेएम महोदय ने बताया कि विवेचना में यदि लापरवाही किये तो तुम्हारे खिलाफ विवेचना का आदेश मैं कर दूँगा इस प्रकार सीजेएम महोदय द्वारा कई बार अपने कोर्ट मोहर्रिर के मोबाईल से बुलाकर चेतावनी दी जा रही है। मुझ विवेचक को स्वतन्त्र रूप से विवेचना करने का मौका नही दिया जा रहा है।"**

3-एस०डीओ० देवव्रत आर्य जनपद बॉदा द्वारा बताया गया कि आवास संख्या जे0-12 न्यायालय परिसर बाँदा में पूर्व आवासित न्यायधीश श्री नितिन सिंह द्वारा अपने स्थानान्तरण पर विद्युत संयोजन विच्छेदित करने हेतु आवेदन किया गया था। इस क्रम में नियमानुसार विच्छेदित करने गये कर्मियों को पद का दुरूपयोग करते हुये सी०जे०एम० श्री भगवानदास गुप्ता द्वारा पुलिस बुलाकर थाने में बैठा दिया गया और विच्छेदित मीटर को भी विद्युत कर्मियों को नहीं दिया गया।

4-एस०डीओ० देवव्रत आर्य जनपद बाँदा द्वारा यह भी बताया गया कि सी०जे०एम० बाँदा श्री भगवानदास गुप्ता जो म०नं०-जे०-12 न्यायालय परिसर बाँदा में आवासित रहे थे, के द्वारा अपने पदीय दबाव में विद्युत का उपभोग नियमित रूप से किया जा रहा था, किन्तु अपने नाम पर विद्युत संयोजन नहीं लिया गया था, जिसकी पुष्टि सीजेएम महोदय के मजीद बयानों से भी हुई है।

5- प्रभारी निरीक्षक मनोज कुमार शुक्ला, कोतवाली नगर बाँदा एवं संदीप कुमार तिवारी, प्रभारी निरीक्षक गिरवा द्वारा बताया गया कि जो भी अभियोग उपरोक्त पंजीकृत किया गया है एवं अधिशाषी अभियन्ता से वार्ता कर अभिलेख मेरे द्वारा मांगे गये है वह सीजेएम महोदय के पदीय प्रभाव में किया गया है।

इस प्रकार उपरोक्त बिन्दु की जांच से स्पष्ट रूप से पाया गया कि श्री भगवानदास गुप्ता, सीजेएम बाँदा द्वारा अपने पदीय शक्ति व पद का दुरूपयोग करते हुये अवैधानिक तरीके से अभियोग पंजीकृत कराया गया है। इसी क्रम में उक्त अभियोग में विवेचक को अवैधानिक विवेचनात्मक कार्यवाही हेतु धमकाया गया है एवं बिना विद्युत संयोजन लिये विद्युत का उपभोग अपने आवास संख्या जे०-12 न्यायालय परिसर बाँदा में किया गया।

बिन्दु संख्या-3 :(c) whether alleged transaction of Rs.20,000/- was ever given by the respondent to a person named as Rakesh and its receipt;

(क्या प्रतिवादी द्वारा 20000/- रूपयें का कथित लेन-देन राकेश नाम के व्यक्ति को किया गया और इसकी रसीद ली गयी कि नहीं।)

उक्त विन्दु के सम्बन्ध में प्रथम सूचना रिपोर्ट में यह आरोप लगाया गया है कि वादी मुकदमा के भाई श्री आनन्द गुप्ता द्वारा दिनांक-23/24.6.2023 को कनेक्शन के सर्वे के समय राकेश के आने पर श्री आनन्द गुप्ता द्वारा 20,000/-रू० राकेश को दिया था जिसका विवेचना के दौरान प्राप्त साक्ष्य एवं मोबाईल नंबर की सीडीआर का विश्लेषण किया गया तो पाया गया कि उक्त तिथि को लाइनमैन राकेश सर्वे के लिये उक्त भवन पर नहीं गया था अपितु वह दिनांक-22.06.2023 को समय 18:00 से 19:00 के बीच में में गया था उसकी पुष्टि राकेश के मोबाईल नंबर से भी हो रही है। साथ ही श्री आनन्द गुप्ता के मो0नं0-8115526929 एवं शुभम गुप्ता के मो0नं0-8299440809 का विश्लेषण किया गया तो उपरोक्त दोनों लोगों की दिनांक-22.06.2023 से लेकर दिनांक-24.06.2023 तक कथित घटना के समय लोकेशन कथित घटनास्थल से दूरस्थ थी एवं शुभम गुप्ता का लोकेशन कथित घटनास्थल से लगभग 15-20 किमी दूर थी एवं आपस में एक-दूसरे के नंबर से कोई वार्ता नही है, जो कथन के मुताबिक विरोधाभासी है।

इस प्रकार विवेचनात्मक विश्लेषण से किसी भी प्रकार से 20000/-रू0 के लेनदेन के कोई पुष्टिकारक साक्ष्य नही पाये जा रहे हैं, न ही किसी रसीद के साक्ष्य मिले हैं।

बिन्दु संख्या-4 :(d) Whether demand notice of Rs.2,10,063/- is forged document;

(क्या डिमाण्ड नोटिस रू0 2,10,063/- जाली दस्वावेज है कि नहीं।)

उपरोक्त इलेक्ट्रानिक अभिलेख एवं अधिशाषी अभियन्ता के पत्र सं0 3678 दिनांक-18.07.2023 द्वारा श्री भगवान दास गुप्ता से परिसर पर पूर्व संयोजन के बकाये एवं धनराशि के पुनः निर्धारण के सम्बन्ध में निर्गत किया गया था जिसमें कुल धनराशि 2,19,063 रू० दर्शाया गया है एवं जिसमें दिनांक

28.09.2015 तक का कुल बिल 2,11,998 रू० है एवं उक्त आवास का स्थायी रूप से विद्युत विच्छेदन दिनांक 29.12.2021 को किया गया उस समय कुल बिल राशि 2,19,063 रू० थी। उक्त डिमाण्ड नोटिस का अभिलेखीय सत्यापन एसआईटी टीम द्वारा विवेचना के दौरान लेसा कार्यालय जाकर किया गया तो उपरोक्त इलेक्ट्रानिक अभिलेख लेसा कार्यालय के ऑनलाइन पोर्टल पर मूलरूप में मौजूद है जो कथित इलेक्ट्रानिक दस्तावेज उपरोक्त से मिलान करने पर पूर्णतया सत्य पाये गये एवं अधिशाषी अभियन्ता के पत्र उपरोक्त का सत्यापन किया गया, तो पत्र भी मूलरूप में पत्रावली पर कार्यालय प्रति के रूप में पाया गया जिसमें अंकित विद्युत बिल की धनराशियों उनके ऑनलाइन पोर्टल पर वर्षवार अंकित पायी गयी एवं अधिशाषी अभियन्ता द्वारा पदीय दायित्वों के निर्वहन में पत्र जारी किया गया था। मा० न्यायालय के आदेश में बिन्दु सं० 04 पर अंकित धनराशि 2,10,063 रू0 की बजाये पत्र में 2,19,063 रू0 पायी गयी है जो उनके पोर्टल पर भी मूल रूप में उपलब्ध है।

अतः अभिलेख सत्य पाये गये जिसमें किसी भी तरीके की कूटरचना का होना नहीं पाया गया है।

बिन्दु संख्या-5 : (e) what are the past credentials of respondent no.4 as judicial officer ?

(रिट याचिका में प्रतिवादी संख्या-4 बतौर न्यायिक अधिकारी की पूर्ववर्ती आम शोहरत की जॉच ।)

विन्दु सं० 05 के सम्बन्ध में विवेचना के दौरान आये साक्ष्यों से यह प्रकाश में आया कि श्री भगवानदास गुप्ता द्वारा सिविल जज सीनियर डिवीजन बांदा के पद पर रहते हुये मु०अ०सं 396/2023 धारा- 420,467,468,406 भादंवि थाना कोतवाली सदर बांदा में अपने छोटे भाई आशीष गुप्ता की पत्नी श्रीमती प्रियंका गुप्ता के द्वारा अपने निवास-जे-12 न्यायालय परिसर के पते को दर्शाते हुए पंजीकृत कराया गया था जबकि उपरोक्त मामले का सम्बन्ध नई दिल्ली व नोयडा से था। वादिनी की मोबाईल लोकेशन घटना के दिन, घटनास्थल वाले जनपद बाँदा में ही नहीं थी। बतौर न्यायिक अधिकारी यह प्रकरण उनके परिवार का व्यक्तिगत प्रकरण था जिसे अपने पदीय प्रभाव में थाना कोतवाली नगर जनपद बांदा के प्रभारी निरीक्षक पर दबाव बनाकर पंजीकृत कराकर विवेचक को बिना साक्ष्य सकंलित किये नामित अभियुक्तों की गिरफ्तारी हेतु दबाव बनाते हुये एन०बी०डब्लू० का वारण्ट जारी कराया गया, किन्तु उपरोक्त प्रकरण की सम्पूर्ण जानकारी होने के बावजूद विवेचना के दौरान अपने अभिकथन में मुकदमा उपरोक्त से सम्बन्धित तथ्यों के विषय में अनभिज्ञता जाहिर की गयी।

इस प्रकार उक्त बिन्दु की जांच से पाया गया कि श्री भगवान दास गुप्ता द्वारा बतौर न्यायिक अधिकारी रहते हुये अपने पारिवारिक मामले में पदीय दबाव में मुकदमा पंजीकृत कराया जाना अवैधानिक था तथा इनकी पूर्व नियुक्तियों जनपद-सुल्तानपुर, सीतापुर, अयोध्या आमशोहरत एवं कार्य आचरण के सम्बन्ध में साक्ष्य संकलन की कार्यवाही शेष है।

विन्दु संख्या-6 (f): Whether the respondent no.4 has taken into confidence or taken prior permission from the learned District Judge, Banda before lodging of the FIR.

(क्या प्रतिवादी संख्या-4 द्वारा एफआईआर दर्ज करने से पूर्व विद्वान जिला न्यायाधीश, बॉदा को विश्वास में लिया गया था या पूर्व अनुमति ली गयी थी की जांच ।)

*उपरोक्त विन्दु के सम्बन्ध में मा० न्यायालय को अवगत कराना है कि इस सम्बन्ध में मा०जिला न्यायाधीश जनपद बांदा की प्राप्त आख्या दिनांक 27.09.2023 के माध्यम से अवगत कराया गया है कि कार्यालय में अनुरक्षित पत्रावली के अवलोकन से स्पष्ट होता है कि वादी मुकदमा डा० भगवान दास गुप्ता द्वारा प्रथम सूचना रिपोर्ट अंकित कराने से पूर्व **लिखित रूप से कोई अनुमति प्राप्त नहीं की गयी थी।** उनके द्वारा मौखिक रूप अनुमति प्राप्त की गयी थी अथवा नहीं, या जिला जज को विश्वास में लिया गया था अथवा नहीं, इस सम्बन्ध में तत्कालीन जिला जज ही जानकारी दे सकते हैं।*

जिला जज, संभल एट चन्दौसी (तत्कालीन जिला जज बाँदा) द्वारा अवगत कराया गया कि उनके कार्यकाल में डा० भगवान दास गुप्ता द्वारा उक्त प्रकरण के सम्बन्ध में उन्हें कभी सूचित नहीं किया गया और न ही मौखिक या लिखित रूप से कोई अनुमति प्राप्त की गयी थी।''

21. From the aforesaid inquiry report, as mentioned above the conduct and character of respondent no.4 Dr. Bhagwan Das Gupta, C.J.M. is exposed to the core and the S.I.T. in its report after holding threadbare investigation have come out every allegation made in the F.I.R. against the accused-petitioners is false, motivated and purposive. All the concerned witnesses in their respective statements have unequivocally accused Respondent no.4 for exerting pressure upon them, after misusing his powers as C.J.M., Banda.

22. The judicial office is essentially a public trust. Society is, therefore, entitled to except that a Judge must be a man of high

integrity, honesty and required to have a moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standard of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct, which would generate public confidence, accord dignity to the judicial office and enhance public image, not only the Judge but the court itself. It is therefore basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of the propriety and probity. The standard of conduct is higher than expected from a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standard of propriety and probity, higher than those deemed acceptable for others.

23. The Judges are also public servant and under the gaze of public at large. They should always remember that they are to serve the public and not for their personal gains or objectives. A Judge is judged not only by his quality of judgements but also by the quality and purity of his private life and character. Impeccable integrity should be reflected both in public and personal life of a Judge. One who stands in judgment over others, should be incorruptible that is the high standard which is expected from a Judge. A Judge who himself wants to become a party in a proceeding then he must quit his office first, to maintain the standard of purity and unblemished character. It is not possible that he remain as a sitting Judge on one hand and after using his power prevail upon his subordinate officer to affect arrest his adversary.

In the present case, this exactly happen when Dan Bahadur, the I.O. of the case was made scapegoat to subserve the design of respondent no.4, as he clearly stated before the S.I.T.

24. Report from S.I.T., as mentioned above, have completely exposed the conduct of Dr. Bhagwan Das Gupta, C.J.M. and his level of functioning. If at all Dr. Bhagwan Das Gupta, C.J.M. is so keen and adamant to book the petitioners, then he must quit his office and the chair and thereafter contest the case like an ordinary litigant.

As mentioned above, the S.I.T. in its report to the Court which also extracted after thrashing various statements of all concerned and analysing various documents, the S.I.T. forms a prima facie opinion that no criminal case against the petitioner is made out.

25. This Court has no reason to ignore the report of S.I.T. and its conclusion and thus imbibing the same in toto we are of the considered opinion, that the F.I.R. does not disclose any offence as alleged and thus liable to be quashed and same has been procured by the C.J.M. after exerting threats upon the concerned S.I. of Kotwali, Banda.

26. Taking into account the *prima facie* findings and the material collected by the S.I.T., this Court is of the considered opinion that the present F.I.R. is driven by *malafides* and in the colourable exercise of power vested in respondent no.4 and thus we have got no

hesitation to quash the F.I.R. exercising the extra ordinary powers of this Court under Article 226 of the Constitution of India.

27. At the very outset of the judgment, we have mentioned in Preface about the character, nature, conduct of a Judge, his position in the society, expectations of public at large from a Judge, his own public and private image and reputation and more importantly his own basic character which should be aboveboard having see through integrity and impeccable and spotless judicial character. The office of a Judge is full of responsibility as he is supposed to perform a divine job, but if we start comparing with the facts of the present case, we have got no hesitation to say that the conduct and character of Respondent No.4 Dr. Bhagwan Das Gupta is well short of those essential and basic characters, which mentioned above, rather unbecoming of a Judge. A judicial officer (Respondent no.4), as mentioned above, just to harass the petitioners who in discharging of their official duties were doing a government job entrusted to them, is proceeding to initiate a criminal case, so that the petitioners may kneel down before him and start dancing on his tune. If this is the standard of a Judge, then fate and future of subordinate judiciary is pitch dark and rudderless. He cannot be permitted to enjoy his position as C.J.M. and behave and act as an ordinary litigant. His own interest, it seems, is of the paramount consideration, for which he can stoop down to any level. This Court, as mentioned above, has deprecated and reprehended his conduct in the strongest term and is in the complete disagreement with the action taken by Respondent no.4 against the petitioners.

Such type of conduct shall not be repeated in future by any of the judicial officer, except in the matter of grave and severe nature like murder, suicide, rape or other sexual offences, dowry death, decoity and in rest of the remaining cases, if any, judicial officer or Judge wants to become the first informant in his personal capacity in any F.I.R., he must take his concerned District Judge into confidence and after having the assent from the District Judge, he can become an informant of any F.I.R.

28. Taking into account the totality of circumstances, the impugned F.I.R. so lodged by Respondent No.4 Dr. Bhagwan Das Gupta dated 27.7.2023 as Case Crime No.605 of 2023, u/s 406, 409, 419, 420, 464, 467, 468, 471, 386 I.P.C., Police Station-Kotwali, District Banda, is hereby Quashed. The instant Writ Petition stands ALLOWED.

29. Let this judgment and order be circulated through the Registrar General of this Court to all sessions divisions of the State of U.P., apprising the District Judges and Judicial Officers not to permit any F.I.R. by a Judge/Judicial Officer, in their personal capacity to subserve their personal interest, except the cases of serious and heinous in nature viz; murder, dowry deaths, sexual offences/rape or dacoity.

30. Besides this, Registrar General of this Court is directed to keep the copy of this judgment in the dossier/service record of Dr. Bhagwan Das Gupta, C.J.M., Banda, Respondent no.4.

(2024) 5 ILRA 1830
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.05.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal No. 590 of 1988

Gaya Prasad Yadav (Deceased) & Ors.
...Appellants
Versus
Ram Bux (Deceased) & Ors.
...Respondents

Counsel for the Appellant:
Balram Yadav

Counsel for the Respondents:
S.K. Mehrotra, Nand Kishore

U.P. Zamindari Abolition & Land Reforms Act, 1950-Section 9-Land in dispute cannot be said to be an appurtenant land to the house of Respondent and settled with him u/s 9 of the Act, 1950-plea of adverse possession but has not disclosed as to who is the true owner of the land in dispute-and ownership of Appellants has been denied-adverse possession can be claimed against the true owner –admitting his ownership and proving his possession in his knowledge without any objection- impugned order does not suffers from any illegality.

Second Appeal dismissed. (E-9)

List of Cases cited:

1. Maharaj Singh Vs St. of U.P. & ors.;(1977) 1 SCC 155

2. Smriti Debbarma (Dead) through Legal Representative Vs Prabha Ranjan Debbarma & ors.-2022 Live Law(SC) 19

3. Jangi Singh Vs Brij Mohan Singh & ors.;2012(30) LCD 2616

4. Dalip Singh Vs Bhupinder Kaur; (2018) 3 SCC 677

5. Suryakunwari Vs Nanhu & ors.;2019(37) LCD 2346

6. Bhagauti Singh @ Chedi Singh S/O Madhuban Singh Vs Mata Prasad Singh S/O Bhaggu Singh; 2022(40)LCD 2461

7. Ram Sukh Vs Gaya Din & anr.;1994(12) LCD 733

8. Dagadabai (Dead) by Legal Representatives Vs Abbas @ Gulab Rustum Pinjari; (2017) 13 SCC 705

9. Ravinder Kaur Grewal & ors. Vs Manjit Kaur & ors.;(2019) 8 SCC 729

10. Kapil Kumar Vs Raj Kumar; (2022) 10 SCC 281

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

1. Heard, Sri Balram Yadav, learned counsel for the appellants and Sri Nand Kishore, learned counsel for the respondents.

2. The instant second appeal has been filed for setting aside the judgment and decree dated 26.08.1988, passed in Civil Appeal No.525 of 1982; Gaya Prasad and 3 others versus Ram Bux by the IIIrd Additional District Judge, Faizabad and direct the respondent to not interfere into the possession of the appellants.

3. The following substantial questions of law have been formulated by the court in the second appeal:-

"(i) Whether the suit could be decreed only on the basis of adverse possession when plaintiff was found to have no title or have been in adverse possession?

(ii) Whether the findings of the learned trial court are without consideration of evidence and perverse?"

4. The brief facts of the case, as pleaded in the plaint, by the respondent who had filed the Regular Suit No.79 of 1981(Ram Bux versus Gaya Prasad and others) is that the parties are resident of Village Sidhaura, Sahijauna, Tehsil Bikapur, District Faizabad. The land in dispute marked by letters Ka, Kha, Ga, Gha in the plaint map belongs to the plaintiff i.e. the respondent in this appeal(hereinafter referred to as the respondent). The land was in possession of the respondent since before the abolition of Zamindari and thereafter after abolition of Zamindari, it was settled

with him under Section 9 of the U.P. Zamindari Abolition and Land Reforms Act 1950(hereinafter referred to as the Act of 1950). The respondent used to tie his cattle and keep house hold articles in the said land and has also planted some trees like Ber, Neer, Chilbil etc. The appellants, who were defendants in the aforesaid suit(hereinafter referred to as the appellants), had no concern with the land in dispute. Since there is a pond towards south and west of the house of the respondent, he has shortage of sahan land near his house, therefore he was using the land in dispute for the aforesaid purpose. The plea was also taken that the respondent has matured his title over the land in dispute by way of adverse possession. The appellants, Lakshmi Prasad and Gaya Prasad have their ancestral house in the village in old abadi and about three years back to the filing of the suit, Gaya Prasad had forcibly constructed a house near the disputed land and about 8-10 days back of filing of the suit raised new construction marked by letters Ka, Kha,Pa,Pha in the plaint map, whereas there was no opening towards west in the house of the appellant no.1 situated near the land in dispute. It has also been averred that there is nali in the land in dispute which is being used by the respondent for irrigating his field situated towards south of the land in dispute from the pond on the north side of the land in dispute. The appellants had threatened to dispossess the respondent from the remaining land also marked by letters Pa, Pha, Ba, Bha in the plaint map. Therefore the respondent filed suit for permanent injunction with a prayer for restraining the appellants from interfering with his ownership and possession over the land in dispute and demolition of incomplete new construction. During pendency of the suit, the appellants completed the constructions Ka, Kha, Pa, Pha and cut one tree of Ber, one tree of Chilbil and two trees of Neem belonging to the respondent worth Rs.1500/-. The respondent amended the plaint and sought the relief of demolition of the disputed construction marked by letters Ka, Kha, Pa, Pha.

5. The respondents contested the case before the trial court by filing the written statement and claiming that they are the owners and in possession of the land in dispute since before the abolition of zamindari,therefore they have become the owners of it after abolition of zamindari. The house of the respondent is situated towards north of the land in dispute at a distance and the land in dispute is not appurtenant to his house,therefore it cannot be said to have been settled with him under Section 9 of the Act of 1950. It has also been averred that land in dispute has always been used by the appellants for tying cattle and keeping Ghoor etc. and trees have been planted by them. It has been denied that the house constructed by the appellant-Gaya Prasad situated towards east of the land in dispute is new one and it is old one and it has always a door facing towards west. Brij Lal was the father of the appellants Lakshmi Prasad and Gaya Prasad. Gaya Prasad had three sons, namely, Ram Pher, Ram Sumer and Mata Deen and Lakshmi Prasad had two sons, namely, Hari Bhajan and Sukh Deo. They have not been made party to the suit, therefore the suit is bad for non joinder of the necessary parties. However,it has been admitted that the old house of appellants No.1 and 2 i.e. Gaya Prasad and Lakshmi Prasad is situated at some distance towards north and east of the present house and there was shortage of accommodation in the old house,therefore Gaya Prasad and Lakshmi Prasad got partition done about 35 years back, consequently, Gaya Prasad constructed new house towards east on the

land in dispute, which had come in his share and since then he is the exclusive owner and in possession of the land in dispute. There was a pond towards east of the house of Gaya Prasad, who levelled it to earth and some new trees have also been planted by him on the land in dispute. The house is situated towards east of the land in dispute and is about 30 years old. There was an old osara of thached structure towards west of the house,which was reconstructed by defendant no.1 i.e. appellant no.1 on pakki wall and it has been denied that the osara was new one.

6. After exchange of pleadings, the trial court framed 9 issues and thereafter the parties led evidence The learned trial court after considering the pleadings and evidence, allowed the suit filed by the respondent and decreed it by means of the judgment and decree dated 20.11.1982. It was further directed that the appellants shall remove the disputed construction from the land in dispute within two months and do not interfere in the possession and peaceful enjoyment of the land in dispute described in the plaint by the respondent. Being aggrieved by the same, the civil appeal was filed by the defendants i.e. the present appellants. The appellate court, after considering the rival contentions of the parties and affording them opportunity of hearing and considering the pleadings and evidence on record, found that there is no documentary evidence on record by either of the parties, therefore the case is to be decided on the basis of oral evidence and after considering and scrutinizing the evidence of the parties decided the civil appeal by means of the judgment and decree dated 26.08.1988 dismissing the appeal with cost and confirming the judgment and decree passed by the trial court. Hence, the present second appeal was filed, in which the aforesaid substantial questions of law have been formulated.

7. Learned counsel for the appellants submitted that the appellants are in possession on the land in dispute since before the abolition of zamindari and, accordingly, it settled with them under Section 9 of the Act of 1950 after abolition of zamindari. In partition between the brothers, it had come to the appellant no.1, who had constructed the house on the eastern side of the land in dispute with an opening on the western side of his house towards the land in dispute since beginning. His osara is also on the land in dispute, which is old one. He further submitted that the land in dispute is not appurtenant land to the house of the respondent and at a considerable distance from the house of the respondent on the southern side,therefore it cannot be said to be appurtenant land to the house of the respondent and settled with him under Section 9 of the Act of 1950. He had also never in possession on the land in dispute and the appellants are in possession. But trial court without considering it and the oral evidence adduced before the trial court and wrongly and illegally examining the evidence of the parties, allowed the suit. He further submitted that the appellate court also failed to consider the above and without appreciating the evidence of the parties appropriately dismissed the suit. Thus, the submission was that since the land in dispute cannot be treated an appurtenant land of the house of the respondent,therefore no rights could have been said to have accrued to him on the land in dispute. It has also been submitted that the case set up by the respondent on the basis of adverse possession is also totally misconceived and not tenable for the reason that he had never been in possession of the land in dispute. Accordingly learned counsel for the

appellants submitted that the appeal is liable to be allowed and the judgment and decree passed by the first appellate court is liable to be set aside. He relied on ***Maharaj Singh versus State of Uttar Pradesh and others;(1977) 1 SCC 155 and Smriti Debbarma (Dead) through Legal Representative versus Prabha Ranjan Debbarma and Others;2022 Live Law(SC) 19.***

8. Per contra, learned counsel for the respondent submitted that the respondent had been in possession on the land in dispute since prior to abolition of zamindari, therefore it has settled with him after abolition of zamindari under Section 9 of the Act of 1950. The respondent was using this land for various agricultural purposes because there is no land near his house for the said purpose, which is essential for a farmer residing in village. He had also planted some trees on the land in dispute and constructed the nali from north to south for irrigation of his agricultural land from the pond situated adjacent to the land in dispute on the southern side from the pond on the north side of the land in dispute. He further submitted that the appellants had house in the old abadi and the appellant no.1 has constructed a house adjacent to the land in dispute forcibly about three years back but there was no door towards the land in dispute on the western side. However, about 8-10 days prior to filing of the suit, he had opened the door on the western side towards the land in dispute and started making osara on the land in dispute, therefore the respondent had to file the suit. He further submitted that during pendency of the suit, the appellants had completed their construction on the land in dispute and have also cut some trees which has been proved by the commission report,which was conducted in pursuance of the order passed by the trial court in presence of the parties. He further submitted that the learned trial court as well as the first appellate court have rightly and in accordance with law allowed and decreed the suit and dismissed the appeal after considering the evidence led by the parties and pleadings on record. There is no illegality or error in the orders passed by the trial court as well as the appellate court and the concurrent findings of facts recorded by them may not be interfered by this Court as there is no illegality or perversity in it. The appeal is liable to be dismissed. He relied on ***Jangi Singh versus Brij Mohan Singh and others;2012(30) LCD 2616,Dalip Singh versus Bhupinder Kaur; (2018) 3 SCC 677,Suryakunwari versus Nanhu and Others;2019(37) LCD 2346 and Bhagauti Singh @ Chedi Singh S/O Madhuban Singh versus Mata Prasad Singh S/O Bhaggu Singh; 2022(40)LCD 2461.***

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

10. The land in dispute is being claimed to have settled with them by both the parties under Section 9 of the Act of 1950, being in possession since prior to the abolition of zamindari. The spot position shows that the house of the respondent is situated towards north of the land in dispute after a reasonable distance and some abadi and a pond(talab).

11. Section 9 of the Act of 1950 provides for conceptualizing the area appurtenant to buildings to have settled with them. ‘Appurtenance’, in relation to a building etc. is dependence of the building on what appertains to it for its use as a building. It has been considered by the Hon'ble Supreme Court, in the case of

Maharaj Singh versus State of Uttar Pradesh and others(supra) and held that in short the touch stone of "appurtenance" is dependence of the buiilding on what appertains to it for use as a building. The Hon'ble Supreme Court has also observed that the High Court has granted viz.5 yards of surrounding space, is sound in law although based on the guess work in fact. As such in fact the Hon'ble Supreme Court has observed that 5 years of surounding space is based only on guess work. However,appurtenant does not mean just adjacent to the house as held by this Court, in the case of ***Ram Sukh versus Gaya Din & Another;1994(12) LCD 733,*** the relevant paragraphs 28 and 29 of which are extracted here-in-below:-

"28. It is also well settled that a Riaya may have the Sahan Darwaza on all the sides of a house. It is user of the land on the date of vesting and prior thereto is material. The passing of a galiyara or Rasta or drain in between the building or house and the land over which in relation to a building or house, the rights of appurtenance is claimed, does not adversely affect the sahan darwaza right or rights involving rights of a person to a land as land appurtenant In the case of Special Manager Court of Wards. Balrampur Estate v. Shyam Lal (AIR 1936 Oudh 324) it has been held by the Chief Court of Oudh, that land appurtenant to residential house need not be actually adjoining the house and the user of the land for the enjoyment of the house by the claimant or by person is necessary to be proved with certain length of period may be of 12 years as held by Chief Court of Oudh in the case of S. Murtaza Ali v. Emperor, reported in (AIR 1947 Oudh page 131).

29. The material observation of the Hon'ble Chief Court of Oudh in the case of Balrampur Estate (Supra) reads as under:

"As to the argument that the land in question cannot be treated as appurtenant to house because there is a public road interven- ing I do not think there is any force in the contention. No authority has been cited for the view that appurtenant land must actually be adjoining the residential house, prima facie, I do not see why a tenant should not use land opposite his house but on the other side of public way for the purpose of tethering his cattle and why such land should not be regarded as appurtenant to his house. In absence of any authority to the contrary I think it may be held that the land is appurtenant."

12. In view of above, it cannot be said that the land in dispute is an appurtenant land to the house of the respondent and settled with him under Section 9 of the Act of 1950.

13. The other plea taken by the respondent is of adverse possession, but he has not disclosed as to who is the true owner of the land in dispute against whom he is claiming adverse possession and the ownership of appellants has been denied, whereas adverse possession can be claimed against the true owner and only after admitting his ownership and proving his possession in his knowledge without any objection. In absence of any such pleadings and proof, it cannot be said that the respondent has matured his title by way of adverse possession.

14. The Hon'ble Supreme Court, in the case of ***Dagadabai (Dead) by Legal Representatives versus Abbas alia Gulab Rustum Pinjari; (2017) 13 SCC 705,*** has held that it is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the

Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well-settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants. The relevant paragraphs 16 and 17 are extracted here-in-below:-

"16. Fourth, the High Court erred fundamentally in observing in para 7 that, "it was not necessary for him (defendant) to first admit the ownership of the plaintiff before raising such a plea". In our considered opinion, these observations of the High Court are against the law of adverse possession. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants.

17. It is only thereafter and subject to proving other material conditions with the aid of adequate evidence on the issue of actual, peaceful, and uninterrupted continuous possession of the person over the suit property for more than 12 years to the exclusion of true owner with the element of hostility in asserting the rights of ownership to the knowledge of the true owner, a case of adverse possession can be held to be made out which, in turn, results in depriving the true owner of his ownership rights in the property and vests ownership rights of the property in the person who claims it.

15. The Hon'ble Supreme Court in the case of ***Ravinder Kaur Grewal and others versus Manjit Kaur and others;(2019) 8 SCC 729*** has held as under in paragraph 60 and 61:-

"60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec vi i.e. adequate in continuity, nec clam i.e. adequate in publicity and nec precorio i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonymous with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and large the coricept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

61. Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which

cannot be defeated on re-entry except as provided in Article 65 itself. Tacking is based on the fulfilment of certain conditions, tacking may be by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period."

"

16. The learned trial court as well as the appellate court, on the basis of pleadings and evidence of the parties, found that the land in dispute is situated towards west of the house of the appellants and at a reasonable distance in the south of the house of the respondent and the agricultural land of the respondent is in the south of the land in dispute,adjacent to it. It has been stated by the respondent Ram Bux, who appeared as P.W.1, that he was in possession of the land in dispute since before the abolition of zamindari and his house is situated towards north of it after talab. There was shortage of sahan land near his house therefore his ancestors occupied the land in dispute for various agricultural purposes and work of leather and remained in peaceful possession of this land. In the cross examination, he stated that there is a rasta connecting his house to the land in dispute towards south and there is no ahata in his house towards north and west. The houses of his real brothers Munai and Kandhai are situated towards east of his house. There is no open land towards east of his house and towards north of his house there are bamboo clumps, towards south of his house there is gali and towards west of his house there is talab after some distance. The learned court's below also found that the commissioner's map shows that there is little open land towards west of the house of the respondent and the land in dispute is well connected from his house by a rasta. Admittedly, the agricultural land of the respondent is situated towards south of the land in dispute, which is adjacent to it and there is a naali in the land in dispute from north to south i.e. from the pond(talab) to the land in dispute,in regard to which respondent stated that he has constructed this naali for irrigation of his agricultural field. However, it has been disputed by the appellants, who have stated that it was constructed by them for preserving the water of rains, which could not be proved by any cogent evidence because it goes to the agricultural field of the respondent.

17. The respondent has also stated that he is living separately after separation from his brothers since last 35 years. He has also stated in his evidence that the appellants have their house in the old abadi, which is not disputed by the appellants and he has constructed his house adjacent to the land in dispute about 3 years back, meaning thereby, his house was constructed in the year 1976. P.W.2-Nithuri, though of not the same village, has stated that the respondent has some agricultural land in the disputed village and has also stated that the appellants had pressurized him not to depose in favour of the respondent. There is also no dispute among the parties that there are some trees on the land in dispute. The Commissioner, who visited the spot also found naali which was connecting agricultural field of the respondent situated towards south of the land in dispute from pond, in regard to which a specific plea has been made by the respondent that it was made by him for irrigation of his field. The appellants could not deny the existence of it, which also supports the case of the respondent that he is

in possession of the land in dispute, which was being used by him for keeping cattle, ghoor etc. It is settled law that if any person is in possession of any land by any means, he can be ejected only by the real owner in accordance with law and none else. Therefore, merely because the land in dispute is situated at some distance from the house of the respondent, his possession cannot be disbelieved on the land in dispute, when it is proved by evidence and admittedly the agricultural filed of the respondent is situated towards south of the land in dispute, adjacent to it since before the chakbandi operation. The aforesaid concurrent findings of fact have been recorded by the trial court as well as the appellate court and held that it cannot be said that the possession of the respondent over the land in dispute was without any basis.

18. While considering the case of the appellants, it has been found by the appellate court that the defendant i.e. the appellant Gaya Prasad, who is owner of the house situated towards east of the land in dispute has not appeared and adduced any evidence. His brother, Lakshmi Prasad appeared as D.W.1. Though the appellants had set up a case in the written statement that the partition had taken place about 35-36 years back between the brothers but D.W.1 could not state as to when the partition had taken place. In fact the D.W.1 tried to conceal the material facts. D.W.2 Gaya Charan, who has constructed the house of Gaya Prasad stated that his house was constructed about 30 years back. In his cross examination, he has admitted his age as 45 years. Therefore according to him, the house of Gaya Prasad is now about 30 years old, whereas according to the evidence of D.W.3 Jokhu, it was about 20 years old because he stated that when this house was constructed he was aged about 25 years and his statement was recorded in the year 1982 and his age at that time was 45 years. However, according to the commissioner, the house of Gaya Prasad was old one, therefore the appellants have not given the correct and true facts and concealed.

19. The respondent had set up a case that the appellant had no door on the side of the land in dispute and commissioner who visited the spot during pendency of the suit has clearly mentioned in his report that the door was new one and it was opened newly as was evident from the fresh mud used . He has also reported that the disputed construction marked by letters ka, Kha,Pa,Pha was under construction at the time of his visit and it was new one and he found no sign of old construction on the land in dispute. The appellants have failed to give any cogent evidence to show that there was any old construction on the land in dispute. The commissioner has also found some pits in the land in dispute, from where the trees were cut. D.W.2 has also admitted in his cross examination that at the time of construction of ka, Kha,Pa,Pha,he found some dry cut trees on the land in dispute, in regard to which no explanation has been given by the appellants in their written statement or evidence. D.W.2,has stated that he had constructed the house in the year 1956 and his statement was recorded in the year 1982 therefore the house of Gaya Prasad must have been constructed 25 years back but he has also stated that he had gone to his house about two years back for certain repairs. Therefore on the basis of above, the courts below found that the respondent is in possession of the land in dispute and as correctly observed by first appellate court that the person in possession can be evicted only by the owner of the house that too only in accordance with law and the appellants

have failed to prove their ownership and possession on the land in dispute.

20. The Hon'ble Supreme Court, in the case of ***Smriti Debbarma (Dead) through Legal Representative versus Prabha Ranjan Debbarma and Others(supra)*** has held that a person in possession of the land in the assumed character as the owner, and exercising peacebly the ordinary rights of ownership, has a legal right against the entire world except the rightful owner and lies on the party who asserts the existence of a particular state of things on the basis of which she claims relief.

21. The Hon'ble Supreme Court, in the case of ***Ravinder Kaur Grewal and others versus Manjit Kaur and others(supra)***, has held that a person in possession cannot be ousted by another person except by due procedure of law.

22. In view of above the courts below have recorded concurrent findings of facts on the basis of pleadings and evidence of the parties and held that the respondent is in possession on the land in dispute and the appellants have opened a door towards the west of their house on the land in dispute and raised certain constructions on it. This Court does not find any illegality or perversity in the concurrent findings recorded by the courts below, which may require any interference by this Court.

23. A coordinate Bench of this Court, in the case of ***Suryakunwari versus Nanhu and Others(supra)***, considering several judgments including Dalip Singh versus Bhupinder Kaur(supra) has held that the concurrent findings of fact recorded by the two courts are not liable to be set aside unless and until the findings are perverse. The relevant paragraphs 11 to 16 are extracted here-in-below:-

"11. In this case, there are concurrent findings on facts by both the courts below. The Hon'ble Apex Court in catena of judgments has laid down the law that the concurrent findings of fact recorded by two courts below should not be interfered by the High Court in Second Appeal, unless and until the findings are perverse.

12. In a recent case of Shivah Balram Haibatti Vs. Avinash Maruthi Pawar (2018)11 SCC 652 the Apex Court has held as under:-

"..... These findings being concurrent findings of fact were binding on the High Court and, therefore, the second appeal should have been dismissed in limine as involving no substantial question of law."

13. In another recent case of Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564 the Hon'ble Apex Court held as under:-

"...interference in second appeal with finding of fact is permissible where such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or where that finding is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law permitting interference in Second Appeal."

14. In one more recent case Dalip Singh Vs. Bhupinder Kaur, (2018) 3 SCC 677 the Hon'ble Apex Court has held that if there is no perversity in concurrent findings of fact, interference by the High Court in Second Appeal is not permissible.

15. In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], the Apex Court held that a party is entitled to take an alternative plea. Such alternative pleas,

however, cannot be mutually destructive of each other.

16. In State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92 the Hon'ble Supreme Court has held as under :-

"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."

24. Similar view has been taken by a Coordinate Bench of this Court, in the case of ***Bhagauti Singh @ Chedi Singh S/O Madhuban Singh versus Mata Prasad Singh S/O Bhaggu Singh(supra),*** in which it has been held that it is crystal clear that the High Court in exercise of power under Section 100 CPC should not interfere in the findings of fact recorded by the first appellate court, which is a final court of fact or concurrent findings of fact unless the same are based on no evidence or perverse.

25. A coordinate Bench of this Court, in the case of ***Jangi Singh versus Brij Mohan Singh and others(supra),*** has held that both the courts below have recorded their finding on the basis of the evidence on record which does not give any rise to the substantial question of law as raised by the defendant-appellant. However observation in regard to appurtenant land is not applicable on the facts and circumstances of this case.

26. The Hon'ble Supreme Court in the case of ***Kapil Kumar versus Raj Kumar; (2022) 10 SCC 281,*** has held that unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 CPC.

27. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that trial court as well as the first appellate court have recorded finding of facts on the basis of the pleadings and evidence as well as the commission report, which does not suffer from any illegality,error or perversity which may require any interference by this Court. The aforesaid substantial questions of law formulated by this Court are answered accordingly. This second appeal has been filed on mis-conceived and baseless grounds, which is liable to be dismissed.

28. The second appeal is, accordingly, **dismissed** with cost.

(2024) 5 ILRA 1840
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Transfer Application (Criminal) No. 66 of 2022

Smt. Roshan Jahan ...Applicant
Versus
Hasmat Ali @ Chhedu & Anr.
...Opposite Parties

Counsel for the Applicant:
Subhash Bisaria

Counsel for the Opposite Parties:

Criminal Law – Criminal Procedure Code, 1973- Sections 125, 340 & 407 - Transfer Application – to transfer two Misc. Cases, from family court, Sitapur to Family court, Lucknow - on the ground of apprehension that opposite party may herm her and her family members – and they tried to influence the proceedings of trial at Sitapur – court finds that, the few instances may suggest heightened feelings amongst the contesting parties but they do not call for transfer of proceedings to another district – if she is aggrieved, she may approach competent forum for redressal of her grievances – held, the relative convenience and difficulties of all the parties are involved in the process which are taken into account - no credible case for transfer of trial to alternative venues outside the district is made out in present case - it is just a ploy adopted by the applicant to delay the proceedings – thus, no interference is required to entertain the instant application, accordingly, rejected. (Para – 8, 9)

Transfer Application Rejected. (E-11)

List of Cases cited:

1. Rajkumar Sabu Vs Sabu Trade private ltd. (2021 SCC online SC 3780,

2. Satish jaggi Vs St. of Chhatisgarh (2007) 3 SCC 62),

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

1. Heard Sri Subhash Bisaria, learned counsel for the applicant and Ms. Ankita Tripathi, learned A.G.A. for the State as well as perused the record.

2. This application Under Section 407 Cr.P.C. has been moved on behalf of applicant with a prayer to transfer the Misc. Case No.1151/2019, Misc. Case No.349/2021 and Misc. Case No.942/2021 for recovery of maintenance amount which is pending before the learned Principal Judge, Family Court, Sitapur, arising out of Criminal Case No.3702182/2014, under Section 125 Cr.P.C. and also Misc. Case No.741/2017, under Section 340 Cr.P.C. to the court of learned Principal Judge, Family Court, Lucknow.

3. Learned Counsel for the applicant submits that the applicant is the wife of opposite party No.1 and she lives in Lucknow, Uttar Pradesh and she always lives in fear whenever she has to appear in District Court, Sitapur as she has an apprehension that the opposite party no.1 may harm her. He further submits that opposite party no.1 always threaten her and abused her and her family members whenever, she appeared in the Trial Court, Sitapur. He further submits that proceedings under Section 125 Cr.P.C. are also pending before the Family Court, Sitapur between the opposite party No.1 and the applicant. He further submits that the opposite party No.1 has tried to influence the proceeding of trial, thus, he submits that aforesaid case may be transferred to the Familcy Court, Lucknow so that the applicant may fully cooperate in the conclusion of case without any fear and the case may also be concluded in a fair manner.

4. On the other hand, learned A.G.A. for the State submits that it is just a ploy to delay the proceedings of the aforesaid case. There is no proper ground for transferring of the aforesaid case from one District Court to another District Court. She further submits that the applicant is adopting a delaying tactics as she has not made any averment regarding the injustice been done to her during the course of proceedings. Moreover, it cannot just be the convenience of the applicant but the private opposite party, the

witnesses and the prosecution. The larger issue of case normally being conducted by the jurisdictional court must also weigh on the issue. She is having an apprehension that the opposite party may harm, which is not a ground to transfer the case from one District to another. Thus, the instant application being devoid of merits is liable to be rejected.

5. After considering the over all facts and circumstances of the case as well as after hearing the learned counsel for the respective parties, this Court finds that the applicant and opposite party no.1 are contesting cases against each other in the concerned courts and it appears that the applicant has filed the present application only considering her own advantage, which is not a ground to transfer the case from one District to another District.

6. Further, the Hon'ble Supreme Court of India in the case of **Rajkumar Sabu vs. Sabu Trade Private Ltd** reported in **2021 SCC OnLine SC 378** has been pleased to observe in paragraph Nos.9 and 10, which are reproduced hereinbelow:

"9. Ordinarily, if a Court has jurisdiction to hear a case, the case ought to proceed in that Court only. The proceeding in the Salem Court has not been questioned on the ground of lack of jurisdiction but on the ground contemplated in Section 406 of the1973 Code. Jurisdiction under the aforesaid provision ought to be sparingly used, as held in the case of Nahar Singh Yadav v. Union of India [(2011) 1 SCC 307]. Such jurisdiction cannot be exercised on mere apprehension of one of the parties that justice would not be done in a given case. This was broadly the ratio in the case of Gurcharan Dass Chadha (supra). In my opinion if a Court hearing a case possesses the jurisdiction to proceed with the same, solely based on the fact that one of the parties to that case is unable to follow the language of that Court would not warrant exercise of jurisdiction of this Court under Section 406 of the 1973 Code. Records reveal that aid of translator is available in the Salem Court, which could overcome this difficulty. If required, the petitioner may take the aid of interpreter also, as may be available.

10. The petitioner's plea for transfer is based primarily on convenience. But convenience of one of the parties cannot be a ground for allowing his application. Transfer of a criminal case under Section 406 of the 1973 Code can be directed when such transfer would be "expedient for the ends of justice". This expression entails factors beyond mere convenience of the parties or one of them in conducting a case before a Court having jurisdiction to hear the case. The parties are related, and are essentially fighting commercial litigations filed in multiple jurisdictions. While instituting civil suits, both the parties had chosen fora, some of which were away from their primary places of business, or the main places of business of the defendants. The ratio of the decision of this Court in the case of Mrudul M. Damle (supra) cannot apply in the factual context of this case. In that case, a proceeding pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi was directed to be transferred to the Special Judge, CBI cases, Court of Session, Thane. Out of 92 witnesses enlisted in the charge sheet, 88 were from different parts of Maharashtra. That was a case which this Court found was not "Delhi-centric". The accused persons were based in western part of this Country. It was because of these reasons, the case was directed to be transferred. The circumstances surrounding the case pending in the Salem Court are

entirely different. In the case of Rajesh Talwar v. CBI [(2012) 4 SCC 217] it was held: ?

"46. Jurisdiction of a court to conduct criminal prosecution is based on the provisions of the Code of Criminal Procedure. Often either the complainant or the accused have to travel across an entire State to attend to criminal proceedings before a jurisdictional court. In some cases to reach the venue of the trial court, a complainant or an accused may have to travel across several States. Likewise, witnesses too may also have to travel long distances in order to depose before the jurisdictional court. If the plea of inconvenience for transferring the cases from one court to another, on the basis of time taken to travel to the court conducting the criminal trial is accepted, the provisions contained in the Criminal procedure Code earmarking the courts having jurisdiction to try cases would be rendered meaningless. Convenience or inconvenience are inconsequential so far as the mandate of law is concerned. The instant plea, therefore, deserves outright rejection.""

7. Further, the Hon'ble Supreme Court in the case of **Satish Jaggi v. State of Chhattisgarh, (2007) 3 SCC 62** has been pleased to observe paragraph Nos. 5, 6 and 7, which are reproduced hereinbelow:-

"5. The law with regard to transfer of cases is well settled. This Court in Gurcharan Das Chadha v. State of Rajasthan [AIR 1966 SC 1418] held that a case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. This Court said that a petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. This Court further held that it is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. The court has further to see whether the apprehension is reasonable or not. This Court also said that to judge the reasonableness of the apprehension, the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the court to be a reasonable apprehension.

6. It was further held by this Court in Maneka Sanjay Gandhi v. Rani Jethmalani [(1979) 4 SCC 167 : 1979 SCC (Cri) 934 : AIR 1979 SC 468] that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or availability of legal services or any like grievance. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. This Court, in the facts and circumstances of the case, said that the grounds for the transfer have to be tested on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. It further said that even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.

7. In Abdul Nazar Madani v. State of T.N. [(2000) 6 SCC 204 : 2000 SCC (Cri)

1048 : AIR 2000 SC 2293] this Court stated that the purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Code. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, if any, the witnesses and the larger interest of the society."

8. It is further observed here that from the available material, this Court cannot reasonably conclude that the situation in Sitapur is not conducive for a fair conclusion of case for the applicant. The few instances mentioned by the applicant's counsel may suggest heightened feelings amongst the contesting parties but they do not in my estimation, call for transfer of proceedings to another District. Moreover, it cannot just be the convenience of the applicant but the private opposite party, the witnesses and the prosecution. The larger issue of cases normally being conducted by the jurisdictional court must also weigh on the issue. When relative convenience and difficulties of all the parties involved in the process are taken into account, the conclusion is inevitable that no credible case for transfer of trial to alternative venues outside the District is made out, in the present matter.

9. Thus, in view of the observations/discussions and judgment of the Hon'ble Supreme Court, this Court finds that there is no good ground for transfer of the case from one District Court to the another. It is just a ploy adopted by the applicant to delay the proceedings of the aforesaid case as she is having an apprehension that the opposite party no.1 may harm her, which is not a ground to transfer the case from one District to another, if she is aggrieved, she may approach competent forum for redressal of her grievances. Thus, no interference is required by this Court to entertain the instant application moved under Section 407 Cr.P.C. and the same is liable to be rejected.

10. The present application is, accordingly, **rejected.**

(2024) 5 ILRA 1844
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Transfer Application (Criminal) No. 93 of 2023

Jay Singh & Ors. ...Applicants
Versus
State of U.P & Ors. ...Opposite Parties

Counsel for the Applicants:
Ashish Kumar Singh

Counsel for the Opposite Parties:
G.A., Kuldeep, Shikhar Deep Singh

Criminal Law – Criminal Procedure Code, 1973 - Section – 407, - Indian Penal Code, Sections 323, 504 & 498-A - Dowry Prohibition Act, 1961 – Sections 3 & 4 - Transfer Application – for transfer of Criminal Case from district Gonda to Lakhimpur Kheri - on the ground that opposite parties along with family members abusing and engaged into scuffle and threatened the applicants to kill – court finds that, the few instances may suggest heightened feelings amongst the contesting parties but they do not call for transfer of proceedings to another district – if they are aggrieved, they may approach competent forum for redressal of their grievances – held, the relative convenience and difficulties of all the parties are involved in the process which are taken into account - no credible case for transfer of trial to alternative venues outside the district is made out in present case - it is just a ploy adopted by the applicants to delay the proceedings – thus, no interference is required to entertain the instant application, accordingly, rejected. (Para – 4, 5)

Transfer Application Rejected. (E-11)

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

1. Heard learned counsel for the applicant, learned Counsel for the opposite party No.2 and learned A.G.A. for the State and perused the material placed on record.

2. By means of the instant application filed under Section 407 CrPC, the applicants have sought transfer of Criminal Case No. 890 of 2017 arising out of Case Crime No. 61 of 2017 under Sections 323, 504, 498-A I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961, Police Station- Itiathok, District- Gonda from District- Gonda to equally competent court of nearby district preferably to District- Lakhimpur Kheri to try the case.

3. The only ground which has been taken in the transfer application is that the opposite party No.2 alongwith his family members have ambushed the applicants on 05.06.2023 in the court compound at about 11:00 A.M. and started abusing and later engaged into scuffle and threatened the applicants to kill.

4. After considering the submissions advanced by learned Counsel for the parties and after going through the available material, this Court cannot reasonably conclude that the situation in Gonda is not conducive for a fair trial for the applicants. The few instances mentioned by the applicants' counsel may suggest heightened feelings amongst the contesting parties but they do not in my estimation, call for transfer of proceedings to another District. Moreover, it cannot just be the convenience of the applicants but the private opposite parties, the witnesses, the prosecution. The larger issue of trial normally being conducted by the jurisdictional court must also weigh on the issue. When relative convenience and difficulties of all the parties involved in the process are taken into account, the conclusion is inevitable that no credible case for transfer of trial to alternative venues outside the District is made out, in the present matter.

5. Thus, in view of the observations/discussions, this Court finds that there is no good ground for transfer of the case from one District Court to the another. It is just a ploy adopted by the applicants to delay the proceedings of the aforesaid trial as they are having an apprehension that the opposite parties may harm them, which is not a ground to transfer the case from one District to another, if they are aggrieved, they may approach competent forum for redressal of their

grievances. Thus, no interference is required by this Court to entertain the instant application moved under Section 407 Cr.P.C. and the same is liable to be rejected.

6. The present application is, accordingly, ***rejected.***

(2024) 5 ILRA 1846
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 2491 of 2024

Ravindra Kumar Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Veer Bahadur La Srivasta, Alok Kumar Mishra, Chandan Srivastava

Counsel for the Opposite Parties:
G.A., Dharmendra Gupta

Civil Law - Negotiable Instrument Act,1881 - Section 147-Application filed to compound the offence u/s 138 NI Act and to quash the impugned judgment whereby Applicant has been convicted u/s 138 NI Act-sec. 147 N.I.Act – parties have settled the dispute amicably-the said Act is at liberty to compound the matter at any stage-compounding of the offence may be released by invoking sec.482 Cr.P.C. read with Article 226 of the Constitution of India-no bar.

Application allowed. (E-9)

List of Cases cited:

1. Damodar S. Prabhu Vs Sayed Babalal H 2010 (2) SCC (Cri) 1328

2. M/s Meters and Instruments Pvt. Ltd. & anr. Vs Kanchan Mehta, 2017 (7) Supreme 558

3. Kripal Singh Pratap Singh Ori Vs Salvinder Kaur Hardip Singh , 2004 Crl. L. J. 3786

4. Vinay Devanna Nayak Vs Ryot Seva Sahkari Bank Limited, AIR 2008 SC 716

5. Tanveer Aquil Vs St. of M.P. & anr. (19990) Supp SCC 63

6. Narinder Singh Vs St. of Punjab (2014) 6 SCC 466

7. Rajinder Prasad Vs Bashir & ors.; AIR 2001 SC 3524

8. Krishan Vs Krishnaveni, (1997) 4 SCC 241

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

10. Municipal Corporation, Indore Vs Ratnaprabha (AIR 1977 SC 308)

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

1. Heard Sri Veer Bahadur Lal Srivastava, learned counsel for the applicant, Sri Ashok Srivastava, learned A.G.A. for the State opposite party no.1 and Sri Dharmendra Gupta, learned counsel for the opposite party no.2

2. The instant application under section 482 Cr. P.C. has been filed with the prayer to compound the offence committed by the applicant under Section 138 of the Negotiable Instrument Act, 1881 in Complaint Case No.7097 of 2017, Police Station Talkatora, District Lucknow (Sanchetna Financial Services Private Limited Vs. Ravindra Kumar Yadav) and further to quash the impugned judgment and order dated 07.04.2021 passed by learned Court of Additional Court No.3 (N.I. Act), Lucknow, whereby the applicant has been convicted under Section 138 of the Negotiable Instrument Act, 1881 and has been directed to undergo imprisonment for

two years alongwith fine of Rs.45,00,000/- and in case of default of payment of fine, the applicant has been directed to undergo additional simple imprisonment for a period of one and half year. A sum of Rs.38,00,000/- was directed to be paid to the complainant as damages.

3. The facts of the case, in brief, are that the applicant had taken a sum of Rs.30,00,000/- as loan from the opposite party no.2 and became defaulter in paying the installment.

4. Thereafter, the applicant agreed to pay the entire dues to the opposite party no.2 and had issued cheque bearing No.000034 dated 05.09.2017 of Kotak Mahindra Bank, Vishal Khand, Gomti Nagar, Lucknow for Rs.27,60,000/-, however, when the same was presented by the opposite party no.2, it got dishonored with the reason "Funds Insufficient".

5. Thereafter, the opposite party no.2 filed a Complaint Case No.7097 of 2017, under Section 138 of the Negotiable Instrument Act, 1881, Police Station Talkatora, District Lucknow. After the completion of trial, the trial court has convicted the applicant vide judgment and order dated 07.04.2021 and sentenced him for a period of two years alongwith fine of Rs.45,00,000/- and in case of default of payment of fine, the applicant has been directed to undergo additional simple imprisonment for a period of one and half year. A sum of Rs.38,00,000/- was directed to be paid to the complainant as damages.

6. Thereafter, the applicant has preferred a Criminal Appeal No.165 of 2021 against the impugned judgment and order dated 07.04.2021 passed by the learned Additional Court No.3 (N.I. Act), Lucknow, however, the same was dismissed by means of judgment and order dated 16.01.2024 passed by the learned Additional Sessions Judge, Court No.3, Lucknow and the applicant was directed to surrender before the learned trial court on 07.02.2024 to undergo sentence.

7. The applicant had already deposited Rs.9,00,000/- before the learned Additional Court No.3 (N.I. Act), Lucknow in compliance of the order passed by learned Sessions Judge, Lucknow during the hearing of Criminal Appeal No.165 of 2021.

8. Thereafter, the applicant had preferred a Criminal Revision before this Court bearing Criminal Revision No.104 of 2024, which too got dismissed at the admission stage vide order dated 08.02.2024.

9. Learned counsel for the applicant submits that the applicant has surrendered himself before the learned trial court on 07.02.2024 in compliance of the judgment and order dated 16.01.2024 passed by the court of learned Additional Sessions Judge, Court No.3, Lucknow in Criminal Appeal No.165 of 2021 and now he is languishing in jail in connection with the aforesaid case.

10. Learned counsel for the applicant further submits that after the rejection of Criminal Revision No.104 of 2024, both the parties have entered into compromise and a written compromise agreement dated 07.03.2024 has been prepared to the effect that the instant matter shall be settled in accordance with the terms and conditions as contained therein.

11. Learned counsel for the applicant further submits that the applicant is ready to make payment of Rs.38,00,000/- in

accordance with the terms and conditions as contained in the compromise dated 07.03.2024. He further submits that Rs.20,00,000/- has been received by the opposite party no.2 through Demand Draft No.253932 dated 07.03.2024 of Yes Bank Ltd., Gomti Nagar, Lucknow.

12. With this background, learned counsel for the applicant has submitted that this petition has been filed on 12.03.2024 on the basis of changed circumstances with the prayer to compound the offence. Learned counsel further submits that this Hon'ble Court may invoke its inherent power under Section 482 Cr.P.C. so that ends of justice could be secured as the object of 'N. I. Act' is primarily compensatory and not punitive and moreover Section 147 of 'N.I. Act' would have an overriding effect on section 320 Cr.P.C. irrespective of which stage the parties are compromising with the kind leave of this Hon'ble Court.

13. In support of his arguments, learned counsel for the applicant has submitted that in the case of **Damodar S. Prabhu vs. Sayed Babalal H** reported at **2010 (2) SCC (Cri) 1328,** the Hon'ble Apex Court had formulated the guidelines for compounding the offence under section 138 N.I. Act wherein in para 21, it was pleased to observe as under :

"With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

14. Learned counsel for the applicant also submitted that in the case of **M/s Meters and Instruments Private Limited and another vs. Kanchan Mehta** reported

at **2017 (7) Supreme 558** Hon'ble the Apex Court in para 18, was pleased to observe as under :

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

(ii)The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

(iii)Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

(iv)Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

(v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

15. Learned counsel for the applicant further submitted that the application under section 482 Cr.P.C. is maintainable after the dismissal of the revision on merit. To support of this arguments, he has relied upon the judgment of Gujarat High Court in the case of **Kripal Singh Pratap Singh Ori vs. Salvinder Kaur Hardip Singh reported at 2004 Crl. L. J. 3786** wherein, the Gujarat High Court was pleased to observe as under:-

"16.I have considered the decisions cited by the learned counsel for

the respective party and some other decisions of the Apex Court and I do not think it necessary to enlist those decisions which are taken into consideration for the purpose of the present proceedings. But ultimately one balanced principle has emerged that the petitions invoking inherent powers under section 482 Cr.P.C. after dismissal/disposal or revision application under section 397 Cr.P.C. read with section 401 Cr.P.C., are not maintainable by the same party, more so when no special circumstances are made out. The gist of this ratio is reflected in the decision reported in AIR 2001 SC 3524 in the case of Rajinder Prasad vs. Bashir and ors. It was contended before the Apex Court that as the earlier revision petition filed by the accused persons under section 397 of the Code has been rejected by the High Court vide order dated 13.7.1990, they had no right to file the petition under section 482 of the Code with prayer for QUASHING the same order. While dealing with the above contention the Apex Court observed that, "...We do not agree with the arguments of the learned counsel for the respondents that as the earlier application had been dismissed as not pressed, the accused had acquired a right to challenge the order adding the offence under section 395 of the Code ..." (i.e. IPC) It is further observed that, "We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court under Section 482 of the Code and the impugned order is liable to be set aside on this ground alone."

17. So can be legitimately argued and inferred and held that in all cases where the petitioners are able to satisfy this court that there are special circumstances which can be clearly spelt out , subsequent application invoking INHERENT powers under section 482 Cr.P.C. can be moved and cannot be thrown away on the technical argument as to its sustainability. The apex court in case of Rajendra Prasad (supra) was dealing with a case related to first part of section 482 Cr.P.C. but, when it comes to third part, the approach should remain more pragmatic and indirect relegation to Supreme Court, if legally possible, can be prevented.

31. In the circumstances, it is hereby declared that the compromise arrived between the parties to this litigation out of court is accepted as genuine and the order of conviction and sentence passed by the learned JMFC, Vadodara and confirmed in appeal by the learned Sessions Judge, Fast Track Court, Vadodara, therefore, on the given set of facts are hereby quashed and set aside as this court intends, otherwise to secure the ends of justice as provided under section 482 Cr.P.C. Obviously the order disposing Revision Application would not have any enforceable effect.

16. Learned counsel for the applicant has also relied upon the judgment of Hon'ble the Apex Court in the case of **Vinay Devanna Nayak vs. Ryot Seva Sahkari Bank Limited reported at AIR 2008 SC 716** wherein the Hon'ble Apex Court was pleased to observe as under :

"18. Taking into consideration even the said provision (Section 147) and the primary object underlying Section 138, in our judgment, there is no reason to refuse compromise between the parties. We, therefore, dispose of the appeal on the basis of the settlement arrived at between the appellant and the respondent.

19. For the foregoing reasons the appeal deserves to be allowed and is accordingly allowed by holding that since the matter has been compromised between the parties and the amount of Rs.45,000/-

has been paid by the appellant towards full and final settlement to the respondent-bank towards its dues, the appellant is entitled to acquittal. The order of conviction and sentence recorded by all courts is set aside and he is acquitted of the charge levelled against him."

17. Learned counsel for the applicant has argued that the law regarding compounding of offences under the N.I. Act is very clear and is no more res integra and the offences under the N. I. Act can be compounded even at any stage of the proceedings. He submits that in terms of the aforesaid law laid down by the Hon'ble Supreme Court, the parties may be permitted to compound the offence and the conviction of the petitioner be set aside.

18. Per-contra, learned AGA for the State has vehemently opposed the submissions made by the learned counsel for the applicant and submitted that the instant application under section 482 Cr.P.C. is not maintainable as the applicant has already been convicted by the learned trial court and the conviction order has been upheld by the appellate court and by this Hon'ble Court in the revision. Learned AGA has submitted that the present application under section 482 Cr.P.C. is not maintainable as the High Court has dismissed the revision application on merits. It is further submitted that in view of the provisions of Sub-section (6) of Section 320 Cr.P.C. and the observations made by the Hon'ble Supreme Court in the case of **Tanveer Aquil vs. State of M.P. and another (19990) Supp SCC 63**, the parties should be relegated to the Hon'ble Apex Court to initiate appropriate proceedings to get the actual affect of compromise arrived at between the parties. In the case of **Tanveer Aquil (supra)**, the appellant was convicted under section 324 I.P.C. and was ordered to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-. After the pronouncement of the judgment by the High Court, the learned Counsel appeared and pleaded for an opportunity of hearing and at that stage the High Court again heard the matter and added a postscript in the judgment confirming the conviction and sentence. The petitioner thereafter had moved the High Court for a compromise to compound the offence. It was submitted to the High Court that the accused has paid a sum of Rs.3,500/- to the complainant and the learned Counsel for the complainant confirmed of having received the amount of Rs. 3,500/- in token of the compromise arrived between the parties. In Para 1 of the cited decision the Apex Court has observed that *"..... but the High Court did not and indeed could not take into consideration that application since it has deposed of the matter already."*

19. Learned AGA has also submitted that when this Court has already rejected the revision application on merits, whether the parties or any one of them can be permitted to place compromise and to get an order of acquittal from the very Court, is the question. Therefore, in more than one decisions, the Hon'ble Apex Court has observed that the petition invoking inherent powers under section 482 Cr.P.C. is not maintainable when the earlier revision application filed under Section 397 Cr.P.C. read with Section 401 Cr.P.C. seeking same or similar relief, when dismissed on merit, or has not pressed. However, in the same way the Hon'ble Apex Court has observed in more than one cases that such petitions, though otherwise, are not maintainable, can even be entertained when special circumstances are made out. These observations are in reference to third part of Section 482 of Cr. P.C. Learned AGA has

submitted that the present case is nothing but a gross misuse of the process of the law. There is no ground available to the applicant for invoking the inherent power under section 482 Cr.P.C. for compounding the sentence on the basis of the compromise as filed by the applicant. The present application is devoid of any merit hence it is to be dismissed.

20. I have heard the learned counsel for the parties and carefully perused the compromise arrived at between the parties and other materials on record.

21. Considering the facts as narrated above, the following two questions arise for consideration -

Whether an order passed by the High Court in the criminal revision petition confirming the conviction can be nullified by the High Court in a petition filed under section 482 Cr.P.C. noticing subsequent compromise of the case by the contesting parties ?

22. Before answering the aforesaid questions as framed, I shall examine the relevant provisions of the Cr.P.C. as well the Negotiable Instrument Act. I may extract the Section 320 Cr.P.C., Section 147 of the Negotiable Instrument Act and Section 482 Cr.P.C.

Section 320 Cr.P.C. - Compounding of Offences -

1) The offences punishable under the sections of the Indian Penal Code (45 of 1860), specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table -

2) The offences punishable under the Sections of the Indian Penal Code (45 of 1860), specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending be compounded by the persons mentioned in the third column of that Table -

3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

4) (a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court, compound such offence.

5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, before which the appeal is to be heard.

6) A High Court or Court of Session acting in the exercise of its powers of revision under Section 401 may allow any person to compound any offence which such person is competent to compound under this section.

7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to

enhanced punishment or to a punishment of a different kind for such offence.

8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

9) No offence shall be compounded except as provided by this section.

Section 147 of the Negotiable Instrument Act :'

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

Section 482 Cr.P.C. :

Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

23. I have to refer the compromise deed which is on the record for proper adjudication :-

सुलहनामा

रवीन्द्र कुमार यादव पुत्र श्री शिव कुमार यादव निवासी–ग्राम धावा मजरे, इमलिया थाना–चिनहट, लखनऊ द्वारा भाई संदीप यादव पुत्र श्री शिव कुमार निवासी–देवा रोड पी0ए0सी0 फार्म खण्डक, लखनऊ।

प्रथम पक्ष

एवम्

संचेतना फाइनेन्शियल प्राइवेट लिमिटेड द्वारा डायरेक्टर विनोद कुमार राय, पता–रजिस्टर्ड आफिस शाप नं0–3 टाईप–एस–02, सी0एस0सी0–5, अवन्तिका रोहिणी, नई दिल्ली व कम्पाउण्ड ऑफिस बी–348/3, राजाजीपुरम थाना–तालकटोरा, जिला लखनउ।

द्वितीय पक्ष

हम दोनों उभय पक्ष निम्नलिखित शर्तों पर पाबन्द होते हैं:–

1. यह कि प्रथम पक्ष ने द्वितीय पक्ष से रू0 30,00,000/– (रूपये तीस लाख मात्र) का लोन प्राप्त किया था, जिसके किस्तों के भुगतान में चूक होने पर प्रथम पक्ष ने बचे हुए लोन धनराशि के पूर्ण भुगतान हेतु एक चेक सं0–000034 दिनांकित 05.09.2017 को धनराशि रू0 27,60,000/– (रूपये सत्ताईस लाख साठ हजार) के भुगतान हेतु द्वितीय पक्ष के पक्ष में जारी किया था।

2. यह कि प्रथम पक्ष द्वारा जारी किये गये उक्त चेक को द्वितीय पक्ष ने भुगतान हेतु बैंक में प्रस्तुत किया जो कि "FUNDS INSUFFICIENT" की टिप्पणी के साथ अनादरित हो कर द्वितीय पक्ष को वापस प्राप्त हो गया।

3. यह कि चेक अनादरित होने के उपरान्त द्वितीय पट्टा ने प्रथम पक्ष के विरूद्ध एक वाद अन्तर्गत धारा–138 एन.आई.एक्ट के तहत माननीय न्यायालय के समक्ष दाखिल किया गया, जिसे न्यायालय श्रीमान अतिरिक्त न्यायालय कक्ष सं0–3, लखनऊ द्वारा दिनांक 07.04.2021 को निर्णीत करते हुए निम्न आदेश पारित किया गया:– ''सिद्ध दोषी रवीन्द्र कुमार यादव को परक्राम्य लिखत अधिनियम–1881 की धारा–138 के अधीन दण्डनीय अपराध कारित करने के लिए दो वर्ष के साधारण कारावास की सजा तथा रू0 45,00,000/–(रूपये पैंतालिस लाख मात्र) अर्थदण्ड की सजा से दण्डित किया जाता है। अर्थदण्ड न अदा करने की दशा में सिद्ध दोषी एक वर्ष छः माह के साधारण कारावास के अतिरिक्त सजा भुगतेगा। अर्थदण्ड की धनराशि में से 38,00,000/– (रूपये अड़तीलस लाख मात्र) परिवादी को प्रतिकर के रूप में भुगतान किये जायेंगे। ''

4. यह कि प्रथम पक्ष ने उपरोक्त निर्णय एवं आदेश दिनांकित 07.04.2021 के विरूद्ध माननीय सत्र न्यायाधीश लखनऊ के समक्ष अपील संख्या–165/2021 प्रस्तुत किया, जो कि न्यायालय श्रीमान् अपर एवं सत्र न्यायाधीश, कक्ष संख्या–3 लखनऊ द्वारा पारित निर्णय एवं आदेश दिनांकित 16.01.2024 के माध्यम से निरस्त कर दी गयी तथा प्रथम पक्ष निर्णय एवं आदेश दिनांकित 16.01.2024 के अनुपालन में दिनांक 07.02.2024 को आत्म समर्पण कर जिला कारागार लखनऊ में निरूद्ध है।

5. यह कि उपरोक्त अपील में माननीय सत्र न्यायाधीश, लखनऊ द्वारा पारित आदेश के अनुपालन में प्रथम पक्ष द्वारा रू0 9,00,000/– (रूपये नौ लाख मात्र) विचारण न्यायालय में जमा किया जा चुका है।

6. यह कि प्रथम पक्ष ने न्यायालय श्रीमान् अपर सत्र न्यायाधीश, कक्ष सं0–3, लखनऊ द्वारा पारित उपरोक्त निर्णय एवं आदेश दिनांकित 16.01.2024 के विरूद्ध माननीय उच्च न्यायालय के समक्ष एक आपराधिक निगरानी संख्या–04/2024 योजित किया था जो कि

आदेश दिनांकित 08.02.2024 के माध्यम से निरस्त कर दिया गया।

7. यह कि प्रथम पक्ष द्वितीय पक्ष को कुल धनराशि रू0 38,00,000/– (रूपये अड़तीस लाख मात्र) भुगतान करने को तैयार है।

8. यह कि प्रथम पक्ष द्वितीय पक्ष को निम्न प्रकार से भुगतान करेगाः–

,पद्ध डिमाण्ड ड्राफ्ट सं0–253931 दिनांकित 06.03.2024 एवं डिमाण्ड ड्राफ्ट संख्या–253932 दिनांकित 07.03.2024, यस बैंक लिमिटेड,गोमती नगर, लखनऊ के माध्यम से रू0 20,00,000/– (रूपये बीस लाख मात्र) इस सुलहनामा के निष्पादन के समय द्वितीय पक्ष को प्रदान कर रहा है।

,पपद्ध बकाया धनराशि रू0 18,00,000/– (अट्ठारह लाख मात्र) में से रू0 9,00,000/– (रूपये नौ लाख) जो कि विचारण न्यायालय में दौरान विचारण अपील प्रथम पक्ष द्वारा जमा किया गया था को द्वितीय पक्ष अपने पक्ष में अवमुक्त करायेगा और रू0 9,00,000/– (रूपये नौ लाख) प्रथम पक्ष जिला कारागार लखनऊ से रिहा होने के एक माह के भीतर जरिये डिमाण्ड ड्राफ्ट द्वितीय पक्ष को अदा करेगा। यदि किन्हीं कारणों से विचारण न्यायालय में जमा धनराशि रू0 9,00,000/–द्वितीय पक्ष के पक्ष में अवमुक्त नहीं होता है। तो उक्त रू0 9,00,000/– का भी भुगतान प्रथम पक्ष द्वारा द्वितीय पक्ष को उसी समय किया जायेगा।

9. यह कि द्वितीय पक्ष भी उपरोक्त भुगतान प्राप्त करके इस आर्थिक विवाद को निपटाने हेतु तैयार है।

10. यह कि प्रथम पक्ष एवं द्वितीय पक्ष के मध्य अब काई विवाद शेष नहीं रह गया है।

11. यह कि उभय पक्ष इस बात से सहमत है कि वे प्रश्नगत आर्थिक विवाद के सम्बन्ध में न तो एक दूसरे के विरूद्ध कहीं कोई शिकायत दर्ज करायेंगे और न ही एक दूसरे के विरूद्ध न्यायालय अथवा सक्षम अधिकारी/प्राधिकारी के समक्ष कोई कार्यवाही संस्थित करेंगे। यदि भविष्य में उनके द्वारा कोई शिकायत/कार्यवाही संस्थित की जाती है तो वह शिकायत/कार्यवाही इस सुलहनामें के शर्तों के अधीन शून्य माने जायेंगे।

12. यह कि दोनों पक्ष इस सुलहनामें के शर्तों के अधीन प्रश्नगत विवाद को समाप्त करने एवं विचारण न्यायलय द्वारा पारित निर्णय व आदेश दिनांकित 07.04.2021 तथा अपर सत्र न्यायाधीश, कक्ष सं0–3, लखनऊ द्वारा पारित निर्णय एवं आदेश दिनांकित 16.01.2021 को अभिखण्डित किये जाने हेतु याचिका दाखिल व निस्तारण कराने में एक दूसरे को सहयोग करेंगे।

अतएव यह सुलहनामा हम उभय पक्षों ने सोच समझकर बिना किसी जोर दबाव या नाजायज व स्वस्थ चित्त मन से समक्ष गवाहान अपने–अपने हस्ताक्षर बनाकर तस्दीक किया जो कि प्रमाण हो और समय पर काम आवे।

24. It is well settled that inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and nor a specific remedy is provided by the statute. It is also well settled that if an effective alternative remedy is available, the High Court will not exercise its inherent power under this section, specially when the applicant may not have availed of that remedy.

25. Inherent powers under Section 482 of Cr.P.C. include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. The court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly and with caution.

26. The High Courts in deciding matters under Section 482 should be guided by following twin objectives, as laid down in the case of Narinder Singh vs. State of Punjab (2014) 6 SCC 466:

i. Prevent abuse of the process of the court.

ii. Secure the ends of justice.

iii. To give effect to an order under the Code.

27. In the instant case, it is true that this Court had dismissed the criminal revision and upheld the conviction and sentence passed by the court below but it cannot be lost sight of the fact that this Court has the power to intervene in exercise of the powers vested under section 482 Cr.P.C. only with a view to do the substantial justice or to avoid miscarriage and the spirit of the compromise arrived at between the parties. This is perfectly justified and legal too.

28. I have considered the judgments cited by the learned counsel for the applicant as well as by the learned Counsel for the State and other decisions of the Hon'ble Apex Court and I do not think it necessary to enlist those decisions which are taken into consideration for the purpose of the present proceedings.

29. In the instant case, the applicant is invoking the inherent power as vested under section 482 Cr.P.C. after the dismissal of the revision petition under section 397 Cr.P.C. read with section 401 Cr.P.C. In this circumstances, I have to examine the maintainability of the present application under section 482 Cr.P.C. and also to examine as to whether for entertaining the aforesaid application, any special circumstances are made out or not. The gist of the ratio is reflected in the decision of the Hon'ble Apex Court in the case of **Rajinder Prasad vs. Bashir and Others; AIR 2001 SC 3524**. In that case, it was contended before the Apex Court that as per the earlier revision filed by the accused persons under section 397 of the Code has been rejected by the High Court vide order dated 13.05.1990, they had no right to file the application under section 482 Cr.P.C. with the prayer for quashing the same order. While dealing with the above contention, the Apex Court observed as under:-

"We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court under section 482 of the Code and the impugned order is liable to be set aside on this ground alone."

So it can be legitimately argued and inferred and held that in all cases where the applicants are able to satisfy this court that there are special circumstances which can be clearly spelt out, subsequent application invoking inherent powers under section 482 Cr.P.C. can be moved and cannot be thrown away on the technical argument as to its sustainability.

30. In the case of **Krishan Vs. Krishnaveni, reported in (1997) 4 SCC 241,** Hon'ble the Apex Court has held that though the inherent power of the High Court is very wide, yet the same must be exercised sparingly and cautiously particularly in a case where the applicant is shown to have already invoked the revisional jurisdiction under section 397 of the Code. Only in cases where the High Court finds that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order was not correct, the High Court may in its discretion prevent the abuse of process or miscarriage of justice by exercising jurisdiction under section 482 of the Code.

31. In the case of **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice.

The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

32. For adjudicating the instant case, the facts as stated hereinabove are very relevant. Here, the applicant has attempted to invoke the jurisdiction of this court vested under section 482 Cr.P.C. The embargo of sub section 6 of section 320 Cr.P.C. as pointed out by learned AGA would not come in the way so far as the relief prayed in this application.

33. I am not in agreement that when the adjudication of a criminal offence has reached to the state of revisional level, there cannot be any compromise without permission of the court in all case including the offence punishable under 'N.I. Act' or the offence mentioned in Table-1 (one) can be compounded only if High Court or Court of Sessions grants permission for such purpose. The Court presently, concerned with an offence punishable under 'N.I. Act'.

34. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point I can refer to the following extracts from an academic commentary [Cited from : K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, 5th Edition :

"17.2 - compounding of offences - A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the court…"

35. Section 147 of NI Act begins with a non obstante clause and such clause is being used in a provision to communicate that the provision shall prevail despite anything to the contrary in any other or different legal provisions. So, in light of the compass provided, a dispute in the nature of complaint under section 138 of N.I. Act, can be settled by way of compromise irrespective of any other legislation including Cr.P.C. in general and section 320 (1)(2) or (6) of the Cr.P.C. in particular. The scheme of section 320 Cr.P.C. deals mainly with procedural aspects; but it simultaneously crystallizes certain enforceable rights and obligation. Hence, this provision has an element of substantive legislation and therefore, it can be said that the scheme of section 320 does not lay down only procedure; but still, the status of the scheme remains under a general law of procedure and as per the accepted proposition of law, the special law would prevail over general law. For the sake of convenience, I would like to quote the observations of Hon'ble the Apex Court in the case of Municipal Corporation, Indore vs. Ratnaprabha reported in (AIR 1977 SC 308) which reads as under :

"As has been stated, clause (b) of section 138 of the Act provides that the annual value of any building shall "notwithstanding anything contained in any other law for the time being in force" be deemed to be the gross annual rent for which the building might "reasonably at the time of the assessment be expected to be let from year to year" While therefore, the

requirement of the law is that the reasonable letting value should determine the annual value of the building, it has also been specifically provided that this would be so "notwithstanding anything contained in any other law for the time being in force". It appears to us that it would be a proper interpretation of the provisions of clause (b) of Section 138 of the Act to hold that in a case where the standard rent of a building has been fixed under Section 7 of the Madhya Pradesh Accommodation Control Act, and there is nothing to show that there has been fraud or collusion, that would be its reasonable letting value, but, where this is not so, and the building has never been let out and is being used in a manner where the question of fixing its standard rent does not arise, it would be permissible to fix its reasonable rent without regard to the provisions of the Madhya Pradesh Accommodation Control Act, 1961. This view will, in our opinion, give proper effect to the non-obstante clause in clause (b) with due regard to its other provision that the letting value should be "reasonable"

36. The expression 'special law' means a provision of law, which is not applicable generally but which applies to a particular or specific subject or class of subjects. Section 41 of Indian Penal Code stands on the same footing and defines the phrase special law. In this connection I would like to quote the well accepted proposition of law emerging from various observations made by the Hon'ble Apex Court in different decisions as a gist of the principle and it can be summarised as under:

"When a special law or a statute is applicable to a particular subject, then the same would prevail over a general law with regard to the very subject, is the accepted principle in the field of interpretation of statute."

37. In reference to offence under section 138 of N.I. Act read with section 147 of the said Act, the parties are at liberty to compound the matter at any stage even after the dismissal of the revision application. Even a convict undergoing imprisonment with the liability to pay the amount of fine imposed by the court and/or under an obligation to pay the amount of compensation if awarded, as per the scheme of N.I. Act, can compound the matter. The complainant i.e. person or persons affected can pray to the court that the accused, on compounding of the offence may be released by invoking jurisdiction of this court under section 482 Cr.P.C. If the parties are asked to approach the Apex Court then, what will be situation, is a question which is required to be considered in the background of another accepted progressive and pragmatic principle accepted by our courts that if possible, the parties should be provided justice at the door step. The phrase *"justice at the door step"* has taken the court to think and reach to a conclusion that it can be considered and looked into as one of such special circumstances for the purpose of compounding the offence under section 147 of the N. I. Act.

38. It is also well settled that the operation or effect of a general Act may be curtailed by special Act even if a general Act contains a non obstante clause. But here is not a case where the language of section 320 Cr.P.C. would come in the way in recording the compromise or in compounding the offence punishable under section 138 of the

N.I. Act. On the contrary provisions of section 147 of N.I. Act though starts with a non obstante clause, is an affirmative enactment and this is possible to infer from the scheme that has overriding effect on the intention of legislature reflected in section 320 Cr.P.C.

39. Merely because the litigation has reached to a revisional stage or that even beyond that stage, the nature and character of the offence would not change automatically and it would be wrong to hold that at revisional stage, the nature of offence punishable under Section 138 of the N.I. Act should be treated as if the same is falling under table-II of Section 320 IPC. I would like to reproduce some part of the statement of objects and reasons of the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002 :

"The Negotiable Instrument Act 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instrument Act, 1981, namely Section 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.

2. A large number of cases are reported to be pending under Sections 138 and 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act, pending in various courts, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act, 181 and make recommendations as to what changes were needed to effectively achieve the purpose of that Section.

3. .....

4. Keeping in view the recommendations of the Standing Committee on finance and other R/SCR.A/2491/2018 ORDER representations, it has been decided to bring out, inter alia the following amendments in the Negotiable Instrument Act 1881, namely.

(i) xxxxxx

(ii) xxxxxx

(iii) xxxxxx

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant.

(v) xxxxxx

(vi) xxxxx

(vii) to make the offences under the Act compoundable. .....

5. xxxxxx

6. The Bill seeks to achieve the above objects."

40. In a commentary the following observations have been made with regard to offence punishable under section 138 of the N.I. Act. [Cited from : Arun Mohan, Some thoughts towards law reforms on the topic of Section 138 Negotiable Instrument Act - Tackling an avalanche of cases] :

"... ... Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a

means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.

If we were to examine the number of complaints filed which were 'compromised' or 'settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."

41. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect

42. So the intention of the legislature and object of enacting "Banking", Public Financial Institutions and the Negotiable Instrument Laws (Amended Act) 1988 and subsequent enactment, i.e., Negotiable Instruments (Amendment & Miscellaneous Provisions Act 2002 leads this Court to a conclusion that the offence made punishable under Section 138 of N.I. Act is not only an offence qua property but it is also of the nature of an economic offence, though not covered in the list of statutes enacted in reference to Section 468 of Cr.P.C. Thus, the parties, in reference to offence under Section 138 N.I. Act read with Section 147 of the said Act are at liberty to compound the matter at any stage even after the dismissal of the application.

43. In the instant case, the problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute, furthermore, the arguments on behalf of the opposite parties on the fact that unlike Section 320 Cr.P.C., Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court.

44. I am also conscious of the view that judicial endorsement of the above quoted guidelines as given in the case of **Damodar S. Prabhu (supra)** could be seen as an act of judicial law making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. I have already explained that the scheme contemplated under Section 320 of the Cr.P.C. cannot be followed in the strict sense.

45. In view of the aforesaid discussion, the parties, in reference to offence under Section 138 N.I. Act read with Section 147 of the said Act are at liberty to compound the matter at any stage. The complainant i.e. the person or persons affected can pray to the court that the accused, on compounding of the offence may be released by invoking jurisdiction of this Court under Section 482 Cr.P.C. read with Article 226 of the Constitution of India.

46. Generally, the powers available under Section 482 of the Code would not have been exercised when a statutory remedy under the law is available, however, considering the peculiar set of facts and circumstances it would not be in the interest of justice to relegate the parties to appellate court. Additionally when both the parties have invoked the jurisdiction of this Court

and there is no bar on exercise of powers and the inherent powers of this court can always be invoked for imparting justice and bringing a quietus to the issue between the parties.

47. As discussed above, the court is inclined to hold accordingly only because there is no formal embargo in section 147 of the N.I. Act. This principle would not help any convict in any other law where other applicable independent provisions are existing as the offence punishable under section 138 of the N.I. Act is distinctly different from the normal offences made punishable under Chapter XVII of IPC (i.e. the offences qua property).

48. In view of the observations and in view of the guidelines as laid down in the case of **Damodar S. Prabhu (Supra)** and also in view of the observations made in the judgment referred above and taking into account the fact that the parties have settled the dispute amicably by way of compromise, this Court is of the view that the compounding of the offence as required to be permitted.

49. Accordingly, the present application under section 482 Cr.P.C. is **allowed** in terms of the compromise arrived at between the parties to this litigation out of the Court. The impugned judgment and order dated 07.04.2021 passed by the learned Court of Additional Court No.3 (N.I. Act), Lucknow, whereby the applicant has been convicted under Section 138 of the Negotiable Instrument Act, 1881 and has been directed to undergo imprisonment for two years alongwith fine of Rs.45,00,000/- and in case of default of payment of fine, the applicant has been directed to undergo additional simple imprisonment for a period of one and half year and a sum of Rs.38,00,000/- was also directed to be paid to the complainant as damages, is hereby **modified.** The conviction and sentence under Section 138 of the N.I. Act 1981 in Complaint Case No.7097 of 2017, Police Station Talkatora, District Lucknow (Sanchetna Financial Services Private Limited Vs. Ravindra Kumar Yadav) stands annulled as this court intends, otherwise to secure the ends of justice as provided under section 482 Cr.P.C. The applicant shall be treated as acquitted on account of compounding of the offence with the complainant/person affected.

50. The learned trial court is directed to release the remaining amount of Rs.9,00,000/- deposited by the applicant before the learned Additional Court No.3 (N.I. Act), Lucknow in compliance of the order passed by learned Sessions Judge, Lucknow during the hearing of Criminal Appeal No.165 of 2021 in favour of the opposite party no.2 within fifteen days from the date of certified copy of this judgment and order is produced before it.

51. Office is directed to communicate this order to the learned trial court concerned immediately.

52. No order as to costs.

(2024) 5 ILRA 1860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ B No. 167 of 1982

Bhagwan Bahadur & Ors. ...Petitioners
Versus
Deputy Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioners:

Sri Harsih Chandra Singh, Sri Dharampal Singh, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Punit Kumar Gupta

Civil Laws – Constitution of India, 1950 - Article 226, – UP Zamindari Abolition and Land Reforms Act, 1950 – Sections 18, 18(1)(E) & 20 – UP Consolidation and Holdings Act, 1953 - Sections – 9(A)(2) & 48, – UP Land Revenue Act, 1901 – Sections 57, - Criminal Procedure Code, 1973 – Sections 107 & 116 - Writ Petition – challenging the impugned revisional court's order passed u/s 48 of Act, 1953 – petitioners claimed that entries with regards to trees standing on Gata in question in the revenue record of year 1930 was continued till Act, 1950 was enforced and as such same was covered by section 18(1)(e) of the Act, 1950 – however, respondents had not raised any objections prior to 1970 and when the consolidation had come in the village, they filed an objection u/s 9-A(2) claiming co-tenancy right against the trees in question – relied upon the judgment of Supreme Court rendered in case of *Ramnath Singh*, court held, that – the entries for the purposes of section 20 of Act, 1950 cannot be doubted or questioned or even incorrect entry (unless shown to have been made fraudulently and surreptitiously) will be sufficient to confer the right of Adivasi/Sirdar/Bhumidhar upon the person and if the entry is continued from the last 11 years, in that case, since before start of consolidation then it cannot be questioned in consolidation proceedings – hence, the present writ petition is allowed – impugned order is hereby quashed. (Para – 20, 22)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Lal Bahadur Vs Ram Adhar (1985 LCD 415),

2. Anjuman Islam Lakhimpur Vs Chandra Prakash Pitaria (2007 325 LCD 721,

3. Niazu Vs DDC 2015 128 RD 797),

4. Sant Bux Singh Vs joint Director of Consolidation & ors.(1986 RD 2016),

5. Adi Pherozshah Gandhi Vs h m Seervai (AIR 1971 SC 385),

6. Rajinder Vs St. of Har. (1991 vol 1 Crimes 973-PH),

7. Shaikh Piru Bux Vs Kalandi Pati (AIR 1970 SC 1885),

8. Ramnath Singh & anr. Vs DDC (2014 vol 32 LCD 659).

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

1. Heard.

2. The present writ petition has been preferred for quashing of the impugned revisional order dated 31.12.1981 passed by respondent no.1-Deputy Director Consolidation Faizabad under Section 48 of Uttar Pradesh Consolidation and Holdings Act, 1953 (hereinafter referred to as "Act, 1953) in Revision No. 1517 titled as Ram Naresh vs. Ram Bahadur and others.

3. Learned counsel for the petitioners has submitted that the dispute with regard to the 32 trees entered in favour of the ancestors of the petitioners and 9 trees in favour of the ancestors of the respondents on gata no. 1906 area 4 bigha 7 biswa 10 biswansi in 1337 fasli i.e. in Khasra of the year 1930. It is further submitted that the gata no. 1906 belonged to zamindar Azam Ali Khan. In 1344-45 fasli i.e. year 1937-38, the name of the ancestor of the petitioners was continued and the name of the zamindar was deleted. It is further submitted that the name of the ancestor of the petitioner was continued and he was covered by Section 18(1)(e) of the U.P. zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as Act, 1950), which has come

into force on 01.07.1952 and prior to that the ancestors of the petitioners had become grove holder.

4. It is further submitted that since the year 1937-38, the respondents had not raised any objections by filing either any case under the provisions of Oudh Rent Act 1886 (hereinafter referred to as "Act, 1886) read with amended Oudh Rent Act, 1921 (hereinafter referred to as "Act, 1921), U.P. Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901") or under the Act, 1950. It is submitted that the village had come under the consolidation in the 1970's and after about 30 years, for the first time the respondents filed an objection under Section 9(A)(2) claiming co-tenancy right against the 9 trees.

5. It is further submitted that if the conflict is between the earlier and subsequent settlement entries then as per the law settled in catena of judgments of this Court, the later entry would be preferred over the earlier entry unless contrary is proved by cogent strong evidence and in support of his submission, learned counsel for the petitioner has relied upon the judgment i.e. **Lal Behari vs. Ram Adhar; 1985 LCD 415, Anjuman Islamia Lakhimpur vs. Chandra Prakash Pitaria; 2007 [25] LCD 721 and Niazu vs. D.D.C., 2015 [128] RD 797.**

6. It is further submitted that the basis of claim of co-tenacy by the respondents were on two grounds firstly, there name was entered in Khasra of 1337 fasli and secondly, a compromise was entered between the parties in the proceedings under Section 107/116 Cr.P.C.

7. It is further submitted that the compromise which has been relied is in the proceedings under section 107/116 Cr.P.C. which is preventive in nature and the compromise if any, made under those proceedings is not binding in the proceedings under the Act, 1953.

8. It is further submitted that the respondents in their objection before the consolidation officer or before the appellate authority had not challenged the subsequent entry of 1345 fasli much less proved it to be a wrong entry by any evidence whatsoever, rather not a word has been said about the subsequent entry except claiming their co-tenacy right as per the two counts as submitted above.

9. On the other hand, Shri Hemant Kumar Pandey, learned State Counsel and Shri Avinash Mishra, learned counsel for the private respondents have submitted that the name of the ancestors of the respondents were entered in the khasra of 1337 fasli against 9 trees but in the 1345 fasli, their names were not there though they are legally entitled for their co-tenancy rights on the 9 trees in pursuance of entry made in the 1337 fasli and they have rightly filed an objection under Section 9(A)(2) during the consolidation proceedings before the consolidation officer.

10. It is further submitted that the compromise was entered and once it is accepted by the ancestors of the petitioners in the compromise regarding the co-tenacy rights of the respondents then they cannot take a u-turn rather they are bound by the same as the said compromise was entered before the Sub-Divisional Magistrate in the criminal proceedings under Section 107/116 Cr.P.C. It is further submitted that the older the entry, more credible it is, as a general rule.

11. It is further submitted that the settlement entry can be rebutted only by

documentary evidence. It can even be rebutted by an oral evidence and in support of his submission, the learned State Counsel has relied upon the judgment dated 28.01.1996 passed by this Court in the case of **Sant Bux Singh vs. Joint Director of Consoldiation and Others; 1986 RD 216.**

12. After hearing the learned counsel for the parties and going through the records of the case, it is an undisputed fact between the parties that the name of the ancestors of the petitioners i.e. his maternal grandfather was entered in the Khasra of 1337 fasli against 31 trees and the name of the ancestors of the respondents was entered against the 9 trees situated at gata no. 1906. In the settlement entry of 1344-45 fasli, the name of the zamindar Azam Ali Khan as well as the name of the ancestors of the respondents was deleted but the name of the ancestors of the petitioners was retained and intact in the settlement year 1344-45 fasli i.e. year 1937-1938.

13. The respondents had never filed any case under the the Act, 1886 and the Act, 1901 against the settlement entry in 1344-45 fasli in favour of the ancestors of the petitioners. Thereafter, the Act, 1950 has come into force w.e.f. 01.07.1952 and at that time, the entry of 1344-45 fasli was intact and the entry in the name of the ancestors of the petitioners is protected by Section 18 of the Act, 1950. For convenience, the same is quoted hereinbelow:-

"18. Settlement of certain lands with intermediaries or cultivators as Bhumidhar.-(1) Subject to the provisions of Sections 10, 15, 16 and 17, all lands-

(d) held as such by-

(i) an occupancy tenant;

(ii) a hereditary tenant;

(iii) a tenant or Patta

[possessing the right to transfer the holding by sale,]

Dawami or Istamrari referred to in Section 17;

(e) held a grover holder,

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government witsh such intermediary, [lessee, tenant, grantee or grove-holder,] as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession of this bhumidhar thereof."

14. The submission of the learned counsel for the petitioners that as per Section 57, U.P. Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901") which deals with the presumption as to entries , the provision is quoted hereinbelow:-

"57. Presumption as to entries. All entries in the record-of-rights prepared in accordance with the provisions of this Chapter shall be presumed to be true until the contrary is proved; and all decisions under this Chapter in cases of dis- pute shall, subject to the provisions of sub-section (3) of Section 40, be binding on all Revenue Courts in respect of the subject-matter of such disputes; but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers pre- scribed by [* *] Section 32."*

15. Section 18 of the Act, 1950 provides that all land held by a grove holder on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary [lesse, tenant, grantee or grove holder], who shall subject to the provisions

of this Act, be entitled to take or retain possession as bhumidhari thereof and Section 57 of Act, 1901 provides all entries in the records of rights prepared in accordance with the provisions of this chapter shall be presumed to be true until the contrary is proved. It is an undisputed case of the respondents that they had not led any evidence either documentary or oral to prove the subsequent entry made in the 1345 fasli is a wrong entry on any ground.

16. Learned counsel for the private respondents had very fairly submitted that the objections were filed on two grounds firstly, on the basis of the entry in the 1337 fasli and secondly, on the basis of compromise entered into between the parties in the criminal proceedings lodged under Section 107/116 Cr.P.C. and they had not questioned the subsequent entry of 1345 fasli. The respondents were claiming for co-tenancy rights on the basis of entry in 1337 fasli as their names were recorded in the khasra. Once it is an admitted case that there was no effort to prove that the entry in 1345 fasli was wrong then as per Section 57 it would be presumed that the entry was rightly made. The judgments relied by the learned counsel for the petitioner on this point are quoted hereinbelow:-

(i) The relevant para of the judgment passed in the case of **Lal Behari (supra)** is quoted hereinbelow:-

"5. It is well settled that under Section 57 of the Land Revenue Act the entries in the current records of the latest settlement are presumed to be correct unless rebutted by cogent evidence. However, in this connection the question which sometimes arises for consideration is, whether the entries made in the subsequent settlements, which are different with those of the earlier settlements, would stand rebutted by the earlier settlement entries or not? It goes without saying that at each settlement the entries are made in accordance with the prescribed procedure contained in Chapter IV of the U. P. Land Revenue Act. Therefore, the entries in the record-of-rights prepared in accordance with the provisions of Chapter IV would be presumed to be true unless the contrary is proved as provided under Section 57 of the Act. Thus, where the entries made at the earlier and subsequent settlements are conflicting, the entries made in subsequent settlement can be given preference with those of the previous settlement unless the contrary is proved by cogent and strong evidence. During the course of every subsequent settlement proceeding the then existing entries in the record-of-right are checked and verified and the same are corrected, if found to be wrong, after following the prescribed procedure under Chapter IV of the Land Revenue Act. Thus, the entries at the latest settlement would be presumed to be correct and the earlier conflicting settlement entries would not be enough evidence to rebut the correctness of the subsequent settlement entries. The entries in the record of rights of the latest settlement would, therefore, be presumed to be correct unless rebutted by cogent evidence and the same cannot be discarded merely on the ground of conflicting entries in the earlier settlement records."

(ii) The relevant para of the judgment passed in the case of **Anjuman Islamia Lakhimpur (supra)** is quoted hereinbelow:-

"16. This Court has held in a decision as reported in 1985 (3) LCD 415, Lalbihari and others v. Ram Adhar and others, that as per provisions of Section 57 of the U.P.L.R. Act, 1901, entries in concurrent records of latest settlement are presumed to be correct unless rebutted by

cogent evidence. The appellant has failed to produce any cogent evidence in support of their claim. As per Sections 101 and 102 of the Evidence Act, 1872, the burden of proof certainly rested on the plaintiff appellant to demonstrate that the land in dispute was a Kabristan or it was dedicated as a waqf. This Court finds strength from a recent decision of Hon'ble Supreme Court of India as reported in (2006) 5 SCC 588, Anil Rishi v. Gurbaksh Singh (paras 8 and 9) in deriving the above conclusion."

(iii) The relevant paras of the judgment passed in the case ofNiazu (supra) is quoted hereinbelow:-

"14. The SOC allowed the objection of the petitioner relying upon the settlement entry of 1365 fasli and the entries in the subsequent years. He has categorically recorded that the entry of 1365 fasli was a settlement entry and, therefore, liable to be relied upon and that no evidence had been adduced to rebut these entries. He has also referred to the admission in the statements of -Saffaq and Faizanda, who have admitted the possession of the petitioner over the land in question. He further recorded that the contesting respondent, namely Saffaq was present in the Court, as admitted by his witness Faizanda but did not care to appear and depose before the Court. On the aforesaid reasoning and evidence the claim of adverse possession as set up by the petitioner was accepted.

15. The DDC, on the contrary, has not taken into consideration the fact that the entry under class 9, in favour of the petitioner was a settlement entry. What has been recorded by the DDC for rejecting the claim of the petitioner, is true only for normal revenue entries and the said reasoning will not apply to a settlement entry. This view is fully fortified by the judgment relied upon by the learned Counsel for the petitioner in the case of Lal Behari (supra). The case law cited on behalf of the respondents does not deal with settlement entries and, therefore, the same has no application in the facts and circumstances of the case.

16. Accordingly and for the reasons given above, I am of the considered opinion that the order passed by the DDC is vitiated as the revisional authority has misdirected himself. It has further failed to consider the reasoning given by the appellate authority while deciding in favour of the petitioner, in his judgment of reversal. The revisional order, therefore, cannot be sustained and is liable to be set aside.

17. Accordingly I allow the writ petition and set aside the order passed by the DDC on 7.6.1984 and affirm the order passed by the SOC. No order as to costs."

17. As far as the submission regarding agreement entered into between the parties before the Sub-Divisional Magistrate in the criminal proceeding lodged under Section 107/116 Cr.P.C. is concerned, the same could not be said to be binding between the parties in the proceedings initiated under the Act, 1953. The proceedings under Section 107/116 Cr.P.C. are preventive in nature and not adjudicated by the judicial court and the rights of parties are not adjudicated by the criminal court. It is a compromise just to give an undertaking that in future the parties shall maintain peace and would not be involved in criminal activity. The judgments relied by the learned counsel for the petitioners quoted hereinbelow:-

(i) The relevant para of the judgment passed in the case of **Adi Pherozshah Gandhi vs. H. M. Seervai** reported in **AIR 1971 SC 385** is quoted hereinbelow:-

"35. Now in disciplinary proceedings the advocate was not estopped from questioning the charge that he was guilty of corrupt practice. In a civil proceeding the decision of a criminal court is not res judicata. To give an example, if a person is involved in a traffic offence in which some one is injured he may in the criminal court receive a light sentence but if he is sued in a civil court for heavy damages he can plead and prove that he was not negligent or that accident was due to the contributory negligence of the defendant. The decision of the criminal court would not preclude him from raising this issue before the civil court."

(ii) The relevant portion of the judgment passed in the case of **Rajinder vs. State of Haryana** reported in **[1991] 1 Crimes 873- PH** is quoted hereinbelow:-

"Security proceedings under section 151 were on the same facts, as the impugned FIR enumerates. Security proceedings cannot be equated with a criminal prosecution. That was a proceeding for preventive measure and the impugned FIR was registered with respect to the substantive offence committed by the petitioners."

(iii) The relevant para of the judgment passed in the case of **Shaikh Piru Bux vs. Kalandi Pati** reported in **AIR 1970 SC 1885** is quoted hereinbelow:-

"11. In our opinion the High Court was right in coming to the conclusion that the compromise was not binding on the Hindu community. The learned Additional Sub-Judge had misdirected himself in law in coming to the contrary conclusion. The compromise was not arrived at in a suit fought in a representative capacity but was filed in a proceeding under Section 107, Criminal Procedure Code. The signatories declared inter alia that "neither we, the Musalmans nor we the Hindus can at any time in future create any disturbance towards each other's religion and will deal with each other as before. We will not create any disturbance in any function of either party and will not create breach of peace with each other amongst ourselves.....There is no apprehension of breach of peace as we the Hindus and the Musalmans have amicably settled the matter nor will there occur any breach of peace in future. So we both parties having settled the matter amicably, hereby submit this petition and pray that the case be disposed of in terms of this compromise petition." It is signed by a number of persons but there is no indication that they represented the two communities. It may be that these persons, who signed the compromise, were important persons in the communities and it may be that both the communities should act according to the compromise effected by the so- called important persons. But in law it does not debar the parties from asserting their legal rights in a Civil Court. We need not decide what the compromise means, and particularly the whether the words inscribed on the pillars were part of the compromise effected by the leaders."

18. From the above judgments, it is clear that the compromise filed in the criminal proceedings under Section 107/116 Cr.P.C. cannot be equated with the compromise filed in a regular trial or in determining the civil rights and title of the parties.

19. The respondents had waited so long i.e. when their names were not added in 1345 fasli i.e. in the year 1937-1938. Thereafter, the entries were intact after the Act, 1950 came into force on 01.07.1952 and for the first time after about 30 years raised the objection in the consolidation proceedings cannot be raised at such a

belated stage in the light of the law laid down by this Court in the case of **Ramnath Singh and another vs. D.D.C.** reported in **[2014(32) LCD 659]**. The relevant para is quoted hereinbelow:-

"It is specifically mentioned by the Deputy Director of Consolidation that in Khasra 1359 Fasli, name of Nawab as main tenure holder and Aniruddh Singh as sub tenant was entered, same position was there in Khasras of 1361 and 1362 Fasli, Khasra of 1360 Fasli was not available, however since 1363 Fasli name of Aniruddh Singh was entered as main tenure holder and name of Nawab Singh was expunged. 1363 Fasli corresponds to 1955-56 A.D. Objections were filed in 1993 i.e. after about 38 years. Absolutely no reason was given for this undue delay and silence. The lower revisional court allowed the revision placing reliance upon section 20 of U.P.Z.A. & L.R. Act and U.P. Land Reforms amendment Act 1954. Under Section 20 it is provided that every person who on the date immediately preceding date of vesting was a sub tenant shall be called Adhiwasi. Thereafter through operation of law Adhiwasis became Sirdars. 1359 Fasli ended on 30.06.1952 and U.P.Z.A. & L.R. Act was enforced w.e.f. 01.07.1952. Accordingly section 20 was squarely applicable. The Settlement Officer of Consolidation decided the matter in favour of the petitioners on the ground that it was not shown that entry of 1359 and 1363 were correctly made. In case of old entries particularly for applying section 20 of the Act it is not necessary to see whether the entries are correct. In any case it was for the other side to show that entry was wrong. After such long time it is almost impossible to file supporting orders, documents etc. to prove correctness of entry. Entries can not challenged after a long time vide Sahibdar Khan Vs. Sadllo Khan, A.I.R 2003 S.C.2073. Moreover in following authorities it has been held that correctness of the entries for the purposes of section 20 can not be doubted or questioned and even in correct entry (unless shown to have been made fraudulently or surreptitiously) will be sufficient to confer the right of Adhivasi/Siradar/Bhumidhar upon the person shown to be defacto occupant, in preference to de jure occupant.

1.Amba Prasad Vs. Abdul Noor Khan, A.I.R. 1965, S.C. 54.

2.Smt. Sonawati vs. Sri Ram A.I.R. 1968, S.C. 466

3.Nath Singh and others Vs. The Board of Revenue and others, A.I.R. 1968, S.C. 1351

4.Wali Mohammad Vs. Ram Surat, A.I.R. 1989, Supreme Court 2296

5.Hira Lal and another Vs. Gajjan and others, 1990 (3) S.C.C. 285.

6.Chandrika Prasad Vs. Pullo, A.I.R. 2000, Supreme Court 1785.

7.Ram Avadh and others Vs. Ram Das and others, 2008 (8) S.C.C. 58.

In the last authority of 2008 it has been held that if entry is continuing for 11 years since before start of consolidation then it can not be questioned in consolidation proceedings.

Learned counsel for the petitioners has cited the following 3 authorities which do not support his contention:

1.1464 R.D. Page 208, Shri Ram Vs. Pilau Singh.

2.1963 R.D. Page 111, Phagu Vs. Sita Ram.

3.1997 C.C.C. 480, Gurumukh Singh Vs. D.D.C."

20. In the case of **Ramnath Singh (supra)**, this Court had relied upon the judgments of Hon'ble Supreme Court, wherein it has been held that correctness of

the entries for the purposes of Section 20, Act, 1950 cannot be doubted or questioned or even incorrect entry (unless shown to have been made fraudulently and surreptitiously) will be sufficient to confer the right of Adivasi/Sirdars/Bhumidhar upon the person and if the entry is continued from last 11 years, in that case, since before start of consolidation then it cannot be questioned in consolidation proceedings. Similarly in the present case, the entry was made in the year 1937-38 i.e. 1344-45 fasli when Act, 1921 was in operation. Thereafter, it remained intact when Act, 1950 has came into force w.e.f 01.07.1952 and thereafter, in the consolidation proceedings, which were started in the year 1970's i.e. after 30 years from the date of 1345 fasli and 20 years from the date of Act, 1950, then for the first time in the consolidation proceedings the objection was raised by the respondents which is not permissible under the law laid down by this Court and over and above that the respondents had never come with a case that settlement made in 1345 fasli in favour of the ancestors of the petitioners was made fraudulently or surreptitiously.

21. In the aforesaid facts and circumstances of this case, the present writ petition is **allowed.**

22. The revisional order dated 31.12.1981 passed by respondent no. 1-Deputy Director Consolidation is hereby quashed.

(2024) 5 ILRA 1868
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.05.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ B No. 563 of 2024

Saiyed Mohammad Rehaan & Ors. ...Petitioners
Versus
Deputy Director of Consolidation District Sultanpur & Ors. ...Respondents

Counsel for the Petitioners:
Dwijendra Mishra, Ajeet Kumar

Counsel for the Respondent:
C.S.C., Mohan Singh

Civil Laws – Constitution of India, 1950 - Article 226, – UP Consolidation and Holdings Act, 1953 - Section – 9(A)(2) - Writ Petition – challenging the impugned remand order passed by the revisional court – petitioners claimed by filing of an objection u/s 9-A-(ii) of the Act, 1953 their rights over the plots in question on the basis that same was owned and possessed by their ancestors and have developed on them on the basis of General Rules of Succession – it was St.d that said plots have been wrongly recorded in the name of opponents – objection was allowed – appeal – consolidation officer decide the appeal on 28.09.2000 by undue haste – grounds taken that on 28.09.2000 there is no any date is fixed for hearing and order sheet would indicate that order sheet has been altered – Revision – DDC allowed the revision and remanded the matter back to the Settlement officer (Consolidation) for determination afresh – court observed that, arbitrariness in passing the order dated 28.09.2000 is writ large on the face of order and the order sheet, – the dates were changed and the order sheet deliberately manipulated so as to pass the order before his superannuation – such an exercise by a judicial officer or revenue officer discharging judicial function is strongly condemned – held, a judicial order should inspire confidence and a judicial order which does not inspire confidence shall be set aside and the manner of passing the order should be above reproach and should be just, fair and reasonable and should not be leave any room for suspicion or arbitrariness – hence, writ petition being devoid merits – Dismissed. (Para – 17, 18, 19)

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Sudha Chaudhary Vs St. of U.P. (Civil Appeal no. 2077/2020 decided on 06.03.2020),

2. Shrirang yadavrao Waghmare Vs St. of Mah. (2019 9 SCC 144),

3. Taras Singh Vs jyoti Basu (2005 1 SCC 201),

4. Daya Shankar Vs High Court of Allahabad (1987 vol. 3 SCC 1),

5. R C Chandel Vs High Court of M. P. (2012 vol. 8 SCC 58),

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

1. Heard Sri Dwijendra Mishra, learned counsel for the petitioners as well as learned Standing Counsel for respondent nos. 1, 2 and 3 and Sri Mohan Singh, learned counsel appearing for respondent no. 4.

2. In the light of proposed order notice to private respondent nos. 5 to 20 is dispensed with.

3. By means of present writ petition the petitoiners have challenged order dated 21.02.2024, passed in Revision No. 34 of 2024 - Kafil Ahmad Vs. Syed Mohd. Rahman, passed by the Deputy Director of Consolidation, Sultanpur.

4. It has been submitted by learned counsel for the petitioners that the petitioners had filed objections under Section 9-A(II) of the U.P. Consolidation of Holdings Act, 1953, claiming their right over Plot Nos. 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1111, 1112, 1137, 870, 1138, 1247, 1114, 779/3, 842, 843 and 2661, situated at Village - Kisni, Pargana - Jagdishpur, Tehsil - Musafirkhana, Sultanpur (now Amethi). The petitioners claimed their right over on the basis that same was owned and possessed by their ancestors and have devolved on them on the basis of General Rule of Succession. It was stated that the said plots have been wrongly recorded in the name of MOhd. Ahmad and Syed Ahmad S/o Nawab Ali. The Consolidation Officer has decided the application of the petitioners and passed order in their favour by means of order dated 28.09.2000.

5. Aggrieved by the order dated 28.09.2000, an appeal was filed before the Settlement Officer (Consolidation) by respondent nos. 5 to 13, which appeal was dismissed by order dated 25.05.2005. In the appeal it was submitted that the case was decided on 28.09.2000 by the Consolidation Officer, with undue haste and it was contended that the case as not listed on the said date on which it was decided. It was submitted that the case was listed on 18.09.2000, on which date arguments of the parties were heard and next date was fixed, but portion of the order sheet was destroyed where next date was endorsed and 28.09.2000 was subsequently inserted, on which date no proceedings took place and the matter was further listed on 13.10.2000, which date was deleted and the matter was fixed for 25.09.2000.

6. It was submitted that perusal of the order sheet would indicate that the order sheet has been altered and manipulated only because the Presiding Officer was about to retire and therefore, prayed that the impugned order be set aside and the matter be remanded. The Settlement Officer (Consolidation) did not agree with the submissions of the appellant and accordingly dismissed the appeal.

7. Revision was filed against the order of Settlement Officer (Consolidation) before

the Deputy Director of Consolidation, who has allowed the revision and remanded the matter back to the Settlement Officer (Consolidation) for determination afresh. While allowing the revision, the Deputy Director of Consolidation was of the view that as per order sheet the case as listed on 28.08.2000 and the parties were present and the case was adjourned for 18.09.2000. On 18.09.2000 general date was fixed i.e. 28.09.2000 and subsequently the case was listed on 16.10.2000, 13.11.2000 and 04.01.2001. He has further noticed that typed order sheet exists till passing of order dated 28.09.2000 and there is no mention as to whether parties were heard or not.

8. The Deputy Director of Consolidation has further noticed the fact that in the year 2000 facility of stenographer was not provided to the Consolidation Officer and accordingly entire order sheet is suspect and the orders passed by the Consolidation Officer become suspect. He has further noticed that in the present case date was fixed for 04.01.2001 but as the Presiding Officer was about to retire, date was changed and the impugned order dated 28.09.2000 was passed by the Consolidation Officer.

9. It is in the aforesaid circumstances that the Deputy Director of Consolidation has allowed the revision and set aside the order passed by the Settlement Officer (Consolidation) dated 21.09.2009 as well as order of Consolidation Officer dated 28.09.2000.

10. Learned counsel for the petitioner has vehemently urged that there is no infirmity in the order passed by the Consolidation Officer and this aspect of the matter has been rightly considered by the Settlement Officer (Consolidation). He further submits that even in case revisional authority was of the opinion that the order of Consolidation Officer was illegal and arbitrary, he should not have proceeded to decide the matter on merits rather then remanding the matter back to the Consolidation Officer.

11. Learned Standing Counsel on the other hand has opposed the writ petition. He has submitted that there are ample evidence on record to indicate that there has been manipulation of records and specially the order sheet at the stage of Consolidation Officer who looking into his retirement seems to have altered the dates and passed the order dated 28.09.2000. He has supported the order passed by the Deputy Director of Consolidation and prayed for dismissal of the writ petition.

12. Heard learned counsel for the parties and perused the record.

13. It is at the very outset noticed that the Consolidation Officer has by means of impugned order has not only allowed the objections filed by the petitioner but has also adjudicated upon the issue with regard to public way and canal, in favour of the petitioner. While passing any such order it was mandatory to issue notice to the Gaon Sabha. It is further noticed that the order dated 28.09.2000 has been passed in haste without considering the evidence on record and points of determination nos. 8, 6, 7 and 9 and the impugned order has been passed in a very cryptic manner in favour of petitioner.

14. The other grounds which have been considered by the Deputy Director of Consolidation is the manner in which the Consolidation Officer has proceeded to decide the objections submitted by the petitioner and the private respondents. He

has perused the order sheet and recorded that the case was listed on 28.08.2000 on which date parties were present and case was adjourned for 18.09.2000. On 18.09.2000, general date of 28.09.2000 was fixed subsequent to which the case was listed on 16.11.2000, 13.11.2000 and 04.01.2001. Typed copy of the order dated 28.09.2000 is also found on record. The Deputy Director of Consolidation has stated that portion of order sheet is torn and the date fixed has been deliberately obliterated by removing portion of the order sheet.

15. In the aforesaid circumstances, when the matter has been adjourned to 04.01.2001, there was no occasion to decide the case on previous date i.e. 28.09.2000 and accordingly, such an order does not inspire confidence and accordingly the Deputy Director of Consolidation has rightly set aside the order passed by the Consolidation Officer and remanded the matter for consideration afresh.

16. Hon'ble Apex Court in **Civil Appeal No. 2077 of 2020 - Sadhna Chaudhary Vs. State of U.P. and Another** (decided on 06.03.2020), while dealing the issue of necessity of upholding the rule of law has held has under :-

"17. Undoubtedly, the High Court is correct in its observation of the applicable law. Indeed, the end result of the judicial process does not matter, and what matters is only the decision-making process employed by the delinquent officer. Clearly, it is a principle since the nineteenth century that Judges cannot be held responsible for the end result or the effect of their decisions. [See Judicial Officers Protection Act, 1850.] This is necessary to both uphold the rule of law, and insulate judicial reasoning from extraneous factors.

18. Even furthermore, there are no two ways with the proposition that the Judges, like Caesar's wife, must be above suspicion. Judicial officers do discharge a very sensitive and important constitutional role. They not only keep in check excesses of the executive, safeguard citizens' rights and maintain law and order. Instead, they support the very framework of civilised society. It is courts, which uphold the law and ensure its enforcement. They instil trust of the constitutional order in people, and ensure the majesty of law and adherence to its principles. The courts, hence prevent people from resorting to their animalistic instincts, and instead provide them with a gentler and more civilised alternative of resolving disputes. In getting people to obey their dicta, courts do not make use of guns or other (dis)incentives, but instead rely on the strength of their reasoning and a certain trust and respect in the minds of the general populace. Hence, it is necessary that any corruption or deviation from judicial propriety by the guardians of law themselves, be dealt with sternly and swiftly.

19. It has amply been reiterated by this Court that the judicial officers must aspire and adhere to a higher standard of honesty, integrity and probity. Very recently in Shrirang Yadavrao Waghmare v. State of Maharashtra [Shrirang Yadavrao Waghmare v. State of Maharashtra, (2019) 9 SCC 144 : (2019) 2 SCC (L&S) 582] , a Division Bench of this Court very succinctly collated these principles and reiterated that:

"5. The first and foremost quality required in a Judge is integrity. The need of integrity in the judiciary is much higher than in other institutions. The judiciary is an institution whose foundations are based on honesty and integrity. It is, therefore, necessary that judicial officers should possess the sterling quality of integrity. This Court in Tarak Singh v. Jyoti Basu [Tarak

Singh v. Jyoti Basu, (2005) 1 SCC 201] held as follows:

'Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary took utmost care to see that the temple of justice does not crack from inside, which will lead to a catastrophe in the justice-delivery system resulting in the failure of public confidence in the system. It must be remembered that woodpeckers inside pose a larger threat than the storm outside.'

6. The behaviour of a Judge has to be of an exacting standard, both inside and outside the court. This Court in Daya Shankar v. High Court of Allahabad [Daya Shankar v. High Court of Allahabad, (1987) 3 SCC 1 : 1987 SCC (L&S) 132] held thus:

'11. ? Judicial officers cannot have two standards, one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy.'

7. Judges are also public servants. A Judge should always remember that he is there to serve the public. A Judge is judged not only by his quality of judgments but also by the quality and purity of his character. Impeccable integrity should be reflected both in public and personal life of a Judge. One who stands in judgments over others should be incorruptible. That is the high standard which is expected of Judges.

8. Judges must remember that they are not merely employees but hold high public office. In R.C. Chandel v. High Court of M.P. [R.C. Chandel v. High Court of M.P., (2012) 8 SCC 58 : (2012) 2 SCC (Civ) 343 : (2012) 3 SCC (Cri) 782 : (2012) 2 SCC (L&S) 469] , this Court held that the standard of conduct expected of a Judge is much higher than that of an ordinary person. The following observations of this Court are relevant:

'29. Judicial service is not an ordinary government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and the rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty.'

9. There can be no manner of doubt that a Judge must decide the case only on the basis of the facts on record and the law applicable to the case. If a Judge decides a case for any extraneous reasons then he is not performing his duty in accordance with law.

10. In our view the word "gratification" does not only mean monetary gratification. Gratification can be of various types. It can be gratification of money, gratification of power, gratification of lust etc., etc."

20. We are also not oblivious to the fact that mere suspicion cannot constitute "misconduct". Any "probability" of misconduct needs to be supported with oral or documentary material, even though, the standard of proof would obviously not be on a par with that in a criminal trial. While applying these yardsticks, the High Court is expected to consider the existence of differing standards and approaches amongst different Judges. There are innumerable instances of judicial officers who are liberal in granting bail, awarding compensation under MACT or for acquired land, back wages to workmen or mandatory compensation in other cases of tortious liabilities. Such relief-oriented judicial approaches cannot by themselves be grounds to cast aspersions on the honesty and integrity of an officer.

21. Furthermore, one cannot overlook the reality of ours being a country, wherein countless complainants are readily available without hesitation to tarnish the image of the judiciary, often for mere pennies or even cheap momentary popularity. Sometimes, a few disgruntled members of the Bar also join hands with them, and the officers of the subordinate judiciary are usually the easiest target. It is, therefore, the duty of the High Courts to extend their protective umbrella and ensure that the upright and straightforward judicial officers are not subjected to unmerited onslaught."

17. A judicial order should inspire confidence and a judicial order which does not inspire confidence shall be set aside and the manner of passing the order should be above reproach and should be just, fair and reasonable and should not leave any room for suspicion or arbitrariness.

18. Arbitrariness in passing the order dated 28.09.2000 is writ large on the face of the order and the order sheet. The dates were changed and the order sheet deliberately manipulated so as to pass the order before his superannuation. Such an exercise by a Judicial Officer or Revenue Officer discharging judicial functions is strongly condemned.

19. From the discussion made above as well as in view of the arguments raised by the petitioners, no ground for interference in the matter by this Court is made out. Hence the prayer made by the petitioners in the present writ petition are declined.

20. The writ petition being devoid of merits is **dismissed.**

(2024) 5 ILRA 1873
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ B No. 739 of 1982

Ram Dularey Singh & Ors. ...Petitioners
Versus
Deputy Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioners:
S. Mirza, Ashok Kumar Verma, Jagdish, Nirmal Singh

Counsel for the Respondent:
C.S.C., Ashok Kumar Verma, Harguru Charan, K.P Singh

Consolidation-Appellate order passed by Settlement Officer, Consolidation and Revisional order impugned-undisputed fact between the parties that the identity of the holdings has been changed-was not in the identical form as it was at the time of common ancestor and admitting

the resettlement then it cannot be said that the entry was made in favour of one Harnam Singh in the representative capacity of his joint family-presumption with respect to jointness of family and if proved then property inherited from common ancestor will be deemed to be a joint property of all-impugned order quashed-**W.P. allowed.** (E-9)

List of Cases cited:

1. Jagdamba Singh & ors. Vs Dy. Director of Consolidation & ors. reported in 1984 (2) LCD page 398

2. Jai Narain Vs D.D.C. & ors. reported in (1979) RD 198,

3. Bodh Raj Vs Joint Director of Consolidation Faizabad & ors., in Writ Petition No.676 of 1980 connected with Writ Petition No.23 of 1980, decided on 22.09.1995

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

1. Heard learned counsel for the petitioners and Sri Ashok Kumar Verma, learned counsel for the private respondents and Sri Hemant Kumar Paney, learned Additional Chief Standing Counsel.

2. During the pendency of the present writ petition, after the demise of petitioner no. 1, his legal heir /representative has been substituted by Petitioner No. 1/1, after demise of Petitioner No.3 his legal heirs have been substituted by Petitioner No.3/1 and Petitioner No.3/2 and after the demise of Petitioner No.3/1 his legal heir has been substituted by petitioner No.3/1/1. Similarly after the demise of respondent nos. 5 and 8, their legal heirs have been substituted as 5/1 to 5/3 & 8/1 to 8/2 respectively, whereas Respondent Nos.6 and 7 have died issueless.

3. The present writ petition has been preferred for quashing of the impugned appellate order dated 3.2.1981 passed by the Settlement Officer, Consolidation and the revisional order dated 16.01.1982 passed by the Deputy Director of Consolidation.

4. Learned counsel for the petitioners has submitted that Gata Nos. 210, 211, 212/1, 212/2, 214, 215, 216, 248, 249, 250, 251 and 252/1 situated at Village - Pooremani, Pargana - Surajpur, Tehsil - Ramsanehi Ghat, District - Barabanki is under dispute between the parties. It is further submitted that initially the lease of Gata Nos. 123, 210, 211 and 251 was in favour of Sheo Charan Singh, who had expired in the year 1915. The petitioners are grandson of Sheo Charan Singh i.e. son of his eldest son Harnam Singh. The respondents are the great grandson of Sheo Charan Singh being son of Awadhraj, who was son of Markandey Singh and Markandey Singh was the second son of Sheo Charan Singh.

5. It is further submitted that after the demise of Sheo Charan Singh in the year 1915 the fresh lease was granted by the zamindar in favour of father of the petitioners Harnam Singh of Gata Nos.210, 211, 212/1, 212/2, 214, 215, 216, 248, 249, 250, 251 and 252/1 including Gata Nos. 210, 211 and 251 except Gata No. 123 which were initially leased in favour of Sheo Charan Singh. After a fresh lease executed in favour of Harnam Singh, the father of the petitioners, it could not be said to be ancestral property on the basis of which the respondents could claim their co-tenancy in the same.

6. It is further submitted that the holding had not come down and intact in the identical form it was resettled in favour of Late Harnam Singh the father of the petitioners.

7. It is further submitted that the finding given in the appeal by the Settlement Officer, Consolidation that the respondents have co-tenancy right in Gata No.210, 211 and 251. The original gatas which were leased in favour of Sheo Charan Singh and also held that the respondents are having co-tenancy rights in Gata No.212/1, 212/2, 214, 215, 216, 248, 259, 250 and 252/1, newly leased in favour of the petitioners, as the same has been acquired from the ancestral property without their being any evidence that the newly leased gatas had been acquired out of the funds of ancestral property.

8. The revisional court without appreciating this submission advanced by the learned counsel for the petitioners had affirmed the order passed by Settlement Officer, Consolidation, feeling aggrieved by the same the present writ petition has been filed.

9. It is further submitted that after the demise of Sheo Charan Singh neither Markandey Singh nor Awadhraj Singh had never raised any claim on the said gatas newly settled with father of the petitioners as mentioned above, even after the resettlement in favour of Harnam Singh the ancestor of the petitioners, thus it is clear that the ancestors of the present respondents had never laid any claim in respect of the newly settled gatas consisting of 12 gatas.

10. It is further submitted that in other villages the petitioners had not raised any objection at the time of entry of names of the respondents in the revenue records but only in the present village it has been opposed.

11. On the other hand Sri Ashok Kumar Verma, learned counsel for the private respondents has submitted that it is an ancestral property and name of Harnam Singh was entered in representative capacity being 'Karta' of the family.

12. It is further submitted that the grandfather of the respondents expired in the year 1919 and the father of the respondents expired in the year 1955, at that time the respondents were minor and living with Harnam Singh father of the petitioners, who was taking care of the respondents, so they were living jointly and jointness of family is proved from the said fact.

13. It is further submitted that the statement were given by the witnesses adduced by the respondents that it is a joint family and the property acquired by the joint family and being the eldest son name of Harnam Singh was entered in the revenue record in a representative capacity, so there is no illegality in the orders passed by the Settlement Officer, Consolidation and the Deputy Director of Consolidation.

14. It is further submitted that the respondents had established by the evidence that the landlord had settled the land with late Harnam Singh in the representative capacity for all other members of the family as well and that all the member of the joint family come into possession over the land which is blended and treated as Joint Hindu Family property. In support of his submission, learned counsel for the respondents has relied upon the judgement of this Court passed in the case of ***Jagdamba Singh and others vs. Dy. Director of Consolidation and others*** *reported in* ***1984 (2) LCD page 398***, the relevant para relied by the learned counsel for the respondent is quoted hereinbelow:

"27. The acquisition of land in the representative capacity either by the Karta

or a member of joint family can be established by the evidence led directly to establish the fact that the landlord had settled the land with him in the representative capacity for all the other members of the family as well and that all the members of the joint family came into possession over the land which was blended and treated as joint family property. The evidence establishing the fact about joint possession of all the members of the joint family, on the land of holding till it remained undivided or over specific plots of the holding by members of the family to the extent of their respective shares, by way of mutual partition in the event of separation in the family and the payment of land revenue by them either directly to landlord or through the recorded person, would, no doubt, be very material circumstance and a piece of admissible corroborative evidence to establish the fact regarding acquisition of land in the representative capacity by the recorded person. It may, however, be expressed to clarify that merely by being in possession over certain plots would alone be not enough to establish that the land was acquired by the recorded tenant in the representative capacity because no amount of common living and the use and enjoyment of the land jointly or severally would make the claimant a co-sharer in the holding or for treating it to be joint family property acquired in representative capacity. It has to be established by cogent evidence that the land was, in fact, acquired by the recorded person as Karta in the representative capacity for the benefit of all the members of the joint family and it was blended and always treated as joint family property by the recorded persons without any objection by the landlord to it and that the claimants have remained in possession over the land of the holding to the extent of their share in it and paid its rent. It be also shown that the possession of claimants over the land of the disputed holding was in their own right and not by way of any arrangement as licensee on behalf of the recorded tenant or for any other consideration on his behalf."

15. In reply, learned counsel for the petitioners has also relied upon the same judgement as relied by the learned counsel for the respondents and drawn attention of this Court to Para 15 of the judgement passed in the case of ***Jagdamba Singh and others (Supra)***, which is quoted hereinbelow:

"15. In all the aforesaid decisions it has been consistently held that in order to uphold the claim of co-tenancy rights on the ground of land being ancestral, it is essential that the entire land of the holding of the common ancestor must have come down in the identical form an it must have remained unchanged and intact. It would, however, be correct to say that where as a result of survey made during settlements, the area of some plots might have decreased or increased or that some plot or plots are eliminated for some explained reason from the holding in question viz. having fallen in the bed of river due to the alluvial and deluvial action of the river or by the construction of the canal etc., then in such event it cannot be said that there is break in the identity of the holding in dispute. The slight change like elimination of certain plot or the increase or decrease in the area of certain plots, for the aforesaid reasons shown, would not operate to destroy the identity of the holding coming down in identical form in the family from the time of common ancestor. But in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it must be established by the claimant that the holding has come down intact and in identical form that it has not been sub-divided or resettled with one or

some of the heirs or with the strangers. Thus, where the disputed holding has not come intact in the identical form and only some of the plots of the holding belonging to common ancestor are found included as in the present disputed holding it would not make it ancestral holding so as to give a share in it to the claimants on that ground nor it would be permissible to pick up those plots from the holding and declare them to be ancestral property and give a share in those plots to the claimant."

16. After hearing the learned counsel for the parties and going through the record of the case the dispute is with regard to the gata numbers as mentioned in the preceding paragraphs. The issue which is to be decided by this Court is whether the gata numbers mentioned above could be treated as an ancestral property for the purpose of giving right of co-tenancy to the respondents or not and whether apart from the gata numbers which were originally leased in favour of Sheo Charan Singh whether in that the respondents have any co-tenancy right or not.

17. It is an admitted case between both the parties that the lease which was granted in favour of Sheo Charan Singh was with regard to Gata Nos.123, 210, 211 and 251 and after his demise in the year 1915 the resettlement was made in favour of Harnam Singh for Gata Nos.210, 211, 251 (original gatas for which the lease was in favour of Sheo Charan Singh), leaving out Gata No.123 which was also in original lease. The new lease included 9 more new gatas alongwith 3 old gatas i.e. Gata Nos.212/1, 212/2, 214, 215, 216, 248, 249, 250 and 252/1.

18. Learned counsel for the petitioners has submitted that by the resettlement the identity of holding has been changed and it is not the same which was at the time of earlier lease in favour of Shiv Charan Singh, so the settlement cannot be said to be in the representative capacity of the joint family.

19. Learned counsel for the respondents has very fairly submitted that the respondents are not in a position to dispute the change of the identity of the holdings as record speaks from itself. It is also very fairly submitted by Sri Ashok Kumar Verma that the respondents are not disputing the resettlement in favour of Harnam Singh but the only thing is that the said settlement is for the whole family and the name of Harnam Singh was entered in the representative capacity of the joint family.

20. The judgement which has been relied by the learned counsel for the parties i.e. the Case of Jagdamga Singh (Supra), wherein it has been held that in order to uphold the claim of co-tenancy right on the ground of being a common ancestor, it must be established by the claimant that the holdings has come down intact and in identical form.

21. The undisputed fact between the parties that the identity of the holdings has been changed and it was not in the identical form as it was at the time of common ancestor and admitting the resettlement then it cannot be said that the entry was made in favour of Harnam Singh in the representative capacity of his joint family.

22. The finding given by the appellate court that 9 gata numbers as discussed above was acquired from the proceeds of original gatas leased in favour of Sheo Charan Singh for admitting the case of the respondents of co-tenancy could also not sustained for the reason that the re-settlement of all the gatas in a one go. It is not the case that initially the gata numbers which were leased in favour of Sheo Charan Singh was leased in favouir of Harnam Singh,

thereafter the nine other gatas were acquired subsequently.

23. Once the identity of the holding has completely changed, more particularly one Gata No.123 which was originally leased in favour of Sheo Charan Singh was not part of the resettlement in favour of Harman Singh alongwith new gatas, it could not be said that it is a property of common ancestor.

24. The respondents though examined witnesses in their favour, who had given statements but none of the statements supported by any documents, rather it is an undisputed case, even on the part of the respondents that the identity of the holdings has been changed and the fresh resettlement was made.

25. The findings of jointness would not lead to inference that the property is ancestral property as it has been held by Hon'ble Supreme Court as well as by this Court in catena of decisions. In the case of **Jai Narain v. D.D.C. & others reported in (1979) RD 198,** it was held that the presumption is only in respect of jointness and not that any property acquired by members of the family is a joint family property and this is a matter of evidence and not of presumption. In the present case, the respondents have failed to adduce any evidence that the property is a joint family property.

26. In the case of **Bodh Raj v. Joint Director of Consolidation Faizabad and Others, in Writ Petition No.676 of 1980** connected with **Writ Petition No.23 of 1980, decided on 22.09.1995,** wherein it has been held that there is a presumption with respect to the jointness of family and if it is shown or proved to the satisfaction of the Court then property inherited from a common ancestor will be deemed to be a joint property of all. It is also clarified in the said judgement that joint family funds must be used for purchase of the property in order to make it joint and property is entered in the name of one person then it has to be proved by other party, who claims to be a joint property that it was acquired by the joint family funds, which the respondents have failed to establish.

27. As far as submission of learned counsel for the petitioners that in other villages, the petitioners had not objected when the names of respondents were entered into revenue records but only in the village of Pooremani, the objection has been raised. It infers that where the respondents have their lawful claim, the respondents had not objected and where they are not entitled to get the right of co-tenancy, it has been objected.

28. Under these circumstances, the appellate order and the revisiaonal order are not sustainable and are liable to be quashed.

29. Accordingly, the writ petition is allowed.

30. The impugned appellate order dated 3.2.1981 passed by the Settlement Officer (Consolidation) and the revisional order dated 16.01.1982 passed by the revisional court are set aside.

(2024) 5 ILRA 1878
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 5686 of 1980

Gaya Prasad & Ors. ...Petitioners
Versus
J.D.C. & Ors. ...Respondents

Counsel for the Petitioners:

S.K. Singh, M.N. Singh, Mahesh Narain Singh, Mahesh Narayan, V.K. Singh

Counsel for the Respondents:
Sakeel Ahmad, M.C. Umrao, M.N. Singh, P.B. Umrao, Piyush, R.C. Pandey, R.P. Shastri, S.C.

Civil Law - Uttar Pradesh Consolidation of Holdings Act, 1953- In the basic year of consolidation operation-both parties were jointly recorded over the plot in question-Petitioners filed objection u/s 9-A (2) of UPCH Act against the basic year entry-impugned order decided both the parties are entitled to be recorded over ½ shares each over the plot-fact is that the predecessor of contesting respondent were recorded along with the predecessor of Petitioners –second settlement year and the entry continued up to the basic year of the consolidation operation-finding of fact that both are entitled for ½ share each is in accordance with law.

W.P. dismissed. (E-9)

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

1. Heard Mr. Mahesh Narayan Singh, learned counsel for the petitioners, Sri P. B. Umrao, learned counsel for respondent no. 4/3 and Sri Ashutosh Kumar Rai, learned Additional Chief Standing Counsel for the State.

2. Brief facts of the case are that plots of Khata No. 323/20-44, situated at village Korsum, Pargana Bindki, District Fatehpur was recorded in the basic year of the consolidation operation in the name of both parties (Ram Chela and Kalicharan). An objection under Section 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred as UPCH Act) has been filed by the petitioners against the basic year entry in respect to the plot in question stating that Plot No. 1365, 1366 & 1390 are sole tenancy of petitioners as such the name of respondnet no. 4/Kalicharan be expunged and respondent no. 4 has no share in Plot No. 1365, 1366 & 1390. It is further prayed in the objection that in Plot No. 1327 & 1328, petitioners have 2/3 share and respondent no. 4 has 1/3 share. Consolidation Officer framed issues in the aforementioned case which have been registered as case no. 8257. The parties lead evidence in support of their cases. The Consolidation Officer vide order dated 27.01.1975 decided the objection holding that petitioners shall be recorded as exclusive owner of Plot Nos. 1365 & 1366 and in respect to Plot Nos. 1327 & 1328, petitioners will be entitled to 7/12 share and respondent no. 4 shall be entitled to 5/12 share. The Consolidation Officer further held that in remaining plots both parties will be entitled to 1/2 share. Against the order of Consolidation Officer dated 27.01.1975 both parties filed appeal under Section 11(1) of the UPCH Act before the Settlement Consolidation Officer. The appeal filed by the petitioners was registered as Appeal No. 559 and appeal filed by the contesting respondent no. 4 was registered as Appeal No. 523. Both the appeals were consolidated and heard together by Assistant Settlement Officer, Consolidation. The Assistant Settlement Officer, Consolidation vide order dated 20.09.1975 allowed the appeal filed by contesting respondent no. 4 and dismissed the appeal filed by the petitioners directing to record the name of the petitioners over 1/2 share of the plot in dispute and contesting respondent no. 4 was also ordered to be recorded over 1/2 share of the plot in dispute. Petitioners challenged the appellate order dated 20.09.1975 in revision under Section 48 of UPCH Act before Deputy Director of Consolidation, which was registered as Revision No. 185. Deputy Director of Consolidation vide order dated 15.03.1980, dismissed the

revision filed by the petitioners and affirmed the order of Assistant Settlement Officer, Consolidation. Hence, this writ petition on behalf of petitioners challenging the impugned orders passed by the respondent nos. 1, 2 & 3.

3. This Court has entertained the matter and granted interim protection on 03.07.1980 staying the dispossession of the petitioner from the plot in question.

4. In pursuance of the order dated 03.07.1980 parties have exchanged their affidavits.

5. Learned counsel for the petitioners submitted that predecessor of the petitioners were recorded over the plot in question in the first settlement but without any order of the court the predecessor of the contesting respondent no. 4 was recorded in the second settlement, as such the objection filed by the petitioners claiming sole tenancy in respect to the Plot Nos. 1365, 1366 and 1390 is to be allowed and the name of the contesting respondent is to be expunged from Plot Nos. 1365, 1366 & 1390. He further submitted that in respect to the Plot Nos. 1327 & 1328 sale deeds were executed in favour of the petitioners' predecessor, as such petitioners were entitled to 2/3 shares and contesting respondents are entitled to 1/3 share in respect to Plot No. 1327 & 1328. He submitted that in the sale deed the contesting respondent no. 4 was witness as such they cannot deny the execution of the sale deed in favour of predecessor of petitioners as such petitioners should be ordered to be recorded over Plot Nos. 1327 & 1328 having 2/3 share. He submitted that all the orders passed by consolidation authorities are liable to be set aside and the petitioners objection under Section 9-A(2) of UPCH Act is to be allowed in toto.

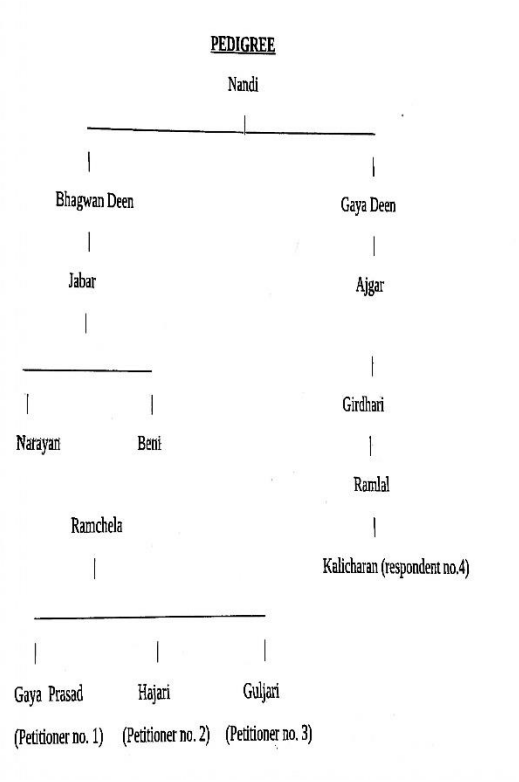
6. On the other hand, Mr. P. B. Umrao, learned counsel appearing for the respondent no. 4/3 submitted that the predecessor of contesting respondents were recorded since second settlement along with predecessor of the petitioners and the entry continued till the basic year of the consolidation operation as such the Settlement Officer, Consolidation has rightly held that both parties are entitled to 1/2 share each in respect to all the plots. He further submitted that sale deed, which are even unregistered also cannot be executed in respect to the Sirdari plots as such there is no illegality in the finding of the fact recorded by the Assistant Settlement Officer, Consolidation, while deciding the appeal filed by both parties. He submitted that no interference is required against impugned judgment and writ petition is liable to be dismissed.

7. I have considered the arguments advanced by learned counsel for the parties and perused the record.

8. There is no dispute about the fact that in the basic year of the consolidation operation both parties were jointly recorded over the plot in question. There is also no dispute about the fact that petitioners filed objection under section 9-A(2) of UPCH Act against the basic year entry, which has been decided by consolidation authorities under the impugned judgment finally it has been held that both parties are entitled to be recorded over 1/2 shares each over the plot in question.

9. The undisputed family pedigree which is also mentioned in the judgment of appellate court will be relevant for perusal, the same is as under:-

PEDIGREE



10. The pedigree mentioned above demonstrate that petitioners are from the branch of Bhagwandeen & respondent no. 4 is from the branch of Gayadeen.

11. The perusal of the appellate Court order dated 20.09.1975 will be also relevant in order to appreciate the consideration of evidences of settlement year by the appellate Court, which is as under:-

न्यायालय सहायक बन्दोबस्त अधिकारी चकबन्दी फतेहपुर
अपील सं० 532/55 वसन 75 धारा 11 (1)
चकबन्दी अधिनियम
ग्राम कोरसम परगना बिन्दकी जिला फतेहपुर
1- कालीचरन बनाम गया प्रसाद आदि
2- गया प्रसाद आदि बनाम कालीचरन

पहले बन्दोबस्त में मौजूदा गाटा 1365, 1366 का साबिक गाटा 1339 था जो कि 1384 को बन्दोबस्त में तनहा जबर के नाम दर्ज था। किन्तु दूसरे बन्दोबस्त मे यह दोनों नम्बरान दोनों पक्षों के मूरसान के नाम दर्ज था। गया प्रसाद आदि ने मौजूदा खाता 88 जिसका रकबा 21-3-0 है के संबंध में दिखाया है कि यह खाता पहले बन्दोबस्त मे तनहा अजगर के नाम दर्ज था इसमें यह साबित किया है कि दोनों पक्षों के पूर्वजों में बन्दोबस्त एक से ही बटवारा हो गया था यह बात दोनों पक्षों को स्वीकार भी है कि इस प्रकार खाता संख्या 354 जो कि इस समय रामलाल पुत्र गिरधारी के नाम दर्ज है पहले खाता 88 था और अजगर का था।

गया प्रसाद आदि के विद्ववान वकील की बहस है कि गाटा 1365, 1366 पहले बन्दोबस्त मे तनहा जबर के नाम था और बटवारा हो चुका था इसलिये दूसरे बन्दोबस्त मे इनका इन्द्राज दोनों पक्षों के पूर्वजों के नाम गलत हुआ केवल बन्दोबस्त में शामिल प्रविष्ट हो जाने से कोई अधिकार उत्तरवादी कालीचरन के पूर्वजों का नहीं था केवल प्रविष्ट से कोई आगम प्राप्त नहीं होता है। उसका पुष्टीकरण आर०डी० 1953 पेज 6 व आर० डी० 1952 पेज 142 से किया है।

उत्तरवादी कालीचरन के विद्ववान वकील की बहस है कि आखिरी बन्दोबस्त की प्रविष्ट पहले बन्दोबस्त से अधिक महत्व की होती है इसलिये बन्दोबस्त 1319 की प्रविष्ट दोनों गाटों 1365,1366 के संबंध में सही मानी जावेगी। आर०डी० 1958 पेज 13 के अनुसार 1333 की प्रविष्ट भी महत्व पूर्णत होती है और उससे अधिक अंतिम बन्दोबस्त की मानी गयी है। इसमें अलावा कालीचरन के विद्ववान वकील की यह भी बहस है कि यह दोनों पक्षों को स्वीकार है कि बटवारा पहले बन्दोबस्त में हुआ था और 40 साल से अधिक तथा एक सेटलमेट से कालीचरन के पूर्वजों का नाम दर्ज है। इसलिये गया प्रसाद आदि का दावा तनहा काश्तकारी का गलत है। जैसा आर०डी० 1940 पेजी 285 पर निर्णय हो चुका है। बन्दोबस्त 1319 से गया प्रसाद व उनके पूर्वज ने उनके पूर्वजों को सहखातेदारी स्वीकार करते रहे हैं इसलिये भी स्टापेल और एक्वीसेन्स से कालीचरन की सहखातेदारी हो जाती है जैसा कि आर०डी० 1969 पेज 396 पर निर्णय हो चुका है। इस निर्णय के अनुसार काली चरन की प्रविष्ट 18 साल की सहखातेदारी के संबंध में पर्याप्त है और इसमें लाआफ प्लेडिंग लागू है जिसके द्वारा एक हिस्सेदार अपनी प्रथम सम्पत्ति को स्वेच्छा से संयुक्त परिवार की सम्पत्ति मे शामिल कर सकता है जैसा कि ए०आई०आर 1963 सुप्रीमकोर्ट पेज 160 (बी) में निर्णय हो चुका है।

उपरोक्त से प्रकट है कि गाटा 1365,1366 के संबंध मे कालीचरन की अपील उचित है। जहां तक गाटा 1390 का प्रश्न है इसका गया प्रसाद केवल इस आधार पर तनहा चाहते हैं क्योंकि इस पर उनका तनहा कब्जा है। इसी संबंध मे मुझे कहना है कि बहस की दृष्टि से यह मान भी लिया जाय कि इसको गया प्रसाद आदि जोते हैं तो यह माना जावेगा कि आपसी बटवारा के आधार पर जोते है क्योकि

संयुक्त खाते में एक हिस्से दार का कब्जा सभी हिस्सेदारों का कब्जा माना जाता है जैसा कि आर०डी० 1971 पेज 408 व ए०डब्लू० आर० 1973 पेज 368 पर निर्णय हो चुका है। गाटा 1327, 1328 मे गया प्रसाद आदि का 2/3 अंश मांगते है। चकबन्दी अधिकारी ने 7/12 अंश दिया है इसको भी कालीचरन स्वीकार नहीं करते है। इसके संबंध में कालीचरन आदि ने यह दिखाया है कि 1327 रकबा व-1 7-0 व 1328 रकबा 0-10-0 का साविक नम्बर 1304 था जो कि 1284 में जबर 1/3 अजगर 1/3 बहादुर 1/3 रघुनाथ 1/3 दर्ज था इसके आधार पर अजगर व जबर का 2/3 अंश बताते हैं।

संबंध 1943 के तीन बैनामा दाखिल किये हैं और यह दिखाया है कि मनई ने अपने 1/3 का ¾ यानी ¼ हिस्सा कुल नम्बरान का विश्वनाथ को बेचा था और 1/12 ढकोखा कुर्मी को बेचा था। ढकोखा कुर्मी मेरे खानदान का है इसलिये 1/12 हिस्सा अजगर और जबर का और मिल गया। इस प्रकार अजगर और जबर का 2/3-1-1/2:- ¾ हो गया और ¼ अंश विश्वनाथ ने फिर बेचा इसमें से 3/16 अजगर व जवाहर दोनों को दिया और 1/16 जबर को बेचा। इस प्रकार जबर का हिस्सा 1/2-1-1/16, 9/16 होता है और 7/16 कालीचरन का होता है। इस संबंध में मुझे यह कहना है कि यह किंचित साबित नहीं है कि मनई विवादित भूमि में किस प्रकार का काश्तकार था जब कि बहादुर और रघुनाथ दर्ज थे। रघुनाथ का वारिस मनई होना साबित नहीं है। विवादित भूमि सीरदारी काश्तकारी है इसलिये इनका बैनामा भी होना साबित नहीं है। चूँकि इन बैनामों की मांग के आधार पर सिला बनाया गया है इसलिये इनका साबित होना भी अनिवार्य था जैसा कि भारतीय साक्ष्य अधिनियम की धारा 10 क में उल्लेख है। इस प्रकार गाटा 1327, 1328 के संबंध मे भी गया प्रसाद का कथन गलत है और कालीचरन की आपील उचित है। अतः आदेश हुआ कि कालीचरन की आपील संख्या 523 स्वीकार की जाती है गया प्रसाद आदि की आपील संख्या 559 खारिज की जाती है। चकबन्दी अधिकारी का निर्णय गाटा संख्या 1365, 1366, 1327, 1328 के संबंध में निरस्त किया जाता है तथा आदेश किया जाता है कि इन गाटों में भी कालीचरन का ½ अंश व गया प्रसाद व हजारी लाल व मोती लाल का ½ अंश दर्ज हो। यही आदेश अपील संख्या 559 पर भी लागू होगा।

ह० /- अपठनीय
हरिश्चन्द्र त्रिवेदी

दिनांक 20-9-75
सहायक बन्दोबस्त अधिकारी

चकबन्दी फतेहपुर।

12. The perusal of finding of fact recorded by appellate Court demonstrate that the predecessor of contesting respondent were recorded along with predecessor of petitioners, since the second settlement year and the entry continued up to the basic year of the consolidation operation as such the finding of fact, which has been recorded by the Assistant Settlement Officer, Consolidation while deciding the appeal filed by both parties for ½ share each is in accordance with law. The exercise of appellate jurisdiction by Assistant Settlement Officer, Consolidation is in accordance with the provision of UPCH Act. The appellate court has also recorded a finding of fact that sale deed cannot be executed in respect of the Sirdari plots, which is also in accordance with law.

13. So far as the exercise of revisional jurisdiction is concern, the same was also in accordance with UPCH Act as before 10.11.1980 the revisional Court was having limited jurisdiction under Section 48 of UPCH Act as such there was no illegality in the impugned revisional order dated 15.03.1980 by which revision filed by the petitioners was dismissed upholding the judgment of appellate Court giving ½ share to both parties in respect to plots in dispute.

14. Considering the entire facts and circumstances of the case, specially joint entry of both parties with effect from second settlement year, no interference is required against the impugned judgment passed by the consolidation authorities.

15. This petition is dismissed, accordingly.

16. No order as to cost.

(2024) 5 ILRA 1883
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ B No. 1006734 of 2013

Hriday Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjai Srivastava, Manoj Kumar, Rama Kant

Counsel for the Respondents:
S.C.

Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Petitioner taken agricultural loan-mortgaged half share of a land-loan remained outstanding-land was put to auction thrice- highest bidder was respondent no.6-settled in his favour-sale certificate was issued-auction was objected by Petitioner-rejected being highly belated-Revision-rejected-impugned- challenging that Assistant Collector not empowered- Assistant Collector of first class is empowered by the St. Government by a notification to exercise function of a collector/s 286 of the Act in respect of any holding of a defaulter- subject to sale approved by the Collector-no infirmity in the proceedings.

W.P. dismissed. (E-9)

List of Cases cited:

Shiv Narain Dubey Vs St. of U.P. & Ors., 2011 SCC OnLine All 1598

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

1. Heard Sri Sanjai Srivastav, learned counsel for petitioner as well as learned Standing Counsel for respondent Nos. 1 to 5 and Sri Amrendra Nath Tripathi, along with Sri Ashish Raman Mishra, learned counsel for respondent No. 6, 8 to 11.

2. The petitioner has approached this Court being aggrieved by the orders dated 22.03.2013 and 09.12.2012 passed by Board of Revenue, Uttar Pradesh as well as Commissioner, Devi Patan Mandal, Gonda thereby rejecting the petitionof the petitioner challenging the auction proceedings.

3. Facts in brief necessary for adjudication of the present case are that the petitioner had taken an agricultural loan in the year 1991 for an amount of Rs. 1,50,000/- from Allahabad Bank, District Bahraich to purchase a tractor and a threasure. To secure the said loan, the petitioner has mortgaged half share of land situated at Khasra No. 595 and 675, Gata no. 291 situated at Village Pipri Mohan, Pargana Fakarpur, Tehsil ?Mahasi, District Bahraich,. The petitioner had repaid only an amount of Rs. 25,000/- with the bank and the rest of the amount was not paid by him.

4. In light of the fact that the loan remained outstanding, recovery proceedings were initiated by the bank. The land was put to auction thrice. On the first occasion, no one came to participate in the said auction. On the second occasion also, no one came to participate in the said auction and the land was purchased by the State Government for Rs. 1/-. Subsequently, on objection being filed, the said auction was again set aside and the land was put to auction to third occasion. It is on this occasion that in the auction proceedings, respondent No. 6 had participated and was the successful bidder out of the three bidders and accordingly the auction proceeding was settled in favour of respondent No. 6.

5. The auction was held on 17.05.2004 and 1/4th of the amount was deposited on the same day while the remaining 3/4th

amount was deposited within a period of 15 days and the auction proceedings were confirmed by the order of the Assistant Collector on 19.07.2004. A sale certificate was also issued in favour of respondent No. 6 on 30.08.2004. For the first time, the objections were filed by the petitioner assailing the said auction on 16.09.2004 after the auction had been confirmed. The District Magistrate had rejected the said objections and against which order the petitioner had approached this Court by filing a writ petition being Writ Petition No. 5785 (MS) of 2004 which was disposed of by this Court by means of order dated 03.01.2005 directing the petitioner to file his objection before the Commissioner as per provisions contained in Rule 285 (I) of U.P. Zamindari Abolition and Land Reforms Rules.

6. As directed by the High Court the petitioner filed his objections on 31.01.2005 against the auction held on 17.05.2004 and considering that the objections were highly belated they were rejected by the Commissioner on 19.12.2012. The Commissioner while rejecting the objections also looked into the merits of the case and found that there was no infirmity in confirmation of the said auction or in conduct of the auction proceedings. The petitioner being aggrieved by the order of Commissioner dt. 19.12.2012 had preferred a revision before the Board of Revenue under Section 219 of the Land Revenue Act which was also rejected by means of order dated 22.08.2013.

7. The Board of Revenue also went to entire factual matrix as well as the grounds raised by the petitioner assailing the said auction proceedings and it was found that all the provisions of Rule 285 had been followed by the authorities and accordingly finding that the said objections to be bereft of any merit, dismissed the revision preferred by the petitioner. The petitioner being aggrieved by all the aforesaid orders has preferred the instant writ petition.

8. Learned counsel for petitioner while assailing the order has submitted that firstly the order dated 19.07.2004 by which the auction proceedings were confirmed was illegal, arbitrary and without jurisdiction. He submits that Assistant Collector /Sub-Divisional Magistrate, Bahraich did not have any power to confirm the auction inasmuch as the said confirmation could have been done only by the Collector. He submits that this aspect of the matter has been duly considered by Division Bench of this Court in the Case of Ram Avadh Tiwari Vs. Sudharshan Tiwari and others reported in 2009 (27) LCD 663 wherein this Court in unequivocal words have held that it is only the Collector who can confirm the sale and not the Sub-Divisional Officer.

9. Accordingly, he submits that once it is held that the confirmation was illegal then the entire proceedings will have to be set aside.

10. Sri Amrendra Nath Tripathi, learned counsel for respondents on the other hand has opposed the writ petition. He has submitted that the revenue authorities have duly considered the objections of the petitioner with regard to the allegation that provisions of Rule 285 have not been followed by the authority. He has further submitted that as the petitioner did not deposit outstanding amount he was arrested and detained under civil prison. He was released on his application an undertaking given on 11.06.2002 that he shall repay the entire outstanding amount of the loan. He further submits that as per provisions

contained in Rule 285 (I), the objections have to be submitted within 30 days from the date of the auction sale and in view of the specific provisions contained in the rule itself, no question arises for condonation of delay and any objections filed after the period prescribed are not liable to be considered by the authorities. He has further submitted that after confirmation of the sale and issuance of the sale certificate, a sale deed was executed in favour of respondent No. 6 on 17.08.2013.

11. He further submits that prior to the said auction, the notice was issued and was served upon the petitioner as per the report of the Collection Amin and the said report confirms the fact that petitioner was duly intimated about the auction proceedings. It is on the aforesaid facts a prayer has been made for dismissal of the writ petition.

12. I have heard learned counsel for parties and perused the record.

13. The moot question which has arisen for determination of this Court is with regard to the adherence of the provisions contained in Rule 285 (J) of U.P. Zamindari Abolition and Land Reforms Rules, 1952 and effect of noncompliance thereof. For the sake of convenience, Rule 285 (J) of U.P. Zamindari Abolition and Land Reforms Rules is quoted hereinbelow:-

"Rule 285(J) -On the expiration of thirty days from the date of the sale if no such application as is mentioned in Rule 285-H or Rule 285-1, has been made or if such application has been made and rejected by the Collector or the Commissioner, the Collector shall pass an order confirming the sale after satisfying himself that the purchase of land in question by the bidder would not be in contravention of the provisions of Section 154. Even order passed under this rule shall be final."

14. As per aforesaid rule, on the expiry of 30 days from the date of sale if no application preferred as provided for in Rule 185(H)/Rule 285(I) of the Rules of 1952 or if such application has been made and rejected by the Collector or Commissioner, the Collector shall pass an order confirming the sale after satisfying himself that the purchase of the land in question by the bidder would not be in contravention of the provisions of Section 154.

15. According to the U.P. Zamindari Abolition and Land Reforms Act, the Collector has been prescribed in Section 3(4) according to which "Collector" means an officer appointed as Collector under the provisions of the U.P. Land Revenue Act, 1901 and includes an Assistant Collector of the first class empowered by the State Government by a notification in the Gazette to discharge all or any of the functions of a Collector under this Act."

16. From the aforesaid provisions, it is clear that that the definition Collector is is inclusive and the Assistant Collector of the first class empoered by the State Government by a notification can discharge all or any of his functions as per the said notifications. This Court in the case of Ram Avadh Tiwari had noticed that the notification of the State Government dated 17.01.1976 wherein it was stated that the same contain a scheme empowering the Assistant Collector First Class who is incharge of the Division, to exercise the function of Collector under Section 286 of the said Act in respect of any holding of a defaulter of which he is a Bhoomidhar,

Sirdhar or Asami, subject to the conditions that the such sale are approved by the Collector.

17. The Court was of the view that even though the Assistant collector has been empowered by the said notification but his exercise of power is subject to the approval of the Collector. The Court noticed the inconsistency between the said notification and the rule position and also considering the case of the Supreme Court in the case of **Shiv Narain Dubey Vs. State of U.P. & Ors., 2011 SCC OnLine All 1598** was of the view that only the Collector is empowered to confirm the sale as provided for under Rule 285 (J) and not the Sub-Divisional Officer.

18. It is noticed that in the case of Ram Awadh, the Supreme Court had not conclusively decided the controversy pertaining to interpretation of Rule 285(J) and as to whether the Collector or the Assistant collector would be empowered to confirm the sale and had not expressed any final opinion in the matter remitting the matter to the High Court to decide the same afresh.

19. In the remand proceedings, the matter was finalised in the case of **Shiv Narain Dubey Vs. State of U.P. & Ors., 2011 SCC OnLine All 1598.**

20. In the remand proceedings, this Court considered the fact that the case of Ram Avadh Tiwari was decided considering the Government Order dated 17.01.1976 which was superseded by another Government Order dated 10.08.1981. In the Government Order dated 10.08.1981, it was stated that a state of confusion is existing with regard to power of the Collector to be exercised under various provisions of the Zamindari Abolition and Land Reforms Act, 1950. In Clause 2, it was clarified that except provisions contained in Section 198 of the Act of 1950, the Pargana Adhikaries would be empowered to act in all cases where the reference has been made to the Collector. This Court in the case of **Shiv Narain Dubey(Supra)** considered the Government Order dated 10.08.1981 and was of the view that the judgments in the case of **Ram Avadh Tiwari (supra)** was passed without noticing the Government Order dated 30.05.1981 and consequently was not good law and is per inqurium as based on non-consideration of notification dated 17.01.1976 which at that point of time had been superceded.

21. It was conclusively held that the SDO was empowered to hold the auction and confirm the sale as per Rule of 285(J) of t he Act of 1950.

22. In light of the above, the law in this regard has been clarified which is based on the Government Order dated 10.08.1981 and consequently this Court after examining the entire conspectus of the fact was of the view that in the present case, the sale was confirmed by the Assistant Collector/SDM,Mahsee, Bahraich who was fully empowered to confirm the same and consequently there is no infirmity in the order of confirmation dated 19.07.2004. No other argument was advanced assailing the impugned auction.

23. In light of the above, there is no infirmity in the auction proceedings or the confirmation of sale, hence the writ petition is bereft of merits and is accordingly **dismissed.**

(2024) 5 ILRA 1887
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 1002642 of 2007

Ainul Hussain Siddiqui ...Petitioner
Versus
Presiding Officer Labour Court U.P. Lucknow & Anr. ...Respondents

Counsel for the Petitioner:
Amar Nath Tripathi, Akhter Abbas, Asif Iqbal, Manoj Kumar Sahu, Syed Husain Abbas

Counsel for the Respondents:
C.S.C., Anupras Singh, J.N. Mathur

Disciplinary Proceedings-Petitioner appointed as an operator in the factory of opposite party-several employees indulged into violent process for pressing their demands-Petitioner was suspended pending disciplinary –suspension became redundant-after coming to the factory he actively participated in illegal and unconstitutional activities-enquiry-dismissed- employer submitted 28 documents before enquiry officer and Petitioner St.d that he will not produce any document in defence-declined to cross –examine witnesses-findings of the Enquiry Officer are based on cogent material-evidence led by employer remained uncontroverted-no illegality.

W.P. dismissed. (E-9)

List of Cases cited:

1. Anil Kumar Vs Presiding Officer, (1985) 3 SCC 378,

2. Rajeev Saxena Vs Punjab National Bank, 2018 (36) LCD 1218

3. Canara Bank Vs Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court & ors.2004 (102) FLR 1146

4. Rajinder Kumar Kindra Vs Delhi Admn.: (1984) 4 SCC 635.

5. Airtech Private Ltd. Vs St. of U.P., 1983 SCC Online ALL954

6. M.P. Electricity Board Vs Jagdish Chandra Sharma , (2005) 3 SCC 401

7. Rajeev Saxena Vs Punjab National Bank, 2018 (36) LCD 1218

8. Canara Bank Vs Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court & ors.2004 (102) FLR 1146

9. Rajinder Kumar Kindra Vs Delhi Admn.: (1984) 4 SCC 635

10. Airtech Private Ltd. Vs St. of U.P., 1983 SCC OnLine All 954

11. Shankar Chakravarti Vs Britannia Biscuit Co. Ltd., (1979) 3 SCC 371

12. M.P. Electricity Board Vs Jagdish Chandra Sharma, (2005) 3 SCC 401

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

1. Heard Sri Amar Nath Tripathi, the learned counsel for the petitioner, Smt. Seema Dixit, the learned Standing Counsel and Sri Anupras Singh, the learned counsel for opposite party no. 2.

2. By means of instant petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of an award dated 30.10.2006 passed by the Prescribed Authority, Labour Court, U.P., Lucknow in Case No. 103 of 2002 as well as an order dated 10.08.2000 passed by opposite party no. 2 dismissing

the petitioner from the service of Telco, which is now known as Tata Motors Ltd.

3. Briefly stated, facts of the case are that the petitioner was appointed as an operator in the factory of opposite party no. 2 situated at Lucknow on 27.04.1995. On 28.03.2000, several employees of the Company indulged into violent process for pressing their demands and they indulged into arson and loot and held the General Manager of the Company hostage, who could be freed with the intervention of the police. The petitioner was suspended by means of an order dated 30.03.2000, pending disciplinary enquiry.

4. The Suspension order was put in abeyance by means of another order dated 07.04.2000, wherein it was stated that as the lock out of the factory has been declared by the management, the suspension has become redundant during continuance of lock out.

5. On 03.04.2000, the charge sheet was issued to the petitioner, a copy whereof has been annexed with the petition which inter alia stated that the petitioner was on duty in B-shift. After coming to the factory, the petitioner did not go to his work place and struck the work. He went to the office of the General Manager and joined the ongoing 'Dharna' and 'Gherao' of the General Manager. He actively participated in illegal and unconstitutional activities and agitated other workers against the management. He threatened the General Manager that his 'Gherao' will continue until the demand of increase in wages was met. Defamatory, intimidating and abusive slogans were hurled which have been reproduced in the charge-sheet and considering the indecent language whereof, the same cannot be reproduced in this judgment. The charge-sheet states that the door of General Manager's Lobby was broken open and the petitioner alongwith some other persons forcibly entered into the room of the General Manager and demanded a meeting with him. During the meeting, the petitioner continued provoking and instigating the workers, which whipped up the passion of the workers and surcharged the already tense atmosphere. The District Magistrate and Police officials had to intervene in the matter and they warned the workmen to lift the illegal confinement of the General Manager. The Administration thereafter warned the workmen to vacate the Chassis Assembly Block Building immediately otherwise the police will be forced to take action. Sensing danger to the life of the General Manager, the police started a rescue operation at about 09:30 p.m. and when he was being taken out in police protection, the petitioner alongwith other workers turned violent and indulged in arson and looting and they assaulted the officials of the district administration, police and of the company with iron rods, broken flower pots, pieces of broken furniture and broken glass panes. The Additional District Magistrate, Trans Gomti, Superintendent of Police, Trans Gomti, Circle Officer Trans Gomti, Station House Officer, Chinhat, some other police personnel and the company's officials Mr. Vinay Kumar Pathak, Mr. Sivdasan and Mr. S. Banerjee were severely injured. Thereafter the petitioner put the expensive property of the Company to fire, in which the Chassis Assembly Block Office building and Planning Department Office of the Company were engulfed. The petitioner indulged in damaging the company's vehicles parked near time office by bricks and missiles. Due to the aforesaid activities, the company suffered losses of Crores of Rupees. The charge-sheet stated that the aforesaid acts amount to serious and grave misconduct as per the provisions of Clause

24(I), 24(2), 24(9), 24(15(a), 24(15)(b), 24(17), 24(18) and 24(39) of the certified standing orders of the company which were reproduced in the charge-sheet. The petitioner claims to have given a letter dated 07.04.2000 demanding copies of certain documents. The enquiry commenced on 28.05.2000 on which date the petitioner had given an application to the Enquiry Officer stating that the documents had not been provided to him and, therefore, he could not file any reply.

6. The Enquiry Officer submitted a report dated 05.07.2000, wherein it is recorded that the petitioner had given an application that he will represent himself. The employer submitted 28 documents. The petitioner stated that he will not produce any document in defence. As per narration made in the enquiry report, Sri Sanjay Sablok PW-1, stated regarding the incident that took place on 28.03.2000. However the enquiry report also refers to PW-1 as Sri Amitabh Nandi. Sri Vinay Pathak was examined as PW-2 and Vikas Bindal was examined as PW-3 Lieutenant Colonel S.S. Maan was examined as PW-4. The petitioner declined to cross-examine the witnesses produced by the employer.

7. The Enquiry Officer concluded that all statements of the witnesses produced by the employer established that on 28.03.2000, the petitioner had made 'Gherao' of the General Manager of the Company alongwith other employees. He was present where speeches were being given, obscene and intimidating slogans and were being raised and the General Manager was being forced to come out of his room to accept the demands and when he did not come out, the door of the General Manager Lobby was broken open. He was 'Gheraoed' for several hours. The Enquiry Officer also referred to the photographs of the incident, newspaper cuttings, FIR, Charter of demands, medico legal examination reports and report of damages, which establishes the active involvement of the petitioner in the incident. The statement of Sanjay Sablok PW-1 and Senior Engineer Vikas Bindal proved that at that point of time, the petitioner was not present in the department and he was seen in the General Manager Officer. He was stopped but he did not agree. PW-2 Vikas Bindal had seen the petitioner in the crowd that was causing damage to the General Manager Office.

8. The petitioner did not adduce any documentary evidence and in his oral submission, he admitted that no work was being done in the factory since morning of 28.03.2000. Most of the employees of B-shift had gone towards the General Manager office and he had also gone there. In his cross examination, he stated that he had gone to attend the sit-in and he had not done it under any fear. He further admitted that all the employees were present in the office of the General Manager.

9. The enquiry officer found that the entire evidence available before him indicates that the petitioner was involved with several employees in laying 'Gherao' of General Manager, raising slogans, indulging in damaging the company property and the charges leveled against him were proved.

10. On the basis of the aforesaid enquiry report, the petitioner was dismissed from service by means of an order dated 10.08.2000.

11. The validity of the dismissal order was challenged before the Presiding Officer, Labour Court, U.P., Lucknow by the

following reference made on 26.06.2000 by the Deputy Labour Commissioner, Lucknow Zone, Lucknow: -

Whether the order dated 10.08.2000 passed by the employer dismissing the petitioner from service is proper and legal ? If no, then to what relief the workman is entitled thereon?.

12. The Labour Court framed the following preliminary issues: -

(i) Whether the departmental enquiry had been conducted against the petitioner in accordance with law or not, and it's effect

(ii) Whether the case of the petitioner can continue before the Industrial Tribunal-2, Lucknow when the cases of other (similarly situated) workmen were going on before Industrial Tribunal-2, Lucknow.

13. While deciding the preliminary objections, the Labour Court held that the departmental enquiry was conducted in a proper and legal manner, in which the petitioner had himself participated. On the second point, the Labour Court held that it had jurisdiction to decide the case.

14. On the point referred to the Labour Court for adjudication of the case, it held that the punishment awarded to the petitioner is proper and the dismissal order dated 10.08.2000 does not want any interference.

15. While assailing the aforesaid award, the learned counsel for the petitioner has submitted that the Labour Court has recorded the factual background of the case while deciding the preliminary issue, wherein it is stated that the petitioner had been appointed as an Operator on 12.07.1995. The Telco Employees Union was constituted around that time and it had entered into a settlement regarding fixation of the salary in the year, 1996 which was in force till 31.03.1999. Thereafter the Union raised a fresh demand for increment of wages and decided to reduce the pace of production, which resulted in decrease of production by 50%. The learned counsel for the petitioner submitted that these facts are not borne out all the pleadings of the parties.

16. The Labour Court held that in reply to the charge-sheet, the petitioner had demanded certain documents. Clause 27 of the Standing Orders of the Company, demanded by the petitioner, had been shown to him during enquiry. He had demanded a copy of another report submitted against him whereas no separate report had been submitted against the petitioner. The petitioner did not submit any reply to the charge-sheet. The employer had appointed an Enquiry Officer by means of a letter dated 15.05.2000 and the enquiry proceedings commenced on 26.05.2000, on which date the petitioner again demanded the copies of documents. The employer's representative submitted that the enquiry was based on common facts, and, therefore, no separate report was there. The petitioner was shown Clause 7 of the Standing Order and he had noted the same.

17. Statement of Sanjay Sablok was recorded as employer witness and the petitioner had cross-examined him on 15.06.2000. The petitioner stated that he was unable to understand Clause 27 and he wanted to engage a legal representative, which was opposed by the employer stating that no outsider could be permitted to be involved in the departmental proceedings.

Sri Vinay Pathak and Vikas Bindal were examined in the presence of the petitioner but he did not cross-examine them.

18. Accordingly, the Labour Court held that enquiry against the petitioner was held in a proper manner and there was no illegality in it. While deciding the questions referred to it by the Deputy Labour Commissioner, the Presiding Officer, Labour Court held that the employee did not lead any evidence and the employer also stated that as the employee has not led any evidence, the employer also would not given any evidence. The Labour Court found that it was for the petitioner to prove by leading evidence as to how the departmental proceedings had not been held properly, but he failed to discharge this burden of proof by leading any evidence.

19. The Labour Court further held that during the proceedings before the Labour Court, the petitioner informed on 07.07.2006 that he had filed a Writ Petition No. 2601 of 2006 against the order passed by the Labour Court, on which ground, time was granted to him. However, this fact stated by the petitioner was false as the Writ Petition had already been dismissed on 24.05.2006 at the admission stage itself and the petitioner had been permitted to participate in further proceedings before the Labour Court. At this stage, the petitioner engaged another Advocate who gave an application for directing the employers to adduce evidences, upon which a detailed order was passed on 28.02.2006 stating that the employers cannot be compelled to lead evidence because the reference was made at the instance of the employee and the burden to establish the illegality committed in the enquiry proceedings lied on the employee but he did not discharge this.

20. The learned counsel for the petitioner has submitted that the petitioner has filed a copy of the enquiry report as paper No. 13 and the learned counsel for the employer had endorsed "Not Admitted" on it and when the enquiry report itself had been denied by the employer, no penal action could be taken against the petitioner, on the basis of such enquiry report, however, the learned Labour Court has held that the document No. 13, filed by the employee, was an incomplete document as the enquiry report filed by the employer as paper No. 66 contains a mention of 28 documents whereas copy of the enquiry report filed by the petitioner contains a list of only 25 documents and the copy of documents at Serial Nos. 26, 27, 28 have not been filed with it. It could have been done by the petitioner deliberately or inadvertently but in any case, the enquiry report filed by the petitioner was not the same as the report filed by the employer "not admitted, was endorsed on the copy of the enquiry report filed for the reason and the petitioner cannot get any benefit from it".

21. The learned Counsel for the petitioner has relied upon the judgments in the cases of **Anil Kumar v. Presiding Officer**, (1985) 3 SCC 378**, Rajeev Saxena versus Punjab National Bank,** 2018 (36) LCD 1218, **Canara Bank Vs. Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court and Ors.** 2004 (102) FLR 1146 and **Rajinder Kumar Kindra v. Delhi Admn.:** (1984) 4 SCC 635.

22. The learned Counsel for the respondent has relied upon the judgments in the cases of **Airtech Private Ltd. v. State of U.P.**, 1983 SCC OnLine All 954 and **M.P. Electricity Board v. Jagdish Chandra Sharma**, (2005) 3 SCC 401.

23. In **Anil Kumar v. Presiding Officer**, (1985) 3 SCC 378, it was held that: -

"5. ... It is well-settled that a disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the enquiry officer has a duty to act judicially. The enquiry officer did not apply his mind to the evidence. Save setting out the names of the witnesses, he did not discuss the evidence. He merely recorded his ipse dixit that the charges are proved. He did not assign a single reason why the evidence produced by the appellant did not appeal to him or was considered not creditworthy. He did not permit a peep into his mind as to why the evidence produced by the management appealed to him in preference to the evidence produced by the appellant. An enquiry report in a quasi-judicial enquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the enquiry officer. It has to be a speaking order in the sense that the conclusion is supported by reasons. This is too well settled to be supported by a precedent…"

6. Where a disciplinary enquiry affects the livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, ***the minimum expectation is that the report must be a reasoned one. The Court then may not enter into the adequacy or sufficiency of evidence. But where the evidence is annexed to an order sheet and no corelation is established between the two showing application of mind, we are constrained to observe that it is not an enquiry report at all.*** *Therefore, there was no enquiry in this case worth the name and the order of termination based on such proceeding disclosing non-application of mind would be unsustainable."*

(emphasis added)

24. In **Rajeev Saxena versus Punjab National Bank,** 2018 (36) LCD 1218, it was held that: -

"35. It is amply clear that the petitioner's defence was not properly considered by the Inquiry Officer, disciplinary authority and also the appellate authority. The punishment of dismissal from service without notice was awarded to him on the basis of defective inquiry, by withholding prime witnesses from the inquiry proceedings. The burden of proof of disproving the charge was wrongly shifted towards the petitioner. It was proved from documentary evidence that the amount of Rs. 10,000/- was received by Shri Vikas Kudesia in cash, but the finding is that this payment to Shri Vikas Kudesia was not proved. The misconduct of posting fraudulent entries was accepted by Shri Vikas Kudesia in writing even then it was attributed to the petitioner. Neither the disciplinary nor the appellate authority considered the defence and evidence of the petitioner is correct perspective. Hence their findings are perverse and deserve to be set aside. The punishment awarded to the petitioner is unwarranted. This is one of such "exceptional case" as held by the Apex Court above.

25. In **Canara Bank Vs. Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court and Ors**. 2004 (102) FLR 1146, it was held that even if the domestic enquiry was proper and valid, the labour court can reappraise the entire evidence for recording it own findings for the purposes of satisfying itself whether the evidence relied on by the employer establishes the misconduct alleged against the workman.

26. In **Rajinder Kumar Kindra v. Delhi Admn.:** (1984) 4 SCC 635 the Hon'ble Supreme Court held that: -

16. ... It is thus well-settled that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man would come, the arbitrator appointed under Section 10-A or this Court in appeal under Article 136 can reject such findings as perverse. Holding that the findings are perverse does not constitute reappraisal of evidence, though we would have been perfectly justified in exercise of powers conferred by Section 11-A to do so.

17. It is equally well settled that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are either his ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated. The Industrial Tribunal or the arbitrator or a quasi-judicial authority can reject not only such findings but also the conclusion based on no legal evidence or if it is merely based on surmises and conjectures unrelated to evidence on the ground that they disclose total non-application of mind….

* * *

20. Where the order of dismissal is sought to be sustained on a finding in the domestic enquiry which is shown to be perverse and the enquiry is vitiated as suffering from non-application of mind the only course open to us is to set it aside and consequently relief of reinstatement must be granted and nothing was pointed to us why we should not grant the same."

27. In **Airtech Private Ltd. v. State of U.P.,** 1983 SCC OnLine All 954, this Court held that: -

"7. The matter can be looked at from another angle, which party will fail if the evidence is not led before the Labour Court in proceedings in a reference made to it for adjudication by the State Government ? The obvious answer is that the workman will fail. Here the reference was made by the State Government at the instance of the workmen and for the benefit of the workman. In the absence of any evidence led by or on behalf of the workman the reference is bound to be answered by the Court against the workmen. In such a situation it is not necessary for the employers to lead any evidence at all…."

28. In **Airtech Pvt. Ltd.** (Supra) this Court had relied upon a judgment of the Hon'ble Supreme Court in **Shankar Chakravarti v. Britannia Biscuit Co. Ltd.,** (1979) 3 SCC 371, wherein it was held that: -

"31…It has to decide the lis on the evidence adduced before it. While it may not be hide bound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a lis between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the lis on any extraneous considerations. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court.

32. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial tribunal is not

required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led."

29. In **M.P. Electricity Board v. Jagdish Chandra Sharma, (2005) 3 SCC 401**, it was held that: -

"8. The question then is, whether the interference with the punishment by the Labour Court was justified? In other words, the question is whether the punishment imposed was so harsh or so disproportionate to the charge proved, that it warranted or justified interference by the Labour Court? Here, it had been clearly found that the employee during work, had hit his superior officer with a tension screw on his back and on his nose leaving him with a bleeding and broken nose. It has also been found that this incident was followed by the unauthorised absence of the employee. It is in the context of these charges found established that the punishment of termination was imposed on the employee. The jurisdiction under Section 107-A of the Act to interfere with punishment when it is a discharge or dismissal can be exercised by the Labour Court only when it is satisfied that the discharge or dismissal is not justified. Similarly, the High Court gets jurisdiction to interfere with the punishment in exercise of its jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed, is shockingly disproportionate to the charge proved.

* * *

...Recently, in Muriadih Colliery BCC Ltd. v. Bihar Colliery Kamgar Union (2005) 3 SCC 331 this Court after referring to and quoting the relevant passages from Krishnakali Tea Estate v. Akhil Bharatiya Chah Mazdoor Sangh (2004) 8 SCC 200 and Tournamulla Estate v. Workmen (1973) 2 SCC 502 held:

"The courts below by condoning an act of physical violence have undermined the discipline in the organisation, hence, in the above factual backdrop, it can never be said that the Industrial Tribunal could have exercised its authority under Section 11-A of the Act to interfere with the punishment of dismissal."

9. In the case on hand, the employee has been found guilty of hitting and injuring his superior officer at the workplace, obviously in the presence of other employees. This clearly amounted to breach of discipline in the organisation. Discipline at the workplace in an organisation like the employer herein, is the sine qua non for the efficient working of the organisation. When an employee breaches such discipline and the employer terminates his services, it is not open to a Labour Court or an Industrial Tribunal to take the view that the punishment awarded is shockingly disproportionate to the charge proved. We have already referred to the views of this Court. To quote Jack Chan,

"discipline is a form of civilly responsible behaviour which helps maintain social order and contributes to the preservation, if not advancement, of collective interests of society at large".

Obviously this idea is more relevant in considering the working of an organisation like the employer herein or an industrial undertaking. Obedience to authority in a workplace is not slavery. It is not violative of one's natural rights. It is essential for the prosperity of the organisation as well as that of its employees. When in such a situation, a punishment of termination is awarded for hitting and injuring a superior officer supervising the work of the employee, with no extenuating

circumstance established, it cannot be said to be not justified. It cannot certainly be termed unduly harsh or disproportionate. The Labour Court and the High Court in this case totally misdirected themselves while exercising their jurisdiction. The Industrial Court made the correct approach and came to the right conclusion."

30. The principles which can be culled out from the aforesaid decisions are that a disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the enquiry officer has a duty to act judicially. The enquiry report must reflect the reasons for its conclusion. The Court may not enter into the adequacy or sufficiency of evidence. The labour court has power to reappraise the entire evidence for recording it own findings for the purposes of satisfying itself whether the evidence relied on by the employer establishes the misconduct alleged against the workman. Where the order of dismissal is based on a perverse finding in the domestic enquiry, the enquiry is vitiated as suffering from non-application of mind and it is unsustainable in law. The burden of proof to challenge the validity of the enquiry report or the order of punishment lies on the workman who assails its validity. If he does not discharge this burden, his claim is liable to fail. The Courts will not interfere in the quantum of punishment unless it is so disproportionate as would shock the Court's conscience.

31. When we examine the facts of the present case in light of the law laid down in the aforesaid precedents, what comes to light is that the employer had submitted 28 documents before the Enquiry Officer and the petitioner stated that he will not produce any document in defence. The employer produced four witnesses in support of its case but the petitioner declined to cross-examine those witnesses.

32. The Enquiry Officer concluded that all statements of the witnesses produced by the employer established that on 28.03.2000, the petitioner had made 'Gherao' of the General Manager of the Company alongwith other employees. He was present where speeches were being given, obscene and intimidating slogans and were being raised and the General Manager was being forced to come out of his room to accept the demands and when he did not come out, the door of the General Manager Lobby was broken open. He was 'Gheraoed' for several hours. The Enquiry Officer also referred to the photographs of the incident, newspaper cuttings, FIR, Charter of demands, medico legal examination reports and report of damages, which established the active involvement of the petitioner in the incident. The statement of Sanjay Sablok and Senior Engineer Vikas Bindal proved that at that point of time, the petitioner was not present in the department and he was seen in the General Manager Officer. He was stopped but he did not agree. Vikas Bindal had seen the petitioner in the crowd that was causing damage to the General Manager Office.

33. The petitioner admitted during his oral submissions that no work was being done in the factory since morning of 28.03.2000 and he had gone to the General Manager's Office alongwith other employees of B-shift and he was present in the office of the General Manager. He admitted that he had gone to attend the sit-in and he had not done it under any fear. The enquiry officer found that the entire evidence available before him indicates that the petitioner was involved with several employees in laying 'Gherao' of General

Manager, raising slogans, indulging in damaging the company property and the charges leveled against him were proved.

34. The petitioner had given an application to the Enquiry Officer for being represented in the enquiry by an outsider, which request was not accepted by the enquiry officer. The Enquiry Officer has erroneously mentioned that the petitioner had given an application that he will represent himself, but this error is insignificant and it does not vitiate the outcome of the enquiry. At one place the Enquiry Officer has wrongly mentioned the name of PW-1 as Sri Amitabh Nandi whereas PW-1 was Sri. Sanjay Sablok and this error also does not vitiate the enquiry report as there is sufficient material to support the findings of the enquiry.

35. The Enquiry Officer has found that the petitioner had made 'Gherao' of the General Manager of the Company alongwith other employees. He was present where speeches were being given, obscene and intimidating slogans and were being raised and the General Manager was being forced to come out of his room to accept the demands and when he did not come out, the door of the General Manager Lobby was broken open. He was 'Gheraoed' for several hours. The Enquiry Officer also referred to the photographs of the incident, newspaper cuttings, FIR, Charter of demands, medico legal examination reports and report of damages, which established active involvement of the petitioner in the incident. The findings of the Enquiry Officer are based on cogent material and the same are not perverse.

36. The burden to prove that the Enquiry Report was incorrect and the dismissal order was bad in law lied on the petitioner as he had sought to challenge the same, but he did not lead any evidence before the Labour Court also. Thus the evidence led by the employer remained uncontroverted.

37. The petitioner had left the place assigned to him for performing his duty and he had involved himself with numerous other employees, who turned violent causing injuries to several persons, including officials of the District Administration, Police and officials of the company. The aforesaid acts or causing damage to the company's property and physical injuries to the company's officials amount to indiscipline of the lowest category, which cannot be tolerated by any employer. In the aforesaid factual background, the punishment of dismissal from service cannot be said to be disproportionate.

38. The Labour Court has not committed any illegality in upholding the order of dismissal of the petitioner from service. The Writ Petition lacks merit and the same is **dismissed.**

(2024) 5 ILRA 1896
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Sales/Trade Tax Revision No. 24 of 2009

M/s Raju Cement Store Oel ...Revisionist
Versus
Commissioner of Commercial Taxes U.P. Commercial Tax ...Opposite Party

Counsel for the Revisionist:
P. Agrawal

Counsel for the Opposite Party:
C.S.C.

U.P. Trade Tax Act, 1948-Survey of Petitioner's premise conducted –show cause notice issued -taxable liability assessed-tax liability reduced by First Appellate Authority on the ground that at the time of survey, merely a sum of Rs. 1,510/- was found in the cash box-set aside by the Tribunal in Second Appeal-Tribunal was justified in restoring the order passed by the Assessing Authority after considering the entire relevant material found during survey not rebutted by the Petitioner in its reply- Petitioner appeared on several dates-but his counsel neither appeared before the Tribunal nor sought an adjournment-Tribunal was justified in proceeding ex-parte.

Revision dismissed. (E-9)

List of Cases cited:

1. Commissioner of Sales Tax U.P. Vs Kumaon Tractors & Motors: (2009) 9 SCC 379

2. Commissioner, Commercial Tax U.P. Lucknow Vs S/S D.I.C. India Ltd. 2024:AHC:13269

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

1. Heard Shri Amar Mani Tripathi holding brief of Shri Pradeep Agrawal Advocate the learned Counsel for the petitioner and Shri Sanjay Sareen, the learned Additional Chief Standing Counsel for the State.

2. By means of the instant Revision filed under Section 11 of the U.P. Trade Tax Act 1948, the revisionist has challenged validity of an order dated 16.10.2008 passed by the Trade Tax Tribunal, Lucknow Bench-III, Lucknow in Second Appeal No.322 of 2004, which was filed by the petitioner against an order dated 28.01.2004 passed by the Joint Commissioner Appeal 4, Trade Tax, Sitapur. The petitioner has also challenged the decision of Second Appeal No.241 of 2004 filed by the Commissioner, Trade Tax U.P., Lucknow, which appeal has also been decided by the same order.

3. The learned Additional Chief Standing Counsel raised a preliminary objection that the petitioner has challenged orders passed in two separate second appeals. Even if both the second appeals were decided by a common judgment and order, since the order decides two separate appeals, two separate revisions ought to have been filed.

4. The learned counsel for the petitioner could not dispute this preliminary objection.

5. Although there is force in the preliminary objection raised by the learned Additional Chief Standing Counsel, since the revision was admitted by means of an order dated 22.01.2009, I do not think it would be proper to dismiss the revision of the preliminary objection and in the interest of justice, I proceed to decide the revision on its merits.

6. Briefly stated, facts of the case are that a survey of the petitioner's premises was conducted by the Special Investigation Branch of Trade Tax Department on 25.01.2003. On the basis of findings of the survey, a show cause notice was issued to the petitioner, to which he did not submit a reply. After taking into consideration the uncontroverted findings of the survey, taxable sale of goods worth Rs.18,00,000/- was assessed, on which the petitioner's tax liability of Rs.1,76,000/- was assessed by the Assessing Officer.

7. The First Appellate Authority did not interfere in the finding of the Assessing

Authority regarding rejection of account books of the petitioner. Yet it substantially decreased the petitioner's tax liability solely on the ground that at the time of survey made at about 4:30 PM on 25.01.2003, merely a sum of Rs.1,510/- was found in the cash box of the petitioner.

8. In second appeal, the department contended that the First Appellate Authority erred in assessing the petitioner's tax liability only on the basis of cash amount found in the cash box of the petitioner's premises whereas several documents have been recovered showing sales of goods worth huge amount, on credit. In such circumstances, tax liability assessed by the Assessing Authority could not be reduced merely on the basis of quantum of cash received in the petitioner's premises.

9. Slips bearing Nos.36 to 50 found in the petitioner's premises indicated sale of goods worth Rs.1,08,625/- by evasion of tax. Slips bearing Nos.15 to 34 indicated sale of goods worth Rs.35,708/-, including Cement worth Rs.15,442/-. Slips bearing Nos.36 to 50/- established sale of Cement and some other goods by evading tax. The source of purchase of Cement and Iron bars could not be established due to lack of documentary evidence and, therefore, the Assessing Authority assessed liability of tax treating the petitioner to be the manufacturer of the goods. The First Appellate Authority did not record any finding regarding lack of purchase of documents for Iron bars but regarding Cement, it held that Cement is manufactured in large factories and the same could not have been manufactured by the petitioner.

10. The Tribunal held that although a sum of merely Rs.1,510/- was found in the cash box at the time of survey made by the Special Investigation Branch at 04.30 PM on 25.01.2003 and the petitioner's brother present at the time of survey claimed that this was the amount of sale that took place on the said date, no cash memos were produced at the time of survey or even before the Assessing Authority. The petitioner's could not produce regular account books to support the claim of sale of goods worth merely Rs.1,510/-. Loose slips found at the time of survey regarding sale of Cement, Iron bars, Sand, Morang, Gitti etc. on credit prove that huge quantity of goods were sold on credits also, besides some sale on cash payments.

11. The Tribunal found that on the basis of documents found at the time of survey, a show cause notice was issued to the petitioner and when the petitioner did not submit any reply to the show cause notice, tax liability of Rs.1,76,000/- was assessed, which does not appear to be improper keeping in view the facts and circumstances of the case. Although the First Appellate Authority concurred with the conclusion of the Assessing Authority regarding absence of account books and rejection of the petitioner's claim which was not supported by the account books, it drastically reduced the tax liability of the petitioner merely on the basis of the amount of cash found in the cash box, which was not a valid basis of reduction of the tax liability.

12. The Tribunal held that when documents have been recovered at the time of survey establishing sale of huge amount of goods on credit, the decision of the First Appellate Authority reducing the tax liability merely on the basis of cash from the premises of the petitioner, was unsustainable in law. The Tribunal further held that Iron bars and Cement, both are manufactured in large factories but this cannot be a reason for

reducing the amount of tax assessed by the Assessing Authority, when the petitioner could not produce documents in support of purchase of Iron bars and Cement both. It is also recorded in the order passed by the Tribunal that in spite of sufficient information of the second appeal, nobody had appeared on behalf of the petitioner in the second appeal.

13. The petitioner claims that it had given an application dated 22.11.2008 under Section 22 of the Trade Tax Act for recall of the ex-parte order dated 16.10.2008, a copy whereof was served upon the petitioner on 09.11.2008. The petitioner claimed that the proprietor and Pairokar of the Firm Anis Ahmed remain confined to bed from 04.10.2008 to 24.10.2008, but no orders were passed on that application.

14. However, as the petitioner has challenged validity of the judgment and order dated 16.10.2008 by filing a revision, the application for setting aside the aforesaid order on the ground that it was passed ex-parte, loses its significance, as this Court has admitted the revision for final hearing and the validity of the order dated 16.10.2008 is being examined on its merits.

15. The revision was admitted on 22.01.2009 on all the questions of law formulated in the memorandum of revision, which are as follows: -

"1. Whether the learned Tribunal was justified in rejecting the appeal filed by the applicant and to allow the cross appeal filed by the Opp.Party, without giving any reasons enhanced the turnover as fixed by the First Appellate Authority.

2. Whether the learned Tribunal was justified in not considering the material evidence on record and the law laid down by this Hon'ble Court that in order to determine the taxable event the onus of proof lay on the assessing authority.

3. Whether the learned Tribunal was justified to ignore that the applicant has not obtained any form 31 from the Trade Tax Department and is dealing in tax paid goods and the entire purchases were made within the State of U.P. which are verifiable from the purchase vouchers.

4. Whether the learned Tribunal was justified in enhancing the turnover determined by the First appellate authority without controverting the findings recorded by the First appellate authority and dismissed the appeal filed by the applicant by recording the perverse findings of facts which gives rise to this Revision.

5. Whether the learned member Tribunal was justified to enhanced the turnover determined by the First appellate authority merely on the basis that the cash of Rs. 1510/- was found at the time of survey at 4.30 P.M. when the applicant himself has shown sales of Rs. 8,100/- per day

6. Whether the learned Tribunal was justified in ignoring the findings recorded by the First appellate authority wherein each and every parcha seized during the course of survey was duly considered and determined the turnover on the said basis.

7. Whether the learned Tribunal was justified to reject the application for recall which was duly supported by an affidavit and the medical certificate without any cogent reason.

8. Whether the learned Tribunal was justified in proceedings on extraneous consideration and committed not only factual but legal error as well which has vitiated the findings recorded in the order."

16. So far as the 1st question of law framed in the revision is concerned, a bare

perusal of the impugned order indicates that sufficient reasons have been given in the order for restoration of the assessment made by the Assessing Authority and setting aside the order of the First Appellate Authority, as the order of the First Appellate Authority was based on the sole reason that merely a sum of Rs.1,510/- was found in the cash box of the petitioner, ignoring the documentary evidence found at the time of survey which clearly establish sale of huge amount of goods on credit. Therefore, it cannot be said that the Tribunal has set aside the order of the First Appellate Authority and restored the order passed by the Assessing Authority without giving any reasons.

17. Regarding the 2nd question formulated in the memo of revision, suffice it to say that the Tribunal has taken into consideration the entire material available on record, including the slips found at the time of survey which established large scale sale made on credit by evading payment of tax, and it cannot be said that the Tribunal had passed the order without considering the material evidence available on record. It is also relevant to note in this regard that no documentary evidence in this regard had been adduced by the revisionist.

18. Regarding the 3rd question relating to Form 31, the findings of the survey and the material placed by the petitioner could not establish that the revisionist is dealing in tax paid goods only. The revisionist could not produce any documentary evidence regarding purchase of huge quantity of goods and Iron bars. In these circumstances, the claim of the revisionist that it had not obtained any Form 31, is without any basis.

19. Regarding the 4th question, the Tribunal has set aside the order passed by the First Appellate Authority, which had been passed without taking into consideration the entire facts and circumstances of the case and which was based on perverse findings and it has restored the well reasoned order of the Assessing Authority and the Tribunal's order cannot be termed as perverse.

20. The 5th question has already been answered while answering the previous question that the First Appellate Authority had erred in reducing the amount of tax assessed by the Assessing Authority, which assessment was made after considering the entire record found during survey, including the slips establishing large scale sale of taxable goods on credit by evading payment of tax. In these circumstances, the Tribunal was justified in restoring the order passed by the Assessing Authority after taking into consideration the entire relevant material found during survey, which was not rebutted by the petitioner by submitting any reply to the show cause notice that was issued to him before making the assessment.

21. Regarding the 6th question, it is apparent that the First Appellate Authority had not taken into consideration the sale made by the petitioner on credit by evading tax and had assessed the amount of tax merely on the basis of cash amount found in the cash box. Therefore, the Tribunal was fully justified in setting aside the order passed by the First Appellate Authority and restoring the appeal passed by the Assessing Authority.

22. Question No.7 framed in the memo of revision, i.e. "Whether the Tribunal was justified in rejecting the application for recall?" is contradictory to the submissions made by the learned counsel for the petitioner that the application was not considered and decided by the Tribunal.

When the application was not considered, there is no question of its rejection.

23. Moreover, Rule 68(4) of U.P. Trade Tax Act 1948 provides as follows:-

"On the date of hearing, if all the relevant records of appeal have been received, the parties present shall be given reasonable opportunity of being heard and the Appellate Authority of the Tribunal, as the case may be, made, after examining of the relevant records, decide the Appeal:

Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex-parte."

24. The appellant itself had filed Second Appeal No.322 of 2004 and, therefore, the appellant had sufficient knowledge of filing of the appeal as the same was filed by itself. The learned counsel for the appellant had attended the proceedings of appeal on some earlier dates but on the date of its decision, his counsel neither appeared before the Tribunal, nor did he seek an adjournment. In these circumstances, the provisions contained in the proviso appended to Rule 68(4) are attracted and the Tribunal was justified in proceedings to decide the second appeal ex-parte.

25. Regarding the last question that the Tribunal has proceeded on extraneous considerations and has committed factual and legal errors, the learned counsel for the revisionist could not point out any material to establish the allegation that the Tribunal has proceeded on any extraneous consideration.

26. In Commissioner of Sales Tax U.P. Versus Kumaon Tractors & Motors: (2009) 9 SCC 379, the Hon'ble Supreme Court has held that Section 11 of the Trade Tax Act confers a limited jurisdiction on the High Court to interfere in the order of the Tribunal only on the question of law and while doing so, this Court cannot re-appreciate the evidence.

27. In the **case of Commissioner, Commercial Tax U.P. Lucknow Versus S/S D.I.C. India Ltd.** 2024:AHC:13269, a Co-ordinate Bench of this Court held that:-

"It is well settled that the Tribunal is the last fact finding body and that this Court in revision would not go into an enquiry with regard to the factual aspects that have been decided by the Tribunal. In exercise of revisional jurisdiction, the High Court has a limited mandate. The scope of revisional jurisdictional, is primarily focused on questions of law, jurisdictional errors, or procedural irregularities. The High Court in a revision petition must refrain from engaging in a de novo inquiry into factual matters already adjudicated upon by the Tribunal, unless compelling grounds warranting such intervention are made."

28. As the Tribunal has passed the impugned order after taken into consideration the entire relevant material placed by the department, which had not been refuted by the petitioner by adducing any evidence and the petitioner had not even disputed the allegations against him contained in the show cause notice by giving a reply to it, the Tribunal has not committed any error in allowing the second appeal.

29. There appears to be no illegality in the impugned order dated 16.10.2008 passed by the Trade Tax Tribunal, Lucknow Bench-III, Lucknow in Second Appeal No.322 of 2004 and 241 of 2004.

30. The Revision lacks merit and the same is hereby ***dismissed.***

(2024) 5 ILRA 1902
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 574 of 2019

M/S KY Tobacco Works Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mrs. Pooja Talwar

Counsel for the Respondents:
C.S.C., A.S.G.I.

Uttar Pradesh Goods and Service Tax Axt, 2017-Section 129(3) -Petitioner is aggrieved by the seizure order, order imposing penalty and Appellate order-all relevant documents were present in the vehicle and the goods matched the invoice and the e-way bill-goods detained on the St.ment of the driver- that he was transporting the goods for the second time with same documents-St.ment of driver not provided-no burden of proof been discharged by the respondents-mensrea not proved

W.P. allowed. (E-9)

List of Cases cited:

M/s Anandeshwar Traders Vs St. of U.P. & ors. reported in (2021 U.P.T.C. [Vol.107]-421)

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

1. Heard Mrs. Pooja Talwar, learned counsel for the petitioner and Sri Rishi Kumar, learned Additional Chief Standing Counsel appearing for the respondents.

2. The is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the seizure order dated August 13, 2018, the order dated August 14, 2024 imposing penalty under Section 129(3) of the Uttar Pradesh Goods and Service Tax Act, 2017 and the appellate order dated January 8, 2019.

3. Mrs. Pooja Talwar, learned counsel for the petitioner submits that the relevant documents were present in the vehicle and the goods matched invoice and the e-way bill. The sole ground on which the goods were detained and seized and penalty order was passed, was the statement supposedly given by the Driver of the vehicle who submitted that he was transporting the goods for the second time with the same documents. She further submitted that the primary documents being MOV-01 wherein the statement of the Driver is recorded has never been provided to the petitioner.

4. Upon such query being put by the Court, counsel appearing on behalf of the respondents submits that he tried to obtain MOV-01 and the statement of the Driver. However, it appears that the Officer concerned has not been able to provide the MOV-01 till date, in spite of several requests made to him. Today, the counsel appearing on behalf of the respondents has provided a sheet of paper that is supposedly the statement given by the Driver. However, the same is not accompanied by the MOV-01.

5. In light of the same, this document is of very little evidentiary value.

6. Mrs. Pooja Talwar, counsel appearing on behalf of the petitioner has placed reliance on a judgement of a coordinate Bench of this Court authored by Hon'ble Saumitra Dayal Singh, J., in **M/s**

Anandeshwar Traders v. State of U.P. and Others reported in **(2021 U.P.T.C. [Vol.107]-421)**, wherein his Lordship has held as follows :-

"10. Even if the dealer does not cancel the e-way bill within 24 hours of its generation, it would remain a matter of inquiry to determine on evidence whether an actual transaction had taken place or not. That would be subject to evidence received by the authority. As such it was open to the seizing authority to make all fact inquiries and ascertain on that basis whether the goods had or had not been transported pursuant to the e-way bills generated on 24.11.2019. Since the petitioner-assessee had pleaded a negative fact, the initial onus was on the assessing authority to lead positive evidence to establish that the goods had been transported on an earlier occasion. Neither any inquiry appears to have been made at that stage from the purchasing dealer or any toll plaza or other source, nor the petitioner was confronted with any adverse material as may have shifted the onus on the assessee to establish non-transportation of goods on an earlier occasion.

11. The presumption could not be drawn on the basis of the existence of the e-way bills though there did not exist evidence of actual transaction performed and though there is no statutory presumption available. Also, there is no finding of the assessing authority to that effect only. Mere assertion made at the end of the seizure order that it was clearly established that the assessee had made double use of the e-way bills is merely a conclusion drawn bereft of material on record. It is the reason based on facts and evidence found by the assessing authority that has to be examined to test the correctness of the order and not the conclusions, recorded without any material on record."

7. In view of the ratio laid down in the above judgement, it is clear that it is the duty of the authorities to ascertain that whether the double movement of the goods has taken place actually. In the present case, no such burden of proof has been discharged by the respondents.

8. From the documents available, it is clear that the respondent authorities have not been able to indicate or prove any *mens rea* for evasion of tax.

9. In light of the same, the impugned orders dated August 13, 2018, August 14, 2024 and the appellate order dated January 8, 2019 are quashed and set aside. Consequential reliefs to follow.

10. The amount of penalty and security that has been deposited by the petitioner to be refunded within a period of six weeks from date.

11. Accordingly, this writ petition stands allowed.

12. A general caution is required to be given to the authorities in respect of the non-assistance and non-providing the relevant documents to the counsel appearing on behalf of respondent authorities resulting in failure of the department's lawyers to defend the case of the department in an effective manner. It is to be noted that this Court on several occasions has passed orders in favour of the assessee as the department has not able to defend its case by timely providing relevant documents to the State counsel.

13. The Commissioner, State Tax, U.P. is directed to take note of this fact and ensure that in future proper assistance is provided to the counsel appearing on behalf of the State/respondents. Registrar Compliance is directed to communicate this order to the Commissioner, State Tax, U.P. forthwith.

(2024) 5 ILRA 1904
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1368 of 2023

M/S Kumar Construction ...Petitioner
Versus
Commissioner of Central Excise (Appeals), CGST Bhawan , Noida ...Respondents

Counsel for the Petitioner:
Sri Rajneesh Shukla, Ms. Riya Soni

Counsel for the Respondents:
Sri Parv Agarwal

Finance Act, 1994- Section 85-Appellate order impugned-Appeal dismissed that the same was time barred-filed beyond the period of 85 days-power of sec 5 of Limitation Act will be available only if extended to special statute-Finance Act is a self-contained code by itself-with inbuilt mechanism-impliedly excluded the application of the Limitation Act.

W.P. dismissed. (E-9)

List of Cases cited:

1. Jai Hind Bottling Company (P) Ltd. Vs Commissioner (Appeals) Central Excise, Allahabad 2002(146) ELT 273 (All.)

2. Pioneer Corporation Vs Union of India 2016(340) ELT 63 (Del)

3. Singh Enterprises Vs C.C.E., Jamshedpur 2008(221) ELT 163 (S.C.)

4. Commissioner of Customs and Central Excise Vs Hongo India Private Limited & anr. (2009) 5 SCC 791

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

1. Heard Ms. Riya Soni, learned counsel appearing on behalf of the petitioner and Mr. Parv Agarwal, learned counsel appearing on behalf of the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the order dated September 20, 2023 passed by the appellate authority that is the Commissioner of Central Excise (Appeals), Noida under Section 85 of the Finance Act, 1994 (hereinafter referred to as the 'Finance Act').

3. By the aforesaid order, the appellate authority had dismissed the appeal filed by the petitioner on the ground that the same was time barred as it was filed beyond the period of 85 days. In paragraphs 6.1 to 6.7 of the aforesaid order, the appellate authority has clearly pointed out that the petitioner has received the order in original on January 17, 2023 whereas the appeal was filed on June 9, 2023, that is, after a delay of 85 days beyond the limitation prescribed under the Act.

4. Upon a perusal of the memo of appeal filed by the petitioner, it is clear that the order was communicated on January 17, 2023, as admitted by the petitioner itself. The petitioner has explained the delay stating that the delay was caused due to the ignorance of authorised representative/legal counsel and also because the petitioner suffered with medical emergency caused by

acute viral hepatitis between the period April 10, 2023 to May 31, 2023. In addition to the above explanation, the petitioner has relied on several judgments of the High Courts including a judgment of this Court in **Jai Hind Bottling Company (P) Ltd. vs. Commissioner (Appeals) Central Excise, Allahabad** reported in **2002(146) ELT 273 (All.)** and submitted that in extra ordinary circumstances, the writ court has the power to condone the delay. The petitioner has also relied upon a judgment of the Delhi High Court in **Pioneer Corporation v. Union of India reported in 2016(340) ELT 63 (Del)** to argue that in exceptional circumstances and in the rarest of rare cases, the writ court has the power to condone the delay.

5. However, as pointed out in the appellate order, which is under challenge before this Court, the Hon'ble Supreme Court in several judgments including the judgment in **Singh Enterprises vs. C.C.E., Jamshedpur** reported in **2008(221) ELT 163 (S.C.)** has held that under Section 35 of the Central Excise Act, the delay cannot be condoned beyond what is prescribed under the Central Excise Act as the language of the said section specifically provides for condonation of delay of additional 30 days only. Section 85 of the Act is in pari materia with the above section. One may examine the Supreme Court judgment in **Singh Enterprises' (supra)** wherein the Supreme Court held as follows:-

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short ?the Limitation Act?) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

6. Furthermore, in **Commissioner of Customs and Central Excise v. Hongo India Private Limited and another reported in (2009) 5 SCC 791**, the Supreme Court has held as under: -

"31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd.[(2008) 3 SCC 73] The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely,

whether the High Court has power to condone the delay in presentation of the reference under Section 35-H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions followingSingh Enterprises v. CCE [(2008) 3 SCC 70] concluded that: (Punjab Fibres Ltd. case [(2008) 3 SCC 73] , SCC p. 75, para 8)

"8. ... the High Court was justified in holding that there was no power for condonation of delay in filing reference application.?

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days."

7. The Finance Act, 1994 is a special statute and a self-contained code by itself having an inbuilt mechanism wherein it has impliedly excluded the application of the Limitation Act, 1963 (hereinafter referred to as the 'Limitation Act').

8. It is a trite law that the power of Section 5 of the Limitation Act will be available only if it is extended to a special statute. The adjudication of matters involving statutory timelines often raises questions regarding the interplay between general statutes such as the Limitation Act and special statutes with their own prescribed limitations.

9. Special statutes such as the Finance Act, 1994, or the Central Excise Act are enacted to address specific areas of law comprehensively. These statutes often contain detailed provisions governing procedural aspects, including timelines for initiating legal proceedings, such as appeals. Courts have consistently held that when a special statute contains provisions governing limitation periods, it impliedly excludes the application of general statutes such as the Limitation Act. The rationale underlying this principle is rooted in the notion that the legislature, in enacting a special statute, intends to provide a comprehensive and exhaustive regime governing all aspects of the relevant legal domain.

10. The principle of statutory interpretation embodies a fundamental tenet of legal reasoning: fidelity to legislative intent. In the context of limitation under special statutes, this principle assumes paramount importance, guiding courts in their adjudicative function. While the court retains discretionary authority in certain matters, the primacy accorded to limitation under special statutes operates as a circumscribing principle delineating the boundaries within which judicial discretion may be exercised.

11. The jurisprudential foundation supporting the primacy of limitation under special statutes over general statutes is multifaceted. Firstly, it recognizes the legislature's intent to create a cohesive and

self-sufficient legal framework tailored to the specific nuances of the relevant legal domain. By providing detailed provisions governing limitation period, the legislature ensures certainty and predictability in legal proceedings, thereby promoting efficiency and expeditious resolution of disputes. Moreover, the exclusion of general statutes like the Limitation Act from the purview of special statutes serves to maintain the integrity and coherence of the legislative scheme, preventing potential conflicts and inconsistencies in statutory interpretation.

12. In light of the above, no interference is warranted with the impugned order. Accordingly, this writ petition is dismissed.

(2024) 5 ILRA 1907
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Cancellation Application No. 13 of 2024

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

Counsel for the Applicant:
Sumit Kumar Srivastava

Counsel for the Opposite Parties:
G.A., Murli Manohar Srivastava

Criminal Law - Criminal Procedure Code, 1973 – Sections 161, 164 & 439(2) - Indian Penal Code, 1860 - Sections 143, 147, 148, 307, 326, 447 & 506 - Bail cancellation Application – for cancellation of anticipatory Bail – FIR – allegations are against those ten accused persons whom have took possession of the land of informant's father forcibly and they poured petrol on her father and set him ablaze – while granting anticipatory bail, this court took into consideration that, - there was a property dispute between the parties – there is no eye witness of the incident – the dispute of land having already been settled in favour of the accused persons, - prima facie there appears to be no motive for them to cause the incident - grounds of cancellation of bail is that, - material facts is concealed by the opposite party no. 2 which was not brought to the notice of the court, - opposite party no. 2 has already been arrested before bail order - court finds that - (i) it appears that it is the informant herself who has set the criminal law in motion by not only concealing the relevant fact that the possession of the land in dispute had been handed over to the opposite party no. 2 by adopting due process of law by the revenue authorities but she making false St.ment and (ii) opposite party no. 2 had not concealed the fact of his arrest in his Anticipatory bail application as he had been not arrested till filing of the said bail application – therefore, the allegation of concealment of fact is not correct either against the applicant or against the learned counsel – held, order of granting anticipatory bail has been passed after taking into consideration of all the relevant facts and circumstances of the case – hence, application for cancellation of bail; order is hereby dismissed. (Para – 25, 26, 27, 30)

Bail Cancellation Application Dismissed. (E-11)

List of Cases cited:

1. Kusha Duruka Vs The St. of Odisha - (2024) 4 SCC 432,

2. Dalip Singh Vs St. of U.P. (2010) 2 SCC 114,

3. Moti Lal Songara Vs Prem Prakash @ Pappu & anr.: (2013) 9 SCC 199,

4. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr.: (2020) 5 SCC 1,

5. Gurbaksh Singh Sibbia Vs St. of Punj., (1980) 2 SCC 565,

6. Dalip Singh Vs St. of U.P., (2010) 2 SCC 114,

7. Prestige Lights Vs St. Bank of India: (2007) 8 SCC 449,

8. Smt. Shanti Rani Agarwal Vs St. of U. P. & anr., Criminal Misc. Bail Cancellation Application No.172 of 2022 - order dated 31.05.2023,

9. Rajesh Kumar Sharma Vs C.B.I., Criminal Misc. Anticipatory Bail Application No.4633 of 2022 decided on 9.12.2022,

10. Smt. Ramendri Vs St. of U.P., Application (U/S 482) No.5094 of 2021 decided on 24.02.2022,

11. Abbas Ansari Vs St. of U.P., 2023 SCC OnLine All 2466,

12. Sunil Kallani Vs St. of Raj. in Criminal Misc. Bail Application No.9155 of 2019 decided on 25.10.2021,

13. Sumant Kumar Rathi Vs St. of U.P. & anr. 2008 SCC OnLine All 1200.

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

1. Heard Shri Sumit Kumar Srivastava, the learned counsel for the applicant, Shri Anant Pratap Singh, the learned AGA for the State and Shri Murli Manohar Srivastava, the learned counsel appearing on behalf of the opposite party No.2.

2. By means of the instant application filed under Section 439 (2) Cr.P.C., the applicant has sought cancellation of an order dated 19.12.2023 passed by this Court in Criminal Misc. Anticipatory Bail Application No.2945 of 2023, whereby this Court had granted anticipatory bail to the opposite party no. 2 in Case Crime No.214 of 2023 under Sections 143, 147, 148, 307, 326, 447, 506 IPC, Police Station-Sohra Mau, District-Unnao.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 12.12.2023 against ten persons stating that the accused persons forcibly took possession of the land of the informant's father. They were raising a boundary wall around the land for the past two days. They poured petrol on her father on 12.12.2023 and set him ablaze. The opposite party no. 2 had contended that he has falsely been implicated in the present case for the reason that a dispute regarding the land in question was going on in the Court of Sub Divisional Magistrate, Hassanganj, Unnao, instituted by Surya Kumar Singh – uncle of the opposite party no. 2, which was decided in his favour by means of a judgment and order dated 17.11.2023, whereby a report submitted by the Revenue Inspector was accepted and demarcation was ordered to be carried out on the spot. On 30.11.2023, the Tehsildar had passed an order constituting a team of officials for carrying out demarcation on the spot and accordingly demarcation was carried out on 09.12.2023. After demarcation of the disputed land on the spot, the uncle of the opposite party no. 2 had secured the disputed land by raising a boundary wall around the land on 09.12.2023 itself. The victim had committed self immolation and newspaper reports to this effect were published online on 12.12.2023 at 12:12:27 i.e. immediately after the incident.

4. This Court took into consideration the aforesaid facts and noted that although the F.I.R states that the victim was saved by persons present nearby and some passersby and he was taken to the hospital, statement of none of those persons had been recorded by the investigating officer. This Court found that there was a property dispute between the parties, which had been settled by the competent authority by ordering demarcation and demarcation had actually being carried out on the spot, but the informant had alleged that there was a property dispute due to which the accused

persons had forcibly taken possession of the land in dispute without making any mention of the order passed by the competent court. There is no eye witness of the incident as alleged in the F.I.R. The dispute having already been settled in favour of the accused persons, prima facie there appears to be no motive for them to cause the incident. No independent person has given statement implicating the opposite party no. 2. Keeping in view the aforesaid facts, this Court granted anticipatory bail to the opposite party no. 2.

5. The ground on which the applicant is seeking cancellation of the order dated 19.12.2023 is concealment of material facts by the opposite party No.2 in as much as it was not brought to the notice of the Court at the time of hearing of the application on 19.12.2023 that the opposite party No.2 had already been arrested at about 23:50 hours on 18.12.2023.

6. The opposite party No.2 has filed a counter affidavit bringing on record a copy of the order dated 17.11.2023 passed by the SDM, Hassanganj, Unnao accepting the demarcation report submitted by the Revenue Inspector regarding the property which was in dispute between the parties.

7. The applicant has filed a rejoinder affidavit running into 236 pages. The applicant has disclosed her qualification to be merely literate and her occupation to be a Shopkeeper. The index appended to the rejoinder affidavit mentions photocopies of the judgments passed by the Hon'ble Apex Court and the Hon'ble High Courts as Annexure No.RA-03, without specifying as to how many and which judgments have been annexed with the rejoinder affidavit. A reference of the judgments filed as Annexure No.RA-03 has been made in the Para-18 of the rejoinder affidavit, which also merely states that "A photocopy of judgments of apex court and high court are being collectively annexed collectively herewith as and marked as **Annexure No.RA-03** to this rejoinder affidavit".

8. This paragraph also does not contain the name and other particulars of the judgments that have been annexed as Annexure No.RA-03. The contents of Para-18 of the rejoinder affidavit have been verified by the deponent on the basis of her personal knowledge.

9. Chapter IV of Allahabad High Court Rules deals with Affidavits And Oath Commissioners. Rule 8 of Chapter IV is as follows: -

"Affidavits filed or presented in Court:-

The provisions of Rules 5,6 and 11 of Chapter IX shall, so far as may be, apply to an affidavit filed or presented in Court. It shall be in the language of the Court and shall bear the general hearing:

"In the High Court of Judicature at Allahabad."

The affidavit and every exhibit annexed thereto shall be marked with the particulars of the case or proceeding in which it is sworn.

The affidavit shall contain no statement which is in the nature of an expression of opinion or argument."

Rule 10 of Chapter IV provides that an affidavit may be sworn by any person having knowledge of the facts deposed to therein. Rule 12 of Chapter IV provides as follows: -

"Facts to be within the deponent's knowledge or source to be stated :-

Except on interlocutory applications, an affidavit shall be confined to such fact as the deponent is able of his own knowledge to prove.

On an interlocutory application when a particular fact is not within the deponent's own knowledge, but is based on his belief or information received from others which he believes to be true, the deponent shall use the expression "I am informed and verily believe such information to be true, "or words to that effect, and shall sufficiently describe for the purpose of identification, the person or persons from whom his information was received.

When any fact is stated on the basis of information derived from a document, full particulars of that document shall be stated and the deponent shall verify that he believes such information to be true."

10. As per the aforesaid provisions contained in the Allahabad High Court Rules provides, the affidavit ought to be confined to such facts, as the deponent is able to prove on her own knowledge. In case the any averment is not in her personal knowledge, and she has made the averment on the basis of information received from some other source, she must have discloses the source of information. There is a clear prohibition against making statements which are in the nature of arguments. Therefore, the annexing of photocopies of numerous precedents with the rejoinder affidavit is against the provisions contained in the Allahabad High Court Rules.

11. Moreover, the manner in which photocopies of seven judgments have been annexed without any index or even list of those judgments, leaves it for the Court to go through the entire rejoinder affidavit running into 236 pages, and in case the Court fails to omit any of the case annexed with the rejoinder affidavit, as otherwise it will be open for the applicant to allege that this Court has passed the order without application of mind to the material available on record. This has resulted in wastage of precious time of the Court which could have been utilized for dispensation of justice to some litigant also. The Court deprecates this conduct of the learned Counsel for the applicant in filing photocopies of numerous precedents alongwith the rejoinder affidavit in violation of the provisions of the Allahabad High Court Rules.

12. Now I proceed to deal with each and every case-law annexed with the rejoinder affidavit.

13. The first judgment annexed with the rejoinder affidavit is of **Kusha Duruka v. The State of Odhisha:** (2024) 4 SCC 432, and he learned Counsel has placed reliance on the following portion of this judgment:

"4. In Dalip Singh v. State of U.P. (2010) 2 SCC 114, this Court noticed the progressive decline in the values of life and the conduct of the new creed of litigants, who are far away from truth. It was observed as under :

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic

changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final." (emphasis in original)

14. In **Kusha Duruka** (Supra), the Hon'ble Supreme Court has also referred to an earlier decision in the case of **Moti Lal Songara Vs. Prem Prakash @ Pappu and another:** (2013) 9 SCC 199, wherein the Hon'ble Supreme Court held that:-

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. ***Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court,and the maxim supressio veri, expression faisi, i.e.. suppression of the truth is equivalent to the expression of falsehood, gets attracted.*** *We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to playpossum.*

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". ***However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand."***

(emphasis in original)

15. A copy of the judgment in the case of **Sushila Aggarwal and Others v. State (NCT of Delhi) and another:** (2020) 5 SCC 1 has also been annexed with the rejoinder affidavit, wherein the Hon'ble Supreme Court referred to a decision in **Gurbaksh Singh Sibbia v. State of Punjab,** (1980) 2 SCC 565, wherein it was held that the provisions of Section 438 Cr.P.C. can be invoked after the arrest of the accused. The grant of anticipatory bail to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

16. **Sushila Aggarwal** refers to the following passage from the judgment in **Gurbaksh Singh Sibbia** (Supra): -

"94. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

.....

96. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail be exercised either at the instance of the accused, the Public Prosecutor or the complainant on finding new material or circumstances at any point of time."

17. The next judgment annexed with the rejoinder affidavit is a judgment dated 3.12.2009 rendered by the Hon'ble Supreme Court in **Dalip Singh v. State of U.P., (2010) 2 SCC 114**, wherein the Hon'ble Supreme Court referred to the following passage from an earlier decision in the case of **Prestige Lights versus State Bank of India**: (2007) 8 SCC 449: -

"6. In Prestige Lights Ltd. V. State Bank of India (2007) 8 SCC 449, it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under article 226 of the Constitution is duty bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, L.J. in R v Kensington Income Tax Commissioners (1917) 1 K.B. 486, and observed:

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

* * *

21. From what we have mentioned above, it is clear that in this case efforts to mislead the authorities and the courts have transmitted through three generations and the conduct of the appellant and his son to mislead the High Court and this Court cannot, but be treated as reprehensible. They belong to the category of persons who not only attempt, but succeed in polluting the course of justice. Therefore, we do not find any justification to interfere with the order under challenge or entertain the appellant's prayer for setting aside the

orders passed by the Prescribed Authority and the Appellate Authority."

18. A copy of an order dated 31.05.2023 passed by a Co-ordinate Bench of this Court in **Smt. Shanti Rani Agarwal versus State of U. P. and another**, Criminal Misc. Bail Cancellation Application No.172 of 2022, has also been annexed with the rejoinder affidavit, wherein it was held that :-

"29. The clean hands doctrine states that one "who comes into equity must come with clean hands." This doctrine requires the court to deny equitable relief to a party having violated good faith with respect to the subject of the claim. The purpose of the doctrine, as elucidated in ***Colby Furniture Company, Inc. v. Belinda J. Overton's*** *is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against equity and good conscience."*

19. Another judgment rendered by another Co-ordinate Bench of this Court in **Rajesh Kumar Sharma v. C.B.I.,** Criminal Misc. Anticipatory Bail Application No.4633 of 2022 decided on 9.12.2022, has been annexed with the rejoinder affidavit and it merely follows the dictum of the Hon'ble Supreme Court in **Gurbaksh Singh Sibbia** (Supra).

20. The next judgment annexed with the rejoinder affidavit is of **Smt. Ramendri v. State of U.P.,** application under Section 482 No.5094 of 2021 decided on 24.02.2022, which refers to a judgment of the Hon'ble Supreme Court in **Prestige Lights Limited v. State Bank of India** (2007) 8 SCC 449, which has already been referred above.

21. As the learned Counsel for the applicant has unnecessary multiplied the number of judgments, it would be relevant to refer to a decision of this Court in **Abbas Ansari v. State of U.P.,** 2023 SCC OnLine All 2466, wherein this Court held that: -

"29. Keeping in view the conduct of the learned Counsel for the applicant in supplying a compilation of 13 judgments running into 242 pages, without even an index, and placing only one judgment of the Delhi High Court and leaving it for the Court to go through the remaining 12 judgments, the Court is constrained to observe that an increasing tendency of supplying multiple case-laws, without connecting the same to the facts and circumstances of the case in hand is being observed nowadays. This results in wastage of precious time of the Court and creates an unnecessary obstacle in expeditious dispensation of justice.

30. It would be proper and sufficient if the learned Counsel put up a proposition and then submit a case-law in support thereof. In case any proposition is supported by any land-mark judgment which has been followed consistently and repeatedly, it would be sufficient to cite that land-mark judgment, or at the most one more latest judgment in which it was followed or reiterated. The Counsel should not supply case laws without putting up a proposition and they should avoid the temptation of citing multiple case-laws on a single point, which does not make any beneficial difference. The learned Counsel are expected to assist the Court in arriving at a decision expeditiously without wasting the precious time of the Court so that the same time may be better utilized in the interest of some other litigants."

22. The learned counsel for the applicant has also annexed a judgment

rendered by Hon'ble Single Judge of Rajasthan High Court sitting at Jaipur in **Sunil Kallani v. State of Rajasthan in Criminal Misc**. Bail Application No.9155 of 2019 decided on 25.10.2021, wherein the Hon'ble Single Judge held that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences.

23. The next judgment annexed with the rejoinder affidavit is of **Sumant Kumar Rathi Vs. State of U.P. & Another** 2008 SCC OnLine All 1200, wherein this Court cancelled a bail granted by the Session Court to a person accused of a very serious offence in which the injured sustained fire arm injury at the abdomen inside the house of her in laws only after six months of her marriage without even providing sufficient opportunity to the prosecution to place the correct facts and the Sessions Judge even failed to consider the statement of the injured recorded u/s. 161, Cr.P.C. Sessions Judge also failed to consider that after sustaining the injury the injured had got paralyzed. His Court held that when Session Court has granted bail to the accused on the basis of the irrelevant and inadmissible evidence then this Court must certainly cancel the bail.

24. The last judgment annexed with the rejoinder affidavit is of **Shri T.K. Dutta v. Pawan Kumar Didwani and Anr.** 1995 Criminal Law Journal 3274, in which an Hon'ble Single Judge of Kolkata High Court held that where the accused had obtained bail by falsely claiming that he was suffering from Myocardial Infraction, only on consideration of the "serious condition his health", by practising fraud upon the Court for obtaining the said Order, the bail order was liable to be cancelled.

25. It is no doubt correct that a litigant approaching the Court or setting the process of law in motion should do so fairly and with clean hands. Bu unfortunately in the present case, it is the applicant herself, who did not observe this basis principle while lodging the FIR falsely alleging that the accused persons had forcibly taken possession of the land in dispute whereas the possession of the land in dispute had been delivered by Competent Revenue Authorities by adopting due process of law. Therefore, it appears that it is the informant herself who has set the criminal law in motion by not only concealing the relevant fact that the possession of the land in dispute had been handed over to the opposite party No.2 by adopting due process of law but making a false statement by alleging that the possession had been taken forcibly.

26. So far as the submission of learned counsel for the applicant that the applicant had already been arrested when this Court passed an order for anticipatory bail, suffice it to say that the opposite party no. 2 had filed the anticipatory bail application on 16.12.2023, after giving its notice to the learned Government Advocate on 14.12.2023. Therefore, the opposite party No.2 had filed the anticipatory bail application while he was not in custody.

27. When the notice of the application was given while the opposite party No.2 was not in custody and the application was also filed when the opposite party No.2 was not in custody, therefore, the opposite party No.2 has not concealed the fact of his arrest in the anticipatory bail application as he had been not arrested till filing of the anticipatory bail application.

28. So far as the question of learned counsel for opposite party No.2 having concealed the facts of arrest of opposite party No.2 from this fact is concerned, the opposite party No.2 was arrested at 23:50 hours on 18.12.2023 and this Court has no reason to presume that the learned counsel for the opposite party No.2 had knowledge of arrest of opposite party No.2, when he advanced his submissions before this Court when the case was taken up as fresh on 19.12.2023.

29. Therefore, the allegation of concealment of fact is not correct either against the applicant or against his learned counsel.

30. The order dated 19.12.2023 has been passed after taking into consideration all the relevant facts and circumstances of the case, as has been noted in the preceding paragraphs of this order, including the facts that the applicant has falsely alleged in the F.I.R. that the accused persons had taken possession of the land in dispute forcibly. The learned Counsel for the applicant has failed to make out any ground for cancellation of the bail order dated 19.12.2023.

31. The application for cancellation of bail order dated 19.12.2023 lacks merit and the same is hereby ***dismissed.***

(2024) 5 ILRA 1915
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 4349 of 2023

Anuj Arya @ Dabbu ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Surendra Kumar Mishra, Nikhil Dwivedi, Raghvendra Pandey, Sudhir Kumar Singh

Counsel for the Opposite Parties:
G.A., Shiv Kumar Yadav

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 309 & 439 - Indian Penal Code, 1860 - Sections 363, 366 & 376 - The Protection of Children from Sexual Offences (POCSO) Act, 2012 – Sections 5-L, 6, 29 & 35(2) - Application for Bail – FIR – allegation of committing rape and threatened prosecutrix/child to face dire consequences – grounds of bail that, present application is languishing in jail since long time and has been falsely implicated as well as there is inordinate delay in lodging FIR has not been explained - court observed that, prosecutrix is a minor child aged about 15 years on the date of incident – considering the entire St.ment recorded u/s 161 & 164 Crpc as well as evidence available on record, she has levelled specific allegation of committing rape against the present applicant on the pretext of false promise of marriage – hence, considering the facts and circumstances of the case as well as the dictums of the Apex Court, the bail application is rejected – further, trial court directed to conclude the trial within a period of nine months, direction issued accordingly – however, applicant has a liberty to file another bail application, if the trial is not concluded within the stipulated time.
(Para – 9, 10, 16, 18, 19)

Bail Application Rejected. (E-11)

List of Cases cited:

1. St. of H.P. Vs Asha Ram, (2005) 13 SCC 766,

2. Ganesan Vs St. represented by its Inspector of Police, (2020) 10 SCC 573,

3. Vijay Vs St. of M.P. (2010) 8 SCC 191,

4. St. of Mah. Vs Chandraprakash Kewalchand Jain, (1990) 1 SCC 550,

5. St. of U.P. Vs Pappu, (2005) 3 SCC 594,

6. St. of Punj. Vs Gurmit Singh, (1996) 2 SCC 384,

7. St. of Orissa Vs Thakara Besra, (2002) 9 SCC 86,

8. Krishan Kumar Malik Vs St. of Har., (2011) 7 SCC 130.

9. Phool Singh Vs St. of M. P., (2022) 2 SCC 74,

10. Sham Singh Vs St. of Har., (2018) 18 SCC 34,

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

1. Heard Sri H.G.S. Parihar, learned Senior Advocate, assisted by Sri Raghvendra Pandey, learned counsel for the applicant, Sri Aniruddh Kumar Singh, learned AGA-I for the State and Sri Shiv Kumar Yadav, learned counsel for the informant/ complainant.

2. As per learned Senior Advocate, the present applicant is in jail since 06.03.2022 in Case Crime No.107 of 2022, under Sections 363, 366, 376 IPC and Section 5L/6 of POCSO Act, Police Station- Ashiana, DistrictLucknow.

3. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. Attention has been drawn towards the impugned FIR, which was lodged on 05.03.2022 for the alleged incident dated 12.12.2021 and the aforesaid inordinate delay has not been explained.

4. As per the prosecution story, the present applicant has allegedly established physical relation with the prosecutrix/ child forcefully without her consent and has threatened her not to say anything to anyone otherwise she will have to face dire consequences. In her statement recorded under Section 161 Cr.P.C., she has narrated the prosecution story so indicated in the FIR and has submitted that she was very afraid from threatening so given by the applicant but when she became pregnant, she told the applicant about the fact, then he insisted her to take medicine to get the foetus aborted. However, she has not taken medicine. She has stated that this incident was within the knowledge of the family members of the applicant, more particularly his father was knowing this fact, who was Journalist by profession and he has also threatened her for dire consequences.

5. Further attention has been drawn towards the statement of the prosecutrix/ child recorded under Section 164 Cr.P.C. wherein she has stated that the present applicant has established physical relation with her consent on the pretext of promise of marriage but when she became pregnant, the applicant has denied to get married, therefore, she made complaint to the family members of the applicant about the aforesaid fact but instead of helping her in this traumatic situation, they also threatened her for dire consequences in the same manner the present applicant had threatened her.

6. Learned counsel for the applicant has drawn attention of this Court towards the medical examination report, which indicates that hymen was not intact but it has not been indicated as to whether on account of alleged rape, the hymen was not intact. Learned Senior Advocate has further submitted that the complainant/ informant has recorded his statement wherein he has

stated that when he came to know that his daughter was not traceable from 22.11.2021, he tried to find out her location; he came to know on 24.11.2021 that she was in the house of the father of the applicant. He reached there and requested that his daughter be permitted to go with him but the applicant and his father refused to send the daughter of the informant/ prosecutrix with him saying that his son, the present applicant, and the prosecutrix would get married very soon. On that, he informed the father of the applicant that his daughter was minor, even then they refused to send his daughter back to his home. Thereafter, the informant has said that he will approach the police; on that, they had taken his daughter to his home. Learned counsel has stated that if the aforesaid statements of the informant and the prosecutrix are taken on its face value, this Court would find that there are apparent variation in those statements. Learned counsel has also drawn attention of this Court towards Annexure No.1 of the supplementary affidavit, which is a certified copy of the statement of the child wherein she has, however, levelled specific allegation against the present applicant but the prosecution story is not consistent.

7. Further submission of learned counsel for the applicant is that the present applicant is having no prior criminal history, therefore, he may be released on bail. Further, the applicant undertakes that if he is released on bail, he shall abide by all terms and conditions of the bail order and shall not misuse the liberty of bail and shall cooperate in the trial proceedings.

8. Sri Aniruddh Kumar Singh, learned AGA-I, has vehemently opposed the aforesaid bail application by submitting that the date of birth of the prosecutrix, as per her High School Mark-sheet, is 28.12.2006, therefore, on the date of incident, the prosecutrix was aged about 15 years. He has further submitted that the present applicant is a named and main accused against whom the specific allegation has been levelled in the FIR, in the statements recorded under Sections 161 & 164 Cr.P.C. as well as in the evidence of the child/ prosecutrix recorded before the learned Trial Court. The prosecution story is intact against him without any relevant variation. He has further submitted that in POCSO matters, burden of proof under Section 29 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act") shall lie upon the accused. He has further submitted that so far as the reason of delay so indicated by the child/ prosecutrix and her father is concerned, that explanation is quite reasonable inasmuch as the father of the applicant was an influential person and had allegedly given threatening for dire consequences, therefore, prompt FIR could not be lodged. However, after lodging the FIR, the prosecution version is intact.

9. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I would like to observe that the prosecutrix/ child, who was aged about 15 years on the date of incident, recorded her statements under Section 161 & 164 Cr.P.C. as well as recorded her evidence before the court concerned levelling specific allegation against the present applicant of committing rape with her. Though there is some variation in her statement recorded under Section 164 Cr.P.C. on some part but if the entire statement recorded under Section 164 Cr.P.C. is read, the fact would emerge that in such statement too, she has levelled specific allegation of rape against the present applicant.

10. In the statement of the prosecutrix/ child recorded before the learned Trial Court, she has levelled specific allegation against the present applicant that he has committed rape with her frequently by alluring her for one reason or another and also on the pretext of false promise of marriage. This is the case where the prosecutrix/ child is a minor girl, therefore, the applicant with the intention to commit rape with her has made false promise of marriage, which was not possible. When such promise of marriage was not legally permissible and in the name of that false promise of marriage, physical relation was established with the minor girl, in that case, prima facie, the offence in question would be the offence of rape subject to final determination by the learned Trial Court.

11. Section 29 of the POCSO Act provides for presumption as to certain offences. It provides that if a person is prosecuted for violating any provision of Sections 3, 5, 7 & 9 of the Act and where the victim is a child below the age of 16 years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

12. The Apex Court in re; **State of H.P. Vs. Asha Ram, (2005) 13 SCC 766**, has observed in para-5, which reads as under:-

*"**5.** We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."*

13. The Apex Court in re; **Ganesan Vs. State represented by its Inspector of Police, (2020) 10 SCC 573**, while considering the judgments of **Vijay v. State of M.P., (2010) 8 SCC 191, State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, State of U.P. Vs. Pappu, (2005) 3 SCC 594, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, State of Orissa v. Thakara Besra, (2002) 9 SCC 86** and **Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130**, has observed that to hold an accused guilty for commission of an offence of rape, the

solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

14. In the case of **Pappu** (supra), the Apex Court has held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion and that consent should be free consent.

15. The Apex Court in re; **Phool Singh v. State of Madhya Pradesh, (2022) 2 SCC 74**, has considered the judgment of **Sham Singh vs. State of Haryana, (2018) 18 SCC 34**, wherein the Apex Court has observed that the testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

16. Therefore, considering the facts and circumstances of the present case as well as the dictums of the Apex Court, as considered above, I am not inclined to grant bail to the present applicant.

17. Accordingly, the bail application is **rejected**.

18. Since the present applicant is in jail since 06.03.2022 and the trial in POCSO cases should be conducted and concluded with expedition, preferably within a period of one year in terms of Section 35 (2) of the POCSO Act, therefore, I hereby direct the learned Trial Court to conclude the trial within a period of nine months from the date of receipt of copy of this order taking recourse of Section 309 Cr.P.C. by fixing short dates, if possible, fix dates on day-to-day basis to ensure that the examination of all prosecution witnesses and other witnesses from both the sides, if any, be completed expeditiously and if any of the witnesses does not cooperate in the trial proceedings properly, the learned Trial Court may take appropriate coercive steps against such witness, which is permissible under the law. Further, no unnecessary adjournment shall be given to any of the parties so that the trial in question could be concluded within the time so stipulated.

19. However, liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

20. Let copy of this order be provided to the learned Trial Court through District & Sessions Judge, Lucknow by the Registry of this Court within three working days for its strict compliance.

(2024) 5 ILRA 1919
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 4767 of 2024

Veer Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ajay Sengar, Gunjan Yadav
Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 438 & 439 - Indian Penal Code, 1860 - Sections 147, 148, 149, 308, 323, 324, 325, 504 & 506 - 2nd Application Anticipatory Bail – 1st Anticipatory Bail Application was disposed of with direction to learned court below to consider the same in terms of the law laid down by the hon'ble Apex Court – Applicant's Bail Application was rejected by court below, holding that the Bail Application moved through counsel is not maintainable – court observed that, it is admitted position that applicants herein have well co-operated during investigation and also furnished their securities before the investigation officer, thus, applicant have complied the two conditions referred in judgment of Apex Court in *'Satendra Kumar Antil'* and therefore the case of the applicant is covered under category 'A' wherein a mechanism has been provided for the offences punishable with imprisonment up to 7 years to be adhered by all courts – held, if conditions mentioned in the order of the hon'ble Supreme Court in *'Satendra Kumar Antil'* case is fulfilled, the physical presence of the accused person is not required for consideration of their bail application u/s 439 Cr.P.C. for the offences enumerated in Category 'A' – accordingly, directions issued to court below to consider the Bail Application of the present applicant in terms of the law laid down by the hon'ble Apex Court – present 2nd Anticipatory Bail Application is disposed of.
(Para – 13, 14, 15, 16)

2nd Anticipatory Bail application Disposed of. (E-11)

List of Cases cited:

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

2. Satendra Kumar Antil Vs CBI & anr. (2022 SCC online SC 825) (2021 10 SCC 773),

3. Aman Preet Singh Vs CBI (2021 SCC online SC 941),

4. Siddharth Vs St. of U.P. (2021 SCC online SC 615),

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Ms. Gunjan Yadav, learned counsel for the applicants and Mr. Thakur Azad Singh and Mr. Ved Mani Tiwari, learned Additional Government Advocates for the State.

2. The **instant 2nd Anticipatory Bail Application** has been moved by the applicants with the prayer that applicants herein be released on anticipatory bail during pendency of trial in respect of the impugned Case No.0015 of 2020 (State of Uttar Pradesh Vs Veer Singh and others) arising out of Case Crime No. 0618 of 2016, under Sections 147, 148, 149, 323, 504, 506, 324, 325, 308 IPC, P.S. Kotwali Kalpi, District Jalaun, pending before the learned CJM, Jalaun at Orai.

3. The 1st Anticipatory Bail application moved by the applicants was heard and disposed of vide order dated 20.12.2023 with the following directions:-

"1. This application has been moved on behalf of the applicant seeking anticipatory bail in Case Crime No. 0618 of 2016, under Sections 147, 148, 149, 323, 504, 506, 324, 325, 308 IPC, P.S. Kotwali Kalpi, District Jalaun during the pendency of trial.

2. Heard Ms Gunjan Yadav, learned counsel for the applicants as well as learned A.G.A. for the State and perused the record.

3. It has been argued by the learned counsel for the applicants that

applicants are innocent and they have apprehension of their arrest in the above-mentioned case, whereas there is no credible evidence against them. Allegations levelled against the applicants are false. The investigation of the case has been completed and charge-sheet has been filed and cognizance has been taken by the Court concerned.

4. It is further submitted that during investigation, the applicants have been fully cooperative. It is further submitted that the alleged offences are punishable with the imprisonment of maximum period of seven years. Applicants have no criminal history. In case applicants are granted anticipatory bail, they shall not misuse the liberty of bail and would obey all conditions of bail.

5. Learned A.G.A. opposed the prayer for anticipatory bail.

6. In this matter, as is evident from the record, offences levelled against the applicants are punishable with the imprisonment upto seven years. After completion of investigation, charge sheet has been submitted and cognizance has also been taken by the Court concerned.

7. In Sushila Aggarwal and others Vs State (NCT ofDelhi) and another, (2020) 5 SCC 1, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial. It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial. It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

8. Hence, considering the settled principles of law regarding anticipatory bail, submissions of the learned counsel for the parties, nature of accusation, role of applicants and all attending facts an10123d circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is not a fit case for anticipatory bail to the applicants till the end of trial. The prayer made in the application is refused.

9. However, it is directed that police and learned trial Court shall strictly adhere with the directions in regard to arrest issued by Hon'ble Supreme Court in the cases of Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273 and Satender Kumar Antil Vs CBI and another, 2022 SCC OnLine SC 825. In cases where maximum punishment is upto seven years, arrest and jail is not necessary. Trial Court and investigation agency shall take care of the directions issued in the said judgements. It is further observed that the bail application of the applicants, if moved, shall be considered and decided by the Court concerned in terms of the law laid down by the Hon'ble Apex Court in Satender Kumar Antil (Supra).

10. It is further directed that the learned court concerned, while considering the bail application of the applicants in the light of Satender Kumar Antil case (supra),

shall pass an order strictly in compliance of the directions given in the aforesaid judgment by the Hon'ble Supreme Court, in letter and spirit.

11. The application stands disposed of accordingly."

4. **Record reveals** that in compliance of the said order, applicants moved their bail application under Section 439 Cr.P.C. in terms of the guide lines issued by the Hon'ble Apex Court in ***Satendra Kumar Antil Vs Central Bureau of Investigation and another (2021 (10) SCC 773,*** which came to be rejected by the learned CJM, Jalaun at orai vide its order dated 29.03.2024 **holding that the bail application moved by the applicants through counsel is not maintainable.**

5. Learned counsel for the applicants while drawing attention of this Court towards the order of this Court dated 20.12.2023 and the order dated 29.03.2024 passed by the Chief Judicial Magistrate, Jalaun submits that this Court while disposing of the anticipatory bail application of the applicants had directed the trial court to dispose of bail application of the applicants in light of the law laid down by the Hon'ble Supreme Court in ***Satenddra Kumar Antil (supra)***, however, the trial court has dismissed the application of the applicants on the ground that since the applicants have not submitted themselves to the custody of the trial court, therefore, the bail application moved through counsel is not maintainable as they are not in the custody of the court.

6. It is contended by learned counsel for the applicants that in view of the judgement of the Hon'ble Supreme Court passed in ***Satendra Kumar Antil*** **(supra)**, whereby it is provided that if two conditions are satisfied **i.e. the accused is not arrested during investigation and secondly has cooperated throughout in the investigation** including appearing before Investigating Officer whenever called for the offences, which are categorized in 'A' i.e. offences punishable with imprisonment upto 7 years of imprisonment, ordinary summons shall be issued and if on their non appearance, non bail warrant may be issued, but the same may also be cancelled and the bail application of such accused person on his appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

7. It is further submitted that the case of the applicants is covered in the cases provided in the category 'A' of the judgement of ***Satendra Kumar Antil*** (supra). It is further submitted that the Chief Judicial Officer, without properly going through the judgement of the Hon'ble Supreme Court passed in ***Satendra Kumar Antil*** (supra) has passed the order on his 'whims and caprice' while it was specifically provided in ***Satendra Kumar Antil*** (supra) that there is no need to surrender for the purpose of getting bail under Section 439 Cr.P.C. for the offences, which are categorized in category 'A' and thus it is submitted that a suitable direction be given to the court below for properly disposing of the bail application of the applicants. It is argued that the present offence is punishable upto seven years, therefore, the presence of the applicants is not required at the time of hearing of bail application. The trial court should have decided the bail application which has been filed through counsel without pressing personal presence of applicants before it.

8. Learned A.G.A. has raised a primary objection by contending that the application has rightly been rejected by the court below as the same has been filed under Section 439 Cr.P.C., which empowers the Court to direct release of a person on bail, who is accused of an offence and in custody. The applicants are not in custody and, therefore, their application under Section 439 Cr.P.C. was rightly dismissed as not maintainable. It is further submitted that though the word "custody" has been interpreted in a broad sense, still, at least physical presence of the accused in the Court is necessary for consideration of an application under Section 439 Cr.PC.

9. The Hon'ble Supreme Court in ***Satendra Kumar Antil*** (supra) issued certain guidelines, which is reproduced as under:

"1. Application for intervention is allowed.

2. We have been provided assistance both by Mr. S.V. Raju, learned Additional Solicitor General and Mr. Sidharth Luthra, learned senior counsel and there is broad unanimity in terms of the suggestions made by learned ASG. In terms of the suggestions, the offences have been categorized and guidelines are sought to be laid down for grant of bail, without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

"3. We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under:

"Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc. D) Economic offences not covered by Special Acts.

Requisite Conditions

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the charge sheet (Siddharth v. State of U.P., 2021 SCC OnLine SC 615)

CATEGORY A

After filing of charge sheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits."

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc.

4. Needless to say that the category A deals with both police cases and complaint cases.

5. The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

6. We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

7. The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in Sanjay Chandra vs.CBI, (2012) 1 SCC 40 has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and

b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

8. We appreciate the assistance given by the learned counsels and the positive approach adopted by the learned ASG.

9. The SLP stands disposed of and the matter need not be listed further.

10. A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial Courts so that the unnecessary bail matters do not come up to this Court.

11. This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the Courts.

12. Pending applications stand disposed of."

10. The aforesaid directions of Hon'ble Supreme Court in ***Satendra Kumar Antil (supra)*** has been again reiterated in the judgement in ***Aman Preet Singh Vs CBI, through Director : 2021 SCC OnLine SC 941*** by the Hon'ble Supreme Court and had held as under:

"9. In our view, the purport of Section 170 Cr.P.C. should no more be in doubt in view of the recent judgment passed by us in Siddharth v. State of Uttar Pradesh (Criminal Appeal No. 838/2021), 2021 SCC OnLine SC 615). In fact we put to

learned senior counsel whether he has come across any view taken by this Court qua the said provision. Learned counsel also refers to judgments of the High Court which we have referred to in that judgment while referring to some judicial pronouncements of this Court on the general principles of bail. The only additional submission made by learned counsel is that while the relevant paragraphs of the judgment of the Delhi High Court in Court **on its Own Motion Vs Central Bureau of Investigation, (2004) 72 DRJ 629** have received the imprimatur of this Court, the extracted portions from the judgment of the Delhi High Court did not include para 26. The said paragraph deals with directions issued to the criminal Courts and we would like to extract the portion of the same as under:

"26. Arrest of a person for less serious or such kinds of offence or offences those can be investigated without arrest by the police cannot be brooked by any civilized society.

Directions for Criminal Courts:

(i) Whenever officer-in-charge of police station or Investigating Agency like CBI files a charge-sheet without arresting the accused during investigation and does not produce the accused in custody as referred in Section 170, Cr.P.C. the Magistrate or the Court empowered to take cognizance or try the accused shall accept the charge-sheet forthwith and proceed according to the procedure laid down in Section 173 Cr.P.C. and exercise the options available to it as discussed in this judgment. In such a case the Magistrate or Court shall invariably issue a process of summons and not warrant of arrest.

(ii) In case the Court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the chargesheet, he or it shall have to record the reasons in writing as contemplated under Section 87 Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or absconding or failure to obey summons and the Court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436, Cr.P.C.

(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating Agency during investigation nor produced in custody as envisaged in Section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail.

Xxxxxxxxxx"

10. A reading of the aforesaid shows that it is the guiding principle for a Magistrate while exercising powers under

Section 170, Cr.P.C. which had been set out. The Magistrate or the Court empowered to take cognizance or try the accused has to accept the charge sheet forthwith and proceed in accordance with the procedure laid down under Section 173, Cr.P.C. It has been rightly observed that in such a case the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest. In case he seeks to exercise the discretion of issuing warrants of arrest, he is required to record the reasons as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. In fact the observations in Sub-para (iii) above by the High Court are in the nature of caution.

11. Insofar as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

(Emphasis mine)

11. Again, the Hon'ble Supreme Court in ***Siddharth Vs State of UP, 2021 SCC OnLine SC 615*** opined as follows:

"9. We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 Cr.P.C. that it does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the investigating officer does not believe that the accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the investigating officer before the court while filing the charge-sheet.

10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and

self-esteem of a person. If the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."

12. After going through the above quoted case laws of the Hon'ble Supreme Court, it is thus very much clear that on completion of two conditions mentioned in ***Satendra Kumar Antil*** (Supra) i.e. accused is not arrested during investigation and, secondly, has cooperated throughout in the investigation including appearing before Investigating Officer whenever called, a mechanism has been provided for the offences punishable with imprisonment upto 7 years of imprisonment for offences placed in category in 'A' and perusal of the procedure/mechanism provided in category 'A' would reveal that at the first instance after filing of the charge sheet/complaint and after taking of cognizance, summons will be issued and that too with the permission to appear through the lawyer and if such an accused is not appearing despite service of summons then bailable warrants should be issued for their physical appearance and on their failure to appear despite issuance of bailable warrants, non bailable warrants may be issued subject to the condition that non bailable warrants may be cancelled or converted into bailable warrants/summons without insisting physical presence of the accused person(s), if any application is moved on behalf of the accused persons for cancellation of the warrants. However, it is in clause (e) of the paragraph 3 pertaining to the category 'A' cases, it is provided that the bail application of such accused persons on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is finally decided.

13. **It is the admitted position that the applicants herein have well co-operated during investigation and also furnished their securities before the Investigating Officer during Investigation and there is no objection that they have not cooperated during investigation, thus, have complied the two conditions referred in judgement of Apex Court in Satendra Kumar Antil (supra) and therefore, their case is also covered under Category 'A' wherein a mechanism has been provided for the offences punishable with imprisonment up to 7 years of imprisonment to be adhered by all courts.**

14. **Thus,** the above mentioned law reports would reveal that the Hon'ble Supreme Court has set a complete mechanism for the offences punishable with upto 7 years of imprisonment in the above ***Satender Kumar Antil (supra), Aman Preet Singh, (supra) and Siddharth (supra)***. Moreover, when an accused appear before the trial Court through counsel for grant of bail under Section 439 Cr.P.C. for the offences punishable upto 7 years of imprisonment or less, and he has fully co-operated during investigation and has not been arrested while submitting the charge sheet by the Investigating Officer, they can be deemed to be under custody of Court and their application in the said offences under Section 439 Cr.P.C. moved through counsel, cannot be solely rejected on the technical ground that it is not maintainable as he has not submitted himself either to the custody of the court or he has not been arrested by the police and in the circumstances, it is left to the court to consider the said request of applicants as

per the said guidelines and principles. On appearance of accused through counsel before Court would always amount to deemed custody and, thus, in terms of the above judgements, their bail application was required to be decided, consequent upon their appearance through counsel before the court on issuance of the process, without the applicants being taken into physical custody or by granting them interim bail till the disposal of their bail application.

15. Having considered the submissions of learned counsel for the applicants and after going through the record of the case as well as the case laws dealt herein above, it is crystal clear that if the conditions mentioned in the order of the Hon'ble Supreme Court in ***Satendra Kumar Antil*** (supra) is fulfilled, the physical presence of the accused person to the custody of the court is not required for considering of their bail under Section 439 Cr.P.C. for the offences enumerated in Category 'A'.

16. Accordingly, the present 2nd Anticipatory Bail Application is **disposed of** with the direction to the applicants to move a fresh bail application before the court concerned under Section 439 Cr.P.C. within 15 days from today and in case the fresh bail application is moved by the applicants, the court concerned shall dispose of the same without insisting the applicants to submit themselves to the custody of the court, strictly in accordance with law laid down by the Apex Court in the above mentioned cases.

(2024) 5 ILRA 1928
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 4880 of 2024

Anurudh ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Fakhr uz Zaman

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 164-A & 439 - Indian Penal Code, 1860 - Sections 363, 366 & 376(3) - The Protection of Children from Sexual Offences (POCSO) Act, 2012 – Sections 3, 4(2) & 27 - Constitution of India,1950 - Article 21, 227 – juvenile justice (care and protection of children) Act, 2015- Section 94 - Application for Bail – Bail jurisdiction – the question of law – nature of legal duty cast on the police to draw up a medical report determining the age of victim while investigating POCSO Act offences – in the instant case, the medical report pertaining to the victim's age as contemplated in Section 164-A Cr. PC r/w Section 27 of the POCSO Act, was not produced by the police authority – court finds that, the issue of medical determining the Victim's Age in POCSO Act offences has been regularly vexing the court's – held, **(i)** in the light of law laid down by the Full Bench of this Court in Chandrapal Singh Case, it can be safely St.d that the directions contained in *Pradeep Kumar Chauhan'* case are not binding judicial authority for determination of the Victim's Age by the competent medical authority u/s 164-A r/w u/s 27 of the POCSO Act, **(ii)** the police authority are directed to strictly comply with the direction of tis court in *Aman' Case* and ensure its compliance, **(iii)** lack of compliance of the directions of this case in *Monish's Case* and lately *Aman's Case* by the trial courts while deciding the bail applications under the

POCSO Act, is being noticed regularly which resulting in repeated miscarriage of justice as in this case, **(iv)** A solemn obligation is cast by the constitution on the high Court to nurture the autonomy of trial judges to enable them to act independently and to build the capacity of the trial judges to judge fairly and to foster the esteem of the trial judges to fortify the citizens' faith in the judiciary – consequently, present bail application is allowed with certain directions to the St. authorities and also to the trial court for necessary action and compliance, accordingly. (Para – 38, 39, 40, 48, 49, 52, 53, 54, 55)

Bail Application Allowed. (E-11)

List of Cases cited:

1. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court of Andhra Pradesh (1978) 1 SCC 240,

2. Mohd. Muslim @ Hussain Vs St. (NCT of Delhi) Special Leave Petition (Criminal) No. 915 of 2023,

3. Ajeet Chaudhary Vs St. of U.P. & anr. - 2021 SCC OnLine All 17,

4. Junaid Vs St. of U.P. & anr. - 2021 SCC OnLine All 463

5. Monish Vs St. of U.P. & ors.- Criminal Bail Application No. 55026 of 2021

6. Anil Gaur @ Sonu Tomar Vs St. of U.P. - 2022 SCC OnLine All 623

7. Maneesh Pathak Vs St. of U.P. - 2023 SCCOnLine All 64

8. Aman @ Vansh Vs St. of U.P. & ors. - Criminal Misc. Bail Application No.2322 of 2024

9. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P. - 2022 SCC Online All 623

10. Bhanwar Singh @ Karamvir Vs St. of U.P. - 2023 SCC Online All 734,

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

12. Monish Vs St. of U.P. & ors.- (2024) 6 ADJ 361,

13. Aman @ Vansh vs St. of U.P.1 - Criminal Misc. Bail Application No.2322 of 2024,

14. Pradeep Kumar Chauhan & anr. Vs St. of U.P. and 3 others - Habeas Corpus Writ Petition No.733 of 2020,

15. Atul Mishra Vs St. of U.P. & ors. - 2022 SCCOnline All 420,

16. Chandrapal Singh Vs St. of U.P. & anr. - 2023 SCC OnLine All 2443,

17. St. of Orissa Vs Sudhansu Sekhar Misra & ors.- AIR 1968 SC 647

18. St. of Assam Vs Ranga Muhammad & ors.- (1967) 1 SCR 454

19. H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior, etc. Vs U.O.I. & anr. - (1971) 1 SCC 85,

20. Dalbir Singh & ors. Vs St. of Punj. - (1979) 3 SCC 745,

21. Krishena Kumar Vs U.O.I. & ors.- 1990 (4) SCC 207,

22. St. of Orissa & ors.Vs Md. Illiyas - 2006 (1) SCC 275,

23. Regional Manager & anr. Vs Pawan Kumar Dubey - (1976) 3 SCC 334,

24. Delhi Airport Metro Express Private Limited Vs Delhi Metro Rail Corporation - (2022) 9 SCC 286,

25. U.O.I. & ors.Vs Dhanwanti Devi & ors.- (1996) 6 SCC 44,

26. Islamic Academy Education & anr. Vs St. of Karnataka & ors.- (2003) 6 SCC 697,

27. Executive Engineer, Dhenkanal Minor Irrigation Division Vs N.C. Budharaj [(2001) 2 SCC 721,

28. T.M.A. Pai Foundation - (2002) 8 SCC 481,

29. Natural Resources Allocation, In Re, Special Reference No.1 of 2012 - (2012) 10 SCC 1,

30. Sanjay Singh & anr. Vs U.P. Public Service Commission, Allahabad & anr. - (2007) 3 SCC 720,

31. Commissioner of Income Tax Vs Sun Engineering Works (P) Ltd. - (1992) 4 SCC 363,

32. Ambica Quarry Works & ors. Vs St. of Guj. & ors.- (1987) 1 SCC 213,

33. Prakash Amichand Shah Vs St. of Gujarat & ors.- 1986 (1) SCC 581

34. Delhi Administration in the NCT of Delhi Vs Manohar Lal - (2002) 7 SCC 222,

35. Divisional Controller, KSRTC Vs Mahadeva Shetty - (2003) 7 SCC 197,

36. Ashwani Kumar Singh Vs U.P. Public Service Commission & ors.- (2003) 11 SCC 584,

37. Director of Settlement, A.P. & ors.Vs M.R. Apparao & anr. - (2002) 4 SCC 638,

38. Gasket Radiator Pvt. Ltd. Vs Employees' St. Insurance Corporation & anr. - (1985) 2 SCC 68,

39. Sreenivasa General Traders & ors. Vs St. of Andhra Pradesh & ors.- (1983) 4 SCC 353,

40. Government of India Vs Workmen and St. Trading Corporation & ors.- (1997) 11 SCC 641,

41. Junaid Vs St. of U.P. & anr. - 2021 (6) ADJ 511,

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

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

1. The judgment is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction
II	Bail Jurisdiction : Scope
III	Facts
IV	Submissions of learned counsels
V	Age of victim: Section 164-A of Cr.P.C., Section 27 of POCSO Act, Judgements in Monish Vs. State of U.P. and others; Aman @ Vansh v. State of U.P. and 3 others; Atul Mishra v. State of U.P. and 3 others.
VI	Judgement in Pradeep Kumar Chauhan and another v. State of U.P. and 3 others: Non applicability to police investigations into POCSO Act offences
VII	Conclusions & Directions
VIII	Order on Bail Application
IX	Post Script and Directions
X	Appendix I. Introduction:

I. Introduction:

2. The question of law which arises for consideration in this bail application is the nature of the legal duty cast on the police to draw up a medical report determining the age of a victim while investigating POCSO Act offences. The jurisdiction of this Court to determine this question will predicate the discussion on the merits of the bail.

II. Bail Jurisdiction: Scope

3. Right of bail is vested by virtue of Section 439 of Code of Criminal Procedure,19731.

4. With coming of the Constitution and development of constitutional law, the statutory domain of bails was transformed into a constitutional jurisdiction as well. The right to bail is derived from statute but cannot be removed from constitutional oversight. The right to seek bail is irretrievably embedded in the fundamental right of liberty enshrined under Article 21

of the Constitution of India by holdings of constitutional courts.

5. Good authority has long entrenched the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India.

6. Bail jurisprudence was firmly ensconced in the constitutional regime of fundamental rights in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh2***. Casting an enduring proposition of law in eloquent speech, V.R. Krishna Iyer, J. held:

"1. Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

7. More recently the interplay of constitutional liberty assured under Article 21 and statutory right of bail of an undertrial prisoner was affirmed by the Supreme Court in **Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)3.**

8. Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law. The right of bail has statutory origins but can never be isolated from its constitutional moorings.

9. The aforesaid authorities establish the undeniable linkage between right to seek bail and the fundamental right to personal liberty. Every prisoner has a fundamental right to file an application for bail before the competent court as per law and without delay.

10. While sitting in bail determination, this Court is not denuded of its constitutional status. The High Court is a court of record and a constitutional court irrespective of the nomenclature of the jurisdiction it is exercising. Needless to add that the High Court always exercises its jurisdiction as per law. While deciding bail applications the High Court exercises a composite jurisdiction of statutory powers and constitutional obligations. At times legal issues which directly impinge on the fair administration of justice arise in bail jurisdiction. The High Court cannot neglect consideration of such issues on the footing that they are beyond the scope of bail jurisdiction. The High Court always

possesses the necessary powers to decide such issues for dispensing fair justice and to realize the fundamental rights of an accused in bail jurisdiction. Refusal to decide the said issues would amount to abdication of constitutional obligations of this Court. Issues arising in the instant case (and those referred in the judgment) directly impact the right of a prisoner to seek bail. They have to be decided by this Court with clarity in lawful exercise of bail jurisdiction and in the interests of equal justice.

11. The judgements rendered by this Court in **Ajeet Chaudhary v. State of U.P. and another4, Junaid v. State of U.P. and another5, Monish v.State of U.P. and others6**, **Anil Gaur @ Sonu Tomar v. State of U.P.7 & Maneesh Pathak v. State of U.P.8]** enable the court in bail jurisdiction to decide legal issues which arise in the facts and circumstances of the case and impede fair administration of justice or prevent realization of the right of bail of an accused accruing from statute or threaten to infringe the personal liberties of the accused vested by the Constitution.

12. While examining the scope of powers of this Court to decide legal issues in bail jurisdiction this Court in **Aman @ Vansh v. State of U.P. and 3 others9** held as under:

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

[Also see: i. **(Anil Gaur @ Sonu @ Sonu Tomar v. State of U.P.10)**
ii. **(Bhanwar Singh @ Karamvir v. State of U.P.11)**
iii. **(Noor Alam v. State of U.P.12).]**

III. Facts:

13. In the instant case the age of the victim as depicted in the prosecution documents was contested in light of the judgement of this Court in **Monish Vs. State of U.P. and others13**. The medical report pertaining to the victim's age as contemplated in Section 164-A Cr.P.C. read with Section 27 of the POCSO Act was not produced by the police authorities.

14. Following the established practice this Court directed that the medical report of the victim's age be got drawn up by the competent medical officer/Chief Medical Officer, Jalaun in light of Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act. **[See: Aman @ Vansh vs State of U.P.14]**

15. The issue of medical report determining the victim's age in POCSO Act offences has been regularly vexing the Courts, and hence is liable to be determined before deciding the bail application on merits.

IV. Submissions of learned counsels:

16. Shri Paritosh Kumar Malviya, learned A.G.A.-I submits that in view of the judgement rendered by this Court in **Pradeep Kumar Chauhan and another v.**

State of U.P. and 3 others15 the police authorities cannot get the medical examination of the victim conducted to determine her age. Hence the said medical report was not got drawn up by police in the instant case. Though in his customary fairness the learned AGA-I has referenced all relevant provisions of law including Section 164-A Cr.P.C. read with Section 27 of POCSO Act. According to the learned A.G.A.-I, the legal position regarding applicability of **Pradeep Kumar Chauhan (supra)** to POCSO Act offences and investigations needs clarification.

17. Per contra, Shri Shams uz Zaman, learned counsel holding brief of Shri Fakhr uz Zaman, learned counsel for the applicant contends that the judgement of this Court in **Pradeep Kumar Chauhan (supra)** is not a binding precedent for the purposes of determination the age of the victim under Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act. The Court rightly called for the medical report regarding the victim's age on account of the failure of the police authorities to do so and to uphold the said provisions of law. The order of the Court calling for the medical report of the victims age was consistent with the law laid down in **Aman (supra)**. **Aman (supra)** is a binding authority for medical determination of the victim's age in POCSO Act offences. In a bail application the victim's age has to be determined by a conjoint reading of **Monish (supra)** and **Aman (supra)**.

18. Heard the learned counsel for the parties.

V. Age of victim: Section 164-A of Cr.P.C., Section 27 of POCSO Act, Judgements in Monish Vs. State of U.P. and others and Aman @ Vansh v. State of U.P. and 3 others; Atul Mishra v. State of U.P. and 3 others.16

19. Large variations in the documents pertaining to the victim's age are being noticed in an overwhelming number of cases under the POCSO Act. Challenges laid to the victim's age as depicted in the prosecution case are also a regular feature in bail applications under the POCSO Act. Victim's age related documents are often put under a cloud in bail hearings. Medical report determining the victim's age as per Section 164-A of Cr.P.C. read with Section 27 of the POCSCO Act thus becomes critical even in bail matters. In fact in POCSO Act offences the victim's age is also a jurisdictional issue.

20. Section 164-A of the Code of Criminal Procedure Code as well as Section 27 of the POCSO Act are extracted hereunder for ease reference:

"Section 164-A of Cr.P.C. Medical examination of the victim of rape.-(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the

information relating to the commission of such offence.

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

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

(ii) the age of the woman;

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

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

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

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

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

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

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

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

"Section 27 of POCSO Act. Medical examination of a child-(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973.

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

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

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

21. Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act provide for a specific method to determine the age of the victim in POCSO Act offences. The said provisions underscore the importance of medical age determination of victims under the POCSO Act. Age determined under Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act is not an exercise in futility, and cannot be excluded from consideration by courts. Omission by the police to get the medical report of age drawn up during the investigation and neglect of the said report by the court while deciding the bail application will render the said statutory provisions redundant and negate the scheme of the POCSO Act.

22. This Court in **Aman (supra)** held that Section 164-A Cr.P.C. read with Section 27 of the POCSO Act insofar as they contemplate medical determination of the age of the victim are mandatory. **Aman (supra)** accordingly directed the police authorities to get the medical report determining the victim's age drawn up by the competent medical authority at the start of the investigations into POCSO Act offences.

23. Age of a child victim of a sexual offence is also liable to be determined in light of the procedure laid down in Section 94 of the Juvenile Justice (Care and Protection of Children) Act (as applicable to the POCSO Act). This Court in had examined the manner and scope of applicability of Section 94 of the Juvenile Justice (Care and Protection of Children) Act to determine the age of victims in bails under the POCSO Act offences. In **Monish (supra)** due weight was given to the medically determined age of the victim apart from consideration of other documentary evidences of age including those referenced in Section 94 of the of the Juvenile Justice (Care and Protection of Children) Act.

25. The implementation of the mandatory provisions of Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act and compliance of **Aman (supra)** are imperative necessities to secure the ends of justice. Medical determination the age of victims is based on scientific parameters and has a high standing in courts. Medical report of the victim's age given by the competent medical authority in POCSO Act cases has a statutory basis and is a reliable document to assist the court in forming an opinion or conclusion about her age even while deciding bail applications under the POCSO Act. Particularly in bails where the accused shows that prosecution documents pertaining to the victim's age are contradictory, unreliable or otherwise rendered doubtful for credible reasons. [See: **Monish Vs. State of U.P. and others]** Failure to consider or to accord due weight or to discord the same without good cause to medical report determining the victim's age contravenes the law and vitiates the order of court.

26. The predicaments faced by this Court while examining the age of the victim in a bail application under the POCSO Act were resolved by this Court in the judgement rendered in **Monish (supra)**. However, the dilemma of the Court persists on account of the recurrent failure of the police authorities to get the victim's age determined by the competent medical authority during investigations of POCSO Act offences. As seen earlier this omission of the police authorities is in the teeth of Section 164-A Cr.P.C. read with Section 27 of the POCSO Act and also violates the explicit judicial directions in **Aman (supra)**.

27. The determination of victim's age in a bail under POCSO Act offences has to be made upon an integrated reading of Section 94 of the of the Juvenile Justice (Care and Protection of Children) Act and Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act in light of the judgements of this Court in **Monish (supra)** and **Aman (supra)**.

28. **Monish (supra)** contemplates consideration of various documents pertaining to the victim's age in bail proceedings. **Aman (supra)** reinforced the significance of the medical age

determination in the scheme of the POCSO Act. The trial court has to make an opinion on the credibility of the respective documents while deciding the bail application. In appropriate cases the age of the victim determined by the competent medical authority can prevail over other age related documents (including school records). Infact in the instant case this Court has relied upon the medical determination of the victim's age in preference to the school records pertaining to her age.

29. False depiction of the victim's age is a favoured tactic used by unscrupulous litigants to frame innocent persons under the stringent provisions of the POCSO Act. False cases under the POCSO Act are an abuse of the process of court which frustrate the laudable intent of the said enactment. As a result thereof innocent persons are subjected to malicious prosecution and undergo long periods of imprisonment. Widespread misuse of the POCSO Act was also noticed in **Aman (supra)**.

30. This Court in **Atul Mishra v. State of U.P. and 3 others.17** noted the legislative object of POCSO Act, and also found abuse of the enactment. Balancing the need to implement the statute while taking social realities into account, Rahul Chaturvedi J. in ***Atul Mishra (supra)*** held:

"13. Growing incidences where teenagers and young adults fall victim of the offences under the POCSO Act, being slapped by the penal provisions of POCSO Act without understanding the far reaching implication of the severity of the enactment, is an issue that brings much concern to the conscience of this Court. A reading of the statement of objects and reasons of POCSO Act would show that, as mentioned, to protect the child from the offences of sexual abuse, sexual assault and harassment, pornography, pursuant to the Article-15 of the Constitution of India, 1950 and the Conservation on the Rights of the children. However, a large array of the cases filed under the POCSO Act seems to be those arising on the basis of the complaints/F.I.Rs. lodged by the families of adolescents and teenagers who are involved in romantic relationship with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or limits, the cases of the nature where the adolescents or teenagers involved in the dense romantic affair.

14. This Court deems it fit and necessary to take a moment to delve into an important aspect, the awareness of which is crucial in understanding and appreciating with the cases of instant nature. It is crucial to accept the science and psychology of an adolescent and young adulthood at this juncture. This is because social and biological phenomenons are widely recognised as determinates of human development, health and socio-economic attainment across the life course, but our understanding of the underlying pathways and processes remains limited. Therefore, a "bio-social approach" needs to be adopted and appreciated i.e. one that conceptualizes the biological and social requirements of two teenagers, who on account of mutual infatuation are attracted and decide for their future. Their decision could be impulsive, immature but certainly not sinful or tainted as branded in the F.I.R. or complaint of the informant."

31. Medical determination of the victim's age by the competent medical authority at the commencement of the police investigation will ensure

implementation of the statutory mandate of Section 164-A of Cr.P.C. read with Section 27 of POCSO Act, comply with the law laid down by this Court in **Aman (supra)**, and will help curb the menace of false cases under the POCSO Act.

VI. Judgement in Pradeep Kumar Chauhan and another v. State of U.P. and 3 others: Non applicability to police investigations into POCSO Act offences:

32. The facts and the legal issues which arose for consideration in **Pradeep Kumar Chauhan (supra)** have to be noticed first. **Pradeep Kumar Chauhan (supra)** was a Habeas Corpus Writ Petition which was filed by the petitioner No.1 claiming that the petitioner No.2 was his legally wedded wife. During the pendency of the habeas corpus petition, a medical report determining the corpus's age was drawn up.

33. In those facts and circumstances while considering the said medical report of the corpus; this Court in **Pradeep Kumar Chauhan (supra)** held as under:

"At this stage, Sri Vinod Kumar Yadav, learned counsel for the petitioners submits that the Investigating Officer got examined the corpus at Pt. D.D.U. Govt. Hospital, Varanasi by the concerned radiologist and Chief Medial Officer whereupon in examination, age of the victim has been determined to be 19 years. This medical was conducted on 13.11.2019. It is further pointed out by the learned counsel for the petitioners that the statement of victim was recorded under Section 164 Cr.P.C. before the concerned Chief Judicial Magistrate, Court No.1 Mirzapur on 08.11.2019 wherein the victim has admitted that she and petitioner No.1 Pradeep Kumar Chauhan were studying in the same school, therefore, in the light of this statement given by the victim, the conduct of Investigating Officer becomes doubtful.

It appears that either Investigating Officer is not aware of the procedure and the provisions contained in the Juvenile Justice (Care and Protection of Children) Act, 2015 or with a view to shield the accused person, he has directed the victim to undergo medical examination.

This requires thorough enquiry in the matter.

The Director General of Police, U.P. is directed to immediately issue a circular/order informing all the investigating Officers through respective Superintendents of Police, the manner in which investigations to be carried out. He shall also ensure that all the Investigating officers are given periodic training and Ist phase of periodic training be completed within one year after drawing a time-table/ roaster for said training to be imparted in various Police Academies of the State including training for forensic and scientific investigation.

The Director General will submit first report before the Registrar General before expiry of three months from today as to the steps taken from rendering training on the aspect of the investigation to all the Investigating Officers posted in the State of Uttar Pradesh.

He shall also cause conduct of an inquiry to be carried out in relation to be alleged misconduct of the Investigating Officer of the present case viz. Sanjeev Kumar Singh, Narayanpur, Police Station-Adalhat, Mirzapur and to take strict disciplinary action against the Investigating Officer, who conducted the Investigation."

34. **Pradeep Kumar Chauhan (supra)** did not arise out of a criminal investigation for an offence under the

POCSO Act. The provisions of Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act were not in issue and never arose for consideration before this Court in **Pradeep Kumar Chauhan (supra)**. Further this Court in **Pradeep Kumar Chauhan (supra)** did not even reference or examine Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act.

35. The directions of this Court issued in **Pradeep Kumar Chauhan (supra)** do not prevent the police authorities to get the age of a victim determined by the competent medical authority under Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act. Infact directions in **Pradeep Kumar Chuahan (supra)** are not applicable to investigation of POCSO Act offences.

36. Non applicability of the directions in **Pradeep Kumar Chauhan (supra)** to POCSO Act offences is supported by authorities in point. A Full Bench of this Court in **Chandrapal Singh v. State of U.P. and another18** was squarely faced with the issue of determining the binding precedent in a judgement rendered by a Constitutional Court.

37. The Full Bench of this Court in **Chandrapal Singh (supra)** examined various judgements in point and held thus:

"158. The law is settled to the point that it is axiomatic that only the ratio decidendi in a judgement constitutes the binding precedent.

159. The Civil Appeal before the Supreme Court in *State of Orissa v. Sudhansu Sekhar Misra and others19* was an outcome of the conflict between the High Court and the Government of Orissa. The High Court effected transfers of judicial officers in light of its reading of the judgment of the Supreme Court in State of *Assam v. Ranga Muhammad and others20*. The High Court relied on the observations in *Ranga Muhammad (supra)* that after a judicial officer is posted to the cadre it is for the High Court to effect his transfers and accordingly passed orders transferring judicial officers to posts in the State Government.

160. The Supreme Court in Sudhansu Sekhar Misra (supra) clarified the ratio in Ranga Muhammad (supra) as follows:

"13. ...Obviously relying on the observation of this Court that after a judicial officer is posted to the cadre, it is for the High Court to effect his transfers, the court below has come to the conclusion that as the posts of the law secretary, deputy law secretary and superintendent and legal remembrancer are included in the cadre, the High Court has the power to fill those posts by transfer of judicial officers. The cadre this Court was considering in Ranga Mahammad case [(1967) 1 SCR 454] , namely, Assam Superior Judicial Services Cadre consisted of the Registrar of the Assam High Court and three district judges in the first grade and some additional district judges in Grade II. In that cadre, no officer holding any post under the government was included. Hence the reference by this Court to the cadre is a reference to a cadre consisting essentially of officers under the direct control of the High Court. It was in that context this Court spoke of the cadre. The question of law considered in that decision was as regards the scope of the expression "control over District Court" in Article 235. The reference to the cadre was merely incidental."

161. The principle that only the ratio decidendi of a judgement that is treated as a binding precedent was reflected in *Sudhansu Sekhar (supra)* wherein after relying on British authorities it was held:

" 13. ...A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury L.C. said in Quinn v. Leathem [[1901] AC 495]:

"Now before discussing the case of Allen v. Flood, [1898] AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

162. The said judgment was also followed by the Supreme Court in *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior, etc. v. Union of India and another21. Madhav Rao Scindia Bahadur (supra)* also cautioned:

"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

164. The scope of law declared within the meaning of Article 141 of the Constitution of India arose for consideration before the Supreme Court in Dalbir Singh and others v. State of Punjab22. The process to isolate the ratio decidendi from the judgment was set out in Dalbir Singh (supra) as under:

"22. With greatest respect, the majority decision in Rajendra Prasad case does not lay down any legal principle of general applicability. **A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less "law declared" within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:**

"(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above."

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the

parties from reopening the dispute. **However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. [R.J. Walker & M.G. Walker : The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24] It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes [LR 1959 AC 7 43 : (1959) 2 All ER 38] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts.** This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

(emphasis supplied)

166. The discussion on binding precedents was initiated *in Jayant Verma (supra)* by citing from authorities of repute. Precedent in English Law by Cross and Harris (4th Edn.) was quoted and the dissenting judgement of A.P. Sen, J. in *Dalbir Singh v. State of Punjab23,* was also cited with approval :

"54. This question is answered by referring to authoritative works and judgments of this Court. In Precedent in English Law by Cross and Harris (4th edn.), 'ratio decidendi' is described as follows:

"The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."

170. Analysis of facts of a case and the process of reasoning were part of the process to ascertain the ratio decidendi of a judgement or the principle of law having binding force in all Courts in India according to the Supreme Court in *Krishena Kumar v. Union of India and others24. Krishena Kumar (supra)* also clarified if the ratio is not clear the Court is not bound by the judgement:

"19. **The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required**". This was what Lord Selborne said *in Caledonian Railway Co. v. Walker's Trustees* [(1882) 7 App Cas 259 : 46 LT 826 (HL)] and Lord Halsbury in Quinn v. Leathem [1901 AC 495, 502 : 17 TLR 749 (HL)] . Sir Frederick Pollock has also said : **"Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."**

(emphasis supplied)

20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the

test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573)

"The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

(emphasis supplied)

33. *Stare decisis et non quieta movere*. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 14 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. **When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice**. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it. But in Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] it was never required to be decided that all the retirees formed a class and no further classification was permissible."

(emphasis supplied)

171. In *State of Orissa and others v. Md. Illiyas25*, the Supreme Court iterated the well settled position of law that it is only the ratio decidendi which comes within the ambit of the law declared by Supreme Court and is binding precedent by stating the law as follows:

"12. When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that prerequisite conditions were absent. **Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not**

everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates : (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa v. Sudhansu Sekhar Misra [(1968) 2 SCR 154 : AIR 1968 SC 647] and Union of India v. Dhanwanti Devi [(1996) 6 SCC 44] .) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem [1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL)] the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

(emphasis supplied)

172. It would be apposite to refer to the following observations of the three-Judge Bench of the Supreme Court *in Regional Manager and another v. Pawan Kumar Dubey26*, wherein it was held that even a single fact could make a difference in conclusions drawn in two cases:

"7. ...**It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."**

(emphasis supplied)

173. While deducing the ratio in a judgement, the Supreme Court in *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation27* held:

"35. This Court has held that the **ratio decidendi is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar**. It has been held that one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

(emphasis supplied)

174. The process of deducing the ratio of the binding statement of law made in a judgment arose for consideration before the Supreme Court in *Union of India and others v. Dhanwanti Devi and*

others28. Dhanwanti Devi (supra) after emphasizing the need to examine the established facts of a case and the principle of law on which the issue was decided, the law of precedents was encapsulated as under:

"9. Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, **we will dispose of the objection raised by Shri Vaidyanathan that Hari Krishan Khosla case [1993 Supp (2) SCC 149] is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi.***

10. **Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents.**

(emphasis supplied)

176. Deriving the ratio of a judgement arose for consideration in *Islamic Academy Education and another v. State of Karnataka and others29* wherein the Supreme Court explained the process as follows:

"2. Most of the petitioners/applicants before us are unaided professional educational institutions (both minority and non-minority). On behalf of the petitioners/applicants it was submitted that the answers given to the questions, as set out at the end of the majority judgment, lay down the true ratio of the judgment. It was submitted that any observation made in the body of the judgment had to be read in the context of the answers given. We are unable to accept this submission. The answers to the questions, in the majority judgment in *Pai case* [(2002) 8 SCC 481] are merely a brief summation of the ratio laid down in the judgment. **The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire *ratio decidendi* of the judgment**. We, therefore, while giving our clarifications, are disposed to look into other parts of the judgment other than those portions which may be relied upon.

139. **A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. *The ratio decidendi* of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal.** *(See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721]* .

143**. It will not, therefore, be correct to contend, as has been contended by Mr Nariman, that answers to the questions would be the ratio to a judgment. The answers to the questions are merely conclusions. They have to be interpreted, in a case of doubt or dispute with the reasons assigned in support thereof in the body of the judgment, wherefor, it would be essential to read the other paragraphs of the judgment also. It is also permissible for this purpose (albeit only in certain cases and if there exist strong and cogent reasons) to look to the pleadings of the parties.**

146. The judgment of this Court in *T.M.A. Pai Foundation* [(2002) 8 SCC 481] will, therefore, have to be construed or to be interpreted on the aforementioned principles. The Court cannot read some sentences from here and there to find out the intent and purport of the decision by not only considering what has been said therein but the text and context in which it was said. For the said purpose the Court may also consider the constitutional or relevant statutory provisions vis-à-vis its earlier decisions on which reliance has been placed."

(emphasis supplied)

177. Ratio decidendi of a judgement alone constituted the law declared in a judgment rendered by the Supreme Court and the method to cull out the ratio from a judgement in *Natural Resources Allocation, In Re, Special Reference No.1 of 201230* was restated after referencing good authorities in point:

"69. Article 141 of the Constitution lays down that the "law declared" by the Supreme Court is binding upon all the courts within the territory of India. **The "law declared" has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. (*See Fida Hussain v. Moradabad Development Authority* [(2011) 12 SCC 615 : (2012) 2 SCC (Civ) 762] .) Hence, it flows from the above that the "law declared" is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided.** *[Also see Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213*] and CIT v. Sun Engg. Works (P) Ltd. [(1992) 4 SCC 363]] **In other words, the "law declared" in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which the case is decided which has to be ascertained in relation to the subject-matter of the decision.**

70. **Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedential value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it the ratio decidendi. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in The Nature of the Judicial Process, had said that "if the Judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition" and "almost invariably his first step is to examine and compare them;" "it is a process of search, comparison and little more" and ought not to be akin to matching "the colors of the case at hand against the colors of many sample cases" because in that case "the man who had the best card index of the cases would also be the wisest Judge". Warning against comparing precedents with matching colours of one case with another, he summarised the process, in case the colours do not match, in the following wise words:**

"It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the Judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: 'For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow."

73**. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case**. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact.

(emphasis supplied)

178. The process of deciphering the ratio of decidendi in a judgement was elaborated in *Sanjay Singh and another v. U.P. Public Service Commission, Allahabad and another31* in the following terms :

"10. The contention of the Commission also overlooks the fundamental difference between challenge to the final order forming part of the judgment and challenge to the ratio decidendi of the judgment. **Broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision**. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of this Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to mould the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. The term "judgment" and "decision" are used, rather loosely, to refer to the entire judgment or the final order or the ratio decidendi of a judgment. Rupa Ashok Hurra [(2002) 4 SCC 388] is of course, an authority for the proposition that a petition under Article 32 would not be maintainable to challenge or set aside or quash the final order contained in a judgment of this Court. It does not lay down a proposition that the ratio decidendi of any earlier decision cannot be examined or differed in another case. Where violation of a fundamental right of a citizen is alleged in a petition under Article 32, it cannot be dismissed, as not maintainable, merely because it seeks to distinguish or challenge the ratio decidendi of an earlier judgment, except where it is between the same parties and in respect of the same cause of action. **Where a legal issue raised in a petition under Article 32 is covered by a decision of this Court, the Court may dismiss the petition following the ratio decidendi of the earlier decision. Such dismissal is not on the ground of "maintainability" but on the ground that the issue raised is not tenable, in view of the law laid down in the earlier decision.** But if the Court is satisfied that the issue raised in the later petition requires consideration and in that context the earlier decision requires re-examination, the Court can certainly proceed to examine the matter (or refer the matter to a larger Bench, if the earlier decision is not of a smaller Bench). When the issue is re-examined and a view is taken different from the one taken earlier, a new ratio is laid down. When the ratio decidendi of the earlier decision undergoes such change, the final order of the earlier decision as applicable to the parties to the earlier decision, is in no way altered or disturbed. Therefore, the contention that a writ petition under Article 32 is barred or not maintainable with reference to an issue which is the subject-matter of an earlier decision, is rejected."

(emphasis supplied)

179. The need to study the whole judgment in light of facts and circumstances of a case, and to avoid cherry picking select facts was essential while determining the precedential value of a decision as held by the Supreme Court in *Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.32:*

"39. ...Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case**. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this**

Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."

(emphasis supplied)

180. The dictum of law that the ratio of a decision must be understood in the facts situation of a case and that a judgment is an authority for what it actually decides and not what logically follows from it was reiterated by the Supreme Court in *Ambica Quarry Works and others v. State of Gujarat and others33:*

"18**...The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."**

(emphasis supplied)

181. The Supreme Court in *Prakash Amichand Shah v. State of Gujarat and others34* cautioned that a judgement is not a statute, and underscored the need to carefully ascertain the true principles laid down by the previous decision and outlined when decisions are liable to be disregarded:

"26. **Before embarking upon the examination of these decisions we should bear in mind that what is under consideration is not a statute or a legislation but a decision of the court. A decision ordinarily is a decision on the case before the court while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Hence while applying the decision to a later case, the court which is dealing with it should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation.**

31. Expressions like "virtually overruled" or "in substance overruled" are expressions of inexactitude. In such circumstances, it is the duty of a Constitution Bench of this Court which has to consider the effect of the precedent in question to read it over again and to form its own opinion instead of wholly relying upon the gloss placed on it in some other decisions. It is significant that none of the learned judges who decided the subsequent cases has held that the Act had become void on account of any constitutional infirmity. They allowed the Act to remain in force and the State Governments concerned have continued to implement the provisions of the Act. What cannot be overlooked is that the decision in *Shantilal Mangaldas case* [(1969) 1 SCC 509 : AIR 1969 SC 634 : (1969) 3 SCR 341] was quoted in extenso with approval and relied on by the very same judge while deciding the *Bank Nationalisation case* [(1970) 1 SCC 248 : AIR 1970 SC 564 : (1970) 3 SCR 530] . He may have arrived at an incorrect or contradictory conclusion in striking down the Bank Nationalisation Act. The result achieved by him in the subsequent case may be wholly wrong but it cannot have any effect on the efficacy of the decision in Shantilal Mangaldas case [(1969) 1 SCC 509 : AIR 1969 SC 634 : (1969) 3 SCR 341]

. **An inappropriate purpose for which a precedent is used at a later date does not take away its binding character as a precedent. In such cases there is good reason to disregard the later decision. Such occasions in judicial history are not rare."**

(emphasis supplied)

182. The Supreme Court in *Delhi Administration in the NCT of Delhi v. Manohar Lal35* reiterated the need to find out the ratio of a decision and cautioned against following decisions which do not lay down any principle of law:

"5. **The High Court and all other courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them**. Considered in that context, we could not find from the decisions reported in Sukumaran [(1997) 9 SCC 101 : 1997 SCC (Cri) 608] and Santosh Kumar [(2000) 9 SCC 151 : 2000 SCC (Cri) 1184 : 2000 Cri LJ 2777] any law having been declared or any principle or question of law having been decided or laid down therein and that in those cases this Court merely proceeded to give certain directions to dispose of the matter in the special circumstances noticed by it and the need felt, in those cases, by this Court to give such a disposal. **The same could not have been mechanically adopted as a general formula to dispose of, as a matter of routine, all cases coming before any or all the courts as a universal and invariable solution in all such future cases also."**

(emphasis supplied)

184. The need to ascertain the principle of law in a judgement and caution against unnecessary expansion of the scope and authority of the precedent was restated by the Supreme Court in ***Divisional Controller, KSRTC v. Mahadeva Shetty36 :***

"23. So far as *Nagesha case* [(1997) 8 SCC 349] relied upon by the claimant is concerned, it is only to be noted that the decision does not indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. **Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment**. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority."

(emphasis supplied)

186. A blind reliance on judgments without considering the fact situation was disapproved *in Ashwani Kumar Singh v. U.P. Public Service Commission and others37*:

"10**. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments**. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761) Lord McDermott observed : (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the *ipsissima* verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge…."

11. In *Home Office v. Dorset Yacht Co.* [(1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] Lord Reid said, "Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances" (All ER p. 297g-h). Megarry, J. in *Shepherd Homes Ltd. v. Sandham* (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed : (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" In *Herrington v. British Rlys. Board* [(1972) 2 WLR 537 : (1972) 1 All ER 749 : 1972 AC 877 (HL)] Lord Morris said : (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

12. **Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."**

(emphasis supplied)

187. The ratio decidendi was distinguished from the obiter dicta in *Director of Settlement, A.P. and others v. M.R. Apparao and another38* as under:

"7. So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. **The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a**

decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see *Ballabhadas Mathurdas Lakhani v. Municipal Committee, Malkapur* [(1970) 2 SCC 267 : AIR 1970 SC 1002] and AIR 1973 SC 794 [(sic)]). When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See *Narinder Singh v. Surjit Singh* [(1984) 2 SCC 402] *and Kausalya Devi Bogra v. Land Acquisition Officer* [(1984) 2 SCC 324] .) We have to answer the first question bearing in mind the aforesaid guiding principles. We may refer to some of the decisions cited by Mr Rao in elaborating his arguments contending that the judgment of this Court dated 6-2-1986 [*State of A.P. v. Rajah of Venkatagiri*, (2002) 4 SCC 660] cannot be held to be a law declared by the Court within the ambit of Article 141 of the Constitution. Mr Rao relied upon the judgment of this Court in the case of *M.S.M. Sharma v. Sri Krishna Sinha* [AIR 1959 SC 395 : 1959 Supp (1) SCR 806] wherein the power and privilege of the State Legislature and the fundamental right of freedom of speech and expression including the freedom of the press was the subject-matter of consideration. In the aforesaid judgment it has been observed by the Court that the decision in *Gunupati Keshavram Reddy v. Nafisul Hasan* [(1952) 1 SCC 343 : AIR 1954 SC 536 : 1954 Cri LJ 1704] relied upon by the counsel for the petitioner which entirely proceeded on a concession of the counsel cannot be regarded as a considered opinion on the subject. There is no dispute with the aforesaid proposition of law."

(emphasis supplied)

191. *Gasket Radiator Pvt. Ltd. v. Employees' State Insurance Corporation and another39* rendered by the Supreme Court highlighted the importance of not construing judgments as statutes held thus:

"8. ….**We once again have to reiterate what we were forced to point out in *Amar Nath Om Prakash v. State of Punjab* [(1985) 1 SCC 345 : 1985 SCC (Tax) 92 : AIR 1985 SC 218] that judgments of courts are not to be construed as Acts of Parliament. Nor can we read a judgment on a particular aspect of a question as a Holy Book**

covering all aspects of every question whether such questions and facets of such questions arose for consideration or not in that case."

(emphasis supplied)

192. In *Sreenivasa General Traders and others v. State of Andhra Pradesh and others40*, the Supreme Court explained the concept of binding precedents and expounded that observations in a judgment which were not necessary for the purpose of the decision are not binding precedents:

"30. In the ultimate analysis, the Court held in *Kewal Krishan Puri case* [(1980) 1 SCC 416 : AIR 1980 SC 1008 : (1979) 3 SCR 1217] that so long as the concept of fee remains distinct and limited in contrast to tax, such expenditure of the amounts recovered by the levy of a market fee cannot be countenanced in law**. A case is an authority only for what it actually decides and not for what may logically follow from it. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case in which such expressions are to be found. It would appear that there are certain observations to be found in the judgment in Kewal Krishan Puri case [(1980) 1 SCC 416 : AIR 1980 SC 1008 : (1979) 3 SCR 1217] which were really not necessary for purposes of the decision and go beyond the occasion and therefore they have no binding authority though they may have merely persuasive value**. The observation made therein seeking to quantify the extent of correlation between the amount of fee collected and the cost of rendition of service, namely: (SCC p. 435, para 23) "At least a good and substantial portion of the amount collected on account of fees, maybe in the neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee", appears to be an obiter."

(emphasis supplied)

195. The Supreme Court in *Government of India v. Workmen and State Trading Corporation and others41* opined that a decision which does not set out the facts or the reasons for the conclusion given cannot be treated as a binding precedent and held:

"4. **….The decision of this Court is virtually a non-speaking order which does not set out the facts and the circumstances in which the direction came to be issued against the Government.** It is not clear as to what was the connection between the respondent-Corporation and the State Government. In the present case the Government of India had clearly averred that it had nothing to do with the State Trading Corporation and there was no relationship of master and servant between the petitioners and the Government of India and, therefore, the Government of India was not in any manner concerned with the closure of the Leather Garment unit of the State Trading Corporation and the consequences thereof. **Mr Usgaocar rightly emphasised that the decision on which the High Court had relied could not be treated as a precedent and in support of this contention he drew our attention to a Constitution Bench judgment in the case of *Krishena Kumar v. Union of India*** [(1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846 : AIR 1990 SC 1782 : JT (1990)

3 SC 173] **. In paras 18 and 19 the question as to when a decision can have binding effect has been dealt with. We need say no more as it is obvious from the decision relied on that it does not set out the facts or the reason for the conclusion or direction given. It can, therefore, not be treated as a binding precedent."**

(emphasis supplied)

219. The process of distilling the ratio in a judgment is a deliberative process governed by a long line of legal precedents. It is the duty of all Courts (including trial courts and tribunals) to cull out the ratio of a judgement in light of the cases in point before following it as a binding precedent. The first step in isolating the ratio of a judgment requires a full reading of the judgment. The material facts and the legal issues in the controversy have to be then ascertained from the judgement as a whole. Finally the principle of law on which the decision was rendered on the subject matter under consideration has to be identified. The said statement of law so extracted is the binding precedent in the said judgement. Courts have to observe the caution of not picking up stray facts or observations and apply them mechanically or out of context as binding precedents."

VII. Conclusions & Directions:

38. In light of the law laid down by the Full Bench of this Court in **Chandrapal Singh (supra),** it can be safely stated that the directions contained in **Pradeep Kumar Chauhan (supra)** are not binding judicial authority for determination of the victim's age by the competent medical authority under Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act. **Pradeep Kumar Chauhan (supra)** does not restrain the police authorities investigating POCSO Act offences to get the victim's age determined by the competent medical authority. Infact the police authorities while investigating POCSO Act offences are bound to comply with the judgement of this Court rendered in **Aman (supra)** wherein Section 164-A of the Cr.P.C. read with Section 27 of the POCSO Act squarely arose for consideration in the facts of POCSO Act offences. During investigations of POCSO Act offences violation of the statutory mandate of Section 164-A of Cr.P.C. read with Section 27 of POCSO Act and non compliance of the directions of this court in **Aman (supra)** are liable to be viewed seriously and cannot be justified on the basis of **Pradeep Kumar Chauhan (supra)**.

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

I) The judgement of this Court in **Pradeep Kumar Chauhan (supra)** is not applicable to POCSO Act offences. The police authorities/investigation officers are directed to strictly comply with the directions of this Court in **Aman (supra)** and ensure that the medical report determining the age of the victim is drawn up by the competent medical authority at the commencement of the investigations of POCSO Act offences in accordance with the provisions of the Section 164-A Cr.P.C. read with Section 27 of the POCSO Act.

II) The medical report of the victim determining her age and drawn up under Section 164-A Cr.P.C. read with Section 27 of the POCSO Act shall be produced by the police authorities/investigation officers before the court hearing the bail application. The learned courts while hearing bail applications shall make due enquiries about

the compliance of these directions and **Aman (supra)** during the bail proceedings.

III) The judgement of this Court rendered in **Monish (supra)**, **Aman (supra)** as well as this case have to be read together and not in isolation. The directions in **Aman (supra)** as well as this case will be of little avail, if not examined and implemented in light of the directions made in **Monish (supra)**.

IV) The age of the victim in bails arising out of POCSO Act offences has been determined by a composite reading of Section 94 of the Juvenile Justice (Care and Protection of Children) Act and Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act in light of the judgements rendered in **Monish (supra)**, **Aman (supra)** and this case.

V) The court hearing the bail application has to accord full weight to the medical age determination report of the victim and also carefully examine all other documents relating to the victim's age. The court has to determine the credibility of the respective age related documents while deciding the bail application in the facts of the case. In appropriate facts and circumstances as in the instant case, the age determined by the competent medical authority under Section 164-A of Cr.P.C. read with Section 27 of the POCSO Act can prevail over other age related documents (including school records).

VIII. Order on Bail Application:

40. Shri Paritosh Kumar Malviya, learned A.G.A.-I for the State contends that the police authorities in compliance of the directions issued by this Court in **Junaid Vs State of U.P. and another42** and with a view to implement the provisions of POCSO Act, 2012 read with POCSO Rules, 2020, have served the bail application upon the victim/legal guardian as well as upon the CWC.

41. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No.622 of 2022 at Police Station-Kotwali Orai, District-Jalaun under Sections 363, 366, 376(3) IPC and Section 3/4(2) of POCSO Act. The applicant is in jail since 05.08.2023.

42. The interim bail of the applicant was granted by this Court on 08.05.2024.

43. The following arguments made by Shri Samshuzzaman, learned counsel holding brief of Shri Fakhruzzaman, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Paritosh Kumar Malviya, learned A.G.A.-I from the record, entitle the applicant for grant of bail:

I. The victim was wrongly shown as a minor of 12 years in the F.I.R. only to falsely implicate the applicant under the stringent provisions of the POCSO Act and cause his
imprisonment.

. II.The age of the victim set out in the prosecution case is refuted in light of the judgement of this Court in **Monish (supra)** and on the following grounds:

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

(b) The age of the victim was incorrectly got registered in the school records by the victim's parents to give her an advantage in life. There is no lawful basis for the age related entry of the victim in the school records. The school records disclosing her age as 13 years and 2 months are unreliable.

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

(d) The medical report sent by the Chief Medical Officer, Jalaun to determine the age of the victim opines that she is 18 years of age.

(e) There is a margin of error of two years in medical reports determining the age, which has to be read in favour of the applicant.

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

IV. The victim and the applicant were intimate.

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

VI. The victim in her statements under Section 161 Cr.P.C. and Section 164 Cr.P.C. has admitted to intimacy with the applicant and that she eloped with the applicant to Delhi and thereon to Faridabad. The victim has stated that she had consensual physical relations with the applicant. The victim in her statement under Section 164 Cr.P.C. has further added that she has got married to the applicant.

VII. The victim has not made any allegation of commission of rape, wrongful detention or forceful assault against the applicant in her statements under Sections 161 Cr.P.C. and 164 Cr.P.C.

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

IX. The victim was never confined or bound down. She was present at various public places but never resisted the applicant nor raised an alarm. Her conduct shows that she was a consenting party.

X. Medical evidence to corroborate commission of rape by the applicant with the victim has not been produced by the prosecution.

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

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

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

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

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

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

46. The learned trial court is directed to fix the sureties after due application of mind in light of the judgement rendered by this Court **in Arvind Singh v. State of U.P. Thru. Prin. Secy. Home Deptt.43.**

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

47. Photostat copy of the medical report drawn up by the Chief Medical Officer to determine the age of the victim shall be duly attested and retained by the Registry as part of the records of the Court.

The original medical report, if any, shall be returned to the concerned Chief Judicial Magistrate for onward transmission to the concerned Investigating Officer.

IX. Post Script and Directions:

48. Lack of compliance of the directions of this Court rendered in **Monish (supra)** and lately **Aman (supra)** by the trial courts while deciding bail applications under the POCSO Act is being noticed regularly. This approach of trial courts is resulting in repeated miscarriages of justice as in this case. A list of some cases by way of exemplars is appended as Appendix-Ii.

49. The following facts are common in each case listed in the appendix-I:

i). The medical report determining the age of the victim opines that she is 18 years (or above).

ii). There are contradictions in age related documents of the victim available with the prosecution.

iii). The victim in her statements under Sections 161 Cr.P.C. and 164 Cr.P.C. has admitted to intimacy and consensual physical relations with the accused. As per the said statements of the victim, she had eloped with the accused. (In some cases the couple had got married).

iv). The victim has not made any allegation of abduction, wrongful detention, rape or inappropriate sexual behaviour against the accused in her statements under Sections 161 Cr.P.C. and 164 Cr.P.C.

v). The victim was never confined or bound down. The victim was present at various places, but never raised an alarm and did not resist the accused. Her conduct showed that she was a consenting party.

vi). Medical report to corroborate rape or forceful assault was not produced by the prosecution.

vii**). All the aforesaid bails (Appendix I) were dismissed by the learned trial courts.**

50. This Court regrets to say that in the said cases the learned trial courts have rejected all the bail applications in a mechanical manner without proper consideration of relevant facts in the record and in contravention of law laid down in **Monish (supra)**.

51. The said orders (Appendix-I) show that regardless of the facts of a case there was a bias in the institution44 (trial courts) towards rejection of bail applications. Hundred percent dismissal of the said bail applications is reflective of “bias” and not divergent judicial opinions which come in the category of “noise”45. The issue needs to be examined and the failings of the learned trial courts have to be addressed by various stakeholders i.e. the learned trial courts, the learned Districts Judges and the Judicial Training & Research Institute, Lucknow, Utrar Pradesh. The culture or if one may say the mindset of the learned trial judges

(collectively speaking) that dismissal of bails in POCSO Act offences irrespective of the facts and circumstances of the case is the only way to show one's integrity and a fail safe way of discharging judicial functions has to change. This can achieved by regular training at the JTRI which is consistently reinforced at the district judgeships in the "Continuous Learning Programmes" being run in the district judgeships. **Needless to add, the observations made in this order shall not operate adversely against the judicial officers who had handed down the said orders**. The issue has to seen less as an individual infirmity but more as an institutional inadequacy.

52. There is an urgent need for the Judicial Training & Research Institute, Lucknow, Utrar Pradesh and all learned District Judges to study the aforesaid systemic faults in depth, and create appropriate training programmes for the learned POCSO judges and to sensitize them for fair administration of justice in bails arising out of POCSO Act offences.

53. The High Court too has a responsibility in this regard. The supervisory jurisdiction of the High Court under Article 227 of the Constitution of India and also the appellate and revisional jurisdictions possessed by this Court have to be exercised with care and caution. By virtue of Article 227 of the Constitution of India, the High Court is the guardian court of the district judgeships. When challenge is laid to a judgment of a trial court before the High Court, the correctness of the impugned judgement is examined by this Court. To correct an error in a judgment one need not condemn the judge. For in the latter case it is often not clear whether the judgment is in appeal or the judge is on trial. The High Court as a benign guardian has to be a pillar of strength and not a source of fear for the trial judiciary. A solemn obligation is cast by the Constitution on the High Court to nurture the autonomy of the trial judges to enable them to act independently and to build the capacity of the trial judges to judge fairly and to foster the esteem of the trial judges to fortify the citizens' faith in the judiciary.

54. Registry is directed to send this order as well as the judgment of this Court rendered in **Aman (supra)** to the learned Government Advocate for communication to the Director General of Police, Lucknow, Uttar Pradesh, Director General (Prosecution), Lucknow, Uttar Pradesh and other police authorities for necessary action.

55. Registry is also directed to send a copy of this order to the Director, Judicial Training & Research Institute, Lucknow, Utrar Pradesh and learned District Judges for necessary action.

(2024) 5 ILRA 1956
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 9640 of 2023

Irshad Ahmad ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Vaibhav Kalia, Vidhu Bhushan Kalia

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164 & 439 - Indian Penal Code, 1860 - Sections – 376, 354, 504 & 506 - The Protection of Children from Sexual Offences (POCSO) Act, 2012 – Sections 3, 4, 7 & 8 - The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sectiosn – 1(w), 3(1), (Dha) & 3(2)(v) - Information Technology Act, 2000 - Section - 67 - Application for Bail – first Bial Application – rejected – Second Bial Application – on the ground that, applicant is languishing in jail since long time – there is decisive contradictions in the story alleged by the prosecution – victim is a major lady but in the FIR her age has been indicated as 17 years – court finds that, - mere long detention in jail does not entitle an accused for bail – prosecutrix was aged about 17 years – if the entire St.ment recorded u/s 164 Crpc is read, the fact would emerge that she has levelled specific allegation of rape against the present applicant – hence, considering the facts and circumstances of the case as well as the dictums of the Apex Court, the bail application is rejected – direction issued to trial court for conclude the trial within a period of six months accordingly – however, liberty is also given to the applicant to file another bail application, if the trial is not concluded within the stipulated time. (Para – 20, 21, 29, 30)

Bail Application Rejected. (E-11)

List of Cases cited:

1. P. Yuvaprakash Vs St. Rep. By Inspector of Police reported in 2023 LiveLaw (SC) 538,

2. Rajesh Ranjan Yadav Vs CBI through its Director, (2007) 1 SCC 70,

3. St. of H.P. Vs Asha Ram, (2005) 13 SCC 766,

4. Ganesan Vs St. represented by its Inspector of Police, (2020) 10 SCC 573,

5. Vijay Vs St. of M.P. (2010) 8 SCC 191,

6. St. of Mah. Vs Chandraprakash Kewalchand Jain, (1990) 1 SCC 550,

7. St. of U.P. Vs Pappu, (2005) 3 SCC 594,

8. St. of Punj. Vs Gurmit Singh, (1996) 2 SCC 384,

9. St. of Orissa Vs Thakara Besra, (2002) 9 SCC 86,

10. Phool Singh Vs St. of M. P., (2022) 2 SCC 74,

11. Sham Singh Vs St. of Har., (2018) 18 SCC 34,

12. Krishan Kumar Malik Vs St. of Har., (2011) 7 SCC 130.

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

1. Heard Sri Vaibhav Kalia, learned counsel for the applicant and Sri G.D. Bhatt, learned Additional Government Advocate for the State.

2. Despite the service of notice upon opposite party No.2, no one has appeared on behalf of opposite party No.2. As a matter of fact, no one has appeared on behalf of opposite party No.2 on any date.

3. This is the second bail application as the first bail application bearing Criminal Misc. Bail Application No.5158 of 2022; Irshad Ahmad vs. State of U.P. & others; has been rejected vide order dated 30.11.2022 passed by Hon'ble Dinesh Kumar Singh, J. The order dated 30.11.2022 reads as under:-

"1. Heard learned counsel for the applicant, Sri Ran Vijay Singh, learned A.G.A. and perused the record.

2. The present application under Section 439 Cr.P.C. has been filed by the applicant Irshad Ahmad seeking bail in FIR/ Case Crime No.-247 of 2021 under section-376, 354, 504, 506 I.P.C. & Section- (1)(w), 3(1)(Dha), 3(2)(v) SC/ST Act and section 3/4 and section 7/8 POCSO

Act and section 67, I.T. Act, Police Station-Pachpedwa District- Balrampur.

3. The allegation against the accused-applicant is of committing rape on the prosecutrix, who is 17 years old girl and a student of Class XI. It is further alleged that the accused-applicant had made some video-clips and clicked indecent photographs of the victim without clothes and sent these indecent photographs on Whatsapp to other persons. The accused-applicant was not allowing the prosecutrix to get married and blackmailing her on the basis of alleged photographs and video-clips. The prosecutrix in her statements recorded under sections 161 and 164, Cr.P.C. has specifically alleged that the accused-applicant raped her and clicked the photo and video-slips and threatened her that if she would tell anybody about the incident, he shall make the video viral and would not allow her to marry anyone else. When the prosecutrix told the incident to her parents, the parents went to the house of the accused-applicant, however, the brothers of the prosecutrix ran them away.

4. Considering the nature of allegations against the accused-applicant and the stand of the prosecutrix in her statements recorded under section 161 and 164, Cr.P.C. this court does not deem it appropriate to enlarge the accused-applicant on bail at this stage and, therefore, the bail application is rejected.

5. The accused-applicant may revive the bail plea after the prosecutrix gets examined in the court.

6. The trial court should make endeavour to record the statements of the prosecutrix and other witnesses of fact expeditiously, preferably within a period of six months.

7. Let a copy of this order be transmitted to the learned trial court for necessary compliance."

4. Learned counsel for the applicant has stated that despite the specific direction being issued by this Court on 30.11.2022 (supra) to record the evidence of the prosecutrix and other witnesses of fact within a period of six months but those statements have not been recorded within time so stipulated.

5. As per learned counsel for the applicant, the present applicant (Irshad Ahmad) is languishing in jail since 28.12.2021 in Case Crime /F.I.R. No.247 of 2021, under Sections 376, 354, 504 & 506 I.P.C. and Section 3 (1) (w) (i), 3 (1) (Dha) & 3 (2) (v) of S.C./S.T. Act and Section 3/4 and 7/8 of Protection of Children from Sexual Offences Act (in short POCSO Act) and Section 67 of Information Technology Act, Police Station-Pachpedwa, District-Balrampur.

6. Learned counsel for the applicant has stated that he shall not address those grounds which have already been considered by this Court while rejecting the first bail application but shall address only those grounds which have emerged after recording of the statement of the prosecutrix and other witnesses.

7. Precisely, the fact of the present case have been narrated in para-3 of order dated 30.11.2022 (supra).

8. Attention has been drawn towards the supplementary affidavit dated 02.05.2024 showing Annexure Nos.SA-1, SA-2, SA-3, SA-4 & SA-5, which are the statements of PW-1 (Arjun Kumar Valmiki), PW-2 (Prosecutrix), PW-3 (Seema Devi), PW-4 (Rajesh Kumar Singh, Principal) & PW-5 (Dr. Mahikriti Sishodia) .

9. Learned counsel for the applicant has stated that if the aforesaid statements

are perused, the fact would emerge that there are relevant decisive contradictions in the story alleged by the prosecution.

10. As per learned counsel for the applicant, the victim is a major lady but in the F.I.R., her age has been indicated as 17 years.

11. Sri Kalia has submitted that in the F.I.R. and in her statement the prosecutrix has stated that she is studying in Lokmanya Tilak Inter College, Panchpedwa in Class-X whereas the Principal of the said institution Sri Rajesh Kumar Singh has been examined as PW-4 has stated that the date of birth of the prosecutrix is 20.05.2004 and she was a regular student of his institution till Class-X and got admission in Class-XI but on account of non-deposition of fee for Class-XI and for being regular absent her name was struck off from the roll of regular student on 19.10.2021, thereafter, she did not get admission again in the institution. Therefore, as per Sri Kalia, on the alleged date of incident i.e. 20.12.2021 she was not a bonafide/ legal student of the institution in question.

12. Sri Kalia has also drawn attention of this Court towards the evidence of Dr. Mahikriti Sishodia, the Medical Officer, District Hospital, Balrampur (PW-5) recorded on 17.10.2023 wherein she has stated that she had internally examined the prosecutrix on 27.12.2021 and as per examination it was found that her hymen was torn and the hymen may likely to torn if any girl drives Cycle, plays some field games or does the hard-work. As per her examination, there was no evidence of rape.

13. Sri Kalia, learned Counsel for the applicant has referred the order dated 16.04.2024 passed by this Court in Criminal Misc. Bail Application No.2322 of 2024, wherein this Court has observed that the age of the prosecutrix / child should be determined by the Medical Board for the reason that the medical report may prove to be a reliable piece of evidence; the said medical report will assist the process of law and enable the courts to make a conclusive finding on the victim's age after considering all evidences in the record; the said medical reports determining the victim's age at the very outset will also help prevent misuse of the POCSO Act and the said medical reports are relatable to specific provisions of law. In the aforesaid judgment, the relevant provisions of Section 164-A Cr.P.C. and Section 27 of the POCSO Act, which provides the medical examination of a child, have been considered.

14. Learned counsel for the applicant has also submitted that if the prosecution story is taken on its face value, it appears that the impugned F.I.R. is anti-time inasmuch as she allegedly narrated her plight to her mother on 26.12.2021 but the impugned F.I.R. has been lodged on 25.12.2021. He has further submitted that there is no allegation of rape in the F.I.R. and the story has been developed later on.

15. Learned counsel for the applicant has also submitted that the story that the present applicant had clicked some obscene video and photographs of the prosecutrix is false and concocted inasmuch there is no material available with the prosecution to that effect. He has also stated that another story that the present applicant has sent those video clips to the person with whom the marriage of the prosecutrix was settled, is incorrect. Further, almost all the fact witnesses have been examined, threfore, considering the period of incarceration of

the applicant in jail i.e. about two years and six months, he may be enlarged on bail.

16. Per contra, learned Additional Government Advocate has opposed the aforesaid bail application by submitting that the statement of the prosecutrix recorded under Sections 161 & 164 Cr.P.C. as well as her evidence recorded before the learned trial court are intact wherein she has levelled specific allegations of rape against the present applicant. The age of the prosecutrix/ child is below 18 years. In terms of Section 29 of the POCSO Act, burden is upon the applicant to establish that he has not committed offence of rape upon the prosecutrix.

17. Attention has been drawn towards Annexure No.CA-9 of the counter affidavit, which is the statement of one Sonu with whom the marriage of the prosecutrix was fixed, who has categorically stated that he is a labourer and doing labour work at Bangalore where he received one phone call on his Mobile Number from one person namely Irshad, who has informed him that the girl with whom his marriage has been fixed, is his lover and he loves her and he has established physical relations with her for couple of times. When the aforesaid Cell Phone Number was verified by the Investigating Agency, it was found that such Cell Phone Number belongs to the present applicant. The aforesaid C.D.R. report has also annexed with the counter affidavit which indicates that those Cell Phone Numbers belong to the present applicant. Therefore, learned Additional Government Advocate has stated that the present applicant has not only committed rape with a minor girl, who is below 18 years, but also has informed this incident to a person with whom marriage of the prosecutrix was fixed, resultant thereof, that marriage was broken before it could take place.

18. Learned Additional Government Advocate has also referred Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, wherein it has categorically mandates that if any School Certificate of the child/ prosecutrix is available, the same would be given first preference than others. Notably, in the present case, the date of birth of the prosecutrix as per the High School Certificate is 20.05.2004, which means she was aged about 17 years and 05 months, therefore, the medical examination report, if any, may not have overriding effect over the age so indicted in the High School Certificate.

19. Learned Additional Government Advocate has relief upon the judgment of Apex Court rendered in the case in re: ***P. Yuvaprakash vs. State Rep. By Inspector of Police reported in 2023 LiveLaw (SC) 538***, wherein the Apex Court in para-16 observed as under:-

"16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2)) of the JJ Act, this court held in Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors. that:

Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely) (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)

(a) (i) indicates a significant change over the provisions which were contained in Rue 12 (3) (a) of the Rules of 2007 made under the Act of 2000. Under Rule 12 (3) (a) (i) of matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94 (2) (i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category."

20. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I would like to observe that the prosecutrix/ child, who was aged about 17 years on the date of incident, recorded her statements under Section 161 & 164 Cr.P.C. wherein the specific allegation against the present applicant of committing rape with her has been levelled. Though there is some variation in her statement recorded under Section 164 Cr.P.C. on some part but if the entire statement recorded under Section 164 Cr.P.C. is read, the fact would emerge that in such statement too, she has levelled specific allegation of rape against the present applicant.

21. To me, mere long detention in jail does not entitle an accused for bail. Further, it all depends on the facts and circumstances of each case as there is no straight jacket formula for granting bail. Therefore, period of long incarceration may be considered as one of the grounds for granting bail, but it depends upon facts and circumstances of the particular case. The Hon'ble Apex Court in re; **Rajesh Ranjan Yadav v. CBI through its Director, (2007) 1 SCC 70,** has observed as under:-

"..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail."

22. Section 29 of the POCSO Act provides for presumption as to certain offences. It provides that if a person is prosecuted for violating any provision of Sections 3, 5, 7 & 9 of the Act, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

23. The Apex Court in re; ***State of H.P. Vs. Asha Ram, (2005) 13 SCC 766***, has observed in para-5, which reads as under:-

"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are

compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

24. The Apex Court in re; ***Ganesan Vs. State represented by its Inspector of Police, (2020) 10 SCC 573 while considering the judgments of Vijay v. State of M.P., (2010) 8 SCC 191, State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, State of U.P. Vs. Pappu, (2005) 3 SCC 594, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, State of Orissa v. Thakara Besra, (2002) 9 SCC 86 and Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130*** has observed that hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

25. In the case of ***Pappu*** (supra), the Apex Court has held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion and that consent should be free consent.

26. The Apex Court in re***; Phool Singh v. State of Madhya Pradesh, (2022) 2 SCC 74,*** *has considered the judgment of* ***Sham Singh vs. State of Haryana, (2018) 18 SCC 34***, wherein the Apex Court has observed that the testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

27. Therefore, considering the facts and circumstances of the present case as well as the dictums of the Apex Court, as considered above, I am not inclined to grant bail to the present applicant.

28. Accordingly, the bail application is ***rejected.***

29. Since the present applicant is in jail since 28.12.20221 and the trial in POCSO cases should be conducted and concluded with expedition, preferably within a period of one year in terms of Section 35 (2) of the POCSO Act, therefore, I hereby direct the learned Trial Court to conclude the trial within a period of six months from the date of receipt of a copy of this order taking recourse of Section 309 Cr.P.C. by fixing short dates, if possible, fix dates on day-to-day basis to ensure that the examination of all prosecution witnesses and other witnesses from both the sides, if any, be completed expeditiously and if any of the witnesses

does not cooperate in the trial proceedings properly, the learned Trial Court may take appropriate coercive steps against such witness, which is permissible under the law. Further, no unnecessary adjournment shall be given to any of the parties so that the trial in question could be concluded within the time so stipulated.

30. However, liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

31. Let copy of this order be provided to the learned Trial Court through District & Sessions Judge, Balrampur by the Registry of this Court within three working days for its strict compliance.

(2024) 5 ILRA 1963
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 9723 of 2022

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

Counsel for the Applicant:
Alok Srivastava

Counsel for the Opposite Parties:
G.A., Aslam Javed Siddiqui, Munna Singh

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 309 & 439 - Indian Penal Code, 1860 - Sections – 506, 375 & 376-AB - The Protection of Children from Sexual Offences (POCSO) Act, 2012 – Sections – 5, 6, 29 & 35(2) - Application for Bail – FIR – allegation that applicant who is neighbour of the informant has committed offence of oral sex with her ten years old minor girl - grounds of bail - present application is languishing in jail since long time and St.ment of prosecutrix recorded under pressure of her family and he has been falsely implicated – considering the totality of the facts, medical examination report, St.ment of prosecutrix recorded u/s 164 Cr.p.c. and provision of law, court has not find any substance in the grounds of bail and not inclined to grant bail to the applicant – accordingly, bail Application rejected - further, trial court directed to conclude the trial within a period of nine months, direction issued accordingly – however, applicant has a liberty to file another bail application, if the trial is not concluded within the stipulated time.
(Para – 17, 22, 24, 25)

Bail Application Rejected. (E-11)

List of Cases cited:

1. Sonu Kushwaha Vs St. of up (Criminal Appeal no. 5415/2018 decided on 18.11.2021),

2. Rajesh Ranjan Yadav Vs CBI through its Director, (2007) 1 SCC 70,

3. St. of H.P. Vs Asha Ram, (2005) 13 SCC 766,

4. Ganesan Vs St. represented by its Inspector of Police, (2020) 10 SCC 573,

5. Vijay Vs St. of M.P. (2010) 8 SCC 191,

6. St. of Mah. Vs Chandraprakash Kewalchand Jain, (1990) 1 SCC 550,

7. St. of U.P. Vs Pappu, (2005) 3 SCC 594,

8. St. of Punj. Vs Gurmit Singh, (1996) 2 SCC 384,

9. St. of Orissa Vs Thakara Besra, (2002) 9 SCC 86,

10. Krishan Kumar Malik Vs St. of Har., (2011) 7 SCC 130.

11. Phool Singh Vs St. of M. P., (2022) 2 SCC 74,

12. Sham Singh Vs St. of Har., (2018) 18 SCC 34,

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

1. Heard Shri Alok Srivastava, learned counsel for the applicant, Shri Rajnish Kumar Verma, learned A.G.A., however, no one has appeared on behalf of the informant/ complainant.

2. As per learned counsel for the applicant, the present applicant is in jail since 31.03.2022 in Case Crime No.56 of 2022, under Sections 376AB, 506 IPC and Section 5/6 of Ptotection of Children from Sexual Offences (POCSO) Act, 2012, Police Station- Asiwan, District- Unnao.

3. Learned counsel for the applicant has further submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per prosecution story so narrated in the FIR, the present applicant has made oral sex with the daughter of the complainant/informant, who is aged about ten years. As per FIR, the present applicant, who is the neighbour of the informant/complainant, in the evening at 9:30 P.M. when informant/complainant was with her husband, the applicant came and asked that his mother is calling the prosecutrix/victim and after a lapse of time, the complainant along with her husband went for search of their daughter. While searching, they heard some sound coming from kothari of kanda and bhusa. They found that the cloths of the child were not on her body and the applicant was also not wearing cloths. After wearing cloths the child told that the present applicant has made oral sex with her and penetrated the penis in her way of urine.

4. Learned counsel for the applicant has submitted that the entire prosecution story is false and concocted inasmuch as the prosecution story creates doubt as there was no independent eye witness account and last seen evidence.

5. Learned counsel for the applicant has also drawn attention of this Court towards the order dated 18.11.2021 passed by this Court in Criminal Appeal No.5415 of 2018, **Sonu Kushwaha Vs. State of U.P**., relying upon paras 17 & 21 thereof, which reads as under:-

"17. From the perusal of the provisions of P.O.C.S.O. Act, it is clear that offence committed by appellant neither falls under Section 5/6 of P.O.C.S.O Act nor under Section 9(M) of P.O.C.S.O. Act because there is pentrative sexual assault in the present case as appellant has put his penis into mouth of victim. Putting penis into mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into category of pentrative sexual assault which is punishable under Section 4 of P.O.C.S.O. Act.

21. The court below has awarded the appellant to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- under Section 6 of P.O.C.S.O. Act and under Section 6 of P.O.C.S.O. Act, minimum sentence is 10 years which may extend to imprisonment for life whereas under Section 4 of P.O.C.S.O. Act minimum sentence is 7 years but which may extend to imprisonment for life also. Learned court below has awarded minimum sentence provided under Section 6 of P.O.C.S.O. Act and accordingly, it would be appropriate to award the sentence to appellant under Section 4 of P.O.C.S.O. Act, seven years of rigorous imprisonment which is minimum provided in that Section and fine of Rs. Rs.

5,000/-, in default, three months additional simple imprisonment."

6. On the basis of aforesaid paras, the learned counsel for the applicant has tried to submit that in the present case, maximum sentence for the alleged offence committed may be seven years and the present applicant has already served about two years and two months in jail, therefore, considering the period of incarceration, the present applicant may be released on bail.

7. Learned counsel for the applicant has further drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under Section 164 of Cr.P.C., wherein her statement has been recorded under pressure of her family members.

8. Learned counsel for the applicant has reiterated that the present applicant has no previous criminal history, therefore, the present applicant undertakes that he shall not misuse the liberty of bail, if so granted by this court and shall abide by all terms and conditions of the bail order and shall cooperate in the trial proceedings.

9. Learned A.G.A. has opposed the aforesaid prayer of learned counsel for the applicant and has submitted that the offence in question is so heinous in nature, therefore, the present applicant may not be released on bail. He has drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under section 164 of Cr.P.C., wherein she told that the present applicant has made oral sex with her and penetrated the penis in her way of urine. Learned AGA has submitted that since this is a case of oral sex so there might not be any other injury on the body of the victim.

10. Learned AGA has further drawn attention of this court towards Annexure No.4, which is the copy of medical report. Hymen was torned, which supports the prosecution story, and also the statement of the prosecutrix/victim recorded under Section 164 Cr.P.C. has reiterated the version of statement recorded under section 161 Cr.P.C., therefore, the present applicant may not be released on bail.

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

12. It is well settled that to constitute an offence of rape complete penetration of penis with emission of semen and the rupture of hymen is not necessary. **Modi in his book- Modi Textbook of Medical Jurisprudence and Toxicology, 23rd Edition,** at page 897, opined thus:

"To constitute the offence of rape, it is not necessary that there should be complete of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the Medical Officer should mention the negative facts in his report, but should not given his opinion that no rape had been committed. "

At page 928: *In small children, the hymen is not usually ruptured, but may*

become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum."

13. In **Parikh's Textbook of Medical Jurisprudence and Toxicology,** the following passage is found:

"Sexual intercourse: In Law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

14. Having heard learned counsel for the parties, having gone through the above definition of 'rape' opined by the eminent experts and having perused the material available on record, at the very outset, I would like to observe that the prosecutrix/ child, who was aged about 10 years but as per her educational documents her age was 12 years on the date of incident, recorded her statements under Section 161 & 164 Cr.P.C. levelling specific allegation against the present applicant of committing rape with her. Notably, after reading the entire statement recorded under Section 164 Cr.P.C., the fact would emerge that in such statement, she has levelled specific allegation of oral sex with her and the present applicant has penetrated the penis in her way of urine.

15. The victim/prosecutrix in her statement recorded under Section 164 Cr.P.C. has categorically informed that the present applicant committed oral sex with her. The victim/prosecutrix was about 12 years at the time of incident, therefore, at the stage of bail, it cannot be presumed that she has given such statement under the influence of her parents. Besides, the medical examination report supports her allegation wherein it has been verified that the penis was penetrated in the mouth of the victim/prosecutrix.

16. To me, mere long detention in jail does not entitle an accused for bail. Further, it all depends on the facts and circumstances of each case as there is no straight jacket formula for granting bail. Therefore, period of long incarceration may be considered as one of the grounds for granting bail, but it depends upon facts and circumstances of the particular case. The Hon'ble Apex Court in re; **Rajesh Ranjan Yadav v. CBI through its Director, (2007) 1 SCC 70**, has observed as under:-

"..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail."

17. Section 29 of the POCSO Act provides for presumption as to certain offences. It provides that if a person is prosecuted for violating any provision of Sections 3, 5, 7 & 9 of the Act and where the victim is a child below the age of 16 years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

18. The Apex Court in re; **State of H.P. Vs. Asha Ram, (2005) 13 SCC 766**, has observed in para-5, which reads as under:-

"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

19. The Apex Court in re; **Ganesan Vs. State represented by its Inspector of Police, (2020) 10 SCC 573, while considering the judgments of Vijay v. State of M.P., (2010) 8 SCC 191, State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, State of U.P. Vs. Pappu, (2005) 3 SCC 594, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, State of Orissa v. Thakara Besra, (2002) 9 SCC 86 and Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130** has observed that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

20. In the case of **Pappu** (supra), the Apex Court has held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion and that consent should be free consent.

21. The Apex Court in re; **Phool Singh v. State of Madhya Pradesh, (2022) 2 SCC 74,** has considered the judgment of **Sham Singh vs. State of Haryana, (2018) 18 SCC 34**, wherein the Apex Court has observed that the testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

22. Considering the totality of the facts and circumstances of the issue in question, medical examination report, statement of the prosecutrix recorded under

Section 164 Cr.P.C. and the provisions of law i.e. Section 375 IPC, Section 5/6 of POCSO Act, I do not find any substance in the arguments of learned counsel for the applicant, looking to the peculiar facts and circumstance of the present case, that I am conscious about the fact that the guilt of any person can be established before the learned trial court and no observation should be given affecting the trial, but on the basis of aforesaid material available on record, prima facie, I am not inclined to grant bail to the present applicant.

23. Accordingly, the bail application is **rejected** on merits.

24. Since the present applicant is in jail since 31.03.2022 and the trial in POCSO cases should be conducted and concluded with expedition, preferably within a period of one year in terms of Section 35 (2) of the POCSO Act, therefore, I hereby direct the learned Trial Court to conclude the trial within a period of nine months from the date of receipt of copy of this order taking recourse of Section 309 Cr.P.C. by fixing short dates, if possible, fix dates on day-to-day basis to ensure that the examination of all prosecution witnesses and other witnesses from both the sides, if any, be completed expeditiously and if any of the witnesses does not cooperate in the trial proceedings properly, the learned Trial Court may take appropriate coercive steps against such witness, which is permissible under the law. Further, no unnecessary adjournment shall be given to any of the parties so that the trial in question could be concluded within the time so stipulated.

25. However, liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

26. Let copy of this order be provided to the learned Trial Court through District & Sessions Judge, Unnao by the Registry of this Court within three working days for its strict compliance.

27. Before parting with, I appreciate the efforts and research made by Shri Piyush Tripathi, Research Associate attached with me, in finding out the relevant case laws applicable in the present case.

(2024) 5 ILRA 1968
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 10123 of 2022

Neeraj Raidas ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Vijay Kumar, Alok Kumar Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections – 161, 164, 309 & 439 - Indian Penal Code, 1860 - Sections – 323 & 376 - The Protection of Children from Sexual Offences (POCSO) Act, 2012 – Section – 3, 4, 29, 35(2) - Application for Bail – FIR – allegation of committing rape forcibly - grounds of bail that, applicant is languishing in jail since long time, - prosecutrix is the consenting party with the applicant, - her St.ment was recorded under the pressure of her family, - entire story is false, fabricated and developed by the complainant – and he has no any criminal history – court observed that, -

prosecutrix was below 18 years at the time of incident - considering the entire St.ment recorded u/s 164 Cr.p.c. she has levelled specific allegation of offence of rape against the present applicant which is subject to final determination by the learned trial court - hence, considering the facts and circumstances of the case as well as the dictums of the Apex Court, the bail application is rejected – further, trial court has directed to conclude the trial within a period of nine months, direction issued accordingly – however, applicant has a liberty to file another bail application, if the trial is not concluded within the stipulated time. (Para –11, 16, 18, 19)

Bail Application Rejected. (E-11)

List of Cases cited:

1. St. of H.P. Vs Asha Ram, (2005) 13 SCC 766,

2. Ganesan Vs St. represented by its Inspector of Police, (2020) 10 SCC 573,

3. Vijay Vs St. of M.P. (2010) 8 SCC 191,

4. St. of Mah. Vs Chandraprakash Kewalchand Jain, (1990) 1 SCC 550,

5. St. of U.P. Vs Pappu, (2005) 3 SCC 594,

6. St. of Punj. Vs Gurmit Singh, (1996) 2 SCC 384,

7. St. of Orissa Vs Thakara Besra, (2002) 9 SCC 86,

8. Krishan Kumar Malik Vs St. of Har., (2011) 7 SCC 130.

9. Phool Singh Vs St. of M. P., (2022) 2 SCC 74,

10. Sham Singh Vs St. of Har., (2018) 18 SCC 34.

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

1. Heard Shri Kumar Mishra, learned counsel for the applicant and Shri Rajnish Kumar Verma, learned A.G.A., however, no one has appeared on behalf of the informant/ complainant.

2. As per learned counsel for the applicant, the present applicant is in jail since 02.05.2022 in Case Crime No.227 of 2022, under Sections 323, 376 IPC and Section 3/4 POCSO Act, Police Station-Bilgram, District- Hardoi.

3. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per prosecution story so narrated in the FIR, the present applicant has made wrong deeds with the daughter of the complainant/ informant, who is aged about eighteen years. As per the FIR, when the daughter of the complainant at about 8.00 P.M. went to defecate in the field, at that time the applicant came there and committed rape forcibly with her.

4. Learned counsel for the applicant has further submitted that the entire prosecution story is false and concocted inasmuch as the prosecutrix is major in age and she is the consenting party with the applicant and the prosecutrix is mentally fit but she is unable to speak and due to this reason, false and fabricated story was developed by the complainant against the present applicant.

5. Learned counsel for the applicant has further drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under section 164 Cr.P.C., wherein her statement has been recorded under pressure of her family members and this fact also reveals from the perusal of statement under Section 164

Cr.P.C. where she first time stated that the applicant has torn her cloths.

6. Learned counsel for the applicant has also submitted that the prosecution has not submitted any educational document of the prosecutrix and only on the basis of Aadhar Card and Medical Report, Section 3/4 POCSO Act has been added.

7. Learned counsel for the applicant has reiterated that the present applicant has no previous criminal history, therefore, the present applicant undertakes that he shall not misuse the liberty of bail, if so granted by this court and shall abide by all terms and conditions of the bail order and shall cooperate in the trial proceedings.

8. Learned A.G.A. has opposed the aforesaid prayer of learned counsel for the applicant and has submitted that the offence in question is so heinous in nature, therefore, the present applicant may not be released on bail. He has drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under section 164 of Cr.P.C., wherein in the presence of special instructor, the victim/prosecutrix after seeing the photocopy of driving licence of the applicant has identified that he is the one who tore my cloth and forcibly committed rape.

9. Learned A.G.A. has further drawn attention of this court towards Annexure No.6, which is the copy of medical report, wherein the radiological age of the victim/prosecutrix is about 17 years. Hymen was not found, which supports the prosecution story, and also the statement of the prosecutrix/victim recorded under section 164 Cr.P.C has reiterated the version of statement recorded under section 161 Cr.P.C, therefore, the present applicant may not be released on bail.

10. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I would like to observe that the prosecutrix/ child, who was below 18 years at the time of incident, recorded her statements under Section 164 Cr.P.C. levelling specific allegation against the present applicant of committing rape with her. The entire statement recorded under Section 164 Cr.P.C. is read, the fact would emerge that in such statement, she has levelled specific allegation of rape against the present applicant.

11. In the statement of the prosecutrix/ child recorded under Section 164 Cr.P.C., she has levelled specific allegation against the present applicant that he has committed rape with her forcibly. This is the case where the prosecutrix/ child is a minor girl, therefore, the applicant with the intention to commit rape with her in that case, prima facie, the offence in question would be the offence of rape subject to final determination by the learned Trial Court..

12. The Apex Court in re; **State of H.P. Vs. Asha Ram, (2005) 13 SCC 766**, has observed in para-5, which reads as under:-

"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the

prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

13. The Apex Court in re; **Ganesan Vs. State represented by its Inspector of Police, (2020) 10 SCC 573,** while considering the judgments of **Vijay v. State of M.P., (2010) 8 SCC 191, State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, State of U.P. Vs. Pappu, (2005) 3 SCC 594, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, State of Orissa v. Thakara Besra, (2002) 9 SCC 86 and Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130** has observed that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

14. In the case of **Pappu** (supra), the Apex Court has held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion and that consent should be free consent.

15. The Apex Court in re; **Phool Singh v. State of Madhya Pradesh, (2022) 2 SCC 74,** has considered the judgment of **Sham Singh vs. State of Haryana, (2018) 18 SCC 34,** wherein the Apex Court has observed that the testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

16. Therefore, considering the facts and circumstances of the present case as well as the dictums of the Apex Court, as considered above, I am not inclined to grant bail to the present applicant.

17. Accordingly, the bail application is **rejected.**

18. Since the present applicant is in jail since 02.05.2022 and the trial in POCSO cases should be conducted and concluded with expedition, preferably within a period of one year in terms of

Section 35 (2) of the POCSO Act, therefore, I hereby direct the learned Trial Court to conclude the trial within a period of nine months from the date of receipt of copy of this order taking recourse of Section 309 Cr.P.C. by fixing short dates, if possible, fix dates on day-to-day basis to ensure that the examination of all prosecution witnesses and other witnesses from both the sides, if any, be completed expeditiously and if any of the witnesses does not cooperate in the trial proceedings properly, the learned Trial Court may take appropriate coercive steps against such witness, which is permissible under the law. Further, no unnecessary adjournment shall be given to any of the parties so that the trial in question could be concluded within the time so stipulated.

19. However, liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

20. Let copy of this order be provided to the learned Trial Court through District & Sessions Judge, Hardoi by the Registry of this Court within three working days for its strict compliance.

21. Before parting with, I appreciate the efforts and research made by Shri Piyush Tripathi, Research Associate attached with me, in finding out the relevant case laws applicable in the present case.

(2024) 5 ILRA 1972
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Civil Revision No. 35 of 2024

M/S Sarnath Auto Zone Pvt. Ltd.
...Revisionist
Versus
M/S Span Infra Developers Ltd.
...Opposite Party

Counsel for the Revisionist:
Satish Chandra Dubey, Sr. Advocate, Ujjwal Satsangi

Counsel for the Opposite Parties:
Ravi Anand Agarwal, Shreya Gupta

Civil Laws – Civil Procedure Code, 1908 – Section 115 - Order 7 - Rules 11 – The Limitation Act, 1963 – Article 54 of part 2 of the Schedule - Civil Revision – challenging the rejection order passed by Civil Judge rejecting the misc. Application filed under order 7 Rules 11 CPC – suit - for specific performance of contract - barred by limitation as prescribed u/article 54 of part 2 of the schedule of the limitation Act – per contra, plea taken that, even if the agreement for sale did not fix any particular date by way of time limit for execution of sale deed, it should be taken to be a date fixed by plaintiff and the limitation to file suit for specific performance may run from the date of the notice – court finds that, the whole purpose and idea behind order 7 Rule 11 that the meaningless litigation should not be dragged and therefore, such power has to be exercise very cautiously – held, limitation is a mixed question of law and question of maintainability of the suit for being barred by limitation is the root of the matter – therefore, present civil revision stands disposed of with direction to the court below to decide the issue *qua* order 7 rules 11 as preliminary issue while framing the issues in the suit and decide the same first by affording reasonable opportunity to the parties. (Para – 7, 17, 22, 24)

Civil Revision Disposed of. (E-11)

List of Cases cited:

1. Ahmadsahab Abdul Mulla (2) (dead) Vs Bibijan & ors.(2009) 5 SCC 462,

2. Eldeco Housing and Industries Limited Vs Ashok Vidyarthi & ors.decided on 30.11.2023 3 of 13 in Civil Appeal No.1043 of 2023,

3. Madina Begum & anr. Vs Shiv Murti Prasad Pandey & ors. decided on 01.08.2016 in Civil Appeal No.6687 of 2016,

4. M/S Bankhandi Nath Developers Pct. Ltd. Vs Alok Kumar Goel & ors. decided on 31.07.2019 in First Appeal No.118 of 2018,

5. Tarlok Singh Vs Vijay Kumar Sabharwal:(1996) 8 SCC 367,

6. Rathnavathi & anr. Vs Kavita Ganashamdas, 9 of 13 (2015) 5 SCC 223,

7. Dahiben Vs Anvindbhai Kalyanji Bhanusali (Gajra) (dead) through legal representatives & ors.: (2020) 7 SCC 366.

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

1. Heard Sri Rakesh Pandey, learned Senior Advocate assisted by Sri Satish Chandra Dubey, learned counsel for the petitioner and Ms. Shreya Gupta, learned counsel for the contesting respondent.

2. Petitioner before this court has questioned the order passed by Civil Judge (Senior Division), Bareilly rejecting the misc. application filed by the petitioner being paper no.36-C requesting for disposal of misc. application filed under Order 7 Rule 11 CPC first before proceeding with suit.

3. The argument advanced by learned counsel for the petitioner was that the court was to hear and dispose of application filed under Order 7 Rule 11 CPC for rejection of the plaint, if it appeared from bare pleadings raised in the plaint that suit was barred by law. Learned counsel for the petitioner submitted that for a decree of specific performance of contract, the limitation prescribed under Article 54 of Second Schedule of Limitation Act, 1963 was three years and according to him from the pleadings raised in the plaint, it was apparently an admitted position that agreement for sale was executed on 12.09.2012. Thus according to him limitation to maintain a suit would be upto 3 years whereas the suit had been instituted in the year 2020 as the plaint was verified and presented on 07.12.2020. It was also submitted that in paragraph 5 of the plaint it was pleaded that there were two suits going on being O.S. Nos.843 of 2012 and 758 of 2012 relating to the property which was subject matter of agreement for sale and which came to be finally decided on 26.10.2020 and 30.07.2020 respectively but there was no statement of fact pleaded that there was any interim order operating in favour of the parties not to dispose of the suit land during pendency of the suit proceedings. Thus according to him, petitioner was not restrained by any order of court from executing the sale deed pursuant to the agreement for sale. Learned Senior Advocate has placed reliance upon judgment of the Supreme Court in the case of ***Ahmadsahab Abdul Mulla (2) (dead) v. Bibijan and others (2009) 5 SCC 462*** in support of his arguments and prayed to interfere with the order in my exercise of jurisdiction under Section 115 of Code of Civil Procedure.

4. *Per contra*, it was argued by learned counsel appearing for the contesting respondents, Ms. Shreya Gupta that in view of the limitations as contained under Article 54 of Part 2 of Schedule of Limitation Act, 1963, in the event date was not fixed for performance, the limitation of three years period would start when the plaintiff received a notice of refusal of performance by the proposed vendor. In

support of her argument she took the Court to the pleadings raised in paragraphs 4 and 7 of the plaint in which a categorical statement had been made that the last notice sent to the defendant on 03.11.2020 was not replied to and it was for the first time on 30.11.2022 that the defendants refused to execute agreement for sale except on payment of a higher price towards sale consideration. Thus according to her in view of Article 54 cause of action accrued to file a suit on 30.11.2020 only and so the presentation of the suit on 07.12.2020 was well within the time prescribed for. She also took the Court through the document of agreement for sale in which vide paragraph 1 it was stated that the petitioner would get the sale deed registered within three months from the date of agreement for sale and vide paragraph 3 thereof it was stated that the boundary wall will be constructed within a period of 3 months and if there would be any dispute then any registry will be done only after the resolution of such dispute.

5. Ms. Gupta submitted that those two suits were going on relating to the property in question and there was some serious boundary dispute and that is why no boundary was constructed within prescribed period of three months of execution of agreement for sale. She submitted that vide paragraph 4 of the plaint it was clearly pleaded that the registered notice was sent by the plaintiff on 03.12.2012 i.e well within the period of three months for execution of a saledeed in performance of agreement for sale.

6. Learned counsel for the answering respondents has relied upon a recent judgment of the Supreme Court in the case of ***Eldeco Housing and Industries Limited v. Ashok Vidyarthi and others decided on 30.11.2023 in Civil Appeal No.1043 of 2023 and Madina Begum and another v. Shiv Murti Prasad Pandey and others decided on 01.08.2016 in Civil Appeal No.6687 of 2016*** and also a judgment of Division Bench of this Court in the case of ***M/S Bankhandi Nath Developers Pct. Ltd. v. Alok Kumar Goel and 4 others decided on 31.07.2019 in First Appeal No.118 of 2018***

7. Meeting the counter submissions made by Ms. Shreya Gupta, Mr. Rakesh Pandey, learned Senior Advocate for the petitioner has submitted in rejoinder that even if the agreement for sale did not fix any particular date by way of time limit for execution of the sale deed, since the notice dated 03.12.2012 was itself got issued by the plaintiff, it should be taken to be a date fixed by the plaintiff and this limitation to file suit for specific performance of contract may run from the date of the notice and the date time given therein.

8. Having heard learned counsel for respective parties and having perused the records, the question arises for consideration of the Court is whether the pleadings as raised in paragraph 4 would bring the limitation within the meaning of first part of Article 54 or in the event of it being not so, the date of refusal to execute a sale deed mentioned in paragraph 7 as 30.11.2020 would be a point of limitation. Article 54 of the Limitation Act, 1963 runs as under:

Description of suit	Period of limitation	Time from which period begins to run
54. For specific	do	The date fixed for the performance,

performance of a contract		or, if no such date is fixed, when the plaintiff has notice that performance is refused.

(Emphasis added)

9. From the agreement for sale copy of which is part of the record filed as annexure 1 to the affidavit filed in respect of the said application, I find that no date has been mentioned for execution of the sale deed. Paragraph nos.1, 2 and 3 relevant for the purposes are reproduced hereunder:

"1. यह कि दोनो पक्षों ने बैनामें की तहरीर व रजिस्ट्री के लिये अपनी सहमति से मियाद बैनामा रजिस्ट्री की आज दिनांक से तीन माह करार पाई है।

2. यह कि प्रथम पक्ष निश्चित की अवधि के भीतर अपनी निम्नलिखित सम्पत्ति का बैनामा द्वितीय पक्ष के हक में तहरीर व तकमील कर देगा और कोई भी आपत्ति किसी भी प्रकार की बैनामा करने में नहीं करेगा।

3. यह कि अन्दर म्याद उक्त आराजी पर प्रथम पक्ष द्वारा बाउन्ड्री कराई जायेगी यदि बाउन्ड्री होने के दौरान कोई विवाद उत्पन्न होता है तो प्रथम पक्ष द्वारा विवाद सुलझाये जाने के पश्चात ही रजिस्ट्री कराई जायेगी। आराजी का फ्रन्ट उत्तर से दक्षिण 82 फिट है।"

(Emphasis added)

10. From a bare reading of the aforesaid paragraphs two facts emerge out: Firstly a period of three months was prescribed for execution of the sale deed with effect from the date of agreement for sale which is admittedly 29.10.2012: and secondly the registry of sale deed was also subject to the condition that boundary wall would be constructed within the prescribed period of three months and if the boundary wall is not constructed on account of any dispute, then the execution of the sale deed will take place only after resolution of such dispute. Thus, it is clear that period of three months was not a date fixed period in paragraph no.1 as prescribed under the agreement for sale and further such period of three months was subject to condition that there should not be any dispute with regard to the boundary as the boundary was to be constructed within such period of three months.

11. In the face of these conditions as laid in the agreement to sell, if I examine the plaint allegations I find that in paragraph 4, a notice was sent on 03.12.2012 by the plaintiff asking the petitioner to execute a sale deed within time. This date is the point for sending the notice within a period of three months. Since three month's period had yet not expired therefore, it cannot be said that 03.12.2012, date of notice sent by the plaintiff should be taken as a date in point of time to execute the sale deed so as to apply the first part of Article 54 of the Limitation Act. Still further, I find that pleadings have been made in paragraph 5 of the plaint to the effect that dispute was going on in respect of the same land and that being a situation coupled with the fact that the boundary wall had not been constructed, it could be a case therefore, that there was some dispute that was why boundary wall was not constructed and this dispute lasted till 26.10.2020 when the second suit was decided. This becomes a question of fact to determine as to whether these suits that were pending, were relating to the same property and was there any dispute regarding the land in question so as to create obstruction in construction of the boundary wall. This could have been determined only after the parties led their evidence. Therefore, this issue becomes mixed question of fact and law whether in the matter of limitation to run so as to

determine whether the suit was bared by time or not. The court was to apply the law to the facts yet to come out by way of evidence to be led by the parties and its proper appreciation. There could be a case, therefore, if the land in question which was subject matter of agreement for sale, was in issue in two suits being O.S. Nos.7843 of 2012 and 758 of 2012 and the boundary could not be constructed as per terms carried in paragraph 3 of the agreement for sale, so saledeed could be executed only after the resolution of such dispute. Further upon appreciation of facts if this fact comes out to be a correct fact that there was a dispute qua property in question, then certainly limitation would run from the date when the second suit being 843 of 2012 came to be disposed of finally on 26.10.2020 in the light of paragraph 3 of the agreement for sale.

12. As far as pleadings raised in paragraph no.7 that the plaintiff faced refusal for the first time on 30.11.2020 at the end of the defendant in the matter of execution of saledeed is concerned as defendant had been claimed to have demanded certain more price as consideration, this in my view is also a question of fact which can be decided after appreciation of evidence in support of the facts so pleaded. Thus in any view of the matter therefore, second part of Article 54 is applicable to the present case and looking to the terms and conditions of the agreement for sale vis-a-vis the pleadings raised that two suits, as claimed to be pending in connection qua the same property..

Coming to the judgment cited by Mr. Pandey in the case of Ahmadsahab Abdul Mulla (2) (dead) ***(supra)*** I find that the court referred to judgment in the case of *Tarlok Singh v. Vijay Kumar Sabharwal:(1996) 8 SCC 367*, which court had dealt with the expression 'date fixed for the performance' as contained in Article 54 of the Schedule of the Limitation Act. The court held that the judgment in Tarlok Singh was rendered in a factual scenario and proceeded to hold vide paragraph 10 that the word *"'fixed' in essence means having final and crystallized form or character not subject to change or fluctuation".*

13. Having held this expression 'date fixed' to be a crystallized notion, the Court meant it to mean that there has to be a date fixed as final limit at a definite point of time. The Court vide paragraph 12 held thus:

"Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression `date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits."

(Emphasis added)

14. This judgment was relied upon by Ms. Gupta, learned counsel appearing for the plaintiff-respondents. She has argued that the what had been held in paragraph 12 was only suggestive of specified date in calendar which is not the case in hand and, therefore, the second part of Article 54 would prevail. A Division Bench of this Court in the case of M/s Bankhandi Nath Developers Pvt. Ltd ***(supra)*** in the background of the factual

matrix of that case held that the plaint could not be rejected under Order 7 Rule 11 CPC by placing reliance upon a part of the plaint. Vide paragraph 29, the court has held thus;

"29. In our opinion, this itself is a matter of appreciation of evidence and therefore, plaint could not have been rejected under Order VII Rule 11 C.P.C. by placing reliance upon part of plaint and ignoring material pleadings contained in plaint which explain the circumstances leading to institution of suit in the year 2017. In our view, Court below has erred in allowing application under Order VII Rule 11 (d) C.P.C. filed by Defendant-Respondent No.2. In all propriety, Trial Court should have framed an issue regarding question of limitation and decide the same after evidence had been led by parties."

15. In view of the above, therefore, relying upon a part of the pleading in paragraph 4 that a notice was sent by the plaintiff to the defendant to execute the saledeed on 03.12.2012 cannot be read in isolation. It is to be read contextually alongwith further pleadings raised in the subsequent paragraphs. Supreme Court in the case of ***Madina Begum (supra)*** has dealt with this issue of limitation prescribed under Article 54 of the Schedule of the Limitation Act, 1963.

16. In that case, Supreme Court first referred to the order of the High Court wherein the period of 6 months to execute the sale deed as prescribed under the Contract Act was taken to be a date fixed for performance of contract and so the limitation was stated to run on the expiry of six months period. Supreme Court did not agree with this above view of the High Court and referred to the judgment in the case of Ahmadsahab Abdul Mulla ***(supra)*** to hold that 'date fixed' for performance means as a crystallized notion and the expression date fixed was held to be suggestive of a definite timeline. The Court then proceeded to refer another judgment of the Supreme Court in the case of ***Rathnavathi and another v. Kavita Ganashamdas, (2015) 5 SCC 223*** wherein it was held that if no date was fixed, limitation of three years would begin to run when the plaintiff had the notice of refusal of performance of agreement. That judgment of the Supreme Court was accordingly referred to vide paragraph 20, 21, 22 and 23, and the Court held thus:

"20. Quite independently and without reference to the aforesaid decision, another Bench of this Court in Rathnavathi and Another v. Kavita Ganashamdas[2] came to the same conclusion. It was held in paragraph 42 of the Report that a mere reading of Article 54 would show that if the date is fixed for the performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within three years from the date so fixed. But when no such date is fixed, the limitation of three years would begin when the plaintiff has notice that the defendant has refused the performance of the agreement. It was further held, on the facts of the case that it did not fall in the first category of Article 54 since no date was fixed in the agreement for its performance.

21. The Clauses of the agreement for consideration in Rathnavathi were Clauses 2 and 3 and they read as follows:-

"2. The purchaser shall pay a sum of Rs. 50,000 (Rupees fifty thousand only) as advance to the seller at the time of signing this agreement, the receipt of which

the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.

3. The seller covenants with the purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the purchaser after paying penalty. In case it is not possible then the time stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties."

22. As far as the present appeal is concerned, the agreement between Gulab Bai and ***Madina Begum*** *did not specify a calendar date as the date fixed for the performance of the agreement. Consequently, the view expressed in Ahmadsahab Abdul Mulla and Rathnavathi on the first part of Article 54 clearly applies to the facts of the case. In taking a contrary view, ignoring the absence of a specified date for the performance of the agreement and reversing the Trial Court, the High Court has fallen in error.*

23. It is not necessary for us to multiply authorities on the subject particularly when the issue has been conclusively settled by a Bench of three learned judges of this Court in Ahmadsahab Abdul Mulla and we see no reason to take a different view.

17. In a recent judgment of **Eldego Housing and Industries Limited** *(supra)* the Supreme Court has referred to its earlier judgment regarding the scope of Order 7 rule 11 in the case of Dahiben v. Anvindbhai Kalyanji Bhanusali (Gajra) (dead) through legal representatives and others: (2020) 7 SCC 366. The Court in this case has held that this power under Order 7 Rule 11 is envoked to dismiss the suit summarily at threshold if on the ground contained under the provisions such suit can be dismissed, as the Court would not be permitting the plaintiff to unnecessarily protract the proceedings. The whole purpose and idea is that the meaningless litigation should not be dragged and therefore, such power has to be exercised very cautiously. It could be also a case where no cause of action is seen. So the only question now, therefore, to be seen is as to whether from bare pleadings raised in the plaint it can be concluded that suit was barred by time or where the pleadings does not disclose any cause of action so the suit deserves dismissal at a very threshold.

18. Mr. Pandey, has not argued that there was no cause of action. The only point argued was that the suit was barred by limitation.

19. On the point of limitation, a suit can be dismissed summarily if it is determinable from the pleadings that limitation would have run from a particular point, say 'A', which plaintiff admits and yet suit has been filed beyond prescribed limit. But this is not the case in hand.

20. Looking to the exposition of law on the point and interpretation of the provisions contained under Article 54 of Limitation Act, 1963 in judgments referred to hereinabove, it can be safely concluded that the agreement since did not contain any fixed date or a crystallized date to suggest that if agreement for sale was not executed on or before that date then cause would arise to maintain a suit for specific performance of contract.

21. Even for arguments' sake though law is otherwise, if it is taken that period of three months would run as limitation period, clause 3 of the agreement

for sale would come into play, as this clause gives a discretion to the defendant-petitioner to execute the saledeed after the resolution of dispute, if any, by erecting the boundary wall upon the land in suit if it was not constructed within three months of execution of agreement for sale.

22. Looking to the pleadings as raised in paragrpah no.5 to the plaint it can be safely concluded that there was some dispute regarding land in question and the Court would only come to a conclusion after the evidence is led whether this dispute was the reason for petitioner not constructing the boundary wall and not executing the saledeed. There is no pleading in the entire petition that petitioner had ever shown his readiness and willingness to execute the sale deed by constructing the boundary wall, or that he had replied to the first notice. All this, therefore, leads to an inevitable conclusion that question as to limitation is a mixed question of law and fact so as to determine whether the suit in question is filed within limitation period or was barred by law of limitation.

23. In such above view of the matter, therefore, neither I find any manifest error in the order passed by the trial court, nor do I see any wrongful exercise of jurisdiction vested in the Court, nor even any failure to exercise jurisdiction vested in Court that may require this Court to interfere with the order impugned in exercise of its revisional power under 115 C.P.C.

24. However, since the question as to maintainability of the suit for being barred by limitation goes to the root of the matter, I hereby provide that while the issues are framed, the issue qua order 7 rule 11 CPC shall be framed as first issue to be decided as preliminary issue before any other issue is decided. Parties shall be permitted to lead their evidence and shall be afforded reasonable opportunity of hearing upon the said preliminary issue.

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

(2024) 5 ILRA 1979
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Revision No. 5872 of 2023

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

Counsel for the Revisionist:
Mohd. Raghib Ali, Sr. Advocate

Counsel for the Opposite Parties:
G.A., Satya Priya Mishra

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 2 (d), 2(h), 156(3), 161, 173, 173(2), 190, 190(1), 190(1)(a), 190 (1)(b), 191(b), 200, 202, 397 & 401 - Indian Penal Code, 1860 - Sections 34, 307 & 427 - Indian Evidence Act, 1872 - Section 11 - Criminal Revision – u/s 397/401 Cr.P.C. – FIR u/s 307, 427, 34 of IPC – investigation – final report – protest petition – rejected by the ACJM – complainant field criminal revision – Revisional Court allowed the revision by remitting the matter to court below to decide the same afresh – against which the present Revision – aspect of, the power of magistrate and jurisdiction of Revisional Court is discussed - court finds that, (i) after registration of FIR and after submission of the final report by the I.O. same was transfer to crime branch, (ii)

the I.O. while submitting FR took into consideration of the St.ments of informant and all the witnesses of both side and arrived at a conclusion that the informant of accused person in the incident was not found and there is no chance to find out the real accused persons being nothing could be found – (iii) on the evidence collected by the I.O. he is duty bound to report the result of investigation in the prescribed form to the concern magistrate – held - (i) Revisional jurisdiction should be exercised by any court in exceptional cases when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice, (ii) relying upon the material available on record, the Magistrate has duly recorded his satisfaction comprehensively that it was a case where the complicity of the revisionist was not found in the incident, (iii) the revisional court has committed error in setting aside the order and remitting the matter back to the Magistrate to decide it afresh – consequently, the order impugned is unsustainable and is set aside – revision stands allowed. (Para – 24, 51, 53, 57, 59)

Revision Allowed. (E-11)

List of Cases cited:

1. Vishnu Kumar Tiwari Vs St. of U.P. & anr. - 2019 AIR (SC) 3482,

2. Munshi Prasad Vs St. of Bihar - AIR 2001 SC 3031,

3. Bhagwant Singh Vs Commissioner of Police - (1985) 2 SCC 53,

4. H.S. Bains, Director, small saving-cum-Deputy Secretary, Punj., Chandigarh (1980) 4 SCC 631,

5. M/s India Carat Pvt Ltd Vs St. of Karnataka & anr. - 1989 (1) RCR (Criminal) 395,

6. Union Public Service Commission Vs S Papaiah – 1997 SCC (Crl) 1112,

7. Vishnu Kumar Tiwari Vs The St. of Uttar Pradesh - (2019) 8 SCC 27,

8. Abhinandan Jha & ors.Vs Dinesh Mishra - AIR 1968 SC 117,

9. Tata Iron and Steel Co. Ltd. Vs Inspector of Police, CCB, Egmore, Madras - 1989 LW(CRL) 155,

10. Dr. Mrs Nupur Talwar Vs C.B.I, Delhi - 2012 Crl. LJ SC 954,

11. India Carat Private Ltd. Vs St. of Karnataka - (1989) 2 SCC 132,

12. Vishnu Kumar Tiwari Vs St. of U.P - (2019) 8 SCC 27,

13. Munna Devi Vs St. of Raj. & anr. – 2001 (9) SCC 631,

14. Km. Phooldali Vs St. of U.P. & anr. - Criminal Revision No.1734/2000, decided on 06.11.2019.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Saghir Ahmad, learned Senior Advocate assisted by Mr. Mohd Raghib Ali, learned counsel for the revisionist, Mr. Satya Priya Mishra, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA-I assisted by Mr. Mayank Awasthi, learned counsel for the State and perused the record.

2. This criminal revision under section 397/401 Cr.P.C. has been preferred by the revisionist against the impugned order dated 30.09.2023 passed by the learned Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur in criminal revision no.130 of 20221, arising out of . Case Crime No. 60 of 2016, F.R. No.20010/2017, under Sections 307, 427, 34 IPC, Police Station-Uruwa Bazar, District-Gorakhpur.

BRIEF FACTS OF THE CASE

3. The facts in brief which are essential to be stated for adjudication of this revision are that:-

(i) An FIR was lodged on 26.05.2016 by the informant; Nanhe Lal Yadav, under Sections 307, 427, 34 IPC, which was registered as Case Crime No.0060 of 2016 against two named accused, namely, Umesh Singh, Vivek Singh and three unknown persons with the allegations that on 25.05.2016, the informant was returning from Rambada to his home with his uncle B.R.Yadav in his Bolero No. UP 53 BK 8201, at around 11:00 pm, his vehicle reached near culvert and the speed of the vehicle was slow due to the height of the culvert, due to prior enmity, the accused Umesh Singh and Vivek Singh along with three unknown persons were present on two motorcycles and they came from the front and started firing at the informant and his uncle with the intention of killing them, due to which the glass of the Bolero broke, the informant's uncle was shot on his right shoulder and neck, whereas the informant was shot on his chest and stomach. As he had a mobile phone in the left pocket of his shirt, the aforesaid firearm gunshot hit the mobile screen due to which the glass of the mobile was broken. Seeing this unfortunate incident, the informant started driving the vehicle speedily to save his life. Seeing this, the accused fired from behind and chased them till the petrol pump. Due to the said gunshot, the front and rear glass of the vehicle was broken. The informant informed the police by dialing 100 in the control room from his mobile number 9956562664. The police reached there with an ambulance and seeing the condition of the informant's uncle, he was taken to the District Hospital, Gorakhpur for treatment in the said ambulance. Seeing the serious condition of informant's uncle, he was referred to the Medical College, Gorakhpur, where he was admitted for treatment. The informant saw the accused in the light of the headlights. Rambrichh s/o Ludur was also sitting with the informant in his vehicle and had witnessed the above incident.

(ii) During investigation, the statement of injured; Budhiram Yadav was recorded under Section 161 Cr.P.C. on 04.06.2016 in which he reiterated the version of the FIR.

(iii) The field unit has inspected Bolero car No.UP53 BK 8201 and prepared the memo, which is evident from case dairy dated 08.06.2016. From the aforesaid, it is clear that no other witness or any accused person was found at the place of incident.

(iv) The case was transferred from Police Station Uruwa Bazar to Police Station Khajni by order dated 07.07.2016. The same finds place at Parcha No.X dated 07.07.2016 in the case dairy.

(v) The second Investigating Officer interrogated the witness Ram Das and Ramai Bind on 04.08.2016 and recorded their statements u/s 161 Cr.P.C. Both the witnesses have supported the FIR version and Ram Das has stated that he was sitting in the back seat along with Ramai Bind and Rambrichh. He also said that three bullets were fired from the front and two from the rear of the vehicle.

(vi) In pursuant of the order dated 28.09.2016 passed by Superintendent of Police (crime), the case was again transferred from the police station Khajni to Crime Branch.

(vii) On 24.11.2016, the third Investigating Officer recorded the statement of the informant, Budhiram, Rambrikchh and hearsay witness; Ramai.

The injured Budhiram and witness; Ram Brikchh have reiterated their earlier statement. The hearsay witness; Ramai has also repeated his earlier statement. On 28.12.2016, the statement of Ram Das has been recorded, who has supported the prosecution story.

(viii) An application alongwith affidavit of Smt. Suddha Singh wife of Umesh Kumar Singh addressed to D.I.G., Gorakhpur Range Gorakhpur for fair investigation has been given on 01.02.2017. The same finds place at parcha no.29 in the case dairy.

(ix) Thereafter, on 10.02.2017, Umesh Kumar Singh has given an application alongwith affidavit referring to the earlier application given by his wife, which is also addressed to the D.I.G., Gorakhpur Range Gorakhpur requesting for fair investigation.

(x) Smt. Sudha Singh wife of Umesh Singh has given an affidavit stating therein that at the date and time of incident, Umesh Singh is not present. The same has been supported by the Chandra Kant, Dinesh Chaubey, Vijay Pratap Singh, Ram Agrawal and statement of Suddha Singh, Doctor Virendra Kumar Gupta, statement of Dig Vijay Singh, Ajay Sharma, Rakesh, Ashok Yadav, Arun Bahadur Pal, by means of affidavits filed before the Investigating Officer, which is part of case dairy.

(xi) Taking into consideration the aforesaid, the Investigating Officer, on the basis of evidence collected during course of investigation under Section 2(h) Cr.P.C. arrived at a conclusion that a there is no evidence against the named accused, therefore, they have been exonerated from all charges and final report no.2/2017, dated 14.02.2017 has been submitted.

(xii) The aforesaid final report has been placed before learned Additional Chief Judicial Magistrate, Bansgaon, Gorakhpur and on 19.11.2018, the opposite party no.2 filed protest/objection in connection with the above referred final report.

(xiii) On 05.05.2022, learned Additional Chief Judicial Magistrate, Bansgaon, Gorakhpur rejected the protest petition and accepted the final report. The aforesaid order dated 05.05.2022 was challenged by the opposite party no.2/complainant by means of filing criminal revision no.130 of 2022 on 05.07.2022.

(xiv) On 30.09.2022, the learned Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur has heard and allowed the revision in part by setting aside the order dated 05.05.2022 and remitting the matter to the learned Chief Judicial Magistrate, Bansgaon, Gorakhpur to decide the same afresh in the light of observations made by the revisional court after providing an opportunity to both the parties. Hence the present criminal revision has been filed.

REVISIONIST'S SUBMISSION

4. Learned counsel for the revisionist, while challenging the order impugned, has submitted that:-

(i) the Revisional Court has passed unjust, improper and illegal order and exceeded his jurisdiction, therefore, the same is not sustainable in the eye of law.

(ii) the finding given and conclusion arrived by the Revisional Court is perverse on record and the very assumption has not been supported by any cogent, clinching and admissible evidence collected by the Investigating Officer during course of investigation according to section 2(h) Cr.P.C.

(iii) the Revisional Court has passed the impugned order without application of judicial mind and without considering that learned Additional Chief Judicial Magistrate, Bansgaon, Gorakhpur has legally taken into consideration of facts and circumstances as enumerated in the material collected by the Investigating Officer as well as protest petition and has reasonably arrived at conclusion to accept the final report passing the order dated 05.05.2022 in just, proper and legal manner.

(iv) the opposite party no.2 has completely failed to point out any error in the investigation and has also not rebutted the conclusion arrived at by the Investigating Officer while submitting final report. No ground has been taken in the memo of revision regarding illegality or infirmity in the order impugned 05.05.2022 passed by the concerned Magistrate, which has not been considered by the Revisional Court in its order dated 30.09.2023. Thus, the same is illegal.

(v) To sum up, the impugned order dated 30.09.2023 has been challenged merely on three grounds; firstly, the opposite party no.2 has been completely failed to point out any error in above referred Final Report No.2/17, dated 14.02.2017 in its protest petition dated 19.11.2018; secondly, the opposite party no.2 has not rebutted the finding recorded by the concerned Magistrate in its order dated 05.05.2022 in the memo of revision dated 05.07.2022; thirdly, the innocence of the revisionist has been fortified firstly by the Investigating Officer vide Final Report No.2/17 dated 14.07.2022 and secondly by the concerned Magistrate vide its order dated 05.05.2022.

6. Learned counsel for the revisionist has relied upon the judgment of Apex Court in the case of ***Vishnu Kumar Tiwari vs. State of U.P. and another2. Relevant paragraph nos.25, 26 & 41*** of the aforesaid judgment are as under:-

"25. In Rakesh Kumar and another v. State of Uttar Pradesh and another, on the basis of a First Information Report lodged by the Police after investigation, a final report came to be filed. The Magistrate accepted the final report. He, simultaneously, directed the case be proceeded with as a complaint case. Statements under Section 200 and 202 of the Code were recorded. The High Court turned down the plea of the accused to whom summons were issued. It was the contention of the accused that having accepted a negative final report, the court could not take action on the basis of the protest petition filed by the complainant. This Court refers to the judgment in H.S. Bains (supra). The principles of law laid down in paragraph 12 of Mahesh Chand (supra), 6 2014 (13) SCC 133 which we have also referred to earlier, came to be approved. The order of the High Court was approved.

26. This is a case where following the First Information Report, the Investigating Officer conducted an investigation. Statements were taken from the complainant, his wife and his son. This is apart from the statements which were taken from the Doctors who treated the daughter of the second respondent/complainant. The Investigation Officer concluded that there is no material which would warrant the accused being sent for trial. When such a report is filed before the court, it is beyond the shade of doubt that the Magistrate may still choose to reject the final report and proceed to take cognizance of the offences, which in his view, are seen committed. He may, on the

other hand, after pondering over the materials, which would include the statements of witnesses collected by the Investigating Officer, decide to accept the final report. He may entertain the view that it is a case where further investigation by the Officer is warranted before a decision is taken as to whether cognizance is to be taken or not.

41. In Rakesh Kumar (supra), the final report was filed which was accepted by the Magistrate but he simultaneously directed the case to be proceeded as a complaint case and statements under Sections 200 and 202 of the Code came to be recorded."

7. On the cumulative strength of the aforesaid submissions, learned counsel for the revisionist submits that the Revisional Court has illegally passed the order impugned dated 30.09.2023 allowing the revision of the opposite party no.2 without assigning any cogent reason, which is not justifiable in the eye of law, therefore, the impugned order is liable to be set aside.

SUBMISSION OF OPPOSITE PARTY NO.2

8. On the other hand, learned counsel for the opposite party no.2 submits that there is no illegality in the order impugned dated 30.09.2023 as the same has been passed after considering the principal as laid down by judgment of Apex Court in ***Vishnu Kumar Tiwari (supra)***. The concerned Magistrate while passing the order dated 05.05.2023 has confirmed the final report ignoring the statement of injured witness and eye witness. The investigating officer while submitting the final report has not collected live location of such witnesses, who have supported the plea of alibi as taken by the revisionist and without taking the same into consideration, the concerned Magistrate has passed the order dated 05.05.2023, which is illegal.

9. He further submits that the opposite party no.2/informant has not mentioned an additional ground in the revision and only such ground, which is recorded by the Investigating Officer during investigation and it's part of case dairy, has been ignored and final report has been submitted, which has been accepted by the concerned Magistrate without verifying the evidence as placed by the accused persons.

10. Relying upon the judgment of Apex Court in the case of ***Munshi Prasad vs. State of Bihar3***, he submits that the plea of alibi was not accepted when the accused had stated that he was present in the meeting held near about 400-500 meters way from the place of incident as considered the accused must have joined meeting after committed the incident. The aforesaid fact has not been considered by the Investigating Officer while submitting the Final Report nor the concerned Magistrate while accepting the final report and passing the order dated 05.05.2023.

11. Relying upon Section 11 of Evidence Act, learned counsel for the opposite party no.2 submits that the plea of alibi has taken by the accused has to be seen as to whether the same is inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts it makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

12. Thus, probability of committing the offence and they going for treatment of his wife as has been stated by

the revisionist and supported by the other persons appears to be highly improbable as the fact that the revisionist has committed the offence and has gone for the treatment of his wife as there are chances that the revisionist would have committed the offence and then had gone for treatment of his wife. Thus, there is no illegality in the order impugned.

SUBMISSION OF STATE COUNSEL

13. While assisting the Court, learned counsel for the State submits that the Magistrate after receiving the final report has the following options:-

(i) he could have accepted the report and, closed the case;

(ii) he could have taken cognizance of offence on the basis of evidence available in the case diary against the accused, if he was satisfied that the conclusion arrived at by the investigating officer was not correct;

(iii) he could have ordered for further investigation, if he was satisfied that the investigation was made in a perfunctory manner; and

(iv) he could have treated the protest petition as a complaint and adopted the procedure under Chapter XV of the code.

14. He further submits that in the present case as the Magistrate has initiated to consider the options available, he after considering the record, issued notice to the first informant, before accepting the police report in the light of judgment of Apex Court in the case of ***Bhagwant Singh Vs Commissioner of Police4***, as there is no provision of protest petition in the Code. As such it is explicit that the Magistrate was of the opinion to opt for the option (a) of accepting the Final Report after considering material collected by investigating agencies. Thus notice was issued to the complainant to raise objection against the same if any.

15. Here, the protest petition has to satisfy the ingredients of complaint before the Magistrate taking cognizance u/s 190 (1) (a) CrPC. Where the informant brought to the notice of the Magistrate the infirmities in the investigation and investigating process, a refusal of the Magistrate on the ground that he does not have the power to review can be totally wrong. Further Magistrate is not debarred from taking cognizance of a second complaint mere on the ground that earlier he had declined to take cognizance. In support of his submission, he has relied upon the followings judgements:-

(i) H.S. Bains, Director, small saving-cum-Deputy Secretary, Punjab, Chandigarh5;

(ii) M/s India Carat Pvt Ltd Vs State of Karnataka & another6;

(iii) Union Public Service Commission Vs S Papaiah7;

(iv) Vishnu Kumar Tiwari Vs State of UP8;

16. The Magistrate after considering the protest petition finds that protest petition is devoid of necessary requirements which may call for questioning the investigation and while concurring with the opinion of I.O. filed in CD Parcha No. 31 accepted the final report vide its order dated 05.05.2022.

17. He further submits that against the order dated 05.05.2022, the revision was filed by the O.P./first informant as revision

no. 130 of 2022 and the same was allowed and case was remitted back for re-adjudication by the learned Additional Sessions Judge, Gorakhpur vide its order dated 30.09.2023.

18. The aforesaid order dated 30.9.2023 was passed by the learned Additional Sessions Judge after observing that learned Magistrate has passed the order dated 5.5.2022 without going through the aspect that I.O. didn't find the incident as untrue and accepted the final report against the accused on the ground that there is evidence of alibi of the accused and that complicity of the accused was wrongly mentioned.

19. He has relied upon the judgment of Apex Court in the case of ***Vishnu Kumar Tiwari vs The State of Uttar Pradesh9.*** The relevant paragraph no.26 is as under:-

"26. It is undoubtedly true that before a Magistrate proceeds to accept a final report u/s 173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the Investigating Officer may rest content by producing the final report, which according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be whether to continue with the matter or to bring the curtain down."

20. While reiterating the aforesaid observation made by the Apex Court in ***Vishnu Kumar Tiwari (Supra)***, the Revisional Court erred in examining the order dated 05.05.2022 which is clearly in the light of its ambit, as the concerned Magistrate has explicitly mentioned that protest petition doesn't mention any infirmities in the investigation nor it specifically points out any such evidence which satisfy for the summoning of accused or rejected the final report. Moreover order dated 05.05.2022 reveals that Magistrate has gone thought the material available and had pointed out the evidence collected by I.O. which exonerate the accused person from the complicity of offence.

21. Further, it is well settled that it is within the discretionary power of the Magistrate to accept or reject the final report submitted to him by the police officer.

22. Moreover, the Revisional Court can not touch the factual aspects of the matter and re-appreciate the evidence unless it is shown / found that the court below failed to exercise the jurisdiction which they are supposed to or have committed a patent illegality. It is further well settled that Revisional Court can not substitute its opinion simply because another view is possible and unless there is patent illegality on the face of record which may lead to miscarriage of justice, the Revisional Court will not exercise its diligence over the matter.

23. With consent of the counsel for the parties, this revision is decided finally at this stage without calling for counter affidavit as legal question is involved.

OBSERVATION OF THE COURT

24. Before entering into merits of the case, the facts of the brief are:-

(a) An FIR was registered as Case Crime No.60 of 2016, under Sections 307, 427, 34 IPC against the revisionist and others at P.S.-, District-Gorakhpur on 26.05.2016 by opposite party no.2-Nanhe Lal Yadav. Subsequently, after investigation, the Investigating Officer submitted final report no.2/17 dated 14.02.2017. The said investigation was conducted by Police Station-Uruwa Bazar then it was transferred to Police Station-Khajni and then it was transferred to crime branch.

(b) The Investigating Officer while submitting final report took into consideration the statement of informant, all the witnesses including injured witness, injury reports, spot inspection report and affidavits filed by person from side of revisionist, thus arriving at a conclusion that the involvement of revisionist-Umesh Singh and Vivek Singh in the incident was not found, efforts were put in to find the real accused persons but nothing could be found. There being no chances in near future to find the real culprits and as the investigation was pending since ten months, therefore, it was not appropriate to keep it pending. Hence, final report was submitted on 14.02.2017.

(c) On the evidence collected by the Investigating Officer, he has to form his opinion as to whether it discloses any offence or it does not disclose any offence and accordingly, he is duty bound to report the result of his investigation in the prescribed form to the jurisdictional magistrate. In the present case on the basis of evidence collected by the Investigating Officer, thus finally submitted a final report on 14.02.2017.

25. While dealing with the merits of the case two aspects are involved; firstly, the power of Magistrate as to what exercise is to be done after receiving such a report; secondly, jurisdiction of the Sessions Judge/ Revisional Court while deciding the revision.

26. While dealing with the first aspects, i.e. the power of Magistrate as to what exercise has to be done after receiving such a report. After receiving the police report, the learned Magistrate has following options;-

(a) The Magistrate may agree with the conclusion of the police report and accept the final report and drop the proceedings;

(b) The Magistrate may take cognizance under Section 191(b) Cr.P.C. and issue process straightway to the accused without being bound by the conclusion of the Investigating Agency where he is satisfied that upon the fact discovered by the police, there is sufficient ground to proceed;

(c) He may order for further investigation, if he is satisfied that the investigation was made in perfunctory manner;

(d) He may treat the protest, if any, as complaint without issuing process and dropping the proceedings under Section 190(1)(a) Cr.P.C. and proceed to record statement under Sections 200 and 202 Cr.P.C. and, thereafter, decide whether the complaint should be dismissed or process should be issued.

27. When a report, i.e. charge-sheet or final report, is submitted, what the learned Magistrate has to do has been stated in Section 190 Cr.P.C. It runs as under:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence.

(b) Upon it police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

28. In the present case, where a Final Report has been submitted, what the learned Magistrate has to do, has been stated in several cases. The Apex Court in the case of **Abhinandan Jha and others vs. Dinesh Mishra10** had occasion to deal with the question as to what the Magistrate has to do when a final report is filed before him by the Investigating Officer. The Apex Court in aforesaid case while referring to section 190 Cr.P.C., which is the first section in the group of sections headed 'conditions requisite for initiation of proceedings', was of the opinion that the use of word, 'may take cognizance of any offence', in Sub-section (1) of Section 190 Cr.P.C., imports the exercise of a 'judicial discretion' and the Magistrate, who receives the report, under Section 173, will have to consider the said report and judicially take a decision, as to whether take or not to take cognizance of the offence.

29. Thus, from the aforesaid judgment, it follows that it is not as if, that the Magistrate is bound to accept the opinion of the police that there is a case for placing the accused, on trial. It is open to the Magistrate to take the view that the facts disclosed in the report do not make out an offence for taking cognizance or he may take the view that there is no sufficient evidence to justify an accused being put on trial. On either of these grounds, the Magistrate will be perfectly justified in declining to take cognizance of an offence, irrespective of the opinion of the police.

30. To be more clear, it can be said that if the Magistrate agrees with the Final Report, he may accept the Final Report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, the Magistrate will have ample jurisdiction to give directions to the police under Section 156(3) Cr.P.C. to make a further investigation. It may also be so, that if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory or incomplete or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation under 156(3).

31. It may also be so, that, in case the Magistrate on receiving the final report forms the opinion that the fact, set out in the final report, constitute an offence, he may take cognizance of the offence under Section 190 (1)(b) Cr.P.C. notwithstanding the contrary opinion of the police expressed in the final report.

32. The same question as to the powers of Magistrate while accepting the final report has been dealt in the case of

Tata Iron and Steel Co. Ltd. vs. Inspector of Police, CCB, Egmore, Madras11. The Apex Court observed as under:-

"6. Thirdly, the contention of the Revision Petitioner is that the Magistrate should not blindly accept the report of the Police Officer, and that he should, on the contrary, apply his mind and come to an independent conclusion whether to take the case on file or not under S.190, Cr.P.C. In fact, when the Magistrate gets a negative report under S.173, Crl.P.C., he should chose between one of the four causes: (1) to accept the report and drop the proceedings. (2) to direct further investigation to be made by the police, (3) to investigate himself or order for the investigation to be made by another Magistrate under S.159, Crl.P.C. (4) to take cognizance of the offence under S.200, Crl.P.C., as a private complaint, when the materials are sufficient in his opinion and if the complainant is prepared for that course."

33. In ***Dr. Mrs Nupur Talwar vs. C.B.I, Delhi12***, the Hon'ble Apex Court has held as under:-

"18. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding.

19. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

20. The taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed.

21. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record."

34. Be that as it may, the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him on receiving the Final Report and in doing so, he is not bound by the opinion of the Investigating Officer and he is competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima facie find out whether an offence has been made out or not. Thus, taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed.

35. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.

36. Reference in this connection may be made to a three Judge Bench decision of the Apex Court in the case of ***India Carat Private Ltd. v. State of Karnataka13***. In the aforesaid case, the Apex Court has explained the position so brevity, which is as under:-

"The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence

under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1) (b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused……"

37. In the present case, first information report was lodged, the Investigating Officer conducted the investigation taking into consideration statements of all concerned, spot inspection report, affidavits filed on behalf of the revisionist taking plea of alibi, concluded that the involvement of revisionist was not found in the incident, therefore, submitted a final report.

38. As it is well settled and beyond shed of doubt that the Magistrate irrespective of the opinion found by the Investigating Officer may choose to reject the Final Report and proceed to take cognizance of the offence which in his view are seen or he may after considering the material which would include the statement of the witnesses collected by the Investigating Officer decide to accept final report. He thus for accepting the final report has to issue notice to the first informant/complainant, which has been done in the present case and a protest petition has been filed.

39. The protest petition dated 19.11.2018 was rejected and accepting the Final Report vide order dated 05.05.2022 as the learned Magistrate found that no specific ground or specific basis was taken in the protest petition which could point out the flaw in the investigation. It was also found by the learned Magistrate that no issues or points were mentioned on which a proper investigation was not done.

40. Short question arises for consideration in the present case is whether the protest filed by the informant after notices issued to him, may be treated as complaint.

41. The protest petition could have been treated as complaint case for taking cognizance under Section 190(1)(a) Cr.P.C. but for the protest petition to be treated as complaint, the Magistrate has to satisfy that the ingredients of complaint as defined under 2(d) Cr.P.C. are fulfilled.

42. In the present case, the contents of the protest petition were only that the Investigating Officer has not carried out investigation in a proper manner though the statements and evidences to that effect were collected by him. The protest petition did not mention the specific ground, points or basis on which the investigation was not conducted.

43. It is undoubted that the Magistrate can treat the protest petition as complaint provided that the protest petition fulfills the requirements of a complaint. It can be treated as a complaint only after considering the facts and circumstances of

the case and the material, which is made available before him by the complainant in the protest petition. The Magistrate cannot be compelled to treat the protest petition as complaint in the absence of any ground and in case, ingredients of complaint as defined in Section 2(d) Cr.P.C. are not there.

44. In the case before this Court, based on material collected by the Investigating Officer and protest petition, the Magistrate came to the conclusion that the protest petition was devoid of necessary requirements, which may call for questioning the investigation as no specific point, ground or basis regarding deficiency in the investigation has been mentioned by the complainant/informant. The Magistrate, thus, agreeing with the opinion of the Investigating Officer filed in CD Parcha No.31, accepted the final report. Thus, he has applied judicial mind while accepting the final report by the order dated 05.05.2022.

45. There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be posed and answered would be as to under what circumstances the said power can be exercised.

46. The Court is concerned with the question as to whether a Magistrate even after accepting final report filed by the police, can take cognizance of offence upon a complaint or the protest petition on same or similar allegations of fact.

47. The Hon'ble Supreme Court in the case of Vishnu Kumar Tiwari v. State of U.P.14 has held that if the material presented with the protest petition is such which persuade the learned Magistrate to disagree with the conclusion arrived at by the investigating officer, learned Magistrate can take cognizance under Section 190(1)(b) of the CrPC. However, learned Magistrate cannot be forced to treat a protest petition as a complaint, if after considering the final report, statement of the witnesses available in the case diary and material made available in the protest petition he is of the opinion that no case is made out. A private complaint is to contain complete list of witnesses to be examined. Para 42 to 46 of the aforesaid judgment are extracted under:-

"42. In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest petition as a complaint, is a different matter. Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Sections 200 and 202 of the Code if the latter section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final

report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the investigating officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

43. It is true that law mandates notice to the informant / complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In Mahabir Prasad Agarwala v. State [Mahabir Prasad Agarwala v. State, 1957 SCC OnLine Ori 5 : AIR 1958 Ori 11] , a learned Judge of the High Court of Orissa, took the view that a protest petition is in the nature of a complaint and should be examined in accordance with the provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in Qasim v. State [Qasim v. State, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows: (Qasim case [Qasim v. State, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , SCC OnLine All para 6)

"6.... In Abhinandan Jha [Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 : 1968 Cri LJ 97 : (1967) 3 SCR 668] also what was observed was "it is not very clear as to whether the Magistrate has chosen to treat the protest petition as complaint". This observation would not mean that every protest petition must necessarily be treated as a complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of witnesses to be examined. A further examination of complainant is made under Section 200 CrPC. If the Magistrate did not treat the protest petition as a complaint, the protest petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case."

(emphasis supplied)

44. We may also notice that in Veerappa v. Bhimareddappa [Veerappa v. Bhimareddappa, 2001 SCC OnLine Kar 447 : 2002 Cri LJ 2150] , the High Court of Karnataka observed as follows:(SCC OnLine Kar para 9)

"9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 CrPC, but, has approached the police only and where the police after investigation have filed the "B' report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under

Section 190(1)(a) CrPC on a complaint. If it were to be so, the protest petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) CrPC, and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) CrPC. Instead, if it is to be simply styled as a protest petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 CrPC."

45. "Complaint" is defined in Section 2(d) of the Code as follows:

*"**2. (d) "complaint**" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

46. If a protest petition fulfils the requirements of a complaint, the Magistrate may treat the protest petition as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code. In this case, in fact, there is no list of witnesses as such in the protest petition. The prayer in the protest petition is to set aside the final report and to allow the application against the final report. While we are not suggesting that the form must entirely be decisive of the question whether it amounts to a complaint or is liable to be treated as a complaint, we would think that essentially, the protest petition in this case, is summing up of the objections of the second respondent against the final report."

48. From perusal of the above opinion of the Apex Court, it is also reflected that the Magistrate had the liberty to reject the protest petition alongwith all other material, which may have been filed in support of the same. In that event the complainant would be at liberty to file a fresh complaint. The right of the complainant to file a petition under Section 200 Cr.P.C. is not taken away even if the Magistrate concerned does not direct that such a protest petition be treated as a complaint.

49. In the present case, the Magistrate has applied his judicial mind and has accepted the final report after taking into consideration the material available in the protest petition as well as the evidence as collected by the Investigating Officer. Thus, there is no illegality in the order dated 05.05.2022.

50. The Revisional Court while setting aside the order passed by the Magistrate has remitted back the matter to be heard again by the concerned Magistrate by order dated 30.09.2023, holding that the Magistrate has not passed the order after application of judicial mind as while accepting the final report and exonerating accused – revisionist, the concerned Magistrate should have looked into the case diary, the grounds mentioned in the protest petition and should have passed a reasoned order for coming to the conclusion of accepting the final report.

51. The Revisional Court while passing the order impugned dated 30.09.2023 has presumed that the concerned Magistrate while accepting the

final report has not applied his judicial mind as on one hand the Investigating Officer while placing the final report before the concerned Magistrate has submitted that the real accused could not be found and considering the affidavits of the witnesses on the point of alibi, their involvement in the incident was found to be incorrect. In the incident, injured and eyewitness have named the accused persons and have supported the prosecution version as narrated in the FIR. The Investigating Officer did not believe the complainant's version and the evidence as produced before him, however, relying upon the call details and the averments made in the affidavits given by the witnesses has found the involvement of accused persons to be incorrect and expressed his inability to divulge the real accused persons. A protest petition has been filed against the submission of final report. The material collected from the place of incident, thus, proves that the incident took place, however, without analyzing the aforesaid fact, the concerned Magistrate has accepted the final report. In the order, impugned herein, dated 30.09.2023, the Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur has also considered the judgment of the Apex Court in ***Vishnu Kumar Tiwari (supra).***

52. In the opinion of the Court, the revisional court has committed manifest error in examining the order dated 05.05.2022 which has been passed in the light of observations made by the Apex Court in ***Vishnu Kumar Tiwari (supra),*** whereas learned Magistrate has clearly mentioned that the protest petition filed by the complainant raising objection against the final report after notices issued to him, the complainant could not mention any infirmity or illegality in the investigation nor has showed any basis, ground or specific point to support any such evidence in his favour, which might satisfy summoning of the accused or rejection of the final report.

53. This Court finds that the concerned Magistrate has not committed any error in applying the judicial mind he has gone through the material as collected and placed by the Investigating Officer before him and has accepted the final report not finding the complicity of the revisionist in the incident as narrated in the FIR. As stated in the preceding paragraphs, in view of the settled position, the Magistrate is independent to form his opinion considering the evidences collected by the Investigating Officer and is free to accept or reject the report submitted by the Investigating Officer U/s 173 (2) of Cr.P.C. applying his judicial mind, without being influenced by the opinion expressed by the Investigating Officer.

54. This Court feels that in case any additional evidence is to be given by the complainant in the protest petition, the same cannot be taken into consideration by the concerned Magistrate, however, the complainant is always at liberty to file a fresh complaint therefor. The right of the complainant to file petition under Section 200 Cr.P.C. is also available, if the Magistrate concerned does not direct such a protest petition to be taken as a complaint.

55 . As regards the second points with respect to jurisdiction of Revisional Court/Sessions Court, in the case of ***Munna Devi Vs. State of Rajasthan and another15***, the Apex Court has held as under:-

"The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner.

While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

56. In the case of ***Km. Phooldali vs. State of U.P. and another16***, the Single Bench of this Court has held that while exercising the revisional jurisdiction, any court cannot sit in appeal and re-appreciate the evidence.

57. In the present case, relying upon the material evidence placed before him, the Magistrate has duly recorded his satisfaction comprehensively that it was a case where the complicity of the revisionist was not found in the incident, therefore, the revisional court has committed error in setting aside the order dated 05.05.2022 remitting the matter back to the Magistrate to decide it afresh. It is settled law that the revisional jurisdiction should be exercised by any court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice. In the present case, the Revisional Court has committed error in passing the order impugned while it cannot sit in appeal and re-appreciate the evidence as per the settled position of law.

CONCLUSION

58. Having gone through the above proposition of law, I find that the jurisdiction of Revisional Court is severely restricted and it cannot embark upon a re-appreciation of evidence as has been done by the Revisional Court in the present case while passing the order impugned dated 30.09.2023. The court concerned has not been able to show that the order passed by the concerned Magistrate is contrary to record or perverse or that any material evidence has been ignored or misread.

59. Considering the submissions advanced by the learned counsel for the parties and law as settled on the issue, enumerated above, the order impugned dated 30.09.2023 passed by the Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur is unsustainable. Thus, it is **set aside.**

60. However, this Court observes that the informant will have opportunity to file a complaint afresh, if so advised, in accordance with law.

61. The criminal revision stands **allowed,** accordingly.

(2024) 5 ILRA 1995
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Misc. Writ Petition No. 1915 of 2024

Ambrish Kumar Verma ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Yogeshwar Sharan Srivastava

Counsel for the Opposite Parties:
G.A., Arvind Kumar Tripathi, Pranjal Krishna, Ravi Kant Pandey

Art. 226 of the Constitution of India - Premature release-Order of premature release of opposite party impugned-pursuant to order of the Division bench of the High Court in Criminal Appeal-that where the Remission Application is pending for more than six months after recommendation by the Superintendent of Jail-the CJM shall release the convict-reference was made in this writ with regard to correctness of the order of division bench-the larger bench held the direction of division bench is not as per law-impugned order set aside.

W.P. allowed. (E-9)

List of Cases cited:

Ganesh Vs St. of U.P. -Criminal Appeal No.165 of 2016

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Narendra Kumar Johari, J.)

1. Short counter affidavit filed today is taken on record.

2. Heard learned counsel for the petitioner, learned A.G.A. for the State, Sri Ravi Kant Pandey, learned counsel for opposite party no.3, Sri Arvind Kumar Tiwari, learned counsel for respondent no.4 and perused the record.

3. Present writ petition is filed by the petitioner challenging the order of premature release of opposite party no.3-Shyampal Verma dated 2.3.2024 in Sessions Trial no.90 of 2007 in Case Crime No.52 of 2006, under Sections 147, 148, 307, 302, 427 & 504 of I.P.C., Police Station Motiganj, District Gonda.

4. Facts of the case are that a Division Bench of this Court passed detailed directions in Criminal Appeal No.165 of 2016 ***(Ganesh vs. State of U.P.)*** in its judgment and order dated 10.1.2024 providing that where the remission application is pending for more than six months after recommendation by the Superintendent of Jail, the Chief Judicial Magistrate concerned shall forthwith release the convict as per the the directions contained in the said judgment. Opposite party no.3 had filed an application for his release, which was allowed by the Chief Judicial Magistrate concerned by the impugned order dated 2.3.2024 while similar application of opposite party no.4 was pending before the Chief Judicial Magistrate concerned.

5. A Reference was made in the present writ petition by a Division Bench of this Court by order dated 21.3.2024 with regard to correctness of the view taken in the case of ***Ganesh (supra)***. The following questions were referred to the Larger Bench.

*"(1) Whether the directions issued by the Division Bench in **Ganesh** (supra) that too general directions, commanding the Chief Judicial Magistrates to release convicts whose applications for remission/premature release have remained pending beyond a particular period, as interim measure, till disposal of the said applications, is in accordance with law especially in view of the Constitution Bench decision in **V. Sriharan @ Murugan and others (supra) and H. Nilofer Nisha** (supra)?*

(2) Whether the High Court in exercise of its criminal appellate jurisdiction under the Code of Criminal Procedure read with Section 482 Cr.P.C. can confer jurisdiction upon the Chief Judicial Magistrates/Magistrates in the District Courts which the law otherwise does not confer upon them?"

6. The aforesaid questions were replied by the Larger Bench by order dated 25.5.2024, which reads as follows:

*"(1) The Division Bench in **Ganesh** (Supra) could not have issued any direction for granting the general directions of bail commanding the Chief Judicial Magistrates to release convicts whose applications for remission/premature release have remained pending beyond a particular period, as interim measure, till disposal of the said applications.*

(2) Learned AGA submits that there is no power vested by the High Court in the Chief Judicial Magistrates for grant of bail. The said power is already exercised by granting bail to all such persons and the Chief Judicial Magistrate is directed only to release such person(s) whose applications are pending beyond a particular time by accepting their bail/surety bonds. However, we leave the said question unanswered as in Question-A, we have already held that the directions of the Division in Ganesh (Supra) are not as per law."

7. In view thereof, since the Larger Bench has already held that the Division Bench in ***Ganesh*** (supra) could not have issued any direction for issuing general directions of bail commanding the Chief Judicial Magistrate to release the convicts, the impugned order passed by the Chief Judicial Magistrate, Gonda based upon the said directions in the case of Ganesh (supra) cannot stand.

8. Therefore, the impugned order dated 2.3.2024 cannot stand and is set aside.

9. The Registrar General is directed to forthwith communicate a copy of this order along with the order passed by the Large Bench dated 25.5.2024 to all the Judicial Officers.

10. With the aforesaid, present writ petition is **allowed.**

(2024) 5 ILRA 1997
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Misc. Writ Petition No. 7132 of 2023

Gopesh Chandra Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Awadh Behari Singh

Counsel for the Opposite Parties:
G.A.

Art. 226 of the Constitution of India -F.I.R. Quashing-Petitioner was initially appointed on the temporary post of Stenographer –thereafter the post of stenographer was abolished-temporary post of camp clerk was created and the Petitioner was appointed thereon-the said post was discontinued-even after abolition of aforesaid post the Petitioner continued on the said post until his superannuation- F.I.R. lodged-From the evidences it transpires that at the time of abolition of post of Camp Clerk on 26.12.1995 and thereafter, the petitioner did not hold the post of Incharge of seat (Patal) of establishment-no occasion for him to have the custody of the letter which communicated the discontinuance of such post-F.I.R. is misuse of law-quashed.

W.P. Allowed. (E-9)

List of Cases cited:

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

2. Maratt Rubber Ltd. Vs J.K. Marattukalam, (2000) 9 SCC 547

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

Heard Sri Awadh Behari Singh, learned counsel for the petitioner and learned A.G.A. for the State-respondents.

2. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner has made following prayer :

I. to issue a writ, order or direction in the nature of certiorari quashing the impugned first information report dated 16.04.2023 registered as Case Crime No. 199 of 2023 under Sections 409 and 420 I.P.C., Police Station- Colonelganj, District- Prayagraj.

II. to issue a writ, order or direction in the nature of mandamus directing the respondents not to arrest the petitioner pursuant to the registration of the first information report dated 16.04.2023 registered as Case Crime No. 199 of 2023 under Sections 409 and 420 I.P.C., Police Station- Colonelganj, District- Prayagraj, till any credible evidence is collected against the petitioner.

III. to issue a writ, order or direction in the nature of mandamus directing the respondents not to take any coercive action against the petitioners till the time any credible evidence is collected.

IV. to issue a writ, order or direction which this Hon'ble Court may deem fit and proper in facts and circumstances of the case.

V. award the cost of the petition to the petitioner.

3. The contents of the impugned F.I.R., in brief, are as follows :

The petitioner was initially appointed on the temporary post of Stenographer on 25.04.1979. The post of stenographer was abolished vide Government Order No. 3067/ dated 16.07.1983, a temporary post of camp clerk was created and the petitioner was appointed thereon on 17.07.1983. In the Government Order No. 3256/ dated 26.12.1995, continuation of post of camp clerk was not mentioned. Thus, the post of camp clerk was discontinued by aforesaid Government Order. Even after abolition of aforesaid post, the then *Patal Prabhari* misused his post of Incharge of that seat and kept the Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, who had the financial and administrative power of department, in dark and from 26.12.1995, without any Government Order extending the continuance of the post, illegally continued on the post of Camp Clerk/Senior Clerk till his date of superannuation on 31.07.2015 and illegally withdrew salary and allowances on that post. The appellate authority, Deputy Labour Commissioner, Prayagraj on the appeal of respondent no. 3 vide order dated 22.12.2022 held that the petitioner is not entitled for gratuity on the post as he has illegally continued on the post of camp clerk since 1995 to 2015. The Director Fisheries, U.P., Lucknow vide letter no. 2054/स्था०शा०/कोर्ट केस/ dated 06.07.2022, directed the Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, to take suitable action against the petitioner for his continuing on the post of camp clerk from 1996 to 2015 although the post was abolished on 26.12.1995. In compliance of

aforesaid order of the Director Fisheries, U.P., Lucknow, the Chief Development Officer, Prayagraj directed respondent no. 3 to take necessary action against the petitioner for misuse of the office/seat *(patal)*. In compliance of aforesaid order of Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, the respondent no. 3 lodged the impugned F.I.R. dated 16.04.2023 against the petitioner.

4. It has been submitted by learned counsel for the petitioner that impugned first information report dated 16.04.2023 has been registered against the petitioner, Gopesh Chandra Saxena, as Case Crime No. 199 of 2023 under Sections 409 and 420 I.P.C., Police Station- Colonelganj, District- Prayagraj, without any ground and due to malafide. No case under the aforesaid sections is made out against the petitioner. It has been next submitted that the petitioner was initially appointed as a Stenographer on 25.04.1979. The post of Stenographer was abolished on 16.07.1983 and further the post of Camp Clerk/Senior Clerk was sanctioned. On the same day, the petitioner was posted as camp clerk and allowed to continue to work accordingly. However, the post of camp clerk was not extended and the petitioner was allowed to continue on the post of Camp Clerk/Senior Clerk sanctioned in the department. It has further been submitted that the allegations that keeping the authorities in dark, he illegally continued on the post of camp clerk from 1995 to 2015 is not supported from the record of the authorities sanctioning the post. Therefore, no offence u/s 409 and 420 I.P.C. is made out against the petitioner. It has also been submitted that in the judgement dated 20.12.2022 of the appellate authority, i.e. Deputy Labour Commissioner, Prayagraj, no consideration of allegation about sanction of posts was done as the case related merely to payment of gratuity to the petitioner. The petitioner who was appointed as Stenographer on 25.04.1979, after abolition of the post of Stenographer in the department on 16.07.1983, without any break in continuance was absorbed/posted on the post of camp clerk. Since the post of camp clerk was not extended after 26.12.1995, hence, the petitioner was allowed to continue on the post of Camp Clerk/Senior Clerk in the department till the date of retirement. After completing 10 years of continuous satisfactory service on the post of Camp Clerk/Senior Clerk, the petitioner was provided next increment on the recommendation of Samta Samiti vide order dated 18.03.1991 (copy of the order has been provided at Annexure No. 2 to the instant writ petition). It has also been submitted that vide Government Order dated 03.06.1989, the petitioner was provided the next promotional payscale on 27.01.1996 on the post of Camp Clerk/Senior Clerk after completing six years of continuous satisfactory service (copy of the order has been provided at Annexure No. 3 to the instant writ petition). It is further submitted that Government Order dated 28.12.1990 provided the benefit of revised pay to the employees of the department in which the post of camp clerk has been shown to be Camp Clerk/Senior Clerk (copy of the Government Order dated 28.12.1990 has been attached as Annexure No. 4 to the instant writ petition). Since the post of camp clerk was already sanctioned by the department, hence, after abolition of the post of Camp Clerk, the petitioner was allowed to continue in the capacity of Camp Clerk/Senior Clerk and provided the benefit of revised pay accordingly. The order dated 20.12.2022 passed by the appellate

authority relates to payment of gratuity and has not given any finding to the effect that the petitioner kept the higher authorities in dark and continued on the post which was discontinued on 26.12.1995 (order of appellate authority is annexed as Annexure No. 5 to the instant writ petition). Since the petitioner continued on the post of Camp Clerk/Senior Clerk from 1995 till retirement i.e. 31.07.2015, he has claimed the benefit of assured career progression (A.C.P.) scheme in his writ petition No. 3057 of 2019. The aforesaid writ petition is till pending and this issue has not yet been adjudicated by the High Court. Thus, the F.I.R. on allegation of continuance of non-sanctioned posts cannot be lodged. The appointing authority never questioned this issue during his service period and it has been raised after about 8 years of his superannuation when he claimed post-retiral benefits. It has been further submitted that allegation in the first information report with regard to manipulation of petitioner working on the seat *(patal)* of establishment is unfounded and baseless. The petitioner was never having charge of seat *(patal)* of establishment. In 1991, the charge of seat of establishment was with one B.D. Vais. Thereafter, in 1995, the charge of establishment was with Smt. Geeta Sonkar. In 2010, the charge of establishment was with Smt. Tahasin Jahara, the senior clerk. As such at no point of time, there was any charge of seat of establishment with the petitioner. Hence, there was no question of manipulation with the higher authorities for continuance of service (Copy of orders dated 05.09.1991, 06.03.1995 and 24.12.2010 giving charge of seat of establishment to the aforesaid employees is attached as Annexure No. 6 to the instant writ petition). It has also been submitted that after 1995, the petitioner has been allowed to continue in the service as a Camp Clerk/Senior Clerk by the respondent authorities and he has been paid the benefits of 6th pay scale etc. mentioning the post of Camp Clerk/Senior Clerk by the respondents themselves (Copy of order providing benefit of fixation of 6th pay scale and annual increments sanctioned on the post of Camp Clerk/Senior Clerk dated 05.07.2013 and 21.11.2012 is attached as Annexure No. 7 to the instant writ petition). It is further submitted that in compliance of High Court's order dated 23.02.2015 passed in Writ Petition No. 10397 of 2015, Gopesh Chandra Saxena Vs. State of U.P. and 3 others, vide Government Order No. 1038/सत्रह-म-2015, 6-5(77)/2014 लखनऊ, दिनांक 22 जून 2015, the government had raised the retirement age of the petitioner from 58 years to 60 years and consequently in place of date of superannuation on 31.07.2013, he was permitted to continue on his post till his date of superannuation on 31.07.2015. It has also been submitted that since the petitioner continued on the post of Camp Clerk/Senior Clerk vide aforesaid government orders, therefore, it shall be presumed that he was legally holding the post till his date of superannuation on 31.07.2015. Since there was no entrustment and no misappropriation, therefore, offence u/s 409 and 420 I.P.C. are not attracted against the accused.

5. **Per contra**, in the counter affidavit on 07.08.2023, respondent no. 3 has reiterated the allegations made in the first information report against the petitioner that after abolition of the post of Stenographer on 26.12.1995, the petitioner keeping the higher authorities in dark, illegally continued on the post of Camp Clerk/Senior Clerk till his date of superannuation on 31.07.2015 and withdrew the pay and his allowances

without any authority. The respondent no. 3 has attached Annexure No. C.A.1 to his petition which is letter dated 16.07.1983 sent by Deputy Secretary of U.P. Government to Director, Fisheries Department, U.P., Lucknow to the effect that vide G.O. No. 1347/12-ई-3-82, दिनांक 20 अप्रैल, 1982 informing that earlier post created in the payscale of Rs. 515-840/- of 17 temporary stenographers, is abolished. In its place, 17 temporary posts of camp clerks is created. The respondent no. 3 has also denied the averment made in the affidavit filed by the petitioner and has filed Annexure No.C.A.1 to his counter affidavit. It has been submitted that the petitioner has wrongly stated that after the abolition of post of Stenographer on 16.07.1983, the post of Camp Clerk/Senior Clerk was sanctioned whereas after abolition of the post of Stenographer, the temporary post of Camp Clerk was created. No post of Senior Clerk was created as alleged by the petitioner. It has also been submitted that the Deputy Labour Commissioner, Prayagraj has allowed the Appeal No. 01 of 2022 filed by the respondent no.3 and has held that the petitioner is not entitled to payment of any gratuity. In the counter affidavit, the averment of petitioner has been denied that the post of Camp Clerk was extended after 01.03.1996. It has been submitted by means of Government Order dated 26.12.1995 that the post of Camp Clerk was extended upto 01.03.1996 and thereafter, the said post of Camp Clerk was not extended. Therefore, petitioner was not entitled to continue on the aforesaid post after 01.03.1996. It has been denied that the petitioner was allowed to continue on the post of Camp Clerk/Senior Clerk. It is stated that the post of Senior Clerk is a promotional post which is filled up only and only by the deputed government employees by the Deputy Director in the office of Fish Farmers Development Agency, Prayagraj. The petitioner has played fraud at this juncture because he being the Camp Clerk, was the custodian of that particular file of appointment and deputation. The Government Order dated 26.12.1995 was earmarked to the petitioner and Smt. Geeta Sonkar (Junior Clerk) by the Chief Executive Officer to put up the same before the Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj to implement the said government order but the same was never presented by them before the Executive Director, Fish Farmers Development Agency, Prayagraj as both of them were similarly situated on an absolutely temporary post which was extended year to year by means of respective government orders. The petitioner was provided the next increment on the recommendation of Samta Samiti vide order dated 18.03.1991 while he was discharging duties as the Camp Clerk and not the Senior Clerk which is a promotional post and filled by the deputed government employees only. The respondent no. 3 has filed government letter dated 28.05.1997 as Annexure No. C.A.2 to the counter affidavit whereby various kinds of 11 posts in Fisheries Department were extended till 29.02.1996 and 28.02.1998 respectively. Smt. Geeta Sonkar was directed by the respondent no. 3 to apprise the Chief Development Officer about the aforesaid government orders. It has been submitted that earlier petitioner was holding seat of establishment and thereafter, Smt. Geeta Sonkar held that seat and they illegally kept those documents for more than 10 years in their possession and did not hand over to the Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, for necessary action. The petitioner was never

allowed to continue as a Senior Clerk which is a promotional post and filled only by government deputed employees. Thus, there is sufficient prima facie evidence that the petitioner has committed the offence u/s 409 and 420 I.P.C. and the petitioner has misappropriated Rs.37,65,013/- illegally as salary and allowances for the post of Camp Clerk/Senior Clerk to which he had no authority to continue.

6. The petitioner in rejoinder affidavit dated 12.07.2023 has denied the averments made in the counter affidavit and reiterated the averments made by him in his petition and has submitted that he was allowed by the competent authority to continue as Camp Clerk/Senior Clerk and he has not made any illegal withdrawal of salary and allowances. He has also submitted that since he has filed the writ petition claiming payment of gratuity allowance, the impugned F.I.R. was lodged with malafide against him.

7. On 23.05.2023, following interim order was passed by this Court :

1. Heard Shri Awadh Behari Singh, learned counsel for the petitioner and Shri Sushil Jaiswal, learned State Law Officer, appearing for the State.

2. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 16.04.2023 registered as Case Crime No. 199 of 2023, under Sections 409 and 420 IPC, Police Station Colonelganj, District Prayagraj and a direction to the respondent authorities not to arrest the petitioner in pursuance of the impugned first information report.

3. Submission of the learned counsel for the petitioner is that no offence whatsoever has been made out in the present case. There is no dispute about the fact that initial appointment of the petitioner was absolutely valid and even as per the first information report and allegations in respect of the period of starting from 1995 to 2015 it is submitted that during this period the petitioner continued on various posts to the full satisfaction of the employer and a dispute regarding gratuity was also raised in this respect and it is only after eight years of his retirement when he had claimed his dues and this first information report has been lodged. Submission, therefore, is that ingredients of offence under Section 409 I.P.C. are not fulfilled.

4. Matter requires consideration.

5. In view of the statement made by learned counsel for the petitioner that respondent no. 3 was represented by the State in the civil matters, we direct the learned A.G.A. to accept the notices on behalf of respondent no. 3 as well and represent respondent no. 3.

6. All the respondents may file counter affidavit within four weeks. The petitioner shall have three weeks, thereafter, to file rejoinder affidavit.

7. List thereafter before the appropriate Bench.

8. Till the next date of listing or till submission of police report under Section 173(2) Cr.P.C., whichever is earlier, the respondents are restrained from arresting the petitioner pursuant to the aforesaid FIR subject to cooperation in ongoing investigation.

8. From the averments made in the impugned F.I.R., the pleadings of the parties and arguments advanced on behalf of the learned counsel for the petitioner and learned A.G.A., the admitted fact emerges that the petitioner, Gopesh Chandra Saxena, was initially appointed on the

temporary post of stenographer on 25.04.1979 in Fish Farmers Development Agency, Prayagraj. The post was continued till 16.07.1983. Thereafter, the petitioner continued on the temporary post of Camp Clerk/Senior Clerk till 26.12.1995 and thereafter he was allowed to continue on the post of Camp Clerk/Senior Clerk till his date of superannuation on 31.07.2015.

9. In **State of Haryana and Others Vs. Bhajan Lal and Others, 1992 Supp (1) SCC 335**, the Hon'ble Apex Court has narrated the categories of cases wherein the extraordinary power under Article 226 or the inherent powers under Section 482 Cr.P.C. can be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice :

"...though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised :

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

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

(3) Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

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

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

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

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

10. In **Maratt Rubber Ltd. Vs. J.K. Marattukalam, (2000) 9 SCC 547**, the Apex Court has held that the power of quashing criminal proceedings should be exercised stringently and with circumspection. This inherent jurisdiction

has to be cautiously exercised to prevent the abuse of the process of Court or gross miscarriage of justice and to secure the ends of justice.

11. While considering the quashing of F.I.R., the Court is not bound to consider only the averment made in the F.I.R. but it can also take into consideration the evidence collected during investigation as well as other undisputed admitted documentary evidence produced by the petitioner and the respondent.

12. In the light of the law laid down by the Apex Court and the pleadings of the parties and arguments advanced by their learned counsels, it is desirable to consider the legality of impugned F.I.R. lodged against the petitioner.

13. In the counter affidavit dated 22.06.2023 filed by Investigating Officer, S.I. Rajendra Kumar, Annexure No. 1 is attached which is CCTNS case report regarding petitioner. From the perusal of the report, it transpires that only one criminal case is registered against him.

14. A counter affidavit dated 07.08.2023 has been submitted on behalf of respondent no.3, Sri Irfanullah Khan, Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj which consists of two annexures. Annexure No. 1 attached to the counter affidavit is letter dated 16.07.1983 by Kumari Neeta Chaudhary, Deputy Secretary, Government of U.P. to Director, Fisheries Department, U.P., Lucknow. According to this letter vide G.O. No. 1347/12-ई-3-82, दिनांक 20 अप्रैल, 1982, intimating that posts of 17 temporary stenographers was discontinued and 17 temporary posts of Camp Clerks were created. Annexure No. 2 is the letter dated 26.12.1995 issued by Satya Prakash Sharma, Deputy Secretary, Government of U.P. to Director Fisheries Department, U.P., Lucknow. It mentions that vide G.O. No. 2627/57-म-93-10-1-81 दिनांक 30.9.93, 11 temporary posts including that of Senior Clerk in the payscale of 1200-2040 has been sanctioned for the year 1994-95 to 1995-96 which shall continue till 29.02.1996. From the perusal of the aforesaid two annexures attached to the counter affidavit dated 07.08.2023, it transpires that the temporary posts of stenographers which were discontinued on 16.07.1983 were replaced by temporary posts of Camp Clerks in Fish Farmers Development Agency, District- Prayagraj (then Allahabad). From perusal of Annexure No. 2, it transpires that in 17 districts of U.P. including Allahabad, vide Government Order dated 30.09.1993, the government had sanctioned apart from other posts, the posts of Senior Clerk in the payscale of 1200-2040 to be continued till 29.02.1996. Thus, it appears that after discontinuance of the post of stenographer, the post of stenographer was replaced by temporary post of Camp Clerk and Senior Clerk in Prayagraj and the petitioner continued on these newly created posts after discontinuance of the post of stenographer.

15. The petitioner has filed Annexure Nos. 1 to 8 attached to the writ petitions which are documents consisting of certified copy of impugned F.I.R. (Annexure No.1), office order dated March 18, 1991 issued by Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, on completion of 10 years satisfactory service sanctioning pay scale of 1200-2040 w.e.f. 29.04.1989 to petitioner, Gopesh Chandra

Saxena, mentioning that the next increment shall accrue to him on 01.07.1989 (Annexure No.2), office order dated January 27, 1996 issued by Chief Development Officer/Office Chairman (Administration), Fish Farmers Development Agency, Prayagraj, after six years of satisfactory service promoting the petitioner and sanctioning the next pay scale of 1350-2200/- to the petitioner (Annexure No. 3), government letter dated 28.12.1990 relating to fixation of pay scale of 1200-2040/- to the post of Senior Clerk of Fisheries Department on the recommendation of Samta Samiti (Annexure No. 4), order of Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj, fixing the payband and grade pay of the petitioner from 01.01.2006 to 01.07.2012 on the basis of Government Order No.वे०आ०-2-1318/10गस-59(एम)/2008 दिनांक 08.12.2008, and Government Order No. 2616/सत्रह-मा०-2012-10-5 (8)/98 टी०सी० दिनांक 21.11.2012 (देय 21.11.2012 से), order dated 05.07.2013 of Assistant Director, Fisheries/Chief Executive Officer, Fish Farmers Development Agency, Prayagraj, fixing payband of 5200-20200/- in the grade pay of 2800/- w.e.f. 01.07.2013 to the petitioner on the post of Camp Clerk/Senior Clerk on the basis of Government Order No 2616/सत्रह-मा०-2012-10-5 (8)/98 टी०सी० दिनांक 21.11.2012 (Annexure No. 7). The petitioner has filed Annexure No. 6 to his writ petition which consists of office orders dated 05.09.1991, 06.03.1995 and 24.12.2010 issued by Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj issuing counter to the staff of his office on different seats.

16. From perusal of Annexure No. 4, it transpires that vide aforesaid Government Order dated 08.12.1990, the grade pay of 1200-2040/- was sanctioned for the post of Camp Clerk/Senior Clerk. From the perusal of aforesaid Annexure No. 2, it transpires that on the basis of recommendation of Samta Samiti, after 10 years continuous and satisfactory service, the petitioner was sanctioned the grade pay of 1200-2040/- from 01.07.1988. The next increment was payable w.e.f. 29.04.1989. From the perusal of Annexure No. 3, it transpires that as per office order dated January 27, 1996, after six years of continuous and satisfactory service, the petitioner was promoted to next grade pay of 1350-2200/-. From the perusal of aforesaid Annexure No. 7, it transpires that in compliance of Government Order No. वे०आ०-2-1318/10गस-59(एम)/2008 दिनांक 08.12.2008 and Government Order No. 2616/सत्रह-मा०-2012-10-5 (8)/98 टी०सी० दिनांक 21.11.2012 (देय 21.11.2012 से), w.e.f. 01.01.2006, the petitioner was sanctioned payband of Rs.12,790/- and grade pay of 2800/- which included increments admissible each year from 2006 to 2012. From 01.07.2012, his payband was fixed as Rs.16,410/- in the grade pay of 2800/-. From Annexure No. 7, it is also conspicuous that in compliance of Government Order dated 2616/सत्रह-मा०-2012-10-5 (8)/98 टी०सी० दिनांक 21.11.2012 w.e.f. 01.07.2013, after increments, the petitioner's payband was fixed as Rs. 5200-20200/- in the grade pay of 2800/-. In their counter affidavits, the respondents have not filed any documentary evidence in rebuttal of aforesaid documents filed by the petitioner as annexures to his writ petition. Therefore, it can be concluded that after discontinuance of the post of stenographer, the petitioner was permitted to continue on the post of Camp Clerk/Senior Clerk and he was sanctioned various scales after

completion of 10 years and after further completion of six years of continuous and satisfactory service, the petitioner's pay scale was also revised as per Government Order dated 08.12.1990 as per letter dated 28.12.1990 issued by Deputy Secretary, U.P. Government to Director, Fisheries, U.P. Lucknow.

17. From perusal of Annexure No. 8 to the writ petition, it transpires that vide Government Order No. 1038/सत्रह-म-2015, 6-5(77)/2014 लखनऊ, दिनांक 22 जून 2015, the retirement age of the petitioner was increased from 58 to 60 years and after his retirement on 31.07.2013, he was permitted to again continue on his post till 31.07.2015. Thus, it appears that petitioner was duly authorized by competent authorities to continue and draw salary on the post of Senior Clerk till his date of superannuation on 31.07.2015 when the post of stenographer/Camp Clerk was discontinued after 26.12.1995.

18. Averment has been made by respondent no. 3 in his counter affidavit that the petitioner was Incharge of the seat *(patal)* of establishment and he received the letter regarding discontinuance and abolition of the post of stenographer but he did not bring these letters/orders in the cognizance of the respondent no. 3, Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj. Therefore, he misused his post as Incharge of establishment and kept the authorities in dark and thereby illegally continued and drew salary and allowances on the post of Camp Clerk/Senior Clerk.

19. The petitioner has filed work distribution order dated 05.09.1991, 06.03.1995 and 24.12.2010 issued by respondent no. 3, Chief Development Officer/Executive Director, Fish Farmers Development Agency, Prayagraj as Annexure No. 6 to the writ petition. From the perusal of aforesaid order dated 05.09.1991, it transpires that from this date, Sri B.D. Vais was made Incharge of the seat *(patal)* of establishment and also correspondence relating to establishment and general administration. On perusal of aforesaid order dated 06.03.1995, it transpires that Smt. Geeta Sonkar, Junior Clerk was made Incharge of the seat *(patal)* of the establishment. On perusal of the aforesaid order dated 24.12.2010, it transpires that Smt. Tahasin Jahara, the Senior Clerk was made Incharge of seat *(patal)* of establishment. Thus, it transpires that at the time of abolition of post of Camp Clerk on 26.12.1995 and thereafter, petitioner did not hold the post of Incharge of seat *(patal)* of establishment. Therefore, there was no occasion for him to have the custody of the letter which communicated the discontinuance/abolition of the post of Camp Clerk. Therefore, there is no force in the allegation of respondent no. 3 that by not placing the aforesaid letter before respondent no. 3, the petitioner illegally continued on and drew salary and allowances of the posts of Camp Clerk/Senior Clerk, thus committing cheating, fraud and misappropriation of public money.

20. From the above discussion, we are of the considered view that the registration of impugned F.I.R. against the petitioner is misuse of law and it is liable to be quashed in the interest of justice.

21. The impugned first information report dated 16.04.2023 registered as Case Crime No. 199 of 2023

under Sections 409 and 420 I.P.C., Police Station- Colonelganj, District- Prayagraj, is hereby quashed.

22. Accordingly, the writ petition is allowed.

(2024) 5 ILRA 2007
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 44 of 2021
Connected with
First Appeal No. 43 of 2021

Smt. Prabhpreet Kaur ...Appellants
Versus
Jitendra Pal Singh ...Respondent

Counsel for the Appellant:
Alok Verma, Prabh Jot Kaur, Ramesh Chandra Pathak

Counsel for the Respondents:
Narendra Kumar Kashyap, Ratnoja @ Ratna Singh, Sunita

Matrimonial dispute-Hindu Marriage Act, 1955 -Section13-Love marriage-bickering between the parties-wife left the matrimonial house-under police pressure-compromise-mutual divorce- but husband did not appeared in the suit for divorce on mutual consent-instead filed a suit u/s 9 of HMA-restitution of conjugal rights-wife further filed a petition seeking divorce u/s 13 of HMA on ground of cruelty- such unilateral withdrawal from divorce from mutual consent by husband added to cruelty-parties living separately for more than 11 years-matrimonial bond is beyond repair- divorce granted on the ground of cruelty.

Appeals allowed. (E-9)

List of Cases cited:

1. Rajiv Chikkara Vs Sandhya Mathur : 2016 SCC OnLine Del 6224

2. Beena M.S. Vs Shino G. Babu , 2022 (2) KHC 11 :

3. Shreedharan Vs Asha (MAT Appeal No.c578 of 2015, decided on 18.09.2023),

4. Vidhyadhar Vs Manikrao: AIR 1999 SC 1441

5. Samar Ghosh Vs Jaya Ghosh : (2007) 4 SCC 511

6. Rajib Kumar Roy Vs Sushmita Saha : 2023 SCC OnLine SC 1221

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Ms. Prabh Jot Kaur, learned Counsel representing the appellant/wife and Ms. Ratna Singh, learned Counsel representing the respondent/ husband.

(2) Since these two appeals arise out of a common order dated 22.02.2021 passed by the learned Additional Principal Judge, Family Court-I, Lucknow based on a common factual matrix, they have been heard together and are being disposed of by this common judgment.

(3) Both these appeals have been filed under Section 19 (1) of the Family Court Act, 1984 by the appellant/wife, inert alia as follows:

(A) First Appeal No. 44 of 2021 has been filed challenging the order passed by Additional Principal Judge, Family Court-I, Lucknow dated 22.02.2021 by which Regular Suit No. 3300 of 2014 filed by the husband/respondent under Section 9 of the Hindu Marriage Act, 1955 has been allowed and learned Family Court has directed the wife/Appellant for restitution

of conjugal rights with her husband/respondent herein.

(B) First Appeal No. 43 of 2021 has been filed challenging the dismissal of Regular Suit No. 2335 of 2015 filed by the wife/appellant seeking divorce under Section 13 of the Hindu Marriage Act, 1955.

(4) The factual exposition of these two appeals can be summarized as herein under :-

(i) The parties claim to have been in love, culminating into their marriage on 20.06.2010 in Arya Samaj Mandir. Obviously there had been no exchange of dowry etc. and records reveal that parties also got their marriage registered in the office of Registrar, Hindu Marriage, U.P. on 23.06.2010. After marriage, both, the appellant and the respondent, had apprehended some risk, danger and threat, therefore, they filed Writ Petition No. 6298 (M/B) of 2010 before this Court, wherein father of wife/appellant had put in appearance and had stated before the Court that he had no grudge against both of them and their apprehension is only a misconception. Noting this statement of the father of the wife/appellant herein and the fact that both of them were major, the said writ petition was disposed of vide order dated 12.07.2010 with a direction to the Station House Officer, Alambagh to provide due protection as required to them and their married life would not be interfered with or obstructed to in any manner.

(ii) Apparently, both of them lived as husband and wife at matrimonial house after marriage and the record reveals that no child was born out of the said wedlock.

(iii) The story further unfolds by the allegation of the husband/respondent, wherein according to him, the appellant/wife, after couple of years and due to certain bickering between them at the instance of parent of his wife, left the matrimonial home and went to stay at her parental house *(maika)* on 20.01.2013. After that he and his family had made frequent efforts to persuade her wife to return to her matrimonial house but all in vain. Ultimately, under the pressure of the police, a compromise was entered between them, according to which, both of them would seek divorce on mutual consent before the competent Court. For this purpose, a suit, bearing No.631 of 2014, under Section 13 (B) of the Hindu Marriage Act, 1955 for divorce on mutual consent was filed before the Family Court, Lucknow, however, as claimed, when the husband realized that he could not live without his wife, then, he, instead of appearing in the said suit for divorce on mutual consent, filed Regular Suit No. 3300 of 2014 under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights.

(iv) Notice was issued in the aforesaid suit. In response thereof, the wife/appellant herein had put in appearance before the Family Court and had filed written statement denying all the allegations made by her husband/ respondent and as counter version it was said that she had solemnized love marriage with the respondent but after marriage, his behaviour towards her was very bad. Her husband harassed and tortured her physically and mentally. Her husband, while consuming alcohol and drugs in excessive quantity, had behaved in a very inhuman and unnatural manner with her and also burnt her with cigarette butts, on account of which there was threat to her life

from her husband itself and as such she left the house of her husband on 20.01.2013 and since then she is living with her parents. She had also stated that she does not wish to live with her husband any longer. She is living separately since 20.01.2013 and ever since has acclimatized to her matrimonial status. She also stated that since her husband did not appear before the Family Court in the said suit filed under Section 13-B of Act, 1955, instead her husband had filed a suit for restitution of conjugal rights, therefore, that suit filed under Section 13-B of the Hindu Marriage Act was dismissed on 08.07.2015. Various other allegations as levelled against her in the plaint were also denied by her.

(v) On the basis of pleadings and documents, the learned Family Court framed following two issues in Regular Suit No. 3300 of 2014 filed by the respondent/husband under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as **'First Suit'**) :-

(a) Whether on the basis of the pleadings of the plaint, the plaintiff is entitled to get decree of restitution of conjugal rights?

(b) Whether plaintiff is entitled to get any other reliefs?

(5) Besides the contest in aforesaid suit for restitution of conjugal rights filed under Section 9 of the Hindu Marriage Act, 1955 by the husband/respondent, during its pendency, the wife/appellant herein also filed a petition seeking divorce under Section 13 of the Hindu Marriage Act, 1955 in the year 2015 on the grounds of cruelty and desertion, which was numbered as Regular Suit No. 2335 of 2015 (hereinafter referred to as **'Second Suit')**. In this suit, notice was also issued and in response thereof, husband/respondent had also put in appearance and filed written statement denying the allegations levelled against him and reiterated his stand made by him in the first suit filed by him under Section 9 of the Hindu Marriage Act, 1955.

(6) On the basis of the pleadings and documents, the learned Family Court framed following two issues in the "second suit" filed by the wife under Section 13-B of the Hindu Marriage Act, 1955 :-

(a) Whether on the basis of the pleadings of the plaint, the plaintiff is entitled to get decree of divorce?

(b) Whether plaintiff is entitled to get any other reliefs ?

(7) Both the aforesaid suits were put for trial, wherein the husband/respondent, examined himself as P.W.1 and also exhibited two documents viz. (i) copy of the Marriage Certificate of Arya Samaj Mandir as annexure no.1; and (ii) copy of the statement made by his wife/appellant before the High Court as Annexure no.2. On the other hand, in support of her case, the wife/appellant examined herself as D.W.1. No other witness was examined by the parties in support of their case.

(8) The Family Court has noted that despite ample opportunity being granted to the husband/respondent, none responded on his behalf to argue both the suits, as such, the Family Court proceeded to consider the issues, as noted hereinabove, and heard the counsel for the wife/appellant and appraised the evidence available on record.

(9) The learned Family Court took issue no.1 framed in both the suits together for the sake of convenience of discussion and decision. The Family Court considered the series of so-called gross misdemeanor

and misconduct resulting in physical as well as mental torture upon the wife by husband as alleged by the wife/appellant and returned a finding that the appellant/wife did not mention any specific date or incident when the alleged cruelty was committed upon her by the respondent/husband. The learned Family Court also observed that the appellant/wife was unable to prove bad conduct of the respondent/husband which could give rise to an apprehension in the mind of the appellant that living with the respondent was unsafe and harmful. The learned Family Court had also returned a finding that the appellant/wife had failed to bring on record any witness such as her father, mother etc. or any other witness or evidence in support of her allegation of torture by her husband. In this backdrop, the Family Court opined that the appellant/wife has failed to establish "cruelty" and “desertion” claimed to be perpetrated by her husband against her. Accordingly, issue no.1 was decided in affirmative in favour of the respondent/husband and against the appellant/wife.

(10) So far as issue no.2, as referred above, framed in both the suits is concerned, the Family Court had returned a finding that the appellant/wife had failed to bring home the ingredients which constituted desertion on the part of the respondent and the appellant/wife had voluntarily and for her own left the in-laws' house and went to her parental house on 20.01.2013, hence issue no.2 was also decided in favour of the husband and against the wife.

(11) By deciding the aforesaid two issues in favour of the respondent/husband, the Family Court has dismissed the divorce petition filed by the wife under Section 13 of the Hindu Marriage Act, 1955 and has allowed the suit for restitution of conjugal rights filed by the husband under Section 9 of the Hindu Marriage Act, 1955 by means of the impugned judgment dated 22.02.2021. It is this common order passed by the Additional Principal Judge, Family Court-I, Lucknow, which has been sought to be interdicted by the appellant by filing these two appeal before this Court.

(12) During the course of arguments, learned Counsel representing the appellant/wife did not advance any argument nor attempted to demonstrate as to how the finding of Family Court on the question of desertion is perverse or erroneous in any manner.

(13) However, learned Counsel representing the appellant/wife has submitted that learned Family Court proceeded in a very cursory manner in allowing suit for restitution of conjugal right filed by the husband/respondent and dismissing the suit for divorce filed by the appellant/wife by recording perverse findings on the issue of cruelty. She has submitted that the appellant in her statement had stated before the Family Court that after couple of years of marriage, the family members including her husband/respondent had started torturing her mentally and physically and sometime even her husband burnt her with Cigarette butts. It has been submitted by the learned counsel for the appellant that inspite of the pain and agony having faced by her almost every day of her marital life, she tried her best to adjust with the respondent but behaviour of her husband continued to be cruel day by day. On being upset on account of day to day physical and mental cruelty of her husband, the appellant had

made a complaint before the police, whereinafter a compromise was arrived between the parties by which both the parties agreed to dissolve the marriage by instituting a suit under Section 13 (B) of the Hindu Marriage Act, 1955. As a consequence of which, the said suit for divorce by mutual consent was filed under Section 13 (B) of the Hindu Marriage Act, 1955 before the Family Court, however, even after putting his signature/consent on the said suit by the respondent, the husband failed to appear before the Family Court for recording of statements etc. and instead, he filed a suit for restitution of conjugal rights before the Family Court. Ultimately, the said suit under Section 13 (B) of the Act, 1955 was dismissed on 08.07.2015 on account of absence of the respondent.

(14) Placing reliance upon the decision of the Hon'ble Delhi High Court in **Rajiv Chikkara Vs. Sandhya Mathur** : 2016 SCC OnLine Del 6224 as well as the decisions of Hon'ble Kerala High Court reported in 2022 (2) KHC 11 : **Beena M.S. Vs. Shino G. Babu and Shreedharan Vs. Asha** (MAT Appeal No. 578 of 2015, decided on 18.09.2023), learned Counsel has submitted that unilaterally not appearing in the suit filed for seeking Divorce by mutual consent under Section 13 (B) of the Hindu Marriage Act, 1955 would itself amount to cruelty, however, the learned Family Court has erred in not considering this aspect of the matter and erred in dismissing the suit filed by the appellant/wife.

(15) Learned Counsel for the appellant/wife, thus, has submitted that the facts and circumstances being what they are, it is neither possible nor desirable for the parties to live as husband and wife because the marriage has not only irretrievably broken down but both of them have been admittedly living apart for more than 11 years. Thus, it was argued that dissolving the marriage was the only right solution to the problem and the learned Family Court was not justified in not granting a decree of divorce to the wife/appellant and has erred in allowing the suit for restitution of conjugal right.

(16) On the other hand, learned Counsel representing the respondent/husband has submitted that the ld. Family Court is absolutely justified both in law and fact in coming to the conclusion about the cruelty, physical and mental, as alleged by the appellant/wife. According to the learned Counsel, the wife had intentionally left his house leaving the appellant. Thus, the wife/appellant cannot take advantage of her own wrong to seek a decree for divorce on the ground of cruelty and desertion which is not established on facts. Moreover, she has further submitted that it is a lame excuse on the part of the wife to pile up unfounded allegations of mental and physical torture and then to allege that it is not possible under the facts and circumstances to live with her husband/appellant. According to the learned Counsel, impugned judgment and order passed by the learned Family Court was in accordance with law, hence both the appeals are liable to dismissed.

(17) We have gone through statements of the appellant/wife and respondent/husband recorded by the Family Court; other evidence on record; the impugned judgment; and have heard the learned counsel for the parties at length.

(18) This Court would first like to deal with the evidence of husband/respondent (P.W.1). His statement was recorded by the

Family Court on 22.10.2019, wherein in his examination-in-chief, he had reiterated the fact that his marriage was solemnized with the appellant on 20.06.2010 in the Arya Samaj Mandir. After marriage, both of them were living together as husband and wife. After 11/2-2 months of marriage, his wife (appellant herein) went to her *maika* (parental house). The reason for dispute between them was on account of interference of his in-laws (parents of his wife). He denied the factum of fighting *(maar peet)* had ever taken place between them, however, he stated that wrangling had been a common feature of their relationship.. He further stated that his wife was residing at her parental house and she did not come back to his house and she submitted an application at police station. He denied the factum of any quarrel with his in-laws (parents of his wife). He admitted that at the police station, it was decided that both of them would part their ways by decree of divorce by mutual consent. It has come on record that both of them had preferred a suit for divorce on mutual consent.

(19) It is pertinent to mention that after aforesaid examination-in-chief of husband/respondent herein (P.W.1), he never turned up before the learned Family Court for further examination and as such, the learned Family Court closed his evidence and proceeded further to decide the claim of the parties.

(20) The relevancy of a party who does not appear into the witness box to cross examination was dealt with by the Apex Court in **Vidhyadhar vs. Manikrao**: AIR 1999 SC 1441, wherein the Apex Court has categorically observed that:

"16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct *as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr.. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors., drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."*

(21) Thus, the statement recorded by the husband could not have been the relevant consideration for decision by the learned Family Court. However, having gone through the statement of respondent/husband (P.W.1), what we find that P.W.1 admitted the fact that compromise had entered between the appellant/wife and respondent/husband at police station to the effect that both of them would file a suit for divorce on mutual consent, in pursuance of which, both of them had actually filed a suit for divorce on mutual consent. It is borne out from the evidence of P.W.1/husband that he had no pressure or coercion in making compromise

at police station in regard to moving a suit for divorce on mutual consent under Section 13-B of the Act, 1955. Therefore, the assertion of the husband/respondent in a suit filed by him under Section 9 of the Act, 1955 that on the pressure of parents, his wife preferred suit under Section 13-B of the Act, 1955 and he put his signature thereon in Court on 12.03.2024 for the happiness of his wife, is not acceptable inasmuch as that P.W.1, in his statement, himself had stated that on the basis of compromise entered between them at police station, a suit for divorce on mutual consent under Section 13-B of the Act, 1955 was filed before the Court. Moreover the husband did not appear for further examination in the said suit under Section 9 of the Act, 1955 and his evidence was closed. This conduct of his is also relevant.

(22) Now, coming to the evidence of wife/appellant (D.W.1). Her statement was recorded on 19.12.2019, wherein she had stated that she solemnized love marriage with the respondent out of her own sweet-will and prior to six months of marriage, she had love affairs with the respondent. She further stated that her parents had never filed any case against her husband/ respondent, but her husband had filed a case against her parents in High Court, wherein she stated that she would live with her husband. She further stated that as her life was in danger and she could not trust and believe any further on her husband, as she was assaulted grievously, she left her matrimonial home and does not want to live with her husband any more. She had further stated that in her plaint, she stated the factum of cigarette and consuming alcohol by her husband and, as such, she did not want to live with her husband. On being confronted as to whether she was willing to live with her husband, if he improves himself, she stated that she will not live with her husband. From the evidence of the D.W.1, it transpires that she reiterated the version of her suit filed under Section 13 of the Act, 1955 and has stated that her husband/respondent had burnt her by Cigarette butts and consumed drugs and also assaulted her.

(23) The Family Court declined to believe the evidence of D.W.1 by recording its finding that there is only sole testimony of D.W.1/wife and evidence in the present case in which neither the basis of bitterness has been revealed by her nor any date or description of incident has been given nor any medical report has been presented nor any witness has been produced to prove the factum of burning with Cigarette or assaulting her by her husband by consuming excessive liquor. However, on a close scrutiny of the facts of the case and evidence on record specially the conduct of the husband, we see no reason to disbelieve it.

(24) On a conjoint reading of the statement of the wife/appellant (D.W.1) and husband/respondent (P.W.1) and other materials/evidence on record, what we find is that both the parties have admitted certain facts, which are very essential for deciding the present appeals. Apparently, the appellant/wife and husband admit going to the Police Station in connection with some complaint filed by the wife where a compromise has arrived at to seek divorce by mutual consent and a suit for divorce on mutual consent under Section 13-B of the Act, 1955 was filed by the parties, which was dismissed on account of non-appearance/non-cooperation of the husband/respondent (D.W.1) on 08.07.2015. If the husband was serious in filing the suit under Section 9 of the Act,

1955, he would not have absented for further examination in the said suit as already noticed. The plea of the husband in the suit under Section 9 of the Act, 1955 that he was forced to enter into such compromise, is not believable in view of subsequent filing of a suit for divorce by mutual consent as there would have been no coercion or pressure before a Court of law.

(25) That being the position, now the question which falls for our determination is as to whether unilaterally non-appearance of the husband/respondent in a suit for divorce by mutual consent filed under Section 13-B of the Act, 1955 added to cruelty thereby entitling her to a divorce; and whether the long separation of 11 years coupled with the conduct of the husband amounts to irretrievable breakdown of marriage.

(26) Section 13 of the Act, 1955 reads as under :-

"13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub—normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) * * * * *

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

(viii) ***

(ix) ***

Explanation.—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

(27) U.P. Amendment to Section 13 (1) (i-a) is as under :-

"(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or"

(28) It is apparent that Section 13 of the Act, 1955 provides for grant of divorce and enumerates various grounds on which the same may be granted. It enacts that *"any marriage solemnized whether before or after the commencement of this Act'* may be dissolved on petition presented either by the husband or by the wife or any of the grounds specified therein. Clause (i-a) of sub section (1) of section 13 of the Act, 1955 declares that a decree of divorce may be granted by a court on the ground that after solemnization of marriage, the opposite party has treated the petitioner with cruelty, however, the State amendment qualifies the extent and nature of such cruelty by stating that the said cruelty has been persistent and repeatedly meted out to one party, which would cause

a reasonable apprehension in the mind of the one party that it would be harmful or injurious for the one party to live with the other party.

(29) It is well-settled that the expression 'cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. It is true that the bond of a marriage is built on the mutual respect, trust and love of the partners. There is a fine line separating 'cruelty' and misbehavior.

(30) Dealing with the almost identical issue, the Delhi High Court in the case of ***Rajiv Chikkara (supra)*** observed that where a divorce by Mutual Consent was agreed to by both the parties, the subsequent unilateral withdrawal of consent by a spouse without any sufficient or just cause, would add to the cruelty meted out to the other spouse. In another judgment, the Kerala High Court in the case of **Shreedharan (supra)** dealing with the issue that the offer of settlement failed on account of the wife refusing to accept the offer made by the husband, observed that the mutual consent for divorce failed in this matter as the bargaining could not meet the level of expectation. The idea of 'No-Fault-Divorce' is to make the parties realize that there is sensible way of parting on the agreed terms. Withholding mutual consent in a failed marriage is nothing but cruelty. In the decision of the Kerala High Court in **Beena M.S. (supra),** it has been observed that withholding of consent for mutual separation in itself would cause mental agony and cruelty to the spouse who demands separation.

(31) Keeping in mind the aforesaid decisions, what we find from perusal of the record is that the conduct of the respondent/ husband in driving the appellant/wife to believe that their disputes were about to be "put to an end" and then to withdraw from the attempted settlement can cause disquiet, cruelty and uncertainty in the mind of the appellant. It is evident that the quarrel inter se between the parties was not on any justifiable grounds, but was a war of the egos prompted by the desire to wreak vengeance against the spouse. Thus, such unilateral withdrawal from divorce by mutual consent added to cruelty.

(32) For the aforesaid reasons, we are unable to subscribe to the findings of the Family Court relating to the issue of unilateral non-appearance of the husband/respondent in a suit filed under Section 13-B of the Act, 1955 being not a cruelty. Rather, this court is of the view that such unilateral withdrawal from divorce by mutual consent under Section 13-B of the Act, 1955 added to cruelty.

(33) The other significant factor for determination as posed hereinabove is that whether the long separation of 11 years coupled with the conduct of the husband amounts to irretrievable breakdown of marriage. The Apex Court in **Samar Ghosh Vs. Jaya Ghosh** : (2007) 4 SCC 511, has held that: -

"Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to serve that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and the emotions of parties. In such like situations, it may lead to mental cruelty."

(34) In the instant case, admittedly, both the parties have been living separately since 20.01.2013 i.e almost more than 11 years. Time and again, the Apex Court as well as this Court has

held that where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties, which leads to cruelty. Recently, the Apex Court in the case of **Rajib Kumar Roy Vs. Sushmita Saha** : 2023 SCC OnLine SC 1221 observed as under :-

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

(35) For all the aforesaid reasons, both the appeals are **allowed**. The impugned judgment dated 22.02.2021 is hereby set-aside. The appellant/wife is granted divorce on the ground of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act, 1955. Suit No. 2335 of 2015 is allowed. Suit No. 3300 of 2014 is dismissed.

(36) There shall be no order as to cost.

(2024) 5 ILRA 2017
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.05.2024
BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 1417 of 2010

Amit Kumar Singh ...Petitioner
Versus
Gola & Anr. ...Opposite Parties

Counsel for the Petitioner:
Rajeev Singh, Akhilesh Kumar Mishra, Alok Singh, Vijay Kumar

Counsel for the Opposite Parties:
Govt. Advocate, Anurag Singh Chauhan

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-Sections 3 (1) (Dha) & 3 (1) (s)- Applicant is a student of Hotel Management in Sydney, Australia- first complaint was lodged by the opposite party-found fake-proceeding dropped-after nine months-he filed an Application u/s 156(3) Cr.P.C. on the same facts-Applicant has not abused the opposite party by caste name in any place within the public view-sec.3 (1) (Dha) or sec. 3(1) (s) of the Act, 1989 not attracted-incidence took place inside the house of the complainant –not a place with public view-no outsider was sitting in the room –nor anyone has seen the alleged incident-from nature of evidence-contents of complaint-incident does not appear to happen-summoning order quashed.

Application allowed. (E-9)

List of Cases cited:

1. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426

2. Mohd. Allauddin Khan Vs St. of Bihar & ors. reported in (2019) 6 SCC 107

3. Masumsha Hasanasha Musalman v. St. of Mah., reported in AIR 2000 SC 1786

4. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710

5. Ramesh Chandra Vaishya Vs St. of U.P. & anr.; (2023) SCC OnLine SC 668

6. Fakhruddin Ahmad Vs St. of Uttranchal & anr. reported in (2008) 17 SCC 157

7. Ankit Vs St. of U.P. & anr. reported in JIC 2010 (1) page 432

8. Mahadev Prasad Kaushik Vs St. of U.P. (2008) 14 SCC 479

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

10. R.P. Kapoor Vs St. of Punjab, AIR 1960 S.C. 866, (ii) St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426,

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

12. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq and 22 another, (Para-10) 2005 SCC (Cri.) 283

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

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

15. M/s Pepsi Food Ltd. & anr. Vs Special Judicial Magistrate & ors.: 1998 (5) SCC 749

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

1. Heard Sri Vijay Kumar, learned counsel for the applicant, Sri Anurag Singh Chauhan, learned counsel for the opposite party no.1 and Sri Ashok Kumar Singh, learned A.G.A.-I for the State Opposite Party No.2 as well as perused the record.

2. The instant application under Section 482 Cr.P.C. has been moved on behalf of the applicant, namely, Amit Kumar Singh with a prayer to quash the impugned order dated 29.05.2009 passed in Criminal Case No.897 of 2008 (Gola Vs. Ambar Singh and Others), under Sections 323, 505, 506, 420 I.P.C. and Section 3(2)(v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Banthra, District Lucknow pending in the court of learned Special Judge, C.B.I., Lucknow.

3. Learned counsel for the applicant submitted that the applicant is a student of Hotel Management studying in Meridian International Hotel School, Sydney, Australia and the entire family of the applicant is law abiding and living peacefully.

4. He further submitted that some persons belonging to the pedigree of the applicant are jealous with the success of the family of the applicant as the elder brother of the applicant went to Australia on scholarship and settled in Sydney, therefore, only with intention to malign the dignity of the family of applicant, the impugned proceeding was instituted.

5. He further submitted that opposite party no.1 sent an application to the U.P. SC/ST Commission, 10th Floor, Indira Bhawan, Ashok Marg, Lucknow, wherein a direction was issued on 04.03.2008 to the Senior Superintendent of Police, Lucknow for conducting inquiry in the complaint of Sri Gola i.e. the opposite party no.1, therefore, the concerned Circle Officer conducted an inquiry, recorded the statements of villagers including complainant (Sri Gola) and found that a fake complaint has been moved by the complainant, as such, the proceeding was dropped.

6. He further submitted that the opposite party no.1 deliberately kept silent about nine months and then again filed an application under section 156(3) Cr.P.C. on the same fabricated story on behest of

present village Pradhan, namely, Sri Shiv Shanker Singh against the applicant and his family members with the allegations that Shri Ambar Singh (uncle of the applicant) borrowed Rs.500/- about three years prior from the date of application (no date and time is mentioned), however, when the opposite party no.1 asked to return the aforesaid amount, only Rs.150/- were returned to him and he also refused to pay the balance amount of Rs.350/-. Further allegation is that inspite of refusal of Sri Ambar Singh, the opposite party no.1 requested repeatedly for returning the balance amount of Rs.350/- but he always gave threat to the opposite party no.1 saying that if he will demand the balance amount, then he will be killed. Further allegation is that on 04.01.2008, when the opposite party no.1 again went to the applicant and demanded the balance amount of Rs.350/-, he was threatened to death and was also insulted by the applicant, who was accompanied with many persons alongwith fire arm weapons as well as lathi and danda.

7. He further submitted that further allegation is that on the next date i.e. 05.01.2008 at about 9.00 A.M. when opposite party no.1 was at his residence, Shri Ambar Singh and the instant applicant along with 7-8 persons armed with rifles, revolver, country made pistol and Lathi - Danda again came to his house and started abusing to the opposite party no.1. Thereafter, he was called by them and as soon as he came out from his house, a fire was opened by the applicant and the opposite party no. 1 tried to rescue himself but the applicant started beating with the help of Lathi Danda. Thereafter, an alarm was made by the family members of opposite party no.1, hearing which, several persons were collected on the place of incident but the applicant and other persons ran away giving threat to the opposite party no.1. Thereafter, the opposite party no.1 moved an application before the learned Judicial Magistrate (Court No.40), Lucknow under Section 156(3) Cr.P.C. for lodging an FIR, wherein the learned Magistrate, ordered to the Station Officer, Police Station Banthra, District Lucknow for producing the police report in the Court on 04.11.2008.

8. He further submitted that the Station Officer, Police Station Banthra, District Lucknow submitted the police report before the learned Judicial Magistrate (Court No. 40) / Additional Civil Judge (Junior Division-VIII), Lucknow, wherein it was mentioned that the entire complaint is on the basis of fabricated facts and it is a result of political rivalry and no such incident took place. The relevant part of the police report submitted by the Station Officer on the Misc. Application No. 162/08 Gola Vs. Ambar Singh is being reproduced as under:-

"आवेदक श्री गोला पासी एस/ओ श्री प्रसादी पासी निवासी ग्राम अमावां थाना बंथरा जनपद लखनऊ की जांच मुझ उपनिरीक्षक द्वारा मौके पर जाकर की गयी तो वाकयात निम्न प्रकार पाये गये। आवेदक श्री गोला पासी उपरोक्त श्री नीटू सिह एस/ओ श्री राज बहादुर सिंह निवासी ग्राम अमावां से लगभग दो वर्ष पहले एक हजार रूपया अपनी पुत्री की शादी के लिए ले गया था। श्री गोला पासी की माली हालत बहुत ज्यादा खराब है। शादी की समय नीटू सिंह ने रूप्या दे दिया था जबकि गोला से श्री नीटू सिंह ने अपने उधार के रूपये मांगे तो टाल मटोल करने लगा और श्री नीटू सिंह का साथ श्री गोला पासी छोड़कर गाव के वर्तमान प्रधान श्री शिव शंकर सिंह निवासी ग्राम अमावा के साथ उठना बैठना और लेन-देन करने लगा। विपक्षी अम्बर सिंह एस/ओ पृथ्वी पाल सिंह, अमित कुमार एस/ओ हरिनाम सिंह, प्रवीण कुमार व नीटू सिंह पुत्रगण राज बहादुर सिंह निवासी ग्राम अमांवा थारा बंथरा लखनऊ की प्रधानी चुनाव के समय से वर्तमान प्रधान श्री शिव शंकर सिंह से प्रतिद्वन्दता चल रही है, विपक्षीगणों द्वारा हारे हुए प्रधान उम्मीदवार श्री देवेन्द्र सिंह एसओ श्री रामेश्वर सिंह निवासी ग्राम अमांवा को समर्थन किया था. इसी

राजनैतिक प्रतिद्विन्दता के कारण श्री शिव शंकर सिंह वर्तमान प्रधान आवेदक श्री गोला पासी एस/ओ श्री प्रसादी पासी निवासी अमांवा को उकसा कर झूठा एवं मनगढन्त आरोप लगाकर प्रार्थना पत्र विपक्षियों के विरूद्ध दिला रहे हैं। आवेदक श्री गोला को मोहरा बनाकर अपनी राजनैतिक प्रतिद्विन्दता निभा रहे हैं। विपक्षीगणों के विरूद्ध 500 रूप्ये उधार मांगने का आरोप एक हास्यास्पद है। विपक्षीगणों के पास अच्छी सम्पत्ति एवं सम्पन्न परिवार है, किसी भी व्यक्ति द्वारा उधार रूप्ये मांगने एवं लगाये गये आरोप की पुष्टि नहीं की है। उपरोक्त संबंध में लगाये गये आरोपों के संबंध में जितने भी शिकायती प्रार्थना पत्र दिए गए सभी की विधिवत जांच से कोई आरोप प्रमाणित नहीं हुआ। उपरोक्त आरोपों की जांच क्षेत्राधिकारी सरोजनीनगर महोदय द्वारा भी की जा चुकी है। लगाये गये आरोप असत्य हैं किसी कार्यवाही की आवश्यकता प्रतीत नहीं होती है।"

9. He further submitted that the police report was submitted in the Court of Additional Civil Judge (Jr. Division-VIII) / Judicial Magistrate Room No.40, Lucknow in relation to the application no.162/08 and after considering the police report, the contents of the application of Sri Gola and arguments of his counsel, the learned Court was pleased to decide the matter with reasoned and speaking order and rejected the same on 25.11.2008. The relevant part of the order dated 25.11.2008 passed by learned Judicial Magistrate, Court No.40 Lucknow in C.M. Application No.162/08 (Gola Vs. Ambar) is being reproduced as under:-

"प्रकीर्ण प्रार्थना पत्र संख्या-162/08

गोला बनाम अम्बर सिंह आदि

25.11.08

प्रार्थी गोला ने उक्त प्रार्थना पत्र अन्तर्गत धारा 156 (3) द.प्र.सं. प्रथम सूचना रिपोर्ट दर्ज करने के संबंध में दिया है।

प्रार्थी ने अपने प्रार्थना पत्र में कहा है कि प्रार्थी से लगभग तीन वर्ष पूर्व अम्बर सिंह पुत्र श्री पृथ्वीपाल सिंह निवासी ग्राम अमावा थाना बंथरा जिला लखनऊ में रूपये 500 उधार मांग ले गये थे और वापस देने का वायदा किया था शपथी के बहुत कहने पर अम्बर सिंह ने 150/- रूपये वापस कर दिये तथा रूपये 350/- शेष नहीं दिया, जब शपथी बकाया मांगने गया तो अम्बर सिंह, अमित कुमार, प्रवीण कुमार, नीतू सिंह ने अपने कई अन्य साथियों के साथ अपना लाइसेंसी राइफल, रिवाल्वर व देशी कट्टा व लाठी डंडा से लैस होकर शपथी को धमकाया व जान से मारने की धमकी दी अतः विपक्षीगण के विरूद्ध प्रथम सूचना रिपोर्ट दर्ज करने के संबंध में आदेश पारित करने की कृपा करें।

थाने से आख्या आहूत की गयी।

थाने की आख्या का अवलोकन करने पर पाया कि प्रार्थी व विपक्षीगण के मध्य चुनाव को लेकर आपसी रंजिश है।

प्रार्थी के विद्वान अधिवक्ता को सुना व थाने की आख्या व संलग्न प्रपत्रों का अवलोकन किया।

अवलोकन करने पर यह पाया कि प्रार्थी ने केवल मौखिक रूप से कहा है कि 500/- रूपये अम्बर सिंह ने उधार लिया था जिसमें से 150 रूपये प्राथी को मिल चुके हैं सिर्फ 350/- बकाया है जबकि प्रार्थी ने अपने प्रार्थना पत्र में कहा है कि प्रार्थी पासी जाति का है। प्रार्थी ने किसे समक्ष पैसा उधार दिया था, इसका उल्लेख प्रार्थना पत्र में नहीं किया है। ***न्यायालय की राय में प्रार्थी ने उक्त प्रार्थना पत्र मात्र प्रधानी के चुनाव की रंजिश में विपक्षीगण के विरूद्ध दिया है।.....***

अतः विपक्षीगण के विरुद्ध पूर्ण रूप से संगेय अपराध का कारित किया जाना प्रतीत नहीं होता। ***प्रार्थना पत्र निरस्त होने योग्य है।***

आदेश

प्रार्थी का प्रार्थना पत्र अन्तर्गत धारा 156 (3) दं०प्र०सं. निरस्त किया जाता है।

ह० अपठनीय

25.11.08

न्या० मैजि० कक्ष सं.-40

लखनऊ।"

10. He further submitted that annoyed with the aforesaid, the opposite party no.1 moved a fresh application on 06.12.2008 before the Court on the same facts and circumstances, wherein the opposite party no.1 concealed the facts and mislead the learned Magistrate by saying that the application under Section 156(3) Cr.P.C. has been disposed of on 25.11.2008, however, it was dismissed with a reasoned and speaking order after considering the inquiry report submitted by the police of Police Station Banthra, District Lucknow. He further submitted that in absence of the facts that the application of opposite party

no. 1 has already been dismissed on 25.11.2008, the Hon'ble Court was pleased to pass an order on 08.12.2008 for registering a case as a Complaint Case No.897/08, under Sections 323/504/506/420 IPC and Section 3(2)(5) SC/ST Act.

11. He further submitted that the complainant also annexed a list of two witnesses, namely, (1) Monu Singh S/o Ram Shankar Singh and (2) Kamlesh S/o Annu residents of Village Amawa, Police Station Banthra, District Lucknow along with the copy of complaint dated 08.12.2008 but there was no whisper about the witnesses in the body of any complaint. He further submitted that it is relevant to mention here that Monu Singh is belonging to the family of the present Pradhan.

12. He further submitted that on 05.03.2009, the learned Special Judicial Magistrate, C.B.I., Lucknow recorded the statement of opposite party no.1 under Section 200 Cr.P.C., in which a new story was narrated by the complainant Gola, who stated that he was working as a labour for Ambar Singh and he worked about 25 days and in lieu of the payment of wages for 25 days, Rs.500/- was not paid by him and whenever, he went to the Ambar Singh for raising his demand, the same was ignored and thereafter on 04.01.2008, when the complainant went to the Ambar Singh, he was scolded and on 05.01.2008 at about 9.00 A.M., the applicant along with other family members and associates came to the house of complainant and a fire was opened on him but due to interference of the wife of complainant, the direction of fire was changed and he ran inside the house and closed the door.

13. He further submitted that on 04.04.2009, the statement of Monu Singh and Ram Kumar were recorded under Section 202 Cr.P.C. but it is pertinent to mention here that the complainant has set up a new story i.e. in contradiction with the facts mentioned in the complaint. He further submitted that it is also relevant to point out that there is no whisper available about the presence of the witnesses and in the list of witnesses, Sri Ram Kumar was not mentioned but his statement was recorded. He further submitted that it is also relevant to mention here that the respondents deliberately did not produce neighbours or his wife as witness.

14. He further submitted that the entire complaint was filed on the basis of fabricated facts as it was established during the course of police inquiry submitted in the Court as well as the inquiry conducted by Circle Officer on the behest of U.P. SC/ST Commission but in the most mechanical manner the learned Magistrate had passed the impugned order dated 29.05.2009 and issued summons to the applicant and even a new story was set up in the statements recorded under Section 200 Cr.P.C. i.e. contradictory to the averments made in the complaint.

15. He further submitted that the impugned case is instituted only to malign the dignity of the family of applicant and the proceeding is in violation of the law laid down by the Hon'ble Supreme Court in the case of **State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426** and the impugned order is perverse and it is passed in the most arbitrary and illegal manner.

16. He further submitted that it is well settled by this Hon'ble Court as well as by the Hon'ble Supreme Court that the abuse of process of law is not permitted and in the present case it is very much clear that the

respondent is abusing the legal provisions only to harass the applicant on the behest of the one Sri Shiv Shankar Singh, the present village Pradhan which is very much clear from the police report.

17. He further submitted that the learned Magistrate passed the impugned order saying that Sri Ambar Singh borrowed Rs. 500/- from opposite party no.1 and Rs.350/- was not being returned to him, therefore, he was scolded by Sri Ambar Singh and his associates but on oath complainant stated that his labour charges that was due on Ambar Singh was not being paid and on the demand, he was scolded and manhandled by them, therefore, order is perverse and the same is liable to be quashed in the light of law laid down by the Hon'ble Supreme Court in the case of **Bhajan Lal (Supra).**

18. He further submitted that the impugned proceeding is under challenge in Criminal Misc. Case No.2468 of 2009 (Application under Section 482 Cr.P.C.) Ambar Singh & two others Versus Gola & another before the Hon'ble High Court, wherein, the Hon'ble Court was pleased to pass an Interim Order on 09.07.2009 and stayed the operation and implementation of the impugned order dated 29.05.2009. The order dated 09.07.2009 passed by co-ordinate Bench of this Court is being reproduced hereunder:-

"Heard the learned counsel for the petitioners, learned A.G.A. and perused the record.

Learned counsel for the petitioners has drawn my attention towards the material contradictions in the allegations made in the complaint and in the statement of the complainant recorded under section 200 Cr.P.C. He has further submitted that after rejection of the application under section 156(3) Cr.P.C., the complaint has been filed on the basis of the wrong facts and the allegations made in the complaint have not been corroborated by the statement of the complainant.

The learned A.G.A. has received notice on behalf of the opposite party no.2.

Issue notice to the opposite party no.1 returnable at an early date.

Let the steps be taken within three days.

The opposite parties may file their respective counter affidavit within six weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List after the expiry of the aforesaid period.

Till the next date of listing, the operation / implementation of the impugned order dated 29.05.2009 shall remain stayed."

19. He further submitted that the applicant is studying in Sydney, therefore, he was not aware about the impugned proceeding and it came into the knowledge of the applicant in the month of December 2009, but the applicant has already deposited the fees for the Hotel Management Course and in every month he has to appear in the examination, in these circumstances, the present petition was being filed after some delay but the same is bonafide. He further submitted that it is also relevant to mention here that the impugned criminal proceeding has been instituted only to malign the dignity of the family of the applicant, therefore, in the interest of justice, the entire proceeding is liable to be quashed.

20. Sri Anurag Singh Chauhan, learned counsel for the opposite party no.1 has opposed the arguments raised by the

learned counsel for the applicant and has submitted that offences under Sections 323, 505, 506, 420 I.P.C. and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out against the applicant. As per the version of F.I.R., the applicant had abused the complainant/informant with caste abusive words in a public place, where other persons were present, therefore, offence under Section 3(2)(v) of SC/ST Act will be made out against the applicant. Similarly, in a public place other persons were also present, therefore, it is a public view. In these circumstances the impugned order dated 29.05.2009, summoning the applicant and taking cognizance, was rightly passed, as such, the same is not liable to be quashed and the instant application under Section 482 Cr.P.C. is liable to be dismissed.

21. In support of his argument, learned Counsel for the respondent No.1 has placed reliance on the judgment of Hon'ble Apex Court in the case of **Mohd. Allauddin Khan vs. State of Bihar and Others reported in (2019) 6 SCC 107.**

22. Sri Ashok Kumar Singh, learned A.G.A.-I for the State-respondent No.2 also made an agreement with the arguments of learned Counsel for the respondent No.1 and submitted that prima facie offence is made out against the applicant and learned trial court has rightly passed impugned summoning order after considering the material placed on record, thus, the applicant is not entitled for any relief by this Court and the present application under Section 482 Cr.P.C. may be dismissed.

23. After considering the arguments advanced by learned counsel for the parties and perusal of record in light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence and the contents of the F.I.R. as well as summoning order dated 29.05.2009, this court is of the view that the Act, 1989 is meant to prevent the commission of offences of atrocities against the members of the Schedule Castes and the Schedule Tribes, to provide for Special Courts and Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

24. It is further observed that the Act, 1989 was enacted to improve the social economic conditions of the vulnerable sections of the society as they have been subjected to various offences such as indignities, humiliations and harassment. They have been deprived of life and property as well. The object of the Act, 1989 is thus to punish the violators who inflict indignities, humiliations and harassment and commit the offence as defined under Section 3 of the Act, 1989. The Act, 1989 thus intended to punish the acts of the upper caste against the vulnerable section of the society for the reason that they belong to a particular community. Section 3(1)(Dha) of the Act, 1989 or 3(1)(s) of the Act, 1989 would read as under:-

"Section 3(1)(s) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989- abuses any member of a Scheduled Caste or a Schedule Tribe by caste name in any place within the public view"

25. Thus, even though the basic ingredient of the offence under Section

3(1)(Dha) can be clarified as abuse of any member of Schedule Caste or a Schedule Tribe by caste name in **any place within the public view.**

26. It is further observed that an offence under the Act, 1989 would be made out when a member of the vulnerable section of the society is subjected to indignities, humiliations and harassment in any place within the public view.

27. In the present case, this Court finds that the applicant has not abused the respondent No.1 by caste name in any place within the public view, thus, Section 3(1)(Dha) of the Act, 1989 or 3(1)(s) of the Act, 1989 is also not attracted in the present case. Section 3(1)(s) of the Act, 1989 would read as under:-

"Section 3(1)(s) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989- abuses any member of a Scheduled Caste or a Schedule Tribe by caste name in any place within the public view"

28. It is further observed that the complainant also annexed a list of two witnesses, namely, (1) Monu Singh S/o Ram Shankar Singh and (2) Kamlesh S/o Annu residents of Village Amawa, Police Station Banthra, District Lucknow along with the copy of complaint dated 08.12.2008 but there was no whisper about the witnesses in the body of any complaint and the witness Monu Singh is belonging to the family of the present Pradhan.

29. Further, in the present case, this Court finds that the offence under Section 3(2)(v) of the Act, 1989, whereby the applicant has been summoned vide impugned summoning order dated 29.05.2009, is also not made out against the applicant as from bare perusal of complaint as well as summoning order, the ingredients of the aforesaid Section is missing. Section 3(2)(v) of the Act, 1989 is being quoted hereunder:-

"commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;"

30. It is further observed that as per his own case, the respondent No.1 clearly stated in the complaint and in his statement recorded under Section 161 Cr.P.C. that whatever incident took place that took place inside his house, thus, it is not a *place within a public view* as no outsider was sitting in the room nor anyone has seen the alleged incident. Even the independent witnesses whose names were taken by the respondent No.1 were also not present inside the house at the time of the alleged incident. Even though the ingredients of Section 3(2)(v) of the Act, 1989 is also not attracted in the present case.

31. It is further observed that offence under the Act, 1989 is not established merely on the fact that the informant/complainant is a member of Scheduled Caste unless there is an intention to humiliate a member of Schedule Caste or Schedule Tribe for the reason that the victim belongs to such caste.

32. This Court further observes that we rarely come across a society, in which crime is not committed by a person on

another. There are number of penal laws to punish the offenders of such crimes. Such laws apply to every offender, irrespective of his caste or creed. However, taking into consideration the indignities to which persons belonging to scheduled castes or scheduled tribe were and are subjected and atrocities committed on them only on the ground that such persons belonged to such caste. The Parliament has enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, to prevent atrocities on the persons belonging to scheduled castes or scheduled tribes. The object behind clause (v) of Section 3(2) of the Act is to punish the persons, who commit offences under the Indian Penal Code punishable for a term of ten years or more, against a members of Scheduled Castes or Scheduled Tribes on the ground that such person belongs to Scheduled Castes or Scheduled Tribes or such property belongs to such person, by higher and more severe punishment.

33. This Court further observes that as special and stricter provisions have been made in the Act, it is the duty of the prosecution to examine the case more carefully. Registration of the offence under the Act, only because the complainant party belonged to a Scheduled Tribe and the accused persons did not belong to a Scheduled Tribe or Scheduled Caste was a mechanical exercise of authority and it has to be deprecated.

34. From the language used by the Legislature in Section 3(2)(v) of the Act, it is clear that this Section does not constitute any substantive offence and if any person not being a member of a Scheduled Caste or a Scheduled tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belongs to such member, then enhanced punishment of life imprisonment would be awarded in such cases, meaning thereby that conviction and sentence under Section 3(2)(v) SC/ST Act, simpliciter is not permissible and in cases where an offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed against a person or property on the ground that such person is a member of a Scheduled Caste or Scheduled Tribe or such property belongs to such member, then in such a case the accused will be convicted and sentenced for the offence under Indian Penal Code read with Section 3(2)(v) SC/ST Act, with imprisonment for life and also with fine. Thus, in order to attract the provision of Section 3(2)(v) the following ingredients must be established :

"(1) The offender should not be a member of a Scheduled Caste or a Scheduled Tribe;

(2) He must commit an offence under the Indian Penal Code punishable with imprisonment for a term of 10 years or more;

(3) The commission of such offence must be against a person or property of a member of a Scheduled Caste or a Scheduled Tribe;

(4) The offences must have been committed on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe."

35. The words “on the ground” have not been used in anywhere in the Act, except in clause (v) of Section 3(2) of the Act. It will be seen that only serious offences under the Indian Penal Code

which are punishable with imprisonment for a term of 10 years or more are covered by clause (v). However, the provisions of the I.P.C. are universally applicable whereas the clause (v) is applicable only where the victim is a person belonging to a Scheduled Caste or Scheduled Tribe. The law therefore expects a graver kind of mens rea denoted by the words " on the ground", to render already serious offences under the Indian Penal Code more serious, which has the effect of making it punishable by no less a punishment than imprisonment for life. In order to constitute an offence under Section 3(2)(v) of Act, 1989, something more than 'intention' is needed – the offence against the victim must have been committed with a particular object, i.e., it must have been committed 'on the ground' that he was a member of a Scheduled Caste or Scheduled Tribe.

36. The expression "on the ground" has been subject matter of decision in a number of cases decided under the SC/ST (P.A.) Act. In the case of **Masumsha Hasanasha Musalman v. State of Maharashtra,** reported in AIR 2000 SC 1786 it was held that " To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under the Section 3(2) (v) of the Act, is constituted.

37. It is further observed by this Court that from the bare perusal of the complaint, the utterances, if any, as mentioned in Section 3(2)(v) of the Act, 1989 are not fulfilled. The Investigating agencies while investigating the matter are duty bound to consider the factual aspects of the matter and also to consider the statement of witnesses, complainant as well as the applicant so as to ascertain whether the chargesheet makes out a case under the Act, 1989 having been committed for forming a proper opinion in the conspectus of the situation before it, prior to taking cognizance of the offence by learned Magistrate. In the present case from the factual aspects and statements discussed above, no offence is made out under Section 3(2)(v) of the Act, 1989. Though, the learned Magistrate has not applied its judicial mind while taking cognizance in the matter and even though, he has only relied on the contents of the complaint and summoned the applicant by impugned order to face trial, which is very serious matter.

38. In view of the aforesaid discussion, this Court deems it proper to discuss some case laws.

39. Hon'ble Supreme Court in the case of **Hitesh Verma Vs. State of Uttarakhand, (2020) 10 SCC 710** has been pleased to observe in para 13, 14 and 18 as under :-

"13. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The

assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

14. Another key ingredient of the provision is insult or intimidation in "any place within public view". What is to be regarded as "place in public view" had come up for consideration before this Court in the judgment reported as Swaran Singh v. State [Swaran Singh v. State, (2008) 8 SCC 435 : (2008) 3 SCC (Cri) 527]. The Court had drawn distinction between the expression "public place" and "in any place within public view". It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view (sic) . The Court held as under :

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view" with the expression "public place". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

40. Further, the Hon'ble Apex Court in the case of **Ramesh Chandra Vaishya Vs. State of U.P. and Another; (2023) SCC OnLine SC 668** has been pleased to observe in paragraph 17, 18 and 21 as under:-

"17. The first question that calls for an answer is whether it was at a place within public view that the appellant hurled caste related abuses at the complainant with an intent to insult or intimidate with an intent to humiliate him. From the charge-sheet dated 21st January, 2016 filed by the I.O., it appears that the prosecution would seek to rely on the evidence of three witnesses to drive home the charge against the appellant of committing offences under sections 323 and 504, IPC and 3(1)(x), SC/ST Act. These three witnesses are none other than the complainant, his wife and their son. Neither the first F.I.R. nor the charge-sheet refers to the presence of a fifth individual (a member of the public) at the place of occurrence (apart from the appellant, the complainant, his wife and their son). Since the utterances, if any, made by the appellant were not "in any place within public view", the basic ingredient for attracting section 3(1)(x) of the SC/ST Act was missing/absent. We, therefore, hold that at the relevant point of time of the incident (of hurling of caste related abuse at the complainant by the appellant), no member of the public was present.

18. That apart, assuming arguendo that the appellant had hurled caste related abuses at the complainant with a view to insult or humiliate him, the same does not advance the case of the complainant any further to bring it within the ambit of section 3(1)(x) of the SC/ST Act. We have noted from the first F.I.R. as well as the charge- sheet that the same makes no reference to the utterances of the appellant during the course of verbal altercation or to the caste to which the complainant belonged, except for the allegation/observation that caste-related abuses were hurled. The legislative intent seems to be clear that every insult or intimidation for humiliation to a person would not amount to an offence under section 3(1)(x) of the SC/ST Act unless, of course, such insult or intimidation is targeted at the victim because of he being a member of a particular Scheduled Caste or Tribe. If one calls another an idiot (bewaqoof) or a fool (murkh) or a thief (chor) in any place within public view, this would obviously constitute an act intended to insult or humiliate by user of abusive or offensive language. Even if the same be directed generally to a person, who happens to be a Scheduled Caste or Tribe, per se, it may not be sufficient to attract section 3(1)(x) unless such words are laced with casteist remarks. Since section 18 of the SC/ST Act bars invocation of the court's jurisdiction under section 438, Cr.PC and having regard to the overriding effect of the SC/ST Act over other laws, it is desirable that before an accused is subjected to a trial for alleged commission of offence under section 3(1)(x), the utterances made by him in any place within public view are outlined, if not in the F.I.R. (which is not required to be an encyclopedia of all facts and events), but at least in the charge-sheet (which is prepared based either on statements of witnesses recorded in course of investigation or otherwise) so as to enable the court to ascertain whether the charge sheet makes out a case of an offence under the SC/ST Act having been committed for forming a proper opinion in the conspectus of the situation before it, prior to taking cognizance of the offence. Even for the limited test that has to be applied in a case of the present nature, the charge-sheet dated 21 st January, 2016 does not make out any case of an offence having been committed by the appellant under section 3(1)(x) warranting him to stand a trial.

21. Section 323, IPC prescribes punishment for voluntarily causing hurt.

Hurt is defined in section 319, IPC as causing bodily pain, disease or infirmity to any person. The allegation in the first F.I.R. is that the appellant had beaten up the complainant for which he sustained multiple injuries. Although the complainant alleged that such incident was witnessed by many persons and that he sustained injuries on his hand, the charge-sheet does neither refer to any eye-witness other than the complainant's wife and son nor to any medical report. The nature of hurt suffered by the complainant in the process is neither reflected from the first F.I.R. nor the charge-sheet. On the contrary, the appellant had the injuries suffered by him treated immediately after the incident. In the counter-affidavit filed by the first respondent (State) in the present proceeding, there is no material worthy of consideration in this behalf except a bald statement that the complainant sustained multiple injuries "in his hand and other body parts". If indeed the complainant's version were to be believed, the I.O. ought to have asked for a medical report to support the same. Completion of investigation within a day in a given case could be appreciated but in the present case it has resulted in more disservice than service to the cause of justice. The situation becomes all the more glaring when in course of this proceeding the parties including the first respondent are unable to apprise us the outcome of the second F.I.R. In any event, we do not find any ring of truth in the prosecution case to allow the proceedings to continue vis-à-vis section 323, IPC."

41. Further, the Hon'ble Supreme Court in the case of **Fakhruddin Ahmad Vs State of Uttranchal and another** reported in **(2008) 17 SCC 157,** discussed the expression *"taking cognizance of an offence"* by a Magistrate within contemplation of section 190 of the Cr.P.C and also discussed what must have been taken notice by the Magistrate while taking cognizance. Paras 11, 12, 13,14 and15 being relevant are abstracted below:-

"11.The next incidental question is as to what is meant by expression `taking cognizance of an offence' by a Magistrate within the contemplation of Section 190 of the Code?

12.The expression `cognizance' is not defined in the Code but is a word of indefinite import. As observed by this Court in Ajit Kumar Palit Vs. State of West Bengal2, the word `cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means--become aware 2 [1963] Supp. 1 S.C.R. 953 9 of and when used with reference to a Court or Judge, to take notice of judicially. Approving the observations of the Calcutta High Court in Emperor Vs. Sourindra Mohan Chuckerbutty3, the Court said that `taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.'

13. Recently, this Court in S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. & Ors.4, speaking through C.K. Thakker, J., while considering the ambit and scope of the phrase `taking cognizance' under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in Superintendent & Remembrancer of Legal Affairs, West Bengal Vs. Abani Kumar Banerjee5, which were approved by this Court in R. R. Chari Vs. State of U.P.6. The observations are:

3 (1910) I.L.R. 37 Calcutta 412 4 (2008) 2 SCC 492 5 A.I.R. (37) 1950

Calcutta 437 6 A.I.R. (38) 1951 SC 207 1 0 "7. ... What is `taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

14. From the afore-noted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by `taking cognizance'. Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

15. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence."

(Emphasis supplied)

42. This Court in the matter of **Ankit Vs State of U.P. and another** reported in **JIC 2010 (1) page 432** has held that-

" Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4^) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

(Emphasis supplied)

43. Thus, in the present case learned Magistrate without considering the material available before him and even without

considering the averments made in the complaint in which as per the own case of the respondent No.1 the alleged incident took place inside his house and at that time no public was present nor there was any public view. Learned Magistrate while taking cognizance did not consider the statements of the applicant. Thus, no offence is made out against the applicant.

44. Further, the judgment of the Hon'ble Apex Court in the case of **Allauddin Khan (Supra)**, which has been relied upon by learned Counsel for the respondent No.1 is not applicable in the facts and circumstances of the present case.

45. It has been consistently held by the Hon'ble Apex Court and also by various High Courts that before an offence under section 506 I.P.C. is made out, it must be established that the accused had an intention to cause an alarm to the complainant. In order to attract the ingredients of Section 506 I.P.C., the intention of the accused must be to cause alarm to the victim. Mere expression of words without any intention to cause alarm would not suffice. Mere vague and bald allegations that the accused threatened the victim with dire consequences is not sufficient to attract the provisions under Section 506 I.P.C. The threat should be a real one and not just a mere word when the person uttering does not exactly mean what he says and also when the person against whom the threat is launched, does not feel threatened actually. It should appear that the complainant was feeling fear for his life. In the case of **Mahadev Prasad Kaushik Vs. State of U.P. (2008) 14 SCC 479**, the Apex Court quashed the proceedings initiated against the appellants for the offences punishable under Sections 504 and 506 I.P.C. on the ground that there was no whisper about the threat alleged to have been given by the appellant to the complainant in the order passed by the Magistrate.

46. Thus, after perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence and as per the contents of the complaint as well as the statement of respondent No.1 and considering the various case laws referred above, the incident does not appear to happen, thus, offence under the Provisions of Act, 1989 is not attracted against the applicant as the incident did not occur in any "place within a public view", even though Sections 323, 505, 506, 420 I.P.C. are also not attracted against the applicant, as such, considering the law laid down by the Hon'ble Apex Court in the cases of **Hitesh Verma (Supra), Ramesh Chandra Vaishya (Supra), Fakhruddin Ahmad (Supra)** as well as law laid down by co-ordinate Bench of this Court in the case of **Ankit (Supra)**, this Court is of the view that the learned trial court has failed to appreciate the material available on record.

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

"38. The order of issuance of process is not an empty formality. The

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

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

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

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

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

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

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

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

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a

Magistrate as contemplated under Section 155(2) of the Code;

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

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

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

49. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- **(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (v) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.**

50. From the aforesaid decisions, the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued.

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

52. In **M/s Pepsi Food Ltd. and another Vs. Special Judicial Magistrate and others: 1998 (5) SCC 749,** Hon'ble Apex Court has observed:

"Summoning of an accused in a criminal case, is a serous matter. Criminal law can not be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that

the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

53. In the instant case, there is nothing in the summoning order to show that the Magistrate concerned perused the material available on record before passing summoning order. Hence the summoning order is bad in the eyes of law and resultantly it is not sustainable.

54. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and also with the assistance of the aforesaid guidelines and keeping in view the nature and gravity and the severity of the offence which more particularly is a private dispute and differences, it deems proper and meet to the ends of justice that the proceeding of the aforementioned case are liable to be quashed.

55. Accordingly in view of the above discussions and observations made, the instant application under Section 482 Cr.P.C. is **allowed.** The impugned summoning as well as cognizance order dated 29.05.2009 passed by learned Special Judge, C.B.I., Lucknow, whereby the applicant has been summoned in Criminal Case No.897 of 2008 (Gola Vs. Ambar Singh and Others), under Sections 323, 505, 506, 420 I.P.C. and Section 3(2)(v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Banthra, District Lucknow as well as the criminal proceedings of the aforesaid case are hereby **quashed** so far as it relates to the present applicant.

56. No order as to the costs.

57. Office is directed to transmit a copy of this order to the learned trial court concerned immediately for necessary compliance and information.

(2024) 5 ILRA 2034
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 2705 of 2019

Vivek Singh @ Monu & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ishan Baghel, Mohd. Khalid

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 304 IPC - Code of Criminal Procedure, 1973-Section 482-Allegation-some persons were demolishing a boundary wall of the Old Employment Office-a *peepal* tree consequently fell over a passerby -got injured and died-Applicants not named in the FIR-arrayed as accused upon the St.ment u/s 161 Cr.P.C. of the deceased's daughter-not eye witness-it is a case of accident not u/s 304 IPC-no intention –Police were present when the accused were demolishing the wall-not prevented them if there was any illegal activity-summoning order and cognizance order-impugned-not examined the nature of allegations in the FIR and evidences-impugned orders quashed

Application allowed. (E-9)

List of Cases cited:

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

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

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

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

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

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

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

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

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

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

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

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

1. Heard Shri Ishan Baghel, learned Counsel for the applicants, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1.

2. As per the office report dated 12.01.2022 notice upon opposite party No.2 has been served personally but till date neither any counter affidavit has been filed nor any counsel is present today to represent opposite party No.2, the case was taken up in the revised call for final arguments.

3. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicants, namely-Vivek Singh @ Monu and Mohd. Danish @ Mohd. Danish Azad seeking quashing of the impugned summoning and cognizance order dated 30.03.2016 and consequential orders dated 11.01.2018 and 11.07.2018 passed by learned Chief Judicial Magistrate, Lucknow and charge sheet dated 13.07.2015 and the entire proceeding in Criminal Case No.16768 of 2016; State vs. Prabhat Agarwal & Others arising out of Case Crime No.224 of 2014 under Section 304 I.P.C. and Section 3 of Prevention of Damage of Public Property Act pending before learned trial court.

4. Learned Counsel for the applicants submitted that in the present case an FIR dated 02.12.2014 was lodged by Constable Govind Narain, P.S. Naka Hindola, Lucknow against Prabhat Agawal and 5-6 unknown persons under section 304 IPC and 3 of Prevention of Damage to Public Property Act and in the FIR it has been alleged that on 02.12.2014 at around 02:00 PM, the complainant alongwith another constable were present on the place of occurrence wherein one Prabhat Agarwal alongwith 5 to 6 other persons were demolishing a boundary wall of the Old Employment Office, Charbagh. It is also alleged in the FIR that a *peepal* tree was standing on the foundation of the said boundary wall, which consequently fell over a passerby namely Harinand Jaiswal S/o Late Satya Narain, who alongwith his wife was passing from the place of occurrence, got injured and was taken to Balrampur Hospital, where he died.

5. Learned Counsel for the applicants further submitted that the post-mortem of the deceased Harinand Jaiswal was done on 03.12.2014 at KGMU, Lucknow in which cause of death was shown due to ante-mortem head injury and apart from the deceased Harinand Jaiswal no other person including her wife who was going with him, has sustained any single injury due to the alleged incident as mentioned in the FIR.

6. Learned Counsel for the applicants further submitted that the applicants are not named in the FIR. However, in order to falsely implicate the applicants they were arrayed as an accused, upon the statement under Section 161 Cr.P.C. dated 23.01.2015 of the daughter of the deceased namely Renu Jaiswal but as per the FIR, only the wife of the deceased namely Rani Jaiswal was going alongwith her husband at the place of occurrence and therefore, she is said to be an eye-witness of the incident and the wife of the deceased in her statement under 161 Cr.P.C. dated 22.12.2014, did not mention names of the applicants as an accused. However, for the first time she mentioned the name of her daughter Renu Jaiswal stating that she was also going with them on the date of occurrence i.e. on 02.12.2014 only with the intention to give gravity to the offence and falsely implicate the applicants.

7. Learned Counsel for the applicants further submitted that as per the FIR Renu Jaiswal is not the eye-witness to the aforesaid incident and the statement of Renu Jaiswal being taken after one month of the alleged incident and that too after the statement of her mother shows that names of the applicants have been dragged into the case with an afterthought and in order to falsely implicate the applicants.

8. Learned Counsel for the applicants further submitted that the story set up by the police in the FIR cannot be believed inasmuch as it does not appeal to reason and when the police personnel saw some illegal activity i.e. demolition of the wall done by the accused, as is mentioned in the FIR, no preventive measures have been taken against them, and notwithstanding, the accused persons have committed the alleged incident mentioned in the FIR the police personnel remained there as spectators.

9. Learned Counsel for the applicant further submitted that the applicants were not named as an accused in the aforesaid FIR and for the very first time the applicants got the knowledge of their implication in the aforementioned crime as an accused, when the police personnel have approached their native place in pursuance of Non-Bailable Warrant and proceeding U/s 83 Cr.P.C. initiated by Learned Chief Judicial Magistrate, Lucknow.

10. Learned Counsel for the applicants further submitted that the applicants on the information of aforementioned case, inquired about the case through counsel and got to know that their names have been dragged in the case after one month of the registration of the FIR, moreover, the summons were also been issued on some wrong addresses. He further submitted that Non-bailable warrant and proceeding under section 83 Cr.P.C. have been initiated against the applicants, the applicants for the first time came to know about the present case when the police personnel visited their native place for their arrest.

11. Learned Counsel for the applicants further submitted that the named

accused in the FIR namely Prabht Agarwal has already been granted bail by the Coordinate Bench of this Court vide order dated 12.12.2018 passed in Criminal Misc. Case No. 7177 (B) of 2018 (Prabhat Agarwal versus State of U.P.).

12. Learned Counsel for the applicants further submitted that the bare perusal of FIR will show that the applicants have not committed any crime and no offence under section 304 IPC and Section 3 of Prevention of Damage to Public Property Act is made out against them nor any ingredients of the above sections are attracted in the case of the present applicants.

13. Learned Counsel for the applicants further submits that the perusal of the FIR would show that the FIR was lodged against the Prabhat Agarwal and 5-6 unknown persons, however, neither the FIR was lodged under section 34 or 149 IPC nor the Investigating Officer has filed the chargesheet under section 34 or 149 IPC, which shows that applicants have been falsely implicated as an accused due to enmity and rivalry.

14. Learned Counsel for the applicants further submitted that on inquiring the background of the alleged FIR the applicants have learnt from the sources that there was a Civil Suit going between one Raja Gopal Singh S/o Late Kunwar Jagdish Singh, who is owner and in possession of the land bearing Khasra No. 579 and 580, Mohalla Charbagh Station, Ganeshganj, Lucknow, of which a Regular Suit No. 1508 of 2014, Gopal Singh versus Vice Chairmand, Lucknow Development Authority & others is pending in the court of Civil Judge (S.D.), Malihabad, Lucknow and upon the land of Khasra No. 579, plot no. 64/C-1 which is ancestral property of Raja Gopal Singh, the illegal Auto and Tempo stand is made with collusion of police persons and strangers and illegal recovery is made from them and upon objection of co-accused Prabhat Agarwal, the police on duty warned for dire consequences to the co-accused Prabhat Agarwal and to send him behind the bars in forged cases. The co- accused Prabhat Agarwal made several applications through registered posts to the higher authority for lodging the FIR against the police and strangers but no action was taken on the said applications.

15. Leaned Counsel for the applicants further submitted that prior to the lodging of the FIR on dated 22.11.2014 the police of Police Station Naka Hindola, Lucknow stopped the work of cleaning of the plot in question, therefore, the co-accused Prabhat Agarwal made an application dated 22.11.2014 to the City Magistrate, Lucknow but no heed was paid on the said application by the concerned authorities.

16. Learned Counsel for the applicants further submitted that if the statement of the deceased's daughter is taken to be true, it is hard to believe that she is a resident of Kushinagar and there cannot be any acquaintance with the applicants to name them as an accused of the alleged incident and as per the version of the FIR, the wife of the deceased was the eye witness and no one else was accompanying them at the time of alleged incident, thus, the story of the prosecution fails on this ground also.

17. Learned Counsel for the applicants further submitted that in the aforesaid case chargesheet has been filed against the applicants and one Mr. Prabhat

Agarwal, however, the applicants have no concern with the co-accused namely Prabhat Agarwal nor they knew him personally, the applicant No.1 was a Research Scholar of Lucknow University and pursuing Ph.D. from there, while, applicant No. 2 was a student. The charge sheet was filed against the applicants totally ignoring the evidence on record and the same was filed in a mechanical manner.

18. Learned Counsel for the applicants further submitted that the learned Chief Judicial Magistrate, Lucknow has passed the cognizance and summoning order dated 30.03.2016 against the applicants without application of judicial mind and in a most mechanical and routine manner, thus, in light of the facts and circumstances of the case, the impugned order dated 30.03.2016, order dated 11.01.2018 & 11.07.2018 and charge sheet dated 13.07.2015 and the entire proceeding of the Criminal case No. 16768 of 2016, pending in the Court of Learned Chief Judicial Magistrate, Lucknow, is liable to be quashed and the present application may be allowed as prima facie no case is made out against the applicants.

19. Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1 has opposed the argument advanced by learned Counsel for the applicants and submitted that the summoning order dated 30.03.2016 and consequential orders dated 11.01.2018 and 11.07.2018 are rightly passed as prima facie offence is made out against the applicants and the trial court has rightly passed impugned summoning order as well as the consequential orders after considering the material placed on record, thus, the applicants are not entitled for any relief by this Court and the present application may be rejected.

20. After considering the arguments advanced by learned counsel for the applicant and learned A.G.A-I for the State-opposite party No.1 and after perusal of the record, materials and arguments presented, this Court finds that the summoning order dated 30.03.2016 and consequential orders dated 11.01.2018 and 11.07.2018, lacks necessary legal and factual foundation. There appears force in the argument of learned Counsel for the applicants that Rani Jaiwal, wife of the deceased, who was accompanying the deceased at the time of the alleged incident, has not taken the names of the applicants in her statement under Section 161 Cr.P.C. dated 22.12.2014. The applicants have reliably learnt that a Regular Suit No.1508 of 2014 (Gopal Singh vs. Vice Chairman, Lucknow Development Authority and others) is pending in the Court of Civil Judge, Senior Division, Malihabad, Lucknow. The disputed land is upon Khasra No. 579, Plot No. 64/C-1 which is an ancestral property of Raja Gopal Singh and an illegal auto and tempo stand is made in collusion with the police is being run on that land and illegal recovery is made by the police along with other persons. The name of the applicants have been dragged in after one month of the incident in the statement of the daughter of the deceased, while the daughter of the deceased is not the eye-witness of the alleged incident nor she was accompanying the deceased and resides in a different town i.e. Kushinagar, Uttar Pradesh.

21. Further, the applicants contend that the incident in question, involving the demolition of a wall which led to a tree falling and subsequently causing the death of an individual, should be classified as an accident and not as culpable homicide amounting to murder.

22. Further, it is relevant to discuss Section 299 of the I.P.C. which defines the term 'culpable homicide' in the following manner:-

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.--

A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.--

Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.--

The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely bom.

'Culpable homicide' according to section 299, I.P.C. has the following ingredients:

1. Causing of death of a human being;

2. Such death must have been caused by doing an act;

3. The act must have been done:

(i) with the intention of causing death;

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

(iii) with the knowledge that the doer is likely by such act to cause death."

23. It is further observed here that Section 304 IPC deals with culpable homicide not amounting to murder, which requires either the intention to cause death or knowledge that the act is likely to cause death. For a conviction under this section, it must be established that the accused had either of these mental states. Section 304 I.P.C. read as under:-

"Section 304 Indian Penal Code, 1860

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

24. Thus, upon reviewing the facts and circumstances of the present case, the following points are considered:-

(i) There is no evidence indicating that the applicants intended to cause death or had knowledge that their actions were likely to result in death. The demolition of a wall, does not inherently

suggest an intention or knowledge of causing death.

Foreseeability: The falling of the tree was an unforeseen consequence of the demolition. There is no indication that the applicants could have reasonably anticipated this specific outcome. In fact, they were not present on the spot at the time of the alleged incident.

(ii) The sequence of events leading to the death appears to be accidental. The demolition work was conducted without any apparent negligence directly linked to the fatal outcome. Accidents, by their nature, are unforeseen and unintentional.

(iii) Given the absence of intention or knowledge to cause death, and considering the unforeseeable and accidental nature of the incident, it is determined that the incident qualifies as an accident. The criteria for culpable homicide under Section 304 IPC are not met.

25. After a thorough examination of the facts and circumstances presented in the petition, the following conclusions are drawn:

(i)Absence of Direct Involvement and Malafide Intent:

(a) The applicants were not named in the original FIR dated 02.12.2014, which was lodged by Constable Govind Narain against Prabhat Agarwal and 5-6 unknown individuals. The FIR does not implicate the applicants directly. Their names surfaced subsequently through a statement made by the deceased's daughter, Renu Jaiswal, on 23.01.2015, which was recorded nearly after a month of the incident. This delay and the circumstances surrounding her statement raise questions about the credibility and timing of their implication and it is also observed here that in the original version of the FIR it has been alleged that the deceased was only accompanied by his wife no one else was with him at the time of alleged incident, even though, she was not the eye witness of the alleged incident.

(b) The primary eyewitness, Rani Jaiswal (wife of the deceased), in her statement under Section 161 Cr.P.C. dated 22.12.2014, did not mention the name of the applicants as being involved in the incident. It was only later that her daughter Renu Jaiswal introduced new names, creating a contradiction. Such contradictions, coupled with the delayed recording of statements, suggest an afterthought rather than a genuine identification of the accused.

(c) For a charge under Section 304 IPC (culpable homicide not amounting to murder), there must be evidence that the accused had the intention or knowledge that their actions were likely to cause death. In this case, there is no evidence to indicate that the applicants had any such intent or knowledge. The demolition of the wall, which resulted in the falling of the *peepal* tree and the consequent death of Harinand Jaiswal who was passing the place of alleged incident with his wife, appears to be an unforeseen and unintended consequence.

(d) The incident is best characterized as an accident. The falling of the tree was not a foreseeable outcome of the demolition activity. There is no indication that the applicants could have reasonably anticipated this specific consequence. Accidents, by their nature, are unforeseen and unintentional, and the sequence of events leading to the death of Harinand Jaiswal aligns with this characterization.

(e) The applicants became aware of their implication in the case only after the issuance of non-bailable warrants and proceedings under Section 83 Cr.P.C. initiated by the Learned Chief Judicial Magistrate, Lucknow. The summons were issued to incorrect addresses, causing further procedural irregularities. The applicants' lack of prior knowledge and involvement in the incident, coupled with these anomalies, underscores the necessity of a detailed judicial review, both of them were students and were unaware about the alleged incdient.

(ii) Misapplication of Legal Provisions:

(a) The FIR and subsequent chargesheet do not invoke Section 34 (Acts done by several persons in furtherance of common intention) or Section 149 IPC (Every member of unlawful assembly guilty of offense committed in prosecution of common object), which would typically be relevant in cases involving multiple accused. This omission indicates that the prosecution's case lacks the necessary legal foundation to substantiate the aplicants' involvement under the claimed sections.

26. Thus, given these considerations, it is clear that the applicants have been wrongfully implicated. The evidence does not support their involvement in any crime under Section 304 IPC or Section 3 of the Prevention of Damage to Public Property Act. The circumstances point towards an accidental death rather than a culpable homicide, and the applicants' names appear to have been added without substantial evidence or just cause.

27. Further, learned Chief Judicial Magistrate, Lucknow has failed to make an enquiry on fact which is mandatory before issuing a summoning order. On this ground alone the proceedings as also the summoning order dated 30.03.2016 as well as the orders dated 11.01.2018 and 11.07.2018 against the applicants appear to be against the settled prepositions of law.

28. Further, while passing the summoning order dated 30.03.2016; no reason has been assigned by learned Chief Judicial Magistrate, Lucknow. The said order does not even mention the content of the FIR and nature of allegation and thus, it reflects that learned Chief Judicial Magistrate, Lucknow has not applied its mind while summoning the applicants to face trial and he has failed to enquire even briefly the question as to whether any culpability be imputed to the applicants or other accused persons.

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

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

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

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

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

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

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

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

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

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

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

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he

has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

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

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

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

13. Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinize whether the allegations made in the complaint proceeding meet the basic ingredients of the offence; whether the concept of territorial jurisdiction is satisfied; and further whether the accused is really required to be summoned. This has to be treated as the primary judicial responsibility of the court issuing process.

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

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

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

under an order of a Magistrate within the purview of Section 155(2) of the Code;

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

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

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

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

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

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

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

37. Thus, in view of the law laid down by the Hon'ble Supreme Court and in light of the observations and discussions made above and keeping in view the facts and circumstances of the case, and from the perusal of the record, the impugned summoning and cognizance order dated 30.03.2016 and consequential orders dated 11.01.2018 and 11.07.2018 passed by learned Chief Judicial Magistrate, Lucknow and charge sheet dated 13.07.2015 and the entire proceeding in Criminal Case No.16768 of 2016; State vs. Prabhat Agarwal & Others, Case Crime No.224 of 2014 under Section 304 I.P.C. and Section 3 of Prevention of Damage to Public Property Act are liable to be quashed as the story set up by the police in the FIR cannot be believed inasmuch as it does not appeal to reason. When the police personnel saw some illegal activity i.e.

demolition of wall is done by the accused, no one prevented them, instead it appears that they remained there as spectators and a 20 years old *peepal* tree would not fall down if an adjacent wall is being demolished. Further, there was no intention on the part of the accused-applicants to cause any danger to anybody and even if it is believed that a tree falls down on the road and one passer by sustains injury(ies), it would be an accident and cannot be a case under Section 304 IPC. and also taking into account the role of the police, allegations in the FIR and the death of the deceased occurred because of falling of *peepal* tree on the deceased demonstrates that no knowledge can be attributed to the accused that the tree would fall on a particular direction where a passer-by would be passing through the road at that particular time. The police were present when the accused were demolishing the wall. It was incumbent upon them to prevent the accused if there was any illegal activity. From the perusal of the FIR, it appears that the police did not take any action to prevent demolition of the wall.

38. Further, in the present case learned Chief Judicial Magistrate, Lucknow has failed to apply his judicial mind to the facts of the case and the law applicable thereto while summoning the applicants and issuing Non-bailable warrants, the Chief Judicial Magistrate has not examined the nature of allegations made in the FIR and the evidences both oral and documentary in support thereof.

39. Accordingly, the the impugned summoning and cognizance order dated 30.03.2016 and consequential orders dated 11.01.2018 and 11.07.2018 passed by learned Chief Judicial Magistrate, Lucknow and charge sheet dated 13.07.2015 and the entire proceeding in Criminal Case No.16768 of 2016; State vs. Prabhat Agarwal & Others arising out of Case Crime No.224 of 2014 under Section 304 I.P.C. and Section 3 of Prevention of Damage to Public Property Act pending in the court of Chief Judicial Magistrate, Lucknow are hereby ***quashed.***

40. For the reasons discussed above, the instant application under Section 482 Cr.P.C. filed by the applicants is allowed in respect of the instant applicant, namely-Vivek Singh @ Monu and Mohd. Danish @ Mohd. Danish Azad.

41. Office is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

42. No order as to cost(s).

(2024) 5 ILRA 2045
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 2828 of 2013

Waris Ali ...Applicants
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Neeraj Kumar, Ambrish Singh Yadav, Amit Jaiswal Ojus Law, Gaurav Saxena, Juhi Saxena, Lalla Chauhan, Rajni Saxena, Rishi Saxena, Sheena Saxena, Tanveer Ahmad Siddiqu

Counsel for the Opposite Parties:
G.A., Ratnesh Chandra

Criminal Law - Indian Penal Code, 1860 - Section 447-Applicant was one of the Director of a company-the said company sold a land to another company –Mr. Qazi Ajmal Hussain is a common link in both the company as he is one of the director in both the companies-after the land was sold to another company-Applicant and his company had no concern with the said land-impugned F.I.R. alleged that Qazi Ajmal Hussain was carrying out construction on the said land against the approved map by breaking the seal-Applicant also implicated for violation of sec. 447 I.P.C.-Applicant was not the owner of the said plot-no evidence to show that notice issued u/s 441 I.P.C. by the complainant had been served on the accused-unless mandatory notice served-the civil trespass could not get converted into a criminal trespass-could not be convicted u/s 447 I.P.C.-filing charge sheet against Applicant is a serious abuse of process of the Court.

Application u/s 482 Cr.P.C. allowed. (E-9)

List of Cases cited:

1. Sundar Babu Vs St. of T.N.-Criminal Appeal No. 773 of 2003

2. St. of Har. Vs Bhajan Lal 1992 SCC(Cr.) 426

3. Lalankumar Singh & ors. Vs St. of Mah. reported in 2022 SCC Online SC 9 1383

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

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

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

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

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

9. M/s Pepsi Food Ltd. & anr. Vs Special Judicial Magistrate & ors.: 1998 (5) SCC 749

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

1. Heard Sri Sudeep Seth, learned Senior Advocate assisted by Sri Tanveer Ahmad Siddiqui and Sri Amit Jaiswal, learned counsel for the applicant, Sri Ashok Kumar Singh, learned A.G.A.-I for the State Opposite Party No.1 and Sri Ratnesh Chandra, Advocate alongwith Ms. Mansi Singh, learned counsel for the respondent no.2 i.e. Lucknow Development Authority.

2. The instant application under Section 482 Cr.P.C. has been filed with a prayer to quash the Charge Sheet of the Case Crime No.8/2012, under Section 447 I.P.C., Police Station Mahanagar, District Lucknow pending before the learned Additional Chief Judicial Magistrate-IV, Lucknow. Further, in the rejoinder affidavit, summoning order dated 15.05.2012 has also been challenged alongwith the entire proceedings in pursuance thereof. 3. On 04.01.2024, a Co-ordinate Bench of this Court has passed the following order:-

"1. Heard Sri Sudeep Seth, learned Senior Advocate, assisted by Sri Tanveer Ahmad Siddiqui and Sri Amit Jaiswal, learned counsel for petitioner and Sri Aniruddh Kumar Singh, learned AGA-I for the State as well as Sri Ratnesh Chandra, learned counsel for opposite party no.2.

2. Learned counsel for the petitioner has vehemently submitted that the investigation has not been conducted by the police properly inasmuch as the petitioner departed from Lucknow (India) to Jeddah (Saudi Arabia) on 19.04.2012 and returned from there on 16.05.2012 as copy of passport has been enclosed as Annexure No.9 to the petition, which indicates those facts. However, the statement of the petitioner is said to have been recorded by the police on 22.04.2012

indicating therein that the petitioner appeared before the police agency and recorded his statement at Lucknow. Sri Seth, learned Senior Advocate, has stated that this cannot be possible in any manner that a person concerned is at abroad from 19.04.2012 to 16.05.2012 but has recorded his statement on 22.04.2012. The specific recital to this effect has been given not only in the petition but also in the rejoinder affidavit, which was filed on 30.10.2023 to the counter affidavit of the LDA. In the rejoinder affidavit, typed copy of the case diary has been enclosed, which clearly shows that statement of the petitioner has been recorded at Lucknow on 22.04.2012.

3. On being confronted the learned AGA as to how statement of the petitioner could have been recorded at Lucknow on 22.04.2012 when he was out of India from 19.04.2012 to 16.05.2012, learned AGA prays for and is granted two weeks and no more time to file counter affidavit/ short counter affidavit replying the contents of the petition as well as of the rejoinder affidavit.

4. It is expected that copy of counter affidavit/ short counter affidavit shall be provided to the learned counsel for the petitioner on or before 20.01.2024. Thereafter, a week's time is given to learned counsel for the petitioner to file rejoinder affidavit.

5. List on 31.01.2024 within top ten cases.

6. It is made clear that this case shall not be adjourned on the next date.

7. Interim order, if any, shall continue till the next date of listing. "

4. Despite the aforesaid order, learned A.G.A.-I for the State has not filed counter affidavit till date, as such, this Court has no other option but to proceed further for final argument.

5. Learned Senior Counsel for the applicant submitted that the applicant was one of the Director of the Company e-Construction Solutions Pvt. Limited situated at e-Chamber, near ISRO Space Center, Kursi Road, Lucknow which was duly registered under the Companies Act, 1956. The said company consisted of three Directors including the applicant and the other two directors of the company, namely, Mr Qazi Azmal Husain S/o Qazi Akhtar Husain and Mr Altaf Husain S/o Mr Ashfaq Husain.

6. Learned Senior Counsel further submitted that the said company i.e. e-Construction Solutions Pvt. Ltd. purchased a piece of land measuring about 7074 sq. feet from one Mr. Shyam Kapoor S/o Mr. N.N. Kapoor by paying a consideration of Rs.56,00,000/ - (Rs Fifty Six Lakhs only) through Registered Sale Deed executed on 23.09.2005. Thereafter, on 12-03-2010, the said company, under the signature of all three Directors, sold the said piece of Land for Rs 86,98,000/- (Rs Eighty Six Lakhs Ninety Eight Thousand only) to another company i.e. M/s Mega Infra Developers India Pvt. Ltd, which was also duly registered under the Companies Act, 1956 and consisted of only two Directors, namely, Mr. Qazi Ajmal Husain S/o Qazi Akhtar and Mr. Rajendra Kumar Verma S/o Ramuggar Verma. However, there is no relation between the two companies but only the common link i.e. Mr. Qazi Ajmal Husain, who is one of the Director in both the companies.

7. Learned Senior Counsel further submitted that after the said piece of Land was sold to M/s Mega Infra Developers India Pvt. Ltd, the e-Construction Solutions Pvt. Ltd had no concern with the said piece of Land, however, upon the statement dated

15.01.2012 given by Mr. Rakesh Kumar Singh, Assistant Engineer, Zone 11, LDA, who is also impleaded as Opposite Party No. 2, the said case crime was registered with allegations that Qazi Ajmal Hussain, Director e-Constructions, was carrying out construction on C-822 Mahanagar, Lucknow against the approved map, therefore, it was sealed on 30.09.2011 and when it was checked again on 09.01.2012, it was found that the construction continued after breaking the seal.

8. Learned Senior Counsel further submitted that investigation was carried out by the concerned Investigating Officer and after concluding the investigation, he filed the charge sheet on 22.04.2012.

9. Learned Senior Counsel further submitted that to the utter surprise of the applicant, the concerned Investigating Officer in the said charge sheet shown to have recorded the statement of the applicant on 22.04.2012 at Police Station Mahanagar, District Lucknow whereas on the contrary, the applicant was not even in the country when the said statement of the applicant had been shown to have been recorded as the applicant left the country for Jeddah (Saudi Arabia) on 19.04.2012 and came back on 16.05.2012 to India which is evident from the records of the Passport of the applicant, the same is also apparent from copy of applicant's passport with visa stamp, which is annexed as annexue no.9 to the affidavit filed alongwith the application under Section 482 Cr.P.C. Thus, learned Senior Counsel submitted that the applicant has been falsely implicated in the said case crime number and the entire investigation shown to have been done by the concerning Investigating Officer seems to be manufactured and sham and is not tenable in the eyes of law. The statement dated 22.04.2012 is being reproduced hereunder:-

"बयान अभियुक्त वारित अली पुत्र स्व० आकि अली नि० बी-77 निराला नगर थाना हसनगंज लखनऊ ने बदरियाफ्त पूछने पर बताया कि भूखण्ड तंख्या ती-822 ते० जी० महानगर को मैने व मेरे दो पार्टन काजी अजमत हुसैन व अल्ताफ हुसैन द्वारा ख्य किया गया है। उक्त भूखण्ड पर हम तीनो लोगों द्वारा फ्लैट का निर्माण किया गया है। हम लोगों द्वारा एल०डी०२० से नक्शा पात कराया गया है। किन्तु थौडा बहुत कभी नक्श के विपरीत हो गया है जिसके सम्बन्ध में हम लोगों की बात एल०डी०ए० से तमन पुल्कि जमा करने की चल रही है। शीघ्र ही तय पुल्क जमा करा दिया जायेगा। यही मेरा बयान है।"

10. Learned Senior Counsel further submitted that the applicant is an innocent person, who has been falsely implicated in the said case crime number, having no relation with the owner of the said plot i.e. M/s Mega Infra Developers Pvt. Ltd. The company, M/s Mega Infra Developer Pvt. Ltd has neither been implicated as accused nor included in the charge sheet.

11. Learned Senior Counsel further submitted that the Hon'ble High Court appreciated the aforesaid fact and granted absolute stay on the proceeding of the said case crime number vide its order dated 14.06.2013, which is being reproduced hereunder:-

"Sri Nadeem Murtaza accepts notice on behalf of respondent no.2 who prays for and is granted six weeks time to file counter-affidavit.

List thereafter.

Meanwhile, further proceedings of Case No. 792 of 2012, pending in the court of Additional Chief Judicial Magistrate-IV, Lucknow, shall remain stayed. "

12. Learned Senior Counsel further submitted that Investigating Officer had also recorded statement under Section 161 Cr.P.C. of Mr. V.C. Zaria, who is another engineer, Zone 11, LDA which is corroborating the above mentioned statement of Mr. Rakesh Kumar Singh. As per statement of Mr. Rakesh Kumar Singh, following brief facts arises:-

i) He found that Qazi Ajmal Husain S/o Qazi Akhtar Husain, Director M/s e-Constructions Solution Pvt. Ltd., situated at e-chambers near ISRO Space Center, Kursi Road, Lucknow was illegally constructing building on plot of land no. C-822, Sector -C, Mahanagar, Lucknow measuring about 7074 sq. feet against the approved plan of L.D.A.

ii) Thus, the Police stopped the construction work, which was being illegally done according to prosecution by Qazi Ajmal Husain and on 30.9.2011 sealed the same.

iii) According to prosecution, Qazi Ajmal Husain was again found on 09.01.2012, resuming the construction work against the law by breaking the seal and defying the orders.

iv) Thus, statement was recorded U/s- 161 Cr.P.C. by the Investigating Officer of Police Station Mahanagar, District Lucknow on account of complaint of the Informant, Mr. Rakesh Singh against Qazi Ajmal Husain at Mahanagar Police Station, District- Lucknow.

13. Learned Senior Counsel further submitted that accused Qazi Ajmal Husain S/o Qazi Akhtar Husain, Director M/s e-Constructions Solution Pvt. Ltd. appeared before the Police Station Mahanagar, District Lucknow and Investigating officer has recorded his statement under Section 161 Cr.P.C. As per his statement, following facts arises:-

i) He alongwith his two other partners of the M/s e-Constructions Solution Pvt. Ltd i.e. (1) Waris Ali S/o Late Ashiq Ali and (2) Altaf Husain S/o Mr. Ashfaq Husain bought the plot of land no. C-822, Sector -C, Mahanagar, Lucknow measuring about 7074 sq. feet jointly.

ii) All the three directors of the company jointly decided to construct flats on the plot of land and thus they submitted an application to L.D.A. for the approval of the plan and map of the construction.

iii) Some construction was slightly in contravention to the approved plan and thus they were trying to resolve the matter by bringing the matter in front of L.D.A and submission of the compounding fees.

iv) The accused assured of submitting the compounding fees as soon as possible.

14. Learned Senior Counsel further submitted that according to the Investigating Officer (R. R. Kushwaha), Mr. Waris Ali S/o Late Ashiq Ali (applicant) R/o B-77, Nirala Nagar, District-Lucknow, Uttar Pradesh during investigation on 22.04.2012 stated :-

i) He along with his two other Partners of the M/s e-Constructions Solution Pvt. Ltd i.e. (1) Waris Ali S/o Late Ashiq Ali and (2) Altaf Husain S/o Mr. Ashfaq Husain bought the plot of land no. C-822, Sector-C, Mahanagar, Lucknow measuring about 7074 sq. feet jointly.

ii) All the three directors of the company jointly decided to construct flats on the plot of land and thus they submitted an application to L.D.A. for the approval of the plan and map of the construction.

iii) Some construction was slightly in contravention to the approved plan and thus they were trying to resolve the matter by bringing the matter in front of L.D.A and submission of the compounding fees.

iv) Negotiation to reduce the compounding fees was going on, and after deciding the exact amount, the fee will be submitted to L.D.A.

15. Thus, learned Senior Counsel submitted that the above noted facts clearly depicts that the applicant is not the owner of the plot of land no. C-822, Sector -C, Mahanagar, Lucknow measuring about 7074 sq. feet and also is not a party to any plan of construction of flat on the above mentioned plot of land with Qazi Ajmal Husain, as such, the facts and statements recorded by the Investigating Officer of Mahanagar Police Station District - Lucknow are false on the pretext of the absence of the applicant i.e. Waris Ali S/o Late Ashiq Ali.

16. Learned Senior Counsel further submitted that it is pertinent to mention here that the prime accused Qazi Ajmal Husain concealed the facts of selling the above plot of land on 12.03.2010 to M/s Mega Infra Developers India pvt. Ltd. through its director Rajendra Kumar Verma and falsely implicated the applicant as the owner of the land by way of the earlier sale deed dated 23.09.2005.

17. Learned Senior Counsel further submitted that in the case of **Sundar Babu versus State of Tamil Nadu; Criminal Appeal No. 773 of 2003**, Hon'ble the Supreme Court laid down the conditions/circumstances for quashing of F.I.R. relying on the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426**. The grounds were as follow:-

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

b) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Sec.156(1) of the Code except under an order of a Magistrate within the purview of Sec. 155(2) of the Code.

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

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

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

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

redress for the grievance of the aggrieved party.

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

18. Learned Senior Counsel further submitted that this is a fit case for quashing the charge sheet because due to legal defect, in filing of charge sheet against applicant, same is not maintainable and is liable to be quashed in exercise of inherent powers of this Court under Section 482 Cr.P.C. to check and prevent abuse of process of the Court alongwith entire proceedings of the case.

19. On the other hand, learned A.G.A.-I for the State Opposite Party No.1 as well as learned counsel for the opposite party no.2 have vehemently opposed the submissions advanced by learned counsel for the applicant and have submitted that the applicant has nowhere pointed out any abuse of process of Court by virtue of which he could knock the door of this Hon'ble Court. A clear case of violation of Section 447 I.P.C. is made out against the applicant for which the trial is to be conducted before the learned trial court and the applicant would be having all the opportunities to contest the case before it. The applicant was raising unauthorized construction due to which the property in question was sealed in the year 2011 and the applicant after breaking the seal in an illegal and unauthorized manner, started the construction, therefore, the F.I.R. under appropriate Section was lodged against him. Thus, a criminal case is made out against the applicant for violation of Section 447 I.P.C., hence, the charge sheet has rightly been filed against him. The applicant is trying to raise factual dispute in the present case and, as such, the present application under Section 482 Cr.P.C. is liable to be dismissed.

20. After considering the entire facts and circumstances of the case as well as after considering the arguments as advanced by learned counsel for the parties, this Court finds it appropriate to discuss some judgments which have been pronounced by Hon'ble the Supreme Court of India.

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

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

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is

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

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

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

22. Further, Hon'ble the Supreme Court of India has also provided guidelines in case of State of **Haryana Vs. Bhajan Lal reported in 1992 Supp (1) SCC 335** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in specific conditions, which have already been discussed above in the contention of learned counsel for the applicant.

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

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

25. In **M/s Pepsi Food Ltd. and another Vs. Special Judicial Magistrate and others: 1998 (5) SCC 749,** Hon'ble Apex Court has observed:

"Summoning of an accused in a criminal case, is a serous matter. Criminal law can not be set into motion as a matter of course. It is not that the complainant has

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

26. Further, Section 441 I.P.C. provides for a civil trespass getting converted into criminal trespass on the service of the notice on the trespasser to vacate the property. There is no evidence to show that the notice issued under Section 441 I.P.C. by the complainant had been served on the accused. unless the notice had been served, the civil trespass could not get converted into a criminal trespass. The accused could not be convicted under Section 447 I.P.C.

27. In the above facts and circumstances, the applicant cannot be termed as trespasser nor he can be tried under the provision of Section 447 I.P.C., because no offence under that section is made out against the applicant. Since notice under amended Section 441 I.P.C. is mandatory requirement but the same has not been completed, because no notice under Section 441 I.P.C. is ever sent to applicant. Due to non compliance of this mandatory provision, offence of *"criminal trespass"* which has been defined in Section 441 I.P.C. has not been made out, therefore, charge sheet filed against applicant under Section 447 I.P.C. is legally not sustainable.

28. For proper appreciation of the rival arguments raised on behalf of parties, amended Section 441 and 447 I.P.C. are of vital importance and the same are reproduced hereinbelow :-

"441. Criminal trespass.- *Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence.*

Or, having entered into or upon such property, whether before or after the coming into force of the Criminal Law (I.P. Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property, or its possession or use ***when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice, is said to commit "criminal trespass"*** *- Uttar Pradesh Act No. 31 of 1961."*

(emphasis by the Court)

"Punishment for criminal trespass.

447. *Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or*

with fine which may extend to five hundred rupees, or with both."

29. It is quite clear from the perusal of above amended Section 441 I.P.C. that any person entered into possession of any property of another person before or after coming into force of the criminal law (U.P. Amendment Act, 1961), with the intention to take unauthorised possession or making unauthorised use of such property and fails to withdraw from such property or its possession or use in compliance of the written notice of another person duly served upon him by the date specified in the notice as said to committed "criminal trespass".

30. Admittedly, in this case no written notice as specified in the amended Section 441 I.P.C. to withdraw from such property or its possession or use of the land alleged to be of sealed by the Lucknow Development Authority i.e. opposite party no. 2 has been served on the applicant, therefore, there is no occasion for the applicant to comply with such notice and vice-versa failing to comply with the notice. As such no offence of "Criminal trespass" can be said to be committed. Overlooking these facts, charge sheet has been filed under Section 447 I.P.C. against the applicant, which is bad in the eyes of law. The accused cannot be punished for the offence which has actually not been committed by him.

31. In the above facts and circumstances, this Court is of the view that filing of charge sheet under Section 447 I.P.C. against the applicant is a serious abuse of process of the Court which must be prevented. Because on the basis of such legally defective charge sheet there is no possibility to end the case in conviction of the applicant and whole exercise before the learned Trial Court will be mere wastage of time and resources in such futile exercise.

32. Even in the instant case, there is nothing in the summoning order to show that the Magistrate concerned perused the material available on record before passing summoning order. Hence the summoning order is bad in the eyes of law and resultantly it is not sustainable as the learned Magistrate failed to look into the oral as well as documentary evidence before the impugned order was passed.

33. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and also with the assistance of the aforesaid guidelines and keeping in view the nature and gravity and the severity of the offence, it deems proper and meet to the ends of justice that the proceeding of the aforementioned case is liable to be quashed.

34. Accordingly, the present 482 Cr.P.C. application stands **allowed**. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the submission made by learned counsel for the parties, the Charge Sheet of the Case Crime No.8/2012, under Section 447 I.P.C., Police Station Mahanagar, District Lucknow pending before the learned Additional Chief Judicial Magistrate-IV, Lucknow as well as summoning order dated 15.05.2012 alongwith entire proceedings of the case are hereby **quashed** so far as it relates to the instant applicant, namely, Waris Ali.

35. No order as to the costs.

36. Office is directed to transmit a copy of this order to the learned trial court

concerned immediately for necessary compliance and information.

(2024) 5 ILRA 2055
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 3261 of 2017

Azim Premji ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Karunanidhi Yadav

Counsel for the Opposite Parties:
Govt. Advocate

Complaint proceedings- Applicant is chairman and managing director of Wipro Ltd. – has no interest in any shareholdings or managerial control over the M/s G4S Secure Solutions (India) Pvt. Ltd. –no administrative control over G4S –its an agency to provide security services-task of security services is outsourced to G4S –G4S is accused no.2-allegation-during inspection by Labour Enforcement Officer certain alleged violation of law were discovered-notices were allegedly issued to Wipro company and G4S-no notice was received ever by the establishment of the company and the Applicant-imperative for the learned CJM to examine the complaint to ensure that the Directors or other senior officers of the company who have been named in the complaint are vicariously liable for the act complained of- impugned order and complaint proceedings are mechanical-quashed.

Application allowed. (E-9)

List of Cases cited:

1. Sunil Bharti Mittal Vs CBI, (2015) 4 SCC 609

2. Shiv Kumar Jatia Vs St. of NCT of Delhi : (2019) 17 SCC 193

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

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

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

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

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

8. St. of Haryana Vs Bhajan Lal reported in 1992 Supp (1) SCC 335

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

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

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

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

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

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

1. Heard Shri Karunanidhi Yadav, learned Counsel for the applicant, Shri Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1.

2. As per office report dated 20.03.2024, wherein it has been stated that the Chief Judicial Magistrate, Lucknow has sent a report dated 08.06.2017 stating therein that notice upon opposite party No.2 was served but in spite of service of notice, no counsel has put in appearance on behalf

of the opposite party No.2 and the case was taken up for final hearing in the revised call.

3. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicant, namely-Azim Premji seeking quashing of the complaint proceedings pending before the Chief Judicial Magistrate, Lucknow in Compliant Case No.2886 of 2016; State of Uttar Pradesh vs. Azim Premji & Another, and the summoning order dated 03.09.2016 and the order dated 08.02.2017 vide which bailable warrant has been issued against the applicant.

4. Learned counsel for the applicant submitted that the applicant is the Chairman and Managing Director of Wipro Ltd. (Company) and has no interest in any shareholdings or managerial control over the M/s G4S Secure Solutions (India) Private Limited. Further, the applicant being in the Board of Directors of Wipro has nothing to do with the day-to-day operations of the Wipro office at Lucknow. The applicant has no administrative control over G4S which is an agency which provides security services.

5. Learned counsel for the applicant further submitted that vide agreement dated 18.03.2015, the company entered into an agreement with M/s G4S Secure Solutions (India) Pvt. Ltd., the service provider, to provide security services to the company. In the said agreement, it has categorically been provided under clause 2 that the service provider i.e., M/s G4S Secure Solutions (India) Pvt. Ltd. agrees to render all services there under as a service provider and any other person employed or engaged by the service provider to perform the services will act and will be considered for all purposes as an independent contractor to Wipro and not as an employee and agent of Wipro.

6. Learned counsel for the applicant further submitted that the facts in brief are that the present applicant is the Chairman and Managing Director of Wipro Limited (Company), a globally renowned Company in Information and Technology and Information Technology enabled Services domain. Wipro Group of Companies (Wipro Group) has varied other legal entities and has also diversified into various other endeavors such as Consumer Products, Lighting, Infrastructure Engineering and other related services.

7. Learned counsel for the applicant further submitted that Wipro Group is known as a Model employer with multiple employee oriented policies. Wipro Group employs highly ethical practices and conducts its business strictly on ethical and lawful principles.

8. Learned Counsel for the applicant further submitted that for providing security services at its various facilities across India, the Company engages the services of varied third party security agencies. One of such security agencies engaged by the Company known as G4S Secure Solutions India Private Limited (hereinafter referred as 'G4S') is accused no.2 in the current Complaint. The task of security services is outsourced to G4S, which is an entirely separate legal entity. It is merely an act of availing services from a specialized agency, and there is no commonality of Freight on Road management between the Company and G4S. The present applicant has no concern with, and does not have any interest in, or control over G4S, which is a separate and distinct legal entity.

9. Learned counsel for the applicant further submitted that from the perusal of the Complaint dated 26.08.2016 made by opposite party No.2, it appears that during an inspection of G4S by Labour Enforcement officer i.e. opposite party No.2, on 02.06.2016, certain alleged violations of law were discovered and notices were allegedly issued to the Wipro Company and G4S. It is the specific case of the applicant that at no point of time, was any notice was ever received by any establishment of the Company, and least of all, by the applicant herein. The applicant is a permanent resident of Bengaluru, Karnataka State, and hardly ever visits Lucknow even in his official capacity. Being the Chairman and Managing Director of the Company, the applicant is not involved at all in day to day functions of the office of the Wipro Company situated at Lucknow. No direct executive function is exercised by the applicant for the office of the Wipro Company at Lucknow.

He further submitted that as stated above, no notice of any alleged violation was received by any office of the Wipro Company. The Wipro Company became aware of the complaint only when a constable of U.P. Police visited the Company's Lucknow office on 17.04.2017 and stated that he was carrying a bailable warrant of arrest of Mr. Azim Premji i.e. the applicant. It was this visit that prompted the functionaries of the Wipro Company to make immediate inquires from the court of learned Chief Judicial Magistrate, Lucknow and also from the Labour Enforcement Officer and it was discovered that the alleged violation does not in any manner relate to the Wipro Company or the present applicant.

10. Learned counsel for the applicant further submitted that no offence(s) as alleged in the complaint are made out against either the Wipro Company or against the applicant. It is also the case of the applicant that the actual employers in question i.e. G4S are not under the supervision and management of the applicant, and he has no control whatsoever, over their affairs and activities. It is also submitted that G4S, being the actual employers in question, there is no justification for issuing summons and bailable warrant against the applicant.

11. Learned counsel for the applicant further submitted that no vicarious liability for the alleged violations in question vests upon the applicant. The cryptic prosecution story is false, fabricated, baseless and unfounded.

12. Learned counsel for the applicant further submitted that the allegations leveled against the applicant does not inspire confidence and the impugned complaint has been lodged with an oblique motive for collateral purposes to harass and pressurize the applicant and further, learned court of Chief Judicial Magistrate, Lucknow also failed to apply its judicial mind while summoning the applicant, as there was no sufficient material to summon and issue bailable warrant against the applicant for the alleged offences.

13. Learned Counsel for the applicant further submitted that impugned summoning order dated 03.09.2016 and order dated 08.02.2017 issuing bailable warrant against the applicant are not sustainable in the eyes of law, as the same have been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned summoning order dated

03.09.2016 and order dated 08.02.2017 issuing bailable warrant against the applicant have been passed by the Chief Judicial Magistrate concerned without assigning any reason, therefore the same are liable to be quashed by this Court alongwith the proceedings of the aforesaid complaint case.

14. Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1 has opposed the argument advanced by learned Counsel for the applicant and submitted that the summoning order dated 03.09.2016 and bailable warrant dated 08.02.2017 are rightly passed as prima facie offence is made out against the applicant and the trial court has rightly passed impugned summoning order as well as the bailable warrant after considering the material placed on record, thus, the applicant is not entitled for any relief by this Court and the present application may be rejected.

15. After considering the arguments advanced by learned counsel for the applicant and learned A.G.A-I for the State-opposite party No.1 and after perusal of the record, materials and arguments presented, this Court finds that the summoning order dated 03.09.2016 and the subsequent bailable warrant issued on 08.02.2017 against the applicant, lacks necessary legal and factual foundation. There appears force in the argument of learned Counsel for the applicant that the applicant has no administrative control over the functioning of G4S, he could not have been summoned for the alleged violation of the Equal Remuneration Act, 1976 (hereinafter referred to as "the Act") under which the complaint has been preferred by opposite party No.2. Moreover, the applicant was never been notified of the said proceedings nor any notice was ever served at any office of Wipro Company and since the said outsourcing of services for providing security at Wipro Office at Lucknow has been given to G4S, the applicant cannot be made accused in case of any alleged violation of the provisions of the Act in so far as security personnel are concerned.

16. Further, learned Chief Judicial Magistrate, Lucknow has failed to ensure the compliance of Section 202 Cr.P.C., where it has been provided that if an accused resides outside the jurisdiction of the court concerned, an enquiry on fact is mandatory before issuing a summoning order. On this ground alone the proceedings as also the summoning order dated 03.09.2016 as well as the order dated 08.02.2017 issuing bailable warrant against the applicant appear to be against the settled prepositions of law.

17. Further, while passing the summoning order dated 03.09.2016; and for that matter even registering of the complaint case, no reason has been assigned by learned Chief Judicial Magistrate, Lucknow. All what the summoning order dated 03.09.2016 states that the challan has been received on 03.09.2016 and the case be registered and the accused be summoned fixing 24.09.2016 as the next date for appearance of the accused. The said order does not even mention the content of challan and thus, it reflects that learned Chief Judicial Magistrate, Lucknow has not applied its mind while summoning the applicant to face trial and he has failed to enquire even briefly the question as to whether any culpability be imputed to the applicant or other accused persons.

18. It is further observed here that in the said agreement dated 18.03.2015

under Clause 2 and 4, it has been specifically provided that the service provider is responsible for paying all wages, salaries, provident funds, E.S.I.C. or any other statutory benefits under the applicable law and ordinary and necessary expenses of its agents or employees including, but not limited to, all applicable taxes and employee State Insurance. The relevant extracts of Clause 2 and Clause 4(h) are being reproduced hereinbelow:-

"2. Personnel :

Service Provider agrees that in rendering all services hereunder, Service Provider and any person employed or engaged by Service Provider to perform the Services will act and be considered for all purposes as an independent contractor to Wipro, not as an employee or agent of Wipro. In its capacity as an independent contractor, Service Provider agrees and represents the Service Provider:

(i) Has the right to control and direct the means and methods of performing the Services by itself and its agents or employees, subject to the general direction of Wipro;

(ii) Service Provider agrees not to represent itself as Wipro's agent for any purpose to any party unless specifically unauthorized to do so, in advance and in writing, and then for the limited purpose(s) stated in such authorization.

(iii) Service Provider shall provide with a replacement personnel within 30 days of Wipro raising request for such replacement.

4 Representations & Warranties

Service Provider warrants and represents to Wipro that;

h) Service Provider is responsible for paying all wages, salaries, P.F., E.S.I.C. or any other statutory benefits under the applicable law and ordinary and necessary expenses of its agents or employees including, but not limited to, all applicable taxes and employee State Insurance;"

19. Further, the complaint dated 26.08.2016 which has been instituted before learned Chief Judicial Magistrate, Lucknow is in a cyclostyled printed format which is bereft of any details and merely states that the applicant alongwith other accused i.e. Shri Sanjeev Pandey of M/s G4S Secure Solutions (India) Pvt. Ltd. has violated the provision of Section 8 of the Act together with Rule 6 of the Rules framed thereunder and that they were found guilty and consequently they may be prosecuted.

20. Further, on bare reading of complaint dated 26.08.2016, it is apparent that there was no objective material before learned Chief Judicial Magistrate, Lucknow to formulate an opinion for issuance of summoning order or even to register the complaint. It is thus, apparent that the registration of the complaint, the issuance of summoning order dated 03.09.2016 and the consequential issuance of bailable warrant vide order dated 08.02.2017 had been done in a mechanical manner sans application of mind whereas it has repeatedly been held that prior to the issuance of a summoning order it is imperative for learned Chief Judicial Magistrate to examine the complaint to ensure that the Directors or other senior officers of the company who have been named in the complaint are vicariously liable for the act complained of. It was also imperative for learned Chief Judicial Magistrate, Lucknow to ensure that there was sufficient incrementing evidence against the applicant coupled with criminal intent or the statutory regime attracts the

doctrine of vicarious liability. In the instant case, learned Chief Judicial Magistrate, Lucknow did not ascribe any incriminating role against the applicant nor was any statutory regime or vicarious liability invoked. As per the settled law, learned Chief Judicial Magistrate, Lucknow could not have issued process to the applicant under Section 204 Cr.P.C. and as such the entire complaint proceedings initiated against the applicant as well as summoning order dated 03.09.2016 and the order dated 08.02.2017 issuing bailable warrant against the applicant are without jurisdiction.

21. Further, the question which arises for consideration before this Court in the present case is that whether the applicant was liable for any offence even if the allegations in the complaint are taken on their face value to be correct in entirety. The Company is a body incorporated under the Companies Act. Vicarious criminal liability of its Directors and Shareholders would arise provided any provision exists in that behalf in the statute. The Statute must contain provision fixing such a vicarious liability. Even for the said purpose, it would be obligatory on the part of the complainant and the investigating agency to make requisite allegations and collect evidence in support thereof which would attract provisions constituting vicarious liability.

22. Futher, the Hon'ble Supreme Court also in the case of ***Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609*** while dealing with the issue of vicarious liability of the Officers, Directors, Managing Directors, Chairman of the Company was pleased to observe in paras- 42 to 44 and 48 to 50 of the aforesaid judgment, which read as under:-

"42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa.

Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

50. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (see SWIL Ltd. v. State of Delhi [(2001) 6 SCC 670 : 2001 SCC (Cri) 1205]). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (see Union of India v. Prakash P. Hinduja [(2003) 6 SCC 195 : 2003 SCC (Cri) 1314]). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."

23. The Hon'ble Supreme Court also in the case of ***Shiv Kumar Jatia Vs. State of NCT of Delhi : (2019) 17 SCC 193*** while dealing with vicarious liability of Managing Director of the Company was pleased to observe in paras-21 and 22 as under:-

"21. By applying the ratio laid down by this Court in Sunil Bharti Mittal [Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 : (2015) 2 SCC (Cri) 687] it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] this Court has

examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further held that statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

22. In the judgment of this Court in Sharad Kumar Sanghi v. Sangita Rane [Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781 : (2016) 1 SCC (Cri) 159] while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 CrPC. In the case on hand principally the allegations are made against the first accused company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is Accused 2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day-to-day affairs of the company. In the absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned."

24. Thus, an Officer, Director, Managing Director or Chairman of the Company can be made an accused along with the Company only if there is sufficient material to prove his active role coupled with criminal intent. Indian Penal Code does not contain any provision for vicarious liability. For Managing Director or Director to be accused and their implications in the offence allegedly committed on behalf of the company, when the accused is a Company, the complaint/ FIR or Charge-sheet must contain requisite allegations of commission of the offence by such individual(s).

25. It is further observed here that the applicant, a distinguished industrialist and the Chairman and Managing Director of Wipro Ltd., has consistently demonstrated a commitment to ethical business practices and social responsibility. Under his leadership, Wipro has not only thrived as a global leader in the IT industry but has also been at the forefront of numerous philanthropic initiatives aimed at improving education, healthcare, and environmental sustainability in India and beyond. In reflecting upon the character and contributions of the individual summoned before the court, it is imperative to consider the specifics of the case at hand and to also consider the broader context of the individual's life and work. This court recognizes the multifaceted nature of the applicant,

whose endeavors as both an industrialist and a philanthropist, has left an impeccable mark on society.

26. Further, the journey of an industrialist is often arduous, demanding an intricate balance of vision, risk-taking, and relentless pursuit of innovation. The applicant, namely-Azim permji has exemplified these qualities, fostering economic growth and creating employment opportunities that have significantly contributed to the prosperity of the community. His enterprise has not only driven industrial advancement but has also catalyzed ancillary development, uplifting the standard of living of many.

27. It is equally noteworthy that his commitment to philanthropy, a testament to their deep-seated belief in the interconnectedness of all individuals within the society. His philanthropic initiatives have spanned diverse fields such as education, healthcare, and environmental sustainability, reflecting a holistic approach to social responsibility. By investing in the betterment of the less privileged, he has demonstrated a profound understanding of the ethical imperative to share the fruits of success for the common good.

28. Philosophically, one might invoke the concept of "karma yoga" from the Bhagavad Gita, which espouses selfless action as a path to spiritual fulfillment. In applicant's life work, this Court observe a parallel to this ideal—a harmonious blend of personal success and altruistic service. Such a balance is not merely commendable but serves as an inspiration, reminding us that true greatness lies in the ability to transcend personal ambition for the welfare of others.

29. Futher, it is pertinent to note here that the applicant has no direct involvement in the day-to-day operations of Wipro's office in Lucknow or any managerial control over M/s G4S Secure Solutions (India) Pvt. Ltd., the external third-party vendor responsible for providing security services to Wipro. The contractual agreement dated 18.03.2015 between Wipro and M/s G4S Secure Solutions explicitly outlines that the security personnel are independent contractors, not employees or agents of Wipro. This agreement further clarifies that the responsibility for complying with all statutory requirements, including the payment of wages and other benefits, lies solely with the service provider.

30. Given these facts, the applicant's impeccable reputation as an industrialist who upholds the highest standard of corporate governance and his extensive philanthropic contribution should be taken into account. His involvement in the case appears to stem from a misunderstanding or misapplication of legal principles rather than any malafide intent or violation of the Equal Remuneration Act, 1976. The orders issued against him lacks substantive ground, as the applicant has no direct or indirect control over the alleged matter and in light of the applicant's distinguished career and substantial contributions to society, it is evident that the proceedings against him are unfounded and merit reconsideration. His exemplary record as an industrialist and philanthropist should serve as a testament to his integrity and the improbability of his involvement in any legal violations concerning the employment practices of an

independent contractor, thus, the impugned proceedings initiated against the applicant is nothing but an abuse of process of law.

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

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

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

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

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

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

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

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

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

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply

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

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

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

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

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

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

13. Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinize whether the allegations made in the complaint

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

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

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

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

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

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

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

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

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

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

38. In ***S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168***, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised*:-(i) to give effect an order under the Code, (ii)*

to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

39. Thus, in view of the law laid down by the Hon'ble Supreme Court and in light of the observations and discussions made above and keeping view the facts and circumstances of the case, and from the perusal of the record, the impugned complaint proceedings pending before the Chief Judicial Magistrate, Lucknow in Compliant Case No.2886 of 2016; State of Uttar Pradesh vs. Azim Premji & Another, and the summoning order dated 03.09.2016 and the order dated 08.02.2017 vide which warrant has been issued against the applicant are liable to be quashed as in the present case learned Chief Judicial Magistrate, Lucknow has failed to apply his judicial mind to the facts of the case and the law applicable thereto while summoning the applicant and issuing bailable warrant, the Chief Judicial Magistrate has not examined the nature of allegations made in the complaint and the evidences both oral and documentary in support thereof.

40. Accordingly, the **impugned complaint proceedings pending before the Chief Judicial Magistrate, Lucknow in Compliant Case No.2886 of 2016; State of Uttar Pradesh vs. Azim Premji & Another, and the summoning order dated 03.09.2016 and the order dated 08.02.2017 vide which bailable warrant has been issued against the applicant** are hereby **quashed.**

41. For the reasons discussed above, the instant application under Section 482 Cr.P.C. filed by the applicant is *allowed* in respect of the instant applicant, namely-Azim Premji.

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

43. No order as to cost(s).

(2024) 5 ILRA 2067
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 4223 of 2024

Monu Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sudhanshu S. Tripathi, Ritwika Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code,1860 - Section 294-Allegation-Police personnel got information-three persons performing obscene acts against the passing women of the area-Applicant got caught red-handed-FIR registered-mere performance of obscene act or indecent act is not sufficient-there must be a further proof establish that it was to the annoyance of others-"annoyance to others" prerequisite to invoke the provision-none of the females were examined to establish the alleged act-gross misuse of penal law-no criminal offence is made out-haste in filing charge sheet-within a week –proceedings quashed

Application allowed. (E-9)

List of Cases cited:

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

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

3. St. of Har. Vs Bhajan Lal reported in 1992 Supp (1) SCC 335

4. R.P. Kapoor Vs St. of Punjab, AIR 1960 S.C. 866

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

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

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

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

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

1. Heard Shri Sudhanshu S. Tripathi, learned Counsel for the applicant, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite parties and perused the entire material placed on record.

2. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicant,namely-Monu Kumar seeking quashing of the impugned summoning order dated 30.01.2024 passed by learned Civil Judge, Senior Division (F.T.C.) Unnao in Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.), arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and the impugned charge sheet no.204/2023 dated 24.12.2023 arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and also the entire as well as consequential proceedings of Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.) arising out of arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao pending in the court of learned Civil Judge, Senior Division (F.T.C.) Unnao.

3. Learned Counsel for the applicant submitted that the opposite party No.2 and his associate police personnel who were patrolling within their jurisdiction for prevention of crime and got information from the reliable informer in Korari Bazaar that three persons are doing obscene acts against the passing women of the area, wherefore the opposite party No.2 caught the Applicant red-handed and registered the F.I.R. bearing Case Crime No. 283 of 2024, under sections 294 IPC, at Police Station Achalganj, District Unnao on 17.12.2023 alleging therein that applicant was passing obscene comments on the females, who were passing by from Jumka Nala bridge.

4. Learned Counsel for the applicant further submitted that on perusal of arrest-cum-recovery memo, dated 17.12.2023, which reveals that despite the alleged incident having been taken place at a bridge connecting a busy road which had all access to the general members of public, there are no independent witnesses of the aforesaid arrest-cum-recovery memo. Moreover, the aforesaid arrest-cum-recovery proceedings have been conducted by the police in gross violation of provisions of section 100 and 165 Cr.P.C rendering the entire proceeding illegal and unworthy of any credit.

5. Learned Counsel for the applicant further submitted that on perusal

of the aforementioned FIR and arrest-cum-recovery memo which makes it clear that there was complete haste in proceeding against the applicant that within one and half hour of arresting the applicant, opposite party No.2 got the FIR registered without preparation of any site plan or making any effort to examine any of the independent eye-witnesses or examining any of passing by females against whom allegedly the applicant was passing of obscene comments.

6. Learned Counsel for the applicant further submitted that the applicant was immediately arrested alongwith other co-accused who happened to be his friends and consequently, he was enlarged on bail on the very same day which is evident from the perusal of entry no.5 of CD Parcha no.1, dated 17.12.2023. He further submitted that while being released on bail assurances were extended to the applicant from the police personnel that no further action will be taken against the applicant in connection with the alleged offence in question. Moreover, the applicant only became aware of the fact that instant case is pending against him is when summoning order was passed against him by the learned trial court.

7. Learned Counsel for the applicant further submitted that the investigation of the instant case has been conducted in a tainted, botched- up and hasty manner by the police merely in order to show up the good work and has proceeded to make out a false, fabricated and concocted case and has falsely implicated the applicant in the present case whereas the police has completely ignored the mandatory provisions of criminal law. The haste in finalizing the investigation in the instant case is evident from the fact that within a week after registration of the FIR, the impugned charge-sheet was filed wherein only the statement of members of police party on one day and on another day site plan was prepared and statement of the informant was recorded. He further submitted that neither any independent witness was examined nor any females were examined, who were being annoyed by the alleged obscene comments of the applicant.

8. Learned Counsel for the applicant further submitted that the statement of all members of police party and witness of arrest-cum- recovery memo, namely Head Constable Avjesh Singh, Constable Sunil Kumar, Lady Constable Gulistan and Lady Constable Pushpa Chauhan was recorded on 20.12.2023 under section 161 Cr.P.C, wherein they have verbatim reiterated the contents of the arrest-cum-recovery memo which creates substantial doubt on the veracity of their statement as well as the prosecution story which in itself is devoid of any credence.

9. Learned Counsel for the applicant further submitted that the statement of the Informant, i.e., opposite party No.2 was recorded on 24.12.2023 under section 161 Cr.P.C wherein, he has verbatim reiterated the contents of the arrest-cum-recovery memo which creates substantial doubt on the veracity of his statement as well as the prosecution story which in itself is devoid of any credence.

10. Learned Counsel for the applicant further submitted that the investigation has been conducted in a tainted manner, which is also evident from the fact that site plan of place of occurrence which is usually prepared at the earliest was the last thing done by the investigating

officer on 24.12.2023 between 11:00 am to 14:00 pm and on the same he went on to file the charge-sheet.

11. Learned Counsel for the applicant further submitted that the applicant is a bright undergraduate student studying at Rajkiya Mahavidyalaya, Unnao affiliated to Chhatrapati Sahu Ji Maharaj University, Kanpur and presently pursuing Bachelor of Arts course (Humanities and Social and in support of the same, college Identity Card, fee deposition receipt, 5th semester result, hall ticket of 5th Semester alongwith fifth semester examination schedule are being placed on record. He further submitted that the applicant is a bright student whose entire life and career is at stake, which will be ruined due to his false implication in the instant case. Moreover, at the time of registration of the FIR the applicant was merely 20 and half years of age and had no occasion to commit the alleged offence in question.

12. Learned Counsel for the applicant further submitted that the applicant is a resident of Korari Kalan and after taking his exam on 16.12.2023 had went to the house of his paternal-aunt (Bua) who resides at nearby village in Korari Khurd and while returning from there he was intercepted by the police personnel because he was doing tripling on motorcycle and thereafter, the applicant was arrested and falsely implicated in the instant case.

13. Learned Counsel for the applicant further submitted that the present case is a classic example wherein false allegations have been leveled by the opposite party No.2 with an ulterior motive to show up the police good work in his jurisdiction without caring for the disrepute it brings to the applicant and his family as well as harassment to the applicant is being put to because of all such serious allegations. Moreover, such cases not only bring disrepute but also cause harassment of an innocent person.

14. Learned Counsel for the applicant further submitted that even if all the allegations levelled against the applicant are prima facie viewed, the offence alleged to have been committed by the applicant is not made out since mere use of abusive, humiliating or defamative words by itself cannot attract an offense under section 294 of IPC. In order to bring home the charge under section 294 of IPC mere utterance of obscene words are not sufficient but there must be a further proof to establish that it was to the annoyance of others, which is completely lacking in the instant case.

15. Learned Counsel for the applicant further submitted that the applicant has neither directly nor indirectly induced or threatened or promised any person acquainted with the facts of the case so as to dissuade them from disclosing the facts before the court or any police officer.

16. Per contra, learned A.G.A-I for the State-opposite party has vehemently opposed the contentions made by learned Counsel for the applicant and submits that there was ample evidence against the applicant, who was present at the railway crossing at the time of incident and the police party in a very cautious manner nabbed him red handed, while he was creating nuisance in a public place and was passing obscene comments on the girls and ladies. Thereafter, the police has thoroughly conducted the inquiry against the applicant and has filed a charge sheet

against him considering the material on record, thus, he submits that the trial court has correctly took the cognizance of the charge sheet and has rightly summoned the applicant to face trial in the aforesaid case. He further submits that no interference by this Court is required in the matter and the present application being devoid of merit and substance is liable to be rejected.

17. I have heard learned Counsel for the parties.

18. On careful perusal of averments made in this application under Section 482 Cr.P.C. as well as after hearing the learned Counsel for the parties, the factual matrix discloses that the opposite party No.2 and his associate police personnel, who were patrolling within their jurisdiction for prevention of crime and got information from the reliable informer in Korari Bazaar that three persons were doing obscene acts against the passing women of the area, wherefore the opposite party No.2 caught the applicant red-handed and registered the F.I.R. bearing Case Crime No. 283 of 2024, under sections 294 IPC, at Police Station Achalganj, District Unnao on 17.12.2023 alleging therein that applicant was passing obscene comments on the females, who were passing by from Jumka Nala bridge, and on perusal of arrest-cum-recovery memo, dated 17.12.2023, which reveals that despite the alleged incident having been taken place at a bridge connecting a busy road which had all access to the general members of public, there is no independent witness of the aforesaid arrest-cum-recovery memo. Moreover, the aforesaid arrest-cum-recovery proceedings have been conducted by the police in gross violation of provisions of section 100 and 165 Cr.P.C. Further, opposite party No.2 got the FIR registered without preparation of any site plan or making any effort to examine any of the independent eye-witnesses or examining any of passing by females against whom allegedly the applicant was passing of obscene comments and while being released on bail assurances were extended to the applicant from the police personnel that no further action will be taken against the applicant in connection with the alleged offence in question. Moreover, the applicant only became aware of the fact that instant case is pending against him is when summoning order was passed against him by the learned trial court.

19. Further, on perusal of records, it appears that the investigation of the instant case has been conducted in a tainted, botched- up and hasty manner by the police merely in order to show up the good work and has proceeded to make out a false, fabricated and concocted case and has falsely implicated the applicant in the present case wherein, the police has completely ignored the mandatory provisions of criminal law. The haste in finalizing the investigation in the instant case is evident from the fact that within a week after registration of the FIR, the impugned charge-sheet was filed wherein only the statement of members of police party on one day and on another day site plan was prepared and statement of the informant was recorded and neither any independent witness was examined nor any females were examined, who were being annoyed by the alleged obscene comments of the applicant.

20. It is further observed here that the applicant is a bright undergraduate student studying at Rajkiya Mahavidyalaya, Unnao affiliated to

Chhatrapati Sahu Ji Maharaj University, Kanpur and presently pursuing Bachelor of Arts course (Humanities), whose entire life and career is at stake, which will be ruined due to his false implication in the instant case. Moreover, at the time of registration of the FIR the applicant was merely 20 and half years of age and had no occasion to commit the alleged offence in question.

21. Further, the trial court has failed to appreciate the fact that while filing the charge sheet, the Investigating officer has failed to comply with the mandatory provisions of criminal law and has passed the impugned summoning order 30.01.2024, which is nothing but an abuse of process of law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. Further the Hon'ble Supreme Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following

cases:- ***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.***

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

27. It is further observed there that the object and scope of the section 294 of IPC is intended to prevent an obscene or indecent act being performed in public to the annoyance of public at large. Section 294 I.P.C. is reproduced hereinunder:-

"Section 294 :Obscene acts and songs

Essential ingredients :

1. Doing of any obscene act in a public place, or

2. Anyone sings,recite or utters any obscene song,ballad or words in or near any public place

3. By such act annoyance is caused to a particular person or persons in general."

28. Thus, from the aforesaid, it is clear that mere performance of obscene or indecent act is not sufficient, but there must be a further proof establish that it was to the annoyance of others, thereby annoyance to others is essential to constitute an offence under this section. Moreso, when the said section says "annoyance to others" is a prerequisite to invoke the provision, then the issue of "obscenity or indecency per se" will not arise until or unless there is evidence on record to see that a person at a given time witnessing particular obscene act was actually annoyed or not. He further submitted that none of the female have been examined to establish that the alleged act of passing obscene comment upon the passing females have caused them annoyance and in absence of such evidence the impugned charge-sheet and summoning order are devoid of any merit and gross abuse of process of law.

29. Further, the instant case is a gross misuse of penal laws in particular and criminal law in general since no criminal offence is made out from the perusal of aforesaid facts and the impugned summoning order has been passed in an arbitrary manner without giving consideration to the material on record and lack of due application of judicial mind.

30. Thus, in view of the law laid down by the Hon'ble Supreme Court and in light of the observations and discussions made above and keeping view the facts and circumstances of the case, and from the perusal of the record, the impugned summoning order dated 30.01.2024 passed by learned Civil Judge, Senior Division (F.T.C.) Unnao in Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.), arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and the impugned charge sheet

no.204/2023 dated 24.12.2023 arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and also the entire as well as consequential proceedings of Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.) arising out of arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao pending in the court of learned Civil Judge, Senior Division (F.T.C.) Unnao and are liable to be quashed as the investigation of the instant case has been conducted in a tainted, botched- up and hasty manner by the police merely in order to show up the good work and has proceeded to make out a false, fabricated and concocted case and has falsely implicated the applicant in the present case wherein, the police has completely ignored the mandatory provisions of criminal law. The haste in finalizing the investigation in the instant case is evident from the fact that within a week after registration of the FIR, the impugned charge-sheet was filed wherein only the statement of members of police party on one day and on another day site plan was prepared and statement of the informant was recorded and neither any independent witness was examined nor any females were examined, who were being annoyed by the alleged obscene comments of the applicant.

31. Accordingly, the impugned summoning order dated 30.01.2024 passed by learned Civil Judge, Senior Division (F.T.C.) Unnao in Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.), arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and the impugned charge sheet no.204/2023 dated 24.12.2023 arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao and also the entire as well as consequential proceedings of Criminal Case No.141/2024 (State of U.P. vs. Sachin and Ors.) arising out of arising out of Case Crime No.283/2023 under Section 294 I.P.C., Police Station-Achalganj, District-Unnao pending in the court of learned Civil Judge, Senior Division (F.T.C.) Unnao are hereby quashed.

32. For the reasons discussed above, the instant application under Section 482 Cr.P.C. filed by the applicant is ***allowed*** in respect of the instant applicant, namely-Monu Kumar.

33. Office is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

34. No order as to cost(s).

(2024) 5 ILRA 2075
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 5228 of 2023

Kaushar Khan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Gibran Akhtar Khan

Counsel for the Opposite Parties:
G.A.

Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989-Section 3(1) (S)-Complaint filed-learned Magistrate without considering the material

available and without considering averment in F.I.R.-as per own case of the opposite party-alleged incidence took place in a private orchard- no public was present-no public view-ingredients of sec. 3(1) (S) of the SC/ST Act not attracted.

Application allowed. (E-9)

List of Cases cited:

1. Hitesh Verma Vs St. of Uttarakhand ,(2020) 10 SCC 710.

2. Ramesh Chandra Vaishya Vs St. of U.P. & anr., SCC OnLine SC 668.

3. Fakhruddin Ahmad Vs St. of Uttranchal & anr. (2008) 17 SCC 157.

4. Ankit Vs St. of U.P. & anr. reported in JIC 2010 (1) Page 432.

5. St. of Haryana Vs Bhajanlal reported in 1992 SCC (Crl.) 426.

6. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710

7. Ramesh Chandra Vaishya Vs St. of U.P. & anr.; (2023) SCC OnLine SC 668

8. Fakhruddin Ahmad Vs St. of Uttranchal & anr. (2008) 17 SCC 157

9. Ankit Vs St. of U.P. & anr. reported in JIC 2010 (1) page 432

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

11. St. of Haryana Vs Bhajanlal, 1992 SCC (Crl.)426,

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

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

14. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, AIR 2021 SC 1918.

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

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

1. Heard Mr. Gibran Akhtar Khan, learned Counsel for the applicants, Ms. Ankita Tripathi, learned A.G.A. for the State-opposite party No.1 and perused the material placed on record.

2. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicants seeking quashing of the entire proceeding of Complaint Case No.281/2022; Smt. Pooja vs. Kaushar and Others, under Sections 323 and 504 I.P.C. and Section 3(1) (S) of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, Police Station-Bilgram, District-Hardoi as well as summoning order dated 09.04.2024 passed in the aforesaid case.

3. Learned Counsel for the applicants submits that the applicants are innocent persons and have been falsely implicated in the present case due to village rivalry. He further submits that the brief facts of case are that on 05.11.2021 when applicant no. 2(Azam) reached home on his Motorcycle at about 1.00 p.m, he found that the Complainant's Husband Bholanath and Complainant's Brother Sunil were sitting at his doorstep and drinking alcohol, on which the applicant no.2 (Azam) requested them not to drink alcohol at his doorstep, however the Complainant's husband namely Bholanath, being in the state of inebriation, started hurling abusive words to the applicant no.2 Azam and applicant no.2, Azam requested the Complainant's husband, not to utter abusive words for his family, but he didn't stop, so applicant no.2 (Azam) called the police at 1.26 pm by making a phone call at Dial 100 Emergency

Service, and on seeing the Police Response Vehicle coming at around 2:00pm, the complainant's husband ran away from his home. Applicants thought, that the matter has come to an end. He further submits that the applicants are the next door neighbors of the Complainant, and in the small narrow lane there are only two houses, one of complainant, and the other one is of the applicants.

4. Learned Counsel for the applicants further submits that on 11.01.2022, in an after thought manner, a frivolous complaint was filed by the Complainant (opposite party no.2), falsely implicating the applicants for extorting money and as per the allegations made in the complaint, all the applicants who are four in number, using abusive words started beating the complainant (opposite party no.2), and also the complainant's husband with hands and feet, and the complainant and her husband were saved by the intervention of complainant's brother and some village people. He further submits that in this entire incident surprisingly no injury was inflicted upon the body of the complainant and the complainant's husband, and admittedly no medical examination was done. He further submits that it is unbelievable that four persons physically assaulted the complainant, who is a lady, and no injury was sustained by her. Moreover, the complainant's husband was also physically assaulted by all the applicants as per the allegations made in the complaint, and no injury was inflicted upon him as well.

5. Learned Counsel for the applicants further submits that the statement of the complainant was recorded under section 200 Cr.P.C., but the same do not corroborate the version enumerated in the Complaint. There is no mention in the statement recorded under Section 200 Cr.P.C., that the applicants entered her house and gave blows with hands and kicks. Neither the statement recorded under Section 200 Cr.P.C. finds mention of one Rajpal and village people, as has been alleged in the complaint, who came to the rescue of complainant and her husband. Thus there is major contradiction in the statement recorded under Section 200 Cr.P.C. and the complaint dated 11.01.2022. He further submits that the statements recorded by the witnesses under section 202 Cr.P.C. also do not inspire any confidence that the alleged incident, did take place.

6. Learned Counsel for the applicants further submits that statement of the complainant's brother recorded under Section 202 Cr.P.C., wherein, there is also no mention of Hand Cart(Thiliya), and neither Rajpal nor Village people have been named, who came to the rescue of Complainant and her Husband as has been alleged in the Complaint.

7. Learned Counsel for the applicants further submits that at this juncture that the aforesaid Complaint has been filed in an after thought manner after a period of two months, and there is no independent witness in the Complaint, to corroborate the alleged incident, which falsify the contents of the complaint and also raise a cloud of doubt over the allegations made therein.

8. Learned Counsel for the applicants further submits that the applicants have never had any dispute with the complainant and his family members before this incident. He further submits that the allegations leveled in the complaint are false and fabricated. No such incident ever took place as alleged by the opposite party

No.2. He further submits that ingredients of Section 3(1) (S) SC/ST Act are not attracted in the present case as the house of the opposite party No.2 was a private place and there was no public view, the scuffle took place in a private house, thus, the there was no public view nor it was a public place. He further submits that on bare perusal of the complaint it is clear that there is no mention of any public view, thus, the very basis of the provisions of SC/ST Act are missing in the present case.

9. Learned counsel for the applicant further submits that the order dated 09.04.2024 passed by learned trial court in Complaint Case No.281/2022; Smt. Pooja vs. Kaushar and Others, under Sections 323 and 504 I.P.C. and Section 3(1) (S) of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, Police Station-Bilgram, District-Hardoi, by which cognizance was taken and the applicants were summoned, is also non speaking as the Magistrate has not considered any material available before him while summoning the applicants to face the trial. As such, the impugned order dated 09.04.2024 on the face of record appears to be unjustified and is passed without application of judicial mind, therefore, the same is liable to be set aside and further proceedings in pursuance to the above case may also be quashed by this Court and the present application be allowed.

10. In support of his arguments, learned Counsel for the applicants has placed reliance on following judgments of Hon'ble Supreme Court of India:-

"(i) Hitesh Verma vs. State of Uttarakhand reported in (2020) 10 SCC 710.

(ii) Ramesh Chandra Vaishya vs. State of U.P. and Another reported in SCC OnLine SC 668.

(iii) Fakhruddin Ahmad vs. State of Uttranchal and Another repored in (2008) 17 SCC 157.

(iv) Ankit vs. State of U.P. and Another reported in JIC 2010 (1) Page 432.

(v) State of Haryana vs. Bhajanlal reported in 1992 SCC (Crl.) 426."

11. Ms. Ankita Tripathi, learned A.G.A. for the State-opposite party No.1 apposed the contentions made by learned Counsel for the applicants and submits that prima facie offence is made out against the applicants and the trial court has rightly passed impugned summoning order after considering the material placed on record, thus, the applicants are not entitled for any relief by this Court and the present appeal may be dismissed.

12. After considering the arguments advanced by learned counsel for the parties and perusal of record in light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence and the contents of the complaint, statements of witnesses as well as summoning order dated 09.04.2024, this court is of the view that the SC/ST Act, 1989 is meant to prevent the commission of offences of atrocities against the members of the Schedule Castes and the Schedule Tribes, to provide for Special Courts and Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

13. It is further observed that the SC/ST Act, 1989 was enacted to improve the social economic conditions of the vulnerable sections of the society as they have been subjected to various offences such as indignities, humiliations and harassment. They have been deprived of life and property as well. The object of the Act, 1989 is thus to punish the violators who inflict indignities, humiliations and harassment and commit the offence as defined under Section 3 of the SC/ST Act, 1989. The SC/ST Act, 1989 thus intended to punish the acts of the upper caste against the vulnerable section of the society for the reason that they belong to a particular community. Section 3(1)(S) of the SC/ST Act, 1989 or 3(1)(S) of the SC/ST Act, 1989 would read as under:-

"Section 3(1)(s) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989- abuses any member of a Scheduled Caste or a Schedule Tribe by caste name in any place within the public view"

Thus, the basic ingredient of the offence under Section 3(1) (S) can be clarified as abuse of any member of Schedule Caste or a Schedule Tribe by caste name in ***any place within the public view.***

14. It is further observed that an offence under the SC/ST Act, 1989 would be made out when a member of the vulnerable section of the society is subjected to indignities, humiliations and harassment in any place within the public view.

15. In the present case, this Court finds that the applicants have not abused the opposite party No.2 by caste name in any place within the public view, even though, the opposite party No.2 has not stated anything about abuses hurled to her by the applicants in a place within a public view, thus, the allegations as leveled in the compliant does not constitute offence under Section 3(1) (S) of the SC/ST Act, 1989.

16. It is further observed by this Court that before an accused is subjected to trial for commission of offence under Section 3(1) (S) of the SC/ST Act, 1989 the utterances made by him in any "place within a public view" is mandatory and from the bare perusal of the F.I.R., the utterances, if any, as mentioned in Section 3(1) (S) are not fulfilled. The Investigating agencies while investigating the matter are duty bound to consider the factual aspects of the matter and also to consider the statement of witnesses, complainant as well as the applicants so as to ascertain whether the chargesheet makes out a case under the SC/ST Act, 1989 having been committed for forming a proper opinion in the conspectus of the situation before it, prior to taking cognizance of the offence by learned Magistrate. In the present case from the factual aspects and contents of the F.I.R. discussed above, no offence is made out under Section 3(1) (S) of the SC/ST Act, 1989. Though, the learned Magistrate has not applied its judicial mind while taking cognizance in the matter and while summoning the applicants by impugned order to face trial, which is very serious matter.

17. In view of the aforesaid discussion, this Court deems it proper to discuss some case laws.

18. Hon'ble Supreme Court in the case of ***Hitesh Verma Vs. State of Uttarakhand, (2020) 10 SCC 710*** has been pleased to observe in para 13, 14 and 18 as under :-

"13. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

14. Another key ingredient of the provision is insult or intimidation in "any place within public view". What is to be regarded as "place in public view" had come up for consideration before this Court in the judgment reported as Swaran Singh v. State [Swaran Singh v. State, (2008) 8 SCC 435 : (2008) 3 SCC (Cri) 527]. The Court had drawn distinction between the expression "public place" and "in any place within public view". It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view (sic) . The Court held as under :

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view" with the expression "public place". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of

hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

19. Further, the Hon'ble Apex Court in the case of ***Ramesh Chandra Vaishya Vs. State of U.P. and Another; (2023) SCC OnLine SC 668*** has been pleased to observe in paragraph 17, 18 and 21 as under:-

"17. The first question that calls for an answer is whether it was at a place within public view that the appellant hurled caste related abuses at the complainant with an intent to insult or intimidate with an intent to humiliate him. From the charge-sheet dated 21st January, 2016 filed by the I.O., it appears that the prosecution would seek to rely on the evidence of three witnesses to drive home the charge against the appellant of committing offences under sections 323 and 504, IPC and 3(1)(x), SC/ST Act. These three witnesses are none other than the complainant, his wife and their son. Neither the first F.I.R. nor the charge-sheet refers to the presence of a fifth individual (a member of the public) at the place of occurrence (apart from the appellant, the complainant, his wife and their son). Since the utterances, if any, made by the appellant were not "in any place within public view", the basic ingredient for attracting section 3(1)(x) of the SC/ST Act was missing/absent. We, therefore, hold that at the relevant point of time of the incident (of hurling of caste related abuse at the complainant by the appellant), no member of the public was present.

18. That apart, assuming arguendo that the appellant had hurled caste related abuses at the complainant with a view to insult or humiliate him, the same does not advance the case of the complainant any further to bring it within the ambit of section 3(1)(x) of the SC/ST Act. We have noted from the first F.I.R. as well as the charge- sheet that the same makes no reference to the utterances of the appellant during the course of verbal altercation or to the caste to which the complainant belonged, except for the allegation/observation that caste-related abuses were hurled. The legislative intent seems to be clear that every insult or intimidation for humiliation to a person would not amount to an offence under section 3(1)(x) of the SC/ST Act unless, of course, such insult or intimidation is targeted at the victim because of he being a member of a particular Scheduled Caste or Tribe. If one calls another an idiot (bewaqoof) or a fool (murkh) or a thief (chor) in any place within public view, this would obviously constitute an act intended to insult or humiliate by user of abusive or offensive language. Even if the same be directed generally to a person, who happens to be a Scheduled Caste or Tribe, per se, it may not be sufficient to attract section 3(1)(x) unless such words are laced with casteist remarks. Since section 18 of the SC/ST Act bars invocation of the court's jurisdiction under section 438, Cr.PC and having regard to the overriding effect of the SC/ST Act over other laws, it is desirable that before an accused is subjected to a trial for alleged commission of offence under section 3(1)(x), the utterances made by him in any place within public view are outlined, if not in the F.I.R. (which is not required to be an encyclopedia of all facts and events), but at least in the charge-sheet (which is prepared based either on statements of witnesses recorded in course of investigation or otherwise) so as to enable the court to ascertain whether the charge sheet makes out a case of an offence

under the SC/ST Act having been committed for forming a proper opinion in the conspectus of the situation before it, prior to taking cognizance of the offence. Even for the limited test that has to be applied in a case of the present nature, the charge-sheet dated 21 st January, 2016 does not make out any case of an offence having been committed by the appellant under section 3(1)(x) warranting him to stand a trial.

21. Section 323, IPC prescribes punishment for voluntarily causing hurt. Hurt is defined in section 319, IPC as causing bodily pain, disease or infirmity to any person. The allegation in the first F.I.R. is that the appellant had beaten up the complainant for which he sustained multiple injuries. Although the complainant alleged that such incident was witnessed by many persons and that he sustained injuries on his hand, the charge-sheet does neither refer to any eye-witness other than the complainant's wife and son nor to any medical report. The nature of hurt suffered by the complainant in the process is neither reflected from the first F.I.R. nor the charge-sheet. On the contrary, the appellant had the injuries suffered by him treated immediately after the incident. In the counter-affidavit filed by the first respondent (State) in the present proceeding, there is no material worthy of consideration in this behalf except a bald statement that the complainant sustained multiple injuries "in his hand and other body parts". If indeed the complainant's version were to be believed, the I.O. ought to have asked for a medical report to support the same. Completion of investigation within a day in a given case could be appreciated but in the present case it has resulted in more disservice than service to the cause of justice. The situation becomes all the more glaring when in course of this proceeding the parties including the first respondent are unable to apprise us the outcome of the second F.I.R. In any event, we do not find any ring of truth in the prosecution case to allow the proceedings to continue vis--vis section 323, IPC."

20. Further, the Hon'ble Supreme Court in the case of ***Fakhruddin Ahmad Vs State of Uttranchal and another reported in (2008) 17 SCC 157,*** discussed the expression "taking cognizance of an offence" by a Magistrate within contemplation of section 190 of the Cr.P.C and also discussed what must have been taken notice by the Magistrate while taking cognizance. Paras 11, 12, 13,14 and15 being relevant are abstracted below:-

"11.The next incidental question is as to what is meant by expression `taking cognizance of an offence' by a Magistrate within the contemplation of Section 190 of the Code?

12.The expression `cognizance' is not defined in the Code but is a word of indefinite import. As observed by this Court in Ajit Kumar Palit Vs. State of West Bengal2, the word `cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means--become aware 2 [1963] Supp. 1 S.C.R. 953 9 of and when used with reference to a Court or Judge, to take notice of judicially. Approving the observations of the Calcutta High Court in Emperor Vs. Sourindra Mohan Chuckerbutty3, the Court said that `taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.'

13. Recently, this Court in S.K. Sinha, Chief Enforcement Officer Vs.

Videocon International Ltd. & Ors.4, speaking through C.K. Thakker, J., while considering the ambit and scope of the phrase `taking cognizance' under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in Superintendent & Remembrancer of Legal Affairs, West Bengal Vs. Abani Kumar Banerjee5, which were approved by this Court in R. R. Chari Vs. State of U.P.6. The observations are:

3 (1910) I.L.R. 37 Calcutta 412 4 (2008) 2 SCC 492 5 A.I.R. (37) 1950 Calcutta 437 6 A.I.R. (38) 1951 SC 207 1 0 "7. ... What is `taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

14. From the afore-noted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by `taking cognizance'. Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

15. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence."

21. This Court in the matter of ***Ankit Vs State of U.P. and another*** reported in ***JIC 2010 (1) page 432*** has held that-

"Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4^) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and

even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

Thus, in the present case learned Magistrate without considering the material available before him and even without considering the averments made in the F.I.R. in which as per the own case of the opposite party No.2 the alleged incident took place in a private Orchard and at that time no public was present nor there was any public view. Learned Magistrate while taking cognizance did not consider the statements of the applicants which was recorded by the Investigating Officer before filing the chargesheet. Thus, the ingredients of Section 3(1) (S) of the SC/ST Act, 1989 is not attracted in the present case and as such, no offence under the aforesaid section is made out against the applicants.

22. Thus, after perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence and as per the contents of the complaint and considering the various case laws referred above, the incident does not appear to happen in a public place or in a public view, thus, Section 3(1) (S) of the SC/ST Act, 1989 is not attracted against the applicants as the incident did not occur in any "place within a public view", as such, considering the law laid down by the Hon'ble Apex Court in the case of ***Hitesh Verma (Supra), Ramesh Chandra Vaishya (Supra), Fakhruddin Ahmad (Supra)*** as well as law laid down by co-ordinate Bench of this Court in the case of ***Ankit (Supra)*** this Court is of the view that the learned trial court has failed to appreciate the material available on record. The summoning order dated 09.04.2024 passed by the trial court alongwith the entire criminal proceedings of the aforesaid case are liable to be quashed.

23. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- ***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (v) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.***

24. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued.

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

real and substantial justice for which the court alone exists.

26. Accordingly in view of the above discussions and observations made, this application is ***allowed***, the entire proceeding of Complaint Case No.281/2022; Smt. Pooja vs. Kaushar and Others, under Sections 323 and 504 I.P.C. and Section 3(1) (S) of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, Police Station-Bilgram, District-Hardoi as well as summoning order dated 09.04.2024 are hereby ***quashed*** so far it relates to the present applicants.

(2024) 5 ILRA 2085
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ B No. 3587 of 1985

Triloki Nath ...Petitioner
Versus
J.D.C. & Ors. ...Respondents

Counsel for the Petitioner:
S.P. Shukla, Arvind Kr. Shukla, B.B. Singh, S.N. Goswami, S.P. Shukla, Shitla Prasad Tripathi

Counsel for the Respondents:
C.S.C. Sri Ashok Kr. Baladiha, D.C. Mukherjee, Raj Mani Dubey

Civil Law - Hindu Adoptions and Maintenance Act, 1956-Section 7- Uncle(Naval Kishore) of Petitioner was the original tenure holder –died issueless-after his demise-Petitioner being nephew –succeeded-during consolidation proceedings-opposite party filed a case u/s 12 of the Act, 1953-claiming his co-tenancy rights on the said chak being an adopted son on the basis of registered adoption deed-rejected-Appeal-allowed-Revision by Petitioner-dismissed-impugned-Hindu male can adopt a child-consent of wife is necessary-adoption deed had sign of Naval Kishore, the adopted child and his wife-sign of wife of Naval Kishore was not there-no reason for his wife not signing it-consent should not necessarily be in writing-can be done by producing evidence –since no consent of wife of late Naval Kishore nor in writing nor in inference- impugned orders quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. Ghisalal & ors.. Vs Dhapubai (Dead) by LRs. & ors.[AIR (2011) SC 644]

2. Uttam Chandra & ors. Vs St. of U.P & ors. - Writ B No. 3822 of 2023

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

1. Heard Shri Shitla Prasad Tripathi, learned counsel for petitioner, learned counsel for respondent as well as Shri Hemant Kumar Pandey, learned State Counsel.

2. During the pendency of the present writ petition, the petitioner has expired and in his place his legal heirs have been substituted and they will be referred to as petitioner. Similarly, during the pendency of the present writ petition, respondent nos. 3, 4 and 5 have also expired and their legal heirs have been substituted and they will be referred to as respondent.

3. The present writ petition has been preferred for quashing of the impugned revisional order dated 25.05.1985 and the appellate order dated 07.01.1985.

4. Learned counsel for petitioner has submitted that the uncle of the petitioner Naval Kishore was the original tenure holder of the Chak no. 32 situated at village Gumwa, District Sultanpur and he died issueless, hence after his demise, the petitioner being the nephew, would succeed the rights over Chak No. 32 as successors of late Naval Kishore.

5. During the consolidation proceedings, respondent no. 3 Ram Ujagir (now deceased) had filed a case under Section 12 of the Consolidation of Holdings Act, 1953 for claiming his co-tenancy rights on Chak No. 32 being an adopted son of late Naval Kishore, on the basis of the registered adoption deed dated 30.09.1972. The said case preferred by respondent no. 3 was dismissed by judgment and order dated 26.10.1983.Against which the respondent no. 3 had preferred an appeal under Section 11(1) of the Act, 1953 which was decided in his favour by judgment and order dated 07.01.1985. Against which, the petitioner preferred a revision under Section 48(1) of the Act, 1953 which was dismissed by judgment and order dated 25.05.1985 and feeling aggrieved by the appellate order and the revisional order, the present writ petition has been preferred.

6. It is further submitted that the issue which was to be decided by the appellate court as well as the revisional court was whether the adoption was in accordance with proviso to Section 7 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the Act, 1956') which provides that the consent of the wife of the person adopting the child shall be necessary and the same was not there at the time of adoption and the registration of the adoption deed. So, the adoption of the respondent no. 3 is invalid and no right could be given to the respondent no. 3 in pursuance of the adoption deed which is invalid. In support of his submission, learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court in the case of ***Ghisalal and Ors. vs. Dhapubai (Dead) by LRs. and Ors. [AIR (2011) SC 644].***

7. It is further submitted that the respondent no. 3 had not adduced either any documentary evidence or oral evidence to establish that there was a consent of the wife of Late Naval Kishore at the time of adoption of respondent no. 3 and in absence of the same, the adoption of the respondent no. 3 is not valid in the eyes of law.

8. On the other hand, learned Standing Counsel and the counsel for the respondents have submitted that it is not necessary that the consent should be in writing.

9. It is further submitted that the statement of the marginal witness (Indrajeet Tiwari) was recorded before the Consolidation Officer wherein he had stated that the adoption was with the consent of the wife of Late Naval Kishore and she was present at the time of adoption.

10. It is further submitted that even respondent no. 3 had also given his statement that he was adopted with the consent of wife of Late Naval Kishore. It is further submitted that the petitioner has not challenged the adoption deed till date and as per Section 16 of the Act, 1956, it would be presumed that the adoption deed is valid being a registered document.

11. It is further submitted that the wife of Late Naval Kishore pre-deceased

her husband i.e. Late Naval Kishore, so this issue is of no relevance now at all in the present case.

12. After hearing the learned counsel for the parties, going through the record of the case, in the present case, the issue which is to be adjudicated that whether there was any consent in writing or tacit consent of the wife of Late Naval Kishore was there at the time of adoption or not in the light of proviso to Section 7 of the Act, 1956 and the judgment of the Hon'ble Supreme Court relied by learned counsel for the petitioner in the case of **Ghisalal and Ors. (supra)**. For convenience, the proviso to Section 7 of the Act, 1956 is quoted hereinbelow:-

*"7. **Capacity of a male Hindu to take in adoption**.- Any male Hindu who is sound mind and is not a minor has the capacity to take a son or a daughter in adoption:*

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation: If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of the them is unnecessary for any of the reasons specified in the preceding proviso."

13. From perusal of the proviso to Section 7 of the Act, 1956, wherein it is provided that a Hindu male can adopt a child but if he has a wife living then her consent is necessary unless the wife has completely and finally renounced the world or is ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

14. In the present case, the adoption deed which was read by learned counsel for respondent no. 3 to establish that there was consent of wife of late Naval Kishore for adoption, but he has failed to show even a single line that his wife consented for adoption, rather he has addressed himself only everywhere i.e. 'I' in place of 'We'. The adoption deed was signed bearing thumb impression of late Naval Kishore, the biological parents of respondent no. 3, the adopted child i.e. Ram Dev Pandey and his wife. If these persons could sign or put their thumb impression on the adoption deed at the time of its registration then the wife of late Naval Kishore could have signed or given her thumb impression on the same. There seems to be no reasons as to why the wife of late Naval Kishore could not have signed or put her thumb impression on the adoption deed while others had done so.

15. It is not necessary that the consent should be in writing. This can be done either by producing documentary evidence showing her consent in writing or by leading evidence to show that wife had actively participating in the ceremonies of adoption with an affirmative mindset to support the action of her husband. For that learned counsel for the respondent no. 3 has submitted that the statements of Ram Ujagir i.e. the person who had been adopted and one Shri Indrajeet, the marginal witness of adoption deed were recorded and both of them in their statement had submitted that the adoption was made with the consent of the wife of late Naval Kishore. But both these persons whose statements have been relied by learned counsel for the respondent no. 3 are interested witness to support and

protect the validity of the adoption deed, for the reason one is the person himself who was adopted and second is the marginal witness of the adoption deed. They did not state as to in what manner the wife of late Nawal Kishore expressed her consent for adoption except that she had participated. Except them no other person was adduced/produced to state that wife of late Naval Kishore had consented for the adoption though it was the case of the respondents throughout that after the ceremonies and following rituals in presence of the villagers, Pandit, Nau (barber) the adoption was made. But none of these persons were produced in support of their submissions by respondent no. 3. Even those witnesses namely Indrajeet Tiwari and Ram Ujagir have not stated that wife of late Naval Kishore had actively or otherwise participated in any of the rituals or in the proceedings of adoption, much less with mindset of having given the consent for adoption. As discussed earlier also mere her presence at the time of adoption of little consequence.

16. The Hon'ble Supreme Court in the case of **Ghisa Lal (supra)** has interpreted the term "consent" used in proviso to Section 7 of the Act, 1956. The relevant paragraph are quoted hereinbelow:-

"20. The term 'consent' used in the proviso to Section 7 and the explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

21. At this stage, we may notice some precedents which have bearing on the interpretation of proviso to Section 7 of the 1956 Act. In Kashibai v. Parwatibai (supra), this Court was called upon to consider whether in the absence of the consent of one of the two wives, the adoption by the husband could be treated valid. The facts of the case show that Plaintiff No. 1 and Defendant No. 1 were two widows of deceased Lachiram. Plaintiff No. 2 was daughter of Lachiram from his first wife Kashibai and Defendant No. 2 was the daughter from his second wife Parwati. Defendant No. 3, Purshottam son of Meena Bai and grandson of Lachiram. The Plaintiffs filed suit for separate possession by partition of a double storey house, open plot and some agricultural lands. The Defendants contested the suit.

One of the pleas taken by them was that Purshottam son of Meena Bai had been adopted by deceased Lachiram vide registered deed of adoption dated 29.4.1970, who had also executed deed of Will in favour of the adopted son bequeathing the suit properties to him and thereby denying any right to the Plaintiffs to claim partition. The trial Court decreed the suit for separate possession by partition by observing that the Defendants have failed to prove the adoption of Purshottam by Lachiram and the execution of Will in his favour. The High Court reversed the judgment of the trial Court and held that the Defendants had succeeded in proving execution of the deed of adoption and the deed of Will in accordance of law and as such the Plaintiffs were not entitled to any share in the suit properties. On appeal, this Court reversed the judgment of the High Court and restored the decree passed by the trial Court. On the issue of adoption of Purshottam, this Court observed:

It is no doubt true that after analysing the parties' evidence minutely the trial court took a definite view that the Defendants had failed to establish that Plaintiff 1, Defendant 1 and deceased Lachiram had taken Defendant 3, Purshottam in adoption. The trial court also recorded the finding that Plaintiff 1 was not a party to the Deed of Adoption as Plaintiff 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial court took the view that the alleged adoption being against the consent of Kashi Bai, Plaintiff 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act provides that any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present case as seen from the evidence discussed by the trial court it is abundantly clear that Plaintiff 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the Defendants was clearly hit by the provisions of Section 7 and the adoption cannot be said to be a valid adoption."

17. The said judgment has been followed by this Court very recently in the case of ***Uttam Chandra and two others versus State of U.P and ten others in Writ B No. 3822*** of 2023, judgment dated 30.11.2023.

18. The other submission of learned counsel for the respondent no. 3 is that the petitioner had not adduced any evidence to disprove that the adoption was without the consent of the wife of late Naval Kishore, the onus was upon them. The said submission of leanred counsel for the respondent no. 3 is not acceptable as the Hon'ble Supreme Court in the case of Ghisa Lal (supra) has held, that if the adoption deed by a hindu male becomes subject matter before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. Here it is the respondent no. 3 who had failed to adduce any independent evidence to show that the adoption of respondent no. 3 was with the consent of the wife of late Naval Kishore. Even the participation if any, of the wife of

late Naval Kishore in the rituals of adoption, even that cannot be said that it was a consent by the wife of late Nawal Kishore as per the law settled in the case of the Ghisa Lal (supra).

19. The appellate and revisional Court for treating the adoption deed proved had relied upon section 6, 11 and 16 and other sections of the Act, 1956 but no plausible and reasonable finding has been given as far as the objection raised by the petitioners in pursuance to proviso to Section 7 of the Act, 1956 i.e. the consent of the wife of the late Naval Kishore. But merely on the basis of statement of Indrajeet Tiwari, the marginal witness treating the adoption deed valid despite the finding that there was no consent of the wife of late Nawal Kishore in writing.

20. In view of the facts, circumstances and discussion made hereinabove, it is clear that the adoption was not in accordance with the proviso to Section 7 Act, 1956, since there was not consent of the wife of late Nawal Kishore for the adoption in writing nor it could so inferred by merely her presence during the adoption ceremonies, more particularly, there is affirmative mindset of her consent, as held by the Hon'ble Supreme Court in the case of Ghisa Lal (supra) that such a presence would be as an spectator in the assembly of people.

21. In the result, the writ petition is ***allowed.***

22. The impugned revisional order dated 25.05.1987 and appellate order dated 07.01.1985 are hereby quashed.

(2024) 5 ILRA 2090
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 2967 of 2024

Satya Narayan Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dinesh Kumar Singh

Counsel for the Respondents:
S.C., Vineet Kumar Singh

U.P. Revenue Code, 2006-Petitioner is a complainant –on his instance proceedings u/s 67 of U.P. Revenue code, 2006 were initiated against the Respondent no.5-on report being called-the proceeding u/s 67 were dropped-Appeal-rejected- Writ is maintainable-cannot be left remedy-less where no other statutory remedy is provided-entire case of Petitioner is based upon the report-report was submitted without proper survey—upon objection by Respondent-alleged constructions existed-Petitioner not been able to demonstrate how the report is bad-no ground to interfere.

W.P. dismissed. (E-9)

List of Cases cited:

1. Rahul Kumar Vs St. of UP & ors. reported in 2023 (9) ADJ 614

2. Ghanshyam Verma & ors. Vs St. of UP & ors. reported in 2021 (7) ADJ 67

3. Rahul Kumar Vs St. of UP & ors. reported in 2023 d(9) ADJ 614

4. Shambhunath Pandey Vs St. of UP & ors.

5. Writ C No. 29440 of 2021,decided on 10.11.2021 Neutral Citation No. 2021:AHC:134861

6. Vivekanand Yadav Vs St. of UP & anr. reported in 2010 (10) ADJ 1 (FB)

7. Narendra Kumar Vs St. of UP & ors. reported in 2013 (1) ADJ 228.

8. Ravi Yashwant Bhoir Vs Collector reported in 2012 (4) SCC 407

9. Dharam Raj Vs St. of U.P. & ors. reported in 2010 (2) AWC 1878 (All)

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

1. Supplementary Affidavit filed by learned counsel for the petitioner is taken on record.

2. Heard Sri Dinesh Kumar Singh, learned counsel for the petitioner, Sri Abhishek Shukla, learned Additional Chief Standing Counsel representing the State respondents, Shri Bhupendra Kumar Tripathi, learned counsel representing the Respondent no. 4 and Shri Vineet Kumar Singh, learned counsel who has put in appearance on behalf of the respondent no. 5.

3. The writ petition has been filed questioning the legality, propriety and correctness of the order dated 23.11.2023 passed by the District Magistrate, Chandauli, in Case No. 674 of 2023 in Appeal under Section 67 (5) of the UP Revenue Code, 2006 whereby and whereunder the Appeal preferred by the petitioner through the Gram Sabha concerned against the order dated 01.07.2023 passed by the Tehsildar, respondent no. 3 has been rejected and the order dated 01.07.2023 dropping the proceedings under Section 67 of the Code, 2006 against the respondent no. 5 has been upheld.

4. Admittedly, the petitioner is a complainant on whose instance proceedings under Section 67 of the UP Revenue Code, 2006 were initiated against the respondent no.5. On a report being called on the allegations levelled in the complaint the proceedings under Section 67 were dropped. The Appeal filed by the petitioner against the order dropping the proceedings has been rejected.

5. A preliminary objection has been raised by Sri Vineet Kumar Singh, learned counsel for the respondent no. 5 that the writ petition at the instance of the complainant petitioner is not maintainable placing reliance upon a decision of a coordinate Bench of this Court in the Case of ***Rahul Kumar vs. State of UP and others reported in 2023 (9) ADJ 614.***

6. The preliminary objection to the maintainability of the writ petition has been repelled by the learned counsel for the petitioner by submitting that the objection is ill founded in as much as petitioner being a member of the Gaon Sabha is vested with the rights to ensure that the Gaon Sabha land is not encroached upon and places reliance upon a decision of the Coordinate Bench of this Court in the case of ***Ghanshyam Verma and others vs. State of UP and others reported in 2021 (7) ADJ 67***. It is further contended that the Appeal of the petitioner under Section 67 (5) of the UP Revenue Code, 2006 has been rejected and the petitioner cannot be rendered remedy less and is certainly within his rights to assail the order passed in the Appeal in a writ petition where no other statutory remedy is provided under the UP Revenue Code, 2006.

7. This Court on 23.05.2024 while recording the submissions of the respective

counsels on the question of maintainability of the writ petition prima facie had opined that the writ petition at the instance of the complainant petitioner whose appeal had been decided against him could maintain the writ petition. However, the case was adjourned to enable the learned counsel for the petitioner to bring on record the Memo of the Appeal. The learned Counsels agreed to make their respective submissions on the maintainability of the writ petition on the next date fixed and accordingly the matter is before this Court.

8. Before this Court dwells into the issue of maintainability of the writ petition at the instance of the petitioner whose status is admittedly that of a complainant, it would be apposite to look into the allegations raised in the complaint against the respondent no. 5.

9. The controversy between the parties is with regard to Arazi No. 227 situate in Mauja Mainur, Patti Chaubisiha, Tehsil-Chakia, District-Chandauli, recorded as 'Kot' in the Revenue Records and is Gram Sabha land. The respondent no. 5 is stated to have illegally occupied the said Gram Sabha land and made temporary constructions over the same. The petitioner is stated to have filed complaint to the revenue authorities apprising them of the illegal encroachment by the respondent no. 5. Acting on the complaint the Assistant Collector/ Tehsildar called for a report and on the basis of the said report issued a notice upon the respondent no. 5 in RC Form-20 requiring the respondent no. 5 to show cause as to why compensation for damage and wrongful occupation not exceeding the amount specified in the notice be not recovered and why he should not be evicted from the land. The respondent no. 5 put in appearance and filed his objections stating that the proceedings under Section 67 of the Code are unwarranted inasmuch as the plot no. 227 is not public utility land rather is an old Abadi of the Zamindars over which their Kothi existed. Plot No. 227 was adjacent to the old Abadi of the village contained in plot No. 186. The ancestors of the petitioner have been residing over the plot by building their houses. Later on an amendment in the objections were sought which were allowed and according to the amended plea of the respondent no. 5, no constructions exist over plot no. 227 rather it exists over plot No. 225 and the entire proceedings under Section 67 are vitiated. An inspection of the spot is stated to have been carried out on 01.06.2023 and a report to that effect submitted on 01.06.2023 which has been brought on record as Annexure 8 to the writ petition.

10. The Assistant Collector/ Tehsildar Chakia-Chandauli under his order has recorded finding of fact on the basis of the report dated 01.06.2023 that constructions raised by the respondent no. 5 is on Bhumidhari land contained in Gata No. 225 and not on Gaon Sabha Land contained in Plot No. 227 which is the subject matter of the proceedings under Section 67 of the Code. He accordingly ordered for withdrawal of the Notice under RC Form-20 against the respondent no. 5 by order dated 01.07.2023.

11. The petitioner preferred an Appeal against the order dated 01.07.2023 which too has been dismissed upholding the findings of the Assistant Collector/ Tehsildar.

12. It is also not out of place to mention here that instructions on behalf of the state respondents have been received

which are taken on record. The instructions clearly state that after proper spot inspection and demarcation by the revenue team it has been found that the disputed constructions of the respondent no. 5 exist over his Bhumidhari plot No. 225 and not over 227 as alleged in the complaint and the notice under RC Form-20 has been rightly withdrawn against the respondent no. 5. In para 5 of the instructions it has been clearly averred that no encroachment of the respondent no. 5 has been found over plot No. 227 and the proceedings for eviction of the respondent no. 5 is unwarranted.

13. Now coming to the issue regarding the maintainability of the writ petition learned counsel for the petitioner does not dispute that the petitioner is a complainant. Learned counsel for the petitioner submits that the land in dispute is Gaon Sabha land and the petitioner being a resident of the same Gaon Sahba has a interest in the land of the Gaon Sabha. In case of encroachment over Gaon Sabha land the petitioner being aggrieved by the order of the Assistant Collector/ Tehsildar dropping the proceeding sunder Section 67 of the Code, 2006 had a right to maintain the Appeal under Section 67 (5) of the Revenue Code, 2006 as the Provision provides that any person aggrieved may within thirty days from the date of such order prefer an appeal to the Collector. The petitioner preferred an Appeal which has been rejected by the impugned order. He is thus aggrieved by the impugned order rejecting the Appeal as also the order dropping the proceedings under Section 67 of the UP Revenue Code, 2006 and can maintain the instant writ petition. Reliance has been placed upon the case of ***Ghanshyam Verma and others vs. State of UP and others reported in 2021 (7) ADJ 67.***

14. Per contra, Sri Vineet Singh, learned counsel for the respondent no. 5 submits that the instant writ petition at the instance of the petitioner who was admittedly a complainant is not maintainable as he cannot be said to be person aggrieved. Reliance has been placed upon the decision in the Case of ***Rahul Kumar Vs. State of UP and others reported in 2023 d(9) ADJ 614*** and also in the case of ***Shambhunath Pandey vs. State of UP and 6 others, Writ C No. 29440 of 2021, decided on 10.11.2021 Neutral Citation No. 2021:AHC:134861.***

15. I have heard the respective counsels for the parties and have perused the materials on record and have also gone through the case laws cited at the Bar.

16. In the opinion of the Court the case of ***Ghanshyam Verma (supra)*** cited by learned counsel for the petitioner lays down the proposition of law regarding the maintainability of an Appeal under Section 67 (5) of the Revenue Code, 2006 by a person aggrieved. In that case the challenge to the order of the Assistant Collector First Class/ Tehsildar was laid by which the Notice/ RC From-20 issued to the opposite party therein in proceedings under Section 67 of the UP Revenue Code 2006 had been withdrawn and the Appeal preferred against the said order was dismissed as not maintainable as the Appellant was not a party to the proceedings and thus could not be said to be aggrieved. The Court after correctly interpreting the provisions of Section 67 (5) of the Revenue Code, 2006 and taking note of the fact that the provision 67 (5) used the expression " Any person aggrieved" and not "Any Party aggrieved" held that an Appeal by a non party to the proceedings but aggrieved would be maintainable. The Court proceeded to entertain the writ petition being of the

considered view that the Appeal was maintainable but was illegally dismissed as not maintainable on the ground that the Appellant was not party to the proceedings.

17. The factual position in the instant case at hand is slightly different inasmuch as the Appeal filed by the petitioner under Section 67 (5) has not been dismissed as not maintainable rather has been decided on merits recording findings in favour of the respondent no. 5 that there was no encroachment found and in fact the encroachment alleged was found to be over the Bhumidhari plot of the respondent no. 5 and consequently the proceedings were dropped.

18. The moot question for consideration of the Court is whether in the given set of facts the writ petition at the instance of the petitioner is maintainable.

19. The case of ***Rahul Kumar (supra)*** cited by Sri Vineet Singh, learned counsel for the respondent no. 5 in turn relies upon the Full Bench decision of this Court in the Case of ***Vivekanand Yadav vs. State of UP and another*** reported in ***2010 (10) ADJ 1 (FB)*** as also upon the decision of the Coordinate Bench of this Court in the Case of ***Narendra Kumar vs. State of UP and others*** reported in ***2013 (1) ADJ 228***.

20. The question as regards the locus standi of a Complainant came up for consideration before the Apex Court in the case of ***Ravi Yashwant Bhoir Vs. Collector*** reported in ***2012 (4) SCC 407*** wherein the Apex Court in para 58 of the judgment proceeded to observe as under:

"58. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria"

21. Then again a Division Bench of this Court in the case of ***Dharam Raj Vs. State of UP and others*** reported in ***2010 (2) AWC 1878 (All)*** with respect to locus of a Complaint observed as under:

"9. As evident from narration of the facts given above, it is evident that the petitioner was one of the complainants in the complaint against the respondent No. 4 on 12.3.2008. The action has since been taken on the complaint so made by the petitioner and others against the respondent No. 4, and fine of Rs. 5,000 has been imposed.

10. In the circumstances, the petitioner cannot have any grievance in the matter, and he is not an aggrieved person rather he is a person annoyed,

11. In the case of R. v. London Country Keepers of the Peace of Justice, (1890) 25 QBD 357, the Court has held:

A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved,

entitle to prefer an appeal against such order.

12. According to our opinion a "person aggrieved" means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.

13. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfied the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction [Utkal University etc. v. Dr. Nrusingha Charan Sarangi and Ors. AIR 1999 SC 943 and Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. (2003) 5 SCC 413].

14. Legal right is an averment of entitlement arising out of law. It is, in fact, an advantage or benefit conferred upon a person by a rule of law, [Shanti Kumar R. Canji v. Home Insurance Co. of New York AIR 1974 SC 1719 and State of Rajasthan v. Union of India and Ors. AIR 1977 SC 1361).

15. In Jasbhai Motibhai Desat v. Roshan Kumar Hazi Bashir Ahmad and Ors.: AIR 1976 SC 578, the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:

Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called damnum sine injuria. The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hang on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate."

In Northern Plastics Ltd. v. Hindustan Photo Films Mfg Co. Ltd. and Ors.

MANU/SC/1151/1997MANU/SC/1151/1997 : (1997) 4 SCC 452, the Hon'ble Supreme Court again considered the meaning of "person aggrieved" and "locus of a rival Government undertaking" and held that a rival businessman cannot maintain a writ petition on the ground that its business prospects would be adversely affected.

16. The view taken by us that the petitioner is not a person aggrieved, thus he has no locus standi to file the present writ petition thereby challenging the order dated 16.3.2009 passed by Sub-Divisional Magistrate, Jaisinghpur, district Sultanpur is also supported by the decision of this Court in the case of Suresh Singh v. Commissioner Moradabad Division 1993 (1) AWC 601, where it was held that in an inquiry under Section 95(g) of the U.P. Panchayat Raj Act, 1947, the complainant who was Up-Pradhan could be a witness in. an inquiry but had no locus standi to approach this Court against the order of the State authorities, for the reasons that none of his personal statutory right are affected.

17. As such the petitioner has no locus standi to file the present writ petition under Article 226 of the Constitution of India. Even otherwise having regard to the facts and circumstances of the case, we are not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India. "

22. In the light of the above and taking note of the fact that the petitioner had been permitted to file an Appeal under Section 67 (5) of the Code which has been decided against him by the impugned order, the Court is of the opinion that the writ petition at the instance of the petitioner is maintainable. The petitioner cannot be left remedy-less to challenge a decision rendered against him in a statutory Appeal where no other statutory remedy is provided. the writ petition is thus held to be maintainable. However, maintainability of the writ petition is one thing while entertainability of the writ petition is another. Maintainability of the writ petition does not mean that the writ petition is liable to be entertained also.

23. Now coming to the entertainability of the writ petition the Court on the perusal of the impugned order under Section 67 of the Code 2006 is of the opinion that the proceedings against the respondent no. 5 have been dropped on the ground that after proper survey of the plot by the Revenue Team and the report dated 01.06.2023 submitted along with the field Book it was found that the alleged constructions existed over plot No. 225 which is the Bhumidhari of the respondent no. 5 and not over plot No. 227 alleged in the RC Form-20 issued against him. The entire case of the petitioner is based upon the report dated 17.12.2017 on the basis of which the proceedings under Section 67 is stated to have been initiated. The report dated 17.12.2017 was submitted without proper survey. Once the objections were filed by the respondent no. 5, fresh survey/ demarcation by taking fixed points was carried out and it was found that alleged constructions existed over plot No. 225 and not over 227. The petitioner in the entire writ petition has not been able to demonstrate how the report dated 01.06.2023 is bad.

24. In view of the above the Court finds that though the writ petition at the instance of the petitioner/ complainant is maintainable against the order rejecting his appeal under Section 67 (5) of the UP Revenue Code, 2006, but there exists no good ground to interfere with the impugned

orders. As a result the writ petition is ***dismissed*** being devoid of merits. There shall however be no order as to Costs.

(2024) 5 ILRA 2097
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ C No. 20603 of 2007

Vinod Kumar Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Aarushi Khare, Advocate

Counsel for the Respondents:
Mr. Rishi Kumar, Addl. C.S.C.

The U.P. Stamp (valuation of Property) Rules, 1997- The Petitioner purchased certain plots of land and paid stamp duty-name recorded as bhumidhar with transferable rights-after three years he received a show cause notice based on an alleged inspection report-matter proceeded exparte and order passed same day imposing deficiency of stamp and penalty with interest- nature of land at the time of execution was agricultural –authorities treated the land as non-agricultural-when St. conducts a spot inspection without involving property owner-it undermines credibility and fairness of entire valuation process-impugned order quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. Smt. Pushpa Sareen Vs St. of U.P. reported in (2015) 0 Supreme (All) 132

2. Raj Kumar Vs St. of U.P. & ors. (Writ-C No.19644 of 2016 decided on April 13, 2023)

3. S.R. Cold Storage Vs Union of India & ors. reported in 2022 SCC online (All) 550; {[2022] 448 ITR 37 (All)}

4. Mrs. Maneka Gandhi Vs Union of India & anr. reported in (1978) 1 SCC 248

5. St. of Kerala Vs K.T. Shaduli Grocery Dealer Etc. reported in (1977) 2 SCC 777

6. Dharampal Satyapal Limited Vs Deputy Commissioner of Central Excise, Gauhati & ors. reported in (2015) 8 SCC 519

7. Madhyamam Broadcasting Limited Vs Union of India & ors. 15 reported in ILR 2023 (2) Kerala 545; (2023 SCC OnLine 366)

8. St. Bank of India & ors. Vs Rajesh Agarwal & ors. reported in (2023) 6 SCC 1

9. Ridge Vs Baldwin reported in [1964] AC 40

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

1. The instant writ petition under Article 226 of the Constitution of India has been filed by Vinod Kumar Jain (hereinafter referred to as the 'Petitioner') assailing the order dated December 7, 2006 passed by the District Magistrate/Collector, Jhansi (hereinafter referred to as the 'Respondent No. 2').

FACTS

2. The facts giving rise to the instant writ petition are delineated below:

a. The Petitioner purchased certain plots of land vide a registered sale deed dated July 17, 2002 and the paid stamp duty on the same.

b. The name of the Petitioner was recorded in revenue records as bhumidhar with transferable rights.

c. After a period of three years from the date of execution of the sale deed,

the Petitioner was served with a show cause notice dated January 7, 2005 which was based on an alleged inspection report dated December 4, 2004.

d. On the date fixed, that is on June 26, 2006, the authority concerned proceeded with the matter ex parte and passed an order on the same day imposing deficiency of stamp, penalty along with interest on the Petitioner. The Petitioner submitted an application on the same day before the authority concerned in order for his reply to be taken on record. However, the authority concerned rejected the said application saying that since the order has been passed, the reply will not be considered.

e. Aggrieved with the aforesaid order dated June 26, 2006 the Petitioner approached this Court by way of a writ petition which was dismissed by this Court on the ground that the Petitioner had an alternative efficacious remedy available.

f. Thereafter, the Petitioner preferred a revision application before the Respondent No.2 and deposited 1/3rd of the deficit amount as alleged by the Department. The said revision application was dismissed vide order dated December 7, 2006.

g. Aggrieved by the order dated December 7, 2006, the Petitioner has preferred the instant writ petition before this Court.

CONTENTIONS OF THE PETITIONER

3. Learned counsel appearing on behalf of the Petitioner has made the following submissions:

a. The nature of the land at the time of execution of the sale deed dated July 17, 2002 was agricultural and the same has been admitted by the Respondent No.2 in his order dated June 26, 2006.

b. The authorities concerned have treated the land as non- agricultural for the purposes of levying additional stamp duty. This too has been done after three years of the execution of the registered instrument without there being any material basis to do so or any exemplar to compare. .

c. No notice was give to the Petitioner regarding the alleged spot verification. The same has also not been denied by the Respondents. The spot verification was not carried out as per Rule 7(3)(c) of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as "the Rules"), which is mandatory.

d. As per Rule 7(3)(c) of the Rules, spot inspection has to be conducted after giving due notice to the parties to the instrument. While a spot inspection was conducted on January 4, 2004, no notice of the same was ever given to the Petitioner. After the said spot inspection, a show cause notice dated January 7, 2005 was issued to the Petitioner.

e. At the relevant point of time, the land in question was agricultural in nature and there were no structures or any activity apart from agriculture being carried out on the said land.

f. The Collector must have material on record to come to a finding as to the potential use of the land and only thereafter, assess the same on the basis of such potential use.

4 g. Spot inspection report does not disclose any material relied upon to come to the conclusion that the Petitioner's land is non-agricultural in nature.

h. Respondents do not dispute the fact that the Petitioner's land was being used only for agricultural purposes at the

time of execution of the sale deed and also at the time of the alleged spot inspection.

CONTENTIONS OF THE RESPONDENTS

4. Learned Additional Chief Standing Counsel appearing on behalf of the State Respondents has made the following submissions:

a. A proceeding under Section 47-A of the Act was initiated on the basis of the report of the Tehsildar which indicated that true facts were not stated in the sale deed as provided under Section 27 of the Act. As per relevant provisions of the Rules, the Petitioner has not paid stamp duty correctly.

b. The Petitioner did not file any reply to the show cause notice issued against him even after several opportunities were provided for the same.

c. The Collector, Jhansi, after considering the report of the Tehsildar and the Committee and the relevant provisions has determined the deficiency along with penalty.

d. The Collector placed reliance on the spot inspection report of the revenue authority, which was based on the prevailing market value at the time of registration of the sale deed. The order of the Collector, Jhansi determining the deficiency was in accordance with the relevant provisions.

e. The Petitioner despite the opportunity being given could not produce any reliable evidence in support of his case and as such the Respondent No.2 has rightly dismissed the revision application filed by the Petitioner as the Respondent No.2 did

5 not find any grounds to interfere with the earlier order passed by Collector.

f. The order impugned in the instant writ petition was passed after affording full opportunity of hearing as per the relevant provisions and applicable rates prevailing in the market.

g. The reports submitted by Tehsildar, Asst. Commissioner Stamp and the Additional Collector (F&R) were on record and the contention of the Petitioner in this regard is misconceived.

ANALYSIS AND CONCLUSION

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. On the power of the Collector under Section 47-A of the Act, reference can be made to the judgment of the Full Bench of this Court in **Smt. Pushpa Sareen v. State of U.P.** reported in **(2015) 0 Supreme (All) 132** penned by the Hon'ble Dr. D.Y. Chandrachud, C.J. (as his Lordship then was). The relevant paragraphs are extracted herein:

"26. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

27. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by

6 ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

28. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. Ambrish Tandon and another11. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

7. Upon a perusal of the judgment in **Smt. Pushpa Sareen's case (supra)**, what emerges is that the Collector can assess the potential use of the land on the date of execution of the instrument for determination of true market value. However, this exercise by the Collector has to be based on adequate materials and cannot be a matter of hypothesis or surmise. The Collector's finding as to the potential use of the land must be backed by sufficient evidence. In the absence of any materials or sufficient evidence to support its findings, the Collector cannot base his valuation on conjectures and surmises.

8. Further reliance can be placed on the judgment of a Coordinate Bench of this Court in **Raj Kumar v. State of U.P. and others** (Writ-C No.19644 of 2016 decided on April 13, 2023) wherein it was held that spot inspection has to be carried out in terms of Rule 7(3)(c) of the Rules. Furthermore, the Court held that burden of

proof is on the State to establish the payment of deficient stamp duty. It was further held that the valuation of the land in question has to be made on concrete grounds. The relevant paragraphs of **Raj Kumar's case (supra)** are delineated below:

17. Moreover, had the allegation of the State been to the effect that though the land was purchased for agricultural purposes, but its user was immediately changed and on the date of sale deed, it was being used for any other purpose like, industrial, commercial or even residential, the situation would have been different. Even in those situations, spot inspection at the relevant point of time was a necessity, but, admittedly, in the present case, no spot inspection has been carried out. Necessity of spot inspection and its mandatory nature, with reference to Rule 7 (3) (c) of the aforesaid Rules of 1997, has been reiterated, time and again by this Court in various authorities including Ajay Agarwal and others vs Commissioner Lucknow and others, reported in 2023 (2) ADJ 561 (LB), and Ram Khelawan alias Bachcha vs State of U.P. and another, reported in 2005 (2) AWC 1087.

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19. The observations/findings recorded in the orders impugned are also contrary to principles of burden of proof particularly, in a case where proceedings arise out of a fiscal statute. Once the State was proceeding to impose deficient stamp duty upon the petitioner, the entire burden lay upon the State to establish beyond reasonable doubt that the petitioner made some concealment at the time of getting the sale deed executed in his favour or that within a close proximity of dates, the user of the land in dispute was changed so as to levy additional stamp duty. Nothing to this effect has been brought on record, rather, not only the findings recorded in the orders impugned are contrary to the provisions of the Indian Stamp Act, 1899, as applicable in the State of U.P. as well as U.P. Stamp (Valuation of Property) Rules, 1997, but certainly contrary to the law consistently laid down by this Court.

9. When the State seeks to impose additional financial liabilities, such as higher stamp duty, it must provide clear and compelling evidence to justify its claims. This principle ensures that property owners are not subjected to arbitrary or unjustified financial burdens. It serves as a cornerstone of fairness and accountability in the legal process, protecting individuals and entities from potential misuse of governmental power. In the context of stamp duty, the burden of proof involves demonstrating that the assessed value of the property, and thus the calculated duty, is accurate and based on tangible, verifiable data. This requirement is essential to prevent arbitrary valuations that could result from assumptions or inadequate investigations. By ensuring that the State must justify its claims with clear evidence, the principle safeguards property owners from potential overreach and ensures that any additional financial burdens are warranted and fair. Courts have constantly underscored that when the State seeks to levy additional taxes or duties, it must do so based on robust and substantiated evidence. For instance, in the case of ***Raj Kumar v. State of U.P*** (supra), this Court highlighted that the entire burden of establishing the necessity for additional stamp duty lies with the State. This Court emphasized that without concrete evidence demonstrating a change in the land's use or value, the imposition of additional duty would be unfounded and unjust. Similarly, in the

landmark case of ***Smt. Pushpa Sareen v. State of U.P.*** (supra), the Full Bench of this Court elaborated on the nature and extent of evidence required from the State. The judgment in ***Pushpa Sareen*** (supra) underscored that the State must provide detailed and specific evidence about the land's current use, potential use, and market value. General assumptions or indirect evidence are insufficient to meet this burden. The court's insistence on a high standard of proof reflects the principle's role in ensuring fairness and protecting property owners' rights.

10. In the present case, indubitably the spot verification was not carried out as per the Rules. Such being the case, the burden of proof that rested solely on the Revenue to indicate the nature of the land and the potential use of the land was not discharged properly. The spot verification was conducted without affording an opportunity to the Petitioners, and the same cannot be sustained.

11. It is trite law that principles *of audi alteram partem* are required to be followed by the authority and giving a go by to the same results in violation of the principles of natural justice. One may examine the development of the law in relation to natural justice. The Division Bench of this Court in **S.R. Cold Storage v. Union of India and Others** reported in **2022 SCC online (All) 550; {[2022] 448 ITR 37 (All)**} held as follows:

"25. The first and foremost principle of natural justice is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.

26. The principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.

27. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

28. Natural justice has been variously defined by different judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by

all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" that is no man shall be a judge in his own cause. The second rule is "audi alteram partem", that is, "hear the other side". A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, i. e., "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."

12. The Supreme Court, in the celebrated constitutional judgment in **Mrs. Maneka Gandhi v. Union of India and another reported in (1978) 1 SCC 248**, while dealing with a challenge laid to an order by which a passport was impounded, expounded upon the significance of the principles of audi alteram partem to the doctrine of natural justice. Justice P.N. Bhagwati while authoring the judgment beautifully expounded the said principles as follows:

"14. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in Russel v. Duke of Norfolk [(1949) 1 All ER 109] that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal : it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."

13. Subsequently, the Supreme Court, **in State of Kerala v. K.T. Shaduli Grocery Dealer Etc. reported in (1977) 2 SCC 777**, examined the principle of natural justice as follows:

"2. Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi- judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 154:(1955) 1 SCR 941:(1955) 27 ITR 126] that a taxing officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317 : (1969) 1 SCJ 543] that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk [(1949) 1 All ER 109] :

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

3. One of the rules which constitutes a part of the principles of natural justice is the rule of audi alteram partem which requires that no man should be condemned unheard. It is indeed a requirement of the duty to act fairly which lies on all quasi- judicial authorities and this duty has been extended also to the authorities holding administrative enquiries involving civil consequences or affecting rights of parties because as pointed out by this Court in A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : (1970) 1 SCR 457] "the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice" and justice, in a society which has accepted socialism as its article of faith in the Constitution is dispensed not only by judicial or quasi-judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule of audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross- examined by the party affected while in some other case it

may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on facts and circumstances of each case."

14. Justice P.N. Bhagwati further expounded on the necessity of disclosing to the assessee the information relied upon by the authorities. The relevant extract is provided below:

"12. This Court further fully approved of the four propositions laid down by the Lahore High Court in Seth Gurmukh Singh v. Commissioner of Income Tax [(1944) 12 ITR 393 (Lahore HC)]. This Court was of the opinion that the Taxing Authorities had violated certain fundamental rules of natural justice in that they did not disclose to the assessee the information supplied to it by the departmental representatives. This case was relied upon by this Court in a later decision in Raghubar Mandal Harihar Mandal's case (supra) where it reiterated the decision of this Court in Dhakeswari Cotton Mills Ltd.'s case (supra), and while further endorsing the decision of the Lahore High Court in Seth Gurmukh Singh's case pointed out the rules laid down by the Lahore High Court for proceeding under sub- section (3) of Section 23 of the Income-tax Act and observed as follows:

"The rules laid down in that decision were these: (1) While proceeding under sub-section (3) of section 23 of the Income-tax Act, the Income-tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false; (2) if he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate; (3) he is not however debarred from relying on private sources of information, which sources he may not disclose to the assessee at all; and (4) in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible."

It will thus be noticed that this Court clearly laid down that while the Income-tax Officer was not debarred from relying on any material against the assessee, justice and fair-play demanded that the sources of information relied upon by the Income-tax Officer must be disclosed to the assessee so that he is in a position to rebut the same and an opportunity should be given to the assessee to meet the effect the aforesaid information."

15. Going forward, the Supreme Court in **Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and others** reported in **(2015) 8 SCC 519** outlined the fundamental importance of providing an opportunity for hearing before making any decision, and characterized it as a basic requirement in any legal proceedings. The Supreme Court further propounded that compliance with principles of natural justice is an implied mandatory requirement, and non-observance of these principles can invalidate the exercise of power. Relevant paragraphs have been extracted below:

28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the

courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

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30. Wade [Administrative Law (1977) 395] also emphasises that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

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35. From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in A.K. Kraipak v. Union of India; [(1969) 2 SCC 262] that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In Maneka Gandhi v. Union of India; [(1978) 1 SCC 248] also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In Maharashtra State Financial Corporation v. Suvarna Board Mills; [(1994) 5 SCC 566] , this aspect was explained in the following manner :

"3. It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straitjacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law. All will depend on facts and circumstances of the case."

16. One may further refer to the recent judgment of the Supreme Court in **Madhyamam Broadcasting Limited v. Union of India and others reported in ILR 2023 (2) Kerala 545; (2023 SCC OnLine 366)** wherein the Hon'ble Supreme Court highlighted that the principles of natural justice of which audi alteram partem is a part, guarantee a reasonable procedure which is a requirement entrenched in Articles 14, 19 and 21 of the Constitution of India. Chief Justice Dr. D.Y. Chandrachud while authoring the judgment has succinctly

examined the principles of natural justice and after examining the Supreme Court's ratio in umpteen cases has penned the relevant paragraph which is extracted below:

"47. The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case [See S.L. Kapoor v. Jagmohan; (1980) 4 SCC 379 "The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary"; also see Swadeshi Cotton Mills v. Union of India; A.I.R. 1981 S.C. 818]. Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds [See Olga Tellis v. Bombay Municipal Corporation: (1985) 3 SCC 545; C.B. Gautam v. Union of India:(1993) 1 SCC 78; Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I: (2008) 14 SCC 151 and Kesar Enterprises v. State of Uttar Pradesh: (2011) 13 SCC 733]. Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14, 19 and 21. The facet of audi alterum partem encompasses the components of notice, contents of the notice, reports of inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating authority, in effect, infringes upon the core of the right to a fair and reasonable hearing."

17. Chief Justice Dr. D.Y. Chandrachud has further elaborated on the principles of natural justice in **State Bank of India and others v. Rajesh Agarwal and others** reported in **(2023) 6 SCC 1.** The relevant paragraph is delineated below:

"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision- making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) nemo judex in causa sua, which means that no person should be a judge in their own cause; and (ii) audi alteram partem, which means that a person affected by

administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favor interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power." .

18. The common thread that runs across these judgments is that although the principle of audi alteram partem can evolve itself given the facts and circumstances of each case, its significance and applicability is universal. Audi alteram partem, which is a part of the doctrine of natural justice, finds its roots primarily in the constitutionally guaranteed ideal of equality. This principle ensures that no one is condemned, penalized, or deprived of their rights without a fair and reasonable opportunity of hearing. It acts as a safeguard against arbitrary decision-making, upholding the principle of due process while also providing a crucial foundation for just and equitable legal or administrative proceedings.

19. The principle of natural justice dictates that individuals affected by a decision must be given an opportunity to present their case and contest any adverse findings. This principle, often encapsulated in the Latin phrase *"audi alteram partem"* (hear the other side), is a fundamental aspect of fair legal procedures. When a spot inspection is conducted ex parte, it violates this principle by depriving the property owner of their right to be heard.

20. The importance of adhering to principles of natural justice in administrative actions has been repeatedly emphasized by the courts. In the case of ***Ridge v. Baldwin*** reported in [1964] AC 40 , the House of Lords held that failure to observe the principles of natural justice renders a decision void. Similarly, in Indian jurisprudence, the Supreme Court in ***Maneka Gandhi v. Union of India (supra)*** stressed the importance of the principles of natural justice. When the State conducts a spot inspection without involving the property owner, it undermines the credibility and fairness of the entire valuation process. The property owner is denied the chance to provide relevant information, challenge inaccurate observations, or present counter-evidence. This one-sided approach can lead to incorrect or biased assessments, resulting in unjust financial burdens on the property owner.

21. To rectify such procedural injustices, courts have the authority to set aside any actions or decisions made without adhering to the principles of natural justice. In the present case, since the spot inspection was carried out ex parte and without affording an opportunity to the Petitioner, the findings of that inspection cannot be sustained.

22. Accordingly, the impugned order dated December 7, 2006 is quashed and set aside. The amount, if any, deposited by the petitioner towards deficient stamp duty, should be returned to the petitioner along with interest @ 4 per cent within six weeks from date. Compliance in this regard

must be filed by the Department after such payment is made.

23. With the above directions, this writ petition is allowed.

(2024) 5 ILRA 2109
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ Tax No. 114 of 2024

Eveready Industries India Ltd., Lko. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Atma Ram Verma

Counsel for the Respondents:
C.S.C.

Civil Law - Uttar Pradesh Goods and Services Tax Act, 2017-Company was registered under UPGST Act-audit notice issued-survey of the premise was conducted-another notice of FORM GST ADT-01 was issued on similar grounds-Petitioner complied with all the directions-not given information regarding action taken in furtherance of audit notices-show cause notice issued relying upon audit FORM GST ADT-01-no audit report was ever issued to the Petitioner-notice without date, time and place of hearing-mandate of sec 75 (4) provides personal hearing-not granted personal hearing-stating that action taken u/s 74(9) does not provide for personal hearing-sec. 75 clearly St.s that it describes the 'General Provisions relating to Determining tax'-sub-section (4) followed by sub sec.(5) requires an officer to adjourn a hearing on the request of person chargeable to tax-such word can only be interpreted to mean giving "personal hearing"-impugned orders set aside.

W.P. allowed. (E-9)

List of Cases cited:

1. Writ- Tax No.1029 of 2021: Bharat Mint & Allied Chemicals Vs Commissioner, Commercial Tax & ors., (2022) Vol.48 VLJ 325, decided on 04.03.2022;

2. Writ Tax No.551 of 2023: M/s Mohini Traders Vs St. of U.P. & anr., decided on 03.05.2023

3. Writ Tax No.44 of 2024: M/s Mahendra Educational Pvt. Ltd. Vs St. of U.P., decided on 05.03.2024

4. M/s Trutuf Safety Glass Industries Vs Commissioner of Sales Tax, UP , 2007 (7) SCC 242

5. Commissioner of Sales Tax Vs Parson Tools & Plants, 1975 (4) SCC 22

6. Godrej and Boyce Manufacturing Co. Ltd.& anr., 2017 (7) SCC 421

7. Pearl Berg Vs Varty, (1972) 2 All ER 6

8. Institute of Chartered Accountants of India Vs M/s Price Waterhouse & anr., AIR 1998 Supreme Court 74

9. D.R. Venkatachalam & ors., etc Vs Deputy Transport Commissioner & ors., AIR 1977 Supreme Court 842

10. Bharat Aluminium Company Vs Kaiser Aluminium Technical Services Inc., reported in 2012 (9) SCC 552

11. Canada Sugar Refining Co. Ltd.Vs The Queen (Canada) 1898 AC 735

12. Commissioner of Customs (Import), Mumbai Vs Dilip Kumar & Co.& ors., 2018 (9)22 SCC page 1

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Sri Rahul Agarwal alongwith Sri Utkarsh Malviya, learned counsel for the petitioner and Sri Rajesh Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. This petition has been filed with the following main prayers:-

"Issue a Writ, Order or Direction in the nature of Certiorari quashing the impugned Order passed u/s 74 of the Uttar Pradesh Goods & Service Tax Act, 2017 bearing Reference No.ZDO90224180025M dated 19.02.2024 issued in FORM GST DRC-1 a/w the Rectification Order bearing Ref. No.ZD0904244094478 dated 27.04.2024 issued in FORM GST DRC-08, by the Respondent no.2 (Annexure no.1).

(2) Issue a Writ, Order or Direction in the nature of certiorari quashing the impugned Show Cause Notice issued to the petitioner u/s 74 of the UPGST Act vide Reference No. ZD090823132533D dated 07.08.2023 issued in FORM GST DRC-01 by Respondent no.2 (Annexure No.2)."

3. It is the case of the petitioner that the company was registered under Uttar Pradesh Goods and Services Tax Act, 2017 (for short 'the Act'). An audit notice was issued to the petitioner on 05.05.2022 vide FORM GST ADT-01 by the Joint Commissioner (Tax Audit), Commercial Tax, Lucknow, requiring the petitioner to produce books of accounts and present its case regarding due discharge of tax liabilities. A survey of the premises of the petitioner was conducted by the Revenue Officials on 11.05.2022. Another notice was issued in FORM GST ADT-01 to the petitioner on 05.01.2023 on similar grounds. The petitioner claims to have complied with all the directions issued by the respondents, however, it was not given any information regarding the action taken in furtherance of audit notices dated 05.05.2022 and 05.01.2023 by the respondent authorities. As per the provisions of Section 65(4) of the Act, if the respondents failed to complete the audit exercise after the lapse of three months from the date of audit, unless the said period has been explicitly extended, it shall be deemed to have concluded upon expiration of the said period. No draft audit report was prepared or issued to the petitioner in FORM GST ADT-02. A show cause notice was issued to the petitioner on 07.08.2023 relying upon the audit FORM GST ADT-01, that were issued on 05.05.2022 and on 05.01.2023. No audit report was ever issued to the petitioner.

4. The impugned show cause notice does not provide any date, place and time of hearing despite the same being mandatory procedure. In the Columns specified for date, place and time of hearing, the show cause notice mentions NA (not applicable) thereby denying the petitioner any opportunity of hearing. The petitioner submitted its reply on 06.11.2023 and in the said reply, the petitioner has specifically prayed that it may be given personal hearing, if the officer is not satisfied with the written explanation given in reply to the show cause notice.

5. Learned counsel for the petitioner has argued that despite the mandate of Section 75(4) of the Act providing personal hearing and despite the petitioner specifically asking for personal hearing, no opportunity of personal hearing was granted and the impugned order was passed in violation of the settled principles of natural justice.

6. Learned counsel for the petitioner to substantiate his argument, has read out the provisions of Section 75(4) of the Act and has placed reliance upon three

judgements of Co-ordinate Benches of this Court in ***Writ- Tax No.1029 of 2021: Bharat Mint & Allied Chemicals Vs. Commissioner, Commercial Tax & others, (2022) Vol.48 VLJ 325,*** decided on 04.03.2022***; Writ Tax No.551 of 2023: M/s Mohini Traders Vs. State of U.P. and another,*** decided on 03.05.2023 ***and Writ Tax No.44 of 2024: M/s Mahendra Educational Pvt. Ltd. Vs. State of U.P.,*** decided on 05.03.2024, copies of such orders passed by Co-ordinate Benches have been collectively filed as Annexure No.9 to the writ petition.

7. Learned Counsel appearing on behalf of the State-respondents has argued that against the impugned order of assessment, the petitioner has a statutory remedy under Section 107 of the Act and all the arguments on the merits of the case, can be dealt with by the appellate authority.

8. Learned counsel for the petitioner has argued that the leading judgment of a Co-ordinate Division Bench in ***Bharat Mint & Allied Chemicals*** (supra) has been relied upon in the case of ***M/s Mohini Traders*** (supra) and ***M/s Mahendra Educational Pvt. Ltd***. (supra) by two Co-ordinate Division Benches and he has read out the judgment of the Division Bench in ***Bharat Mint & Allied Chemicals*** (supra), wherein the Division Bench has framed two questions to decide; the first related to whether opportunity of personal hearing is mandatory under Section 75(4) of the CGST/UPGST Act 2017; and second question was whether under the facts and circumstances of the case, the impugned adjudication order has been passed in breach of principle of natural justice and consequently, it deserved to be quashed in exercise of powers conferred under Article 226 of the Constitution of India.

9. The Co-ordinate Bench dealt with the notice issued to the petitioner under Section 75(4) of the Act and observed that under the column meant for the date, time and place of personal hearing, the officer has noted NA (not applicable) and then has quoted the language of Section 75(4) of the Act. To decide the controversy, it is appropriate to quote the judgement of ***Bharat Mint & Allied Chemicals*** (supra) in extenso :-

"8. Section 75(4) of the Act, 2017 reads as under:-

"An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person."

9. From perusal of Section 75(4) of the Act, 2017 it is evident that opportunity of hearing has to be granted by authorities under the Act, 2017 where either a request is received from the person chargeable with tax or penalty for opportunity of hearing or where any adverse decision is contemplated against such person. Thus, where an adverse decision is contemplated against the person, such a person even need not to request for opportunity of personal hearing and it is mandatory for the authority concerned to afford opportunity of personal hearing before passing an order adverse to such person.

10. In the counter affidavit the respondents have taken the stand that no opportunity of hearing is required before passing the assessment order. In support of their contention the respondents have relied upon the judgment of Hon'ble Supreme Court in Union of India and Others Vs. M/s.Jesus Sales Corporation AIR 1996 SC 1509. Perusal of the judgment

in the case of M/s. Jesus Sales Corporation (supra) shows that the observation was made by Hon'ble Supreme Court while interpreting 3rd proviso to Section 4 M(1) of the Imports and Exports (Control) Act 1947, which is reproduced below:

"Provided also that, where the Appellate authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose."

11. The aforequoted 3rd proviso of Section 4 M (1) of the Act 1947 does not contemplate any opportunity of personal hearing in contrast to the provisions of Section 75(4) of the CGST/UPGST Act, 2017 which specifically mandates for opportunity of hearing before passing the order. The counter affidavit has been filed by an Officer of the rank of Joint Commissioner, Corporate Circle Commercial Tax, Bareilly who has either not read the aforesaid judgment of Hon'ble Supreme Court or was not able to understand it and in a casual manner the counter affidavit has been filed in complete disregard to the statutory mandate of Section 75(4) of the Act 2017.

12. It has also been admitted in the counter affidavit that except permitting the petitioner to reply to the show cause notice, opportunity of personal hearing has not been afforded to the petitioner. Thus the legislative mandate of Section 75(4) of the Act to the authorities to afford opportunity of hearing to the assessee i.e. to follow principles of natural justice, has been completely violated by the respondents while passing the impugned order."

10. The Court thereafter observed that the stand taken by the respondents that the petitioner has alternative remedy of appeal under Section 107 of the Act cannot be accepted. Insofar as it is settled law that availability of alternative remedy, is not a complete bar to entertain a writ petition under Article 226 of the Constitution of India and has referred to exceptions that have been carved out to alternative remedy by the Hon'ble Supreme Court with regard to three cases i.e. (i) where there is complete lack of jurisdiction in the officer or authority to take the action or to pass the order impugned; or (ii) where vires of an Act, Rules, Notification or any of its provisions has been challenged; or (iii) where an order prejudicial to the writ petitioner has been passed in total violation of principles of natural justice. There are other exceptions also, which have been mentioned in sub-clauses (iv) to (xi) of the Division Bench judgment, which are being quoted herein-below:-

"(iv) Where enforcement of any fundamental right is sought by the petitioner.

(v) Where procedure required for decision has not been adopted.

(vi) Where Tax is levied without authority of law.

(vii) Where decision is an abuse of process of law.

(viii) Where palpable injustice shall be caused to the petitioner, if he is forced to adopt remedies under the statute for enforcement of any fundamental rights guaranteed under the Constitution of India. (ix) Where a decision or policy decision has already been taken by the Government rendering the remedy of appeal to be an empty formality or futile attempt.

(x) Where there is no factual dispute but merely a pure question of law or interpretation is involved.

(xi) Where show cause notice has been issued with preconceived or premeditated or closed mind."

11. The Division Bench in the case of ***M/s Mohini Traders (supra)*** has placed reliance upon the judgement rendered in the case of ***M/s Bharat Mint & Allied Chemicals*** (supra) and observed in similar terms in paragraphs 8 and 9 as follows:-

"8. Even otherwise in the context of an assessment order creating heavy civil liability, observing such minimal opportunity of hearing is a must. Principle of natural justice would commend to this Court to bind the authorities to always ensure to provide such opportunity of hearing. It has to be ensured that such opportunity is granted in real terms. Here, we note, the impugned order itself has been passed on 25.11.2022, while reply to the show-cause-notice had been entertained on 14.11.2022. The stand of the assessee may remain unclear unless minimal opportunity of hearing is first granted. Only thereafter, the explanation furnished may be rejected and demand created.

9. Not only such opportunity would ensure observance of rules of natural of justice but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required."

12. A coordinate Bench sitting at Lucknow in ***M/s Mahendra Educational Pvt. Ltd.*** (supra) has placed reliance upon the Division Bench Judgement in the case of ***M/s Bharat Mint & Allied Chemicals (supra)*** and has quoted the observations made in the case of ***M/s Mohini Traders (supra)*** and observed in paragraph 8 as follows:-

"8. Not only such opportunity would ensure observance of rules of natural of justice but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required."

13. It has been argued on the basis of observations made by the three Division Benches of this Court that the law is settled insofar as Section 75(4) of the Act is concerned. The officer should not only issue a show cause notice, but also give personal hearing where a request has been received in writing from the person chargeable with tax or penalty or where any adverse decision is contemplated against any such person.

14. Learned counsel for the State-respondents has pointed out that Section 74 of the Act, which relates to determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful- misstatement or suppression of facts. Section 74 of the Act in its entirety is quoted below:-

"Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously

been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded."

15. The action taken against the petitioner under Section 74(9) of the Act does not provide for personal hearing to be given to the concerned person chargeable with tax or penalty. It only states that the

proper officer shall after considering the representation, if any, made by the person chargeable with tax determine the amount of tax, interest and penalty due from such person and issue an order.

16. Learned counsel for the petitioner, however, has pointed out that Section 75 of the Act which, as has been published in the text book, is under sub-heading of "General Provisions Relating to Determination of Tax". It has been argued that Section 75 of the Act will apply as a general procedure to be adopted in all actions that are proposed under Sections 73 and 74 of the Act and the procedure prescribed under Section 75 of the Act will have to be followed by the tax authorities even for determination of tax under Section 74 of the Act.

17. Learned counsel appearing for State-respondents has referred to Section 75 (2) of the Act and says that the language of Section 75(2) of the Act is clear that where any appellate authority or appellate Tribunal or Court concludes that the notice issued under sub-section (1) of Section 74 of the Act is not sustainable for the reason that the charges of fraud or any willful-misstatement or suppression of fact to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of Section 73 of the Act.

18. It has been argued that sub-clauses of Section 75 of the Act relate to the procedure to be followed by the Officer after remand of the matter by the appellate authority or tribunal or the court and sub-section (4) should be read in that context and it requires that an opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty or where an adverse decision is contemplated against such person.

19. It has however been argued by the learned counsel for the petitioner that if such an interpretation is given to Section 75 of the Act and its sub clauses, it would render a situation anomalous and he has read out sub-sections (5), (6), (7), (8) and (9) of Section 75 of the Act. Section 75 of the Act in its entirety is quoted below:-

"Section 75. General provisions relating to determination of tax.

(1) Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any willful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

(3) Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.

(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse

decision is contemplated against such person.

(5) The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted for more than three times to a person during the proceedings. (6) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

(7) The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.

(8) Where the Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified.

(9) The interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.

(10) The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74.

(11) An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.

(12) Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.

(13) Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act."

20. Learned counsel for the petitioner has also argued that Section 75(4) of the Act would be rendered otiose if this Court comes to the conclusion that the argument raised by the learned counsel for the State-respondents is liable to be accepted as Section 74(1) of the Act also contemplates issuance of a notice and calling for a reply. It has been submitted that Sections 73, 74 and 75 of the Act lay down one integrated scheme regarding imposition of tax or penalty and the procedure to be followed by the Taxing Officer.

21. This Court having considered the submissions made by the learned counsel for the parties has gone through the leading

judgment in the case of ***M/s Bharat Mint & Allied Chemicals (supra)*** and finds that the said judgment although has read into the language of Section 75(4) of the Act and the right of "personal" hearing, it has not mentioned any *casus omissus* on the part of the legislature reading into the statute words like "personal" hearing" as the Act itself only states that an opportunity of hearing shall be given.

22. The golden rule for construing Wills, Statutes, and in fact, all written instruments has been stated in Grey versus Pearson (1857) 6 HL cases 61 as: –

"the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther"

23. However Jervis, C J, in ***Ableyv Dale***, 11, CB 378; as quoted by the Supreme Court in the case of ***M/s Trutuf Safety Glass Industries versus Commissioner of Sales Tax, UP , 2007 (7) SCC 242***, has further observed that the latter part of this golden rule must, however, be applied with with much caution. "If the precise words used are plain and unambiguous, in a statute, we are bound to construe them in their ordinary sense, even though it leads in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy, an absurdity, or manifest injustice from an adherence to the literal meaning".

24. In ***Commissioner of Sales Tax versus Parson Tools and Plants, 1975 (4) SCC 22,*** the Supreme Court observed that the will of the legislature is the supreme law of the land, and demands, perfect obedience. Judicial power is never exercised for the purpose of giving effect to the will of the judges; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. Therefore, where the legislature clearly declares its intent in the scheme and language of a Statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law; if the Statute is a taxing Statute. If the legislature wilfully omits to incorporate something of an analogous law in a subsequent Statute, or even if there is *casus omissus* in a Statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, or by implication, something that it thinks to be a general principle of justice and equity. To do so, would be entrenching upon the preserve of the legislature, the primary function of a Court of law, being jus dicere and not jus dare.

25. In ***Godrej and Boyce Manufacturing Company Limited Vs Deputy Commissioner of I.T., Mumbai and another, 2017 (7) SCC 421***; the Supreme Court had observed that where the words of the Statute are clear and unambiguous, recourse cannot be had to principles of interpretation other than the

literal rule. It further observed that it is the bounden duty and obligation of the Court to interpret the Statue as it is. It further observed that it is contrary to all rules of construction to read words into a Statute which the legislature in its wisdom, has deliberately not incorporated.

26. Lord Hailsham in ***Pearl Berg versus Varty***, (1972) 2 All ER 6; observed in regard to importation of the principles of natural justice into a Statute, which is a clear and complete code by itself, thus:–

"it is true, of course that the courts will lean heavily against any construction of a Statute which would be manifestly unfair. But they have no power to amend or supplement the language of a Statute, merely because in one view of the matter, a subject feels himself entitled to a larger degree of say in the making of a decision than a Statute awards him. Still less is it the function of the courts to form first a judgement on the fairness of an act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgement,– –."

27. As a matter of first principle, a *casus omissus* cannot be supplied by the Court, unless there is a clear case of necessity and when reason is found within the Statute itself.*(See Padmasundara Rao (dead) and others Vs State of Tamil Nadu and others* AIR 2002 Supreme Court 1334).

28. In Institute of Chartered Accountants of ***India versus M/s Price Waterhouse and another, AIR 1998 Supreme Court 74;*** the Supreme Court had observed that the object of interpreting a Statute is to ascertain the intention of the legislature in enacting it. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said, and also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. Courts cannot aid the legislature's defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. It is contrary to all rules of construction to read words into a Statute unless it is absolutely necessary to do so. Principles of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament, unless clear reason for it is to be found within the corners of the Act itself.

29. In ***D.R. Venkatachalam and others, etc Vs. Deputy Transport Commissioner and others, AIR 1977 Supreme Court 842***, it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the guise of interpretation.

30. The Supreme Court in the case of ***Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc***., reported in ***2012 (9) SCC 552***, has held that the Court must proceed on the footing that the legislature intended what it has said. Even where there is a *casus omissus*, it is for others than the Courts to remedy the

defect. it has quoted the House of Lords in Duport Steels Ltd Vs. Sirs, 1980, All ER 529 (HL) in observing:-

"– – the role of the Judiciary is confined to ascertain from the words that Parliament has approved as expressing its intention what that intention was, and to give effect to it. Where the meaning of the statutory words are plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. ....,Under our constitution, it is Parliament's opinion on these matters that is paramount.."

31. In *Canada Sugar Refining Company Limited versus The Queen (Canada) 1898 AC 735,* Lord Davey observed that "the good expositor of an Act of Parliament should make construction on all the parts together, and not of one part only by itself. Every clause of a Statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute …"

32. Two principles of construction, one relating to *casus omissus,* and the other in regard to reading the Statute as a whole, – appear to be well settled. Under the first principle, the *casus omissus* cannot be supplied by the Court, except in the case of clear necessity, and when reason for it is found in the four corners of the Statute itself, but at the same time a *casus omissus* should not be readily inferred, and for that purpose, all parts of the Statute or the section must be construed together, and every clause of a section should be construed with reference to the context and other clauses thereof, so that the construction to be put on a particular provision makes it consistent of the whole Statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results, which could not have been intended by the legislature. An intention to produce an unreasonable result is not to be imputed to a Statute, if there is some other construction available. Where to apply words literally would "defeat the obvious intention of the legislature and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction, as per Lord Reid in Luke v. IRC (1966 AC 557), where it has been observed "this is not a new problem, though our standard of drafting is such that itrarely emerges".

33. In *Commissioner of Customs (Import), Mumbai Versus Dilip Kumar and Company and others,* 2018 (9) SCC page 1, a Constitution Bench of the Supreme Court was interpreting an exemption clause as per customs Notification 20 of 1999, relating to concessional rate of Duty pertaining to prawn feed. The concessional duty was denied by the department to the respondent, who had imported a consignment of Vitamin E 50 powder (feed grade) on the ground that the goods under import contained chemical ingredients for animal feed, and not animal feed/prawn feed. The Supreme Court observed that in the matter of interpretation of charging section of taxation Statute, this rule of interpretation is mandatory that if there are two views possible in the matter of interpretation of the charging section, the one favourable to the assessee needs to be applied.

34. The Supreme Court further observed that the principles of

interpretation of statutes come in handy here. In spite of the fact that experts in the field assist in drafting Act and Rules, there are many occasions where the language used and the phrases employed in the Statute are not perfect. Therefore, Judges and Courts need to interpret the words. The purpose of interpretation is essentially to know the intention of the legislature. Whether the legislature intended to apply the law in a given case; whether the legislature intended to give discretion to enforcing authority or to adjudicating agency to apply the law, are essentially questions to which answers can be given only by knowing the intention of Legislation. Apart from the general principles of interpretation of statutes, there are certain internal aids and external aids, which are tools for interpreting the Statutes. The long title, the preamble, the heading, the marginal note, punctuation, illustrations, definitions, or exclusionary clause, proviso to a section, explanation, examples, a Schedule to the Act, et cetera are internal aids to construction. The external aids to construction are Parliamentary debates, history leading to the legislation, other statutes which have a bearing, dictionaries, thesaurus etc. It is well accepted that a Statute must be construed according to the intention of the legislature and the Courts should act upon the true intention of the legislation while applying the law and while interpreting the law. If a statutory provision is open to more than one meaning, the Court has to choose the interpretation which represents the intention of the legislature. In other words, legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object, which comprehends the mischief and its remedy to which the enactment is directed. The well settled principle is that when the words in a Statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences.

In applying the rule of plain meaning, any hardship and inconvenience cannot be the basis to alter the meaning of the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used, keeping in view the legislative purpose. Not only that, if the plain construction leads to an anomaly or absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation.

35. After referring to Justice GP Singh's 'Principles of Statutory Interpretation' and several English case laws and also judgements of the Supreme Court, the Constitution Bench in paragraph 34 of Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company and others, 2018 (9) SCC 1, has observed as under: –

"In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) Before taxing any person, it must be shown that he falls within the ambit

of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly"

36. When we examine the scheme of Sections 73, 74 and 75 of the Act taken together, we find that under Section 74, the procedure for determination of tax not paid or short paid or erroneously refunded or input tax credit, wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts is provided. Under sub-section (1) and (2) and (3), the proper officer shall serve a notice on the person chargeable with such tax requiring him to show cause as to why he should not pay the amount specified in the notice along with interest thereon under Section 50 and a penalty equivalent to the tax specified in the notice.

37. Such notice should be given at least six months prior to the time limit specified in Section 10 for issuance of order; along with a statement containing the details of tax, not paid or short paid or erroneously refunded or input tax credit wrongly availed.

38. Sub-Section (4) provides that service of statement under sub-Section (3) shall be deemed to be service of notice under sub-Section (1) of Section 73.

Under sub-Section (5) of Section 74, the person chargeable with tax may before service of notice under sub-Section (1) pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to 50% of such tax on the basis of his own ascertainment or as ascertained by the proper officer and inform him in writing of such payment. Under sub-Section (6), the proper officer on receipt of such information shall not serve any notice under sub-Section (1) in respect of tax payable if he is satisfied with such payment, however, if he is not satisfied, then, under Sub-Section (7), he shall proceed to issue notice as provided for under sub-Section (1) in respect of such amount, which falls short of the amount actually payable. This can be deemed to be a second notice, or a second opportunity given to the assessee in respect of the amount which falls short of the amount, actually payable. If on service of such notice, the person chargeable with Tax pays the tax along with interest under Section 50 and a penalty equivalent to 25% of such tax, all proceedings in respect of the said notice shall be deemed to be concluded. Penalty in sub-Section (8) is equivalent to 25% of such tax as against penalty, which is payable under sub-Section (1), which is equivalent to the tax specified in the notice.

Under sub-Section (9), the proper officer shall after considering the representation if any, made by the person chargeable with tax, determine the amount of tax, interest, and penalty due from such person and issue an order.

Under sub-Section (10), the limitation is provided within which the proper Officer shall issue order under sub-Section (9).

Under sub-Section (11), where any person is served with an order issued under sub-Section (9) and he pays the tax along with interest payable thereon under Section 50 and a penalty equivalent to 50%

of such tax payable within 30 days of communication of the order, all proceedings in respect of such notice shall be deemed to be concluded.

39. It is evident from the scheme of Section 74 that initially a notice along with a statement of tax payable along with penalty has to be issued by the proper officer within the time limit as prescribed, to which a representation can be made by the assessee in case he is dissatisfied with such computation of tax and penalty. On the other hand, in case the assessee pays the amount as given in the notice along with interest payable thereon and penalty, then the proper officer may issue orders which may conclude the proceedings.

It is when the assessee is dissatisfied then, whether in addition to being given an opportunity for submitting representation, he is also entitled to personal hearing is the question that this court has to decide.

40. Section 75 starts with the subheading *'General Provisions relating to Determination of Tax'*. It has been argued that Section 75 of the Act will apply as a general procedure to be adopted in all actions that are proposed to be taken under Section 73 and 74 of the Act. As against the argument raised by the learned Standing Counsel appearing for the State Respondents, that Section 75 deals with the procedure to be followed by the proper officer after remand of the matter to him by the Tribunal or the Court; it has been argued that if such an interpretation is given to Section 75 of the Act, it would render the situation anomalous as many of the sub-Sections of Section 75 would become otiose.

41. We have gone through the language of Section 75. Indeed sub-Section (1), sub-Section (2) and sub Section (3) relate to determination to be made by the proper officer after the Court or the Appellate Tribunal quashes the original order and remands the matter for a fresh determination to the proper officer. However, from sub-Section (4) onwards the procedure to be followed by the proper officer in determination of tax is given in detail. Sub-Section (4) of Section 75 provides that an opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person. Sub-Section (5) provides that if sufficient cause is shown by the person chargeable with tax, the proper officer shall grant time to the said person and **adjourn the hearing** for reasons to be recorded in writing: provided that no such adjournment shall be granted for more than three times to a person during the proceedings. Sub-Section (6), (7), (8), (9), (10) and (11) of Section 75 relate to the Order to be passed in by the proper officer, determining the amount of tax, interest, and penalty, in conformity with the notice issued to the assessee, and also to nature of the adjudication proceedings and the limitation for concluding the same.

42. It is evident that Sub-Section (1), (2), (3), (8) and (11) deal with adjudication by the proper officer after remand either by the Appellate Tribunal or the Courts, whereas sub-Sections (4) and (5), (6), (7), (9) and (10), in Section 75 deal with assessment before the matter is taken up in appeal and remanded to the proper officer for reconsideration on merit.

43. If we take recourse to internal aids to construction of the charging Section then 'Sub-heading' being an internal aid, can be validly referred to while determining the true purport of the words *'opportunity of hearing'*. Sub-heading of Section 75 clearly states that it describes the *'General Provisions relating to Determining of Tax'*; then most certainly Section 75 deals with all kinds of hearings for determining tax, both at the first instance and also on remand. Also sub-Section (4) is followed by sub-Section (5), which requires an officer to adjourn a hearing on the request of the person chargeable to Tax, in case sufficient cause is shown by such person after recording reasons for such adjournment in writing. Such words as are used for granting more time to the assessee and adjourning the hearing can only be interpreted to mean giving "personal" hearing. Adjournment is granted in cases where hearing is continuing. It cannot be said to relate to giving time extensions for giving written reply to the show cause notice.

44. Taking into account the settled principles of interpretation of Statutes, (a) all Sections of a Statue need to be read together, (b) no words, Section in a Statute can be rendered otiose, (c) any ambiguity in a charging Section must be read in favour of the assessee, (d) a *casus omissus* can be supplied if the Court, having an overall view of the scheme of the Statute is convinced that the legislature did intend a certain manner of conducting predecisional hearing but draftsman failed to add the necessary words to make it plain and beyond doubt; we are of the considered opinion that word "personal" can easily be construed to have been intended to be added but has been left out erroneously. We, therefore, are in respectful agreement with the three Coordinate Bench decisions cited at the Bar by learned counsel for the petitioner.

45. The Writ Petition is ***allowed*** and the orders dated 19.02.2024 and 27.04.2024 are set aside. The matter is remitted back to the proper officer to provide opportunity of personal hearing to the petitioner and then to pass a fresh order in accordance with statutory provisions.

(2024) 5 ILRA 2123
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 518 of 2024

Ram Sukh & Ors. ...Petitioners
Versus
Dy. Director of Consolidation, Sultanpur & Ors. ...Respondents

Counsel for the Petitioners:
Mata Prasad Yadav, Shiva Shashank

Counsel for the Respondents:
C.S.C., Vijai Shankar Tripathi, Vijay Bhan Pandey

A. Consolidation Proceedings – U.P. Consolidation of Holdings Act, 1953 - Sections 9A(2) & 52 – U.P. Consolidation of Holdings Rules, 1954 - Rule 109A(1) - An authority, while exercising its power under Rule 109A(1), is not empowered to amend or modify the order passed by the Consolidation Officer at the stage of deciding objections under Section 9A(2) of the Act, 1953 - Correction of Records - Powers of Authorities Post-Denotification under Section 52 – Correction in the order passed under Section 9A(2) is permissible (Para 33)

B. After *partaal* (survey), Form C.H. 4 was prepared, followed by the issuance of Parcha No. 5 to the tenure holders. Respondent Nos. 8 and 9 filed objections u/s 9A(2) of C.H. Act, 1953, challenging the inclusion of the petitioners' names along with Respondent Nos. 3 to 7 in the revenue records (Khatauni). Objections were allowed by Consolidation Officer on 26.12.2012, and the names of the petitioners and Respondent Nos. 3 to 7 were deleted. Order became final as no recall, appeal, or revision was filed. Subsequently, petitioners' names were re-added through an order issued under Rule 109A(1) of the U.P. Consolidation of Holdings Rules, 1954, during the execution of the earlier order of 26.12.2012 - *Held* - Court rejected petitioners' argument that following the de-notification of consolidation proceedings u/s 52, the authorities become functus officio and held that the authorities acted within their jurisdiction to correct an error. Only error was rectified in pursuance of the order dated 26.12.2012 and it was a continuation of the proceedings and not a fresh proceedings. (Para 33, 34)

Dismissed. (E-5)

List of Cases cited:

1. Jodhey Vs State, reported as AIR 1952 All 788

2. Gadde Venkateswara Rao Vs Govt. of A.P.; AIR 1966 SC 828

3. Commissioner of Income Tax, Madras & ors.. Vs Vinod Kumar Didwania & ors. AIR 1987 SC 1260

4. Mohammad Swalleh Vs Third Additonal District Judge, Meerut; (1988) 1 SCC 40

5. Shangrila Food Products Ltd. Vs LIC, (1996) 5 SCC 54

6. Roshan Deen Vs Preeti Lal; (2002) 1 SCC 100

7. Ramesh Chandra Sankla & ors. Vs Vikram Cement & ors. (2008) 14 SCC 58

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

1. Heard learned counsel for petitioner as well as Shri Hemant Kumar Pandey, learned State Counsel.

2. The present writ petition has been preferred for quashing of the impugned revisional order dated 12.04.2024 passed by respondent no. 1, Deputy Director of Consolidation and impugned appellate order dated 04.03.2024 passed by respondent no. 2 i.e.Settlement Officer Consolidation, District Sultanpur.

3. The learned counsel for the respondent nos. 8 and 9 has stated that it would not be necessary to file counter affidavit and the matter may be heard at this stage itself.

4. Learned counsel for petitioner has submitted that the dispute is with regard to Gata No. 2774 (new number) and the old number was Gata No. 1652, Area- 2 Biswa. The petitioners and respondents were co-tenant on the above mentioned gata number.

5. It is further submitted that initially Ram Kalap and Raj Nath Singh, son of Sahdev, i.e. respondent nos. 8 and 9 were the co-tenant of 1 Biswa and on another 1 Biswa, the ancestors of the petitioners namely late Urai and late Ram Kishan along with their brother Bhagirathi i.e. fathers of respondent nos. 3, 4 and 5.

6. It is further submitted that the names of the petitioners along with the family members of late Sahdev were entered in the Khatauni as co-tenants on the

Gata No. 2774 and the names of the co-tenants were intact at the time of consolidation operations.

7. It is further submitted that the names of the ancestors of petitioners and respondent nos. 3 to 7 were entered in Form C.H- 45, the consolidation proceedings were finalised and notification under Section 52 of the Consolidation and Holdings Act, 1953 (hereinafter referred as Act, 1953) was published/notified.

8. It is further submitted that after the denotification under Section 52, an application was preferred by respondent no. 8 Ram Kalap before the Deputy Director of Consolidation that the proceedings have been finalized without deciding the objections preferred by respondent no. 8 against Form CH-4. The said application preferred by respondent no. 8 was rejected by order dated 22.05.2007. Within four days of rejection of the said application, a recall application was preferred on 26.05.2007 by respondent no. 8, the same was allowed by order dated 16.06.2008 a reference was made and referred to the Consolidation Officer to decide objections against Form C.H.-4 preferred by respondent no. 8

9. Thereafter, the proceedings had started afresh with a reference to the Consolidation Officer to a limited extent to consider the objections filed against Form C.H-4 of Ram Kalap, and the Consolidation Officer decided the matter to the limited extent of reference i.e the Consolidation Officer had decided the matter and has allowed the application by order dated 20.09.2021 and has enhanced the area from 1 Biswa to 2 Biswa as that was the only objection against Form C.H.-4 by respondent no. 8. Against which respondent no. 8 alone had preferred an appeal before the Settlement Officer Consolidation disputing about the entry of the name of the petitioners along with respondent nos. 3 to 7. The Settlement Officer Consolidation had allowed the appeal by order dated 04.03.2024 and had given a finding that the father of respondent nos. 3 to 5 i.e. late Bhagirathi had executed a sale deed in favour of widow of Sahdev in the year 1987 of his share, so his name has wrongly been entered in Form C.H.-45.

10. Against the said order a revision was preferred by petitioner no. 5, Smt. Sita, wife of Maharajdeen, the son of late Ram Kishan and others which was also rejected by impugned order dated 12.04.2024.

11. The Appellate Authority as well as the Revisional Authority had exceeded their jurisdiction by deciding the matter relating to the title/rights of the petitioner along with respondent nos. 3 to 7.

12. On the other hand, Sri V.S. Tripathi, learned counsel for the caveator has filed his Vakalatnama on behalf of respondent no. 9 also, which is taken on record and has submitted that the submission of learned counsel for petitioners is not tenable against C.H. Form- 4, the objections were filed, which was decided by the Consolidation Officer by its order dated 26.12.12 whereby only the names of respondent no. 8 and 9 have been entered. The objections were filed with regard to correction in area of land from one biswa to two biswa, but no such document in support of the submission was enclosed.

13. It is further submitted that once Bhagirathi had sold his share to the widow of Sahdev i.e. the grandmother of the

respondent nos. 8 & 9, then he has no share in the said land, particularly, when the said fact is neither denied or disputed by the petitioners. The names of the petitioners or their ancestors were wrongly entered in Form C.H. 45.

14. It is further submitted that objections were decided by order dated 26.12.2012 by the Consolidation Officer in favour of respondent nos.8 and 9 and deleted the names of petitioners and respondent nos. 3 to 7 and their names were entered in the revenue record in compliance of the order passed under Rule 109 A(1) of Consolidation and Holding Rules, 1954 (hereinafter referred as Rules, 1954) at the time of taking decision on the objection of respondent no. 8 and 9 under Section 9A(2). The names of the petitioners and respondent nos. 3 to 7 were added which is illegal for the reason that the names of the petitioners and respondent nos. 3 to 7 was not on the record or were deleted by allowing the objections of respondent nos. 8 under Section 9A(2) of the Act, 1953 and the executing Court or the authority who is empowered to implement the order under Rule 109A(1) of Rules, 1954 again added names of the petitioners along with respondent nos. 3 to 7. So this is only the correction which was made by these orders and it cannot be said that it is a new proceedings initiated by the Authorities after the notification of Section 52 of Act, 1953. The petitioners and respondent no. 3 to 7 had never filed any recall, appeal or revision and the order dated 26.12.2012 has attained finality.

15. On the other hand, learned Standing Counsel has submitted that after publication of Form C.H. 4, Parcha no. 5 is distributed to every tenure holders and if they are aggrieved by the same, they could raise their objection under Section 9A(1)/9A(2) of the Act, 1953 and after deciding the objections, the Consolidation proceedings initiated further and at every stage, there are appeals and the revisions and after that Form C.H. 45 is to be prepared which is final and thereafter publication is made under Section 52 of the Act, for de-notification of the consolidation operations.

16. After hearing learned counsel for the parties and going through the record of the case, it is clear that the dispute is with regard to the old Gata no. 2774 area 2 biswa (now Gata No. 1652). The names of ancestors of petitioners and respondent nos. 3 to 7 along with respondent nos. 8 & 9 in the khatauni and the names were there at the time of consolidation in the basic year khatauni. After the partaal, Form C.H. 4 was prepared and thereafter parcha no. 5 would have been served upon the tenure holders. The respondent no. 8 & 9 had filed their objection under Section 9A(2) of the Act, 1953, regarding the claim of the petitioners in the said land against the entry of names of the petitioners along with respondent nos. 3 to 7 in the revenue records/khatauni. The said objections preferred by the respondent no. 8 was allowed by the order dated 26.12.2012.

17. On being asked from the learned counsel for petitioner, the decision in objection preferred under Section 9A(2) of the Act, 1953 would not amount to deciding the objection against Form C.H.-4, he has very fairly replied that it amounts that the objection against Form C.H.-4 is decided.

18. The second query put by this Court from learned counsel for petitioner whether against the order dated 26.12.2012 passed under Section 9A(2) any appeal was

preferred by petitioner under Section 11 of the Act, 1953, he has very fairly submitted that to the best of his knowledge and as per the record, no appeal appears to be filed by the petitioners against the said order.

19. The names of the petitioners along with respondent no. 3 to 7 was entered in the Khatauni in compliance of the order passed under Rule 109A(1) of the Rules, 1954, which empowers the Assistant Collector/Incharge of the Sub-Division, the Tehsildar, the Naib Tehsildar, the Supervisor and the Lekhpal of the area to which the case relates shall, respectively, perform the functions and discharge the duties of the Settlement Officer of the Consolidation for the purposes of giving effect to the orders aforesaid, so the authorities cannot either modify or amend the orders passed by the Consolidation Officer dated 26.12.2012.

20. On being asked specific query from learned counsel for the petitioner whether while deciding the objection under Section 9A(2) of the Act, 1953 by the Consolidation Officer, the names of the petitioners along with respondent nos.3 to 7 were also allowed to be continued in the record or whether the names of the petitioners along with respondent nos. 3 to 7 were entered in Form- C.H.45 in pursuance of the order passed under Rule 109 A(1) of the Consolidation and holding Rules, 1954. He has submitted that from the perusal of the record it appears that the names of the petitioners along with respondent nos.3 to 7 were entered in form C.H.45 by order passed under Rule 109A (1) of Rules, 1954 and not disputed the fact that the names of the petitioners along with respondent nos. 3 to 7 were not in the order dated 26.12.2012 passed by the Consolidation Officer as against the objections preferred by respondent no.8.

21. From the above, it cannot be said that orders have been passed without jurisdiction after the notification under Section 52 of the Act, 1953 for the reason it is the continuation of the proceedings even after the notification under Section 52 of the Act, 1953. It is also noticeable that once the name of the petitioners along with respondent nos. 3 to 7 were deleted by order dated 26.12.2012 by the Consolidation Officer while deciding the matter under Section 9A(2) and against which the petitioners along with respondent nos.3 to 7 had never ever preferred any appeal or revision now again come with a case that after Section 52, their names cannot be deleted when it is admitted by the learned counsel for the petitioners that the names of the petitioners and respondent nos. 3 and 7 were entered in compliance of the order passed under Rule 109A(1) and not in pursuance of the order dated 26.12.2012. Apart from that the father of respondent nos. 3 to 5 had already sold the complete share in favour of grand mother of respondent no.8 and the said fact is admitted in paragraph no. 23 of the Writ Petition.

22. Against the said appellate order, the revision was preferred and the Revisional court affirmed the appellate order and rejected the revision preferred by the petitioners.

23. The tenure holders got an opportunity in the Consolidation proceedings to make objections at various stages and with an availability of remedy of appeal and revision almost at every stage, firstly at the stage of Form C.H. 4, i.e.

objection under Section 9A, then appeal under Section 11 and Revision under Section 48. Thereafter, at the second stage when the provisional consolidation scheme is prepared by the Assistant Consolidation Officer, under Section 19 of the Act, 1953. Then there is a third stage when the confirmation of the provisional consolidation scheme and issuance of the allotment orders under Section 23, the tenure holder has a right to file objections under Section 20 of the Act, 1953, but as per the admitted case of the respondent no. 8 and 9, they had never ever challenged the order passed under Section 9A(2) dated 26.12.2012 nor filed any revision or appeal as per the stages mentioned above.

24. In given circumstances, the question before this Court is as to whether in exercise of its extraordinary discretionary jurisdiction this court should interfere or not. The law in this regard is very well settled. In a catena of judgments, both this Court and Supreme Court have emphasised that while exercising discretionary jurisdiction under Article 226, the High Court must ensure that substantial justice is done, equity be upheld and injustice is eliminated.

25. In ***Jodhey vs State, reported as AIR 1952 All 788,*** this Court considered the discretionary and equitable jurisdiction of the High Court and the manner in which the same ought to be exercised. Relevant portion of the same reads:-

"There are no limits, fetters or restrictions placed on this power of superintendence in this Clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein. "(emphasis supplied)"

26. In ***Gadde Venkateswara Rao v. Govt. of A.P.; AIR 1966 SC 828***, a three judges Bench of the Supreme Court affirmed the judgment of the Andhra Pradesh High Court where it refused to interfere into a matter on merit even when the appellant alleged violation of principles of natural justice. The Supreme Court observed that if the impugned order passed by the Government would have been set aside by the High Court, it would have restored an illegal order. Paragraph 19 of the judgment reads:-

"19. The result of the discussion may be stated thus: The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said village did not comply with the necessary conditions for such location. The Panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre permanently at Lingopalem. Both the orders of the Government, namely, the order dated March 7, 1962, and that dated April 18, 1963, were not legally passed: the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have

restored an illegal order it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

27. In ***Commissioner of Income Tax, Madras and Ors. vs. Vinod Kumar Didwania and Ors.; AIR 1987 SC 1260***, Supreme Court deprecated the conduct of the private respondent who first got the interim injunction and then withdrew the petition. It was held that the respondent has abused the process of law and therefore he could not be allowed to retain undue benefits received by him under the garb of interim injunction. Relevant portion of paragraph 3 of the said judgment is quoted hereafter:-

"3. The learned Attorney General appearing on behalf of the Deputy Director of Inspection submitted before us that the amount representing the value of the goods removed from the three godowns should be restituted by the 1st Respondent since the goods were removed by him under an ex parte order of injunction obtained from the High Court of Calcutta in the Writ Petition filed by him and the nefarious purpose of filing the Writ Petition having been accomplished by removal of the goods, the writ petition was withdrawn. There is great force in his submission of the learned Attorney General. There is no doubt that the 1st Respondent has abused the process of the Court for securing removal of the goods from the three godowns and he cannot be allowed to retain that advantage....."

28. In ***Mohammad Swalleh v. Third Additonal District Judge, Meerut; (1988) 1 SCC 40*** the Supreme Court dismissed an appeal against an order passed by the High Court wherein the High Court refused to interfere with the order of the District Court which had no jurisdiction to entertain an appeal from the Prescribed Authority under the scheme of the Act on the ground that setting aside District Court's order would mean restoring the erroneous order of the Prescribed Authority. Paragraph 7 of the above referred judgment of the Supreme Court reads:-

"7. It was contended before the High Court that no appeal lay from the decision of the prescribed authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid (sic no appeal lay) before the District Judge, the order of the prescribed authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the prescribed authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the prescribed authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception

can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the prescribed authority has been set aside, no objection can be taken." (emphasis supplied)

29. In ***Shangrila Food Products Ltd. v. LIC, (1996) 5 SCC 54*** the Supreme Court reiterated that while exercising jurisdiction under Article 226 and 227 of the Constitution, a duty is casted upon the High Courts to see to it that equity is upheld. High Court must ensure that any undue advantage gained by a party prior to invoking discretionary jurisdiction of the High Court ought to be taken into account before granting it any relief. Relevant paragraph 11 of the same reads:-

"11. It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge, is clear from the above emphasised words which may be reread with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the findings were to go in favour of the appellant Company and it is proved to be a lawful sub- tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub- tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation of the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed interdependently. For those who seek equity must bow to equity." (emphasis supplied)"

30. In ***Roshan Deen vs. Preeti Lal; (2002) 1 SCC 100***, the Supreme Court while setting aside an order passed by the High Court observed that the High Courts while exercising power of superintendence under Article 226 and 227 should ensure that such exercise must ensure that justice is done and at the same time injustice is eliminated. Paragraph 12 of the same reads:-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal

measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao [(1984) 2 SCC 673: AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law,"

31. A Division Bench of the Supreme Court in the case of ***Ramesh Chandra Sankla and Others vs. Vikram Cement and Others and other connected matters, reported as (2008) 14 SCC 58*** has considered, affirmed, and reiterated all the aforesaid judgments and held in paragraphs 98 that:-

"98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in Shiv Shankar Dal Mills v. State of Haryana, (1980) 1 SCR 1170, Courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience."(emphasis supplied)"

32. The law repeatedly settled by the Supreme Court is that the High Court should exercise its discretionary jurisdiction in such a manner which would advance the ends of justice and uproot injustice. It should exercise power conferred under Article 226 and 227 of the Constitution of India in a manner that provides complete and substantial justice to parties. The Supreme Court in Shangrila (supra) has held that "One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party, priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief." From the law settled by the Supreme Court it is clear that while exercising power under Article 226 and 227 of Constitution of India, the Court must give and refuse relief.

33. As such, in the present case, as per the submission of learned counsel for petitioner that after the denotification of Consolidation proceedings by issuing the notification under Section 52 of the Act, 1953, the change of entries is not permissible as the authorities have become functus officio, is not tenable in the light of the facts of this case, reason being, in the consolidation proceedings, the Consolidation Officer while deciding the objections had entered the name of

respondent no. 8 and 9 only and at the stage of Form C.H.-45, the names of the petitioners were added by the order dated 02.02.2015 passed in pursuance of order passed under Rule 109A(1) of the Rules, 1954, at the time when respondent no. 8 moved an application for implementation/execution of the order dated 26.12.12. The authority while exercising its power under Rule 109A(1) is not empowered either to amend or modify the order passed by the Consolidation Officer at the stage of deciding the objections under Section 9A(2) of the Act, 1953. It cannot be said that it is a fresh proceedings initiated by the respondent no. 8 for deletion of the names of the petitioners and respondent nos. 3 to 7 or their ancestors from the revenue records, rather it is a correction in pursuance of the order dated 26.12.12 passed during the consolidation proceedings. Only error has been rectified in pursuance of the order dated 26.12.2012, so it is a continuation of the proceedings and not a fresh proceedings, particularly when it is an admitted case of the petitioners that their names were not in the order dated 26.12.2012 and it was added in Form C.H. 45 in compliance of the order passed under Rule 109A(1) of the Rules, 1954.

34. In view of the facts, circumstances and discussion made herein above, the orders passed by the Appellate Authority and the Revisional Authority does not call for any interference. The writ petition is devoid of merit and is liable to be dismissed.

35. Accordingly, the present writ petition is hereby ***dismissed***.

(2024) 5 ILRA 2132
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 2751 of 1980

Indra Pal ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Shashi Kant Agrawal, Sri Pavan Kishore, Sri Piyush Kishore Srivastava, Sri Rajiv Lochan Shukla

Counsel for the Respondent:
A.G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 154(1), 161, 162, 162(1) & 313 - Indian Penal Code, 1860 - Sections 33, 34 & 302 - Appeal – against conviction & sentence – FIR –offence of murder due to illicit relation – Life imprisonment – separate two appeals by both accused – one appeal was abated due to death of one of co-accused – present was co-accused's appeal – Examination of evidences - court finds that, testimony of sole eyewitness (PW2) contains material contradiction and improvements and manifestly clear that he did no see the incident as such it cannot be relied upon – PW-2 also could not identify the accused persons as there was dark - prosecution has filed to prove the motive behind the commission of the offence – no independent witness was examined, even the overt act attributed to appellant also becomes doubtful in the light of medical evidence – the I.O. neither send the seized pellets & blood-soaked-soil to the F.S.L. for examination nor recovered the weapon of offence which could have strengthened the version of PWs - Held, to assess evidence as of sterling quality, the trial court should consider various factors, including consistency, corroboration, relevancy, and authenticity - and it is the responsibility not only of the investigating agency but also of the courts

to ensure that the investigation is conducted fairly and does not infringe upon an individual's – further, court of the view that, where the case rests on the testimony of the sole eyewitness, who did not see the act, the same must not be wholly reliable – consequently, Appeal is allowed – conviction and sentence is set aside – direction issued accordingly.
(Para – 47, 49, 51, 52, 53, 55)

Appeal allowed. (E-11)

List of referred Cases:

1. Kuna alias Sanjay Behera Vs St. of Odisha (2018 1 SCC 296),

2. Ramji Suriya & anr. Vs St. of Mah. (AIR 1983 SC 810),

3. Amar Singh Vs NCT of Delhi (2021 – 114 - ACC 931 SC),

4. Shakila Abdul Gafar Khan Vs Vasant Raghunath Dhoble (2003 7 SCC 749),

5. St. of AP Vs Pullagummi Kasi Reddy Krishna Reddy (2018 7 SCC 623),

6. Rupinder Singh Sandhu Vs St. of Punj. (2018 16 SCC 475),

7. Emperor Vs Khwaja Nazir Ahmad (ILR (1945) Lah. 1 / AIR 1945 PC 18),

8. Jitendra Chandra Sahib Vs St. of Tripura (1996 3 GLR 197),

9. St. of UP Vs Kishanpal (2008 16 SCC 73),

10. Bipin Kumar Mondal Vs St. of W.B. (2010 12 SCC 91),

11. Jagdish B Rao Vs Govt. of Union Territory of Goa Daman & DiVs (1976 Cr. L.J. 132 at 134),

12. Chandrika Ram Kahar Vs Emperor (1922 Pat. 535),

13. Surendra Singh Vs St. (Union Territory of Chandigarh) (2021 20 SCC 24),

14. Vadivelu Thevar Vs St. of Madra (AIR 1957 SC 614),

15. Harchand Singh & anr. Vs St. of Har. (1974 3 SCC 397),

16. Krishnamurti Vs St. of Karn. (2022 7 SCC 521),

17. Ram Nihore Yadav Vs St. of Bihar (1998 4 SCC 517),

18. Surendra Paswan Vs St. of Jharkhand (2003 12 SCC 360).

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Rajiv Lochan Shukla and Shri Pavan Kishore, learned counsel for the appellant, Shri C.L. Singh, learned A.G.A. for the State-respondent, and perused the material placed on record.

2. Upon completing the investigation1 the police filed the charge-sheet against the accused-appellant Indra Pal, and co-accused Sohanvir. The accused-appellants were charged under Section 302 read with section 34 IPC, wherein, they denied the prosecution case and claimed trial.

3. The learned trial court vide impugned judgment and order dated 26.11.1980 convicted the accused-appellant Indra Pal and co-accused Sohanvir, and vide order dated 27.11.1980 sentenced them to undergo life imprisonment for the offenses under Section 302 read with Section 34 I.P.C. Aggrieved by the impugned judgment of conviction and order of sentence, the accused-appellants preferred the instant appeal before this Court.

4. The co-accused Sohanvir assailed the impugned judgment of conviction and order of sentence through separate Criminal

Appeal bearing No.2741 of 1980, who died on 5.11.2011 during the pendency of the appeal, and thus, the appeal No.2741 of 1980 was dismissed as abated vide order dated 28.9.2021. The instant appeal bearing Criminal Appeal No.2751 of 1980 qua accused-appellant, Indra Pal, is being heard and decided by this judgment. Needless to say, both the appeals have arisen out of the common impugned judgment.

5. The prosecution case, in brief, is that a written complaint was lodged at Police Station Jani, District Meerut, on 31.5.1978 at 08:00 a.m. regarding the incident took place at 02:30 a.m. in the village Jani, by one Chamel Singh- father of the deceased- with the allegation that he along with his son Karamvir (since deceased) and Vijendra Singh (PW-2) were sleeping in his Gher2, where a lantern was burning on the Jamun tree. It was at around 02:30 a.m., the accused-appellants and another person scaled over the wall and barged into his Gher. Karamvir was shot dead, and on the noise of firing, Chamel Singh and Vijendra Singh woke up and saw the accused-appellants along with a third person, who was crossing the wall of the Gher and accused Sohanvir and Indra Pal were standing a few paces away from his deceased son carrying pistols in their hands. The accused-appellant, Indra Pal, and co-accused, Sohanvir, were identified by Chamel Singh.

6. The motive assigned in the Tehrir is that Sohanvir son of Bhopal had an illicit relations with one Smt. Prasandi, who was a cousin of the informant Chamel Singh, and Karamvir made an attempt to stop the illicit relations, therefore, accused-appellant executed the murder of Karamvir.

7. On receipt of the information, the police registered the F.I.R. and, after that, proceeded to the place of occurrence for further proceedings; S.I. A.K. Chaudhary prepared the inquest report, and the blood-stained pillow cover and lantern were taken into possession and seizure memo was thus prepared accordingly. The Station House Officer prepared the site plan and recorded the statement of witnesses. During the investigation, Sarwan Singh Yadav (PW-5), S.H.O., was transferred, and further investigation was entrusted to S.I. Ranvir Singh, who, upon receipt of the investigation, conducted the pending investigation and upon its completion filed the charge-sheet. The post-mortem was conducted by Dr. G.N. Goel (PW-4) at P.L. Sharma Hospital, Meerut on 31.5.1978 at 04:45 p.m., and opined the cause of death was due to the gunshot injuries inflicted on the head of the deceased.

8. The prosecution examined five witnesses; PW-1 Jai Prakash is the witness to the inquest report; PW-2 Vijendra Singh is the solitary eyewitness of the case; PW-3 HC Madan Lal was posted as *Moharrir* at the Police Station and recorded the F.I.R.; PW-4 Dr. G.N. Goel has conducted the post-mortem of the deceased; PW-5 S.I. Sarwan Singh Yadav conducted the initial investigation and recorded the statement of the witnesses; and S.I. Ranvir Singh, who filed the charge-sheet, was not examined by the prosecution.

9. Besides ocular testimony, the prosecution proved an exhibited documentary evidence outlined hereinafter; the F.I.R. is marked and exhibited as Ex.Ka-6; Recovery Memo and Supurdginama of Lantern are marked and exhibited as Ex.Ka-7; Post-mortem Report is marked and exhibited as Ex.Ka-5; Panchayatnama is marked and exhibited as Ex.Ka-2/1; a site plan with an index is

marked and exhibited as Ex.Ka-8; Charge-sheet is marked and exhibited as Ex.Ka-9.

10. PW-1 Jai Prakash stated that the Sub Inspector prepared the inquest report of the deceased- Karamvir at about 09:00-10:00 a.m., and he was a witness to the inquest report (Ex.Ka-1). Deceased Karamvir had sustained a firearm injury on his head. In his cross-examination, he stated that accused Sohanvir and his father were present during the inquest proceedings, but accused-appellant Indra Pal was not there. The dead body of the deceased Karamvir was lying on a cot. Besides this, the witness was not put to cross-examination, neither by the accused-appellant nor by the prosecution to prove the prosecution case.

11. PW-2 Vijendra Singh is the solitary eyewitness of the incident and the star prosecution witness, who has stated in his examination-in-chief that he was sleeping on one of the cots in the Gher, and his father, Chamel Singh, was sleeping in another cot. His brother Karamvir Singh was also sleeping beside him on a separate cot, and a burning lantern was hanging on the Jamun tree. Upon hearing the gunshot noise, he woke up and saw accused-appellant Sohanvir standing at a distance of two paces from the cot of the deceased Karamvir carrying a pistol in his hand, and accused Indra Pal was also standing there with a pistol. A third person was also standing there with a pistol, whom he did not know but could identify in his presentation. All the accused were staring at the deceased Karamvir, and after seeing the witness and his father, they ran away after crossing the southern side wall of the Gher. Karamvir died on the spot. After hearing the noise of gunshot, other co-villagers also arrived there. His father, Chamel Singh, died on 19.3.1979, who had reported the matter to the police and he could identify his signatures. The police come to the village at about 10:00 a.m. The witness was also threatened by the accused-appellant Indra Pal on 8.7.1980 not to depose in the instant case. Otherwise, he would face the dire consequences, his father faced. The victim has also filed an application before the trial court in this regard. On the question put by the court, the witness said that he had stated in the Panchayat that his brother was killed by one Daya Ram and his son, with whom they had old enmity, and the said Panchayat was convened after 2-3 days of his brother's death. He is aware of whether his brother had requested the police to investigate the case by C.I.D. and had filed the application to the D.S.P. in this regard.

12. PW-3, Constable Madan Lal, stated that he had recorded the F.I.R. based on Tahrir received from Chamel Singh, the deceased's father.

13. PW-4 Dr. G.N. Goel, Medical Officer at P.L. Sharma Hospital, conducted the postmortem of the deceased Karamvir and observed the following injuries:

"(i) A gunshot wound of entry 2 cm. x 2 cm. x brain cavity deep on the left side of the head 7 cm. above the left ear.

(ii) Blackening and charring around the wound.

(iii) Gunpowder marks were seen on the back and left forearm.

(iv) The frontal and parietal bones were found fractured.

(v) The brain was lacerated.

(vi) The interior perennial fossa was also fractured.

(vii) Six pellets were recovered from the head, and the same was sealed and handed over to the I.O.

(viii) Cause of death was opined due to injuries sustained by the deceased in the brain, which is the vital organ of the body."

14. PW-5, S.I. Sarwan Singh Yadav, in whose presence the police conducted the investigation, along with S.I. A.K. Chaudhary, prepared the Panchnama, collected the blood-soaked pillow and lantern, and prepared the site plan. He stated that he has recorded the statements of Jagsoran, Prahlad Singh and Prasandi.

15. After recording the statement of prosecution witnesses, the statement of accused-appellant Indra Pal was recorded under Section 313 Cr.P.C., who stated that he along with Sohanvir, Babu Ram and his father Uday Singh, were present at the time of the inquest proceedings and had been falsely implicated in this case because of the village rivalry. Had he been accused, why would he have been present at the time of inquest proceedings by police?

16. Shri Rajiv Lochan Shukla, learned counsel for the appellant, made the following submissions:

16.1 The original copy of the F.I.R., based on which the police investigation commenced, is missing from the record, and the same was not proved and exhibited by the trial court. Therefore, the entire investigation began after the registration of F.I.R. was vitiated under the law, and thus, the appellant shall be acquitted on this ground alone. In the absence of a fair investigation, a fair trial is not possible, which is the fundamental requirement under criminal jurisprudence.

16.2 The case diary, in which the I.O.'s proceedings were recorded, has not been exhibited.

16.3 The testimony of sole eyewitness Vijendra Singh (PW-2) cannot be relied upon because it contains material contradictions and improvements. PW-2's statement was contrary to the statement recorded by the police under Section 161 Cr.P.C., and no explanation was given as to why the Investigating Officer did not record certain material facts and he also resiled from the prosecution case.

16.4 The motive of the offence is absurd, and the prosecution has failed to prove the motive behind the commission of the offence.

16.5 PW-2's testimony is manifestly clear that he did not see the incident, and he only saw the accused-appellant after the commission of the crime.

16.6 PW-2 Vijendra Singh could not identify the accused persons as there was dark, and it was also not clear as to who shot the deceased Karamvir Singh.

16.7 The prosecution has not produced Jagshoran, the domestic help, and Prahlad Singh, whose houses were situated beside the place of the incident, for a reason best known to the prosecution. Prasandi, with whom the co-accused Sohanvir had an illicit relationship, was not examined by the prosecution, therefore, the prosecution has not presented the case as was, instead, they have come up with a different story to protect the real culprits.

16.8 No independent/public witness has been examined, and no recovery has been effected. The lantern was not shown hanging with the Jamun tree in the site plan, and the competent witness has not proved the site plan. The alleged clothes seized by the I.O. have not been produced before the court. No weapon of offence was recovered and produced in the court. No recovery has been effected from the accused-appellant, and the appellant was not seen committing murder.

16.9 The prosecution has miserably failed to connect the accused with the commission of the offence. The testimony of PW-2 is full of contradictions and embellishments and can not be relied upon.

16.10 Further, the prosecution has failed to prove the corroboration. The deposition of PW-2 should be disbelieved as it ought to be, in view of the evidence surfaced during trial. Other materials on record do not show the accused's complicity in the offence; thus, the appellant is liable to be acquitted of the charges. The prosecution could not establish the illicit relationship between the co-accused Sohanvir and one Smt. Prasandi, therefore, the sole motive for commission of offense is absurd and non conclusive.

16.11 Finally, it's not safe to rely upon the testimony of the solitary eyewitness, which is full of contradictions and embellishments without corroboration.

17. Learned counsel for the appellant relied upon the judgments of the Supreme court in the cases of **(i) Kuna alias Sanjaya Behera v. State of Odisha; (ii) Ramji Suriya and Another v. State of Maharashtra; and (iii) Amar Singh v. NCT of Delhi** on the issue that the testimony of the sole eyewitness must be examined with caution, especially when he is an interested witness as the PW-2 is the real brother of deceased, and there is high likelihood to implicate the appellant falsely.

18. Per contra, learned A.G.A. states that the evidence of sole witnesses PW-2 is coherent, consistent, cogent, and fully corroborated by the medical evidence. Thus, the prosecution has proved the charges beyond a reasonable doubt. The conviction and sentence of the accused-appellant do not merit interference. The court below was justified in relying on the testimony of PW-2, which is duly proved and corroborated by the testimony of Dr. G.N. Goel (PW-4), who conducted the Post-mortem of the deceased. There are no material contradictions in the evidence adduced on behalf of the prosecution. In normal circumstances, PW-2 Vijendra Singh, being the brother of the deceased, would be most reluctant to spare the actual assailants and falsely mention the names of the other persons responsible for causing the death of his brother. He further submits that the report lodged by Chamel Singh, father of the deceased, if proven, would have suggested that he would be the last person to have falsely implicated the accused persons in his son's murder, leaving the real culprits. Thus, the fact that PW-2 Vijendra Singh is the deceased's brother, is insufficient to discredit his sworn testimony. There does not appear to be any exaggeration of falsehood in his evidence.

19. Learned A.G.A. further contends that merely because a minor contradiction/inconsistency cropped up in the witness's evidence, it cannot be a ground to disbelieve the truthfulness of the testimony of PW-2. He submits that the grain has to be separated from the chaff to find out the truth from the testimony of the PW-2 and relied on the judgments of the Supreme Court in **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble, State of A.P. v. Pullagummi Kasi Reddy Krishna Reddy, and Rupinder Singh Sandhu v. State of Punjab.**

20. The principal argument of Shri Rajiv Lochan Shukla, learned counsel for the appellant is that the prosecution failed

to produce the original F.I.R.; therefore, the entire proceedings arising out of the impugned F.I.R. were vitiated, and hence, the appellant may be acquitted. In this regard, it's become necessary to scrutinize the law carefully regarding the evidentiary value of F.I.R.

21. Shri Shukla, primarily assailed the impugned order on the ground that the original F.I.R. is missing and has not been produced in the court; therefore, the entire investigation commenced after that is vitiated under law. Therefore, the law about the evidentiary value of F.I.R. assumes significance and is thus imperative to have a re-look in this regard. As observed by the Privy Council in **Emperor v. Khwaja Nazir Ahmad** the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eyewitness. The First Information Report under Section 154(1) Cr.P.C. is not even considered substantive evidence. It can only be used to corroborate or contradict the informants' evidence in court. Undue or unreasonable delay in lodging the First Information Report invariably gives rise to suspicion, which puts the court on guard to look for the plausible motive and explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version10.

22. Once the complaint of the petitioner disclosed the commission of a cognizable offense, the proper course according to law as provided by Section 154 (1) of the Code of Criminal Procedure is to register the F.I.R. and then investigate the same and the vice-versa could not be resorted to, legally.

23. In any circumstance, it is the responsibility of the defense counsel to ascertain whether a statement has been regarded as a First Information Report (F.I.R.) or is recorded as a statement taken during the investigative process outlined in Section 162 of the Code of Criminal Procedure. The defense counsel should then confront the concerned witness regarding any omissions or contradictions within that statement.

24. There are situations where the complainant is the initial person to visit the police station and provide details about an alleged crime directly to the officer-in-charge, who promptly records the statement before any other actions. In such instances, the statement can be immediately marked as an exhibit on the record without being initially making for identification and subsequently marking it as a regular exhibit after the Investigating Officer's testimony. However, unless these circumstances are evident from the record, it is advisable for the trial court to adopt the procedure initially marking the statement first for identification and then as a regular exhibit. These observations stem from numerous cases where statements recorded during the investigative process were treated as F.I.R.s without any objection from the defense counsel or without the trial court deliberating on whether the statement was obtained during the investigation or before it commenced.

25. The absence of the First Information Report, therefore, by itself cannot destroy the prosecution case11. But this will make a prosecution case suspicious12.

26. It is necessary to stress that the statement recorded under Section 161 Cr.

P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162 (1) Cr.P.C.

27. So far as Shri Rajeev Lochan Shukla's next argument is concerned, the trial court has committed a grave error by believing the testimony of solitary eyewitness Vijendra Singh (PW-2) without corroboration, which is supplemented by the weak motive attributed to the commission of the offense, and absurd investigation.

28. The Supreme court in **State of U.P. v. Kishanpal** case has held that the motive may be considered as a circumstance that is relevant for assessing the evidence, but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

29. The Supreme court in **Bipin Kumar Mondal v. State of West Bengal** has held that motive is a thing that is particularly known to the accused himself, and it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a crime. The motive is distinct from "object and means" which innervates or provokes an action. Unlike "intention", "motive" is not the yardstick of a crime. A lawful act with an ill motive would not constitute an offense but it may not be true when an unlawful act is committed with best of the motive. Unearthing "motive" is akin to an exercise of manual brain-mapping. At times, it becomes herculean task to ascertain the traces of a "motive". The three-Judge Bench of the Supreme court in **Surendra Singh v. State (Union Territory of Chandigarh)** case has further elucidated that the motive is infallibly a crucial factor, and is a substantial aid for evincing the commission of an offense, but the absence thereof is, however, not such a quintessential component which can be construed as fatal to the case of the prosecution, especially when all other factors point towards the guilt of the accused and testaments of eyewitnesses to the occurrence of a malfeasance are on record.

30. As the PW-2 Vijendra Singh is the only eyewitness to the incident, who was examined by the prosecution and was sleeping beside the deceased on a separate cot and had seen the appellant carrying a pistol in his hand standing a few paces away from the cot on which the deceased was lying. Chamel Singh was also present at the spot; he was a police witness but could not be produced in the court for examination as he had died before the trial court could summon him. The other police witnesses, Jagmohan, Prabhat Singh and Smt. Prasandi, were not summoned by the prosecution to prove the prosecution's case; therefore, it is prudent to examine the law about the admissibility of evidence of the sole eyewitness. The relevant portion of the testimony of PW-2 is extracted herein under, for ready reference:

"11. हमारे व दयाराम तथा उसके लड़को के ताल्लुकात ठीक है न मेल है न रंजिश हैं इन्द्रपाल से मेरी कोई रंजिश नहीं थी, सोहनवीर से भी हमारी कोई रंजिश नहीं थी। गांव में मेरे पिता के मारे जाने के 2-3 दिन बाद एक पंचायत हुई थी। जिसमें मेरे मामा व गांव के अन्य आदमी भी थे।

प्रश्न- क्यो ऐसा है कि पंचायत में मेरे भाई ज्ञानेन्द्र ने यह कहा कि मेरे पिता व मेरे भाई को दयाराम व उसके लड़को ने मारा है?

उत्तर- मेरे भाई ने पंचायत में यह बात कही थी।"

"14. परसन्दी को मै जानता हूँ, वह मेरी फूफी है और उम्र करीब 55-60 साल होगी। उसके सगे भाई हरपाल सिंह है। हरपाल सिंह के चार लड़के है। मेरे पिता जी की उम्र 65 वर्ष थी। मै बाबूराम को जानता हूँ, वह अदालत में मौजूद है, उनकी उम्र का मुझे पता नहीं। हमारी इनसे कोई रंजिश नहीं है।"

31. The Supreme Court in **Vadivelu Thevar v. State of Madras** has carved out three categories of witnesses; (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable, and thus held:

"In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's I Law of Evidence -9th Edition, at pp. 1 100 and 1 101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in s. 134 quoted above. The section enshrines the well-recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our

opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable."

32. The Supreme court in **Harchand Singh & Anr. v. State of Haryana**, held that (i) the function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offense with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offense with which he is charged; (ii) the court can base the conviction of the accused on a charge of murder upon the testimony of a single witness if the same was found to be convincing and reliable. If in a case the prosecution leads two acts of evidence, each one of which contradictions and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

33. A perusal of the trial court judgment would reveal that the conviction is based on the testimony of PW-2, the sole eyewitness of the incident. While recording the finding of the conviction against the accused-appellant, the trial court believed that there was no question to disbelieve the testimony of PW-2 Vijendra Singh, who is the real brother of the deceased and was present at the time of the incident. PW-2 clearly stated in his deposition that the accused-appellant was standing near his brother when he woke up after hearing the gunshot; he could identify two of the assailants, whereas the third assailant could not be identified. As the deceased was from his village and had illicit relations with Smt. Prasandi, who is a relative of PW-2; therefore, the accused decided to eliminate the deceased, who was coming his way to continue his illicit relationship with Smt. Prasandi. There was sufficient light, and the site plan also indicates the source of light. There is also no ground to disbelieve that the lantern was burning inside Gher and the accused was standing two paces away from the cot of the deceased and, after that, scaled over the wall. The registration of the chik F.I.R. was exhibited by PW-3, Police constable Madan Lal, who has recorded the Tehrir; therefore, it's become inconsequential whether the F.I.R. was exhibited or not. Normally, PW-2 Vijendra Singh, being the brother of the deceased, would be most reluctant to spare the real assailant and falsely mention the name of the other person for murdering his brother. Lastly, the testimony of PW-2 was found convincing and reliable.

34. In the light of the findings of the trial court, it becomes imperative to examine the witnesses on two aspects; firstly, the motive, and secondly, the act performed by the accused in the commission of the crime. It is an admitted case of the prosecution that accused Sohanvir had illicit relations with Smt. Prasandi, and the deceased was coming in their way to object to the same. Therefore, the accused persons decided to eliminate the deceased. This is the sole motive behind

the commission of murder to prove the motive and for the act performed in commission of murder; the testimony of sole eyewitness PW-2 Vijendra Singh, the brother of the deceased assumes significance because he is the solitary eyewitness.

35. The facts and the evidence placed before the trial court by the prosecution-suggest that the appellant's conviction is solely based on the testimony of PW-2, the eyewitness who saw appellant was carrying the pistol in hand, when he woke up after hearing the gunshot noise and found the deceased in pool of blood on the cot.

36. In this case, the touchstone of legal exposition is the testimony of PW-2, the sole eye witness, and PW-5, who conducted the investigation.

37. Admittedly, PW-2, a solitary eyewitness of the incident, is the deceased's brother and, therefore, is a related and interested witness. He claims to have slept beside the deceased and woke up after hearing the gunshot. PW-2 supported the case of the prosecution in the chief examination, whereas, in cross-examination, he stated that he knows one Daya Ram of his village, who has three sons, and all live with their parents, and further said that we had a panchayat at his village after 2-3 days of the date of the incident in which his maternal uncle and other co-villagers were present. On a court question, the witness admitted that his brother Gyanendra had stated that one Daya Ram and his son had murdered the deceased. He further stated that his family was not happy with the police investigation and had requested the C.O. to transfer the investigation to the C.B.C.I.D. When the witness was confronted with the statement under Section 161 Cr.P.C., he stated that he had not given such statement to the Investigating Officer and did not know why he recorded his statement under Section 161 Cr.P.C. that the accused Indra Pal was standing two paces away from the cot of the deceased and he was carrying a pistol. He further stated that he had not told the Investigating Officer that the third person was also standing there carrying a gun in his hand. He has also not told to the Investigating Officer that the accused scaled the wall, but he has told that the accused went south, and his father has told the incident to his servant Jagshoran and one Jai Prakash Jogi, but the Investigating Officer did not record their statements.

38. When the PW-2, the solitary eyewitness was confronted with the statement recorded by the I.O. under Section 161 Cr.P.C. he showed ignorance of certain relevant facts, which are extracted below:

23. सुबह मेरे घेर से सोहनवीर को गिरफ्तार नही किया। सोहनवीर व इन्द्रपाल की तलाशी रात में नही कराई थी। मैंने दरोगा जी को मुलजिमान के तलाश कराने की बात नही बताई थी, पता नही मेरे बयान मे उन्होने कैसे लिख लिया। यह गलत है कि मेरी आंख गोली चलने के बाद खुली और <u>मैंने केवल तीन आदमीयों को दीवार फाँदते देखा था जिनको मै पहचान नही सका।</u> मैंने दरोगा जी को बयान दिया था कि मुलजिमान व एक अन्य आदमी को दीवार फाँदते हुऐ देखा है। दरोगा जी को पिच्छली दक्षिणी दीवार फाँदना बताया था पता नही उन्होंने क्यों नही लिखा। ऐसा नही है कि मै वहाँ नही था और चूंकि रिपोर्ट लिखा दी है। इसलिये बयान दे रहा हूँ।"

39. Given the aforesaid improvements and deliberations, it becomes necessary to corroborate the solitary witness's testimony with other circumstantial evidence, and the evidence of PW-2 must be scrutinized with great caution and circumspection.

40. The PW-1, a witness to the inquest report, has shown ignorance as to who had gone to the police station to register the F.I.R. and how many cots were present near the place of the incident. He is unaware of who was present during the inquest proceedings. The Investigating Officer PW-5 stated that he had seized blood-soaked soil, lantern and prepared the site plan, and after that second Investigating Officer, Shri Ranveer Singh, after taking the statement of Jagshoran and Prahlad Singh, filed the charge-sheet. On examination by the prosecution, nothing in the testimony of PW-5 suggests that he had made any efforts to recover the gun, the weapon of offence or sent the pellets recovered from the deceased to the F.S.L. for corroboration.

41. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence that is relevant, as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove effect. The evidence must be weighed and not counted. The testimony of PW-2 fails to pass the standard of test of a creditworthy witness. There is no doubt the conviction can be based on the testimony of a sole eyewitness, and there is no rule of law for evidence that says to the contrary, provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness, the courts have no difficulty basing conviction on his testimony alone.

42. The trial court recorded the finding that the charge framed under Section 302 read with Section 34 I.P.C. is proved against the accused persons and, therefore, hold guilty both the appellant and co-accused Sohanveer, who had died during the pendency of the instant appeal before this Court, therefore, the appeal is dismissed as abated qua accused Sohanveer. Therefore, we proceed to deal with the evidence come-forth qua appellant-Indrapal.

43. Succinctly, as per the trial court, three accused persons had committed the crime: accused Sohanveer (since died) and Indra Pal were carrying a gun, and a third accused was also there who could not be identified, as per PW-2, and the deceased had died because of a single gunshot injury on his head, P.W.4 stated. There is no material on the trial court record to establish a common intention on the part of the appellant, Indra Pal, to commit murder. Assistance has been taken from **Krishnamurti v. State of Karnataka**.

"26.Section 34 I.P.C. makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct

evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence.The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 I.P.C. are satisfied. We must remember that Section 34 I.P.C. comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 I.P.C. is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34, or the principle of common intention, is invoked to implicate and fasten joint liability on other co-participants."

44. To attract the applicability of Section 34 I.P.C., the prosecution is obligated to establish a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a pre-arranged plan, which can even be formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the accused's innocence and incapable of explanation by any other reasonable hypothesis. By Section 33 of I.P.C., a criminal act in Section 34 I.P.C. includes omission to act. Thus, a co-perpetrator who has done nothing but has stood at the place of incident while the offence was committed may be liable for the offence since in crimes, as in other things, "they also serve who only stand and wait". Thus, common intention or crime sharing may be by an overt or covert act, by active presence or at a distant location, but there should be a measure of jointness in committing the act.

45. On conjoint reading of Section 34 with Section 33 IPC, it infers that there should be a common intention of all the co-accused persons, which means a community of purpose and shared desire. Common intention does not by itself mean engaging in any discussion or agreement to prepare a plan or hatch a conspiracy for committing the offence. Common intention is a psychological fact, and it can be formed a minute before the actual happening of the incident or even during the occurrence of the incident. A mere common intention per se may not attract Section 34 I.P.C. unless the accused has done some act in furtherance of the commission of the crime.

46. In the instant case, the statement of PW-2 does not suggest as to who fired on the deceased, particularly given the testimony of PW-4, which suggests that the deceased had died due to a single gunshot injury on his head, which became fatal to the deceased; no overt act is attributed to the appellant; not has seen that the appellant fired at deceased and he died because of his

gunshot, as per the prosecution, the testimony of PW-2 does not inspire the confidence of the Court; it was co-accused Sohanvir, who allegedly had illegal relations with one Smt. Prasandi. No evidence on record could suggest that both the accused have shared a common intention or appellant has done any overt act in furtherance of the commission of the crime and finally the PW-2 could not identify the assailants (reference is invited to para 36). On this ground, the appellant also deserves the benefit of the doubt.

47. On examination of testimony of PW-5, the first investigating officer, we observe that he did not send the seized pellets to the F.S.L. for its examination, nor was any effort made to recover the weapon of offence, the blood-soaked soil seized from the place of incidence, was also not sent to the F.S.L. for chemical examination, which would have indeed corroborated the version given by the witness. No explanation is forthcoming for the failure of the prosecution to not send the pellets recovered from the deceased and blood-soaked soil to the F.S.L., which could have strengthened the version given by PW-2 Vijendra Singh at least, in the testimony of PW-5.

48. In **Ram Nihare Yadav v. State of Bihar**, the Supreme court, while dealing with the effect of shoddy investigation of cases, held that if primacy is given to such negligent investigation or to the omission and lapses committed in the course of investigation, it will shake the confidence of people not only in law enforcing agencies, but also in the administration of justice. The Supreme court in **Surendra Paswan v. State of Jharkhand**, further delineated that in the instant case not only the I.O. sent the seizure to the FSL and made no effect to the recovery of weapon of offence but the prosecution's the solitary star witness who resiled in cross-examination making his testimony doubtful, and "dis-proved"; because the sample was not sent may constitute a deficiency in the investigation, but the same did not corrode the evidentiary value of the eyewitnesses, if proved unshakable.

49. In essence, the cumulative effect of both oral testimony and documentary evidence is paramount, to assess the sterling quality and admissibility of the evidence presented during the trial. The court must weigh the credibility and reliability of both oral and documentary evidence to determine their overall probative value. To assess evidence as of sterling quality, the court should consider various factors, including consistency, corroboration, relevancy, and authenticity. Additionally, the court should evaluate the demeanor of the witnesses, the clarity and coherence of the testimony, and veracity of the documentary evidence.

50. It would have been certainly making the prosecution case at better footing if the Investigating Officer (PW-5) had sent the pellets recovered from the deceased and blood-soaked soil to the Forensic Science Laboratory and had made efforts to recover the weapon of offence, i.e. gun for comparison. However, the report of the ballistic expert and F.S.L. report would have, in any case, been the nature of an expert opinion, and the same is not conclusive evidence. The failure of the Investigating Officer in sending the blood-soaked soil pellets recovered from the deceased cannot be utterly proved fatal for prosecution, if the same is fully established from the testimony of the sole eyewitness (PW-2), whose presence cannot be doubted

as he was sleeping beside the deceased on a separate cot but a testimony of PW-2 by itself does not inspire the confidence of the court, therefore, become a relevant fact to be considered by this Court.

51. It is the responsibility not only of the investigating agency but also of the courts to ensure that the investigation is conducted fairly and does not infringe upon an individual's freedom except as prescribed by the law. Equally integral to criminal law is the principle that the investigating agency bears a significant responsibility to conduct an investigation without bias or unfairness. The investigation should not, at first glance, suggest a prejudiced mindset, and every endeavor should be made to hold the guilty accountable under the law, as no one is above it, irrespective of their societal status or influence.

52. By applying the ratio culled out in **Vadivelu Thevar v. State of Madras (supra),** we can safely conclude that where the case rests on the testimony of the sole eyewitness, who did not even see the act of firing on the deceased, he woke up after hearing the gunshot and show the accused's were standing two paces away from the deceased staring at the deceased, the same must not be wholly reliable. Additionally, PW-2 has resiled from his statement when contradiction with 161 Cr.P.C. statement. The relevant portion is extracted herein below:

"17. दरोगा जी ने इस घटना के बारे मे मुझ से पूछंताछ की थी, पहले पिता जी का बयान लिया बाद को मेरा लिया था। मैने दरोगा जी को गोली की आवाज सुनकर खाट से ऊतर कर खड़े होने की बात बताई थी। यदि मेरे बयान में यह बात नही है तो इसकी कोई वजह नहीं बता सकता। दरोगा जी ने मुझ से मेरे पिता जी के खाट से ऊतर कर मेरे पीछे खड़े हो जाने की पूछी नही थी इसलिये नही बताई। मैने यह बात दरोगा जी को नही बताई कि मैने देखा कि इन्द्रपाल करमवीर की खाट से 2 कदम दूर खड़ा है और उसके हाथ मे पिस्तोल है। "मेने दरोगा जी को यह बात भी नही बताई कि "सोहनवीर उसकी वगल मे खड़ा था और उस के हाथ मे भी पिस्तोल थी।" मैने दरोगा जी को यह भी नही बताया कि "तीसरा आदमी भी वही खड़ा था और उसके हाथ में भी पिस्तोल थी।" मैने दरोगा जी को यह बात कि दीवार कूद कर भाग गये बताई थी लेकिन यह बात नही बताई कि ठिठके और दक्षिण की तरफ दीवार कूद कर भाग गये। मैने दरोगा जी को यह बात बताई थी कि पिता जी ने करमवीर को आवाज दी वह नही बोला और नवज देखकर कहा कि यह खत्म हो गया यदि उन्होंने मेरे बयान में यह बात न लिखा हो तो कोई वजह नही बता सकता। मै तो रो रहा था लेकिन मेरे पिता ने घटना और लोगो को बताई थी। मेरे नौकर जगशोरन को भी बताई थी। और जय प्रकाश जोगी को भी बताई थी वह इस मुकदमे में गवाह नही है। जो नाम मैने बताये थे उनके बयान दरोगा जी ने मेरे सामने नही लिये।"

53. In this case except the evidence of PW-2, the related and interested witness, we do not find any other evidence which at least gives some assurance. We think it is highly dangerous to convict the appellant on this kind of evidence when there are strong circumstances to show that the testimony of the sole eyewitness needs corroboration, either from ocular testimony or documentary/scientific evidence. In this case, there is no way of separating the grain from the chaff since even the overt act

attributed to appellant Indra Pal also becomes doubtful in the light of the medical evidence and serious contradiction and embellishment in the testimony of PW-2.

54. Based on the forgoing discussions, we have concluded that (i) the prosecution could have produced either Smt. Prasandi or her relatives so that the motive could be well established. The police have neither recorded the statement of Smt. Prasandi nor her relatives, and neither has produced the evidence that could justify the motive behind the commission of murder, (ii) the testimony of PW-2 cannot be relied upon in the facts and circumstances of the case because of reason; a) that there are serious discrepancy in the statement of PW-2 with respect to the motive of the crime; b) the manner in which the crime has been committed, has not been explained by the witness; c) PW-2 becomes evasive to most of the relevant questions and showed ignorance when confronted with statement u/s 161 Cr.P.C. recorded by I.O.; d) admitted that a panchayat was convened in his village soon after his brother's murder and his brother had told that Karamvir was murdered by one Dayaram and his sons; e) he had seen three unidentified assailants scaling the wall, towards South, but could not identifiable; (iii) non-examination of servant Jagshoran and Jai Prakash by the prosecution, their names are mentioned in the tehrir; (v) the recovery was not effected; (vi) no scientific evidence was gathered or sent for the F.S.L. to link the weapon of offence to the crime.

55. As a result, the conviction and sentence passed against the appellant vide impugned judgment of conviction dated 26.11.1980 and order of sentence dated 27.11.1980, passed by VIth Additional Sessions Judge, Meerut in Sessions Trial No. 433 of 1979 titled State v. Sohanvir and Another, arising out of Case Crime No 171 of 1978, under Section 302/34 I.P.C., registered at Police Station Jani, District Meerut, is hereby set aside and the appellant is acquitted of all the charges. Thus, the appeal is **allowed**.

56. Office is directed to send back the record of this appeal to the trail court concerned along with a copy of this order for compliance of section 437-A Cr.P.C.

(2024) 5 ILRA 2147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 5227 of 2019

Vedram & Anr. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Radhey Shyam Shukla, Sri Vipul Shukla

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Section – 313 - Indian Penal Code, 1860-Sectiosn 201, 304-B & 498-A – Dowry Prohibition Act,1961 - Sections 3 & 4 - Two Appeals – against conviction & sentence – FIR – Charge – alleged that sister of informant died due to dowry death - Life imprisonment for husband and 10 years rigorous imprisonment for both mother & father in-laws – appeal was abated against father-in-law due to his death - Evaluation of evidence - court finds that, the dead body had been cremated on the same day of incident, as such neither any

postmortem report nor any forensic evidence is available to the prosecution – even though the death of the deceased was un-natural, yet no information was furnished to the police about the un-natural death of deceased - death of deceased was occurred within 7 years of marriage – prosecution witnesses have fully supported the version of demand of dowry which persisted till soon before her death – hence, the conviction of husband is sustained – but, so for as the role of mother-in-law is concern who is reported to be around 70 years of age and in jail for last 5 years - the allegations is not specific as against her – and since the deceased herself had started living separately from her family prior to her death - therefore, conviction of mother-in-law is reversed – appeal of mother-in-law is allowed. (Para – 12, 13, 16, 17, 23)

(B) Criminal Law - Criminal Procedure Code, 1973 - Section – 313 - Indian Penal Code, 1860-Section – 201, 304-B, 498-A – Dowry Prohibition Act, - Section – 3, 4 - Two Appeals – against conviction & sentence – FIR – Charge – alleged that sister of informant died due to dowry death - Life imprisonment for husband and 10 years rigorous imprisonment for co-accused both mother & father in-laws – appeal was abated against father-in-law due to his death – Quantum of punishment - Court finds that, punishment u/s section 304-B IPC varies from 7 year to life and it is cardinal principle of law that reasons have to be given by the trial court while proceeds to award maximum permissible sentence for an offence - court finds no any such reasons - and there are no such circumstances which may justify awarding of extreme punishment to the accused husband in the facts of the present case – hence, in the light of settled law as rendered in case of 'Hem Chand' and 'Kashmira Devi' punishment of life imprisonment u/s 304-B IPC to the accused-husband is not warranted – sentence awarded to him be modified to the sentence already undergone by him – direction issued accordingly - Appeal is allowed in part. (Para – 18, 19, 20, 22)

One Appeal is allowed & anr. is allowed in part. (E-11)

List of Cases cited:

1. Hem Chand Vs St. of Har. (1994 6 SCC 727),

2. Kashmira Devi Vs The St. of Uttrakhand (AIR 2020 SC 652).

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

1. These two appeals are directed against the judgment and order of conviction and sentence dated 5.7.2019, passed by Additional Sessions Judge/Fast Track Court No.2, Shahjahanpur, in Sessions Trial No. 167 of 2016 (State Vs. Vedram and others), arising out of Case Crime No.384 of 2015, Police Station Paraur, District Shahjahanpur, whereby the accused appellants Vedram and Smt. Kusuma Devi have been convicted and sentenced to ten years rigorous imprisonment each, as well as accused appellant Rajendra has been convicted and sentenced to life imprisonment, under Section 304-B IPC, and all accused appellants have also been convicted and sentenced to two years rigorous imprisonment alongwith fine of Rs.5,000/- each under Section 498-A IPC; two years rigorous imprisonment alongwith fine of Rs.3,000/- each under Section 201 IPC; one years rigorous imprisonment alongwith fine of Rs.1,000/- each under Section 4 Dowry Prohibition Act. On failure to deposit the above fines to undergo additional rigorous imprisonment for one year each. All punishments are to run concurrently.

2. Brother of the deceased has made a written report scribed by Jugal Kishore, stating that his sister Ramkanti got married about 4 years back in the month of June, 2012 to accused Rajendra son of Vedram. She was a graduate. Rajendra and his brother Manish as well as their father Vedram and mother-in-law used to harass

her for dowry and on multiple occasions she informed him on Phone and also on visits to the parental family. Although dowry was given as per the financial ability but due to poverty, the informant could not meet all demands of the accused persons. The aforesaid persons demanded a motorcycle, gold chain and ring and as demand in that regard could not be met as such his sister was tortured and has been done to death. Her body has been cremated. The incident has occurred on 19.9.2015 at 5.00 pm. The informant received a telephone call from one Rajesh about the incident and has consequently lodged the report. This written report (Ex.Ka-1) forms the basis of FIR in Case Crime No.384 of 2015, under Sections 498-A, 304-B, 201 IPC and 3/4 Dowry Prohibition Act. Five persons have been implicated in the FIR, namely Vedram (father-in-law), Rajendra (husband), Manish and Anil (brothers-in-law), mother-in-law of Smt. Ramkanti (Smt. Kusuma Devi). Since the dead body had already been cremated on 19.9.2015 itself, as such neither any postmortem was possible nor any other forensic evidence is available to the prosecution. Relying upon testimony of witnesses chargesheet came to be submitted against 3 of the 5 named accused i.e. husband Rajendra as well as his parents namely Vedram and Smt. Kusuma Devi. Cognizance was taken on the chargesheet and the case was committed to the court of sessions where it got registered as Sessions Trial No.167 of 2016. Alternate charge was also framed under Section 302/34 IPC in addition to the sections in which chargesheet was filed by the police.

3. The informant has appeared as PW-1 and has supported the prosecution case with regard to marriage having been held in June, 2012; giving of dowry articles in marriage by the family to the deceased; demand of dowry by the family members due to which she was physically and mentally harassed; demanded motorcycle, gold chain and ring. PW-1 has also proved the written report. He has also stated that he came to know of the incident on Phone and by the time family members could reach Village Varkhimaee, Police Station Paraur, District Shahjahanpur, her dead body was already cremated. In the cross-examination PW-1 has admitted that no written complaint with regard to demand of dowry was ever made. He got no information regarding death of his sister from her in-laws. He got a Phone call from one Rajesh but his Phone number is not available. He has stated that at the time of marriage, there was no complaint made regarding dowry, but it was later that dowry was demanded. Panchayat was also held in that regard.

4. Similarly PW-2 Narendra Kumar claims to be the brother of deceased and has stated that marriage got solemnized in June, 2012. He has also supported the plea of demand of dowry and has testified that on its failure the deceased has been done to death. PW-2 has also admitted that ever since the marriage, no complaint was ever made with anyone with regard to demand of dowry by the accused persons. All expenditure in respect of the marriage was arranged by the father of the deceased.

5. PW-3 Yadunath Singh is a villager, who too has supported the prosecution case.

6. PW-4 Rajaram is father of the deceased. He has stated that at the time of marriage there was no demand of dowry. However, all her Stridhan was taken by the in-laws and this fact was disclosed by the deceased to her brother Narendra. PW-4 has admitted that some time before the death of the deceased she had started living

separately and the deceased with her husband had separate living and kitchen etc. He has clarified that about 15 days prior to death her daughter and son-in-law separated from their parents and other family members.

7. PW-5 Sheeshram has not supported the prosecution case. This witness has stated that family members of deceased were informed and after waiting for sufficiently long the deceased was cremated. There was never ever a demand of dowry nor any any prior complaint was made.

8. PW-6 is the Investigating Officer, who has stated that accused persons were arrested on 1.10.2015. Statement of villagers were recorded and it was found that deceased was cremated in the field at a distance of about 300 metres from the house of the accused persons. The witnesses had informed him that deceased had committed suicide by hanging.

9. Based upon the evidence led during trial by the prosecution, statement of accused persons under Section 313 Cr.P.C. has been recorded, wherein they have denied the allegations made against them. In addition to above accused persons have stated that deceased committed suicide by hanging, which fact was intimated to the family members of the deceased. They participated in the cremation, whereafter a Panchayat was held and the family members of the deceased were demanding more money and as they could not pay the amount, a false report has been lodged. Similar stand has been taken by all the three accused persons.

10. The accused persons have also produced their witnesses. DW-1 has stated that deceased died on account of illness. The death was reported to family members but they did not arrive, and therefore, the body was cremated in the evening. Next day the family members arrived and demanded money on account of which FIR has been lodged. Similar stand has been taken by DW-2 and DW-3, all of whom are neighbours and claimed that they have participated in the cremation. It is on the basis of above evidence that the court of sessions has convicted the accused appellants and sentenced them as per law.

11. Aggrieved by the judgment and order of conviction and sentence, the accused appellants have filed the appeals, which have been heard together and are being disposed of by this common judgment. We have heard Sri Bishram Tiwari and Sri Ritesh Singh for the appellants, Sri Vikas Goswami, learned AGA for the State and have perused the materials available on record including the original records of the trial court.

12. In the facts of the case, evidence on record shows that the marriage of the deceased has been solemnized with accused Rajendra in June, 2012. This fact has been specifically asserted by prosecution witnesses. Prosecution witnesses have not been confronted on this aspect by the defence. Although suggestion has been given that marriage was held 9 years prior to the incident, but even in their written statement the marriage is reported to have been solemnized in 2010. Upon evaluation of evidence on the factum of marriage the trial court has concluded that the death of deceased has occurred within 7 years of marriage. Although this finding is assailed by the counsel for the appellants but having carefully perused the materials on record we do not find any reasons to disagree with

the conclusion drawn by the court of sessions. The categorical statement of prosecution witnesses about marriage having been solemnized in June, 2012 is neither challenged nor any contra-evidence on this aspect has been led by the defence. We, therefore, concur with the opinion of the trial judge that death of the deceased has occurred within 7 years of the marriage.

13. The other aspect is as to whether death of the deceased was unnatural or that she died on account of illness. On this aspect we find that defence version is not consistent. Three witnesses have been produced by the defence namely DW-1, DW-2 and DW-3, all of whom have asserted that the deceased was suffering from ailment and the death was natural. No evidence in support of such plea has, however, been placed on record. There are no prescriptions of the doctor nor any details of illness etc. has been furnished. We otherwise find that the defence version that deceased died a natural death due to illness is contradicted by their own statement under Section 313 Cr.P.C., wherein the accused have stated that the deceased committed suicide by hanging. The defence version on the factum of death, therefore, is contradictory. While accused in their statement under Section 313 Cr.P.C. claimed that the deceased committed suicide by hanging, but their witnesses claim that death occurred on account of illness and was natural. We have examined the evidence on this aspect of the matter, and we find the defence version on this score also not to be trustworthy. The Investigating Officer in his testimony has stated that he made enquiries from various villagers and he was informed that deceased had committed suicide by hanging. This is also the plea set up by the accused in their testimony under Section 313 Cr.P.C. The weight of evidence on record, therefore, persuades us to endorse the conclusions drawn by the trial court, as per which the deceased died an unnatural death. Death by suicide cannot be said to be natural, and therefore, we agree with the conclusion of the trial judge that the deceased died an unnatural death.

14. Coming to the other aspect relating to demand of dowry soon before her death, we find that the prosecution witnesses of fact have stated that the deceased was harassed for demand of dowry.

15. PW-4, who is the father of the deceased, although has stated that at the time of marriage or soon thereafter the demand of dowry was not made but after few months when her daughter came in the month of November, she was physically assaulted and all her Stridhan was taken by the in-laws. His elder son Narendra had got back the deceased. PW-4 has also stated that a report with regard to physical assault to the deceased was lodged with police station but its details are not available. The evidence adduced by the prosecution clearly supports its plea that the deceased was subjected to demand of dowry and even soon before her death the demand of dowry had continued.

16. In the facts of the case, we find that even though the death of the deceased was unnatural, yet no information was furnished to the police about the unnatural death of the deceased. It was expected that accused persons would inform the police regarding unnatural death of deceased. No such information was given. It is admitted that the death occurred on 19.9.2015 and on the same day the deceased was cremated. Even if the family members of the deceased

had not arrived on 19.9.2015, as is suggested by the defence, the accused persons were expected to have deferred the cremation till arrival of the family members or at least inform the police about the incident. The manner in which dead body has been surreptitiously disposed of without intimation made to the police, we are of the view that this was a case of dowry death. The prosecution witnesses although have not furnished the specific details with regard to the date and time of demand of dowry but they have fully supported the prosecution version of demand of dowry of motorcycle, gold chain and ring. In the facts of the case, we are of the opinion that the deceased has met an unnatural death within 7 years of the marriage, and that there was a demand of dowry which persisted till soon before her death. The conviction of accused appellant Rajendra under Section 304-B IPC is, therefore, sustained.

17. Father-in-law of the deceased Vedram (accused appellant) has already died. Mother-in-law Smt. Kusuma Devi is reported to be around 70 years of age and is in jail for the last 5 years. So far as the role of mother-in-law in demanding dowry is concerned, the allegation is not specific as against her and the allegations at best appear to be omnibus and vague. PW-4, who is the father of the deceased, has categorically admitted that deceased and her husband (accused Rajendra) had separated from the family prior to her death. Not only that the deceased had started living separately but their kitchen etc. had also separated. In that view of the matter, we are of the view that even if the deceased has died unnatural death within 7 years of marriage, yet Smt. Kusuma Devi cannot be convicted for offence under Section 304-B, 498-A, 201 IPC & Section 4 Dowry Prohibition Act in the absence of any specific allegation against her, when it is admitted that deceased had a separate living. The conviction of Smt. Kusuma Devi under Section 304-B, 498-A, 201 IPC & Section 4 Dowry Prohibition Act is, therefore, reversed.

18. Coming to the question of sentence, we find that the trial court has awarded life sentence to the accused appellant Rajendra under Section 304-B IPC. Punishment under Section 304-B IPC varies from 7 years to life. When the court proceeds to award maximum permissible sentence for an offence, it is the cardinal principle of law that reasons have to be given for awarding such maximum punishment. We do not find any such reasons to have been disclosed by the trial court. We otherwise find that there are no circumstances, which may justify awarding of extreme punishment to the accused appellant Rajendra in the facts of the present case. Considering the evidence in its entirety, we are of the view that punishment of life under Section 304-B IPC to the accused appellant Rajendra is not warranted.

19. In Hem Chand Vs. State of Haryana, (1994) 6 SCC 727, the Supreme Court has observed that though punishment under Section 304-B IPC varies from 7 years to life but award of extreme punishment should not be as a matter of course and must be awarded in rare cases. In para 7 and 8, the Supreme Court observed as under:-

"7. Now coming to the question of sentence, it can be seen that Section 304-B IPC lays down that:

"Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven

years but which may extend to imprisonment for life."

The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case. A reading of Section 304-B IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B IPC also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 IPC. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr Usha Rani PW 6 and Dr Indu Lalit PW 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decomposed. On the other hand, Dr Dalbir Singh PW 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post-mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B IPC would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable under Sections 304-B and 201 IPC have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence under Section 304-B IPC was made out. Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime, he himself indulged therein and precipitated in it and that bride-killing cases are on the increase and therefore a serious view has to be taken. As mentioned above, Section 304-B IPC only raises presumption and lays down that minimum sentence should be seven years but it may

extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

8. Hence, we are of the view that a sentence of 10 years' RI would meet the ends of justice. We, accordingly while confirming the conviction of the appellant under Section 304-B IPC, reduce the sentence of imprisonment for life to 10 years' RI. The other conviction and sentence passed against the appellant are, however, confirmed. In the result, the appeal is dismissed subject to the above modification of sentence."

20. In Kashmira Devi Vs. The State of Uttarakhand, AIR 2020 SC 652, the principle laid down in Hem Chand (supra) has been reiterated and the Court observed as under in para 24:-

"24. Having arrived at the above conclusion the quantum of sentence requires consideration. The High Court has awarded life imprisonment to the appellant on being convicted under Section 304-B IPC. The minimum sentence provided is seven years but it may extend to imprisonment for life. In fact, this Court in Hem Chand v. State of Haryana [Hem Chand v. State of Haryana, (1994) 6 SCC 727 : 1995 SCC (Cri) 36] has held that while imposing the sentence, awarding extreme punishment of imprisonment for life under Section 304-B IPC should be in rare cases and not in every case. Though the mitigating factor noticed in the said case was different, in the instant case keeping in view the age of the appellant and also the contribution that would be required by her to the family, while husband is also aged and further taking into consideration all other circumstances, the sentence as awarded by the High Court to the appellant herein is liable to be modified."

21. In light of the observation made in para 24 (reproduced above), the Court modified the sentence to a period of 7 years. Para 25 of the judgment in Kashmira Devi (supra) is, thus, reproduced hereinafter:-

"25. In the result, the following:

Order

25.1. The conviction of the appellant recorded by the High Court under Section 304-B IPC and Section 498-A IPC through its judgment dated 29-6-2017 [State v. Govind Singh, 2017 SCC OnLine Utt 1932] is upheld and affirmed.

25.2. The sentence ordered by the High Court through its order dated 10-7-2017 [State of Uttarakhand v. Govind Singh, GA No. 42 of 2010, decided on 10-7-2017 (Utt)] is modified and the sentence of imprisonment for life is altered by ordering the appellant to undergo rigorous imprisonment for a period of seven years which shall include the period of sentence already undergone by the appellant. The fine as imposed and the default sentence is sustained.

25.3. The appeal is allowed in part, in the above terms.

25.4. The parties to bear their own costs."

22. The accused appellant Rajendra has been taken in custody on 20.9.2015 and has remained in jail ever since then. The actual period of incarceration undergone by him is about 8 years 7 months and with remission the incarceration period is almost 10 years. We are of the considered view that the sentence awarded to him under Section 304-B IPC be modified to the sentence already undergone by him. The fine and the default sentence is maintained.

The appellant Rajendra is set to liberty on the sentence already undergone, subject to observance of Section 437A Cr.P.C., provided he is not wanted in any other case. Criminal Appeal No. 2720 of 2024, consequently, succeeds and is allowed in part, to that extent.

23. For the reasons recorded above, the Criminal Appeal No. 5227 of 2019 of accused appellant Smt. Kusuma Devi succeeds and is allowed. The judgment and order of conviction and sentence dated 5.7.2019, passed in Sessions Trial No. 167 of 2016 (State Vs. Vedram and others), arising out of Case Crime No.384 of 2015, against the accused appellant Smt. Kusuma Devi is set aside. Accused appellant Smt. Kusuma Devi is reported to be on bail, as such her bail bonds stands discharged. The appeal at the instance of accused appellant Vedram abates and is **dismissed**.

(2024) 5 ILRA 2155
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Crl. Misc. Bail Application No. 6914 of 2023

Abbas Ansari ...Applicant
Versus
Directorate of Enforcement, Allahabad ...Opp. Party

Counsel for the Applicant:
Pranjal Krishna, Mirza Shariq Aziz, Purnendu Chakravarty

Counsel for the Opp. Party:
Rohit Tripathi

Criminal Law - Indian Penal Code, 1860 - Sections 120-B, 419, 420, 433, 434, 447, 467, 468 & 471 - Prevention of Damages to public property Act, 1984 - Sections 3 & 4 – The Prevention of money laundering Act, 2002 – Sections 2(u), 3, 4, 44 & 45 - Application for Bail u/s 45 of PMLA Act, – three FIR – the first FIR is against M/s Vikas Construction Firm through its partners for alleged encroachment on public property by falsification of records, in which applicant has neither directly nor indirectly to do with the daily affairs of the firm – in second FIR, the present applicant has neither named nor he has been charge-sheeted and the allegations are against co-accused – while in the third FIR, lodged against applicant along with his other family members as co-accused – grounds has also taken that entire case of prosecution revolves around the theory that the present applicant received money from his family members generated from the firm as a beneficiary, – applicant is completely unaware regarding the alleged origin of proceeds of crime and allegations are vague and baseless -allegation regarding not explaining the transactions from his account is itself not sufficient to charge the applicant for the alleged offence of money laundering - court observed that, - from perusal of material available on record prima facie it reflects the involvement of present applicant – court is also required to consider the nature and gravity of the accusation, severity of the punishment in the event of conviction and the likelihood of the offence being repeated, reasonable apprehension of the witnesses being influenced and danger, of course, of justice defeated by grant of bail – held, the plea considering the fact that the applicant is a member of the legislative assembly and a national level sportsman yet not knowing how the funds were being given to him including quantum of the funds given by his relatives to purse his own sporting and political pursuits does not inspire confidence – taking an overall view including the gravity of offence and the witness of fact are yet to be examined and also keeping in mind the dictum of the Apex Court the application for bail is rejected – further, direction issued to the trial court to expedite the trial. (Para – 38, 39, 41, 42, 43)

Bail Application Rejected. (E-11)

List of Cases cited:

1. Rohit Tandon Vs Directorate of Enforcement (2018) 1 SCC 46,

2. Nikesh Tara Chandra Shah Vs U.O.I. & ors. (2018) 11 SCC 1,

3. Vijai Madan Lal Chaudhary Vs U.O.I. & ors. (2022) SCC 929,

4. Saumya - 12 - Chaurasia Vs Directorate of Enforcement (2023) SCC Online SC 1674,

5. Pavana Dibbur Vs Directorate of Enforcement 2023 SCC Online SC 1586,

6. Rohit Tandon Vs Directorate of Enforcement, (2018) 11 SCC 46,

7. Tarun Kumar Vs Enforcement Directorate, 2023 SCC OnLine SC 1486,

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The applicant is a sitting MLA from Mau Assembly Seat No.356 in State of Uttar Pradesh. He is stated to be a professional sport person and he has been arraigned as an accused in ECIR/ALSZO/27/2021 [Directorate of Enforcement through Assistant Director, Allahabad, Vs. M/s. Vikas Construction & others] for the commission of offence punishable under Section 3 read with Section 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the PMLA)

2. The instant ECIR has been lodged based upon an investigation, initiated on the basis of three FIRs relating to predicate offences.

(i) In FIR No.129 of 2020 registered under sections 419, 420, 433, 434, 447, 467, 468, 471 IPC and Sections 3 and 4 of Prevention of Damages to Public Property Act, 1984 against M/s Vikas Constructions through its partner. In the instant case, the allegation is that the partners of M/s Vikas Construction had encroached on public property by falsification of records.

(ii) The other FIR is bearing No.185 of 2021 registered under Sections 419, 420, 468, 471, 120-B, 467 IPC against the accused of the said FIR. In the said FIR, significantly, the present applicant has neither been named nor he has been chargesheeted. Nevertheless, the allegations in the said FIR is that one of the co-accused in the said FIR, namely Mukhtar Ansari had taken funds from the MLA fund to build a school though no school was built and the land is being used for agricultural purposes.

(iii) The third FIR is bearing No.236 of 2020 registered under Sections 120-B, 420, 467, 468, 471 IPC read with Section 3 of Prevention of Damages to Public Property Act, 1984 against the applicant, his brother Umar Ansari and his father Mukhtar Ansari. In the said FIR, it has been stated that the accused alongwith the other two co-accused knowing that the property in question is owned and vested with the government but by using their influence usurped the said land, got a map prepared and constructed an illegal house thereby causing loss to the government. It is stated that in so far as the present case under Section 3 and 4 of the PMLA is concerned, the investigating agency has not alleged that any proceeds of crime have been generated from the predicate offence emanating from the FIR bearing No.236 of 2020.

3. Primarily, for the offences under Sections 3 and 4 of the PMLA, the proceeds of crime, have been generated from the scheduled offence of FIR bearing No.129 of 2020.

4. The applicant was arrested by the investigating agency on 04.11.2022 in

context with the instant ECIR. The statement of the applicant was recorded. A supplementary complaint was also filed by the investigating agency. The special court has taken cognizance. In the aforesaid backdrop, the present applicant filed his first bail application under Sections 44/45 of the PMLA.

5. Mr. Kapil Sibal, learned Senior Counsel, assisted by Mr. Purnendu Chakravarty and Mr. Pranjal Krishna, has primarily submitted that the instant proceedings under PMLA have been initiated by the investigating agency primarily from the FIR relating to the predicate offences bearing Case Crime No.129 of 2020 and Case Crime No. 236 of 2020. It has been submitted that the investigating agency alleged that it is the firm M/s. Vikas Construction which is allegedly directly involved in the offence of money laundering. It is the firm M/s Vikas Construction which has usurped the land upon which constructions of go-downs was made which in turn was given on rent to the Food Corporation of India and the rentals received in excess of 15 crores and odd has been show as proceeds of crime. It is also alleged that the firm M/s. Vikas Construction obtained a subsidy of 2.25 crores from NABARD which is also shown as proceeds of crime.

6. The investigating agency further alleged that several high value transactions were both credited and debited into and from the account of the applicant who could not explain the same. It has been taken note of that the major share holders in the firm M/s. Vikas Construction are Ms. Afshar Ansari (mother of the applicant) and Mr. Atif Raza (maternal uncle-Mamaji) amongst others. However, the present applicant could not explain source of income especially in respect of the transactions made from and into the account of the applicant.

7. Mr. Sibal has submitted that the present applicant is in no way connected to the firm M/s. Vikas Construction nor the present applicant had anything directly or indirectly to do with the daily affairs of the said firm M/s. Vikas Construction. The said firm operates its own business through its partner and the present applicant is neither a partner nor an authorized signatory nor he has any authority or control to deal with the funds belonging to the said partnership firm. There is no material to indicate that the applicant had any connection with the properties acquired by the said firm or in respect of the money/funds of the said firm. Merely because some partners in the firm M/s. Vikas Construction are related to the applicant, it does not mean that he too is a partner in crime. Hence, the applicant has been falsely implicated and even though in the investigation the trail of money has not been satisfactorily connected to the applicant yet he has been apprehended and is languishing in jail since 04.11.2022.

8. It is further submitted that the entire case of the prosecution revolves around the theory that the present applicant received money from his family members generated from the firm M/s. Vikas Construction and since the applicant is a beneficiary of the said funds which allegedly according to the investigating agency are proceeds of crime, hence the applicant is alleged to have committed the said offence under the PMLA .

9. Mr. Sibal has further submitted that the applicant is completely unaware regarding the alleged origin of proceeds of crime. The allegations against the applicant

are vague and baseless and apparently no specific role has been attributed to the applicant in the predicate offence nor the trial of tainted money has been tracked to the doorstep of the applicant.

10. It is further urged that it is one thing to say that the applicant may not have been able to explain the transactions from his account which at best may be a case of unaccounted money in the hands of the applicant but that in itself is not sufficient to charge the applicant for the alleged offence of money laundering.

11. The offence of money laundering as defined in Section 3 of the PMLA is not made out against the applicant. It necessarily, must be established that a person accused of an offence under Section 3 and 4 of the PMLA must be shown to have been involved in a process or activity connected with the proceeds of crime. Once the investigating agency on their own showing comes to the conclusion that the applicant was not concerned or connected with the firm M/s Vikas Construction and for the said reason he cannot be held as an accused in the predicate offence, consequently, no case for money laundering in terms of Sections 3 and 4 of the Act of 2002 can be driven home against the applicant.

12. It is further submitted by Mr. Sibal that the applicant is a sports person and a national level rifle shooter having won accolades in the sporting arena for the country. He is also a representative of the public in capacity of a member of the Legislative Assembly and having his own source of income. It may be that some amount was transacted through the account of the applicant which has come from his mother and/or uncle (mamaji) but that in itself is not sufficient to allege that the applicant is involved in money laundering.

13. As far as the present applicant is concerned, certain money credited into the account of the applicant from his mother or uncle and utilized for import of fire arms for competitive purposes cannot be treated as proceeds of crime in the hands of the applicant.

14. *'Unaccounted money'* cannot be taken as a synonym for 'proceeds of crime' as both are distinct and separate concepts. Any amount which may be unaccounted but acquired from legitimate means cannot be treated as proceeds of crime unless it is established that it has been generated from a scheduled offence. On the aforesaid touch stone the investigating agency has not been able to make out a case against the applicant, hence the bail applications deserves to be allowed.

15. It has further been argued by Mr. Sibal that Section 45 of the PMLA provides for a twin condition to be satisfied while considering an application for bail **(i)** the public prosecutor is given an opportunity to oppose the application for bail; **(ii)** where the bail application is opposed, the court must be satisfied that there are reasonable grounds to believe that the applicant is not guilty of an offence and that he is not likely to commit any offence while on bail.

16. In the instant case, in so far as the first condition is concerned, the same stands complied with as prosecution is duly represented and they have filed their counter-affidavit opposing bail application. In so far as the second condition is concerned, it is for the court to form its satisfaction, however, the contents and the material available on record would clearly

establish that, in so far as the present applicant is concerned, the allegation against him is to the extent that he has received money from his mother and maternal uncle which has been utilized by the applicant for his personal use. However, there is nothing to indicate that the applicant knowingly committed any offence as provided in Section 3 of the PMLA nor the applicant was in any way involved in the commissioning of the predicate offence and in case if the predicate offence is not made out against the applicant then proceeding under the PMLA will also fall.

17. Moreover, the statement of the applicant was recorded on several dates and he cooperated during the entire investigation. ECIR has been filed before the special court of which cognizance has been taken and in the aforesaid circumstances, neither the applicant can tamper with the evidence which is mostly documented and submitted before the court nor he can influence any witness. The applicant has deep root in the society, being a representative of the public and a national level rifle shooter too, all of this indicate that he is firmly entrenched in the society, hence not at flight risk and the applicant has been in jail since 04.11.2022 coupled with the fact that the minimum sentence as attracted upon commissioning of an offence under the PMLA is three years and it may extend up to seven years. Hence, in this backdrop, the applicant has already served for one and half years as an under trial and looking into the list of the witnesses filed alongwith the complaint before the special court which specifically mentions 14 witnesses, while not a single witness has been examined and there are voluminous records as evidence, accordingly, the trial is not likely to conclude soon, hence the bail application be allowed.

18. Mr. Rohit Tripathi, learned counsel appearing for the investigating agency has submitted that there is a distinction between the predicate offence and the offence under sections 3 and 4 of the PMLA. It is submitted that the learned Senior Counsel for the applicant has primarily based his submission on the premise that though the proceedings were initiated in context with three FIRs relating to predicate offence and as per the learned Senior Counsel for the applicant, no case is made out against the applicant in the predicate offence, accordingly the proceedings against the applicant for the offence under the PMLA will also falter, is not quite correct.

19. It is urged that Section 3 of the PMLA operates in a different sphere. From the statement recorded by the investigating agency and looking into the Bank details, balance sheet and other documents, it clearly indicates the commissioning of the predicate offence. The proceeds generated from the predicate offence have clearly been traced to and for the benefit of the present applicant which is enough to establish complicity of the applicant to the offence of money laundering in terms of Section 3 of the Act 2002 and then it is the applicant who has to establish his innocence regarding non commissioning of an offence under the PMLA.

20. Mr. Tripathi has further argued that language used in Section 3 of the PMLA is very wide and inclusive. From the record it can clearly been seen that the proceeds of crime have been generated from the firm M/s Vikas Construction

which is clearly connected to another firm M/s. Aaghaaz which is also a family firm which is controlled by the maternal grand father of the applicant amongst others. It is thus urged that in light of the investigation and the material collected, there is ample evidence to establish the complicity of the applicant in the commissioning of the offence under the PMLA.

21. It is further urged that the chargesheets have been filed by the police in FIR Nos.129 of 2020 and 236 of 2022. The investigation done under the PMLA clearly established that the applicant is not only the beneficiary of the proceeds of crime but he has actively participated in the offence of money laundering. The two family firms, namely M/s. Vikas Construction has Ms. Afsan Ansari (mother of the applicant) and Mr. Atif Raza (uncle Mamaji) as partners amongst others and which has been used as vehicle for generating the proceeds of crime and the funds so generated have been transferred to and from M/s. Aaghaaz Project and Engineering Ltd., again a family owned company, and routing of funds through the aforesaid two firms and thereafter the end proceeds being debited and credited through the account of the present applicant is nothing but a clear case of layering the proceeds of crime which in turn has been utilized by the applicant and it has been attempted to show that the funds are untainted.

22. Mr. Tripathi has further urged that the present applicant did not cooperate during investigation and he was apprehended under Section 19 of the Act of 2002 on 04.11.2022. A lookout notice had to be issued against the applicant and it is only thereafter that the applicant was apprehended and then statements have been recorded. Merely denials that the applicant is no way connected with the firm M/s. Vikas Construction or M/s. Aaghaaz has to be considered noting the fact that the applicant has clearly given statements wherein he stated that as and when he required funds, the same was arranged by his mother Ms. Afsan Ansari and Mr. Atif Raza. He further stated that his maternal grand father (Nana), who controlled and is also a director and signatory in the Pvt. Ltd. Company M/s. Aaghaaz, hence, whenever the applicant required funds then the same was catared by the maternal grand father of the applicant and beyond this he was not aware of the various other transactions. In light of the said statement and the funds in the account of the applicant which was utilized by the applicant for his personal expenses, his foreign trips as well as for importing arms for his participation in the sport on rifle shooting in such circumstances it cannot be said that the applicant has not been a direct beneficiary nor it can be said that he was not aware from where the funds were sourced or their origin.

23. In the aforesaid circumstances where the applicant knowingly has been a user of the proceeds of crime, hence he is *prima facie*, liable for the offence coupled with the fact that the status of the applicant as a sitting member of the Legislative Assembly, the influence yielded by his family including his deceased father, who had more than fifty criminal cases to his credit is enough to create a bonafide assumption that the applicant can very well influence any witness and this can also be corroborated from the fact that while the applicant was incarcerated in Chitrakoot Jail in connection with other cases against the applicant yet he was using the jail premise as his personal fiefdom with active

connivance of the police and the Jail Authority, hence for all the aforesaid reasons the bail application deserves to be rejected.

24. In support of his submissions Mr. Tripathi has relied upon the decision of the Apex Court in ***Rohit Tandon Vs. Directorate of Enforcement (2018) 1 SCC 46, Nikesh Tara Chandra Shah Vs. Union of India & others (2018) 11 SCC 1, Vijai Madan Lal Chaudhary Vs. Union of India & others (2022) SCC 929, Saumya Chaurasia Vs. Directorate of Enforcement (2023) SCC Online SC 1674 and Pavana Dibbur Vs. Directorate of Enforcement 2023 SCC Online SC 1586***.

25. The Court has heard the learned counsel for the parties and also perused the material on record.

26. Before dealing with the respective submissions of the learned counsel for the parties, it will be appropriate to take a glance at the certain relevant provisions relating to PMLA.

Section 2(u) of the PMLA defines *'proceeds of crime'* as under:-

(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country] [or abroad]

[Explanation- For the removal of doubts, it is hereby clarified that 'proceeds of crime' including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence]

27. Scheduled offence has been defined in Section 2(y) which reads as under:

(y) "scheduled offence" means

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part-B of the Schedule if the total value involved in such offences is [one crore rupees] or more; or

(iii) the offences specified under Part C of the Schedule;]

28. The offence of money laundering has been defined in Section 3 while the punishment for money laundering has been provided in Section 4 which reads as under:-

3. ***Offence of money-laundering****- Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.*

[Explanation- For the removal of doubts, it is hereby clarified that –

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-

(a) concealment, or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever]

4. ***Punishment for money-laundering****:- Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a terms which shall not be less than three years but which may extend to seven years and shall also be liable to fine*

Provided that where the proceeds of crime inolve in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.

29. In so far as the issue regarding consideration of an application for bail is concerned, the same is provided under Section 45 which reads as under:-

45. Offences to be cognizable and non-bailable:- (1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless-}

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

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

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

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by-

(i) the Director; or

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

[(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

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

[Explanation- For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-

bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfillment of conditions under Section 19 and subject to the conditions enshrined under this section.]

30. Having taken a glance at the aforesaid statutory provisions it now will be worthwhile to notice certain decisions of the Apex Court on the issue of the offence of money laundering and the approach of courts while dealing with an application for bail.

31. The Apex Court in ***Rohit Tandon v. Directorate of Enforcement, (2018) 11 SCC 46*** has held as under:-

"19. The sweep of Section 45 of the 2002 Act is no more res intergra. In a recent decision of this Court in Gautam Kundu v. Directorate of Enforcement (2015) 16 SCC 1, this Court has had an occasion to examine it in paras 28-30. It will be useful to advert to paras 28 to 30 of this decision which read thus : (SCC pp. 14-15)

"28. Before dealing with the application for bail on merit, it is to be considered whether the provisions of Section 45 of PMLA are binding on the High Court while considering the application for bail under Section 439 of the Code of Criminal Procedure. There is no doubt that PMLA deals with the offence of money laundering and Parliament has enacted this law as per commitment of the country to the United Nations General Assembly. PMLA is a special statute enacted by Parliament for dealing with money laundering. Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law. In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.

29. Section 45 of PMLA starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of PMLA imposes the following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule of PMLA:

(i) That the prosecutor must be given an opportunity to oppose the application for bail; and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

30. The conditions specified under Section 45 of PMLA are mandatory and needs to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PMLA. Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PMLA has an overriding effect and the provisions of

CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made under Section 439 CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant." (emphasis supplied)

20. In para 34, this Court reiterated as follows : (Gautam Kundu case, SCC p. 16)

"34. ... We have noted that Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of PMLA imposes two conditions for grant of bail, specified under the said Act. We have not missed the proviso to Section 45 of the said Act which indicates that the legislature has carved out an exception for grant of bail by a Special Court when any person is under the age of 16 years or is a woman or is sick or infirm. Therefore, there is no doubt that the conditions laid down under Section 45-A of PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure."

The decisions of this Court in Subrata Chattoraj v. Union of India (2014) 8 SCC 768, Y.S. Jagan Mohan Reddy v. CBI (2013) 7 SCC 439 and Union of India v. Hassan Ali Khan (2011) 10 SCC 235 have been noticed in the aforesaid decision.

21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.

22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294 and State of Maharashtra v. Vishwanath Maranna Shetty, (2012) 10 SCC 561 , dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the

possibility of the accused committing a crime which is an offence under the Act after grant of bail.

31. Suffice it to observe that the appellant has not succeeded in persuading us about the inapplicability of the threshold stipulation under Section 45 of the Act. In the facts of the present case, we are in agreement with the view taken by the Sessions Court and by the High Court. We have independently examined the materials relied upon by the prosecution and also noted the inexplicable silence or reluctance of the appellant in disclosing the source from where such huge value of demonetised currency and also new currency has been acquired by him. The prosecution is relying on statements of 26 witnesses/accused already recorded, out of which 7 were considered by the Delhi High Court. These statements are admissible in evidence, in view of Section 50 of the 2002 Act. The same makes out a formidable case about the involvement of the appellant in commission of a serious offence of money laundering. It is, therefore, not possible for us to record satisfaction that there are reasonable grounds for believing that the appellant is not guilty of such offence. Further, the courts below have justly adverted to the antecedents of the appellant for considering the prayer for bail and concluded that it is not possible to hold that the appellant is not likely to commit any offence ascribable to the 2002 Act while on bail. Since the threshold stipulation predicated in Section 45 has not been overcome, the question of considering the efficacy of other points urged by the appellant to persuade the Court to favour the appellant with the relief of regular bail will be of no avail. In other words, the fact that the investigation in the predicate offence instituted in terms of FIR No. 205/2016 or that the investigation qua the appellant in the complaint CC No. 700 of 2017 is completed; and that the proceeds of crime are already in possession of the investigating agency and provisional attachment order in relation thereto passed on 13-2-2017 has been confirmed; or that charge-sheet has been filed in FIR No. 205/2016 against the appellant without his arrest; that the appellant has been lodged in judicial custody since 2-1-2017 and has not been interrogated or examined by the Enforcement Directorate thereafter; all these will be of no consequence."

32. Similarly, the Apex Court in ***Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1*** has held as under:-]

"11. Having heard the learned counsel for both sides, it is important to first understand what constitutes the offence of money laundering. Under Section 3 of the Act, the kind of persons responsible for money laundering is extremely wide. Words such as "whosoever", "directly or indirectly" and "attempts to indulge" would show that all persons who are even remotely involved in this offence are sought to be roped in. An important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and "proceeds of crime" is defined under the Act, by Section 2(1)(u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence). Thus, whosever is involved as aforesaid, in a process or activity connected with "proceeds of crime" as defined, which would include concealing, possessing,

acquiring or using such property, would be guilty of the offence, provided such persons also project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property."

33. In ***Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929*** the Apex Court has held as under:-

"269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

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295. As aforesaid, in this backdrop the amendment Act 2 of 2013 came into being. Considering the purport of the amended provisions and the experience of implementing/enforcement agencies, further changes became necessary to strengthen the mechanism regarding prevention of money-laundering. It is not right in assuming that the attachment of property (provisional) under the second proviso, as amended, has no link with the scheduled offence. Inasmuch as Section 5(1) envisages that such an action can be initiated only on the basis of material in possession of the authorised officer indicative of any person being in possession of proceeds of crime. The precondition for being proceeds of crime is that the property has been derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence. The sweep of Section 5(1) is not limited to the accused named in the criminal activity relating to a scheduled offence. It would apply to any person (not necessarily being accused in the scheduled offence), if he is involved in any process or activity connected with the proceeds of crime. Such a person besides facing the consequence of provisional attachment order, may end up in being named as accused in the complaint to be filed by the authorised officer concerning offence under Section 3 of the 2002 Act.

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387. Having said thus, we must now address the challenge to the twin conditions as applicable post amendment of 2018. That challenge will have to be tested on its own merits and not in reference to the reasons weighed with this Court in declaring the provision, (as it existed at the relevant time), applicable only to offences punishable for a term of imprisonment of more than three years under Part A of the Schedule to the 2002 Act. Now, the provision (Section 45) including twin conditions would apply to the offence(s) under the 2002 Act itself. The provision post 2018 amendment, is in the nature of no bail in relation to the offence of money-laundering unless the twin conditions are

fulfilled. The twin conditions are that there are reasonable grounds for believing that the accused is not guilty of offence of money-laundering and that he is not likely to commit any offence while on bail. Considering the purposes and objects of the legislation in the form of 2002 Act and the background in which it had been enacted owing to the commitment made to the international bodies and on their recommendations, it is plainly clear that it is a special legislation to deal with the subject of money-laundering activities having transnational impact on the financial systems including sovereignty and integrity of the countries. This is not an ordinary offence. To deal with such serious offence, stringent measures are provided in the 2002 Act for prevention of money-laundering and combating menace of money-laundering, including for attachment and confiscation of proceeds of crime and to prosecute persons involved in the process or activity connected with the proceeds of crime. In view of the gravity of the fallout of money-laundering activities having transnational impact, a special procedural law for prevention and regulation, including to prosecute the person involved, has been enacted, grouping the offenders involved in the process or activity connected with the proceeds of crime as a separate class from ordinary criminals. The offence of money-laundering has been regarded as an aggravated form of crime "world over". It is, therefore, a separate class of offence requiring effective and stringent measures to combat the menace of money-laundering.

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400. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. While dealing with a similar provision prescribing twin conditions in MCOCA, this Court in ***Ranjitsing Brahmajeetsing Sharma(2005) 5 SCC 294****, held as under:*

"44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be

assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby" (emphasis supplied)

401. We are in agreement with the observation made by the Court in ***Ranjitsing Brahmajeetsing Sharma****. The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in* ***Nimmagadda Prasad(2013) 7 SCC 466*** *the words used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."*

34. Similarly, the Apex Court in ***Tarun Kumar v. Enforcement Directorate, 2023 SCC OnLine SC 1486*** has held as under:-

"15. In our opinion, there is hardly any merit in the said submission of Mr. Luthra. In ***Rohit Tandon v. Directorate of Enforcement (2018) 11 SCC 46****, a three Judge Bench has categorically observed that the statements of witnesses/accused are admissible in evidence in view of Section 50 of the said Act and such statements may make out a formidable case about the involvement of the accused in the commission of a serious offence of money laundering. Further, as held in* ***Vijay Madanlal*** *(supra), the offence of money laundering under Section 3 of the Act is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The offence of money laundering is not dependent or linked to the date on which the scheduled offence or predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with the proceeds of crime. Thus, the involvement of the person in any of the criminal activities like concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so, would constitute the offence of money laundering under Section 3 of the Act.*

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17. As well settled by now, the conditions specified under Section 45 are mandatory. They need to be complied with. The Court is required to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. It is needless to say that as per the statutory presumption permitted under Section 24 of the Act, the Court or the Authority is entitled to presume unless the contrary is proved, that in any proceedings relating to proceeds of crime under the Act, in the case of a person charged with the offence of money laundering under Section 3, such proceeds of crime are involved in money laundering. Such conditions enumerated in Section 45 of PML Act will have to be complied with even in respect of an application for bail made under Section 439 Cr. P.C. in view of the overriding effect given to the PML Act over the other law for the time being in force, under Section 71 of the PML Act."

35. Again, the Apex Court in ***Pavana Dibbur v. Enforcement Directorate, 2023 SCC OnLine SC 1586*** has held as under:-

*15. The condition precedent for the existence of proceeds of crime is the existence of a scheduled offence. On this aspect, it is necessary to refer to the decision of this Court in the case of **Vijay Madanlal Choudhary**. In paragraph 253 of the said decision, this Court held thus:*

"253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now." (underline supplied)

16. In paragraphs 269 and 270, this Court held thus:

"269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would

constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

270. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No. 2) Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all." (underline supplied)

17. Coming back to Section 3 of the PMLA, on its plain reading, an offence under Section 3 can be committed after a scheduled offence is committed. For example, let us take the case of a person who is unconnected with the scheduled offence, knowingly assists the concealment of the proceeds of crime or knowingly assists the use of proceeds of crime. In that case, he can be held guilty of committing an offence under Section 3 of the PMLA. To give a concrete example, the offences under Sections 384 to 389 of the IPC relating to "extortion" are scheduled offences included in Paragraph 1 of the Schedule to the PMLA. An accused may commit a crime of extortion covered by Sections 384 to 389 of IPC and extort money. Subsequently, a person unconnected with the offence of extortion may assist the said accused in the concealment of the proceeds of extortion. In such a case, the person who assists the accused in the scheduled offence for concealing the proceeds of the crime of extortion can be guilty of the offence of money laundering. Therefore, it is not necessary that a person against whom the offence under Section 3 of the PMLA is alleged must have been shown as the accused in the scheduled offence. What is held in paragraph 270 of the decision of this Court in the case of ***Vijay Madanlal Choudhary*** *supports the above conclusion. The conditions precedent for attracting the offence under Section 3 of the PMLA are that there must be a scheduled offence and that there must be proceeds of crime in relation to the scheduled offence as defined in clause (u) of sub-section (1) of Section 3 of the PMLA.*

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31. While we reject the first and second submissions canvassed by the learned senior counsel appearing for the

appellant, the third submission must be upheld. Our conclusions are:

a. It is not necessary that a person against whom the offence under Section 3 of the PMLA is alleged, must have been shown as the accused in the scheduled offence;

b. Even if an accused shown in the complaint under the PMLA is not an accused in the scheduled offence, he will benefit from the acquittal of all the accused in the scheduled offence or discharge of all the accused in the scheduled offence. Similarly, he will get the benefit of the order of quashing the proceedings of the scheduled offence;

c. The first property cannot be said to have any connection with the proceeds of the crime as the acts constituting scheduled offence were committed after the property was acquired;

d. The issue of whether the appellant has used tainted money forming part of the proceeds of crime for acquiring the second property can be decided only at the time of trial; and

e. The offence punishable under Section 120-B of the IPC will become a scheduled offence only if the conspiracy alleged is of committing an offence which is specifically included in the Schedule.

36. Having examined the statutory provisions as well as the dictum of the Apex Court in the aforesaid mentioned decisions and applying the principles as laid therein to the facts of the instant case. The position as obtained, *prima facie*, is as under:-

(i) A partnership firm mainly M/s. Vikas Construction is the prime vehicle which appears to have been used for commissioning of the scheduled offence and for generating the proceeds of crime. The firm M/s. Vikas Construction through its partners is alleged to have usurped the government land in district Mau and Ghazipur by resorting to forgery, cheating and criminal trespass. This firm was initially constituted and run by Mr. Masood Alam and his four partners. Later, in August 2012 Mukhtar Ansari father of the applicant is alleged to have forcibly gained the control of the firm and three of the then existing partners were replaced and supplanted by Ms. Afsan Ansari (wife of Mukhtar Ansari, mother of the present applicant) Mr. Atif Raza and Mr. Anwar Sahzad (brother-in-law of Mukhtar Ansari and brother of Ms. Afsan Ansari and maternal uncle Mamaji of the present applicant).

(ii) During investigation, it was unearthed that the original partners of the said firm were forced to leave the firm and they were not even paid the value of their share and the amount to their credit in their capital account. The said firm was utilized for acquiring public contracts so much so that whenever the bid was made by the instant firm. The contracts invariably went to the said firm. The said firm was used to procure loans from the public banks to construct go-downs which then were given an rent to the Food Corporation of India and the Uttar Pradesh State Ware Housing Corporation and the rent received from the Food Corporation of India and U.P. State Ware Housing Corporation to the tune of several crores have been generated. In this context, subsidy was also received from NABARD to the tune of more than 67 lakhs. The amount generated from the rent received was routed not only into the account of M/s. Vikas Construction but also in the other family firm M/s. Aashaaz and by creating layers thereafter the money was withdrawn both by cash as well as deposited in the loan account of M/s Vikas

Construction as also for procuring immovable properties at such rates which were substantially much lower than the market price.

(iii) Certain properties have been sold to certain individuals while there was no apparent need to sell the property and the amount received from such sale was deposited into the account of M/s.Vikas Construction and M/s. Aaghaaz and also withdrawn in cash.

(iv) Money was transferred into the bank account of the applicant from M/s. Vikas Construction which was thereafter transferred to a firm, namely, M/s Laggar Industries Ltd for providing bullet proof modification of the vehicle belonging to the present applicant. The investigation revealed that the transactions made in and from the account of the applicant has been used by the applicant for not only getting his vehicle bullet proofed but also for his foreign visit and purchase/import of guns and fire arms but what is more important is that whenever these transactions have been done they have either been sourced through M/s Vikas Construction and prior thereto cash deposits have been made in M/s Vikas Construction and the same trail has been noticed through various bank transfers and into the hands of the applicant.

(v) The record further indicates that a some of money was transferred from the account of M/s Vikas Construction into the account of M/s. Aaghaaz which thereafter was transferred to the account of the present applicant and out of the amount so transferred in the hands of the present applicant, part of the same was used to pay for importing of fire arms and a substantial amount was withdrawn in cash.

(vi) The record further indicates that on a particular date a cash deposit is made in the account of one Mashaza Enterprizes which on the same date is transferred by Mashaza Enterprizes to the account of the present applicant and the same is then utilized by the applicant for importing fire arms and a substantial amount is withdrawn in cash. Several other transactions have been unearthed during investigation including large number of amount being transferred into the account of the applicant from several firms which otherwise had no dealing with the applicant nor he could explain as to why the aforesaid firm would pay or deposit amount into the account of the applicant which is then withdrawn by the applicant for his personal expenditure.

(vii) The record further indicates that during investigation it was clearly traced that the firm M/s. Vikas Construction and M/s. Aaghaaz which were in total control of the members of the family closely linked with the applicant [through his mother, maternal uncle (Mamaji), maternal grand father (Nanaji)] and of course the aforesaid web of the transactions was done by Mr. Atif Raza, who stated that he was only executing the directions of Mukhtar Ansari, the father of the applicant.

(viii) The statements recorded during investigation given by Mr. Atif Raza, the present applicant, the charted accountant all indicate that the mother of the applicant had 60% shares in the partnership M/s Vikas Construction and though she was a home maker but the said firm was used *prima facie* for generating the proceeds of crime and then funds have been transferred to various persons including the applicant.

(ix) The applicant could not indicate or explain the amount received into his account from Mashaza Enterprizes. He also could not authenticate the source of the funds or his explanation that he had generated his own income by training and mentoring other sports enthusiasts in the discipline of rifle shooting. This fact could not be verified from the organizations which as per the applicant used the professional talent of the applicant. On the contrary it was denied by the organizations that neither they had any panel of trainers wherein the applicant was a mentor/trainer. Hence, the statements of the applicant was not found credible. Even otherwise the applicant feigned ignorance regarding several transactions which were done in and from the account of the applicant. Merely to state that whenever he needed funds, he would inform his mother and his maternal uncle and maternal grand father and they would arrange for the funds which were received and the applicant did not know anything beyond that. This explanation does not reflect credibility especially from the applicant who is a sitting MLA and an elected representative of the people.

37. Section 2(1)(u) defines the phrase *'proceeds of crime'* which clearly indicates that any person who derives any property or obtains, directly or indirectly as a result of a criminal activity would be treated as proceeds of crime. The word *'property'* as defined in Section 2(1)(v) includes both movable and immovable property as also tangible or intangible, corporeal or incorporeal and includes deeds and instruments evidencing title or interest indicates that it is a wholesome inclusive definition. The offence of money laundering as per Section 3 not only relates to generation of such proceeds of crime but it also includes any activity directly or indirectly relating to concealment or possession or acquisition or use amongst others. The said definition is very wide and inclusive, thus, the fact that directly or indirectly if any person is in possession or use of such proceeds of crime whether directly or indirectly, knowingly assists or knowingly is a party or actually involved or in any activity connected with proceeds of crime relating to concealment possession acquisition or use or projecting the property as untainted property or claiming as untainted property in any manner whatsoever would be liable for commissioning of any offence under the PMLA.

38. In the instant case, from the perusal of the complaint which has been brought on record as annexure no.2 including the supplementary complaint which has been brought on record as annexure no.9, *prima faice*, it reflects the involvement of the present applicant. Even though this Court is conscious of the fact that at this stage a mini trial is not be held nor the court is required to enter into the merits or the depth of the evidence to return a finding of guilt but what is required is to *prima facie*, consider the material available on record for the Court to satisfy itself and to enable it to reasonably form an opinion, to believe, that the applicant is not guilty of the offence and that he is not likely to commit any offence on bail as enshrined in Section 45 of the PMLA.

39. While forming such satisfaction, the Court is also required to consider the nature and gravity of the accusation, severity of the punishment in the event of conviction, danger of the accused absconding or fleeing, character, behaviour means, position and standing of the accused

and the likelihood of the offence being repeated, reasonable apprehension of the witnesses being influenced and danger, of course, of justice being defeated by grant of bail.

40. It is in the aforesaid backdrop, considering the material available on record including the flow charts which clearly demonstrates the origin of funds and it also explains how it finds its way into the accounts of the applicant and its use by the applicant, and there is material against the applicant to link him with the movement and trail of funds to and from the two firms M/s. Vikas Construction and M/s. Aaghaaz.

41. Considering the family antecedents of the applicant including the statement which is contained in the ECIR that the applicant initially was not co-operative rather evaded the summons and only when the lookout notice was issued and in furtherance thereof the applicant was apprehended and during custody he gave his statements but nevertheless many of the transactions could not be explained by him by taking a plea that he did not know from where the fund was coming rather whenever he wanted the funds he asked his mother and maternal uncle and grand father who would arrange the funds. This plea considering the fact that the applicant is a member of the Legislative Assembly and a national level sportsman yet not knowing how the funds were being given to him including the quantum of the funds given by his relatives to pursue his own sporting and political pursuits does not inspire confidence.

42. Thus taking an overall view including the gravity of offence including the fact that the witnesses of fact are yet to be examined also keeping in mind the dictum of the Apex Court in ***Pavana Dibbur (supra)*** and for all the reasons aforesaid, this Court is unable to persuade itself to form a, *prima facie*, satisfaction in terms of Section 45 of the PMLA, at this stage, that the applicant is not guilty or that he may not commit an offecne on bail. Thus, for all the aforesaid reasons, the bail application is **rejected**.

43. However, it is also clarified that any observations made by this Court may not be taken as an expression of opinion on merits. The trial court is directed to expedite the trial to complete it as swiftly as possible and the prosecuting agency shall not seek any unnecessary adjournments on the ground of examination of witnesses.

(2024) 5 ILRA 2174
CRIMINAL JURISDICTION
REVISIONAL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Revision No. 159 of 2024
And
Criminal Revision No. 173 of 2024
And
Criminal Revision No. 194 of 2024

Dr. Tanzeen Fatima ...Revisionist
Versus
State of U.P. ...Respondent

Counsel for the Revisionist:
Sri Imran Ullah, Sri Mohammad Khalid, Sri Zubair Ahmad Khan, Sri Kapil Sibal (Sr. Advocate)

Counsel for the Respondent:
Sri J.K. Upadhyay, AGA, Sri Ajay Kumar Mishra (A.G.), Sri P.C. Srivastava (A.A.G.), Sri A.K. Sand (G.A.), Sri Sameer Srivastava, Sri Sharad Sharma

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 39, 161, 164, 311, 389(1), 397, 401 & 439 - Indian Penal Code, 1860 - Sections 30, 120-B, 415, 420, 465, 467, 468 & 471 - Evidence Act, 1872 - Section 3, - The Registration of Births and Deaths Act, 1969 - Sections 9(3) & 23 - Criminal Revisions – against rejection their appeals – complaint – FIR – investigation – Charge-sheeted - conviction and sentence u/s 120-B, 420, 467, 468 & 471 of IPC – Revision – prayer for Interim Relief, at this stage, for suspension of their sentence and stay of their conviction – **court finds that**, (i) Mohd. Abdullah Azam khan have two birth certificates having DoB 01.01.1993 issued by Nagarpalika Parishad, Rampur & other with DoB 30.09.1990 issued by municipal Corporation, Lucknow, - as per his all educational documents right from beginning to 16.01.2015 his DoB is mentioned as 01.01.1993, - (ii) on the application moved by his mother Dr. Tanzeen Fatima Municipal Corporation, Lucknow has issued second birth Certificate having DoB 30.09.1990, - (ii) the second birth certificate was used by Mohd. Abdullah Azam khan in filing his nomination paper in year 2017 for election of St. Assembly Election 2017 and also for obtaining third passport and a new PAN card, - later on his aforesaid election contested on the basis of second birth certificate has been cancelled by high Court and affirmed by hon'ble Supreme Court, - (iii) during investigation, IO has neither recorded the St.ments of u/s 161 Cr.P.C. of the concern officers of Nagarpalika Parishad, Rampur, Municipal Corporation, Lucknow & the SDM nor the prosecution produced them as PW witnesses, - (iv) Despite availability of direct evidence the prosecution, only tried to prove its case through indirect evidence, - (v) The documents filed by Dr. Tanzeen Fatima along with an affidavit to get second Birth Certificate of his son cannot be said to be forged documents wherein she has also not disclosed the material facts regarding first Birth Certificate in her application, - (vi) prosecution could not prove the fact that first Birth Certificate was issued on the basis of affidavit filed by both father and mother of Mohd. Abdullah Azam khan, - (vii) nothing on record against Mohd. Azam khan which indicate that for issuance of the impugned second birth certificate any information was given by him, - (viii) there is no any material against Mohd, Azam khan regarding cheating, furnishing false information or forgery/fabricating document and forgery in valuable security, - (ix) it is well settled law that conjectures and suspicions should not be allowed to take place of legal proof, - (x) there is no evidence on record to established that nay of the revisionist have forged the birth certificate dated 21.01.2015 and similarly basic ingredient of all the three offences is also not made out, - (xi) alleged offences against the revisionist are not a heinous offence, both Dr. Tanzeen Fatima and Mohd. Azam khan are suffering from old aged diseases, and there is no possibility of absconding of the revisionist and they are on bail during trial and they did not misused the liberty – **held,** considering the case in totality, nature of allegations, role of attributed to the revisionists, material evidence on record, court is of the view that during pendency of these Revisions - (i) the application u/s 389(1) Cr.P.C. is liable to be allowed, (ii) impugned sentence is hereby suspended, (iii) all the revisionists be released on bail, (iv) case of Mohd. Azam khan is distinguishable from the case of other Revisionists, (v) judgment & order of Conviction of Mohd. Azam khan shall remain stayed but prayer for stay of conviction against Dr. Tanzeen Fatima & Mohd. Abdullah Azam khan is rejected – hence, interim Applications disposed of, accordingly.

(Para –20, 21, 24, 28, 29, 30, 31, 32, 33, 34)

Revision is pending, but - Interim Applications are disposed of. (E-11)

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

1. Mohd. Ibrahim Vs St. of Bihar (2009) 8 SCC 751,

2. Ayodhya Prasad Sital Prasad Vs Emperor; AIR 1938 Sind 193

3. VR Venugopal Vs Miss T Pankajam; (1961) 1 CrLJ 804 •

4. Matilal Chakravarty Vs The King; AIR 1949 Cal 58 •

5. Mohammaed Ibrahim and Ors. Vs St. of Bihar & anr; (2009) 8 SCC 751 •

6. Sheila Sebastian Vs R. Jawaharaj & anr.; (2018) 7 SCC 581 38 •

7. Sanjiv Ratanappa Ronad Vs Emperor; AIR 1932 Bom 545 •

8. Guru Bipin Singh Vs Chongtham Manihar Singh (1996) 11 SCC 622 •

9. St. of U.P. Vs Sabir Ali; (1964) 7 SCR 435 •

10. Dr. S. Dutt Vs St. of U.P.; (1966) 1 SCR 493 •

11. Oseela Abdul Khader & anr. VS St. of Kerala; 2012 SCC Online Kerala 31803 •

12. Kiran Kanta Vs St. of Uttarakhand; 2019 SCC Online Utt 1670 •

13. Krishna Kumari Vs St. of Punj., 2016 SCC Online P&H 16199 •

14. Surineni Renukaiah Vs St. of A.P.; Crl. P. No. 6234/2022 •

15. Jullu Rehman Vs St. of Jharkhand; Crl. M.P. No. 576/2012 •

16. Pardeep Singh Vs St. of Punj.; CRM.M, 48407/2018 •

17. Malcolm War Macleod Vs St. of W.B; 2010 SCC Online Cal 2115 •

18. St. of U.P. Vs Singhara Singh & ors.; (1964) 4 SCR 485 •

19. Noor Mohammad Vs St. of U.P.; 2010 SCC Online All 823 •

20. Ravi Kant Sharma Vs St.; 2011 SCC Online Del 4342 •

21. Amin & Anr. Vs St.; 1957 SCC Online All 331 •

22. Kishore Chand Vs St. of Himachal Pradesh; (1991) 1 SCC 286 •

23. St. of A.P. Vs Punati Ramulu & Ors.; 1994 Supp (1) SCC 59 •

24. Vijender and Ors. Vs St. of Delhi; (1997) 6 SCC 171 •

25. Tomaso Bruno & Anr. Vs St. of U.P.; (2015) 7 SCC 178 •

26. Mohanlal Shamji Soni Vs U.O.I. & anr.; 1991 Supp (1) SCC 271 •

27. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 39 •

28. Anvar P.VS Vs P.K. Basheer, (2014) 10 SCC 473 •

29. St. Vs Navjot Sandhu; (2005) 11 SCC 600,

30. M.N.G Bharateesh Reddy Vs Ramesh Ranganathan & anr., 2022 SCC OnLine SC 1061,

31. Hridaya Ranjan Prasad Verma Vs St. of Bihar, (2000) 4 SCC 168,

32. Shriniwas Pandit Dharmadhikari Vs St. of Mah. & ors. - 1980 SCC (Cri) 45.

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

1. All the above captioned Criminal Revisions No. 159 of 2024, 173 of 2024 and 194 of 2024 under Section 397/401 of Code of Criminal Procedure have been preferred by the revisionists, namely Dr. Tanzeen Fatima, Mohammad Azam Khan and Mohammad Abdullah Azam Khan against the judgment and order dated 23.12.2023 passed by learned Additional Sessions Judge / Special Judge (MP/MLA/E.C. Act), Rampur in Criminal Appeal No. 75 of 2023 (Dr. Tanzeen Fatima vs. State of U.P.), Criminal Appeal No. 76 of 2023 (Mohammad Abdullah Azam Khan vs. State of U.P.) and Criminal Appeal No. 77 of 2023 (Mohammad Azam Khan vs. State of U.P.) rejecting the appeals against the judgment and order dated 18.10.2023 passed by Trial Court / learned Special Judge (MP/MLA), ACJM-I, Rampur in

Criminal Case No. 312 of 2022 (State of U.P. vs. Mohammad Azam Khan & Ors.) arising out of Case Crime No. 04 of 2019, under Sections 120-B, 420, 467, 468, 471 IPC, Police Station Ganj, District-Rampur, convicting and sentencing the accused-revisionists as under:

(a) One year's simple imprisonment and fine of Rs. 5000/- for the offence under Section 120-B I.P.C. and in default of payment of fine, one month's additional simple imprisonment.

(b) Three years' simple imprisonment and fine of Rs. 10,000/- for the offence under Section 420 I.P.C. and in default of payment of fine, six months' additional simple imprisonment.

(c) Seven years' simple imprisonment and fine of Rs. 15,000/- for the offence under Section 467 IPC and in default of payment of fine, one year's additional simple imprisonment.

(d) Three years' simple imprisonment and fine of Rs. 10,000/- for the offence under Section 468 IPC and in default of payment of fine, six months' additional simple imprisonment.

(e) Two years' simple imprisonment and fine of Rs. 10,000/- for the offence under Section 471 IPC and in default of payment of fine, three months' additional simple imprisonment.

2. However, all the sentences were directed to run concurrently.

3. Since all the revisionists namely Dr. Tanzeen Fatima, Mohammad Azam Khan and Mohammad Abdullah Azam Khan have been convicted and sentenced by common judgment and order dated 18.10.2023 and their separate Criminal Appeals No. 75 of 2023, 77 of 2023 and 76 of 2023 have also been decided by the common judgment and order dated 23.12.2023, therefore the issue with regard to interim relief as sought in all the three Criminal Revisions are heard and being decided together.

Interim relief

4. In all the above mentioned Criminal Revisions, interim relief has been sought to suspend the execution of the sentence dated 18.10.2023 as affirmed by the order dated 23.12.2023 and enlarge the revisionists on bail during pendency of the above mentioned criminal revisions.

5. In addition to above, three separate applications all bearing Application No.1 dated 23.02.2024 U/s 389(1) r/w 397/401 Cr.P.C. have also been filed in the above mentioned Criminal Revisions with a prayer to stay the impugned judgment and order dated 18.10.2023 of conviction as affirmed by appellate Court vide its judgment and order dated 23.12.2023 during the pendency of the above Criminal Revisions.

Brief Facts

6. The prosecution case is that on the written complaint dated 17.12.2018 of complainant /informant Akash Saxena, Regional Convener, Bhartiya Janata Party Small Scale Industry Cell, West U.P., a first information report was registered on 03.01.2019 against Mohammad Azam Khan s/o late Mohammad Mumtaz Khan, Dr. Tanzeen Fatima w/o Mohammad Azam Khan, Mohammad Abdullah Azam Khan s/o Mohammad Azam Khan, all resident of Gher-Mir-Baaz Khan, P.S. Ganj District Rampur at Case Crime No. 4 of 2019, under Sections 193, 420, 467, 468 and 471 IPC at Police Station Ganj, District Rampur,

wherein it is alleged that Mohammad Azam Khan and Dr. Tanzeen Fatima by forgery and hatching a well planned conspiracy for their personal gain got two birth certificates of their son Mohammad Abdullah Azam Khan issued from two places. The first birth certificate dated 28.06.2012 (Registration No. RNPB2012-03857) was issued from Municipal Corporation, Rampur on the basis of affidavits given by Mohammad Azam Khan and Dr. Tanzeen Fatima, in which place of birth is shown as Rampur. The second birth certificate dated 21.01.2015 (Registration No. NNLKO-B-2015-292611) was issued from Municipal Corporation, Lucknow on the basis of duplicate birth certificate, serial No. 781, dated 21.04.2015 issued by Queen Mary's Hospital, Lucknow, in which place of birth is shown as Lucknow. The first birth certificate issued by Municipal Corporation, Rampur was used by Mohammad Abdullah Azam Khan in preparing his passport etc. and he travelled abroad by wrongly using it. The second birth certificate issued by Municipal Corporation, Lucknow was used in government documents and several degrees of Jauhar University. Both the birth certificates were made and used by Mohammad Azam Khan, Dr. Tanzeen Fatima and Mohammad Abdullah Azam Khan for their personal gain by forgery and well planned conspiracy.

7. After culmination of the investigation, Investigating Officer submitted Charge sheet No. 196 of 2019 dated 01.04.2019 (Ext. Ka-69) under Sections 420, 467, 468, 471 IPC against Mohammad Azam Khan, Dr. Tanzeen Fatima and Mohammad Abdullah Azam Khan.

8. When accused-revisionists moved discharge applications with a stand that there is no charge-sheet under Section 120-B I.P.C. against them, thereafter without any order for further investigation by the Trial Court, the supplementary charge sheet No. 196A of 2019 dated 10.08.2021 (Ext. Ka-70) under Section 120B IPC was filed on 11.08.2021 in the Trial Court and same was taken on record vide order dated 16.08.2021.

9. On 18.08.2021, charges were framed against the revisionists under Sections 120-B, 406, 420, 467, 468 and 471 IPC.

10. During the course of trial, following fifteen prosecution witnesses were produced to prove the charges against the revisionists :

(i) PW-1 Akash Kumar Saxena, first informant.

(ii) PW-2 Manoj Pathak, Principal of St. Paul School, Rampur.

(iii) PW-3 Tejpal Verma, the then Sub Registrar (Births and Deaths) Rampur.

(iv) PW-4 Vijay Kumar, the then Income Tax Officer, Rampur.

(v) PW-5 Mohd. Naseem, Passport Officer, Bareilly.

(vi) PW-6 Rai Singh, Pradhan Sahayak, District Election Office, Rampur.

(vii) PW-7 S.K. Rawat, Health Officer/Registrar (Birth and Death), Lucknow.

(viii) PW-8 Rishi Pal, the then Head Moharrir.

(ix) PW-9 Matloob Hussain, Fire Brigade Officer.

(x) PW-10 Gajendra Singh, Returning Officer.

(xi) PW-11 Mohd. Shaffiq, Proposer for Mohammad Abdullah Azam Khan in the nomination form Suar Assembly Election 2017.

(xii) PW-12 Mohd. Saleem, Record Keeper of Nagar Palika Parishad, Rampur.

(xiii) PW-13 Dinesh Kumar Goel, Proposer of Mohammad Abdullah Azam Khan in the nomination form for Suar Assembly Election 2017.

(xiv) PW-14 Narendra Tyagi, First Investigating Officer.

(xv) PW-15 Kishan Avatar, Second Investigating Officer.

11. Following nineteen persons were produced and examined as defence witnesses:-

(i) DW-1 Mohd. Zafaruddin @ Zafar Khan, Advocate.

(ii) DW-2 Zahid Khan.

(iii) DW-3 Akhilesh Kumar.

(iv) DW-4 Asim Khan.

(v) DW-5 Anwar Khan.

(vi) DW-6 Javed Khan.

(vii) DW-7 Hargyan Singh.

(viii) DW-8 Firasat Khan.

(ix) DW-9 Khalid Ali.

(x) DW-10 Abdul Karim Khan.

(xi) DW-11 Tasleem Raza Khan, Videographer.

(xii) DW-12 Farhan Ali Khan.

(xiii) DW-13 Zameer Ahmed Khan.

(xiv) DW-14 Mrs. Nikhat Akhlaque.

(xv) DW-15 Mrs. Fareeda Sultana.

(xvi) DW-16 Dilip Shankar Acharya, Expert.

(xvii) DW-17 Dr. Ranjeet Kumar Singh, Expert

(xviii) DW-18 Mrs. Tanveer Fatima.

(xix) DW-19 Mohd Hamid.

12. As per paragraph No. 4 of the judgement of the Trial Court, on behalf of the prosecution, total seventy documents (Ext.1 to Ext.70) were produced and exhibited before the trial Court. During cross-examination of the prosecution witnesses total thirty seven documents were produced by the defence side and exhibited before the trial Court. On behalf of defence, total thirteen material exhibits were produced and exhibited as D-1 to D-13 before the trial Court.

Submissions on behalf of revisionists

13. Mr. Kapil Sibal, learned Senior Counsel for the revisionists, at the outset, primarily drawn the attention of this Court focusing on following six documents, namely :-

i- F.I.R. dated 03.01.2019 (Exhibit Ka-61).

ii- Birth certificate dated 28.06.2012 (Registration No. RNPB2012-03857) of Mohammad Abdullah Azam Khan issued by Nagar Palika Parishad, Rampur (Exhibit Ka-11).

iii- Application dated 17.01.2015 (Exhibit Ka-55) and affidavit dated 17.01.2015 (Exhibit Ka-53) of revisionist-Dr. Tanzeen Fatima given before City Health Officer, Nagar Nigam Lucknow.

iv- Birth certificate dated 21.01.2015 (Registration No. NNLKO-B-2015-292611) (Exhibit Ka-59) of Mohammad Abdullah Azam Khan issued by Municipal Corporation, Lucknow.

v- Duplicate Birth certificate, Serial No. 696 dated 29.01.2015 issued by Queen Mary's Hospital, Lucknow (Exhibit Ka-54).

vi- Duplicate Birth certificate dated 21.04.2015, serial No. 718 (Ext. Kha-1/PW-7/10.11.2022) issued by Queen

Mary's Hospital, Lucknow produced by PW-7 before the Trial Court.

14. Main substratum of argument of Mr. Kapil Sibal, learned Senior Counsel for the revisionists is that it is not a case of forgery or fabrication of any document on the part of the accused-revisionists. Even accepting the prosecution case for the sake of argument only, no offence is made out against Dr. Tanzeen Fatima, Mohammad Azam Khan and Mohammad Abdullah Azam Khan. Under the facts and circumstances of this case, criminal prosecution of the revisionists, which is based on malice is bad in law. The findings recorded by the Trial Court as well as Appellate Court are illegal and perverse on the face of record. Impugned judgment and orders dated 18.10.2023 and 23.12.2023 are in complete disregard to the provisions of Code of Criminal Procedure and Indian Evidence Act, hence the same are not sustainable in the eye of law. Revisionists have been convicted on the basis of illegal presumption without any legal evidence sufficient to convict them. Both the courts below failed to appreciate that ingredients to constitute the offence punishable under Sections 120-B, 420, 467, 468 and 471 IPC are lacking in this case.

15. Mr. Kapil Sibal in order to strengthen his aforesaid submissions further argued that :-

15-1. Mohammad Abdullah Azam Khan was born in Queen Mary's Hospital, Lucknow on 30.09.1990, but at the initial stage, date of birth of Mohammad Abdullah Azam Khan was recorded in the concerned record of Nagar Palika Parishad, Rampur as 01.01.1993 and place of birth as Rampur on the basis of information given by the family friend of his father Mohammad Azam Khan.

15-2. The birth certificate dated 28.06.2012 (Registration No. RNPB2012-03857) of Mohammad Abdullah Azam Khan, in which his date of birth is recorded as 01.01.1993 and place of birth is recorded as Rampur shows that same was issued under Section 12/17 of the Registration of Births and Deaths Act 1969 and Rules 8/13 of the Uttar Pradesh Registration of Births and Deaths Rules, 2003 by the department of Health/ Nagar Palika Parishad, Rampur, as such birth certificate dated 28.06.2012 (Exhibit Ka-11) is neither a forged nor a fabricated document.

15-3. The first allegation of the complainant in the F.I.R. that the first birth certificate dated 28.06.2012 of Mohammad Abdullah Azam Khan was issued by Nagar Palika Parishad, Rampur on the basis of affidavits given by Mohammad Azam Khan and Dr. Tanzeen Fatima is completely false and against the evidence on record. No affidavit was given by Mohammad Azam Khan and Dr. Tanzeen Fatima for issuance of first birth certificate dated 28.06.2012. Nothing is on record with regard to any kind of forgery or fabrication made by Mohammad Azam Khan and Dr. Tanzeen Fatima in issuance of birth certificate dated 28.06.2012 to Mohammad Abdullah Azam Khan. The prosecution could not prove the said allegation in accordance with law against them.

15-4. The second allegation against Mohammad Azam Khan and Dr. Tanzeen Fatima and Mohammad Abdullah Azam Khan are that they, for their personal gain, by forgery and well planned conspiracy, got issued second birth certificate dated 21.01.2015 of their son Mohammad Abdullah Azam Khan from

Municipal Corporation, Lucknow on the basis of duplicate birth certificate, Serial No. 718, dated 21.04.2015 (Exhibit Kha-1/PW-7) issued by Queen Mary's Hospital, Lucknow, is also wrong and false allegation. In this regard, it is submitted that in fact Dr. Tanzeen Fatima moved an application dated 17.01.2015 (Exhibit Ka-55) along with her affidavit dated 17.01.2015 (Exhibit Ka-53) before City Health Officer, Nagar Nigam Lucknow for issuance of birth certificate of her son Mohammad Abdullah Azam Khan mentioning inter alia that Mohammad Abdullah Azam Khan was born on 30.09.1990 in Queen Mary's Hospital, Lucknow (King George University). There is an urgent need of birth certificate of my son and birth of my son can be confirmed from the records of Queen Mary's Hospital, Lucknow as required. Thereafter second birth certificate dated 21.01.2015 was issued by the Municipal Corporation, Lucknow after due verification of record in accordance with law.

15-5. It is also pointed out that no duplicate birth certificate of Queen Mary's Hospital, Lucknow, was filed along with application dated 17.01.2015 (Exhibit Ka-55) of Dr. Tanzeen Fatima. The birth certificate dated 29.01.2015 (Exhibit Ka-54) and 21.04.2015 (Exhibit Kha-1/PW-7/10.11.2022) Serial No. 718 of Queen Mary's Hospital, Lucknow are of later date of issuance of second birth certificate dated 21.01.2015, hence the case of the prosecution in F.I.R. that second birth certificate dated 21.01.2015 has been issued on the basis of birth certificate dated 21.04.2015 of Queen Mary's Hospital, Lucknow cannot be accepted. There is no forgery in the application and affidavit dated 17.01.2015 of Dr. Tanzeen Fatima.

15-6. Much emphasis has been given by contending that second birth certificate dated 21.01.2015 may be illegal or wrong for civil consequences, but cannot be said or treated as a forged document, because the same has been officially and validly issued following due procedure of law under the genuine seal and signature of officer competent to issue the same.

15-7. The revisionists are neither author of either of the birth certificates nor there is a charge that they interpolated or fabricated either of the birth certificates.

15-8. The prosecution has failed to establish that any kind of alleged forgery was committed by the revisionists in the process of obtaining birth certificate issued at Rampur or Lucknow.

15-9. The birth certificate would not fall within the definition of ‘valuable security' as defined under Section 30 of IPC, hence, the ingredients of Sections 467 and 471 IPC are also not satisfied.

15-10. It is also submitted that if birth certificate dated 21.01.2015 is being treated as a forged document by the State government/prosecution, the appropriate legal action should have been taken under Section 23 of the Registration of Births and Deaths Act, 1969 against all the concerned officers and persons, who were involved in the process of issuance of said birth certificate dated 21.01.2015, but no action has been taken by the State against any authorities/officer concerned.

15-11. The issue involved in this case attracts the provisions of the the Registration of Births and Deaths Act, 1969, which is a Special Act. It is well settled that special law prevails over general law and things to be done in a particular manner can only be done in that manner, hence, under the facts of the case, the provisions of Indian Penal Code is not attracted against the revisionists.

15-12. If such kind of malicious criminal prosecutions are allowed, then

lakhs of people of this country will be behind the bar in a civil wrong for no fault.

15-13. Mr. Sibal, learned Senior Counsel, stretching his argument further submits that it is not the case of the complainant that any of accused tried to deceive him and he has been cheated by them or he is victim of this case. There is no victim in the present case. The complainant has made complaint on his letter pad disclosing his identity as Convener, Small Scale Industries Cell, West U.P., Bhartiya Janata Party in order to mount pressure upon the administrative officers.

15-14. On the complaint dated 17.12.2018 of the complainant, F.I.R. (Ext. Kha-61) was lodged after 15 days on 3.01.2019 due to political malice.

15-15. In view of Section 39 Cr.P.C. applicant had no locus to lodge FIR under section 420 IPC as he is not a person deceived or victim.

15-16. It is simply a case of correction of date of birth of Mohammad Abdullah Azam Khan. No complaint was filed by Municipal Corporation, Lucknow regarding the birth certificate dated 21.01.2015.

15-17. The investigating officer did not record the statement under Section 161 Cr.P.C. of Rajeev Rajput, then Sub-Registrar of Births and Deaths of Municipal Council, Rampur who had prepared and issued Birth Certificate dated 28.06.2012. Even he was not produced by the prosecution before the trial Court. In this regard, it is further pointed out that though on the application under Section 311 Cr.P.C. of the prosecution, Rajeev Rajput was summoned, but later on prosecution moved another application for not summoning him as a prosecution witness therefore, trial court has withdrawn its previous order of summoning Rajeev Rajput. Similarly Dr. Uma of Queen Mary's Hospital, Lucknow was also summoned by the Trial Court, but subsequently at the request of prosecution, she was dropped.

15-18. Both the Courts below failed to consider that there was no motive or mens rea on the part of the revisionists to commit any offence. Even several documents, which have been exhibited, have not been properly marked.

15-19. Similarly, the Trial Court has also failed to appreciate the relevant evidence produced and proved as genuine by the revisionists. One such evidence is a video of a wedding attended by Mohammad Abdullah Azam Khan on 16.12.1990, which proves beyond all reasonable doubts that he could not have been born on 01.01.1993, as alleged by the prosecution.

15-20. The Trial Court has failed to consider that Mohammad Abdullah Azam Khan had already applied for correction of his date of birth on 23.03.2015 before the St. Paul School, Rampur which was forwarded to C.B.S.E. on 15.04.2015 much prior to election of Legislative Assembly, 2017 and about three and half years prior to complaint and registration of FIR dated 13.01.2019.

15-21. After going through the statement of PW-3, Tejpal Singh in totality, clear inference can be drawn that he was telling lie after lie as there are material contradictions in his statement.

15-22. Referring to the relevant part of statement of Dr. Sunil Kumar Rawat, PW-7 whereby he had stated that copy of birth certificate issued by Queen Mary's Hospital, Lucknow was also attached along with the affidavit dated 17.1.2015 of Dr. Tanzeen Fatima, it is argued by Mr. Sibal that the said birth certificate was issued on 29.1.2015, therefore, the same could not be attached

along with the affidavit dated 17.1.2015 of Dr. Tanzeen Fatima. In this regard, it is further stated that the statement had been given by Dr. Sunil Kumar Rawat, PW-7 in order to implicate the accused.

15-23. Much emphasis has been given by contending that the birth certificate dated 28.6.2012 of Mohammad Abdullah Azam Khan issued by Nagar Palika Parishad, Rampur was filed in Civil Appeal No. 104 of 2020 before the Hon'ble Supreme Court, on which there was no such endorsement in Hindi that the same was issued on the basis of affidavit. But when same birth certificate dated 28.6.2012 (Ext. Ka-11) has been filed by Investigating Officer along with charge sheet before the trial court of this case, on which there was a stamp on the top of left side mentioning that शपथ पत्र के आधार पर जारी. This fact clearly goes to suggest that prosecution has filed the birth certificate dated 28.6.2012 (Ext. Ka-11) after making addition / interpolation by putting stamp शपथ पत्र के आधार पर जारी in order to support the prosecution case, which amounts to forgery on the part of prosecution. It is further pointed out that said fact was also proved by the defence by filing the correct birth certificate dated 28.6.2012 before the trial court as paper No. A80/1 which has also been exhibited as PW3/D1 on which there is no such stamping. On putting query in this regard, Mr. P.C. Srivastava, learned Additional Advocate General and learned counsel for complainant are speechless and they could not address the court on the said issue.

15-24. DWs 11, 15, 16 and 17 were the expert witnesses and their evidences have not been discussed by the Trial Court.

15-25. During trial revisionist-Mohammad Abdullah Azam Khan has also filed a civil suit No. 925 of 2023 on 12.5.2023 in the Court of Civil Judge (SD), which is still pending.

15-26. Relying upon the judgment of the Apex Court in the case of **Mohd. Ibrahim vs. State of Bihar** (2009) 8 SCC 751, it is argued that Section 467, 468 and 471 IPC cannot be applied in the present case as there is no forgery in the Birth Certificate dated 21.01.2015.

15-27. It is further submitted that although accused persons did not furnish false particulars, but even furnishing of a false particulars does not amounts to forgery, hence the birth certificate dated 21.01.2015 itself is not a forged document.

15-28. Since the entry of information furnished by Queen Mary's Hospital, Lucknow was already made on 30.9.1990 in births and deaths register of Municipal Corporation, Lucknow, therefore, provisions of Rule 9(3) Uttar Pradesh Registration of Births and Deaths Rules 2003 will not be attracted in the present case.

15-29. So far as Section 420 IPC is concerned, it is argued that nothing is on record to establish a dishonest or fraudulent intention of the revisionist and deceiving any person by them.

15-30. The documents were submitted before the Passport Authority by Mohammad Abdullah Azam Khan were in good faith considered to be correct documents obviating any scope of fraud or deceit, which is sine qua non for invoking Section 420 IPC.

15-31. So far as alleged offence against the revisionist under Section 120-B I.P.C. is concerned, it is submitted that initially revisionist was not charge-sheeted for the alleged offence under Section 120-B I.P.C. in charge-sheet No. 196 of 2019 dated 01.04.2019. On 10.3.2021 when discharge applications were moved on behalf of revisionists on which prosecution

sought time to file objection, thereafter on 24.3.2021, 26.3.2021. 1.4.2021, 12.4.2021 prosecution took adjournment. On 3.8.2021 when it was argued on behalf of the revisionists that they are liable to be discharged as there is no evidence of conspiracy, then again prosecution took adjournment on 4.8.2021 and 5.8.2021 on the ground to show some judgments and the date was further fixed for 11.8.2021. On 11.8.2021 supplementary charge-sheet No. 196A of 2019 under Section 120-B I.P.C. has been filed by the informant Akash Kumar Saxena on behalf of the investigating officer, who was not present at that time in the Trial Court. On 8.11.2021 the complainant/ informant has also filed an application along with his affidavit seeking prayer to take cognizance upon the supplementary charge-sheet. It is also submitted that no permission was sought by the Investigating Officer from the trial court for conducting further investigation and even did not inform the trial court regarding any further investigation.

15-32. The revisionists have been falsely and maliciously implicated in several cases including this case due to political vendetta of the ruling party (BJP).

15-33. Revisionist-Dr Tanzeen Fatima has been member of Legislative Assembly from Rampur Constituency, U.P. once and Member of Rajya Sabha once. She retired from the post of Reader after dedicated service of 34 years as a teacher.

15-34. Revisionist-Mohammad Azam Khan has been member of Legislative Assembly for nine terms and was Cabinet Minister of State of U.P. He has also been privileged to discharge public democratic duty as a leader of the opposition for 14th State Legislative Assembly of State of U.P. He was Member of Rajya Sabha once and was also a Member of the 17th Lok Sabha.

16. Learned counsel for the revisionists lastly, explaining the criminal history of the revisionists, submits that prior to this case, being, Case Crime No. 04 of 2019 (Case No. 312 of 2022), revisionist Dr. Tanzeen Fatima was not having any criminal history. Revisionist Mohammad Azam Khan had criminal history of 06 pending cases and revisionist Mohammad Abdullah Azam Khan had criminal history of 01 case, when he was juvenile. The details of criminal history of the revisionists are as follows :

A-List of 35 Criminal Cases pending against Revisionist Dr. Tanzeen Fatima

S. No.	Case No.	Section(s)	Present status
1.	Crime No. 224/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail.
2.	Crime No.226/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
3.	Crime No.227/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
4.	Crime No.228/2019, P.S. Azeem	U/s 447, 420, 120B IPC	On bail

	Nagar, District Rampur, U.P.		
5.	Crime No.232/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420,120B IPC	On bail
6.	Crime No.235/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
7.	Crime No.236/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
8.	Crime No.237/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
9.	Crime No.238/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
10.	Crime No.239/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
11.	Crime No.240/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
12.	Crime No.241/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
13.	Crime No.242/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
14.	Crime No.248/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
15.	Crime No.249/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
16.	Crime No.250/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
17.	Crime No.251/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail

18.	Crime No.252/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
19.	Crime No.253/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
20.	Crime No.254/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
21.	Crime No.255/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
22.	Crime No.256/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
23.	Crime No.257/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
24.	Crime No.260/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
25.	Crime No.261/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
26.	Crime No.262/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
27.	Crime No.295/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
28.	Crime No.004/2019, P.S. Ganj, District Rampur, U.P.	U/s 420, 467, 468, 471, 120B, 34 IPC	Present Case
29.	Crime No.312/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 420, 447, 120B IPC & u/s 3 PDPP Act	On bail
30.	Crime No.46/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail
31.	Crime No. 53/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail

32.	Crime No. 553/2019, P.S. Kotwali, District Rampur, U.P.	U/s 447 IPC and 2 & 3 PDPP Act	On bail
33.	Crime No. 943/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 420, 467, 468, 471, 120B IPC.	On bail
34.	Crime No. 70/2020, P.S. Kotwali, District Rampur, U.P.	U/s 420, 120B IPC.	On bail
35.	Crime No. 543/2019, PS Kotwali	U/s 135 of Electricity Act	On bail

16-A. Brief submissions of behalf of Revisionist-Dr. Tanzeen Fatima about her above mentioned criminal history are:

(i) Prior to F.I.R. dated 03.1.2019 of this case, she had no F.I.R. against her.

(ii) All the subsequent F.I.Rs. to this case cannot be termed as criminal history of revisionist Dr. Tanzeen Fatima.

(iii) All the above mentioned criminal cases were registered against her only after change of State Government in the year 2017.

(iv) After registration of F.I.R. being Case Crime No. 224 of 2019 (mentioned at Sl. No. 1), 26 successive F.I.Rs. (Sl. Nos. 2 to 27) of same offences were got registered separately by 26 farmers.

(v) The cases mentioned at Sl. Nos. 29, 30 & 31 (similar in nature) were filed due to the reason that she is a member of Maulana Jauhar Trust.

B- List of total 92 pending criminal cases against the revisionist Mohammad Azam Khan

Sl. No.	Case No.	Section(s)	Present status
1	Crime No.224/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 342, 384, 386, 389, 420, 323, 447, 506 IPC	On bail
2	Crime No.226/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 347, 386, 389, 420, 447, 504, 506 IPC	On bail
3	Crime No.227/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 504, 506 IPC	On bail
4	Crime No.228/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
5	Crime No.232/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail

6	Crime No.235/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 504, 506 IPC	On bail
7	Crime No.236/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC.	On bail
8	Crime No.237/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
9	Crime No.238/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
10	Crime No.239/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 342, 386, 389, 420, 447, 506 IPC	On bail
11	Crime No.240/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
12	Crime No.241/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
13	Crime No.242/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 342, 386, 389, 420, 447, 506 IPC	On bail
14	Crime No.248/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
15	Crime No.249/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
16	Crime No.250/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
17	Crime No.251/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
18	Crime No.252/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
19	Crime No.253/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail

20	Crime No.254/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
21	Crime No.255/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
22	Crime No.256/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
23	Crime No.257/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 504, 506 IPC	On bail
24	Crime No.260/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
25	Crime No.261/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 347, 386, 389, 420, 447, 506 IPC	On bail
26	Crime No.262/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447, 506 IPC	On bail
27	Crime No.295/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B, 323, 342, 386, 389, 420, 447 IPC	On bail
28	Crime No.507/2019, P.S. Ganj, District Rampur, U.P.	U/s 447, 452, 504, 506, 395, 120-B IPC	After serving about 27 months he has been acquitted.
29	Crime No.508/2019, P.S. Ganj, District Rampur, U.P.	U/s 427, 447, 452, 504, 506, 395, 120-B IPC	Convicted by trial Court for 7 years on 16.03.2024, against which, Crl Revision is pending before the High Court.
30	Crime No.509/2019, P.S. Ganj, District Rampur, U.P.	U/s 427, 447, 452, 504, 506, 395, 120- B IPC	After serving about 27 months, he has been acquitted

			by the Trial Court.
31	Crime No.512/2019, P.S. Ganj, District Rampur, U.P.	U/s 427, 447, 452, 504, 506, 395, 120- B IPC	On bail
32	Crime No.513/2019, P.S. Ganj, District Rampur, U.P.	U/s 427, 447, 452, 504, 506, 395, 120- B IPC	On bail
33	Crime No.533/2019, P.S. Ganj, District Rampur, U.P.	U/s 323, 354, 427, 447, 452, 504, 506, 395, 120- B IPC	On bail
34	Crime No.536/2019, P.S. Ganj, District Rampur, U.P.	U/s 427, 447, 452, 504, 506, 395, 120- B IPC	On bail
35	Crime No.538/2019, P.S. Ganj, District Rampur, U.P.	U/s 323, 447, 452, 504, 506, 395, 120- B IPC	On bail
36	Crime No.556/2019, P.S. Ganj, District Rampur, U.P.	U/s 307, 392, 447, 452,	On bail
		504, 506, 120- B IPC	
37	Crime No.576/2019, P.S. Ganj, District Rampur, U.P.	U/s 147, 447, 452, 427, 323, 307, 354, 504, 395, 120B IPC	On bail
38	Crime No.629/2019, P.S. Ganj, District Rampur, U.P.	U/s 447, 452, 423, 504, 354, 506, 395, 120-B IPC	On bail
39	Crime No.528/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 389, 427, 448, 395, 506, 504, 120B IPC	On bail
40	Crime No.529/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 354A, 389, 395, 448, 427, 504,506, 120B IPC	On bail
41	Crime No.531/2019, P.S. Kotwali, District Rampur, U.P.	U/s 504, 506, 427, 395, 448, 452, 120B IPC	On bail
42	Crime No.533/2019, P.S.	U/s 452, 427, 395, 448,	On bail

	Kotwali, District Rampur, U.P.	323, 504, 506, 120B IPC	
43	Crime No.534/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 448, 389, 395, 504, 506, 120B IPC	On bail
44	Crime No.530/2019, P.S. Kotwali, District Rampur, U.P.	U/s 427, 504, 323, 395, 304, 448, 120B IPC	On bail
45	Crime No.535/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 323, 504, 506, 395, 448, 120B IPC	On bail
46	Crime No.536/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 504, 506, 389, 395, 448, 120B IPC	On bail
47	Crime No.537/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 504, 323, 395, 389, 448, 120B IPC	On bail
48	Crime No.538/2019, P.S.	U/s 452, 427, 504, 506,	
	Kotwali, District Rampur, U.P.	395, 448, 120B IPC	
49	Crime No.539/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 323, 504, 395, 448, 120B IPC	On bail
50	Crime No.556/2019, P.S. Kotwali, District Rampur, U.P.	U/s 452, 427, 389, 395, 448, 304, 504, 506, 120B IPC	On bail
51	Crime No.959/2007, P.S. Tanda, District Rampur, U.P.	U/s 171G, 504 IPC, 125 RP ACT & 3(1)(10) SC & ST Act.	On bail
52	NCR No.50/2019, P.S. Swar, District Rampur, U.P.	U/s 171G IPC	On bail
53	Crime No.167/2019, P.S. Tanda, District Rampur, U.P.	U/s 153A(1)(B), 505(1)(B) IPC & 125 RP ACT	On bail
54	Crime No.185/2019, P.S. Milak, District Rampur, U.P.	U/s 153A, 505(1)(B) IPC	Convicted by trial Court for three years.

		& u/s 125 RP Act	Acquitted by appellate Court, against which, criminal revision is pending before High Court.
55	Crime No.130/2019, P.S. Shahzad Nagar, District Rampur, U.P.	U/s 171 G, 505(1)(B) IPC & u/s 125 RP Act.	Convicted by trial Court for two years, confirmed by appellate Court, against which, criminal revision is pending before High Court.
56	Crime No.206/2019, P.S. Bilaspur, District Rampur, U.P.	u/s 153A, 505(1)(b) IPC & u/s 125 RP Act.	On bail
57	Crime No.94/2019, P.S. Khajuria, District Rampur, U.P.	U/s 153A(1)(b), 505(2) IPC & u/s 125 RP Act.	On bail
58	Crime No.221/2019, P.S. Shahabad, District Rampur, U.P.	U/s 509 IPC & u/s 125 RP Act & u/s 2(A)/3/6 Indecent Representation of Women (Prohibition) Act,1986	On bail
59	Crime No.215/2019, P.S. Shahabad, District Rampur, U.P.	U/s 171G IPC & u/s 125, 135(2) RP Act	On bail
60	Crime No.128/2019, P.S. Bhot, District Rampur, U.P.	U/s 295A, 188, 171G, 341, 505(2) IPC & u/s 125 RP Act	On bail
61	Crime No.336/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 126(2) RP Act	On bail
62	Crime No.509/2017, P.S. Civil Lines, District Rampur, U.P.	U/s 153A, 505(1) IPC	On bail

63	NCR No.33/2019, P.S. Ganj, District Rampur, U.P.	U/s 171-F IPC and 133 RP Act	On bail
64	Crime No.232/2019, P.S. Shahbad, District Rampur, U.P.	U/s 295A, 188, 171G, 341, 505(2) IPC & 125 RP Act	On bail
65	Crime No.547/2018, P.S. Ganj, District Rampur, U.P.	U/s 147, 323, 341, 504, 506 IPC	On bail
66	Crime No.283/2019, P.S. Kotwali, District Rampur, U.P.	U/s 505(1)(B), 505(2) IPC, 125 RP ACT	On bail
67	Crime No.333/2019, P.S. Kotwali, District Rampur, U.P.	U/s 153A, 171F, 505A IPC & u/s 125 RP Act.	On bail
68	Crime No.472/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 354A, 294, 504 IPC & u/s 67 IT Act	On bail
69	Crime No.505/2019, P.S. Katghar, District Moradabad, U.P.	U/s 354A, 294, 500, 509 IPC & 67 IT Act	On bail
70	C. Case No. 1088/SS/2017 a private complaint titled as "Dr Syed Ejaz Abbas Sunniy Vs Mohd Azam Khan (Bombay)	U/s 500 IPC	On bail
71	Crime No. 259/2022, PS Kotwali.	U/s 153A, 505 IPC	Notice u/s 41A Cr.P.C. was served upon Revisionist and he was not arrested during investigation. The charge sheet has been filed.
72	Crime No.165/2007, P.S. Rasoolpur, District Firozabad, U.P.	U/s 188, 153-A IPC	On bail
73	Crime No.79/2019, P.S. Hazratganj, District Lucknow	U/s 500, 505 IPC	On bail
74	Crime No.45/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 153A, 295A, 500, 506 IPC	On bail

75	Crime No.4/2019, P.S. Ganj, District Rampur, U.P.	u/s 420, 467, 468, 471, 120-B IPC	Present case
76	Crime No.980/2019, P.S. Civil Lines, District Rampur, U.P.	u/s 420, 467, 468, 471, 120-B IPC	On bail
77	Crime No.781/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 392, 427, 448 IPC	On bail
78	Crime No.176/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 332 IPC & u/s 2/3 PDPP Act	On bail
79	Crime No.46/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail
80	Crime No. 53/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail
81	Crime No.498/2019, P.S. Kotwali, District Rampur, U.P.	U/s 420, 467, 468, 471, 447, 120B IPC	On bail
82	Crime No.312/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 120-B,201, 420, 447, 467, 468, 471, 409 IPC & u/s 3 PDPP Act	
83	Crime No. 642/2019, P.S. Ganj, District Rampur, U.P.	U/s 420, 447, 120-BIPC & u/s 3(2)(b) PDPP Act	On bail
84	Crime No.586/2019, P.S. Ganj, District Rampur, U.P.	U/s 120B, 307, 323, 386, 452, 504 IPC	After serving about 27 months, he has been acquitted by the Trial Court.
85	Crime No.397/2019, P.S. Ganj, District Rampur, U.P.	U/s 379, 448, 411 IPC	On bail
86	Crime No.52/2020, P.S. Chajlet, District Moradabad, U.P.	U/s 174A IPC	On bail
87	Crime No.001/2008, P.S. Chajlet, District Moradabad, U.P.	U/s 147, 341, 353 IPC and 7 CLA Act.	Convicted by Trial Court for two years and granted bail under Section 389 Cr.P.C.

88	Crime No.2/2018, P.S. SIT Lucknow	U/s 201, 204, 420, 467, 468, 471, 120B IPC & Sec 13 PC Act	On bail
89	Crime no. 211/2022 PS Kotwali.	U/s 409, 411, 201, 120B IPC & 2/3 PDPP Act	Charge sheet filed. Regular bail application is pending before High Court.
90	Crime No. 173/2022 PS Kotwali	U/s 147/195 A/506/1 20B IPC	Notice u/s 41A Cr.P.C. was served upon Revisionist and he was not arrested during investigation. The charge sheet has been filed.
91	Crime No. 257/2022 PS Ganj.	U/s 452, 323, 504, 506, 420, 120B IPC	Charge sheet has been filed and he has been taken into judicial custody.
92.	Crime No.70/2020, P.S. Kotwali, District Rampur, U.P.	u/s 420, 120B, 467, 468, 471 IPC	On bail

16-B. Brief submissions on behalf of Revisionist Mohammad Azam Khan about his above mentioned criminal history are:

(i) Prior to F.I.R. dated 03.1.2019 of this case, he had only 6 pending cases (Sl. Nos. 51, 62, 65, 72, 87, 88) against him. It is only after the change of the Government in the year 2017, due to political pressure police started lodging F.I.R. one after another.

(ii) All the subsequent F.I.Rs. of this case cannot be termed as criminal history of revisionist Mohammad Azam Khan.

(iii) Aforesaid false and frivolous cases have been lodged against him by local police of district Rampur for making his long criminal history.

(iv) After registration of F.I.R. being Case Crime No. 224 of 2019 (mentioned at Sl. No. 1), 26 successive F.I.Rs. (Sl. Nos. 2 to 27) of same offences were got registered separately by 26 farmers.

(v) Three cases mentioned at Sl. Nos. 36, 37 and 38 are in respect of same offences alleged to have been committed in the course of same transaction.

(vi) Eleven cases mentioned at Sl. Nos. 39 to 50 are in respect of same offences making allegation inter alia of demolition of house and loot of goats, buffaloes and other household articles in furtherance of conspiracy hatched by Mohammad Azam Khan.

(vii) Twenty four cases mentioned at Sl. Nos. 51 to 74 are related to hate speech.

(viii) Case Crime No. 980 of 2019 (Sl. No. 76) was registered with similar allegation relating to date of birth as mentioned in Case Crime No. 4 of 2019 (Sl. No. 75) by changing police stations.

(ix) The cases mentioned at Sl. Nos. 78, 79, 80, 81 and 82 (similar in nature) were filed relating to taking of enemy property inside the boundary wall of Jauhar University.

C: In addition to the aforesaid 92 pending criminal cases, the revisionist Mohammad Azam Khan had following 19 other cases, which have come to an end :

Sl. No.	Case No.	Section(s)	Present status
1	Case Crime No. 116 of 1982, PS Kotwali Rampur, district Rampur	U/s 147, 352, 504, 506 IPC	Case has been withdrawn by State.
2	Case Crime No. 250 of 1989, PS Kotwali Rampur, district Rampur	U/s 147, 353, 504 IPC	Case has been withdrawn by State.
3	Case Crime No. 252 of 1989, PS Kotwali Rampur, district Rampur	U/s 147, 353, 504 IPC	Case has been withdrawn by State.
4	Case Crime No. 767 of 2007, PS Kotwali Rampur, district Rampur	U/s 147, 148, 353, 504, 506 IPC	Case has been withdrawn by State.
5	Case Crime No. 558 of 2007, PS Kotwali Rampur, district Rampur	U/s 406, 409, 147, 148, 353, 506 IPC	Case has been withdrawn by State.
6	Case Crime No. 1534 of 2011, PS Kotwali Rampur, district Rampur	U/s 147, 148, 149, 341, 353, 332, 506, 427 IPC and Section 3 Prevention of Damage to Public Property Act, 1984	Case has been withdrawn by State.
7	Case Crime No. 127 of 2012, PS Kotwali Rampur, district Rampur	U/s 188 Representation of Peoples Act	Closure report submitted and the same has been accepted by Court.

8	Case Crime No. 114 of 2014, PS Kotwali Rampur, district Rampur	U/s 153, 153B, 295, 505(2), 188, 189, 504, 171G IPC and Section 125 Representation of Peoples Act	He has been discharged.
9	Case Crime No. 1200 of 2007, PS Civil Lines, district Rampur	U/s 427, 452, 120B IPC	Closure report submitted.
10	Case Crime No. 893 of 2000, PS Civil Lines, district Rampur	U/s 420, 120 IPC, 13(2) Prevention of Corruption Act	Case has been withdrawn by State.
11	Case Crime No. 554 of 2007, PS Ganj, district Rampur	U/s 109, 119, 120, 166, 174, 177, 34, 192, 217, 383, 384, 431, 432, 444, 447, 506 IPC	
12	Case Crime No. 606 of 2007, PS Ganj, district Rampur	U/s 427, 447, 323, 504, 506, 394 IPC	Closure report submitted.
13	Case Crime No. 607 of 2007, PS Ganj, district Rampur	U/s 427, 447, 323, 504, 506, 394 IPC	Closure report submitted.
14	Case Crime No. 230A of 1996, PS Shahjadnagar, district Rampur	U/s 332 IPC	Closure report submitted.
15	Case Crime No. 584 of 2007, PS Azeemnagar, district Rampur	U/s 431 IPC	Case has been withdrawn by State.

16	NCR No. 37 of 2007, PS Azeemnagar, district Rampur	U/s 323 IPC	Case has been withdrawn by State.
17	Case Crime No. 364 of 2022, PS Ganj, district Rampur	U/s 354A(1)(4), 504, 505(2), 509, 153A IPC	No sanction granted by the State.
18	Case Crime No. 398 of 2019, PS Kotwali, district Rampur	U/s 509 IPC	Closure report submitted.
19	Case Crime No. 335 of 2019	U/s 354A, 294, 500, 509 IPC and Section 67 IT Act	His complicity in the crime has been found false.

D. List of total 46 criminal cases pending against the revisionist Mohammad Abdullah Azam Khan

S. No.	Case No.	Section(s)	Present status
1	Crime No.001/2008, P.S. Chajlet, District Moradabad, U.P.	U/S 147, 353, 341 IPC & 7 CLA Act.	*Convicted by trial Court for 2 years. *Criminal appeal is pending. *Bail granted
2	Crime No.224/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
3	Crime No.226/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
4	Crime No.227/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
5	Crime No.228/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
6	Crime No.232/2019, P.S. Azeem Nagar,	U/s 447, 420, 120B IPC	On bail

	District Rampur, U.P.		
7	Crime No.235/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
8	Crime No.236/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
9	Crime No.237/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
10	Crime No.238/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
11	Crime No.239/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
12	Crime No.240/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
13	Crime No.241/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
14	Crime No.242/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
15	Crime No.248/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
16	Crime No.249/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
17	Crime No.250/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
18	Crime No.251/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
19	Crime No.252/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail

20	Crime No.253/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
21	Crime No.254/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
22	Crime No.255/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
23	Crime No.256/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
24	Crime No.257/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
25	Crime No.260/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
26	Crime No.261/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
27	Crime No.262/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
28	Crime No.295/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447, 420, 120B IPC	On bail
29	Crime No.004/2019, P.S. Ganj, District Rampur, U.P.	U/s 420, 467, 468, 471, 120B, 34 IPC.	Present case.
30	Crime No. 594/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 420, 467, 468, 471, 120B IPC	On bail
31	Crime No.980/2019, P.S. Civil Lines, District Rampur, U.P.	u/s 420, 467, 468, 471, 120-B IPC	On bail
32	Crime No. 98/2021, P.S. Suar, District Rampur, U.P.	U/s 125A RP Act	On bail
33	Crime No.312/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 420, 447, 120B IPC & u/s 3 PDPP Act	On bail

34	Crime No.46/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail
35	Crime No. 53/2020, P.S. Azeem Nagar, District Rampur, U.P.	U/s 447 IPC & 2/3 of PDPP Act	On bail
36	Crime No.586/2019, P.S. Ganj, District Rampur, U.P.	U/s 452, 323, 307, 504, 386, 120B IPC	After serving about 20 months incarceration period in jail, he has been acquitted by the Trial Court.
37	Crime No.397/2019, P.S. Ganj, District Rampur, U.P.	U/s 379, 448, 411 IPC	On bail
38	Crime No. 231/2019, P.S. Azeem Nagar, District Rampur, U.P.	U/s 147, 149, 153, 353 IPC.	On bail
39	Crime No. 334/2019, P.S. Kotwali, District Rampur, U.P.	U/s 171G IPC and 125 RP Act	On bail
40	Crime No. 553/2019, P.S. Kotwali, District Rampur, U.P.	U/s 447 IPC and 2 & 3 PDPP Act	On bail
41	Crime No. 478/2019, P.S. Ganj, District Rampur, U.P.	U/s 504, 506 IPC.	On bail
42	Crime No. 943/2019, P.S. Civil Lines, District Rampur, U.P.	U/s 420, 467, 468, 471, 120B IPC.	On bail
43	Crime No. 505/2019, P.S. Katghar, District Moradabad, U.P.	U/s 294, 354A, 500, 509 IPC and 7 CLA, Act	On bail
44.	Crime no. 211/2022 PS Kotwali.	U/s 409, 411, 201, 120B IPC & 2/3 PDPP Act	Bail application is pending before High Court.
45.	Crime No. 367/2022, P.S. Ganj, District Rampur,	U/S 147/172G/ 323/504/506/332/ 188 IPC	Notice under Section 41A Cr.P.C. has

			been served.
46.	Crime No. 9/2024 PS Kotwali	U/s. 420/431/ 120B IPC, Section 2/3 of PDPP Act, 1984 and Section 5/15 of Environmental Protection Act.	Notice under Section 41A Cr.P.C. has been served.

16-C. Brief submissions on behalf of Revisionist Mohammad Abdullah Azam Khan about his above mentioned criminal history are:

(i) Prior to F.I.R. dated 03.1.2019 of this case, he had only 1 case (Sl. No.1) against him. It is only after the change of the Government in the year 2017, police due to political pressure started lodging F.I.R. one after another.

(ii) All the subsequent F.I.Rs. of this case cannot be termed as criminal history of revisionist Mohammad Abdullah Azam Khan.

(iii) Aforesaid false and frivolous cases have been lodged against him by local police of district Rampur for making his long criminal history.

(iv) In two cases being Case Crime No. 381 of 2017, under Sections 147, 148, 149, 307, 427, 504, 506 IPC, police station Kotwali, district Rampur and Case Crime No. 184 of 2017, under Sections 147, 148, 149, 307 IPC, police station Swar, district Rampur, which have been shown in the counter affidavit of the State, name of Mohammad Abdullah Azam Khan has been dropped during investigation.

(v) After registration of F.I.R. being Case Crime No. 224 of 2019 (mentioned at Sl. No. 2), 26 successive F.I.Rs. (Sl. Nos. 3 to 28) of same offences were got registered separately by 26 farmers.

(vi) Case Crime Nos. 594 of 2019 (Sl. No. 30), 980 of 2019 (Sl. No. 31), 98 of 2021 (Sl. No. 32) were registered with similar allegation relating to date of birth as mentioned in Case Crime No. 4 of 2019 (Sl. No. 29) by changing police stations.

(vii) In the cases mentioned at Sl. No. 29, 30 & 31, the first informant is Akash Kumar Saxena, BJP Leader and sitting MLA from Rampur.

(viii) The cases mentioned at Sl. Nos. 33, 34 & 35 (similar in nature) were filed due to the reason that he is member of Maulana Jauhar Trust.

(ix) He has been falsely implicated in F.I.Rs. mentioned from Sl. No. 36 to 46. without any evidence due to political enmity.

17. On behalf of accused-revisionists reliance has been placed on following judgements on different issues :-

- Ayodhya Prasad Sital Prasad Vs. Emperor ; AIR 1938 Sind 193
- VR Venugopal v. Miss T Pankajam; (1961) 1 CrLJ 804
- Matilal Chakravarty v. The King; AIR 1949 Cal 58
- Mohammaed Ibrahim and Ors. v. State of Bihar & anr; (2009) 8 SCC 751
- Sheila Sebastian v. R. Jawaharaj and Anr.; (2018) 7 SCC 581
- Sanjiv Ratanappa Ronad v. Emperor; AIR 1932 Bom 545

- Guru Bipin Singh v. Chongtham Manihar Singh (1996) 11 SCC 622
- State of U.P. vs. Sabir Ali; (1964) 7 SCR 435
- Dr. S. Dutt vs. State of U.P.; (1966) 1 SCR 493
- Oseela Abdul Khader & Anr. V. State of Kerala; 2012 SCC Online Kerala 31803
- Kiran Kanta v. State of Uttarakhand; 2019 SCC Online Utt 1670
- Krishna Kumari v. State of Punjab, 2016 SCC Online P&H 16199
- Surineni Renukaiah v. State of A.P.; Crl. P. No. 6234/2022
- Jullu Rehman v. State of Jharkhand; Crl. M.P. No. 576/2012
- Pardeep Singh v. State of Punjab; CRM.M, 48407/2018
- Malcolm War Macleod v. State of W.B; 2010 SCC Online Cal 2115
- State of U.P. v. Singhara Singh and Ors.; (1964) 4 SCR 485
- Noor Mohammad v. State of UP; 2010 SCC Online All 823
- Ravi Kant Sharma v. State; 2011 SCC Online Del 4342
- Amin & Anr. v. State; 1957 SCC Online All 331
- Kishore Chand v. State of Himachal Pradesh; (1991) 1 SCC 286
- State of A.P. v. Punati Ramulu & Ors.; 1994 Supp (1) SCC 59
- Vijender and Ors. v. State of Delhi; (1997) 6 SCC 171
- Tomaso Bruno & Anr. v. State of U.P.; (2015) 7 SCC 178
- Mohanlal Shamji Soni v. Union of India & Anr.; 1991 Supp (1) SCC 271
- Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1
- Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473
- State v. Navjot Sandhu; (2005) 11 SCC 600

Submissions on behalf of the State and complainant

18. Main substratum of argument of learned counsel appearing on behalf of the State and complainant are that;-

18-1. Right from childhood to 16.1.2015, in all the concerned documents, the date of birth of Mohammad Abdullah Azam Khan was recorded as 01.1.1993 and place of birth was Rampur.

18-2. Since, in the year 2017, Mohammad Abdullah Azam Khan was not completing the age of 25 years, which was the minimum eligibility criteria for contesting legislative assembly election, therefore, the accused-revisionists in a pre-planned manner got a second birth certificate dated 21.1.2015 issued from Municipal Corporation, Lucknow, in which date of birth of Mohammad Abdullah Azam Khan is shown as 30.09.1990 and his place of Birth is shown as Lucknow.

18-3. The impugned birth certificate dated 21.1.2015 is a forged document because the same has been obtained by concealing the fact of issuance of birth certificate dated 28.06.2012 by Nagar Palika Parishad, Rampur. The birth certificate dated 21.1.2015 has been issued on the basis of application and affidavit dated 17.1.2015 of Dr. Tanzeen Fatima as well as taking into consideration the birth and death register dated 30.9.1990 (Ext. Ka-56) of Municipal Corporation, Lucknow, which has been forged / interpolated by making wrong entry.

18-4. It is also submitted that since the record of Nagar Palika Parishad, Rampur was burnt in the year 2015, therefore, there is no evidence to establish the basis of issuance of birth certificate dated 28.06.2012 by Nagar Palika Parishad, Rampur but under the facts of the case it

shall be presumed that the birth certificate dated 28.06.2012 would have been issued on the basis of affidavit of Mohammad Azam khan and his wife Dr. Tanzeen Fatima.

18-5. It is also submitted that since at the time of procuring the second birth certificate dated 21.1.2015 of Mohammad Abdullah Azam Khan from Municipal Corporation, Lucknow, Mr. Mohammad Azam Khan was sitting Cabinet Minister and the birth certificate has been issued within four days, therefore, it shall also be presumed that the same would have been issued under his direction and influence, therefore, offence under section 120-B IPC is made out against all the accused.

18-6. So far as allegation of the prosecution in the FIR that the birth certificate dated 21.1.2015 has been issued on the basis of certificate dated 21.4.2015 (Ext.-Kha-1/PW-7) of Queen Mary's Hospital, Lucknow, it is argued that since the said certificate dated 21.04.2015 was found in the file of Municipal Corporation, Lucknow, therefore, it shall also be presumed that the said certificate dated 21.4.2015 would have been taken into consideration while issuing birth certificate dated 21.1.2015. This submission of learned Additional Advocate General and learned counsel for the complainant is too hard to swallow.

18-7. On the issue of locus of the complainant, it is argued that since, it is an offence against the State, therefore, any one can lodge FIR in such matter.

18-8. On the issue of defective investigation, it is submitted that the accused cannot take benefit of faulty investigation.

18-9. Since Birth certificates create a legal right, therefore same is valuable security.

18-10. Lastly it is submitted that the prosecution has proved its case beyond reasonable doubt, hence the interim relief as sought for by the revisionists is liable to be rejected.

Discussion

19. In view of the above, at this stage, this Court is required to consider the prayer of the revisionists for suspension of their sentence and stay of their conviction during pendency of these Criminal Revisions before this Court.

20. Having heard the submissions of learned counsel for the parties and having gone through the record of the case which consists of more than thousand pages in its entirety, I find that the facts enumerated below are not in dispute by the learned counsel for the parties :

20-1. In the year 1995, Mohammad Abdullah Azam Khan took admission in class nursery at St. Paul School, Rampur and on 01.04.1998 he got admission in Class Ist. As per school record, his date of birth is 01.01.1993. He studied at St. Paul School, Rampur till 12th standard. Thereafter he also did B.Tech and M.Tech in the year 2015 and in all his educational mark-sheets / certificates, his date of birth is mentioned as 01.01.1993.

20-2. In the year 2006 when Mohammad Abdullah Azam Khan was studying in IX standard, there were some spelling mistakes in his name as well as in the name of his mother, which was got corrected by Mohammad Abdullah Azam Khan before sending the final list to CBSE Board for the examination of Xth standard.

20-3. On 18.7.2006, manual birth certificate (Ext. Ka-21) was got issued from Nagar Palika Parishad, Rampur by

Mohammad Abdullah Azam Khan, in which his date of birth is mentioned as 01.1.1993 and place of birth is mentioned as Rampur, which was used by Mohammad Abdullah Azam Khan in getting his first passport no. F-8757022 (Ext. Ka-14) issued on 28.8.2006, the validity period thereof was up to 31.12.2010.

20-4. On 28.06.2012, the computerized birth certificate (Ext. Ka 11) was issued to Mohammad Abdullah Azam Khan by Nagar Palika Parishad, Rampur, in which date of birth of Mohammad Abdullah Azam Khan is mentioned as 01.01.1993 and his place of birth is mentioned as Rampur.

20-5. The second passport No. K-7951741 dated 13.07.2022 (Ext. Ka 13) of Abdullah Azam Khan was issued on the basis of birth certificate dated 28.06.2012 (Ext. Ka 11) issued by the Nagar Palika Parishad, Rampur. The second passport was valid up to 12.07.2022.

20-6. On 10.01.2018, Mohammad Abdullah Azam Khan applied for correction of his date of birth in his second passport No. K-7951741 dated 13.07.2022 (Ext. Ka 13) on the basis of his birth certificate dated 21.01.2015 (Ext. Ka 59) and cancellation order dated 30.01.2015 (Ext. Ka-9) of first birth certificate dated 28.06.2012 (Ext. Ka-11). On the said application, police verification report was submitted on the same day i.e. on 10.01.2018 and after depositing penalty amount, passport has been issued on 10.01.2018 itself to Mohammad Abdullah Azam Khan and later the same was impounded when he was in jail.

20-7. On 17.1.2015, Dr. Tanzeen Fatima moved an application (Ext. Ka 55) addressed to City Health Officer, Municipal Corporation, Lucknow stating therein that her son (Mohammad Abdullah Azam Khan) was born on 30.09.1990 in Queen Mary's Hospital, Lucknow and the birth certificate is urgently needed for very important and unavoidable reasons. She has also filed her own affidavit dated 17.1.2015 (Ext. Ka 53) in support of her application. On such an application and affidavit being furnished by Dr. Tanzeen Fatima, within four days, the birth certificate of Mohammad Abdullah Azam Khan was issued by Municipal Corporation, Lucknow on 21.01.2015 (Ext. Ka-59) on the basis of entry made in Births and Deaths register of September, 1990 (Ext .Ka-56) of Municipal Corporation, Lucknow based on the information given by Queen Mary's Hospital, Lucknow. PW-7 has also given certificate (Ext. Ka-57) to this effect. All the above noted documents (Ext.Ka-53, 55, 56, 57 & 59) were produced by the prosecution and proved by the PW-7.

20-8. After issuance of second birth certificate dated 21.01.2015 (Ext. Ka-59), the first birth certificate dated 28.06.2012 (Ext. Ka-11) was cancelled on 30.01.2015 (Ext. Ka-9) by Nagar Palika Parishad, Rampur.

20-9. On 23.03.2015 Mohammad Abdullah Azam Khan moved an application (Ext. Ka-7) before St.Paul School, Rampur for amendment of his date of birth in school record, which was forwarded to C.B.S.E. on 15.04.2015 (P.W.-2/A), 19.04.2015 (P.W.-2/B) and 15.04.2015 (P.W.-2/C).

20-10. In the year 2013, first PAN No. DFOPK6164K was issued to Mohammad Abdullah Azam Khan, in which his date of birth is mentioned as 01.01.1993. Thereafter in the year 2015, Mohammad Abdullah Azam Khan obtained second PAN Card No. DWAPK7513R, in which his date of birth is mentioned as 30.09.1990. On 09.05.2017, Mohammad Abdullah Azam Khan gave an application to deactivate his

second PAN No. DWAPK7513R and similarly, he also gave an application dated 19.09.2017 for correction of his date of birth in his first PAN Card No. DFOPK6164K. Both the above mentioned applications are still pending.

20-11. As per statement of PW-3 Tejpal Singh Verma, the record related to Birth Certificate dated 28.06.2012 issued by Nagar Palika Parishad, Rampur had been burnt on 8.5.2015 and thereafter, pursuant to order dated 26.11.2018 of Executive Officer, Sub-Divisional Magistrate, Rampur, a committee of five members was constituted to investigate the incident of fire that broke out in the premises of Municipal Corporation, Rampur on 8.5.2015. In the said committee PW-3 was also one of the members. The five members committee submitted report dated 20.12.2018 mentioning inter alia that the incident of fire was accidental.

20-12. The notification was issued notifying the schedule for election of UP State Legislative Assembly of 34-Suar Assembly Constituency of District Rampur. Mohammad Abdullah Azam Khan for contesting said election filed his nomination papers on 24.01.2017 using his second birth certificate dated 21.01.2015 issued by Municipal Corporation, Lucknow. The election took place as per schedule, in which Mohammad Abdullah Azam Khan was declared elected on 11.03.2017. The said election of Mohammad Abdullah Azam Khan was challenged by Nawab Kazim Ali Khan in Election Petition No. 8 of 2017, which was allowed by the High Court vide judgment and order dated 16.12.2019 and the election of Mohammad Abdullah Azam Khan from 34-Suar Assembly Constituency of District Rampur was declared void and the same was set aside. Mohammad Abdullah Azam Khan preferred a Civil Appeal No. 104 of 2020, U/s 116A of the Representation of People Act, 1951 before the Hon'ble Supreme Court against the judgment and order dated 16.12.2019 passed by High Court of Judicature at Allahabad, which has been dismissed by the Hon'ble Supreme Court vide judgment and order dated 07.11.2022 affirming the judgment of the High Court. In Review Petition No. 160 of 2023, it has been further clarified by the Hon'ble Supreme Court vide order dated 07.2.2023 that the criminal cases, if any, pending in reference to self-same subject may be decided on its own merits.

20-13. Mohammad Azam Khan and Dr. Tanzeen Fatima were not a party to the proceeding before Hon'ble Supreme Court.

20-14. As per FIR version, Abdullah Azam Khan had used second birth certificate dated 21.1.2015 in obtaining degrees of Jauhar University, whereas during course of argument, it is admitted by the learned counsel for the parties that there is no evidence on record to establish that second birth certificate dated 21.1.2015 was used by Mohammad Abdullah Azam Khan for obtaining any degree from Jauhar University.

20-15. During investigation, the investigating officer has neither recorded the statement under Section 161 Cr.P.C. of the concerned person of Nagar Palika Parishad, Rampur who had issued manual birth certificate dated 18.7.2006 (Ext. Ka-21) nor prosecution produced him as prosecution witnesses before the trial court.

20-16. Similarly the investigating officer has neither recorded the statement under section 161 Cr.P.C. of Mr. Rajeev Rajput, the then Sub-Registrar Births and Deaths, Nagar Palika Parishad, Rampur, who had issued birth certificate dated 28.6.2012 nor prosecution produced him as prosecution witnesses before the trial court.

20-17. The statement under section 161 Cr.P.C. of the concerned persons of Municipal Corporation, Lucknow, who had processed and issued second birth certificate dated 21.01.2015 was also neither recorded nor they were produced by the prosecution before the trial Court, whereas they were the material witnesses relating to allegations levelled by the prosecution against the revisionists.

20-18. The statement under section 161 Cr.P.C. of the SDM concerned, who is the competent authority under Rule 9(3) of Uttar Pradesh Registration of Births and Deaths Rules 2003 as well as concerned persons/ Doctor of Queen Mary's Hospital, Lucknow was also neither recorded nor they were produced by the prosecution before the trial Court.

20-19. Despite availability of direct evidence as mentioned above, the prosecution, by ignoring the same, tried to prove its case through indirect evidence. On putting query in this regard, learned counsel for the State and the complainant could not give any satisfactory reply.

21. Now it would be appropriate to deal a brief overview of the role and evidence on record relating to each of the revisionist individually.

Dr.Tanzeen Fatima

i- The second birth certificate dated 21.01.2015 was issued on the basis of an application dated 17.01.2015 (Ext Ka 55) and affidavit dated 17.01.2015 (Ext. Ka 53) of Dr. Tanzeen Fatima, wherein she has stated that the correct date of birth of Abdullah Azam Khan is 30.9.1990. The said fact may be incorrect but both the above documents cannot be said to be forged documents.

ii- The relevant fact that a birth certificate dated 28.06.2012 (Ext. Ka-11) has already been issued by Nagar Nigam, Rampur to Mohammad Abdullah Azam Khan has not been disclosed by Dr. Tanzeen Fatima in her application dated 17.01.2015 (Ext. Ka 55) and affidavit dated 17.01.2015 (Ext. Ka 53).

Mohammad Abdullah Azam Khan

i- Right from beginning to 16.1.2015, date of birth of Mohammad Abdullah Azam Khan was mentioned as 01.1.1993 and place of birth as Rampur in all his educational documents etc.

ii- The second birth certificate dated 21.1.2015 in which date of birth of Mohammad Abdullah Azam Khan is shown as 30.9.1990 and place of birth at Rampur has been used by Mohammad Abdullah Azam Khan in filing his nomination paper dated 24.01.2017 for election of Legislative Assembly, 2017 and for obtaining third passport dated 10.1.2018 and new PAN card.

iii- The election contested by Mohammad Abdullah Azam Khan on the basis of second birth certificate dated 21.1.2015 has been cancelled by the High Court and affirmed by the Hon'ble Supreme Court.

Mohammad Azam Khan

i-Regarding birth certificate dated 28.6.2012 issued by the Nagar Palika Parishad, Rampur, it is the case of the prosecution (State and the complainant) that same had been issued on the basis of affidavit of Mohammad Azam Kham and Dr. Tazneen Fatima but no such affidavits are on record and prosecution could not prove said allegation by documentary evidence.

ii-The fire broke out in Nagar Nigam, Rampur on 08.5.2015 but inquiry of the said incident was made in the year 2018 during the period of present ruling party, in which PW-7 was also one of the member and in the inquiry report dated 20.12.2018, it was found that fire was accidental and there is no allegation against Mohammad Azam Khan.

iii-Nothing is on record to indicate that for issuance of the impugned second birth certificate dated 21.01.2015 by the Municipal Corporation Lucknow, any information (oral or written) was given by Mohammad Azam Khan.

iv- Mr. Rajeev Rajput, the then Sub-Registrar of Births and Deaths of Municipal Corporation, Rampur who had prepared and issued Birth Certificate dated 28.06.2012 was the star and relevant witness but neither his statement under Section 161 Cr.P.C. was recorded nor he was produced by the prosecution before the trial Court.

v- Mr. P.K. Singh, then Sub-Registrar of Births and Deaths of Municipal Corporation, Lucknow who had prepared and issued Birth Certificate dated 21.01.2015 was also the star and relevant witness, but neither his statement under Section 161 Cr.P.C. was recorded nor he was produced by the prosecution before the trial Court.

vi- With regard to alleged offence of conspiracy under Section 120-B of IPC against Mohammad Azam Kham, the case of the prosecution is mainly based on statement of PW-11 and PW-13 who have stated inter-alia that they became proposer in the nomination of 2017 election of Mohammad Abdullah Azam Khan on the instructions of Mohammad Azam Khan and Mohammad Abdullah Azam Khan. On the other hand the case of the accused-revisionists is that PW-11 and PW-13 were not interrogated during investigation. Their statements under Section 161 Cr.P.C. were not recorded and they are not witnesses of the charge-sheet. During trial PW-11 started supporting the complainant and became inimical to Mohammad Azam Khan and in this regard, he also held a press conference on 21.11.2022 stating inter alia that he is supporting the complainant Akash Saxena, who was contesting by-election from Legislative Assembly Rampur Constituency (32), which was scheduled to be held on 05.12.2022. The said press conference was telecast by 'Bharat Channel' on 21.11.2022 at about 04:03 PM and also admitted by PW-11 during the trial. Since, he was inimical to Mohammad Azam Khan, therefore, for the first time an application was moved on 22.11.2022 on behalf of the prosecution under Section 311 Cr.P.C. for summoning PW-11 Mohammad Shafiq and PW-13 Dinesh Goel, on which oral objection was raised on behalf of the accused that prosecution cannot be permitted to improve its case, but the said application was allowed on the same day on 22.11.2022 and their examination-in-chief were recorded on 25.11.2022 and 13.12.2022. On the conviction of Mohammad Azam Khan vide judgement and order dated 27.10.2022 in a hate speech case, he became disqualified and thereafter in by-election complainant Akash Saxena contested the election and elected as M.L.A and after disqualification of Mohammad Abdullah Azam Khan, vacancy arose, on which PW-11 contested the election on the symbol of Apna Dal (S), one of the alliance parties in NDA and elected as M.L.A. Much emphasis has been given by contending that after giving false statement by PW-11 against Mohammad Azam Khan, he has been rewarded.

22. The allegation of the prosecution in FIR that the second birth certificate dated

21.1.2015 was issued by the Municipal Corporation, Lucknow on the basis of duplicate birth certificate No. 718 dated 21.4.2015 issued by Queen Mary's Hospital, Lucknow is not possible at all, as the same is of later date. The stand of the prosecution (State and the complainant) in this regard is wholly misconceived as no prudent person can ever reach on the conclusion that any certificate can be issued in the month of January, 2015 on the basis of document of April, 2015.

23. On putting specific query, that who has been cheated in this case by Mohammad Azam Khan and what is the evidence of deception, cheating, furnishing false information or forgery/ fabricating document and forgery in valuable security on the part of Mohammad Azam Khan, learned counsel appearing on behalf of the State and complainant could not point out any material evidence against Mohammad Azam Khan in this regard except stating that since he was aware about the birth certificate dated 21.01.2015, therefore presumption shall be drawn against him.

24. It is well settled that conjectures and suspicions should not be allowed to take place of legal proof in view of Section 3 of the Evidence Act. At times, it can be a case of 'may be true', but there is a long mental distance between 'May be true' and 'Must be true' and the same divides conjectures from sure conclusions.

25. It is also well settled that whoever forges a document purporting to be a valuable security is an offence under Section 467 IPC and using of that forged document as genuine is offence under Section 471 IPC. There is no evidence on record to establish that any of the revisionists have forged the birth certificate dated 21.1.2015. Similarly forgery for the purpose of cheating is offence under Section 468 IPC but basic ingredient of all the three offences is that there should be forgery, which is punishable under Section 465 IPC. In the instant case revisionists have not been convicted for the offence under section 465 IPC. It is a case of the prosecution that birth certificate dated 21.1.2015 is a forged and false document, but the person, who made, signed, sealed and executed, has not been prosecuted, neither his statement under section 161 Cr.P.C was recorded nor he was produced before the trial court. So far as Section 468 IPC is concerned, there must be a forgery for the purpose of cheating as defined under Section 415 IPC. The Hon'ble Apex Court in catena of decisions considering and discussing the ingredients of offence of cheating has settled the law that in order to constitute an offence of cheating there must be a person deceived or in another word a person must deceived another and by doing so the former must induce the person so deceived, but in the instant case, there is no victim. The complainant Akash Saxena is not a person deceived by the revisionists, therefore, in view of Section 39 Cr.P.C, he had no locus to lodge FIR as the offence under Section 120-B, 420, 467, 471 IPC, for which the revisionists have been tried and convicted, are not covered under Section 39 of Cr.P.C. The ingredients/evidence of cheating and dishonestly inducing delivery of any property is also lacking in this case, hence Section 420 IPC is also not made out. In the light of judgement of Hon'ble Apex Court in the case of **Mohd. Ibrahim vs. State of Bihar (Supra),** I find force in the submission of Mr. Sibal, learned Senior Counsel for the revisionists.

26. Here it would be apposite to mention that the Hon'ble Apex Court in the case of **M.N.G Bharateesh Reddy Vs. Ramesh Ranganathan and another,** 2022

SCC OnLine SC 1061 has considered and discussed the ingredients of Section 415 and 420 IPC. The relevant paragraph Nos. 13 to 16 are extracted herein below:

"13. The ingredients of the offence of cheating are spelt out in Section 415 of the IPC. Section 415 is extracted below:

"**415. Cheating** — Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation — A dishonest concealment of facts is a deception within the meaning of this section."

14. The ingredients of the offence under Section 415 emerge from a textual reading. Firstly, to constitute cheating, a person must deceive another. Secondly, by doing so the former must induce the person so deceived to (i) deliver any property to any person; or (ii) to consent that any person shall retain any property; or (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.

15. Section 420 deals with cheating and dishonestly inducing delivery of property. It reads as follows:

"**420. Cheating and dishonestly inducing delivery of property** – Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being capable of converting into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

16. In **Hridaya Ranjan Prasad Verma v. State of Bihar**, (2000) 4 SCC 168, a two-judge bench of this Court interpreted Sections 415 and 420 of IPC to hold that fraudulent or dishonest intention is a precondition to constitute the offence of cheating. The relevant extract from the judgment reads thus:

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest."

27. In similar issue relating to alleged forgery in two certificates for getting admission in college had been considered by the Hon'ble Apex Court in the case of **Shriniwas Pandit Dharmadhikari Vs. State of Maharashtra and other connected appeals**, 1980 SCC (Cri) 45, in which the Hon'ble Apex Court after discussing the ingredients of Sections 467 and 471 IPC, set aside the sentence passed

against the appellants by a very precise order, which is quoted herein below:

"The appellant was convicted of offence under Sections 417, 420 read with Section 511 and Section 471 read with Section 467 of the Indian Penal Code and sentenced to various terms of imprisonment and fine for those offences. Having heard counsel for both sides we do not find any reason to disturb the order of conviction in respect of offences under Sections 417 and 420 read with Section 511 but as regards the offence under Section 471 read with Section 467, I.P.C. we do not think that the two certificates the appellant has been found to have forged to get admission in the Arts and Commerce College affiliated to Poona University could be described as 'valuable security' as the expression is defined in Section 30 of the Indian Penal Code. We, therefore, alter the conviction under the aforesaid sections to one under Section 471 read with Section 465 of the Indian Penal Code. However, having regard to the facts and circumstances of the case we set aside the sentences passed against the appellant and remit the matter to the trial court to consider, as provided in Section 6 of the Probation of Offenders Act, 1958, whether the appellant should be given the benefit of Section 4 of the said Act. If the trial court does not find it expedient to release the appellant on probation of good conduct under Section 4 of that Act, it should then pass proper sentences on the appellant for the offences of which the appellant has been found guilty. The fine imposed on the appellant, if paid, shall be refunded. The appeal is disposed of as above."

28. Apart from merit of the case, I also find that:-

i- That alleged offence against the revisionists are not a heinous offence.

ii-Revisionists were on bail during trial and they did not misuse the liberty.

iii- Revisionist-Dr. Tanzeen Fatima is aged about 72 years and revisionist Mohammad Azam Khan is aged about 74 years and are suffering from several old aged diseases.

iv-There is no possibility of absconding of the revisionists.

v-Till date, out of maximum sentence of seven years, they have already served following sentence with remission:

a-Dr. Tanzeen Fatima has served more than 01 year and 04 months,

b- Mohammad Azam Khan has served more than 02 years and 05 months,

c- Mohammad Abdullah Azam Khan has served more than 01 year and 04 months.

Conclusion

29. In view of the above, considering the facts and circumstances of the case in totality, nature of allegations, role attributed to the revisionists, material evidence on the record, submissions advanced on behalf of the parties concerned and reasons as noted above, this Court is of the view that the application under Section 389(1) Cr.P.C. of the revisionists for suspension of their sentence dated 18.10.2023 (affirmed by the order dated 23.12.2023 of the appellate court) during pendency of above mentioned Criminal Revisions is liable to be allowed.

30. As a fallout and consequence of the above discussion, the impugned order dated 18.10.2023 of sentence, as noted above is hereby suspended during pendency of these Criminal Revisions.

31. Accordingly, the revisionists namely, Dr. Tanzeen Fatima, Mohammad Azam Khan and Mohammad Abdullah Azam Khan who have been convicted and sentenced by the impugned judgment and order dated 18.10.2023, be released on bail on their furnishing a personal bond and two reliable sureties each in the like amount to the satisfaction of Court concerned during pendency of these Criminal Revisions.

32. On acceptance of their bail bonds, the trial court shall transmit the photo copies thereof to this Court for being kept on record of these Criminal Revisions.

33. Considering the nature of allegations, role attributed to the revisionists and evidence on record against the revisionists, I find that the case of revisionist Mohammad Azam Khan is distinguishable from the case of Dr. Tanzeen Fatima and Mohammad Abdullah Azam Khan. Accordingly, the judgement and order of conviction qua Mohammad Azam Khan shall remain stayed/suspended during pendency of his criminal revision, but prayer for stay of judgement and order of conviction qua Dr. Tanzeen Fatima and Mohammad Abdullah Azam Khan is rejected.

34. Three separate applications all bearing Application No. 1 dated 23.02.2024 U/s 389(1) r/w 397/401 Cr.P.C., which have been moved for stay the impugned judgment and order dated 18.10.2023 of conviction as affirmed by appellate Court vide its judgment and order dated 23.12.2023 stands disposed of accordingly.

(2024) 5 ILRA 2212
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 3047 of 2017

Muralidhar Tiwari & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Ayodhya Prasad Mishra

Counsel for the Opp. Parties:
Govt. Advocate

Criminal Law - Criminal Procedure Code, 1973 - Sections 155(2), 161, 169, 173, 190(1) & 482 - Indian Penal Code, 1860 - Sections 34, 193, 195, 324, 307, 504 & 506 - Arms Act, 1959 - Section – 27 - Constitution of India - Article 21 - Application u/s 482 - for quashing the impugned orders – an FIR was lodged against the opposite party no. 2 – police filed Final Report – rejected – court directed to summon the applicant to file reply – police registered an NCR against the applicants – impugned orders - Whether the learned magistrate may summon the accused person on a printed proforma without assigning any reason and without satisfying himself as to which offence were prima-facie being made out against the applicants and take cognizance on the police report is against the settled judicial norms – held, impugned judgments are cryptic and do not stand the test of the law laid down by the hon'ble Apex court – consequently, cannot be legally sustained – accordingly, present application is allowed – the matter is remitted back to court below to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law. (Para – 23, 34, 35, 36, 37)

Application u/s 482 Allowed. (E-11)

List of Cases cited:

1. Dilawar Vs St. of Har., (2018) 16 SCC 521,

2. Menka Gandhi Vs U.O.I., AIR 1978 SC 597,

3. Hussainara Khatoon (I) Vs St. of Bihar, (1980)1 SCC 81,

4. Abdul Rehman Antulay Vs R.S. Nayak, (1992) 1 SCC 225,

5. P. Ramchandra Rao Vs St. of Karnatka, (2002) 4 SCC 578.

6. H.N. Rishbud Vs St. of Delhi, AIR 1955 SC 196.

7. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., AIR 2012 SC 1747,

8. Basaruddin & ors. Vs St. of U.P. & ors., 2011 (1) JIC 335 (All)(LB),

9. Sunil Bharti Mittal Vs Central Bureau of Investigation, AIR 2015 SC 923,

10. Darshan Singh Ram Kishan Vs St. of Mah., (1971) 2 SCC 654,

11. Ankit Vs St. of U.P. & anr. passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009,

12. Kavi Ahmad Vs St. of U.P. & anr. passed in Criminal Revision No. 3209 of 2010,`

13. Abdul Rasheed & ors. Vs St. of U.P. & anr. 2010 (3) JIC 761 (All).

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

1. Heard Shri Ayodhya Prasad Mishra, learned counsel for the applicants as well as Shri Rajeev Kumar Verma, learned A.G.A. for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to set aside the order dated 20.11.2015/03.01.2017 passed in Case No.568/2015 relating to N.C.R. No.236/2015 under Section 193/195 I.P.C. pending in the court of learned Additional Chief Judicial Magistrate 1st, District-Gonda and also to quash the N.C.R. registered against the applicants as well as cognizance order passed by learned Additional Chief Judicial Magistrate 1st, District-Gonda and during the pendency of the present application the orders dated 20.11.2015/03.01.2017 may kindly be kept in abeyance, in the interest of justice.

3. Learned Counsel for the applicants submits that the facts of the present case are that the applicants have lodged criminal cases at police station concerned and supported them through their statements in all cases along with independent witnesses under section 161 Cr.P.C. before investigating officer and they also adduced documentary material to establish their case before investigating officer including medical reports in respect of causing injuring to Baijnath Shukla and Shyam Narayan Tiwari caused by opposite party No.2 as well as some other persons but since the investigating officer connived with accused persons in all cases and reason is best known to him in spite of proper, fair and just investigation filed final report, that's why the initial version of the all criminal cases filed by applicants were found truthful supported with other material provided to the investigating officer, the learned magistrate rejected the final report submitted by investigating officer in all cases and desired to summon the applicants to submit their reply and thereafter without going through with the material in two cases the learned Magistrate passed an order for further investigation in the cases, therefore at this stage even for a moment if the allegation are accepted of false allegations in the F.I.R. as alleged by opposite party No.2 then the same cannot be said to be true fact for commission of any offence under section 193/195 I.P.C. because the allegation of the applicants

made in their F.I.R.s have been given truthfulness by judicial order as passed by the learned Magistrate concern refusing to accept the final report submitted by investigating officer, therefore, no question for false allegations in any F.I.R. by any persons (applicants) is made out, therefore, the prosecution under section 193/195 I.P.C. was not to be admitted to be continued by police officials as well as also by judicial magistrate concerned in the present case hence being serious illegality for passing order under section 155 (2) Cr.P.C. by learned Magistrate concerned is nothing but tried to initiate illegal criminal prosecution by invoking jurisdiction under section 155(2) Cr.P.C. against the applicants otherwise there was no such stage to pass any order on such application by the Magistrate concerned except to reject even the N.C.R.

4. Learned Counsel for the applicants further submits that it is significant to mention here that an F.I.R. was registered on 09.08.2009 by Muralidhar Tiwari (applicant no. 1) vide F.I.R. no. 191/2009 under section 324/34 1.P.C. and section 27 of Arms Act against the opposite party No.2- Venktesh Datt Ram Pandey, at Police Station- Sadar Bazar, District- North Delhi in which after filing final report under section 169 Cr.P.C. the protest application filed by applicant No. 1 (Muralidhar Tiwari) in the court of learned Metro Politan Magistrate, Tees Hajari Court, District- North Delhi is pending.

5. Learned Counsel for the applicants further submits that on 30.01.2012 an F.I.R. was registered by Shyam Narain Tiwari (applicant no. 2) at Police Station Kotwali Dehat, District- Gonda vide crime no. 122/2012 under section 307/504/506 I.P.C. in which under the pressure of opposite party No.2, the police filed final report and after filing protest application the learned Additional Chief Judicial Magistrate Ist, district- Gonda has passed an order for further investigation in the matter which is also pending.

6. Learned Counsel for the applicants further submits that on 15.07.2015 an F.I.R. has been lodged by applicant No.3 (Baijnath Shukla) against named accused persons in the F.I.R. which was registered vide crime no. 220/2015 under section 307 1.P.C. at Police Station- Kotwali Dehat, District- Gonda. The opposite party No.2 has no concern from this F.I.R. because he has not been named by applicant No.3, but being influential person he was supporting the named accused person in this F.I.R. and on his pressure the police filed final report under section 169 Cr.P.C. in which protest application was filed before learned A.C.J.M. Ist, district- Gonda by applicant No.3 in which the learned Magistrate has been pleased to pass an order for further investigation in the case and investigation is still going on.

7. Learned Counsel for the applicants further submits that the order passed after filing of final report by learned Magistrate concerned relating crime nos. 220/2015 and 122/2012 for further investigation of the case and final report submitted by investigating officer is bad in the eyes of law.

8. Learned Counsel for the applicants further submits that admittedly in all cases due process of law has been adopted without filing any false evidence before court of law in any case. The procedure provided for need full remedy under Cr.P.C. as well as through judicial

pronouncement by Hon'ble Apex court of India as well as by this Court has been adopted by applicants in all cases. No question of filing false evidence arises at this stage.

9. Learned Counsel for the applicants further submits that there are no documents purporting to be forged or false filed by applicants in any judicial proceedings. The protest applications have been filed in support of the allegations made by persons concerned of all cases on which investigation started but investigating officer either in connivance of opposite party No.2 or without fair, proper and just investigation under pressure of accused persons filed final report before court concerned on which, the court concerned being not satisfied with final report submitted by investigating officer and after going through the allegations made in the F.I.R. as well as material collected by him during investigation refused to accept the final report and according to procedure established by law invited to the applicants to submit their reply against final report and on that the applicants filed protest applications in all cases before the court concerned. The learned Magistrate going through with material available on record passed an order for further investigation in two cases relating to crime no. 122/2012 and 220/2015 which are still going on in District Gonda. So far as case relating District- North Delhi is concerned the hearing is going on protest application filed by applicant No.1- Muralidhar Tiwari before court concerned.

10. Learned Counsel for the applicants further submits that on 02.10.2015 an application at Police staion Kotwali Dehat, district-Gonda was submitted by opposite party No.2 (Venktesh Datt Ram Pandey) stating therein that because of village Pradhan election enmity, the applicants-Muralidhar tiwari, Shaym Narayan tiwari and Baijnath Shukla resident of same village-Banghusara Khas, have registered several false cases by concocting false story at Police Station- Kotwali Dehat as well as other Police Station against opposite party No.2 as the family members of the opposite party No.2 as well as he himself is very aggrieved and also faced mental and physical torture. The accused persons are lodging F.I.R. against him and his other family members and also their supporters out of which all cases were found false as the investigating officer filed final report in all cases. He further submits that the opposite party No.2 also filed list of all allegedly false cases registered against him and others. It is further alleged that because of cases based on false and concocted facts, the final report was submitted suggesting that under conspiracy by way of false evidence they are torturing the opposite party No.2. It is further alleged that in all cases in which false evidence were prepared for awarding conviction to the opposite party No.2 also have been narrated in the list of the cases. In the aforesaid circumstances it was requested that the criminal case be registered against the applicants-Muralidhar, Baijnath and Shyam Narayan. The application was submitted on 02.10.2015 and case was registered as N.C.R. no. 0236/2015 under section 155 Cr.P.C. registering a case under section 193/195 L.P.C. by the police of police station- Kotwali Dehat. District-Gonda against the petitioners.

11. Learned Counsel for the applicants further submits that it is well settled preposition of law as well as according to the provision of Indian Penal

code the provision of section 193 and 195 1.P.C. can be invoked only if false evidence has been filed by any person against any person intentionally in judicial proceeding as evidence then only prosecution under section 193 and 195 I.P.C. can be invoked against that person. Therefore according to the mandate and the statute of I.P.C. the allegation made in the application which was later registered as N.C.R. was not required to invoke jurisdiction of section 193/195 1.P.C. for prosecuting any person, thus, the same was not maintainable because there is no case in which any judicial proceeding was started and any false evidence was adduced by the persons concerned but the police of concerned police station under the pressure of opposite party No.2 being an influential person, the police has taken the application filed by opposite party No.2 and knowingly and intentionally and registered a N.C.R. against the applicants though this is no stage as per F.I.R. itself for registering a case under section 193 and 195 LP.C. registered a criminal case as N.C.R. under section 193/195 LP.C.

12. Learned Counsel for the applicants further submits that an application under section 155(2) Cr.P.C. was filed by opposite party No.2 on 03.10.2015 in the court of learned Additional Chief Judicial Magistrate Ist, District- Gonda and the case was registered before court as case no. 568/2015 and the learned Magistrate without considering legal question regarding the stage of maintainability of F.I.R. /N.C.R. passed an order on 20.11.2015 with the direction for investigation of the case to the investigating officer.

13. Learned Counsel for the applicants further submits that learned Magistrate also given an opinion in his order dated 20.11.2015 and admitted this fact that "the false evidence though has been alleged given at police station but not before any court". Meaning thereby that learned Magistrate was very well aware about the maintainability of the application for registration of the F.I.R. as per allegation that the same was not maintainable even then he accepted the request of the opposite party No.2 and passed an order for investigation of the case and due to this reason the police investigated the matter and filed charge sheet against the applicants under section 193/195 I.P.C. only.

14. Learned Counsel for the applicants further submits that after filing of charge sheet by investigating officer the learned court concern taken cognizance and summoned the applicants for facing trial proceeding and being aggrieved by filing of charge sheet and cognizance order under section 193/195 L.P.C. the applicants approached to this Ccourt and filed a petition under section 482 Cr.P.C. vide Criminal Miscellaneous Case no. 2496/2017 wherein they challenged the charge sheet as well as cognizance order and, the said petition was decided by passing final order on 20.04.2017.

15. Learned Counsel for the applicants further submits that the question involved in the present application is for protection of fundamental rights enshrined under article 21 of the Constitution of India which provides that the personal liberty to person shall not be disturbed except procedure established by law. In the present case for launching criminal prosecution case under Section 193/195 I.P.C. the basic requirement is that there must be judicial proceeding pending before any court of law

and intentionally false evidence has been filed in judicial proceedings by a person's but in the present case no such stage has arisen as admitted by the learned magistrate in his own order dated 20.11.2015 accepting that no false evidence has been given in any judicial proceeding by the applicants. Merely submission of any application does not amount that the investigation is mandatory in each and every case as per settled preposition of law.

16. Learned Counsel for the applicants further submits that the allegations made in the N.C.R. by opposite party No.2 are vague, frivolous, unwarranted even without the applicability of the stage of section 193/195 I.P.C. hence the same are liable to be set aside and all proceedings are also liable to be terminated based on N.C.R. no. 236/2015 as well as subsequently through the order dated 20.11.2015 passed by learned magistrate concern.

17. Learned counsel for the applicants further submits that by the order dated 20.11.2015/03.01.2017passed in Case No.568/2015 relating to N.C.R. No.236/2015 under Section 193/195 I.P.C. pending in the court of learned Additional Chief Judicial Magistrate 1st, District-Gonda whereby cognizance has been taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law and the same was without application of mind and was passed in a routine manner.

18. Learned counsel for the applicants further submits that after submission of charge sheet and cognizance order on printed proforma, the applicants have been summoned mechanically by order dated 03.01.2017 and the trial court while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Apex Court in various cases that summoning in criminal case is a serious matter and the trial court without dwelling into material and visualizing the case on the touch stone of probability should not summon accused persons to face criminal trial. He further submits that the trial court has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicants. The trial court has summoned the applicants through a printed order, which is wholly illegal.

19. It is vehemently urged by learned counsel for the applicants that the impugned cognizance/summoning order dated 20.11.2015/03.01.2017 are not sustainable in the eyes of law, as the same have been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance/summoning order dated 20.11.2015/03.01.2017 has been passed by the Magistrate concerned on printed proforma by filling up the blanks, therefore the same are liable to be quashed by this Court.

20. Learned counsel for the applicants has given much emphasis that if the cognizance/summon has been taken on the printed proforma, the same is not sustainable.

21. Per contra, learned A.G.A. for the State submits that considering the material evidences and allegations against the applicants on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out,

therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. Accordingly, this case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

22. I have heard the learned counsel for the parties and perused the record.

23. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

24. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

25. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide ***Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578***.

26. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide ***H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196***. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

27. In the case of ***Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747***, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceedIn the case of ***Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB)***, this Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

28. In the case of ***Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr.***, ***AIR 2012 SC 1747***, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for

issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

29. In the case of ***Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923***, the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself."

30. In the case of ***Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654***, the Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

31. In the case of ***Ankit Vs. State of U.P. And another passed in Application U/S 482 No.19647 of 2009*** decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ़्तारी मा० उच्च न्यायालय द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी ।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short

signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

32. In the case of ***Kavi Ahmad Vs. State of U.P. and another passed in Criminal Revision No. 3209 of 2010***, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

33. In the case of ***Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All)***. The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

34. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

35. In light of the judgments referred to above, it is explicitly clear that the order dated 20.11.2015/03.01.2017 passed in Case No.568/2015 relating to N.C.R. No.236/2015 under Section 193/195 I.P.C. pending in the court of learned Additional Chief Judicial Magistrate 1st, District-Gonda are cryptic and do not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance/summoning order dated 20.11.2015/03.01.2017 cannot be legally sustained, as the Magistrate concerned failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

36. Accordingly, the present Application U/S 482 Cr.P.C succeeds and is ***allowed***. The impugned cognizance/summoning order dated 20.11.2015/03.01.2017 passed in Case No.568/2015 relating to N.C.R. No.236/2015 under Section 193/195 I.P.C. pending in the court of learned Additional Chief Judicial Magistrate 1st, District-Gonda are hereby ***quashed***.

37. The matter is remitted back to Additional Chief Judicial Magistrate-Ist, District-Gonda directing him to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

(2024) 5 ILRA 2222
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.05.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 12489 of 2023

Nirogi Venkata Sesha Pavan Kumar ...Applicant

Versus

State of U.P. & Anr. ...Opp. Party

Counsel for the Applicant:
Nadeem Murtaza, Aditya Vikram Singh, Gaurav Mehrotra

Counsel for the Opp. Party:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections - 482 - Indian Penal Code, 1860 - Sections 406, 420, 506, 120-B & 436 - Application u/s 482 - for quashing the entire criminal proceedings initiated u/s 406, 420, 506, 120-B & 436 IPC and for quashing the charge sheet and order of taking cognizance and summoning the applicants - FIR - investigation – police filed charge sheet – 1 against co-accused – which was challenged in another application u/s 482 – later, police on the basis of

same material filed charge sheet -2 against the applicant, at a much belated stage – court finds that, a co-ordinate bench of this Court in another Application u/s 482 has already quashed the entire proceedings in respect of other co-accused – hence, in view of law laid down by the hon'ble Apex court, the entire proceedings against the present applicant are hereby quashed so far as it relates to the instant applicant - accordingly, present application is allowed. (Para – 6, 22)

Application u/s 482 Allowed. (E-11)

List of Cases cited:

1. B.S. Joshi Vs St. of Har. & ors. 2003 (4) ACC 675.

2. Gian Ssingh Vs St. of Punj. 2012 (10) SCC 303.

3. Dimpey Gujral & ors. Vs Union Territory Through Administrator 2013 (11) SCC 697.

4. Narendra Singh & ors. Vs St. of Punj. & ors.2014 (6) SCC 466.

5. Yogendra Yadav & ors .Vs St. of Jharkhand 2014 (9) SCC 653,

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Gujarat & anr,; reported in (2017) 9 SCC 641,

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

8. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426,

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

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

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

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

1. Shri Purnendu Chakravarty, Advocate has filed Vakalatnama alongwith short counter affidavit on behalf of opposite party No.2, which is taken on record.

2. Supplementary affidavit filed today in the Court by Shri Nadeem Murtaza, learned Counsel for the applicant is also taken on record.

3. Heard Shri Nadeem Murtaza, learned counsel for applicant, Shri Anuuj Tondon, Advocate holding brief of Shri Purnendu Chakravarty, learned counsel for the opposite party no.2, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1 and perused the record.

4. The applicant, namely-Nirogi Venkata Sesha Pavan Kumar, son of Shri Nirogi Venkata Rama Krishna Rao and the opposite party No.2, namely-Hardik Kotak, son of Shri Indubhai Kantilal Kotak are present before this Court, who have been identified by their respective counsel.

5. This application u/s 482 Cr.P.C. has been filed with the prayer to quash the entire proceedings of the Case No.122651/2022; State vs. Petr Novotny and Ors, arising out of Case Crime No.492/2020, pending before the learned Special Chief Judicial Magistrate (Custom), Lucknow, under Sections 406, 420, 506, 120-B and 436 I.P.C. with a further prayer has been made to quash the impugned summoning order dated 20.10.2023 passed by learned Special Chief Judicial Magistrate (Custom), Lucknow whereby the applicant has been summoned under Sections 406, 420, 506, 120-B and 436 I.P.C. alongwith the impugned charge sheet bearing No.2 dated 31.03.2023 filed under Sections 406, 420, 506, 120-B and 436 I.P.C. in relation to Case Crime No.492/2020, Police Station-Banthara, District-Lucknow.

6. Learned Counsel for the applicant submits that the police after conducting the investigation prepared and submitted a charge sheet dated 10.12.2022 in the instant case and the other co-accused persons under Section 406, 420, 506, 120-B and 436 I.P.C. and subsequently the cognizance of the matter was taken by learned Magistrate in Criminal Case No.122651 of 2022 (State v. Petr Novotny and Ors.), whereas, the investigation was kept pending in respect of the present applicant. He further submits that susbequently the police on the basis of same material as was collected during the time of submission of charge sheet No.1 dated 10.12.2022, proceeded to file the impugned charge sheet bearing No.02 dated 31.03.2023 under Sections 406, 420, 506, 120-B and 436 I.P.C. against the present applicant at a much belated stage.

7. Learned Counsel for the applicant further submits that the co-accused persons being aggrieved by the summoning order dated 17.12.2022 passed by learned Magistrate preferred an Application U/S 482 Cr.P.C. No.782 of 2023 wherein, this Court vide order dated 28.01.2023 stayed the further proceedings of learned trial court. He further submits that subsequently, a Coordinate Bench of this Court was pleased to quash the entire proceedings of Criminal Case No.122651 of 2022 (State vs. Petr Novotny and Ors.) vide order dated 06.12.2023. Copy of the interim order dated 28.01.2023 and final order dated 06.12.2023 passed by this Court are annexed as Annexure No.SA-1 to the supplementary affidavit.

8. Learned Counsel for the applicant further submits that the instant dispute essentially exists between Scania India the ex-employer of the present applicant and the opposite party No.2 and the instant case at best involves a civil liability. He further submits that the opposite party No.2 in the present case runs a travel agency in the name of M/s Eagle Travels & M/s Falcon Bus Lines Private Limited.

9. Learned Counsel for the applicant further submits that during the pendency of this application an agreement dated 09.02.2024 has been entered into between the parties i.e. Scania Commercial Vehicles India Private Limited (First Party) and Falcon Bus Lines Private Limited (Second Party) whereby both the parties have arrived at an amicable settlement to extend their cooperation and end all the dispute existing between them. He further submits that in the aforesaid settlement agreement dated 09.02.2024 one of the terms and condition of the agreement provides that the opposite party No.2 shall facilitate and cooperate in quashing of the impugned proceedings of Criminal Case No.122651 of 2022 (State vs. Petr Novotny and Ors.) assailed by means of this application. The settlement agreement dated 09.02.2024 is annexed as Annexure No.SA-2 to the supplementary affidavit.

10. Learned Counsel for the applicant further submits that in the aforesaid settlement agreement dated 09.02.2024, it has been amicably agreed between the parties that the parties shall facilitate the quashing of the impugned proceedings. It has been further agreed that a Demand Draft of Rs. 45,00,000/- (Rupees Forty Five Lacs Only) drawn in favour of M/s Eagle Travel Agency will be handed over to the opposite party No.2 upon the final order being passed by this Court for quashing of the impugned proceedings herein.

11. Learned Counsel for the applicant further submits that as per the terms and

conditions of the aforesaid settlement agreement dated 09.02.2024, the applicant has brought a Demand Draft of Rs.45,00,000/- (Rupees Forty Five Lacs Only) drawn in favour of M/s Eagle Travel Agency from Deutsche Bank, Bangalore, Raheja Towers, M.G. Road, Bangalore bearing No.783229 dated 08.05.2024 before this Court in original to be handed over to the opposite party No.2, thus, he submits that the proceedings of the present case may be quashed on the basis of settlement agreement dated 09.02.2024 as both the parties are ready to settle their dispute.

12. Learned Counsel for the opposite party No.2 and the opposite party No.2 himself submit that they have no objection if the proceedings of the present case are quashed after a Demand Draft of Rs.45,00,000/- (Rupees Forty Five Lacs Only) drawn in favour of M/s Eagle Travel Agency from Deutsche Bank, Bangalore, Raheja Towers, M.G. Road, Bangalore bearing No.783229 dated 08.05.2024 is handed over to the opposite party No.2 before this Court in original. They further submit that they are ready to comply with the terms and conditions of the settlement agreement dated 09.02.2024 entered into between the parties amicably.

13. Learned A.G.A-I for the State-opposite party No.1 also made an agreement with the submissions made by learned Counsel for the parties and the parties, who are present before this Court in person and submits that he has no objection if the impugned proceedings are quashed as the parties have amicably settled their dispute by means of settlement agreement dated 09.02.2024.

14. After considering the submissions made by learned Counsel for the parties and the parties, who are present before this Court in person and after going through the record, this Court is also satisfied with the submissions made by learned Counsel for the parties. The Demand Draft of Rs.45,00,000/- (Rupees Forty Five Lacs Only) drawn in favour of M/s Eagle Travel Agency from Deutsche Bank, Bangalore, Raheja Towers, M.G. Road, Bangalore bearing No.783229 dated 08.05.2024 is handed over to the opposite party No.2 in original by the applicant. The opposite party No.2 has received the same before this Court and signed the photostat copy of the same, which is taken on record.

15. Further, the amount of Rs.45,00,000/- (Rupees Forty Five Lacs Only) has been paid to the opposite party No.2 as per the settlement agreement dated 09.02.2024 now no dispute remains to be adjudicated between the parties. Further, a Coordinate Bench of this Court vide order dated 06.12.2023 passed in Application U/S 482 Cr.P.C. No.782 of 2023 already quashed the proceedings of Criminal Case No.122651 of 2022 (State vs. Petr Novotny and Ors) in respect of the other co-accused persons.

16. Thus, after considering the same, this Court also finds that no useful purpose would be served in keeping the matter pending between the parties as the parties have amicably settled their dispute by means of settlement agreement dated 09.02.2024, which is on record.

17. Learned counsel for the parties have drawn the attention of this Court and placed reliance on the judgment of the Hon'ble Apex Court in support of their case.

(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.

(ii) Gian Ssingh Vs. State of Punjab 2012 (10) SCC 303.

(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.

(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.

(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.

18. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial,

financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

19. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.**

20. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

21. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

22. The present 482 Cr.P.C. application stands **allowed**. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the applicant as well as opposite party no.2 and the observation made above and also taking note of the fact that a Coordinate Bench of this Court vide order dated 06.12.2023 passed in Application U/S 482 Cr.P.C. No.782 of 2023 already quashed the proceedings of Criminal Case No.122651 of 2022 (State vs. Petr Novotny and Ors) in respect of the other co-accused persons, the entire proceedings of the Case

No.122651/2022; State vs. Petr Novotny and Ors, arising out of Case Crime No.492/2020, pending before the learned Special Chief Judicial Magistrate (Custom), Lucknow, under Sections 406, 420, 506, 120-B and 436 I.P.C. are hereby **quashed** so far as it relates to the instant applicant.

(2024) 5 ILRA 2228
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ - C No. 3837 of 2024

Vijay Kumar Singh & Ors. ...Petitioners
Versus
Addl. Commissioner (Admn), Ayodhya Division, Ayodhya & Ors. ...Respondents

Counsel for the Petitioners:
Ravi Shanker Tewari, Sheo Pal Singh, Vishwakant Srivastava

Counsel for the Respondents:
C.S.C., Brijesh Kumar Singh, Mohan Singh

Civil Law –order passed by the revisional court under Section 210 of the U.P. Revenue Code, 2006-under challenge-preliminary objection raised-alternative remedy to file a suit under Section 144 of the Code-consolidation proceedings-name of respondent no. 4 recorded-his mother predeceased her maternal grandmother-mutation proceedings under Section 34 of the Code allowed in favour of petitioner-appeal filed by respondents-U-turn by respondent no. 4-his mother expired after the demise of his maternal grandmother- appeal dismissed-revision against it allowed- respondent had claimed inheritance under Section 171 (2) (h) of the Act,1950-objection of forged death certificate not duly appreciated by the revisional court-nor did the finding returned by the appellate court has been challenged in revision- petition maintainable as per the exceptions carved out in *Hadisul Nisha judgement*-admission is the best piece of evidence-impugned order quashed- petition allowed. (Paras 31 to 35)

HELD:
The observation/ finding of the revisional Court that it might have been mistake of the counsel has no substance but it is only conjectural. The revisional court has erred, in case the original which are said by the revisional Court to be before it and when the same was objected by the petitioners who were respondents there and moved an application for summoning the original record and the Officer who had issued the same and particularly under the circumstances that since the year 2013, the respondent no. 4 filed affidavits before different authorities and the courts including before the High Court had never ever been placed the copy of the death certificate and made averment on oath that her mother predeceased her mother and the detailed finding in the appellate order treating that the photocopy of the death certificate is not an admissible piece of evidence then it is incumbent upon the revisional court before deciding the case in favour of respondent no. 4 must require the document to be proved by the party relying upon it. (Para 31)

The writ petition is maintainable as per condition no. (v) of the judgment in the case of Hadisul Nisha (supra). (Para 33)

The admission of respondent no. 4 not once but more than once before different authorities including before this Court in the writ petition filed by the respondent no. 4 that his mother predeceased her mother i.e. maternal grandmother of respondent no. 4 and that his case falls under category of (h) of Section 171 (2) of the Act, 1950 and it is best piece of evidence in the light of Section 31 of the Indian Evidence Act, 1872, though it is not a conclusive proof but they may operate as estoppel. The Hon'ble Supreme Court in the case of Divisional Manager, United India Insurance Co. Ltd. and Anr. vs. Samir Chandra Chaudhary [2005(5) SCC 63] has held that admission is the best piece of

evidence against the persons making admission by following the judgment of Hon'ble Supreme Court in the case of Avadh Kishore Das vs. Ram Gopal [AIR 1979 SC 861] in the backdrop of Section 31 of the Indian Evidence Act. (Para 35)

Petition allowed. (E-14)

List of Cases cited:

1. Hadisul Nisha Vs Additional Commissioner (Judicial), Faizabad [(2021) 6 ADJ 176]

2. Kalawati Vs Board of Revenue & ors. [(2022) 4 ADJ 578]

3. Divisional Manager, United India Insurance Co. Ltd. & anr. Vs Samir Chandra Chaudhary [2005(5) SCC 63]

4. Poonam Vs St. of U.P.: (2016) 2 SCC 779

5. Avadh Kishore Das Vs Ram Gopal [AIR 1979 SC 861]

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

1. Short counter affidavit has been filed by learned counsel for the respondent no. 4, which is taken on record.

2. Heard Shri Ravi Shanker Tiwari, learned counsel for the petitioners, Shri Hemant Kumar Pandey, learned Standing Counsel and Shri Brijesh Kumar Singh, learned counsel for the private respondents.

3. Learned counsel for the petitioners has submitted that he does not want to file any rejoinder affidavit to the short counter affidavit filed by counsel for the respondent no. 4.

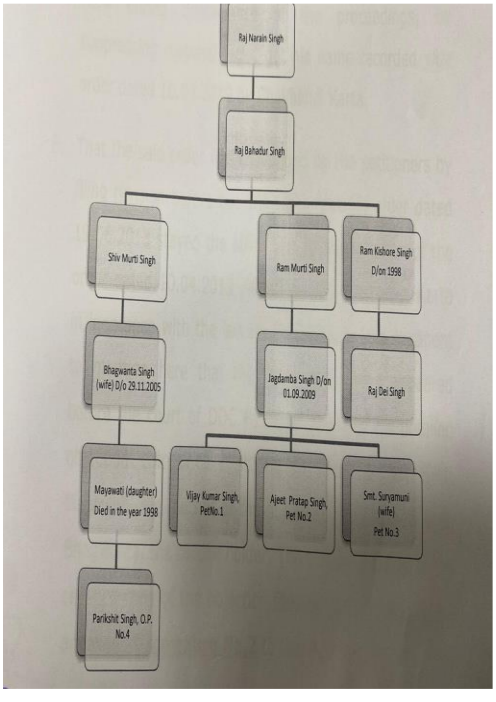
4. With the consent of the parties the matter is being finally decided at this stage itself.

5. The present writ petition has been preferred for quashing of the impugned revisional order/judgment dated 09.04.2024 passed by respondent no. 1/Additional Commissioner (Admn), Ayodhya Division, Ayodhya in revision no. 341/2024 (computerized no. C202404000000341 titled as Parikshit Kumar Singh vs. Vijay Kumar and Ors., under Section 210 of the U.P. Revenue Code, 2006.

6. Sri Hemant Kumar Pandey, learned Standing Counsel and Sri Brijesh Kumar Singh, learned counsel for the respondent no. 4 have raised a preliminary objection regarding the maintainability of the present writ petition as the petitioners have an alternative remedy to file a suit under Section 144 of the U.P. Revenue Code, 2006 (hereinafter referred to as the Code, 2006).

7. Learned counsel for the petitioners has submitted that the writ petition is maintainable before this Court and the alternative remedy to file a suit under Section 144 of the Code, 2006 is not attracted in the case of the petitioners as per exceptions (iv) & (v) carved out by this Court in the case of **Hadisul Nisha v. Additional Commissioner (Judicial), Faizabad [(2021) 6 ADJ 176]** which has been followed in the case of **Kalawati v. Board of Revenue & ors. [(2022) 4 ADJ 578].**

8. It is further submitted that late Raj Bahadur Singh was the original tenure holder of the agricultural land in villages Raipatti and Gehnaar in Tehsil- Milkipur, District Faizabad/Ayodhya. The pedigree which the petitioners are relying is admitted to the respondent no. 4 also. For convenience, the pedigree is given below:-



9. It is further submitted that as per the pedigree mentioned above, the petitioner nos. 1 and 2 are great Grandsons of late Raj Bahadur Singh being the son of Jagdamba, who was son of Ram Murti Singh and Ram Murti Singh was the second son of Raj Bahadur Singh whereas the petitioner no. 3 is the grand daughter-in-law of late Raj Bahadur Singh i.e. w/o late Jagdamba Singh, grandson of Late Raj Bahadur Singh. The respondent no. 4 was the maternal great grandson of Late Raj Bahadur Singh i.e. Son of Mayawati and Mayawati was daughter of Bhagwanta, who was wife of Shiv Murti Singh, who was eldest son of late Raj Bahadur Singh.

10. It is further submitted that after the village had come under consolidation, on the application of respondent no. 4, the land was entered in his name by the Consolidation Committee under Section 6A of the Act, 1953 on 10.04.2013 passed by Chakbandi Karta, which was challenged by the petitioners by filing revision before the Deputy Director of Consolidation in which, an interim order dated 19.06.2013 was passed which was challenged by the respondent no. 4 by filing Writ Petition No. 795 of 2013 (Consolidation). The said writ petition was disposed of with a direction to decide the revision expeditiously. The respondent no. 4 filed an objection on 02.09.2013 and stating that his mother predeceased his grandmother i.e. maternal grandmother of respondent no. 4. During the pendency, the petitioners had approached this Court by filing a Writ Petition No. 795 of 2013 and this Court by its judgment and order dated 18.05.2016 disposed of the writ petition with liberty to the petitioners to file their objections under Section 9-A(2) of the Act, 1953.

11. It is further submitted that before the petitioners could have filed their objections, the notification under Section 6 was published de-notifying the consolidation proceedings. After the de-notification under Section 6, the petitioners had moved an application for mutation under Section 34 of the U.P. Revenue Code, 2006 which was allowed in their favour by order dated 28.09.2020. Against which the appeal was preferred by the respondents and for the first time, in the said appeal, a U-turn was taken by the respondent no. 4 and took the stand that his mother expired after the demise of her mother i.e. maternal grandmother of respondent no. 4 and in support of his submission, the respondent no. 4 filed a photocopy of the death certificate for the first time in the year 2021. The appeal was dismissed by the judgment and order dated 09.01.2024 with a finding that the photocopy of the death certificate cannot be accepted as admissible piece of evidence.

12. It is further submitted that against the appellate order, the respondent no. 4 had preferred a revision which was allowed in favour of the respondent no. 4 by the impugned judgment and order dated 09.04.2024 against which the present writ petition has been preferred.

13. It is further submitted that the revisional court was adamant to pass an order in favour of respondent no. 4 and this fact could be seen from the objections filed by the petitioners before the revisional court mentioning all these facts as it has been pleaded in the present writ petition along with documents but none of the documents or the submission of the petitioners were considered by the revisional court.

14. It is further submitted that the petitioners had also moved an application for summoning of original death certificate and the parivar register which could prove the case but no orders were passed even on the said application.

15. It is further submitted that when the revisional authority was not hearing the petitioners, the petitioners had moved an application for transfer of the case on 05.04.2024 and the moment the application was filed, within four days the impugned order has been passed by the revisional court.

16. On the other hand, learned counsel for the respondent no. 4 has submitted that the petitioners had filed a mutation application with an inordinate delay and that too, without making or arraying the respondent no. 4 as an opposite party.

17. It is further submitted that the birth and death certificate issued under Section 8 of the Registration of Births and Deaths Act, 1969 (hereinafter referred to as the Act, 1969) and the documents issued under Section 8 of the Act, 1969 would be in existence untill and unless the same is cancelled under Section 15 of the Act, 1969, whereas the petitioners had not filed any application for cancellation of the said death certificate.

18. It is further submitted that the submission of learned counsel for the petitioner which he has pressed hard that he had moved an application for summoning the parivar register and the death certificate and the same was never decided is also an incorrect submission for the reason that in para 16 of the revisional order, it has been mentioned that the death certificate and parivar register in original were in the court and it was seen and on that the petitioners who were respondents there had not raised any strong objection. Para 16 of the revisional order is quoted hereinbelow:-

"16. मायावती की मृत्यु का प्रमाण पत्र और परिवार रजिस्टर मूल रूप से इस न्यायालय में उपलब्ध कराये गये है। इस पर विपक्षी कोई ठोस आपत्ति प्रस्तुत नहीं कर सकते ।"

19. It is further submitted that the finding regarding that the mother of the respondent no. 4 predeceased his mother was due to the fault of the counsels and the same has been followed in the subsequent proceedings but at the appellate stage it was rectified by the respondent no. 4 by filing the photo copy of the death certificate.

20. At this stage, learned counsel for the petitioners has submitted that though the original death certificate was filed by respondent No.4 but the petitioners had raised the objection even the original documents are forged and fabricated and when the same was not considered then an

application was moved on 27.03.2024 for summoning the original record and the officer who had issued the said certificate but the revisional court has not paid any heed to the same and had not passed any order on the application of the petitioners and without proving the death certificate, the same was taken into consideration by the revisional Court.

21. After hearing learned counsel for the parties and going through the record of the case, the position which emerges out in the present case is that the agricultural land belonged to Late Raj Bahadur Singh. The petitioners belong to the family of Late Raj Bahadur Singh being great grandfather of the petitioners and respondent No.4 is the maternal great grandson of Late Raj Bahadur Singh. The agricultural land was entered in the name of late Raj Bahadur Singh in two villages namely Raipatti and Gahnaar, Tehsil Milkipur District Ayodhya. Dispute involved in the present writ petition is with regard to the agricultural land situated at Village Raipatti. The petitioners got their names mutated on the basis of succession/inheritance which was objected by the respondent No.4 by raising his claim at three stages with an admission on affidavit that her mother predeceased her mother i.e. maternal grandmother of the respondent no. 4 and he falls under category 171 (2) (h) of the Act, 1950 whereas, petitioners fall under category (e) of Section 171(2) of the Act, 1950. For convenience, the Section 171 of the Act, 1950 is quoted hereinbelow:-

171. General order of succession. - (1) Subject to the provisions of Section 169, when a bhumidhar or asami, being a male dies, his interest in his holding shall devolve upon his heirs being the relatives specified in sub-section (2) in accordance with the following principles, namely :-

(i) the heirs specified in any one clause of sub-section (2) shall take simultaneously in equal shares;

(ii) the "heirs specified in any preceding clause of sub-section (2) shall take to the exclusion of all heirs specified in succeeding clauses, that is to say, those in clause (a) shall be preferred to those in clause (b), those in clause (b) shall be preferred to those in clause (c), and so on, in succession;

(iii) if there are more widows than one, of the bhumidhar or asami, or of any predeceased male lineal descendant, who would have been an heir, if alive, all such widows together shall take one share.

(iv) the widow or widowed mother or the father's widowed mother or the widow of any predeceased male lineal descendant who would have been an heir, if alive, shall inherit only if she has not remarried.]

[(2) the following relatives of the male bhumidhar or asami are heirs subject to the provisions of sub-section (1), namely :-

(a) [widow, unmarried daughter] and the male lineal descendant per stirps:

Provided that the widow and the son of a predeceased son how low-so-ever per stirps shall inherit the share which would have devolved upon the predeceased son had he been alive;

(b) mother and father;

(c) [*];

(d) married daughter;

(e) brother and unmarried sister being respectively the son and the daughter of the same father as the deceased; and son of a predeceased brother, the predeceased brother having been the son of the same father as the deceased;

(f) son's daughter;

(g) father's mother and father's father;

(h) daughter's son;

(i) married sister;

(j) half sister, being the daughter of the same father as the deceased;

(k) sister's son;

(l) half sister's son, the sister having been the daughter of the same father as the deceased;

(m) brother's son's son;

(n) mother's mother's son;

(o) father's father's son's son.]

22. Firstly, the said admission was made by the respondent no. 4 in para no. 13 of the objections dated 02.09.2013,which is quoted hereinbelow:-

" Para 13- that the recorded tenant Smt. Bhagwanta had no any male issue except a daughter named Smt. Mayawati who was died during the life time of his mother and as a real son of Smt. Mayawati or as a son of daughter of the deceased Smt. Bhagwanta opposite party no. 2 named Parikshit Kumar son of Raghaw Bihari Singh is the only legal heir of the deceased."

23. The second time in his objection dated 08.01.2014 with regard to the agricultural land situated at Gahnaar , para nos. 4 to 6 of the said document filed alongwith the supplementary affidavit are quoted hereinbelow:-

"धारा-4 यह कि शपथी परीक्षित कुमार की नानी भगवन्ता के जीवनकाल में ही माता माया की मृत्यु हो चुकी थी जिससे प्रार्थी नानी के साथ रहकर उनकी सेवा परवरिश करता था

धारा-5 यह कि शपथी परीक्षित कुमार की माता माया की मृत्यु नानी भगवन्ता से पूर्व हो जाने के कारण प०क०11 मे विद्वान राजस्व निरीक्षक ने भगवन्ता की मृत्यु के बाद उत्तराधिकार/वरासत का निर्धारण कर भगवन्ता की आराजी को शपथी परीक्षित कुमार के नाम दाखिल खारिज कर दिया जो नियमानुसार विधि संगत है।

धारा-6 यह कि शपथी परीक्षित कुमार का नाम भगवन्ता मृतक के स्थान पर प०क० 11 पर दर्ज किया जाना उ०प्र० जमी० विनास और भूमि व्यवस्था अधिनिय1950 की धारा 171 ज के उपबन्धो के अन्तर्गत न्यायसंगत है।"

24. In which, it has also admitted that the respondent no. 4 falls under category (h) of Section 171 (2) of the Act, 1950. In Hindi language, it has been mentioned as (ज) in the affidavit.

25. Again, third time the respondent no. 4 before this Court at the time of filing of the Writ Petition No. 795 of 2013 (Consolidation) has averred in para no. 5 of the writ petition. The relevant para no. 5 is quoted hereinbelow:-

" That unfortunately the mother of the petitioner Smt. Mayawati died in the life time of his mother Smt. Bhagwanta and thus after the death of Smt. Bhagwanta the maternal grand mother of the petitioner, the name of petitioner was mutated in the Shattwarshik Khatauni of Fasli year 1407 to 1412 by the consolidation officer by exercising the power vested under Section 6-A of the C.H. Act on dated 14.04.2013. The copy of Sharwarshik Khatauni of the land in question is being filed as annnexue no. 2 to with writ petition. "

26. The respondent no. 4 filed an appeal against the mutation order dated 28.09.2020 passed in favour of the petitioner and changed the stand completely and took u-turn from his earlier admissions made on oath before the Court below even before this Court by stating that her grand mother Bhagwanta had

predeceased her daughter i.e. mother of respondent no. 4. The appeal was dismissed by the judgment and order dated 09.01.2024, where only the photocopy of the death certificate was produced and a detailed finding was given by the appellate authority. The relevant extract of the same is quoted hereinbelow:-

"17 -पत्रावली पर प्रस्तुत साक्ष्यों से यह भी स्पष्ट हुआ कि प्रश्नगत भूमिधर के मृत्यु प्रमाण पत्र की मात्र छायाप्रति या जो सत्यापित भी नही है, ऐफेडेबिट से समार्थित नहीं है, अपीलार्थी द्वारा प्रस्तुत की गयी है, जिसे विद्वान अधिवक्ता उत्तरदाता पक्ष द्वारा जाल साजी युक्त करार दिया है, बताया कि प्रस्तुत प्रश्नगत मृत्यु प्रमाण पत्र की छायाप्रति जिसमें श्रीमती मायावती सिंह की मृत्यु दिनांक 07.02.2006 लिखी हैं तथा रजिस्ट्रेशन का दिनांक 22.02.2006 तथा जारी होने का दिनाँक भी 22.02.2006 दर्शाया गया है, वह फर्जी है, जो येन-केन जारी कराया गया है, इसकी प्रमाणित प्रति न्यायालय में प्रस्तुत नहीं की गयी है, वस्तुतः सूचना मृत्यु के मूल अभिलेख से लिये जाने का प्राविधान है, लेकिन उक्त मूल अभिलेख को अपीलार्थी द्वारा न्यायालय के समक्ष प्रस्तुत नही किया गया, अपीलार्थी द्वारा परिवार रजिस्ट्रर की नकल दिनांक 27.12.2021 प्रस्तुत की गयी है, अपीलार्थी ने मृत्यु प्रमाण पत्र निगर्मन दिनांक 22.02.2006 प्रस्तुत किया है अतः उक्त सूचना के दिनांक के कागजात जिनके आधार पर यह प्रमाण पत्र प्रस्तुत करना अपेक्षित था, ताकि यह सिद्ध हो पाता की श्रीमती मायावती कि मृत्यु श्रीमती भगवन्ता सिंह के जीवनकाल में हई थी अन्यथा की स्थिति में विद्वान अधिवक्ता उत्तरदाता के तर्क अति तथ्यापक है कि श्रीमती मायावती सिंह की मृत्यु दिनांक फर्जी तरीके से कूट रचना कर बाद की तिथि की दार्शायी जा रही है।"

27. Against the appellate order, the respondent no. 4 had preferred a revision and on being asked from the learned counsel for the respondent no. 4 whether the finding given by the appellate Court regarding death certificate as mentioned above was challenged in the revision or not, learned counsel for the respondent no. 4 in his reply has submitted that it was challenged by taking a specific ground and the pleadings and in support of his submissions he has drawn attention of this Court to para nos. 5, 7, 13, 14 and 23 of the revision, which are quoted hereinbelow:-

"Para-4:

Because the learned Tehsildar has acted with substantial illegality in allowing the mutation application moved by the opposite party Vijay kumar & others cryptically, even without hearing to me applicant / revisionist by way of violating his right of natural justice and thereafter, appeal moved by the applicant / revisionist has been dismissed by the learned Dy. Collector (J.) Milkipur, Ayodhya relied on the false & inadmissible facts aaduced by the opposite party regarding death of revisionist's mother late Smt. Mayawati with the sole object for providing undue & influential advantages to the opposite party no.1 to 3. Hence, both the orders impugned are liable to be set aside.

Para-5:

Because applicant / revisionist had adduced evidences regarding death of his mother as well as recorded tenure holder of the land in question and accordingly, real daughter of the recorded tenure holder Smt. Mayawati Singh proceed to death on 07.02.2006 after the death of her mother Smt. Bhagwanta dated 29.11.2005 but this fact has been fully overlooked by the learned Courts below in passing the orders impugned as such liable to be set aside.

Para-7:

Because whole approach of the learned Courts below in deciding the case was arbitrarily & cursorily, overlooking the entire material evidence on record adduced by the applicant / revisionist and orders impugned have been passed upon surmise grounds, keeping illegal grounds regarding death of real daughter of late

Bhagwanta while there was no objection from the side of the opposite party before the Consolidation Court claiming outrightly their rights on the basis of alleged legal heirship.

Para-13:

That subsequently, against the order aforesaid dated 15.04.2023 passed by the learned Consolidator, there was filed a revision u/s-48 (1) of UPCH Act which was decided by the revisional Court on 17.12.2016 by way of confirming the order aforesaid passed by the leamed Consolidator.

Para-14:

That the opposite parties concerned are habitual litigants and accordingly, they approached before the Hon'ble High Court by way of preferring a Writ Petition No.10519/2017 under Article 226 of Cons. of India which disposed off.. by the Hon'ble High Court on 12.05.2017 by way of dismissing the writ petition. The operative portion of the order of Hon'ble

High Court is being reproduced as below: "By means of order dated 17.12.2016, opposite party no.1 has dismissed the revision on the ground that if the petitioners have any grievance in the matter in question, he may agitate the same under Section 9 of the U.P. Consolidation of Holdings Act. So, I do find any good ground or reason to interfere in the matter because parties will get ample opportunity by way of oral & documentary evidence before Consolidation Officer, so at this stage no legal injury has been caused to the petitioner by means of order dated 17.12.2016 passed by the opposite party no. 1.

For the foregoing reasons, the writ petition lacks merit and is dismissed."

Para-23:

1. That in the interest of justice, it is necessary to allow the revision and the order impugned dated 19.01.2024 passed by the learned Dy. Collector (J.) Milkipur, Ayodhya as well as order of learned Tehsildar Milkipur dated 28.09.2020 to be set aside and appreciating the order of Consolidation Court as well as Hon'ble High Court, it would be just & expedient to be passed an appropriate order in favour of the applicant / revisionist by way of recording the land property in question in favour of the applicant / revisionist as legal heir of the recorded tenure holder late Smt. Bhagwanta w/o Shiv Murat Singh as well as her real daughter late Smt. Mayawati w/o Raghav Bihari Singh. Otherwise. the applicant / revisionist will put to irreparable loss which may not be compensated by any other means.

It is, therefore, prayed that the order & judgment may kindly be passed in the following manners:

(i) The revision moved by the applicant / revisionist, may kindly be allowed.

(ii) The order & judgment in question under revision dated 19.01.2024 passed by the learned Dy. Collector (J.) Milkipur. Ayodhya as well as order of learned Tehsildar Milkipur dated 28.09.2020 please be set aside. And

(iii) Appreciating the order of Consolidation Court as well as Hon'ble High Court be pleased to be passed an appropriate order in favour of the applicant / revisionist for recording the land property in question in favour of the applicant / revisionist as legal heir of the recorded tenure holder late Smt. Bhagwanta w/o Shiv Murat Singh as well as her real daughter late Smt. Mayawati w/o Raghav Bihari Singh. Or

(iv) Any other relief / relives which this Hon'ble deems fit, just & proper be pleased to be passed an. appropriate order in favor of the applicant / revisionist in the interest of justice."

28. From the perusal of the aforequoted paragraphs relied by the learned counsel for the respondent no. 4, it is clear that he has failed to indicate that the findings given by the appellate Court with regard to the death certificate was challenged before the revisional court.

29. The petitioners had filed objections in the revision taking all these pleas including the forged death certificate adduced by the respondent no. 4 and about the earlier proceedings where the respondent no. 4 had admitted that the mother of the respondent no. 4 predeceased her mother i.e. the maternal grand mother of the respondent no. 4 but the revisional Court was not ready to hear any of the objections. Under these compelling circumstances, the petitioners had approached this Court by filing a Writ Petition No. C No. 2230 of 2004 (Vijay Kumar Singh and 2 others Vs. Additional Commissioner (Administration) and others. The said writ petition was disposed of by this Court by its judgment and order dated 11.03.2024 with an expectation from the revisional Court that it will consider the objection of the petitioners. The relevant extract of the same is quoted hereinbelow:-

"Considering the facts and circumstances and also noticing that the issue is still alive before the revisional court and even though the petitioner has filed his objections, yet the same is yet to be considered on merits. Accordingly, at this stage, this Court is not inclined to interfere leaving it open for the petitioners to press their objections before the revisional court and since the matter is already listed on 15.3.2024, it is expected that the revisional court shall hear the parties on the aforesaid issue on 15.3.2024 and pass necessary orders and in case if the same is not possible, then within next two weeks."

30. The submission of learned counsel for the petitioners finds force, so an application was moved on 27.03.2024 for summoning the original record of the alleged original copies which are said by the revisional Court to be before it and also to summon the officer who had issued the said certificate but no orders were passed on the said application. Thereafter, the petitioners had no other option except to move an application for transfer of the case by moving an application on 05.04.2024 and within four days of moving the application, the impugned judgment has been given by the revisional court. The revisional court in complete derogation to the orders passed by this Court dated 11.03.2024 has decided the revision. The case/objections of the petitioners have not been discussed and decided the revision in favour of the respondent no. 4 and erred in giving the following findings:-

(i) Firstly, that the court below had failed to appreciate the death certificate produced by the respondent no. 4 without appreciating that original copy of death certificate was never adduced by the respondent no. 4 before the Court below. It is for the first time as per para no. 16 of impugned revisional order, as mentioned in preceding para, there is a reference of original death certificate. It is also revealed from the record that the revision was filed on 03.02.2024 by the respondent no. 2. The objections were filed by the petitioners, who were respondents in the revision in the

month of February, 2024 itself and after more than one and a half months from the date of filing of the revision by the respondent no. 2 and after filing of the objections by the petitioners, an application was filed by the respondent no. 2 on 27.03.2024 bringing on record certain documents including death certificate of Late Mayawati i.e. the mother of the respondent no. 2 dated 22.02.2006 in which the date of death has been shown as 07.02.2006 but no death certificate of late Bhagwanta was filed by the respondent no. 2 and without filing the same, it could not be determined that who predeceased whom.

(ii) Secondly, as far as the finding that when the Will was in favour of the father of the petitioner was executed by Late Bhagwanta why he had not claimed the agricultural land on the basis of the same is concerned, it is not at all relevant for the purposes of determining the claim of respondent no. 4. The petitioners did not claim their right on the basis of the Will executed by Late Bhagwanta in favour of Jagdamba Singh, the father of the petitioners. They have raised their claim on the basis of inheritance/succession.

(iii) And thirdly, if some typographical mistake is committed by the counsel by cutting and pasting the paras in the earlier affidavits, the revisionist could not be said to be a party to the same as the earlier admission of the respondent no. 4 could not be said to be an admission by the respondent no. 4 as it is the fault of the lawyer or typing mistake, who had drafted the documents by cut and paste even that finding is not tenable, for the reasons the documents as relied above and mentioned in the preceding paragraphs, affidavits were not only in one language, they were in different language somewhere it was in English and somewhere it was in Hindi and even somewhere the contents are additional or changed. The said finding is also not tenable as in the application/affidavit, in para nos. 4 & 5 as mentioned in the preceding paragraph, it is admitted by the respondent no. 4 that his mother predeceased her mother i.e. the maternal grandmother of respondent no. 4 could not be said that it is on the fault of the Lawyer or typing mistake when the same is read with para 6 where the respondent no. 4 himself admitted that he falls under the category 171 (2)(h) of the Act, 1950.

31. The observation/ finding of the revisional Court that it might have been mistake of the counsel has no substance but it is only conjectural. The revisional court has erred, in case the original which are said by the revisional Court to be before it and when the same was objected by the petitioners who were respondents there and moved an application for summoning the original record and the Officer who had issued the same and particularly under the circumstances that since the year 2013, the respondent no. 4 filed affidavits before different authorities and the courts including before the High Court had never ever been placed the copy of the death certificate and made averment on oath that her mother predeceased her mother and the detailed finding in the appellate order treating that the photocopy of the death certificate is not an admissible piece of evidence then it is incumbent upon the revisional court before deciding the case in favour of respondent no. 4 must require the document to be proved by the party relying upon it.

32. The case of the petitioners falls under the exception no. (iv) & (v) of the judgment in the case of Hadisul Nisha (supra). The relevant extract is quoted hereinbelow:-

"The Courts in the aforecited decisions have laid down a few parameters for entertaining writs arising out of mutation proceedings. The exceptions that have been carved out being very few, for example:

(i) If the order is without jurisdiction;

(ii) If the rights and title of the parties have already been decided by the competent Court, and that has been varied by the mutation Courts;

(iii) If the mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims;

(iv) If rights have been created which are against statutory provisions of any Statute, and the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act;

(v) Where the orders impugned in the writ petition have been passed on the basis of fraud or misrepresentation of facts, or by fabricating the documents by anyone of the litigants.

(vi) Where the Courts have not considered the matter on merits for example the Courts have passed orders on restoration applications etc (Vijay Shankar v. Additional Commissioner, MANU/UP/0255/2015 : 2015 (3) ADJ 186 (LB)"

33. The writ petition is maintainable as per condition no. (v) of the judgment in the case of Hadisul Nisha (supra).

34. The submission of counsel for respondent no. 4 that petitioners had claimed their rights after an inordinate delay could also not be material for the adjudication in the present case but the said submission is not tenable in the circumstances of the present case as the petitioners prior to moving an application of mutation in the year 2019 had continuously fighting for their rights since the year 2012/13 when the consolidation proceedings had started and the name of respondent no. 4 was entered by the Consolidation Committee under Section 6 of the Act, 1953.

35. The admission of respondent no. 4 not once but more than once before different authorities including before this Court in the writ petition filed by the respondent no. 4 that his mother predeceased her mother i.e. maternal grandmother of respondent no. 4 and that his case falls under category of (h) of Section 171 (2) of the Act, 1950 and it is best piece of evidence in the light of Section 31 of the Indian Evidence Act, 1872, though it is not a conclusive proof but they may operate as estoppel. The Hon'ble Supreme Court in the case of **Divisional Manager, United India Insurance Co. Ltd. and Anr. vs. Samir Chandra Chaudhary [2005(5) SCC 63]** has held that admission is the best piece of evidence against the persons making admission by following the judgment of Hon'ble Supreme Court in the case of **Avadh Kishore Das vs. Ram Gopal [AIR 1979 SC 861]** in the backdrop of Section 31 of the Indian Evidence Act.

36. In view of the facts, circumstances and the discussion made hereinabove, the present writ petition is **allowed**.

37. The revisional order dated 09.04.2024 passed by respondent no. 1/Additional Commissioner (Admn),

Ayodhya Division, Ayodhya in revision no. 341/2024 (computerized no. C202404000000341 is hereby quashed and the case is remanded to the Revisional Court to consider the matter afresh in the light of the observations made in the judgment.

(2024) 5 ILRA 2239
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 1000528 of 2010

Steel Authority Of India Ltd. Sultanpur
...Petitioner
Versus
District Judge Lucknow & Anr.
...Respondents

Counsel for the Petitioner:
Shraddha Agarwal, Anshuman Singh, Radhika Singh

Counsel for the Respondent:
C.S.C., Amita Srivastava, Anil Srivastava, Ashwani Kumar Singh, Asit K. Chaturvedi, Brijesh Kumar Shukla, Manik Sinha, Pratul Kr. Srivastava, Pratyush Chaube

Civil Law – execution of arbitration award-order substituting petitioner in place of original judgement debtor-under challenge-petitioner was not a party to the arbitration proceedings-impleading application decided by treating it to be an application for substitution-application filed under Order I Rule 10(2) of CPC-Order XXI of CPC- self-contained code for execution proceedings-no provision that empowers the court to order impleadment of any new party in execution proceedings- substitution proceedings under Order XXII Rule 10 of CPC-not of any avail-transfer made long after passing of the arbitration award-on application for attachment of properties of judgement debtor filed under Order XXI CPC-no bar in property being sold by Debt Recovery Tribunal-petitioner is an auction purchaser-not liable to satisfy the arbitration award passed against the judgement debtor-it can neither be impleaded nor be substituted in execution proceedings- impugned order unsustainable in law- petition allowed. (Paras 21, 25, 26 & 27)

HELD:
The application for impleadment filed by the opposite party no.2 did not make a mention of the provision under which it was filed. Learned counsel for the opposite party no.2 has submitted that the application had been filed under the provisions contained in under Order I Rule 10 (2) of the CPC. Order 1 of the CPC deals with "Parties to Suits". The application for impleadment was filed in execution proceedings and not in a suit. The execution proceedings have also not been filed for execution of any decree passed in a suit, rather it was for execution of an arbitration award. The procedure governing the executions proceedings is contained in Order XXI of CPC which in itself is a self-contained code. There is no provision in Order XXI of the CPC which empowers the court to order impleadment of any new party in execution proceedings, which party was not there in the arbitration proceedings in which the arbitration award was passed. (Para 21)

The provision for substitution of parties in the proceedings of suit are contained in Order XXII C.P.C. Rule 10 whereof provides for substitution of the transferee in case of assignment, creation or devolution of any interest during pendency of the suit but in the present case, the transfer was not made during pendency of the arbitration proceedings and it was made long after passing of the arbitration award. (Para 25)

The opposite party no. 2 filed the application for execution of the arbitration award on 25.07.2006, but it did not file any application for attachment of the properties of the judgment debtor M/s Malvika Steels Ltd. under the provisions of Order XXI C.P.C. Therefore, there

was no bar against the properties of Malvika Steels Ltd. being sold by the Debt Recovery Tribunal by holding an auction. The petitioner has purchased the properties in an auction held by the Debt Recovery Tribunal without any encumbrance on 'AS IS WHERE IS' basis. Therefore, the petitioner got absolute rights in the property of Malvika Steels Ltd. purchased in an auction held by the Debt Recovery Tribunal. (Para 26)

In these circumstances the petitioner cannot be held liable to satisfy the arbitration award that was passed against the Malvika Steels Ltd. and it can neither be impleaded nor be substituted in the execution proceedings. (Para 27)

Petition allowed. (E-14)

List of Cases cited:

Southern Power Distribution Co. of Telangana Ltd. Vs Gopal Agarwal: (2018) 12 SCC 644

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

1. Heard Sri Prashant Chandra, the learned Senior Advocate, assisted by Ms. Radhika Singh Advocate, the learned counsel for the petitioner, Sri Ashwani Kumar Singh Advocate, the learned counsel for the opposite party no.2 and perused the record.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner-Steel Authority of India Ltd. has challenged the validity of an order dated 20.08.2008 passed by the District Judge, Lucknow in Execution Case No.22 of 2006, General Manager, Northern Railway versus M/s Malvika Steels and others, whereby while allowing the application (C-31) filed by the opposite party no. 2 – decree holder for impleadment of the petitioner - Steel Authority of India Ltd. as a judgment debtor, the District Judge has ordered that the petitioner-Steel Authority of India Ltd. be substituted in place of the original judgment debtor M/s Malvika Steels.

3. The petitioner has also challenged the validity of an order dated 02.01.2010 passed by the District Judge, Lucknow in the aforesaid execution case whereby the application (C-36) filed by the petitioner for recall of the aforesaid *ex-parte* order dated 20.08.2009 has been rejected.

4. Briefly stated, facts of the case are that the opposite party no.2-General Manager, Northern Railway had filed Execution Case No.22 of 2006 against M/s Malvika Steels and others. On 07.05.2009, the opposite party no.2 filed an application for impleadment of the petitioner-Steel Authority of India as judgment debtor no.11 stating that it had come to know through daily newspaper as well as through internet that judgment debtor M/s Malvika Steels had sold away its property to the petitioner without satisfaction of the decree/arbitration award and therefore, the petitioner should be arrayed as judgment debtor in Execution Case as judgment debtor no.11.

5. By means of an order dated 11.03.2024 passed in this case, the parties were granted time to file a supplementary affidavit bringing on record a copy of the order-sheet of the Execution Case No.22 of 2006. Learned counsel for the opposite party no.2 has supplied a certified copy of the order-sheet, although the same has not been filed along with the supplementary affidavit. The learned counsel for the petitioner does not object the certified copy of the order-sheet of Execution Case No.22 of 2006 being taken on record without any supplementary affidavit, as it being a

certified copy, there is no doubt regarding its genuineness.

6. A perusal of the certified copy of the order-sheet of the execution case reveals that the opposite party no. 2 had filed the application dated 07.05.2009 for impleadment of the petitioner on 16.05.2009. The Court had passed an order for sending a copy of the application to the petitioner through both ways, and had fixed 07.08.2009 for disposal of the application. On 07.08.2009, counsel for the petitioner-Steel Authority of India filed an application (C-33) for obtaining copies of the documents. The Vakalatnama (C-34) executed in favour of the learned counsel for the petitioner was also filed. The District Judge passed an order that Steel Authority of India Ltd. was not a party to the execution case and necessary steps be taken for making it a party and the matter was ordered to be put up on 20.08.2009 for further orders.

7. On 20.08.2009, the District Judge passed the impugned order allowing the application (C-31). It is recorded in the order dated 20.08.2009 that the decree holder had filed an application (C-31) for impleadment of the petitioner-Steel Authority of India as judgment debtor in place of Malvika Steels and this application was supported by an affidavit. The order states that the opposite party no. 2 had filed extracts from internet showing that M/s Malvika Steels had been purchased by the petitioner - Steel Authority of India Ltd. and this fact had not been denied by the petitioner who had appeared through counsel on previous date. Considering the aforesaid facts, the District Judge allowed the impleadment application (C-31) by referring to it as 'the substitution application' and ordered the decree holder to make necessary amendments forthwith and give copies of the entire record to the learned counsel for the petitioner within ten days. The matter was posted for 21.10.2009 and the petitioner was given opportunity to file its objections within twenty days from the receipt of the copies of the record.

8. On 22.09.2009, the petitioner filed an application under Order XXI Rule 106 read with section 151 of C.P.C. for setting aside the order dated 20.08.2009. The Court passed an order directing the petitioner to take requisite steps for filing the application in proper format within a week. The petitioner filed the application for recall of the order dated 20.08.2009 (C-36) on the proper format on 29.09.2009, i.e. within the time of one week granted by means of the earlier order dated 22.09.2009. As this application had been filed beyond the period of thirty days mentioned in Rule 106 (3) and the petitioner filed an application (C-39) under Section 5 of the Limitation Act for condonation of delay in filing the application for recall of the order, which was supported by an affidavit (C-40). On 19.11.2011 three days time were granted for filing objections against the petitioner's application. The objections C-41 was filed on 26.11.2009. The petitioner filed its reply to the objections (C-43) against the objection on 01.12.2009 and the application for recall of the *ex-parte* order was rejected by means of the order dated 02.01.2010, which has also been assailed in this writ petition.

9. The learned Counsel for the petitioner Shri Prashant Chandra Senior Advocate submitted that the execution case in which the petitioner has been substituted as the judgment debtor, has been filed for execution of an arbitration award passed in

arbitration proceedings to which the petitioner was not a party. The arbitration proceedings had been instituted by the opposite party no.2 - General Manager, Northern Railways, Baroda House, New Delhi against the judgment debtor M/s Malvika Steels and its directors etc., and the arbitration award dated 26.12.2012 was passed against M/s Malvika Steels. Therefore, the petitioner, who was not a party to the arbitration proceedings or the arbitration award, could not have been impleaded in the execution proceedings. In any case, while allowing the application for impleadment, the District Judge could not have ordered substitution of the petitioner in place of the judgment debtors and deleting the names of the judgment debtors from the array of the parties.

10. The learned Counsel for the petitioner further submitted that the application for impleadment was filed on the basis of newspaper reports and information taken from the internet, without disclosing the website from which the information was allegedly taken. A mere newspaper report or information taken from an undisclosed website on the internet cannot form the basis of an order for impleadment/substitution of any party to an execution case.

11. The learned counsel for the petitioner also submitted that the averments made in the application for impleadment that M/s Malvika Steels has been purchased by the petitioner Steel Authority of India Ltd., is an incomplete and misleading statement as the petitioner-Steel Authority of India Ltd. has purchased some assets of M/s Malvika Steels in an auction held by the Debts Recovery Tribunal, New Delhi in furtherance of R.C. No.121/2005 issued for enforcement of an order passed in O.A. No.145 of 2002, and it is wrong to say that the petitioner has purchased M/s Malvika Steels Ltd. company itself.

12. The learned counsel for the petitioner further submitted that the order dated 20.08.2009 was passed in absence of the petitioner or its counsel and therefore, it was an *ex-parte* order and the District Judge has committed an error while rejecting the application for setting aside the order dated 20.08.2009 holding that the order is not *ex-parte*. The District Judge further held that even if the order was *ex-parte*, application for recall of the order ought to have been filed on the same day or the following day and the application filed beyond the prescribed limitation period of 30 days belies the contention that the order dated 20.08.2009 is *ex-parte*.

13. The learned counsel for the petitioner has relied upon a judgment of the Hon'ble Supreme Court in the case of **Southern Power Distribution Co. of Telangana Ltd. v. Gopal Agarwal**: (2018) 12 SCC 644 in which the Hon'ble Supreme Court had held that an auction-purchaser in an auction-sale conducted by the Official Liquidator on "as-is-where-is" and "whatever-there-is" basis was not liable for payment of arrears of the previous owner of the property.

14. Opposing the writ petition, Shri Ashwani Kumar Singh, learned counsel for the opposite party no.2-General Manager, Norther Railway, has submitted that the order dated 20.08.2009 was not an *ex-parte* order, as the petitioner has already put in appearance before the District Judge on 07.08.2009 by filing Vakalatnama in favour of its counsel. He has further submitted that even if the order was *ex-parte*, since the petitioner had knowledge of the

proceedings, he ought to have filed an application for recall of the order promptly and the application filed beyond the prescribed period of limitation of 30 days, has rightly been rejected by the trial court.

15. I have heard the submissions of the learned counsel for the parties and gone through the record.

16. The facts, which emerge from the pleadings and submissions of the parties are that the opposite party no.2 - General Manager, Northern Railways had instituted an arbitration claim against M/s Malvika Steels Ltd. The Arbitrator passed an arbitration award dated 26.12.2005 in favour of the opposite party no. 2. The opposite party no.2 filed Execution Case No.22 of 2006 for enforcement of the aforesaid arbitration award in the Court of District Judge, Lucknow and the opposite party nos.1 to 10 arrayed in that execution application were the judgment debtor M/s Malvika Steels Ltd. and its Director/Officers.

17. The opposite party no.2 filed an application for impleadment of the petitioner as judgment debtor no.11, stating that it came to know through daily newspaper as well as through internet that the judgment debtor M/s Malvika Steels Ltd. had sold the property in dispute without satisfaction of decree/arbitration award to the petitioner-Steel Authority of India Ltd. and therefore, Steel Authority of India Ltd. has become a necessary party. It was prayed that Steel Authority of India Ltd., who has purchased the assets, share and other movable and immovable properties of M/s Malvika Steels Ltd., may be arrayed as judgment debtor no.11.

18. The application (C-31) prepared on 07.05.2009 and it was filed on 16.05.2009, on which date, the District Judge passed an order that a copy of the application to be sent to the petitioner through both ways and fixed 07.08.2009 for its disposal. The petitioner had put in appearance before the District Judge through its counsel on 07.08.2009 and without the application for impleadment having been considered by the District Judge stated in the order dated 07.08.2009 that necessary steps be taken for impleading the Steel Authority of India Ltd.

19. The District Judge has allowed the impleadment application by means of the impugned order dated 20.08.2009 treating the same to be an application for substitution. Although the application merely stated that the petitioner had purchased some properties of the judgment debtor M/s Malvika Steels Ltd., the District Judge stated in the order that the company M/s Malvika Steels itself had been purchased by the petitioner-Steel Authority of India Ltd.

20. In the impugned order dated 20.08.2009, the District Judge has recorded that *"J.D. (Sic. D.H) has also filed extracts from internet which shows that Malvika Steels has been purchased by the Steel Authority of India Ltd. This fact is not being denied by the Steel Authority of India Ltd., who had also appeared on last date."* The District Judge has held that in view of the aforesaid fact, it was proper that substitution application (C-31) moved by D.H. be allowed. In the preceding paragraph of the same order, the application has been mentioned to be an application for impleadment of Steel Authority of India Ltd.

21. The application for impleadment filed by the opposite party no.2 did not make a mention of the provision under which it was filed. Learned counsel for the opposite party no.2 has submitted that the application had been filed under the provisions contained in under Order I Rule 10 (2) of the CPC. Order 1 of the CPC deals with "Parties to Suits". The application for impleadment was filed in execution proceedings and not in a suit. The execution proceedings has also not been filed for execution of any decree passed in a suit, rather it was for execution of an arbitration award. The procedure governing the executions proceedings is contained in Order XXI of CPC which in itself is a self contained code. There is no provision in Order XXI of the CPC which empowers the court to order impleadment of any new party in execution proceedings, which party was not there in the arbitration proceedings in which the arbitration award was passed.

22. The application was filed for impleadment of the petitioner as opposite party no.11, in addition to the originally arrayed opposite parties no.1 to 10. There was no prayer for substitution of the petitioner in place of originally impleaded judgment debtor but while allowing the application for impleadment, the District Judge has ordered substitution of the judgment debtor by the petitioner.

23. The petitioner has been substituted on the ground that it has purchased Malvika Steels Ltd., which is a juristic person and which person has not been purchased by the petitioner. Malvika Steels Ltd. still continues to exist as per the submissions made by the learned counsel for the petitioner

24. The arbitration award in favour of the opposite party no.2 was passed way back on 26.12.2005. After closure of the arbitration proceedings and passing of the award, the Debt Recovery Tribunal – I, Delhi had held a public auction of some properties of M/s Malvika Steels Ltd. held on 22.12.2006 in furtherance of R.C. No. 121/2005 issued in O.A. No. 145/02, in which the petitioner has purchased those assets of Malvika Steels Ltd. on "AS IS WHERE IS" basis.

25. The provision for substitution of parties in the proceedings of suit are contained in Order XXII C.P.C. Rule 10 whereof provides for substitution of the transferee in case of assignment, creation or devolution of any interest during pendency of the suit but in the present case, the transfer was not made during pendency of the arbitration proceedings and it was made long after passing of the arbitration award.

26. The opposite party no. 2 filed the application for execution of the arbitration award on 25.07.2006, but it did not file any application for attachment of the properties of the judgment debtor M/s Malvika Steels Ltd. under the provisions of Order XXI C.P.C. Therefore, there was no bar against the properties of Malvika Steels Ltd. being sold by the Debt Recovery Tribunal by holding an auction. The petitioner has purchased the properties in an auction held by the Debt Recovery Tribunal without any encumbrance on 'AS IS WHERE IS' basis. Therefore, the petitioner got absolute rights in the property of Malvika Steels Ltd. purchased in an auction held by the Debt Recovery Tribunal.

27. In these circumstances the petitioner cannot be held liable to satisfy the arbitration award that was passed

against the Malvika Steels Ltd. and it can neither be impleaded nor be substituted in the execution proceedings.

28. In view of the aforesaid discussion, the impugned order dated 20.08.2009 passed by the District Judge, Lucknow, in Execution Case No.22/2006 ordering substitution of the petitioner in place of judgment debtor Malvika Steels Ltd. is unsustainable in law.

29. As the order dated 20.08.2009 has been held to be unsustainable in law, there is no need to examine the legality of the subsequent order dated 02.01.2010, passed by the learned District Judge, Lucknow rejecting the application for recall of the order dated 20.08.2009.

30. Accordingly, the Writ Petition is **allowed** and the impugned order dated 20.08.2009 passed by the District Judge, Lucknow, in Execution Case No.22/2006 ordering substitution of the petitioner in place of judgment debtor Malvika Steels Ltd., is quashed.

31. The parties to bear their own costs of the litigation.

(2024) 5 ILRA 2245
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 1001137 of 1993

Dharam Raj ...Petitioner
Versus
Distt. Registrar Gonda ...Respondent

Counsel for the Petitioner:
Mohd. Arif Khan, Mohammad Aslam Khan

Counsel for the Respondent:
S.P. Shukla, Dhirendra Kr. Dubey, Hemant Kumar Mishra, Kapil Muni Dubey, R.P. Shukla, S.C. Kashish, Udai Bhan Pandey

Civil Law –District Registrar's order directing Sub-Registrar to register and agreement-under challenge- Sections 35(3), 36 & 71(1) of the registration Act, 1908-Enquiry required to be conducted by the registering officer before registration of a document-Section 34 of the Registration Act-if conditions laid down satisfied-document will be registered as directed in Sections 58 to 61 of the Act-Section 58 of the Act-particulars to be endorsed on documents admitted to registration-Section 59 of the Act-Registrar shall authorise date and signature to all the endorsements made by him-Section 60 of the Act-provision for issuance of certificate of registration-no statutory provision in the Act-requires the Sub-Registrar/Registrar to ascertain the capacity of the executant to execute the document by satisfying himself that the executant holds a valid title in respect of the property in question- Rule 300 of Rules framed under the Act-Registrar to satisfy himself that the person presenting it has legal authority to do so i.e. to present the document-Appeal under Sections 72 and 73 of the Act-mere mentioning of wrong provision not fatal to proceedings-Rule 364 framed under the Registration Act, 1908-Registar has dealt with the issues properly-impugned order does not suffer from any illegality-petition dismissed. (Paras 12, 13, 14, 15, 16, 19, 25 & 26)

HELD:
A bare perusal of Section 34 of Registration Act would indicate that Registrar is merely required to satisfy himself that the persons executing the document or their representatives, assignees or authorized agents have appeared before him within the time allowed for presentation. He has to enquire whether the executant is admitting execution of the document and whether the

person appearing before him is the same person, who is executant of the document. If the executant of the document admits execution thereof and the Sub-registrar is satisfied about the identity of the executant, he will register the document as directed in Section 58 to 61 of the Act. (Para 13)

Section 58 of the Registration Act contains particulars to be endorsed on documents admitted to registration, which include the signatures of every person admitting the execution of document, signatures of persons examined in reference to the document and any admission of receipt of consideration. Section 59 mandates that the Registrar shall authorize the date and his signature to all the endorsements made by him. Section 60 contains provision for issuance of certificate of registration. There is no statutory provision contained in the Registration Act which requires the Sub-Registrar/Registrar to ascertain the capacity of the executant to execute the document by satisfying himself that the executant holds a valid title in respect of the property in question. (Para 15)

A bare perusal of the aforesaid Rule indicates that it requires the Registrar to satisfy himself that the person presenting it has legal authority to do so i.e. to present the document. The legal authority to present a document can by no stretch of imagination be read as legal authority to execute the document as the execution of a document and presentation of a document for its registration are two different and distinct things. Therefore, Rule 300 also does not require the Sub Registrar to satisfy himself regarding title of the executant of an agreement to sale by examining as to whether he holds title of the property in question. (Para 16)

The registrar has examined this aspect of the matter and held that the Sub-Registrar has erred in mentioning denial under Section 35 (3) (a) of the Act in the impugned order and the mention of wrong provision by the Sub-Registrar created a confusion in the mind of the concerned parties whether he should file an appeal under Section 72 of the Act or an application under Section 73 of the Act. The Registrar found that an appeal under Section 72 of the Act ought to have been filed, yet as the application had been filed under Section 73 of the Act, it would not be proper to leave the dispute undecided on this ground and he rejected the objection raised in this regard. (Para 25)

There appears to be no illegality in the approach of the Registrar in deciding the dispute on merits in spite of mention of a wrong provision when under both the provisions, the jurisdiction vested with the registrar and no prejudice has been caused to any party by the mere mention of a wrong provision under which the appeal / application was filed. (Para 26)

Petition dismissed. (E-14)

List of Cases cited:

1. Hussein Abdul Rehman & Co. Vs Lakmichand Khetsey: AIR 1925 Bombay 34

2. Savitri Devi & ors. Vs Surendra Mohan Mohana: 1987 Vol 5 LCD 137

3. Mt. Gulab Devi Vs Monji Ram: AIR 1919 Lahore 156

4. Hoosein Abdul Rehman Vs Lakelmichand Khetsey: AIR 1925 Bombay 34

5. Savitri Devi & ors. Vs Surendra Mohan Mohana: 1987 Vol 5 LCD 137

6. Mt. Gulab Devi Vs Monji Ram: AIR 1919 Lahore 156

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

1. Heard Sri Mohammad Arif Khan Senior Advocate assisted by Sri Mohammad Aslam Khan Advocate, the learned counsel for the petitioner, Sri S. K. Khare, the learned Standing Counsel appearing for the State and Sri Kapil Muni Dubey, the learned counsel for the contesting private opposite parties.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India the petitioner has sought issuance of a writ in the nature of

certiorari quashing the order dated 03.05.1993, passed by the District Registrar, whereby an order dated 15.03.1989, passed by the Sub-Registrar, Gonda has been set aside and the Sub-Registrar has been directed to register an agreement dated 15.11.1988 executed by the opposite party no.2-Radha Mohan, in favour of deceased opposite party no.3-Ladla agreeing to sell a piece of land bearing Gata No.107/1-78 and 2-00 acre out of Gata No.195/3-00 which was presented for registration on 15.11.1988.

3. Briefly stated, facts of the case are that the opposite party no.2 was the Bhumidhar of Plot No.195 area 2.16 acres, Plot No.107 area 1.78 acres, Plot No.195 area 3.00 acres and Plot No.47-Dha area 0.40 acres, situated in Village Amdohwa, Pargana, Tehsil and District Gonda. On 07.03.1989 he executed a sale deed in respect of Plot No.107 in favour of the petitioner no.1 and on 31.03.1989 he executed another sale deed in respect of 0.40 acre land out of Plot No.195 in favour of the petitioner no.2. On 13.11.1990 he executed yet another sale deed in respect of Plot No. 195 and 47-Dha in favour of the petitioner nos.3 to 5. Meanwhile, on 09.03.1989, the opposite party no.3 and 4 presented an agreement dated 15.11.1988 executed by the opposite party no.2 in their favour agreeing to sell Plot Nos.107 and 195, for being registered under Section 36 of the Registration Act. The Sub-Registrar issued notice to the opposite party no.2.

4. On 15.03.1989, the Sub-Registrar passed an order stating that as there was a strike going on, summon was sent through registered post, fixing 14.03.1989 as the date of appearance. However, the acknowledgment of service of summon had not been received back. The Sub-Registrar held that as the limitation for registration of the deed had expired and no time was left for issuing fresh summons, registration was refused under Section 35 (3) read with Section 71 (1) of Registration Act.

5. Aggrieved by the aforesaid order, the opposite party no.3 filed Case No.7/89, under Section 73 of Registration Act before the District Registrar, Gonda, which was allowed by means of the impugned order dated 03.05.1993. The Registrar has recorded in the aforesaid order that on 09.03.1989 the deceased opposite party no.2 - Ladla Prasad had produced before the Sub-Registrar, Gonda an agreement executed on 15.11.1988 by Radha Mohan (the opposite party no.2) to sell the land bearing Gata No.107/1.78 acres and 2 acres land out of Gata No.195/3-00 in favour of Ladla Prasad and Girwar Dayal (opposite parties no.3 and 4), for being registered under Section 36 of Registration Act. The executant of the agreement Radha Mohan had not presented himself for registration of the document before the Sub-Registrar Gonda. Upon production of document by the applicant, the Sub-Registrar, Gonda had issued notice to the executant Radha Mohan through registered post, which was not received back and the Sub-Registrar refused to register the agreement on 15.03.1989. It has been stated in the application under Section 73 of the Registration Act that they had entered into an agreement to purchase the land in dispute from Radha Mohan for a sale consideration of Rs.52,000/, out of which Rs.43,000/- had been paid by him and the remaining amount was agreed to be paid at the time of execution of the sale deed. The agreement had been prepared, the seller had put his thumb impression on it and the marginal witnesses had also put their respective signatures. The seller had got

prepared his two photographs and had attached the same with the document, but thereafter he abstained from appearing for registration of the agreement. It was contended before the Registrar that the Sub-Registrar has erred in refusing registration of the documents by means of the order dated 15.03.1989 and it was prayed that the order dated 15.03.1989 be set aside and the Sub-Registrar, Gonda be directed to register the agreement for sale of the property.

6. The opposite party no.2 Radha Mohan filed his objections *inter alia* stating that all the narrations made in the agreement to sell the property, including the payment of advance money, were false. The signatures were obtained on the agreement deceitfully and, therefore, he did not appear for its registration and he had given complaints to the District Magistrate and to the Superintendent of Police through registered post. He has further stated that he had already executed a sale deed dated 07.03.1989 in favour of Dharam Raj (the petitioner no.1) in respect of the land bearing Gata No.107/1.78 acre. He further stated that he has executed another sale deed in respect of four bigha land forming a part of Gata No.195 in favour of Choutkau (the petitioner no.2). Another objection raised was that instead of filing an application under Section 73 of the Registration Act, an appeal under Section 72 of the aforesaid Act ought to have been filed. Dharam Raj and Choutkau also filed their objections. However, later on the deceased opposite party no.2-Radha Mohan and opposite party no.3-Ladla Prasad filed a compromise was on 01.11.1991, wherein Radha Mohan admitted to have executed the agreement to sell and he agreed for registration of the agreement.

7. The Registrar found that when the executant Radha Mohan did not appear for registration of the document, it cannot be said that the executant had denied execution of the sale deed and the Sub-Registrar has erred in mentioning denial under Section 35 (3) (a) of the Act in the impugned order; that the mention of wrong provision by the Sub-Registrar created a confusion in the mind of the concerned parties whether he should file an appeal under Section 72 of the Act or an application under Section 73 of the Act. The Registrar found that an appeal under Section 72 of the Act ought to have been filed, yet as the application had been filed under Section 73 of the Act, it would not be proper to leave the dispute undecided on this ground and he rejected the objection raised in this regard.

8. The Registrar found that although Radha Mohan had initially stated that the agreement to sell had been obtained deceitfully but later on he admitted that he had executed the agreement and in these circumstances, no question can be put against legality of execution of the agreement at this stage. While proceeding under Section 74 of the Registration Act, the District Registrar has to enquire whether the deeds were executed or not and whether the applicant has complied with the requirements of law, making out a case for registration of the documents. As the executant of the agreement Radha Mohan has admitted that he has executed the agreement and had requested for registration of the agreement, there was no option except for registering the deed. Accordingly, the Registrar allowed the application and set aside the order dated 15.07.1989 passed by the Sub-Registrar, Gonda and directed the Sub-Registrar to

register the agreement in case the same was presented before him within time.

9. While assailing the validity of the aforesaid order, the learned Counsel for the petitioner, Sri Mohammad Arif Khan Senior Advocate submitted that when the seller had already executed three sale deeds in respect of the property in question, he had no authority to enter into an agreement to sell the same land and, therefore, the agreement executed by him could not have been registered. He has further submitted that as the Sub-Registrar/Registrar has no power to cancel the sale deeds, he could not have registered the agreement to sell in spite of existence of the sale deeds in respect of the same property in favour of the petitioner.

10. Sri Mohd. Arif Khan, the learned counsel for the petitioner has further submitted that Rule 300 of Rules under the Registration Act, 1908 (as applicable in the Uttar Pradesh) makes it obligatory for the Sub-Registrar to satisfy himself about the competence of the executor to execute the deed.

11. In support of his submissions, the learned counsel for the petitioner has relied upon the judgment of High Court of Bombay in the case of **Hussein Abdul Rehman and company Vs. Lakmichand Khetsey**: AIR 1925 Bombay 34, **Savitri Devi and others Vs. Surendra Mohan Mohana**: 1987 Vol 5 LCD 137, **Mt. Gulab Devi Vs. Monji Ram**: AIR 1919 Lahore 156.

12. The enquiry required to be conducted by the registering officer before registration of a document is provided under Section 34 of the Registration Act, which provides as follows:

"34. Enquiry before registration by registering officers:-(1) Subject to the provisions contained in this Part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents authorised as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26:

Provided that, if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under section 25, the document may be registered.

(2) Appearances under sub-section (1) may be simultaneous or at different times.

(3) The registering officer shall thereupon—

(a) enquire whether or not such document was executed by the persons by whom it purports to have been executed;

(b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and

(c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

(4) Any application for a direction under the proviso to sub-section (1) may be lodged with a SubRegistrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

(5) Nothing in this section applies to copies of decrees or orders."

13. A bare perusal of Section 34 of Registration Act would indicate that

Registrar is merely required to satisfy himself that the persons executing the document or their representatives, assignees or authorized agents have appeared before him within the time allowed for presentation. He has to enquire whether the executant is admitting execution of the document and whether the person appearing before him is the same person, who is executant of the document. If the executant of the document admits execution thereof and the Sub-registrar is satisfied about the identity of the executant, he will register the document as directed in Section 58 to 61 of the Act.

14. Section 58 of the Registration Act contains particulars to be endorsed on documents admitted to registration, which include the signatures of every person admitting the execution of document, signatures of persons examined in reference to the document and any admission of receipt of consideration. Section 59 mandates that the Registrar shall authorize the date and his signature to all the endorsements made by him. Section 60 contains provision for issuance of certificate of registration. There is no statutory provision contained in the Registration Act which requires the Sub-Registrar/Registrar to ascertain the capacity of the executant to execute the document by satisfying himself that the executant holds a valid title in respect of the property in question.

15. Rule 300 of Rules framed under the Registration Act, 1908, reliance on which has been placed by the learned Counsel for the petition, reads as follows: -

*"**300. Parties entitled to present documents for registration.** If the document be not open to any of the objections set forth above, the registering officer, before finally accepting it for registration, should satisfy himself that the person presenting it has legal authority to do so. The persons who may present a document for registration are the flollowing :*

(a) in the case of a will, the testator, and after his death any person claiming under it as executor otherwise ;

(b) in the case of an authority to adopt, the donor, and after his death, the donee or the adopted son ;

(c) in the case of a copy of a decree or order, any person claiming under the decree or order ; (d) in any other case, any person executing or claiming under the document ;

(e) the representative or assign of any of the foregoing ;

(f) the agent of any of the foregoing.

Note. Where the Indian Registration Act, 1908 or any rule made thereunder, requires or permits any act to be done with reference to a document by a person executing or claiming under the same and the document has been executed on behalf of Municipal or District Board or is a document under which a Municipal or District Board claims, the act may, notwithstanding anything to the contrary contained in the aforesaid enactment or in any rule thereunder, be done (1) in the case of Municipal Board, by the Chairman, the Executive Officer or a Secretary of the Board, or by other officer of the Board empowered by regulation in this behalf, and (2) in the case of District Board, by the Chairman, or by any other officer of the Board empowered by regulation in this behalf."

16. A bare perusal of the aforesaid Rule indicates that it requires the Registrar

to satisfy himself that the person presenting it has legal authority to do so i.e. to present the document. The legal authority to present a document can by no stretch of imagination be read as legal authority to execute the document as the execution of a document and presentation of a document for its registration are two different and distinct things. Therefore, Rule 300 also does not require the Sub-Registrar to satisfy himself regarding title of the executant of an agreement to sale by examining as to whether he holds title of the property in question.

17. In support of his submissions, the learned counsel for the petitioner has relied upon the judgment of High Court of Bombay in the case of **Hoosein Abdul Rehman v. Lakelmichand Khetsey**: AIR 1925 Bombay 34, **Savitri Devi and others Vs. Surendra Mohan Mohana**: 1987 Vol 5 LCD 137, **Mt. Gulab Devi Vs. Monji Ram**: AIR 1919 Lahore 156.

18. In the case of **Savitri Devi** (Supra) this issue was neither involved nor was decided as to whether the Sub-Registrar is required to satisfy himself regarding title of the executant of a deed before registering the same and, therefore, this judgment is not relevant for decision of the present case.

19. The law down in the judgment in the case of **Mt. Gulab Devi** (Supra) was that a person who sets up a title to property by purchase, must prove that his vendor has a title in the property sold. In this case also the question involved was not as to whether the Sub-Registrar or the Registrar is obliged to verify the title of the presentor of an agreement to sell a property before registering it. Therefore, the contention of the learned counsel for the petitioner that the Sub-Registrar was required to record a satisfaction regarding title of the executant to execute the sale deed and that he ought to have declined registration of the document in view of the fact that the petitioner had obtained sale deed in respect of the land in question in his favour is without any force of law and same is turned down.

20. The learned counsel for the petitioner has next submitted that the seller already having sold the property in question in his favour, the agreement to sale executed in favour of the opposite party no.3 is void. This question is not required to be decided in this writ petition, which has been filed challenging the validity of the order for registration of agreement to sell. The learned counsel for the contesting respondents has submitted that a suit regarding title of the parties is pending and these questions are left open for being decided by the Civil Court, in case the same are involved therein.

21. The learned Counsel for the petitioner has next submitted that the Registrar himself has held that the the registration of the agreement was refused on the ground that the executant had not appeared for registration of the document and in these circumstances an appeal ought to have been filed under Section 72 of the Registration Act and Application under Section 73 of the Act was not maintainable, more particularly when the Registrar has himself in the order that an appeal under Section 72 of the Act ought to have been filed.

22. Section 72 and 73 of the Registration Act, 1908 provide as follows: -

*"**72. Appeal to Registrar from orders of Sub-Registrar refusing registration on ground other than denial***

of execution.—(1) Except where the refusal is made on the ground of denial of execution, an appeal shall lie against and order of a Sub-Registrar refusing to admit a document to registration *(whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate, if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order.*

(2) ...

73. Application to Registrar where Sub-Registrar refuses to register on ground of denial of execution*.—(1) When a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution, any person claiming under such document, or his representative, assign or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered."*

(2) Such application shall be in writing and shall be accompanied by a copy of the reasons recorded under Section 71, and the statements in the application shall be verified by the applicant in manner required by law for the verification of plaints." (Emphasis added)

23. The learned Counsel for the petitioner has placed reliance on Rule 364 of Rules under the Registration Act, 1908 (as applicable in the Uttar Pradesh), which reads as follows: -

"364. Appeals and applications to the District Registrar under Sections 72 and 73 of the Registration Act.

When application is made to a District Register to reverse the order of a Sub-Registrar refusing to admit a document of the District Registrar should examine it to See registration, 1 was made within time i.e. 50 days after the date of the order and secondly, whether it was of the nature of application under Section 72. or of an application under Section 73, if the application be brought within time, and be of the nature of an appeal under Section 72, the District Register shall pass such orders thereon as seem to him proper under the circumstances. If it be made within time, and be of the nature of an application under Section 73, i.e. an application to establish a right to have a document registered on account of denial of execution, the District Registrar must make the enquiries prescribed in Section-74, and pass an order accordingly. This is an obligation imposed upon him by law, which he is not at liberty to avoid by referring the applicant to a Civil Court."

24. The learned Counsel for the petitioner has submitted that the District Registrar ought to have examined whether the application was of the nature of application under Section 72 or of an application under Section 73.

25. The registrar has examined this aspect of the matter and held that the Sub-Registrar has erred in mentioning denial under Section 35 (3) (a) of the Act in the impugned order and the mention of wrong provision by the Sub-Registrar created a confusion in the mind of the concerned parties whether he should file an appeal under Section 72 of the Act or an application under Section 73 of the Act. The Registrar found that an appeal under Section 72 of the Act ought to have been filed, yet as the application had been filed

under Section 73 of the Act, it would not be proper to leave the dispute undecided on this ground and he rejected the objection raised in this regard.

26. There appears to be no illegality in the approach of the Registrar in deciding the dispute on merits in spite of mention of a wrong provision when under both the provisions, the jurisdiction vested with the registrar and no prejudice has been caused to any party by the mere mention of a wrong provision under which the appeal / application was filed.

27. The learned Counsel for the petitioner has relied upon the judgment in the case of **Hoosein Abdul Rehman v. Lakelmichand Khetsey** (Supra), in which the following questions were involved: -

"The second issue in this suit is whether the document should be ordered to be registered. It was rejected for insufficient description under section 21 of the Registration Act. The reasons for this rejection are given in the Sub-Registrar's orders of June 7, and August 13, 1923, Exhibit F, and they are summarised in the Registrar's order of September 25, 1923, Exhibit H. He there says:—

* * *

The main question is whether this view is correct, that is, whether the property is not sufficiently described in accordance with sections 21 and 22 of the Indian Registration Act so that registration of it was properly refused under section 21. Before I proceed to discuss that point, I may mention that Mr. Binning for the defendant also seeks to support the Sub-Registrars refusal to register under section 20 of the Act, on the ground that the blank in the document regarding the Port Trust number has not been initialled by the executant….."

28. None of the aforesaid questions are involved in the present case and, therefore, **Hoosein Abdul Rehman v. Lakelmichand Khetsey** (Supra), is no relevant for decision of the present case.

29. In view of the aforesaid discussions, I am of the opinion that the impugned order does not suffer from any illegality, warranting interference by this court in exercise of its writ jurisdiction. The writ petition lacks merit and the same is hereby **dismissed**.

30. The parties to bear their own costs of litigation.

(2024) 5 ILRA 2253
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Bail Application No. 3446 of 2023
Along With other connected cases

Man Singh **...Applicant**
Versus
State of U.P. **...Opp. Party**

Counsel for the Applicant:
Vishnu Murti Tripathi

Counsel for the Opp. Party:
G.A., Sunil Choudhary

Criminal Law - Criminal Procedure Code, 1973 – Sections 161, 164 & 439 - Indian Penal Code, 1860 - Sections 307, 352, 326-A/34 & 420 - Applications for Bail – offence of Acid attack – due to reason that victim who was working as Bank manager rejected loan applications of accused persons – prompt FIR – during investigation name of applicant and other co-accused was came into light – some of

co-accused has granted bail on the ground of their names were disclosed in confessional St.ment of co-accused – however, bail application of one of co-accused was rejected by co-ordinate bench of this Court while considering the injury report of victim, CCTV footage, call details as well as criminal history of twenty cases registered against him – grounds of bail is that, applicants are languishing in jail since long time, - motive & conspiracy was not supported by any cogent evidence, - no any eye witness and other co-accused has already been granted bail – court while considering the nature and manner of occurrence, takes note that (i) victim being a lady has suffered acid attack, (ii) she still recovering from scars of it, (iii) she has to pay cost for not being succumbed to pressure to undertake an illegal act to sanction such loan applicants which were not qualified for it, (iv) this court has transferred the trial to judgeship at Allahabad, (v) evidence collected during investigation about purchase of acid and actual involvement of some applicants and supporting role assigned to other applicants, (vi) certain relevant facts were not brought into notice of co-ordinate bench, which have granted bail to some co-accused – hence, bail applications are accordingly rejected - directions issued for conclude the trial expeditiously and if St.ment of victim has not been recorded, it may be recorded within a period of six months – further Victim is permitted to avail protection under witness protection Scheme, 2018. (Para – 8, 9, 18, 19)

Bail Application Rejected. (E-11)

List of Cases cited:

1. Shivani Tyagi Vs St. of U.P. & ors, 2024 INSC 343,

2. Parivartan Kendra vs U.O.I. & ors., (2016) 3 SCC 571,

3. Suresh Chandra Jana vs St. of West Bengal & ors., (2017) 16 SCC 466,

4. St. of Himachal Pradesh & anr. vs Vijay Kumar alias Pappu & anr., (2019) 5 SCC 373,

5. Deepak Yadav Vs St. of U.P. (2022) 8 SCC 559,

6. Manoj Kumar Khokar Vs St. of Raj. & anr.(2022) 3 SCC 501,

7. St. of Jharkhand Vs Dhananjay Gupta @ Dhananjay Prasad Gupta: Order Dt. 7.11.2023 in SLP (Crl) No.10810/2023,

8. Shiv Kumar Vs St. of U.P. & ors. - Order dt. 12.9.2023 in Criminal Appeal No.2782/2023,

9. Ramayan Singh Vs The St. of U.P & anr., 2024 SCC Online SC 563),

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

1. Heard Sri Vishnu Murti Tripathi, learned counsel for applicant-Man Singh, Sri Kripa Shankar Pandey, learned counsel for applicant-Santlal, Sri Pawan Shukla, learned counsel for applicant- Dharmendra, Sri Sunil Chaudhary, learned counsel for informant and Sri Roshan Kumar Singh, learned A.G.A. for State.

2. None appeared on behalf of applicant-Dilip Kumar.

3. Applicants are seeking bail arising out of Case Crime No.191 of 2022 under Sections 307, 352, 326A/34 and 420 of I.P.C. Police Station-Charwa, District-Kaushambi.

4. All the bail applications are arising out of same case crime number, therefore, decided by this common order.

5. Present case is arising out of an occurrence of an Acid attack.

6. Victim was working as a Bank Manager. On day of occurrence while she was travelling, two unknown persons came on a motorcycle and threw acid on her. A prompt F.I.R. was lodged by her father.

7. During investigation, name of applicant and other co-accused came into light that they all act as Brokers in the bank to facilitate sanctioning of loan etc and when the victim while exercising her duties as Bank Manager rejected some of loan applications, she was pressurized. However, when she did not succumb to their pressure it led her to suffer an acid attack.

8. It has been brought on record that some of co-accused have been granted bail mainly on ground that their names were disclosed in confessional statement of co-accused. However, bail application of one of co-accused namely Mohd. Azam was rejected by co-ordinate Bench of this Court vide order dated 20.2.2023, Neutral Citation No.2023:AHC:41353.

9. According to prosecution story, all accused persons hatched a conspiracy to commit crime of acid attack to deter the victim to succumb to pressure and to pass loan illegally. Victim has submitted various applications that not only she, but her family was pressurized to withdraw the case. However, it appears that cognizance has not been taken of it. Documents in this regard are being part of counter affidavit which is filed by son of informant.

10. Co-ordinate Bench while rejecting bail application of co-accused Mohd. Azam has also taken note of injury report of victim, CCTV Footage, call detail reports as well as criminal history of twenty cases registered against him.

11. Arguments have been raised by counsel for applicants that motive assigned was not supported by any cogent evidence. Theory of conspiracy also does not have support of any cogent evidence. There was no eye witness that applicants were involved in actual crime, other co-accused have already been granted bail and that victim has not suffered any grievious injury.

12. Learned counsel for the applicants further submits that applicants are languishing in jail since 17.8.2022 and 18.8.2022 respectively i.e. about one year and eight months and there is no likelihood of early disposal of trial and the applicants undertake that if enlarged on bail, they will never misuse their liberty and will co-operate in the trial.

13. Learned A.G.A. as well as learned counsel for informants have vehemently opposed the bail applications and referred documents placed on record by way of above referred counter affidavit, wherein there is discharge summary of the victim that she was given treatment at a hospital with history of chemical burn for surgical management in the Department of Plastic Surgery of Apollo Hospital.

14. Legislature has taken note that incidents of acid attack frequently occurred, therefore, in the year 2013, Section 326A of IP.C. was inserted by an Act 13 of 2013 and for reference same is mentioned hereinafter:

"S.326A : Voluntarily causing grievous hurt by use of acid, etc.

[Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be

punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim;

Provided further that any fine imposed under this section shall be paid to the victim.]"

15. As referred above, aforesaid section not only makes a crime where due to acid attack there is some damage to body of victim, but is also includes an act if undertaken with intention of causing or with the knowledge that accused is likely to cause such injury or hurt. Aforesaid section provides that in case of conviction, punishment of imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine could be awarded. It further provides that such fine shall be paid within reasonable time to meet the medical expenses for treatment of the victim. It further provides that any fine imposed under this section shall be paid to the victim.

16. In this regard, few paragraphs of a recent judgement passed by Supreme Court in the case of ***Shivani Tyagi Vs. State of U.P. & Ors, 2024 INSC 343,*** would be relevant wherein while considering challenge to suspension of sentence in a burn acid attack, the Supreme Court has observed (as per Hon'ble Rajesh Bindal, J), in its paras 9 to 11 that:

"9. This court had been taking the offence of acid attacks, which are on increase, seriously. It is even to the extent of regulating the sale of the acid with stringent action so that the same is not easily available to the people with perverse mind. Observations made by this court in paragraph 13 of ***Parivartan Kendra vs Union of India and Others, (2016) 3 SCC 571*** *being appropriate is extracted below:*

"13. We have come across many instances of acid attacks across the country. These attacks have been rampant for the simple reason that there has been no proper implementation of the regulations or control for the supply and distribution of acid. There have been many cases where the victims of acid attack are made to sit at home owing to their difficulty to work. These instances unveil that the State has failed to check the distribution of acid falling into the wrong hands even after giving many directions by this Court in this regard. Henceforth, stringent action be taken against those erring persons supplying acid without proper authorisation and also the authorities concerned be made responsible for failure to keep a check on the distribution of the acid."

10. In ***Suresh Chandra Jana vs State of West Bengal and Others, (2017) 16 SCC 466****, while rejecting the acquittal of an accused as ordered by the High Court in an acid attack case, this Court observed that the acid attack has transformed itself to a gender-based violence, which causes immense psychological trauma resulting in hurdle in overall development of the victim. Paragraph 30 thereof is extracted below:*

"30. At the outset, certain aspects on the acid attack need to be observed. Usually vitriolage or acid attack has transformed itself as a gender based violence. Acid attacks not only cause damage to the physical appearance of its victims but also cause immense psychological trauma thereby becoming a hurdle in their overall development. Although we have acknowledged the

seriousness of the acid attack when we amended our laws in 2013 [The Criminal Law (Amendment) Act, 2013 (13 of 2013).] , yet the number of acid attacks are on the rise. Moreover, this Court has been passing various orders to restrict the availability of corrosive substance in the market which is an effort to nip this social evil in the bud. [Parivartan Kendra v. Union of India, (2016) 3 SCC 571 : (2016) 2 SCC (Cri) 143] It must be recognised that having stringent laws and enforcement agencies may not be sufficient unless deep-rooted gender bias is removed from the society."

11. In another case reported as ***State of Himachal Pradesh and Another vs Vijay Kumar alias Pappu and Another, (2019) 5 SCC 373,*** *regarding acid attack on a young girl of 19 years, in which this Court observed in paragraph 13 thereof, that the victim had suffered 16% burn injuries and that such a victim cannot be compensated by grant of any compensation. Paragraph 13 is thereof extracted below:*

"13. Indeed, it cannot be ruled out that in the present case the victim had suffered an uncivilised and heartless crime committed by the respondents and there is no room for leniency which can be conceived. A crime of this nature does not deserve any kind of clemency. This Court cannot be oblivious of the situation that the victim must have suffered an emotional distress which cannot be compensated either by sentencing the accused or by grant of any compensation."

17. I have considered the above mentioned rival submissions in referred factual and legal background and in view of established principle of jurisprudence of bail i.e 'bail is rule and jail is exception' as well as relevant factors for consideration of a bail application such as (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused;(vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; (viii) danger of course, of justice being thwarted by grant of bail etc. and that an order to grant or not to grant bail must assigned reasons (see **Deepak Yadav Vs. State of U.P. (2022) 8 SCC 559, Manoj Kumar Khokar Vs. State of Rajasthan and Anr (2022) 3 SCC 501, The State of Jharkhand Vs. Dhananjay Gupta @ Dhananjay Prasad Gupta: Order dated 7.11.2023 in SLP (Crl) No.10810/2023 and Shiv Kumar Vs The State of U.P. and Ors: Order dated 12.9.2023 in Criminal Appeal No.2782 of 2023; Ramayan Singh Vs. The State of U.P. and Anr, 2024 SCC Online SC 563)**, therefore, I am of considered opinion that present is not a fit case to grant bail to applicant.

18. In the aforesaid circumstances considering nature and manner of occurrence, where victim being a lady has suffered acid attack and is still recovering from scars of it as well as taking note of other factors of law in regard to bail which is mentioned above, that she has to pay cost for not being succumbed to pressure to undertake an illegal act to sanction such loan applications which were not qualified for it. The Court also takes note that this Court has transferred the trial to Judgeship at Allahabad. The Court also takes note of evidence collected during investigation about purchase of acid and actual involvement of some applicants and

supporting role assigned to other applicants. There are CDR details as well as all applicants and other co-accused are part of large conspiracy. The Court also takes note that certain relevant facts were not brought into notice of co-ordinate Bench, which have granted bail to some co-accused.

19. Bail applications are accordingly **rejected**. However, learned Trial Court is directed to take all endeavour to conclude the trial expeditiously and in case statement of victim has not been recorded till date, it may be recorded within a period of six months from today. Victim is permitted to avail protection under Witness Protection Scheme, 2018.

20. Registrar (Compliance) to take steps.

(2024) 5 ILRA 2258
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHSRA, J.

Criminal Appeal No. 2325 of 2010
And other connected cases

Shankar @ Daddi & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Rakesh Kumar Mishra, Anshul Tiwari, Sanyukta Singh A.C.

Counsel for the Respondent:
Govt. Advocate, A.K. Tripathi

(A) Criminal Law - Criminal Procedure Code, 1973 - Section 313 - Indian Penal Code,1860 - Sections 34, 147, 148, 149, 302, 307, 379 & 411 - Criminal Law Amendment Act, - Section – 7 - Appeals – against conviction & sentence – offence of murder by forming unlawful assembly – Accused persons had allegedly assaulted upon complainant side resulting one died & anr. injuries – proof – in one set of Appeals (filed by Shankar Yadav alias Daddi, Santosh Singh, Kalloo alias Kalyan & Raghubir Yadav) – evaluation of evidence – court finds that, appellant witnesses including the injured St.d that accused persons who were carrying rifle, country made gun and axe, encircled deceased, opened fire with rifle and gave axe blows to deceased and when injured tried to save her husband and lie down on his body, accused again opened fire that hit her on her thigh - Presence of witnesses on spot was proved - Testimony of witnesses was corroborated by medical evidence - Delay in recording St.ment of injured was of no consequence since she had suffered firearm injury and only when she returned home, her St.ment was recorded - moreover, her testimony regarding description of offence and manner in which offence was committed, could not be shattered by defence - Accused persons had prior enmity with deceased - Weapons of offence were recovered from accused persons - Motorcycle of deceased which was taken away by accused was also recovered – hence, being find no merit in one set of appeals - conviction was proper. (Para – 51, 51-a,b,c,d,e,g,h, i,j)

(B) Criminal Law - Criminal Procedure Code, 1973 - Section – 313 - Indian Penal Code,1860 - Sections 34, 147, 148, 149, 302, 307, 379 & 411 - Criminal Law Amendment Act(E-11) **Section – 7 -** Appeals – against conviction & sentence – offence of murder by forming unlawful assembly – co-accused persons had allegedly assaulted upon complainant side resulting one died & anr. injuries – common intention - proof - another Appeal (filed by Ballu alias Balak Das, Toran Yadav & Bhan Singh) – evaluation of evidence – court finds that, neither motive nor enmity was attributed to co-accused persons by witnesses – no recovery was effected from them – further, record did not shows that co-accused persons had meeting of minds or sharing of common intention with accused persons for committing

murder – Prosecution witnesses have not specifically St.d how they (co-accused persons) had exactly caused injuries to deceased – held, offence under section 302/34 IPC is not proved – hence, appeal is allowed - conviction was set aside - directions issued accordingly.(Para – 51, 51-l, n, 52, 53)

One Appeal is allowed & anr. is allowed dismissed. (E-11)

List of Cases cited:

1. Suresh Sakharam Nangare Vs St. of Mah. (2012 9 SCC 249),

2. Chhota Ahirwar Vs St. of M.P. (2020 4 SCC 126),

3. Vinod & ors. Vs St. of UP (2023 0 Supreme (All) 1217),

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. These appeals have been filed against the judgment of conviction dated 16.03.2010 passed by the Additional Sessions Judge/F.T.C. 1st, Lalitpur in Sessions Trial No. 25 of 2009 arising out of Case Crime No. 356 of 2008, under Section 147, 148, 149, 302, 307, 379, 411 IPC, Police Station – Poorakala, District – Lalitpul vide which all the appellants namely (1) Santosh Singh (2) Kalloo alias Kalyan Singh (3) Shankar alias Daddi (4) Ballu alias Balak Das (5) Toran Yadav (6) Rabuvir Yadav and (7) Bhan Singh have been found guilty of offence punishable under Section 147, 148, 302/149 IPC read with Section 149, 307/149 IPC and additionally accused Shankar alias Daddi was held guilty under Section 379 and 411 IPC and the order of sentence dated 17.3.2010 vide which, appellants were directed to undergo substantive sentence of life imprisonment under Section 302/149 IPC with fine of Rs. 10,000/- each, further ten years' rigorous imprisonment under Section 307/149 IPC with fine of Rs.30,000/- each, and one year sentence under Section 147 and 148 IPC each. Shankar alias Daddi was additionally awarded two years rigorous imprisonment with fine of Rs. 500/- under Section 379/411 of IPC and in default of payment of fine, they have to undergo two years more rigorous imprisonment. All the sentences were directed to run concurrently.

2. Trial Court's record is received and paper books are ready. With the help of all the learned counsels for the appellants Sri Sita Ram Patel and Sri Anshul Tiwari and learned A.G.A. for the State, the entire evidence is re-scrutinized and re-appreciated.

3. As per prosecution version, the informant-Bhoori Raja gave a complaint that she is resident of village Chaubara, Police Station – Poora Kala, District – Lalitpur, Her son, Rajbhan Singh alias Baderaja, was having enmity with Santosh Singh and Shankar Yadav who are residents of the same village. Her son had gone to meet his Advocate at Jhansi on a motorcycle about two years ago and he was returning back from Jhansi at about 3:30 pm and while passing near to the Hanuman Temple of the village, Santosh Singh, Bhan Singh and Kalloo @ Kalyan Singh who were on another motorcycle, driven by Santosh Singh had followed and encircled her son Rajbhan Singh. From the other side of the village, Shankar Yadav, Ballu Yadav, Toran Yadav and Raghubir Yadav, carrying axe and country made pistol, came there. Santosh Singh was carrying rifle and opened fire on her son Rajbhan Singh who fell down. Thereafter Shankar Yadav also opened fire on him with his rifle and other

accused, in conspiracy with each other, attacked the son of the complainant with their weapon and gave multiple strokes and her son died at the spot. The informant alongwith her daughter-in-law, Rajju, Mulayam Singh and Mohan, resident of village, reached on the spot. Her daughter-in-law lie down on the body of her husband to save him and Santosh Singh also fired on her and she suffered bullet injury on her thigh. While running away the accused-Shankar Yadav took away the red colour "Apache - motorcycle" of her son. She took her daughter-in-law to the hospital and then came to the police station to register the F.I.R..

4. On the written complaint (Ex-ka-1) , Chick FIR No. 41/08 (Ex-Ka-7) under Section 147, 148, 149,302, 307, 379 IPC and Section 7 of Criminal Law Amendment Act, was registered at 17:15 pm on 24.7.2008. The same was entered vide report No. 21 (Ex-Ka-8) on 24.7.2008 at about 17:15 pm. Thereafter the Inquest/Panchayatnama of the dead body was conducted. Sub Inspector Ghasi Ram reached at the spot and completed Panchayatnama and through constables Jai Prakash and Babulal, the dead body was sent for postmortem and From the place of occurrence bloodstained earth was recovered. Near the dead body of Rajbhan Singh, one brass empty cartridge and three cartridges of small size were recovered in presence of the witnesses and taken in possession vide recovery memo the other documentation was entered in the case diary. During the investigation, the statement of witnesses were recorded. After the arrest of the accused persons, on the pointing out of Raghubir, an axe used in the crime, was recovered vide a separate recovery memo. Thereafter, investigation was conducted by one Balvir Singh, SHO, who submitted the charge sheet (EX-Ka-11) on 25.8.2009. Thereafter, CJM, Lalitpur committed the case to the court of Sessions.

5. Charges under Sections 147, 148, 302 read with Section 149, 307 read with Section 149 of IPC were framed by the Additional Sessions Judge on 1.7.2009. Additional charge under Section 379/411 of IPC was also framed against accused-Shankar Yadav. The accused did not plead guilty and claimed trial.

6. In prosecution evidence, Smt Bhoori Raja (PW-1) appeared and stated on line of information given to the police as recorded in the FIR. She stated that firstly Santosh Singh who was carrying rifle opened fire on her son Rajbhan Singh and her son fell down. Thereafter Shankar Yadav also opened fire on him with his rifle and other accused, in conspiracy with each other, attacked the son of the complainant with axes and multiple strokes were given and her son died on the spot. At that time, PW-1 alonwith her daughter-in-law Basant Raja (PW-2) and three persons of the village namely Rajju, Mulayam Singh and Mohan reached on the spot. Her daughter-in-law Basant Raja lie down on the body of her husband and in her presence, Santosh Singh also fired on her and she suffered bullet injury on her thigh. While running away, accused Shankar Yadav took away the red colour "Apache - motorcycle " of her son.

This witness further stated that she has gone to the police station alongwith her son Jitendra and Basant Raja and on way they met Narayan Singh who wrote the complaint and after it was read over to her, she put thumb impression on the same which is Ex-Ka-1.

7. Thereafter, Trial court opened a bundle received from the Malkhana from which this witness identified the clothes of the deceased i.e. trouser (paint), shirt, underwear, west sleeper, one black string, one ring which was Ex-Ka-1 to Ka-8. She further stated that motive for committing murder of her elder son Rajbhan Singh was that Gajraj, brother of the accused Santosh Singh ,was murdered by the father-in-law of Rajbhan Singh namely Bahadur Singh alongwith Jaibhan, Manohar, Balwant and Mardan Singh and due to that enmity her elder son was murdered. She further stated that Santosh Singh has doubt that Rajbhan Singh was having a hand in murder of his brother Gajraj. Other Brother of Santosh Singh i.e. Rudrapal was having illicit relations with Bua (father's sister) namely Harendra Raja of the deceased and thereafter, Shankar Yadav was keeping her. It was also the reason for keeping grudge with Rajbhan Singh and due to this reason they have committed murder of her son Rajbhan Singh. Santosh Singh and Shankar Yadav who forms a group had even previously fired upon one Chhote Singh who is friend of Rajbhan Singh.

8. In a lengthy cross examination by the accused persons, she has clearly stated about the manner in which occurence took place. She stated that Raghubir was carryng axe, Shankar Yadav was carrying country made rifle and Toran was carrying an axe and after firing upon her daughter-in-law, they ran away. She pleaded ignorance about the cases pending against the deceased Rajbhan Singh. She also pleaded ignorance that Rajbhan Singh faced a trial for committing dacoity at the house of Pancham Theemar of Vrindanvan Bagh at PS-Talbaihat. She also pleaded ignorance that Rajbhan was an accused of looting and attacking on SHO Ramshumar Malik. She stated that she does not know if in the murder of Brijraj Singh, Rajbhan Singh was an accused or not. Regarding identity of Santosh Singh, she stated that even prior to the incident she has seen Santosh Singh in village.

9. She further stated that she had gone to the house of one Hindupat aongwith her daughter-in-law Basant Raja. On specific question as to how much was the distance from the house of Hindupat to the place where dead body of Rajbhan Singh was lying, this witness answered that Rajbhan Singh was murdered in front of her eyes and therefore, dead body was lying in front of her.

10. In further cross examination, she has given details of the clothes worn by Basant Raja who was taken to hospital on a tractor. She denied the suggestions that in conspiracy with other witnesses, Santosh Singh and Kalyan have been falsely implicated.

11. Basant Raja (PW-2), widow of the deceased Rajbhan Singh stated that on the date of the incident at about 3-3:30 pm, her husband Rajbhan Singh was coming on a motorcycle and near Hanuman Temple he was followed by another motorcycle which was driven by Santosh Singh and Bhan Singh & Kalyan Singh were pillion riders and they encircled her husband Rajbhan Singh and from the side of the village Shankar Yadav, Ballu Yadav, Toran Yadav and Raghubir Yadav carrying axes and country made pistol came there. Santosh Singh was carrying a rifle and opened fire on her husband Rajbhan Singh who fell down. Thereafter, Shankar Yadav also opened fire on him with his rifle and other accused, in conspiracy with each other, attacked the husband of PW-2 by giving

multiple strokes with their respective weapons and her husband died on the spot. PW-2 laid down on the body of her husband and Santosh Singh also fired on her and she suffered bullet injury on her thigh. While running away, accused-Shankar Yadav took away the red colour "Apache - motorcycle " of her husband. Thereafter the police admitted her in Talmohar Government hospital and then she was referred to Jhansi medical college for further treatment.

12. This witness further stated that her maternal uncle had committed the murder of Gajraj Singh who was the brother of Santosh Singh, therefore, Santosh Singh used to doubt Rajbhan and because of this enmity, he committed murder of Rajbhan Singh @ Baderaja. She also stated that paternal (Bua) aunt of Rajbhan, namely, Harendra Raja was kept by Rudra Pal, brother of accused-Santosh Singh, and thereafter, Shankar Yadav was keeping her. This was also a reason that the accused were keeping enmity with deceased-Rajbhan. She also stated that one Chotey Singh who used to accompany Rajbhan Singh @ Bade Raja was also assaulted by Shankar Yadav along with Rajbhan, Raghubir Yadav, Kallu @ Kalyan Singh. As Chotey Singh used to help the deceased, accused were keeping enmity with her husband. She stated that she was married to Rajbhan about eight years ago and since then she is residing with her in-laws. She pleaded ignorance about involvement of Rajbhan Singh in criminal cases. She also pleaded ignorance about number of motorcycle, however, she stated that motorcycle was purchased by Rajbhan Singh about three months ago which was returned by the police to her brother-in-law. She stated that after the gunshot injury, she was bleeding and her blouse and sari etc. were soaked in blood. She also stated that one bullet is still inside her body and was not removed.

13. Further in her cross examination, she stated that even the Investigating Officer had seen her injuries. It is also stated that she stayed in the Government Hospital, Jhansi for about four days and her mother-in-law had gone there to see her. After she returned from Jhansi, the Investigating Officer came and recorded her statement.

14. Nepal, S.O.(PW-3) has stated that he knew Rajbhan Singh @ Baderaja and after murder of Rajbhan Singh @ Baderaja, he reached at the spot and then the Investigating Officer and other police officials prepared the Panchanama in which, informant, her son Jitendra, Rajpal Singh, Arvind Singh and Bhuri Raja were 'Panchs' who had signed the same. The Investigating Officer collected the bloodstained earth in two separate plastic box. After 20-22 days, the Investigating Officer came along with Shankar Yadav and informed that Shankar Yadav wants to get the revolver recovered from the place where he had concealed the same. When they reached near a pond abutting the Hanuman Temple, Shankar Yadav told that the revolver used by Santosh was thrown in the water at that place. With the help of some persons, they tried to recover the revolver but the villagers told that as many animals move inside the pond, therefore, due to their foot movement, it is not possible to recover the revolver. Thereafter, Shankar Yadav by reaching near a nursery, recovered the read colour Apachi motorcycle of Rajbhan concealed under bushes.

15. In cross examination, he has stated that there were three injuries on the

head of deceased and the blood of Basant Raja and Rajbhan was lying nearby and the Investigating Officer has collected the bloodstained earth of Rajbhan only.

16. Dr. Ajay Bhale (PW-4), an Eye Surgeon who conducted the medico legal report of Basant Raja, reported that injury no.1 is an abrasion having blue mark 1 x 4.5 cm in red colour, on the right side of the back. Injury No. 2 was a lacerated wound of 2x 1.5 cm. muscle deep on left thigh, 2.4 cm. above the knee on posterolateral. Injury No.3 was near injury no.2, of 2 x 3 cm. with tattooing which is due to burning of gun powder and there was scratch mark. Injury no.4 some hard article was present on the middle of left thigh which is 2/3 on upper side and 1/3 on lower side of the joint of the thigh. He stated that injury no. 3 and 4 can be caused with firearm, again stated that injury no. 2 and 3 can be caused by firearm. He further stated that the injured informed that the injury no. 1 is a gunshot injury. This witness proved the MLR as Exhibit-Ka-4. In his cross examination, he stated that injury no. 1 and 2 can be caused by a lathi and injury no. 4 was not an apparent wound and on checking, it was found that some thing is there inside the body which may be an old bullet. Basant Raja was in senses when she came to the doctor.

17. Dr. Pankaj Tripathi (PW-5), Eye Surgeon, who conducted the postmartum of Rajbhan Singh, found the following injuries : -

"1- Lacerated wound 4 x 1 cm, deep to bone, on the back side of skull.

2- Lacerated wound 4 x1 cm x deep to bone, 3 cm below and distant to injury no. 1.

3- Incised wound 5 x 1.5 cm x deep to bone, behind left ear on skull.

4- Incised wound 5 x 3 cm, running through and through above left ear.

5 – Incised wound 5 x 1.5 cm, deep to bone, right side on forehead.

6- Mark of contusion with swelling of size 15 x 12 cm, irregular in movement above left cheek.

7- Entry wound of bullet, size 1 x 1 cm x deep to muscle, on chest 2 cm below to collar bone having trajectory downwards.

8- Entry wound of bullet, 1 x1 cm in circle form, around which black marks of charring were present which was deep to muscles, situated on the back side of left elbow.

9- Entry wound of bullet, 1 x 1 cm deep to muscles, on medial part of left hand below injury no. 8.

10- Entry wound of bullet, 1 x 1 cm deep to muscles, around which black marks of charring were present, whose trajectory was medio superior (sic), ahead to injury no. 8.

11- Exit wound of bullet, 2.5 x 2.5, deep to muscles, on anterior medial aspect of left hand, 6 cm above left elbow.

12- firearm wound of exit 1.5 cm x 1.5 cm x muscle deep on pedial aspect above 2 cm from injury no. 11"

18. This witness stated that the cause of death was the injuries sustained by the victim .

19. During recording the statement of this witness, it was noticed that the original postmortem report was not there, therefore, the photocopy of the same was proved by this witness as Exhibit-Ka-5 and the objection regarding admissibility of the secondary evidence was kept open. This

witness stated that injury nos. 1, 2, 13 and 14 can be caused by sharp edged weapon. In cross examination, he stated that the bullets which were removed from the body of the deceased, are not shown to him in the Court at the time of recording his statement.

20. Ghasiram (P.W.-6), Sub Inspector, stated about the registration of the FIR and the manner in which the investigation was conducted and the Panchayatnama was prepared. The dead body was sent for postmortem. This witness also stated that from the spot one empty cartridge made of brass and three small bullet cartridges were recovered in the presence of witnesses, Rajbhar and Rajpal Singh Singh and were sealed in an empty match box which is Exhibit- 7 Ka/2. He also stated that one riffle 315 bore, one empty cartridge and one live cartridge were recovered from Santosh Singh on 1.8.2008 during the police encounter when police tried to arrest accused persons and a separate case was registered. Copies of chick report, *rapat*, panchayatnama, recovery of bloodstained earth, empty cartridges and the case diary were exhibited as Exhibit–Ka-9 to Ka-11. In cross examination, this witness stated that in a bundle opened in the Court, rifle and bullets are same which were recovered which and were sealed. He further stated that one cartridge kept in a bottle is of 315 bore and five empty cartridges and one cartridge on a plastic bag are of 315 bore. This witness stated that the documents, Exhibit Ka-7/1 and Ka-7/2 neither bear time nor signature / thumb mark of any witness.

21. Constable Bharat Singh (PW-7) stated that he recorded the chick FIR No.41/08 which is in his handwriting, the same was proved as Exhibit Ka-7. In his cross examination, he stated that Bhuri Raja alongwith Basant Raja (injured) came with her son Jeetu @ Jitendra, and FIR was recorded. This witness denied that Rajbhan Singh was a history sheeter.

22. Constable Jai Prakash (PW-8) proved that he was deputed by Sub-Inspector Ghasiram Sonkar to take the dead body for postmortem and he had taken the dead body to mortuary on 25.7.2008 where the postmortem was conducted. In cross examination, this witness reiterated the version given in the FIR.

23. Surendra Singh, SHO, Pali, District Lalitpur (PW-9) stated that *naksa nazri* (site plan) was prepared by him, photocopies of which is Exhibit Ka-8, however, he do not know where the original *naksha nazri* (*site plan*) is, as it may be lost . This witness further stated about recording the statement of the witnesses, arrest of the accused, recovery effected and the recovery of axe recovered on pointing out of accused-Raghubir Yadav along with other accused in a police encounter on 1.8.2008. The recovery memo of Axe was marked as Exhibit Ka-9. A bundle was open and the axe which was recovered from accused Raghubir Yadav was identified by this witness as Exhibit -Ka- 12. In cross examination, this witness stated that the original *naksa nazri* is not on record and the photocopy which is on record, was not certified by S.O. Balveer Singh in his presence. However, two carbon copies of *naksa nazri* were prepared.

24. Balbeer Singh-SHO, Police Station Jakhaura (PW-10) stated that he has undertaken the investigation and accused-Shankar surrendered on 8.8.2008 and thereafter on 11.8.2008 by taking permission from Chief Judicial Magistrate, Lalitpur, statement of Shankar was

recorded in jail, in which he stated that he can get recovered the country made pistol from a pond near the Hanuman Temple as well as motorcycle of Rajbhan Singh and thereafter, he was taken in police custody (in remand) and was taken to the pond as well as other place from where the revolver could not be recovered however, the motorcycle was recovered.

25. He further stated that on 15.8.2008, accused-Shankar alias Daddi was taken on police remand and Section 411 of IPC was added. On 17.08.2018 he recorded the statement of injured-Basant Raja and the other witnesses of Panchayatnama. After preparing khaka/plan of the recovered articles, the articles were sent to Forensic Science Laboratory, Agra through Constable Jai Prakash and submitted charge-sheet against the accused persons. He also took the Postmortem report and Medico Legal Report from the hospital.

26. This witness stated that on 11.09.2008, he sought permission from Chief Judicial Magistrate that pages nos. 1 to 9 of the original Case Diary, during the custodial investigation of Shankar were misplaced as these were given to the prosecution officer and, therefore, he sought permission of the C.J.M. to prepare certified copy of the same which was granted by CJM, Lalitpur on 11.9.2008 which is Ex.Ka-12. This witness also proved the recovery of bloodstained earth and the weapons. In cross examination, this witness stated that one axe was recovered from the accused. In lengthy cross examination by the defence about the manner of committing the offence, this witness stated on the line as informed by the informant and no dent could be made on the deposition of this witness.

27. In cross examination, this witness further stated that deceased-Rajbhan Singh alias Bade Raja is having criminal history of 21 cases in Police Station Purakala which was regarding murder, attempt to murder, N.S.A., Dacoity, Gangster Act and under Gundas Act apart from making an attempt to commit murder of one SHO Ramshumar Malik.

28. Thereafter, the Trial Court closed the prosecution evidence and the statement of accused persons under Section 313 Cr.P.C. was recorded and all the incriminating evidence was put to the accused. In his statement, accused-Santosh Singh denied that the gun was recovered from him and stated that he has been falsely implicated by the complainant as deceased-Rajbhan Singh was a history-sheeter and was murdered by some other person having enmity with him. Similar is the statement of all other accused persons.

29. Shankar alias Daddi with regard to a question that he got recovered the motorcycle, denied the same and stated that he has been falsely implicated. However, no defence evidence was led.

30. Thereafter, the Trial Court vide impugned judgment of conviction and order of sentence held the appellants guilty offences as discussed above and awarded them life sentence with fine. Thereafter, the present four appeals were filed challenging the impugned judgment dated 16.3.2010 and order of sentence dated 17.3.2010.

31. The argument of all the learned counsels for the appellants have been heard. The common argument raised by all the counsel is that deceased-Rajbhan Singh was having criminal antecedents as it has come in the statement of PW-10 that he was

involved in 21 criminal cases regarding murder, attempt to murder, N.S.A., Dacoity, Gangster Act and under Gundas Act and, therefore, he was having enmity with many persons and only after he was murdered by some unknown persons, the informant has falsely named the appellants.

32. It was also argued that both PW-1 and PW-2 are not eye-witnesses and they had reached the spot after the incident. Counsel argued that there is huge distance between the house of the appellant and place of occurrence and, therefore, the story put forward by PW-1 and PW-2 that they immediately reached at the spot and had witnessed the occurrence is not sustainable. Reference is drawn to the cross examination of the witnesses to submit that they have admitted that their house is far away from the place of occurrence which is near the temple.

33. It was also argued by all the counsels that the injuries sustained by Basant Raja (PW-2) are self inflicted injuries and she is also not an eye-witness. Counsel further argued that reason for falsely implicating the appellant is that it has come in the statement of PW-1 and PW-2 that the real paternal aunt (Bua) namely, Harendra Raja was illegally kept by Rudrapal, the real brother of accused-Santosh Singh, and thereafter Shankar Yadav was keeping her and due to this reason, the appellants have been falsely implicated.

34. Counsel for the appellants, Kallu alias Kalyan Singh, Ballu alias Balakdas, Toran Yadav, Raghubir Yadav and Bhan Singh, have argued that no motive or enmity was attributed towards them and, therefore, there was no occasion for them to commit murder of Rajbhan. It was also argued on behalf of aforesaid five accused that even as per the F.I.R. version, first Santosh Singh opened fire on Rajbhan Singh and thereafter Shankar Yadav had opened fire. Counsel submits that deceased-Rajbhan Singh died due to firearm injuries which were given by Santosh Singh and Shankar Yadav.

35. It is also submitted that it has come in the statement of PW-10 that Rajbhan has even made an attempt of life of one SHO Ramshumar Malik and therefore he had criminal antecedents of many cases.

36. Next argument raised by the counsels are that it has come in the statement of Balbir Singh, IO, (PW-10) that all the accused persons except Shankar Yadav were arrested during a police encounter, however, with regard to police encounter, no evidence has come on record to show that the police personnel were present at the alleged place of encounter and his oral statement to prove this fact is not sufficient.

37. It is next argued that as per the cross examination of Balbir Singh, IO, (PW-10), only one gun was recovered on the identification of Santosh Singh and one axe was recovered from Raghubir Singh and Motorcycle from accused-Shankar Yadav. Therefore, the allegation against other accused are not proved beyond doubt.

38. It is also argued that it has come in the statement of PW -9 SHO Surendra Singh that no axe was recovered from accused-Raghubir Yadav. Counsel further submitted that statement of injured witness Basant Raja was recorded by Investigation Officer (PW-10) on 17.8.2008 as admitted

by Balbir Singh, IO, (PW-10) in which he has stated that he when the investigation was transferred only on 8.8.2008.

39. Counsel submitted that statement of Basant Raja was recorded after about 26 days of the incident i.e. 24.7.2008 and, therefore, she has made improvements in her statements.

40. Counsel further submits that there are material discrepancies in the statement of PW-1 and PW-3 regarding the place of occurrence, clothes worn by the deceased, recovery effected from the spot and regarding recovery of bloodstained earth. PW-2 had failed to give description of motorcycle used by deceased-Rajbhan.

41. It is thus argued that both PW-1 and PW-2 are not the eye-witnesses rather they reached at the spot after incident had taken place and have falsely implicated the appellants.

42. It is also argued that it has come in the statement of PW-4 Dr. Ajay Bhale, an eye surgeon, who conducted the medico legal report that injury no.4 was an old injury as no fresh injury was seen. A reference is drawn to the cross examination of this witness who has stated that injury No.3 and 4 are caused by firearm and injury No.2 & 3 are caused by firearm. In further cross examination, this witness stated that injury No.1 and 2 can be caused with a lathi blow whereas injury no.4 is relating to some old bullet inside the body and she has not suffered any injury on the vital part.

43. It is submitted that both Dr. Ajay Bhale (PW-4) and Dr. Pankaj Tripathi (PW-5) who conducted the medico legal report of Basant Raja and postmortem report of Rajbhan Singh are eye surgeons and are not expert to give opinion about the weapon with which the injuries were caused. A reference is drawn to the statement of PW-5 who conducted the postmortem of deceased Rajbhan who has stated that injury No.1 and 2 and 13 & 14 were cause with sharp edged weapon (Kundalaya).

44. In reply, learned A.G.A. for the State has argued that both the eye witnesses i.e. PW-1 and PW-2 have not only supported the prosecution version but also clearly deposed about the manner in which the incident took place.

45. Learned A.G.A submits that both the witnesses have stated that accused Santosh Singh and Shankar Yadav were having enmity with deceased Rajbhan Singh and on account of the same, they committed his murder.

46. Learned counsel submits that though it is argued by the learned counsel for the appellants that PW-1 and PW-2 are not eye witnesses and they reached after the incident had taken place. However, in cross examination of both the witnesses i.e. PW-1 and PW-2, no suggestion has been given by either of the accused that they were not present at the spot or they have not witnessed the incident.

47. Learned counsel submits that a prompt FIR has been registered by the prosecution and the ocular version of the prosecution is duly supported by medical version. Prosecution witnesses have explained about the injuries sustained by the deceased and even by PW-2, an injured eye witness.

48. Learned counsel submits that trial court has granted permission to record the

secondary evidence vide Ex. Ka-11 and only thereafter, some document shows the original version were duly proved by PW-9, the Investigating Officer.

49. Learned counsel also argued that the deceased suffered as many as 14 injuries, out of which, injury nos. 7, 8, 9, 10, 11 and 12 are firearm injuries and injury nos. 3, 4 and 5 are incised wounds which are caused by sharp edged weapon like axe and injury no.1 and 2 are lacerated wound and, therefore, it is proved that same were caused by the country made pistol and from the sharp edged side of axe or from the blunt side of the axe.

50. Learned counsel submits that mere fact that the deceased was having criminal history is no ground to hold that prosecution version is false as it is duly supported by two prosecution witnesses out of which PW-2 herself is an inured witness, who suffered firearm injury on her thigh.

51. After hearing learned counsel for the parties, we find no merit in appeals of Shankar Yadav alias Daddi, Santosh Singh, Kalloo alias Kalyan Singh, and Raghubir Yadav, however, we find merit in the appeals of Ballu alias Balak Das, Toran Yadav and Bhan Singh for the following reasons:

(a) We find no merit in the argument advanced on behalf of the accused persons that PW-1 – Bhoori Raja and PW-2-Basant Raja are not the eye witness. Firstly, both the witnesses, in clear terms, have stated that they reached the spot and found that the accused persons namely Santosh Singh, carrying rifle, Shankar Yadav carrying country made gun and another accused, carrying axe, encircled deceased Rajbhan Singh. Santosh Singh opened fire with the rifle which hit Rajbhan Singh and he fell down. Thereafter, Shankar Yadav opened fire with his rifle to Rajbhan Singh and other accused gave axe blow to Rajbhan Singh. Presence of both these witnesses on the spot is also proved from the fact that when PW-2 Basant Raja tried to save her husband deceased Rajbhan Singh and lie down on the body of her husband. Santosh Singh again opened fire that hit PW-2, Basant Raja on her thigh. Morever, in cross examination of both the witnesses no suggestion was given by either of the accused that neither they are the eye witnesses nor they were present on the spot. Therefore, the argument raised by the learned counsel for the appellant is not sustainable.

(b) The medical evidence ie. post mortem report of deceased Rajbhan Singh prove that he sustained as many as 14 injuries out of which, injury nos. 7, 8, 9, 10, 11 and 12 are firearm injuries and injury nos. 3, 4 and 5 are incised wounds which are caused by sharp edged weapon like axe and injury no. 2 is lacerated wound and, therefore, it is proved that same was caused by the country made pistol and from the sharp edged side of axe or from the blunt side of the axe which shows that on pre meditated mind, the accused persons firstly opened fire on deceased Rajbhan Singh, and then gave him multiple axe blows.

(c) Even the statement of PW-4 , Doctor, who conducted the MLR of PW-2 Basant Raja prove that she suffered firearm injury which as per ocular version was caused by Santosh Singh from his rifle when she tried to save her husband.

(d) Recovery of rifle from Santosh Singh is also proved from the statement of PW-6, the Investigating Officer, in whose presence, sealed parcels were opened and chick report, inquest report, recovery of blood stained earth,

empty cartridge and case diary i.e. Ex-Ka-9 to K-11 and the rifle of 315 bore with bullets were recovered and he proved that these weapons are the same which were recovered from Santosh Singh.

(e) The police, during investigation, on the pointing out of Shankar Yadav alias Daddi, tried to recover the gun used in the crime which was thrown in a village pond, but despite best efforts could not recover the same. However, on the same date, the motorcycle of the deceased which was taken away by Shankar Yadav was recovered as proved by PW-10, who after seeking permission from the Chief Judicial Magistrate, took his custody and recovered motorcycle.

(f) The argument raised by the learned counsel for the appellant that original document of the investigation were not produced, is also not correct as it has come in the statement of PW-10 that vide order dated 11.9.2008, the Chief Judicial Magistrate had granted permission to lead secondary evidence recorded on page no. 128 of the original case diary and the order was produced on record as Ex-Ka-12, and thereafter, the prosecution has led the secondary evidence.

(g) It is also proved on record by PW-1 and PW-2 that accused Santosh Singh and Shankar Yadav were having enmity with deceased Rajbhan Singh. Gajraj Singh, elder brother of the accused Santosh Singh was murdered by father-in-law of Rajbhan Singh namely Bahadur Singh alongwith three other persons and Santosh Singh having a doubt that even Rajbhan Singh was also involved in the murder of his brother, and was keeping enmity with the deceased. Santosh Singh even fired upon Basant Raja (PW-2) who is the daughter of Bahadur Singh. Accused-Kalloo alias Kalyan Singh is real brother of Santosh Singh and both came together on one motorcycle.

(h) It has also proved on record that Shaankar Yadav was having illicit relationship with real Bua namely Harendra Raja (father's sister of the deceased) and, therefore, even Shankar Yadav was having enmity with the family of Rajbhan Singh.

(i) The argument raised by the learned counsel for the appellant that FSL report is not proved, though may be an instance in favour of the appellants, however, PW-10, Investigating Officer, has duly proved the weapon of offence which were recovered by him from the accused persons, by opening sealed parcel, he proved that the articles recovered, are the same which were recovered from Santosh Singh and from Shakar Yadav and Raghubir Yadav. Therefore, the primary evidence proves the recovery of weapons of offence from the accused persons.

(j) The argument raised by the counsel for the appellant that statement of PW-2 was recorded after much delay of the incident is also of no consequence as it has come on record of the Medical college, Jhansi that she has suffered firearm injury and only when she returned home, her statement was recorded. Moreover, in a lengthy cross examination, her testimony regarding description of offence and the manner in which the offence was committed, could not be shattered by the defence.

(k) The argument raised by the appellant that no evidence of police encounter is on record is also misplaced as it has come in the statement of prosecution witness that a separate case was registered regarding the police encounter. No further cross examination was offered on this point.

(l) However, there is merit in the contention raised by the learned counsel on

behalf of Toran Yadav, Bhan Singh and Ballu alias Balak Das. Firstly, neither any motive nor any enmity is attributed to these three accused persons by PW-1 and PW-2. Secondly, no recovery has been effected from them and thirdly nothing has come on record that they, a meeting of mind with the above four accused persons had committed murder of Rajbhan Singh. PW-1 and PW-2 have not specifically stated how they have exactly caused injuries to Rajbhan Singh even during their custodial investigation nothing was recovered from them.

(m) Counsel for these appellant has relied on the judgment of Supreme Court in ***Suresh Sakharam Nangare Versus State of Maharashtra, (2012) 9 Supreme Court Cases 249,*** wherein it is held as under :-

"21. Since the conviction of the appellant is based only with the aid of Section 34 of IPC, it is useful to refer the same:

"34. Acts done by several persons in furtherance of common intention – When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." A reading of the above provision makes it clear that to apply Section 34, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. It further makes clear that if common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds."

(n) Counsel for the appellants submits that from the prosecution evidence neither the common intention of the appellants, namely, Toran Yadav, Bhan Singh and Ballu alias Balak Das is there with the remaining four accused persons nor their active participation is proved.

(o) Reliance is also placed on the decision of Supreme Court in ***Chhota Ahirwar Versus State of Madhya Pradesh, (2020) 4 Supreme Court Cases 126,*** the Supreme Court has observed as under :-

"25. Mere participation in crime with others is not sufficient to attribute common intention. The question is whether, having regard to the facts and circumstances of this case, it can be held that the Prosecution established that there was a common intention between the accused appellant and the main accused Khilai to kill the complainant. In other words, the Prosecution is required to prove a premeditated intention of both the accused appellant and the main accused Khilai, to kill the complainant, of which both the accused appellant and the main accused Khilai were aware. Section 34 of the Indian Penal Code, is really intended to meet a case in which it is difficult to distinguish between the acts of individual members of a party and prove exactly what part was played by each of them."

(p) Learned counsel for the appellants submits that the statements of PW-1 & PW-2 only states that the other accused has caused injuries to the deceased without assigning specific roll and in absence of common intention between two sets accused persons, the appellants cannot be held guilty.

(q) Counsel for the appellant has relied on the judgment of Supreme Court in ***Vinod and Others Versus State of U.P.,***

2023 0 Supreme(All) 1217, wherein it is held as under :-

"38. Thus, in such facts and circumstances, the ingredients of Section 34 I.P.C., i.e. the common intention to kill the deceased Om Prakash is not established from the evidences. At best, as per prosecution case, the exhortation was to beat. No evidence was led by the prosecution that during the course of alleged beating, any of the accused appellants herein have exhorted or instigated the accused Rekhpal Singh to kill the deceased Om Prakash. In such facts and circumstances, even if it is assumed that the accused Rekhpal fired by his licensed DBBL gun to kill Om Prakash, then it was an unilateral act of the accused Rekhpal. Thus, the alleged gun shot injury allegedly caused by the accused Rekhpal to the deceased Om Prakash, is not in furtherance of common intention shared by the accused appellants Vinod and Pramod. In the absence of any common intention of the accused anterior in time to kill the deceased, showing a pre-arranged plan and prior concert. No evidence could be led by the prosecution to establish a prior conspiracy or pre-meditation or common intention formed either prior to or in the course of occurrence of the crime, to kill the deceased Om Prakash. In the absence of meeting of minds or sharing of common intention by the accused appellants to kill the deceased, Section 34 I.P.C. could not be invoked. Consequently, the accused appellants cannot be convicted under Section 302 I.P.C. inasmuch as it is not the case of the prosecution that the accused appellants have killed the deceased Om Prakash."

Learned counsel for the appellants submits that in absence of clear evidence from the prosecution regarding meeting of minds or sharing of common intention by all the accused to kill the deceased, Section 34 IPC cannot be invoked.

52. In view of the judgments in **Suresh Sakharam Nangare's Case (Supra), Chhota Ahirwar Case (Supra) and Vinod and others' Case (Supra),** we find that charge against appellants-Toran Yadav, Bhan Singh and Ballu alias Balak Das under Section 302/34 of IPC is not proved.

53. In view of above, we dismiss the appeal for Shankar Yadav alias Daddi, Santosh Singh, Kalloo alias Kalyan Singh and Raghubir Yadav However, we allow the appeal on behalf of Toran Yadav, Bhan Singh and Ballu alias Balak Das as these three appellants were convicted in the aid of section 34 of IPC and therefore they are acquitted of the charges. All the three appellants-Toran Yadav, Bhan Singh and Ballu alias Balak Das are on bail. Their bail stands discharged. The impugned judgment of conviction and order of sentence shall stand modified to the aforesaid extent.

54. Record and proceedings be sent to the Trial Court forthwith.

(2024) 5 ILRA 2271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2024

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Criminal Appeal No. 10230 of 2023
With other connected cases

Smt. Usha ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Ashutosh Sharma

Counsel for the Respondents:
G.A., Subedar Mishra

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 156(3), 173(2), 157, 190, 193, 202, 203, 313, 386, 397 & 482 - Indian Penal Code, 1860 - Sections 147, 148, 307, 323, 324, 325, 504 & 506 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(r), 3(1)(s), 14-A & 14-A(1) - Appeals – against order of cognizance - named FIR – investigation - final report against accused for offence u/s 324 IPC – complainant, filed Application for addition of offences u/s 325, 327 IPC – allowed – hence appeals – examination of evidence - court finds that, reliance placed upon by the appellants on the pendency of the civil dispute between the parties in the given set of facts and circumstances of the case is misplaced, as the offence contained in FIR relates to the offences against a human body, which is also supported by the medical evidence thus, it cannot be said that ingredients to constitute the offences are not made out against accused – However, as far as the addition of offences in final report is concern – same is apparently not sustainable – held, (i) Trial court is well within its jurisdiction and powers to frame charges against the accused – (ii) offences cannot be either added or subtracted in the Police Report at the stage of taking cognizance u/s 190 Cr.P.C. – Hence, impugned order to the extent of whereby the claim of the complainant has been accepted for additions of offence is not sustainable – and – it is open for the accused to press their respective claims before the Special Court at the stage of consideration of the final report for framing charges – Appeals are partly allowed.
(Para – 37, 38, 39, 40)

Appeals are partly allowed. (E-11)

List of Cases cited:

1. St. of Har. Vs Bhajan Lal (1992 SCC (CR.) 426),

2. In re Provision of Section 14-A of SC/ST Act 2015 Vs NIL (2018 SCC Online All 2087),

3. Ghulam Rassol Khan & ors.Vs St. of UP & ors.(Cri. Appeal No. 1000/2018),

4. Shantaben Burabhai Bhuriya Vs Anand Athabhai Chaudhari (2021 SCC Online SC 974),

5. Gyandendra Maurya @ Gollu Vs UOI & ors.(Cri. Misc. WP No. 7522 of 2022),

6. Ajay Kumar Parmar Vs St. of Raj. (2012 12 SCC 406),

7. Raj Kapoor & ors. Vs St. & ors. (AIR 1980 SC 258),

8. St. of Orissa Vs Debendra Nath Padhi (AIR 2005 SC 359),

9. Amit Kapoor Vs Ramesh Chander & ors. (2012 9 SCC 460),

10. Ramawatar Vs St. of Madhya Pradesh (2022 13 SCC 635),

11. Gulam Mustafa Vs The St. of Karnataka & ors. (AIR 2023 SC 2999),

12. Gian Singh Vs St. of Punj. & anr. (2012 (4) RCR (Criminal) 543),

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Appellants-Accused have filed the above separate appeals under Section 14-A(1) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to challenge the impugned order dated 17.8.2023 passed by Special Judge (SC/ST Act), Mathura in Case Crime No. 321 of 2022, under Sections 147, 148, 323, 504, 506 I.P.C. and Sections 3(1)(r), 3(1)(s) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, whereby while taking cognizance of the offences contained in final report under Section 173(2) Cr.P.C. dated 2.1.2023, additionally cognizance in respect of the

offences punishable under Section 325, 307 I.P.C. has also been taken, by allowing the application filed by respondent no.2-complainant.

2. Briefly, the facts leading to the appeals are that complainant-Lekhi S/o Lachchi got lodged F.I.R. dated 24.10.2022 bearing Case Crime No. 321 of 2022 (Annexure No.6), wherein it is alleged that on 24.10.2022 at around 4:00 p.m., he reached on his tractor at his land comprised in Khasra No. 71 measuring 0.405 hectare for ploughing, which was taken by him on lease from Mohan Singh S/o Ratiram. When the complainant started the work, suddenly Badani, Lakhkhi S/o Nandram, Kanhiya S/o Raggo, Usha W/o Keshav, Parwati W/o Lakhkhi, Pooran Devi W/o Badani, Rajkumar S/o Laxman, Vishnu S/o Lakhkhi, Keshav S/o Lakhkhi, Lalaram S/o Gyasi, Tejpal S/o Gyasi, all residents of Gazipur armed with sticks, sharp edged weapon (*Farsa*) and rods arrived there and attacked the complainant. The assault resulted in head injury and fractures to the complainant, who fell down and turned unconscious. When complainant gained consciousness, the accused persons abused him in the name of his caste and also threatened him. On these broad allegations, the F.I.R. was registered for alleged commission of offences punishable under Section 147, 148, 323, 504, 506 I.P.C. and Section 3(1)(r), 3(1)(s) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Atrocities Act, 1989').

3. After registration of the F.I.R., the investigation in the case was conducted and upon conclusion of the same, a final report dated 2.1.2023, under Section 173(2) Cr.P.C. was filed against the accused-appellants, wherein during investigation, in addition to the offences contained in F.I.R., the offence punishable under Section 324 I.P.C. was also incorporated.

4. Thereafter, the complainant moved an application dated 7.8.2023 (Annexure No.11) before the Special Court, Mathura and prayed that cognizance in respect of the offences punishable under Sections 325, 307 I.P.C. be also taken, and the Special Court, Mathura vide impugned order dated 17.10.2023 allowed the application moved by the complainant and proceeded to take cognizance of offences contained in the final report dated 2.1.2023, under Section 173(2) Cr.P.C. as well as for the offences punishable under Sections 325, 307 I.P.C. Hence, these appeals.

5. Pursuant to the notice issued in these appeals, the opposite parties were served and complainant filed his counter affidavit in Criminal Appeal No. 10230 of 2023, wherein he refuted the grounds raised by the appellants. It is pleaded that the record of the case, including the medical examination report of the injured-complainant clearly a case for alleged commission of offences punishable under Sections 147, 148, 307, 323, 324, 325, 504, 506 I.P.C. and Section 3(1)(r), 3(1)(s) of "Atrocities Act, 1989" is made out, therefore, Special Court, Mathura has rightly accepted the application of the complainant while passing the cognizance order dated 17.8.2023. In the end, it is prayed that appeals be dismissed.

6. Learned counsel for appellants has argued that the land comprised in Khata No. 29, Khasra No. 2 measuring 2.651 hectare and land comprised in Khasra No. 71 measuring 1.554 hectare situated at Mauja Ghazipur, Tehsil Gowardhan, District Mathura is a subject matter of civil

dispute between the parties and in this regard, a civil suit bearing O.S. No. 192 of 2022 (Annexure No.1), titled *Nandram Vs. Mohan Singh*, is pending adjudication before Civil Judge (J.D.), Chhata, Mathura, wherein the gift deed dated 8.4.2022 relied upon by Mohan Singh has been challenged. Learned counsel submits that after filing of the suit, defendant-Mohan Singh also filed a civil suit bearing O.S. No. 234 of 2022 (Annexure No.2), titled *Mohan Singh Vs. Kushagra Gupta and others*, seeking permanent injunction. Learned counsel refers to the report dated 15.7.2022 by Ameen (Annexure No. 3) to contend that the appellants were found in possession of the suit property.

7. Learned counsel for appellants has further pointed out that on 24.10.2022 Tara and Sunil along with other unknown persons were consuming liquor in the agriculture field of appellants and when Usha Devi confronted them, they molested her and her mother-in-law. According to the learned counsel, Tara is maternal uncle of defendant-Mohan Singh, and in this regard, a case F.I.R. dated 24.10.2022 bearing Case Crime No. 320 of 2022 (Annexure No.5) was registered against accused persons for alleged commission of offences punishable under Sections 354, 323, 504, 506 I.P.C. Learned counsel for appellants has vehemently argued that in retaliation to the civil litigation and criminal case, opposite party no.2-complainant has falsely implicated the appellants through Case Crime No. 321 of 2022, wherein investigation was not conduced properly, as while filing the charge sheet, the offence punishable under Section 324 I.P.C. was also added.

8. Learned counsel for appellants submits that Special Court, Mathura while considering the final report under Section 173(2) Cr.P.C. for the purposes of taking cognizance of the offences has erroneously allowed the claim of the complainant and has also taken the cognizance in respect of the offences punishable under Sections 325 and 307 I.P.C. Learned counsel submits that Special Court, Mathura has not examined the facts and circumstances of the case carefully and has wrongly passed the impugned order dated 17.8.2023, whereas no offence as alleged would be made out against the accused, as the necessary ingredients to constitute the alleged offences are missing. In support of his arguments, learned counsel has placed reliance upon the decision of Hon'ble Supreme Court ***State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426***. Learned counsel submits that if, the allegations contained in the prosecution case are taken to be true on its face value, no offence would be made out, therefore, he prayed that impugned order dated 17.8.2023 be set aside and the criminal proceedings against the appellants be dropped.

9. The prayer is opposed by learned A.G.A., who is assisted by learned counsel for complainant-respondent no.2. Learned counsel for respondent no.2 has argued that merely because a civil dispute between the parties is pending, that alone would not be a ground to disbelieve the case of the prosecution, as the evidence regarding injuries suffered by the injured are supported with documentary evidence. Learned counsel for opposite party no.2 submits that since the investigation in the case was not conducted properly and the charge sheet was not filed in respect of the serious offences committed by the accused, therefore, the complainant-respondent no.2 rightly availed his right to seek indulgence of the Special Court, Mathura for redressal

of his grievance. According to learned counsel, while passing the cognizance order dated 17.8.2023, the Special Court, Mathura has given valid reasons and no interference is warranted by this Court. He prays that appeals be dismissed.

10. Learned counsel for the parties have been heard and with their assistance case file has been perused carefully.

11. Amid growing confusion on choice of availing the remedy by a litigant, against an order taking cognizance of the offence(s) based upon police report under Section 173(2) Cr.P.C., passed by Special Court constituted under "Atrocities Act, 1989" i.e. either to file a statutory appeal under Section 14-A of "Atrocities Act 1989" or by invoking inherent powers under Section 482 Code of Criminal Procedure, this Court deems it appropriate to analyse this question before adjudicating the appeal on its merits. Previously, twice this question has been examined by two full benches of this Court in ***In re Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 Vs. Nil, 2018 SCC OnLine All 2087 and Ghulam Rassol Khan and others Vs. State of U.P. And others, passed in Criminal Appeal No. 1000 of 2018***, but, the conflicting views by the co-ordinate Benches of this Court are still continuing.

12. Full Bench of this Court in the case of ***re Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (Supra)*** had formulated five questions for consideration and question 'B' related to the exercise of powers under Section 482 Cr.P.C. by the High Court and the same reads as under:-

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

13. Upon considering the various decisions of the Hon'ble Supreme Court and the High Courts, the Full Bench answered the said question in the following manner:-

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

14. The subsequent decision by Full Bench of this Court in ***Gulam Rasool Khan's case (Supra),*** also echoes the voice of the decision by the earlier Full Bench, wherein it is held that in view of Section 14-A of "Atrocities Act, 1989" aggrieved person cannot be allowed to invoke the inherent powers under Section 482 Cr.P.C.

15. Frequently, the petitions originally filed under Section 482 Cr.P.C. challenging such an order taking cognizance of offences based on police report have been received for adjudication, after those were converted as appeals under Section 14-A of "Atrocities Act, 1989". Recently, to solve the puzzle, another co-ordinate Bench of this Court has again referred this issue before the larger Bench vide order dated 20.9.2023 passed in Application U/S 482 No. 8635 of 2023, which is pending consideration.

16. The Code of Criminal Procedure, 1973 provides for two modes of criminal prosecution, one based upon police investigation report, whereas other is founded on directly instituted private complaint before the Magistrate and these procedures are contained in Chapter XII and XV, respectively. The prosecution in a complaint case begins with the filing of the complaint directly before the court of competent jurisdiction and in the said procedure, the police has no role, except to hold an inquiry under Section 202 Cr.P.C., if, directed by the court. The said inquiry is also for an extremely limited purpose of ascertaining the truth in the allegations contained in the complaint. The procedure meant for a complaint case contemplates that Magistrate shall record the statements of complainant and other witnesses under Section 200 Cr.P.C. and upon considering the same the Magistrate may either dismiss the complaint under Section 203 Cr.P.C. or may issue process against accused. After appearance of the accused, the trial would progress further based upon the classification of the offences i.e. either before the court of Sessions or the Magistrate.

17. Unlike the complaint case, the prosecution based upon police report consists of two stages; First- upon an information to the police, a First Information Report is registered, regarding alleged commission of cognizable offence(s) followed by submission of special report to the concerned court as envisaged under Section 157 Cr.P.C. and thereafter a thorough investigation in the alleged crime is conducted. After completion of investigation, the final report is prepared as contemplated under Section 173(2) Cr.P.C. for submission before the court of competent jurisdiction for consideration. Second- The trial court examines the final report, and, if, a prima facie case is made out against the accused, the cognizance of offence(s) is taken and then comes the stage of framing of charges against the accused. After commencement of trial, the prosecution witnesses are examined and after discharge of onus by prosecution, the accused is called upon for explanation, if, so required and thereafter, the defence evidence, if any, is recorded. Lastly, the trial court delivers the final judgment of conviction or acquittal.

18. Ordinarily, the trial before the court of sessions commences after committal of the case by the Magistrate as the cognizance of offences directly by Sessions Court is prohibited by Section 193 Cr.P.C., but Section 14 of "Atrocities Act, 1989" contains an exception to Section 193 Cr.P.C. in respect of offences punishable under "Atrocities Act, 1989", as it provides that the courts established or specified under the "Atrocities Act of 1989" shall have power to directly take cognizance of the offences. Section 14 reads as under:-

14. Special Court and Exclusive Special Court.—

(1) *For the purpose of providing for speedy trial, the State Government*

shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

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

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

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

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

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

19. Thus, by virtue of this statutory provision, the powers vested with the Magistrate to either direct registration of case for investigation contained in Section 156(3) Cr.P.C. or cognizance of offences contemplated by Section 190 Cr.P.C. can also be exercised by the Special Court constituted under Atrocities Act, 1989. This issue has already been dealt with by the Hon'ble Supreme Court in the case of ***Shantaben Burabhai Bhuriya vs. Anand Athabhai Chaudhari, (2021) SCC Online SC 974***, which has been followed by this Court in ***Gyanendra Maurya @ Gullu Vs. Union of India and others, passed in Criminal Misc. Writ Petition No. 7522 of 2022.*** In this regard, the relevant observations contained in ***Gyanendra's case (Supra)*** read as under:-

"34. We have already held that Section 156(3) of Code 1973 will apply to investigation of an offence under the Act 1989 and as per Section 156(3) of Code 1973 a Magistrate empowered under Section 190 of Code 1973 can order such investigation and as, in view of proviso to Section 14 of the Act 1989 read with Section 190 of Code 1973, it is the Courts established or specified under the Act 1989 which can take cognizance directly in respect of an offence under the Act 1989, therefore, the Magistrate can not and should not take cognizance of an offence under the Act 1989 as such power when specifically vested with the Special Courts under the Act 1989 should be exercised by the latter as held in Shantaben Burabhai Bhuriya vs. Anand Athabhai Chaudhari1, therefore, this power under Section 156(3) of Code 1973 has to be exercised by such Exclusive or Special Courts and not the Magistrate.

20. The expression *"cognizance"* as contained in Section 190 Cr.P.C. has not been defined in the Code of Criminal Procedure, but the same has been analyzed by the Hon'ble Supreme Court as well as various High Courts, and consistently it has been held that whenever a court of competent jurisdiction applies its judicial mind to the complaint or the police report, as the case may be, the cognizance of

offences is said to be taken. Here it becomes relevant to examine Section 14-A of "Atrocities Act, 1989", which provides for a remedy of appeal in respect of judgment and other decisions passed by Special Court. The Section 14-A reads as under:-

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

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

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

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

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

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

21. At this juncture, it would be apt to note that many orders like refusing or granting bail to an accused, discharge of accused or framing charges against an accused are not appealable as per the provisions of Cr.P.C., but by virtue of Section 14-A of "Atrocities Act, 1989" even an appeal lies against such orders. Of course, the remedy of appeal is provided by the "Atrocities Act, 1989", but such appeals are to be adjudicated by following the procedure of adjudication of appeals enshrined under Chapter XXIX Cr.P.C., particularly the Section 386 Cr.P.C., which defines the powers of appellate court. The said Section 386 Cr.P.C. reads as under:-

386. Powers of the Appellate Court.

- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in the case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction -(i)reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or(ii)alter the finding, maintaining the sentence, or(iii)with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence -(i)reverse the finding and sentence and acquit or discharge the

accused, or order him to be re-tried by a Court competent to try the offence, or(ii)alter the finding maintaining the sentence, or(iii)with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper :

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement :

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

22. A reading of the above section would show that Clauses (a), (b) and (c) of the above section are only relating to the appeals against acquittal, conviction and enhancement of sentence, respectively, therefore, an appeal challenging the order taking cognizance of offences would fall with the ambit of Clause (d). The above Section also indicates that appellate jurisdiction can be effectively exercised, if, an appeal is founded on substance, coupled with reasoning, whereupon the impugned decision of the trial court is based. Of course, trial proceedings may carry more procedural aspects, but the appellate court is not supposed to pay much importance to the procedural aspect over and above the material substance. In criminal law there is only one remedy of criminal appeal, therefore, it is incumbent for the appellate court to examine the substance threadbare to test the correctness and validity of an order under challenge in an appeal.

23. Most importantly, at the stage of considering the final report under Section 173(2) Cr.P.C. for the purposes of taking cognizance, neither the complainant is heard nor any opportunity of hearing is provided to the accused, and this exercise only consists of examining the police report carefully to find out, if, the same is complete in all respects and contains the relevant material such as statements of witnesses recorded under Sections 161 and 164 Cr.P.C., other documentary evidence collected during investigation etc. and makes out a case for further proceedings. Thus, assuming the conclusion of Investigating Officer to be correct, the court passes the cognizance order only to indicate the initiation of criminal proceedings in respect of the alleged commission of offences.

24. Time and again it has been held that at the stage of passing the cognizance order detail reasons are not required to be given by the court and in this regard reference can be made to the decision of Hon'ble Supreme Court in the case of ***Ajay Kumar Parmar Vs. State of Rajasthan, (2012) 12 SCC 406,*** wherein the following observation have been made:-

"19. The Magistrate, in exercise of its power under Section 190 CrPC, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 CrPC, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record

and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case."

25. Besides, by now it is also a settled law that while examining the final report under Section 173(2) Cr.P.C., even at the stage of framing of charges against the accused, the trial court is not required to examine the proposed defence of the accused. Since, the examination is confined to the material collected during investigation, therefore, appeal against the order taking cognizance filed on the strength of the proposed defence by the accused would otherwise contain a material, which was neither before the trial court nor was examined while passing the order taking cognizance of offences. But, strangely the appellate jurisdiction is frequently invoked by the accused persons under Section 14-A of "Atrocities Act, 1989" by relying upon the proposed defence or other relevant material, whereas the same cannot be analyzed for the first time, that too by the appellate court in exercise of appellate powers.

26. Comparatively, as far as the trial proceedings based upon a complaint case is concerned, the same is different in nature as in the said procedure, the evidence of complainant and other witnesses is recorded by the trial court itself, whereupon it forms an opinion to find out, if, a prima facie case for alleged commission of offences is made out for issuance of the process against the accused, or the complaint is dismissed under Section 203 Cr.P.C. Thus, any order passed by Special Court in a complaint case can be effectively assailed in an appeal provided under Section 14-A of "Atrocities Act, 1989". In other words, the appellate court would be examining the evidence on record and the reasons given by the Special Court while passing the order under challenge in appeal.

27. Doubtlessly, the nature of the order taking cognizance of offences on a police report cannot be construed as an interlocutory order to hold that in terms of Section 14-A of "Atrocities Act, 1989", no appeal against such an order would lie, but in essence the remedy of appeal may not be effective, particularly when the order under challenge does not contain elaborate reasoning. Examining this issue from another angle, it is noticed that in many cases under other penal laws, the challenge to such orders taking cognizance of offences by the court of competent jurisdiction, are made by filing a petition under Section 482 Cr.P.C., and not by availing the alternative statutory remedy of revision.

28. Now, here the question arises that even if, the remedy of appeal is available to the litigant in terms of Section 14-A of "Atrocities Act, 1989" against an order of taking cognizance of offences, whether inherent powers of this Court envisaged under Section 482 Cr.P.C. can be invoked to challenge such an appealable order as well as the entire criminal proceedings? The inherent powers vested with the High Court under Section 482 Cr.P.C. is extraordinary in nature and the same has been examined by the Hon'ble Supreme Court on numerous occasions and in the various decisions it has been invariably held that these powers can be exercised irrespective of the availability of the alternative remedy, if, the case falls within the guidelines and parameters laid down by the Hon'ble Supreme Court. As

far as the maintainability of a petition under Section 482 Cr.P.C. is concerned, there is no bar to exercise the said inherent powers. The Hon'ble Supreme Court in ***Raj Kapoor and others Vs. State and others, AIR 1980 SC 258,*** while discussing the inherent powers of the High Court vested under Section 482 Cr.P.C., made the following observations:-

The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397 can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made; easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code.

In Madhu Limaye's case this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in s. 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution:

"would be to say that the bar provided in sub- section (2) of section 397 operates only in exercise of the revisional power of the High Court meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principle enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then if the assailed is purely on an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction."

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extra-ordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the courts process. Can we state that in this third category the inherent power can be exercised ? In the words of Untwalia. J.:

"The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."

29. Further, the Hon'ble Supreme Court in ***Bhajan Lal's case (Supra)*** laid down the guidelines for exercise of inherent powers under Section 482 Cr.P.C. The relevant observation reads as under:-

8.1. In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guide- ï7 myriad kinds of cases wherein such power should be exer- cised:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

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

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

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

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

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

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

30. As discussed in the preceding paragraphs that at the stage of framing charges, the trial court is required to look into the material relied upon by the prosecution alone, and the proposed

defence of the accused cannot be analyzed, and while examining this issue, the Hon'ble Supreme Court in ***State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359,*** has observed that in exceptional cases, the High Court may consider unimpeachable evidence relied upon by accused while exercising jurisdiction under Section 482 Cr.P.C. The relevant observation reads as under:-

16. All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition. This aspect, however, has been adverted to in State Anti-Corruption Bureau, Hyderabad and Another v. P. Suryaprakasam [1999 SCC (Crl.) 373] where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage is of being heard and nothing beyond that (emphasis supplied). The judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by this Court. It may be noticed here that learned counsel for the parties addressed the arguments on the basis that the principles applicable would be same whether the case be under Sections 227 and 228 or under Sections 239 and 240 of the Code.

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20. Reliance placed on behalf of the accused on some observations made in Minakshi Bala v. Sudhir Kumar and Others *[(1994) 4 SCC 142] to the effect that in exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence is misplaced for the purpose of considering the point in issue in these matters. If para 7 of the judgment where these observations have been made is read as a whole, it would be clear that the judgment instead of supporting the contention sought to be put forth on behalf of the accused, in fact, supports the prosecution. Para 7 of the aforesaid case reads as under:-*

"If charges are framed in accordance with Section 240 CrPC *on a finding that a prima case has been made out - as has been done in the instant case - the persons arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under* Section 173 CrPC *and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under* Sections 240 *CrPC the High Court in its revisional*

jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 *and* 240 *CrPC; nor would it be justified in invoking its inherent jurisdiction under* section 482 *CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."*

21. It is evident from the above that this Court was considering the rare and exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under Section 482 of the Code. In the present case, however, the question involved is not about the exercise of jurisdiction under Section 482 of the Code where along with the petition the accused may file unimpeachable evidence of sterling quality and on that basis seek quashing, but is about the right claimed by the accused to produce material at the stage of framing of charge. (emphasis supplied)

31. Again in ***Amit Kapoor Vs. Ramesh Chander and others, (2012) 9 SCC 460***, the Hon'ble Supreme Court after discussing the scope of inherent powers under Section 482 Cr.P.C. laid down the principles to be considered for proper exercise of jurisdiction under Section 482 Cr.P.C. The relevant observations are as under:-

19. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be

committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6) The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. (emphasis supplied)

32. Recently, the Hon'ble Supreme Court in ***Ramawatar Vs. State of Madhya Pradesh, (2022) 13 SCC 635,*** again

examined the inherent powers of the High Court contained in Section 482 Cr.P.C., specifically in the context of the "Atrocities Act, 1989" and held that where the proceedings are attended with mala fide intentions and would be abuse of the process of law, the High Court can exercise its powers to quash the proceedings. The relevant observations read as under:-

15. Ordinarily, when dealing with offences arising out of special statutes such as the SC/ST Act, the Court will be extremely circumspect in its approach. The SC/ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes. The Act is also a recognition of the depressing reality that despite undertaking several measures, the Scheduled Castes/Scheduled Tribes continue to be subjected to various atrocities at the hands of uppercastes. The Courts have to be mindful of the fact that the Act has been enacted keeping in view the express constitutional safeguards enumerated in Articles 15, 17 and 21 of the Constitution, with a twin-fold objective of protecting the members of these vulnerable communities as well as to provide relief and rehabilitation to the victims of caste-based atrocities.

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

33. The above view of the Hon'ble Supreme court is again reiterated in ***Gulam Mustafa Vs. The State of Karnataka and Others, AIR 2023 SC 2999,*** wherein the offences including the offence under "Atrocities Act, 1989" were quashed. Relevant part is reproduced:-

36. What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than not, relating to land and/or money are given the colour of criminality, only for the purposes of exerting extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating dispute with regard to the ownership of the land in question, and the criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no.2/her family members. It is evident that resort was now being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reasons and is a clear case of vengeance.

37. The Court would also note that even if the allegations are taken to be true on their face value, it is not discernible that any offence can be said to have been

made out under the SC/ST Act against the appellant. The complaint and FIR are frivolous, vexatious and oppressive.

38. This Court would indicate that the officers, who institute an FIR, based on any complaint, are duty- bound to be vigilant before invoking any provision of a very stringent statute, like the SC/ST Act, which imposes serious penal consequences on the concerned accused. The officer has to be satisfied that the provisions he seeks to invoke prima facie apply to the case at hand. We clarify that our remarks, in no manner, are to dilute the applicability of special/stringent statutes, but only to remind the police not to mechanically apply the law, dehors reference to the factual position.

39. For the reasons aforesaid, the Court finds that the High Court fell in error in not invoking its wholesome power under Section 482 of the Code to quash the FIR. Accordingly, the Impugned Judgment, being untenable in law, is set aside. Consequent thereupon, the FIR, as also any proceedings emanating therefrom, insofar as they relate to the appellant, are quashed and set aside.

34. Also, in many cases where during pendency of the cases, if, the parties arrive at a compromise, even then the appeals are filed before this Court under Section 14-A of "Atrocities Act, 1989" for setting aside the entire criminal proceedings including the order taking cognizance of the offences on the strength of the said compromise. But, in the considered opinion of this Court, such an appeal cannot be construed as an appropriate remedy, particularly when the said compromise between the parties is not a part of the record of the case pending before the Special Court. The Hon'ble Supreme Court has injected some elasticity in laying down the principles for quashing of the criminal proceedings even in non compoundable offences on the basis of compromise, but all such decisions relate to the exercise of inherent powers vested with High Courts under Section 482 Cr.P.C. In ***Gian Singh Vs. State of Punjab and another, 2012 (4) RCR (Criminal) 543,*** the Hon'ble Supreme Court has also discussed the powers of High Court under Section 482 Cr.P.C. and the relevant portion reads as under :-

"The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of

Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

35. Consequently, in view of the above discussion, as well as in the light of the law laid down by the Hon'ble Supreme Court it is abundantly clear that even if, Section 14A "Atrocities Act, 1989" provides for a remedy of appeal against an order taking cognizance of the offences, but in a given case, which falls within the guidelines and parameters laid down by the Hon'ble Supreme Court for exercise of powers under Section 482 Cr.P.C., the said remedy can be availed by the litigant, and availability of alternative statutory remedy cannot be a ground for refusal to exercise the inherent powers under Section 482 Cr.P.C., if the merits of the case makes out a case for exercise of inherent powers under Section 482 Cr.P.C.

36. Since, the jurisdiction of the appellate court is limited, therefore, at least in cases where the trial is either yet to commence or pending, the appellate powers cannot be exercised for setting aside the criminal proceedings on the basis of compromise between the parties. In such cases also the appropriate remedy would be to invoke inherent powers under Section 482 Cr.P.C.

37. Now, while turning back to the merits of these appeals, this Court finds that reliance placed upon by the appellants on the pendency of the civil dispute between the parties in the given set of facts and circumstances of the case is misplaced, as the offence contained in F.I.R. relates to the offences against human body. Further, the case of the prosecution is also supported by the medical evidence of the injured-Lekhi (Annexure No.5), which reveals that in all he suffered ten injuries on various parts of his body. The case of the prosecution is further supported by the statement of Dr. Sushil Kumar, Civil Hospital, Mathura, thus, it cannot be said that ingredients to constitute the offences are not made out

against the accused, who are specifically named in the F.I.R.

38. However, as far as the addition of offences in the final report under Section 173(2) Cr.P.C. by Special Judge (SC/ST Act), Mathura is concerned, the same is apparently not sustainable in the eyes of law. Again it is observed that at the stage of taking cognizance of offences on the basis of police report, hearing is not provided to the complainant or the accused and addition of the offences under Section 325 and 307 I.P.C. without hearing the accused would certainly result in prejudice to them. Apart from this, in-depth evaluation of the charge sheet under Section 173(2) Cr.P.C. is conducted at the stage of considering the prosecution case for the purposes of framing charges against the accused, and if, the material on record indicates that some other offence, which is not contained in the charge sheet is also prima facie made out against the accused, the trial court is well within its jurisdiction and powers to frame charges against the accused in respect of such offences. Consideration of the final report at the stage of taking cognizance of offences is for a limited purposes and while analyzing the similar issue, the Hon'ble Supreme Court in ***State of Gujarat Vs. Girish Radhakrishnan Varde, 2013 (0) Supreme (SC) 1070,*** held that the offences cannot be either added or subtracted in the police report at the stage of taking cognizance under Section 190 Cr.P.C. In this regard, the relevant observations made by Hon'ble Supreme Court are reproduced below:-

14. The question, therefore, emerges as to whether the complainant/ informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offence into the chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 *of the Cr.P.C. as the case may be which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.*

39. In view of above discussion, this Court has no hesitation in holding that only to the limited extent, whereby the claim of

the complainant has been accepted by taking cognizance of the offences punishable under Sections 325 and 307 I.P.C. is not sustainable, thus, to that extent, the impugned order dated 17.8.2023 is set aside. However, it shall be open for the complainant/ prosecution as well as the accused to press their respective claims before the Special Court, Mathura at the stage of consideration of the final report under Section 173(2) Cr.P.C. for framing of charges.

40. Resultantly, without meaning any expression of opinion on the merits of the case, these appeals are partly allowed and while upholding the impugned order dated 17.8.2023 only to the extent of taking cognizance of offences contained in police report under Section 173(2) Cr.P.C., the remaining part is hereby set aside.

(2024) 5 ILRA 2290
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Application U/S 482 No. 2700 of 2024

Heera Lal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Imran Ullah, Vineet Vikram

Counsel for the Opp. Parties:
G.A., Rishikesh Tripathi

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 200, 202 & 482 - Indian Penal Code, 1860 - Sections 323, 504, 506, 390 & 392 - Application u/s 482 - for quashing the summoning order – issued in a complaint case to face trial u/s 392, 323, 504, 506 IPC – plea has taken by the applicants that applicant no. 1 is a retired judicial officer and is about 87 years old, residing at Kanpur Nagar and suffering from leukoderma a skin disease, it is not possible for him to travel up to Banda to commit such incident - court finds that, opposite party no. 2 is the son-in-law of the applicant no. 1, - after death of daughter of applicant no. 1 his grandson is residing with him, - a civil proceedings to obtain custody of child is pending, - and an application for granting temporary custody of his son is already been dismissed by the concern court – these facts did not disclosed in his complaint – one of the witnesses in his complaint was not produced as witness which creates suspicion about the incident – Moreover, did not immediately seek police assistance by making a call to police help line number – he filed moved a complaint to the SP through registered post after around five weeks of the incident and filed the complaint u/s 156 (3) around two and half month after the alleged incident – held, present case is squirely covered under clause (7) of the judgment of Bhajan lal Vs St. of Har. and the present proceedings are manifested with malafide and are instituted with an ulterior motive due to private and personal grudge – accordingly, the present application is allowed – entire proceedings against the applicants is hereby quashed. (Para – 21, 23, 24, 25)

Application u/s 482 Allowed. (E-11)

List of Cases cited:

1. Pramod Suryabhan pawar Vs St. of Mah. & anr. (2019 vol 9 SCC 608),

2. Mohammad Wajid & anr. Vs St. of up & ors.(2023 SCC Online SC 951),

3. St. of Har. Vs Bhajan Lal (1992 Supp. 1 SCC 335)

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Heard learned counsel for the applicants, learned Additional Government Advocate for the State.

2. Present application under Section 482 Cr.P.C. has been filed to set aside the impugned order dated 21.7.2023 in Special Criminal Case No. 108 of 2022 passed by the Additional District and Sessions Judge/Special Judge (Dacoit Affected Area), Banda, whereby the applicants have been summoned to face trial under Section 392, 323, 504 and 506 I.P.C. It is also prayed to stay further proceeding of the aforesaid case during pendency of present application.

3. The case of the complainant as set out in this complaint is that:-

3.1. That the marriage of the first informant was solemnized in 2005 with the daughter of applicant no. 1. Out of this wedlock, one son namely Harshit was born. The son is residing with the applicants after the death of his mother.

3.2. The first informant is working as a professor/doctor in Government Hospital, Banda.

3.3. The applicants are keeping Harshit with them without any authority and have fetched thousands of rupees from the first informant.

3.4. On 9.3.2022, at around 3:40 P.M., applicant no. 1 armed with a rifle, applicant no. 2 carrying a hockey stick along with 3-4 unknown persons possessing lathi, danda in their hands, arrived at the house of opposite party no. 2.

3.5. Applicant no. 1 made a demand of Rs. 10 lacs for the education and welfare of Harshit.

3.6. When opposite party No. 2 expressed inability to give such money, applicant no.1 became furious. He exhorted other persons to kill him. The complainant was badly beaten up by all persons with kicks, fists, lathi danda and butt of the rifle.

3.7. Applicant No. 2 snatched gold chain worth Rs. 1,00,000/- and applicant no. 1 took Rs. 50,000/- cash from the drawer. When opposite party No. 2 raised alarm, witnesses Hub Lal and Asha came there. When they challenged the applicants, the applicants ran away threatening the complainant with life.

4. The application under Section 156(3) Cr.P.C. was treated as complaint. The statement of complainant was recorded under Section 200 Cr.P.C. The statements of the witnesses such as PW-1 Hub Lal and PW-2 Pavitri Devi were recorded under Section 202 Cr.P.C.

5. The learned Special Judge (DAA), Banda, vide summoning order dated 21.07.2023 summoned the applicants to face trial under Sections 392, 323, 504, and 506 I.P.C.

6. Mr. Imran Ullah, learned counsel for the applicants submitted that applicant no. 1 is a senior citizen aged 87 years. He is a retired Judicial Officer. He retired as Additional District and Sessions Judge in 2004. Opposite party no. 2 is son-in-law of applicant no. 1. Applicant no. 2 is son of applicant no. 1.

7. It is submitted by learned counsel that the applicants are residing in District Kanpur Nagar. It is not possible for applicant no. 1, who is 78 years old to travel up to Banda to commit such incident. He is bracketed an accused by his son-in-law. Opposite party no. 2 instituted proceedings against applicant no.1 to obtain custody of Harshit. The same proceedings are still pending. The interim application of the first informant had been dismissed.

8. It is vehementally argued by the learned counsel for the applicants that date of occurrence, as alleged in the complaint, is 09.03.2022. whereas, the medical examination was allegedly conducted on 12.03.2022. Opposite party No. 2 was posted in the same district hospital at Banda. Therefore, it is highly improbable that one person who is a doctor in the same hospital is not examined at the first opportunity. It is also submitted that application to S.S.P. was given on 16.04.2022, i.e. one month after the date of alleged incident. The complaint has been filed after two and half month from the date of occurrence. These facts demonstrate that the entire proceedings have been initiated as a counter blast on the basis of concocted facts and forged medical report.

9. It is further submitted that the applicant had no reason to go to Banda to demand money for the welfare and education of Harshit. Harshit is happily residing with applicants. The applicant No.1 is suffering with skin disease Leukoderma, and his medical prescriptions are brought on record which indicate that he is continuously on medicine. Due to old age complications, he is unable to walk without any support/assistance.

10. It is also submitted that opposite party no. 2 has performed second marriage after the demise of the daughter of applicant no. 1. Opposite party no. 2 had moved an application for temporary custody of Harshit for 20 days during his summer vacation. The said application was rejected by the Court.

11. It is further submitted that complaint has also been filed against three unknown persons and allegation of maar-peet committed by them is also made. During his statement under Section 200 Cr.P.C., opposite party no. 2 stated that he fell down on floor and sustained injuries. It is submitted that medical examination was conducted after three days of the alleged occurrence and no plausible explanation is offered by the complainant for such inordinate delay. No application to any Superior Authority was given immediately after the alleged incident. He did not make any call to 112 Police Help Line. Names of the unknown persons were not disclosed in primary evidence. The entire story narrated in the complaint is fabricated, unbelievable, and concocted.

12. It is vehemently argued that witness Pavitri Devi is not named as witness in the complaint while the named witness Asha is not produced by the applicant to support the version of the complaint. It is submitted that on the basis of the allegation and evidence available on record, no offence under Sections 392, 323, 504, and 506 I.P.C. is made out against the applicants.

13. Per contra, learned counsel for opposite party no. 2 vehemently opposed the prayer made by learned counsel for the applicant. He submitted that since opposite party no. 2 sustained six injuries, including fracture in his wrist, therefore the incident cannot be considered to be false. When the complainant refused to meet the demands of the applicants, they beat him up with lathi danda and butt of the rifle. Upon exortation by applicant no.1, applicant no. 2 snatched gold chain from the first informant and applicant no. 1 took Rs. 50,000 from the drawer. Therefore, prima facie, offence under Sections 392, 504, 506 I.P.C. is made out.

14. It is further submitted that all the arguments advanced by the learned counsel

for the applicants are to be examined at the time of trial. It is also submitted that proceedings pending about the custody of the child in Kanpur District Court are civil proceedings, therefore, it cannot be said that opposite party no. 2 instituted the present proceedings as a counter blast.

15. Perused the record.

16. The Hon'ble Supreme Court in ***Pramod Suryabhan Pawar VS State of Maharashtra and another, (2019) 9 SCC 608*** has considered the principles, scope, and ambit of the powers of the Court under Section 482 Cr.P.C. and held that:

"6. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and reiterated by this Court. In Inder Mohan Goswami v. State of Uttaranchal [Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1 : (2008) 1 SCC (Cri) 259] , this Court observed : (SCC p. 10, paras 23-24):

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

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

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

(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

7. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The Court in Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] noted that quashing may be appropriate where: (SCC pp. 378-79, para 102)

"102. ... (1) Where the allegations made in the first information

report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

***

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

8. In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v. State of Maharashtra [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100], (Dhruvaram Sonar) : (SCC para 13)

"13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

17. In the case of ***Mohammad Wajid and Another Vs. State of U.P. and Others, reported in 2023 SCC OnLine SC 951,*** the Hon'ble Apex Court observes that:-

"34. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of

the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation....."

35. In State of Andhra Pradesh v. Golconda Linga Swamy, (2004) 6 SCC 522, a two-Judge Bench of this Court elaborated on the types of materials the High Court can assess to quash an FIR. The Court drew a fine distinction between consideration of materials that were tendered as evidence and appreciation of such evidence. Only such material that manifestly fails to prove the accusation in the FIR can be considered for quashing an FIR. The Court held:—

"5. ...Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

6. In R.P. Kapur v. State of Punjab, AIR 1960 SC 866 : 1960 Cri LJ 1239, this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings : (AIR p. 869, para 6)

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process, no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death....."

18. Perusal of record goes to show that the complaint was filed against the

applicants alongwith 3 unknown persons. It has been alleged that the applicants along with 3 unknown persons had beaten up opposite party no. 2 with lathi danda and butt of the rifle. Participation of unknown persons is not substantiated during the statements adduced as primary evidence. Besides this, their names and identification was also not disclosed by the complainant and his witnesses. Therefore, it appears to be unbelievable that all the injuries, sustained by opposite party no. 2, were caused by applicant no. 2 only.

19. Section 390 I.P.C. provides thus:

390. Robbery.—

"In all robbery there is either theft or extortion.When theft is robbery.— Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.When extortion is robbery.— Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted."

20. In the case of ***Mohammad Wajid and Another Vs. State of U.P. and Others (supra),*** the Hon'ble Apex Court observes that:

"15. Theft amounts to 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Before theft can amount to 'robbery', the offender must have voluntarily caused or attempted to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. The second necessary ingredient is that this must be in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft. The third necessary ingredient is that the offender must voluntarily cause or attempt to cause to any person hurt etc., for that end, that is, in order to the committing of the theft or for the purpose of committing theft or for carrying away or attempting to carry away property obtained by the theft. It is not sufficient that in the transaction of committing theft, hurt, etc., had been caused. If hurt, etc., is caused at the time of the commission of the theft but for an object other than the one referred to in Section 390, IPC, theft would not amount to robbery. It is also not sufficient that hurt had been caused in the course of the same transaction as commission of the theft.

16. The three ingredients mentioned in Section 390, IPC, must always be satisfied before theft can amount to robbery, and this has been explained in Bishambhar Nath v. Emperor, AIR 1941 Oudh 476, in the following words:—

"The words "for that end" in sec. 390 clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is

committing the theft or is carrying away or is attempting to carry away the property obtained by theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances."

17. In Karuppa Gounden v. Emperor, AIR 1918 Mad 821, which followed two Calcutta cases of Otaruddi Manjhi v. Kafiluddi Manjhi, (1900-01) 5 CWN 372, and King Emperor v. Mathura Thakur, (1901-02) 6 CWN 72, it has been observed at page 824 as follows:—

"Now it is our duty to give effect to the words "for that end". It would have been open to the legislature to have used other words which would not raise the difficulty that arises here. The Public Prosecutor has been forced to argue that "for that end" must be read as meaning 'in those circumstances'. In my opinion we cannot do that in construing a section in the Penal Code. Undoubtedly, words 'in those circumstances' would widen the application of the section and we are not permitted to do that. The matter has been considered in two judgments of the Calcutta High Court one of which is reported as Otaruddi Manjhi v. Kafiluddi Manjhi (1900-01) 5 CWN 372. Their Lordships put the question in this way:

"It seems to us that the whole question turns upon the words "for that end". Was any hurt or fear of instant hurt, that was caused in the present case, caused for the end of the commission of the theft? We think not. It seems to us that whatever violence was used for the purpose of dispossessing the persons who were already in possession of the premises in question and had no relation to the commission of theft, although theft was committed at the same time."

18. Ordinarily, if violence or hurt is caused at the time of theft, it would be reasonable to infer that violence or hurt was caused for facilitating the commission of the theft or for facilitating the carrying away of the property stolen or for facilitating the attempt to do so. But there may be something in the evidence to indicate that hurt or violence was caused not for this purpose but for a different purpose....."

****

28. Section 504 of the IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence. If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the Section merely because the insulted person did not actually break the peace or commit any offence having exercised selfcontrol or having been subjected to abject terror by the offender. In judging whether particular abusive language is attracted by Section 504, IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive

language that is the test for considering whether the abusive language is an intentional insult likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.

29. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504, IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace of an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that case and there cannot be a general proposition that no one commits an offence under Section 504, IPC if he merely uses abusive language against the complainant. In King Emperor v. Chunnibhai Dayabhai, (1902) 4 Bom LR 78, a Division Bench of the Bombay High Court pointed out that:—

"To constitute an offence under Section 504, I.P.C. it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well as deeds."

30. A bare perusal of Section 506 of the IPC makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that the accused had an intention to cause alarm to the complainant."

21. Admittedly, opposite party no. 2 is the son-in-law of applicant no. 1. The daughter of applicant no. 1 has passed away. The grandson of applicant no. 1 is residing with him after her death. Opposite party no. 2 has instituted civil proceedings in Kanpur Nagar to obtain custody of his son. The application for granting temporary custody of Harshit has already been dismissed by the concerned Court. The first informant did not disclose these facts in his complaint.

22. Pertinent to mention here that the first informant name Asha as one of the witnesses in his complaint. She was not produced under Section 202 Cr.P.C. as witness. PW-2 Pavitri Devi, instead, was produced as witness. This fact creates suspicion about the incident.

23. It is worthy to note that applicant no. 1 is aged 87 years old. He is suffering with "Leukoderma", a skin disease. Besides this, several documents relating to his treatment are brought on record. Considering the age and health condition of applicant no. 1, it seems unbelievable that he could travel from Kanpur Nagar to Banda along with his rifle and to commit alleged incident.

24. It is also taken into consideration that opposite party No. 2 was working as Assistant Professor/Doctor at District Hospital, Banda in which he was medically examined on 12.3.2022. The date of occurrence is mentioned in the complaint filed by opposite party no. 2 as 9.3.2022. It is highly improbable that a doctor who is posted in the same hospital, was examined after three days of the incident. Moreover, opposite party no. 2 did not immediately seek police assistance by making a call to police help line number 112. The complainant moved an application to S.P Hamirpur through registered post on 16.04.2022 i.e. after around five weeks of the incident. The complaint is filed by him

on 28.5.2022 i.e. around two and half month after the alleged incident. Opposite party no. 2 did not offer any plausible explanation for such inordinate delay.

25. On the basis of the facts and circumstances of the case, the present case is squarely covered under clause (7) of the judgement ***Bhajan Lal vs. State of Haryana (supra).*** In view of the foregoing discussion, the Court is of the view that present proceedings are manifested with malafide and are instituted with an ulterior motive due to private and personal grudge. Therefore, the application deserved to be allowed.

26. Accordingly, the present application U/s 482 is ***allowed***.

27. The entire proceedings against the applicants in aforesaid case is hereby quashed.

(2024) 5 ILRA 2299
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Application U/S 482 No. 36921 of 2018

Shabban Khan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Mukhtar Alam, Saquib Mukhtar

Counsel for the Respondents:
G.A., Pankaj Satsangi

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 212, 213 & 482 - Indian Penal Code, 1860 - Sections – 323, 506 & 498-A - The Dowry Prohibition Act, 1961 – Sections – 3 & 4 - Application on behalf of the Sisters-in-law & Brother-in-law – for quashing the entire criminal proceeding – FIR – as per prosecution case, allegations are that, after marriage, when the informant come to her matrimonial home, accused persons are taunted her for brining less dowry and further demanded more dowry – court finds that, the law contemplates demand of dowry as punishable, however, the taunting for giving less gifts by itself is not a penal offence – more so, the demand alleged to have been made against the accused persons are general and wholly vague in nature - the date, time and manner in which the demand was made is also not been St.d in prosecution case – in terms of section 498-A IPC the cruelty would be any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman are also not shown by the prosecution – even during investigation no specific role has been assigned to the applicants – held, criminal proceedings against applicants are absurd and improbable that no prudent mind can arrived at conclusion for proceedings against applicants in view of the vague allegations – hence, entire proceedings is hereby set-aside – present application is accordingly partly allowed.
(Para – 23, 31, 32, 33, 34)

Application u/s 482 partly Allowed. (E-11)

List of Cases cited:

1. Kahkashan Kausar Vs St. of Bihar (2022 6 SCC 599),

2. Achin Gupta Vs St. of Har. (2024 INSC 369),

3. Neelu Chopra Vs Bharti (2009 10 SCC 184),

4. St. of Har. Vs Bhajan Lal (1992 Supp. 1 SCC 335),

5. SMS Pharmaceuticals Ltd. Vs Neeta Bhalla (2005 8 SCC 89).

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Saquib Mukhtar, learned counsel for the applicants and learned AGA for the State.

1-A. No one has appeared on behalf of opposite party no.2. Previously on 20.02.2024, the case was proceeded ex-parte against opposite party no. 2.

2. This application under Section 482 Cr.P.C. has been filed by the applicants for quashing the entire proceedings of Criminal Case No. 6213 of 2018 (State vs. Shabban Khan and others) under Sections 498A, 323, 506 IPC and Section 3/4 of D.P. Act, P.S. Bilsi, District Budaun arising out of Case Crime No. 689 of 2017 as well as charge-sheet dated 20.05.2018.

3. Learned counsel for the applicant submits that initially the present application was filed by five applicants, however, relief in respect of applicant no. 1-Shabban Khan (husband) has been rejected vide order dated 11.10.2018 and during pendency of the application, applicant no. 2-Shahidan Khan has died. As such, counsel for the applicants is not pressing the application in respect of applicant nos. 1 and 2, namely Shabban Khan and Smt. Shahidan Khan, respectively.

4. Learned counsel for the applicant submits that he is pressing the application only on behalf of applicant nos. 3, 4 and 5, who are married sister-in-law, brother-in-law and unmarried sister-in-law.

5. It is submitted by learned counsel for the applicants that the first information report was lodged on 04.12.2017 by the opposite party no. 2-wife with allegations that on 07.05.2017, the opposite party no. 2 was married with applicant no. 1-Shabban Khan and dowry was given at the time of marriage. Thereafter, husband and other accused persons were harassing the opposite party no. 2 and her family members for dowry. Learned counsel for applicants submits that allegations are also with regard to assault, however, there is no injury report in respect of the same.

6. It is further submitted by learned counsel for the applicants that allegations with regard to threatening have also been levelled in the first information report. Statement of the informant recorded under Section 161 Cr.P.C. is verbatim to the allegations in the first information report. He submits that general and vague allegations have been made in the FIR against applicant nos. 3, 4 and 5, however, no specific role has been assigned. Reliance has been placed on the judgment of Supreme Court rendered in **Kahkashan Kausar @ Sonam and others vs. State of Bihar and others**1, to submit that the present criminal proceedings against applicant nos. 3, 4 and 5 are liable to be quashed.

7. Learned A.G.A. has opposed the present application, however, he does not dispute the fact that no specific role has been assigned in the present case in respect of applicant nos. 3, 4 and 5.

8. Criminal law is set in motion by lodging of the First information report or complaint. The investigation is carried upon to find the truth in allegations. Setting in motion criminal law entails consequences including curtailing of liberty of individual. The criminal prosecution is based on the nature of allegations and the evidence found during investigation. It is important for the prosecution to provide material details of

the allegations and evidence to support their allegations.

9. Vague and ambiguous allegation can violate the right of the accused to due process of law and fair trial. It is fundamental principal of law that accused is subjected to fair trial. Vague allegation has significant effect on defence by creating uncertainty. Without specific details and evidence, the defence of accused may be prejudiced or accused may not be able to effectively defend himself.

10. Vague allegations can affect the defence of accused by making it difficult to formulate a targeted defence strategy. Without clear specifics or evidence to address, accused may struggle to refute the allegations or present a compelling counter argument. Lawyers typically rely on specific information to prepare their case, such as dates, time, location, and witnesses. Vague allegations lack these crucial details, leaving the defence to speculate or generalize their response, which can weaken their defence in court. The mere suggestion of wrongdoing, without substantiation, can lead to stigma and prejudice against the accused, making it harder for them to receive a fair trial. Moreover, vague allegations may prolong legal proceedings as the defence attempts to gather more information to understand the allegations.

11. In **State of Haryana v. Bhajan Lal**2, the supreme court has has laid down the categories of cases by way of illustration wherein power under Section 482 Cr.P.C. could be exercised either to prevent abuse of process of any court or otherwise to secure the ends of justice. One of the categories pointed out in the said judgement is stated in para 102 (5) which is quoted herein below :

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

12. In law, prudent person is a hypothetical person who in the facts and circumstances would conduct in a reasonable, just and fair manner. In the context of vague allegations at the stage of cognizance or summoning of accused, it is to be examined whether on the basis of the allegations in the complaint or the first information report and the evidence collected during investigation it can be said that a prudent person would come to the conclusion that there is sufficient ground for proceeding against the accused. The insufficiency of ground for proceedings against an accused may also arise when material particulars in respect of the alleged offence are absent. The sufficiency of material against an accused is a condition precedent for proceedings against an accused.

13. In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla**3, the Supreme Court has laid emphasis that the complaint must contain material to enable the court to make up mind for issuing process.

"5.Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is

sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. ***This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous.*** *Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."*

14. The question therefore arises what is the material which is required to be before the court to issue process under criminal law. The material facts and particulars to constitute an offence are required to be shown by the prosecution before the court proceeds to issue the process. The material facts and particulars are those facts which essentially would be required to constitute an offence. These facts would also include such facts which the law recognizes as important facts for proceeding with the trial of the case. These facts are also necessary to bring fairness in the process of trial.

15. The rule of law requires that the accused is visited with specific allegations in criminal prosecution. Specific allegation under criminal law would require that date, time and place of alleged offence is specified. The details of the person against whom the offence is committed or the thing in respect of which the offence was committed are disclosed. The allegations should also describe the manner in which the offence is committed.

16. In **Neelu Chopra v. Bharti**4, the Hon'ble Supreme Court has emphasised the need for specific and proper allegation in criminal law.

"9.In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not be all and end all of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accused and the role played by each and every accused in committing of that offence."

17. The Criminal procedure code not only provide the procedure to proceed against any person under criminal law. It also provides various checks to ensure that the criminal law is applied fairly on any accused person. The aforesaid aspect of fairness in criminal trial is essential in view of Article 21 of the Constitution. One of the essential part of criminal trial after the cognizance is taken is the framing of charge against an accused person. The object of framing of charge is to enable an accused to have a clear idea of what he is being tried for and the essential facts which the accused is required to meet in the trial. Section 212 of the criminal procedure code mandates that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom or the thing in respect of which it

was committed as a reasonably sufficient to give accused notice of the matter with which he is charged. Section 213 of the criminal procedure code further requires that the manner of committing offence must be stated in the charge.

18. The aforesaid requirement of law indicate that the aforesaid information is required to be disclosed to accused so that he is able to meet out the same at the trial. An incomplete, vague and omnibus allegation without specific details would violate section 212 and 213 of the Cr.P.C. It is after the Magistrate/court takes cognizance of the offence at a subsequent stage there is no possibility of supplying the aforesaid details to the accused if the same is not part of the final report/charge-sheet. It is therefore imperative that when the summons are issued the requirement of law is seen by the court concerned to have been fulfilled prior to taking cognizance.

19. It is true that the first information report is not an Encyclopedia and may not contain all material details however once an investigation is carried out it is the duty of the investigating officer to investigate into the material facts and particulars before submission of charge-sheet. The aforesaid material particulars would be necessary at the time of framing of charge. Once the material particulars are missing then in the event the trial is proceeded with the same would be in violation of the mandate under section 212 and 213 of the Cr.P.C. It is the duty of the investigating officer to investigate whether the material particulars are available in respect of the offence in question.

20. The material particular form the foundation for proceeding against an accused person under criminal law. It would be wholly impermissible under law for the informant/complainant to make allegation with regard to committing of an offence by an accused person without the material particulars as to how the offence has been committed being stated. A prudent man would never reach a conclusion for proceeding against accused person when the material particulars has not been provided by the prosecution. It is to be reminded that criminal law machinery has traits of curtailing liberty of an individual as such allegations against accused person must have factual foundation. Mere mention of the language of the section by itself would not be sufficient for the prosecution to proceed against the accused person. The particulars of offence committed by each accused person and the role played by each person in committing the offence is essentially required.

21. The effect of absence of specific allegations have been considered by the Supreme Court in **Achin Gupta Vs State of Haryana**5, which is quoted herein below:

"25. If a person is made to face a criminal trial on some general and sweeping allegations without bringing on record any specific instances of criminal conduct, it is nothing but abuse of the process of the court. The court owes a duty to subject the allegations levelled in the complaint to a thorough scrutiny to find out, prima facie, whether there is any grain of truth in the allegations or whether they are made only with the sole object of involving certain individuals in a criminal charge, more particularly when a prosecution arises from a matrimonial dispute"

22. The Supreme Court has laid down that general and omnibus allegations

without any specification are prima facie indicative of matrimonial dispute between the parties and as such do not warrant prosecution. In this respect attention is drawn to the observations made by Supreme Court in **Kahkashan Kausar v. State of Bihar**6,, which is quoted herein below:

"18. Coming to the facts of this case, upon a perusal of the contents of the FIR dated 1-4-2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes. Insofar as husband is concerned, since he has not appealed against the order of the High Court, we have not examined the veracity of allegations made against him. However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution."

23. In the present case, applicant nos. 3, 4 and 5 are proceeded with under section 498A, 323, 506 I.P.C. and ¾ Dowry Prohibition Act. As per the prosecution case, informant–wife was married to applicant no. 1 on 07.05.2017. The first information report is lodged on 04.12.2017. The first information report is lodged against accused person under the above mentioned sections. It is alleged that at the time of marriage the parents of the informant has given to applicant no. 1 rupees 4 lakhs for purchase of plot, one motorcycle, fridge, cooler, television, double bed, washing machine and to the informant Jewellary. After marriage when the informant went to the house of her husband all the accused person started harassing for giving less dowry in the marriage. The accused person demanded one car in dowry and assaulted the informant. When the informant confronted the accused person in respect of demand of dowry, the accused persons assaulted the informant. The conduct of accused person was disclosed to the parents of informant by the informant herself and when the parents of informant intervened it was stated by accused person that without giving car they will not keep the informant at her matrimonial home. It is further alleged that the accused persons were harassing the informant and were making the informant do the daily work of household. It is further alleged in first information that accused persons have administered medicine to the informant as a result of the same she became sick and thereafter the informant was thrown out of house just before the festival of Eid and threatened not to come back to matrimonial home without fulfilling the demand of car otherwise the informant would be killed. Thereafter conciliation meetings have been held however the accused person are not ready to keep informant with them.

24. The statement of the victim under Section 161 Cr.P.C. has been recorded during investigation a copy of the same has been filed along with the present 482 application. A perusal of the aforesaid

statement of the informant during investigation would demonstrate that the informant has reiterated the allegations made in first information report. The informant has also stated that no medical examination was made as she had not received any external injury.

25. The investigating officer has also recorded statement of Nirale Khan who is father of the informant. The aforesaid witness has stated that as daughter was married on 07.05.2017 with the applicant no. 1 and in the marriage he had given rupees 400,000/- for purchase of plot and other gift items to the tune of rupees 10 lakhs. He has further stated that when his daughter reached her matrimonial home then the accused person were harassing the informant for less dowry given at the time of marriage and demanded for the dowry and assaulted the informant. He has further stated that the aforesaid incident was informed by his daughter. It is also alleged that the accused persons had thrown out informant from the matrimonial home just before the festival of Eid and has stated not to come back without demand of car being fulfilled. It is also alleged that accused persons have administered some medicine to the informant as a result of same informant became sick. The aforesaid witness has further stated that the receipt of the item given in dowry is lost and is not available.

26. The investigating officer has further recorded the statement of Smt Junaida who is mother of informant. The aforesaid witness has stated that informant was married to applicant no 1 on 07.05.2017. It is further stated that in the marriage rupees 4 lakh was given for purchase of plot. It is also stated that fridge, cooler, washing machine, television, double bed, jewellery and other items were given at the time of marriage. In the marriage rupees 10 lakh was spent. It is further stated that when the informant went to the matrimonial home after marriage she was harassed by the accused person for bringing less dowry and demanded one car. Before the festival of Eid accused persons assaulted the informant and thrown her out of the house and had threatened not to come back without fulfilling the demand for car otherwise she would be killed. It is also stated that the conciliation process was also undated, however, accused persons did not agree.

27. Thereafter the investigating officer has submitted charge-sheet on 20.05.2018 and the cognizance has been taken by the court concerned on 27.07.2018. The applicants in the charge-sheet has been proceeded under section 498A, 323, 506 of the IPC and Section 3/4 of the Dowry Prohibition Act.

28. It is further to be seen that section 498A IPC provides penal consequences where the husband or relative of the husband of a woman subjects such woman to cruelty. The cruelty has been explained in explanation appended to provisions of section 498A IPC. There are two explanations provided under the aforesaid provision for interpretation of the word cruelty provided under the aforesaid section. The explanation (a) provides that the cruelty would mean any willful conduct which is of such nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical). The explanation (b) provides cruelty would mean harassment of the woman where such harassment is with a view to coerce her or any person related to her to meet any

unlawful demand for any property or valuable security or is on account of failure of her or any person related to her to meet such demand.

29. The law contemplates a woman to cruelty by the husband or relative of the husband where the demand are unlawful for any property or valuable security and the woman is harassed in respect of the same. The demand for property or valuable security is required to be unlawful. The demand would be unlawful where the same is prohibited by law or the law punishes the aforesaid demand. The demand for dowry is prohibited under the law and is also a punishable offence. The demand of an amount or thing by the husband or the relative of the husband is required to be unlawful. Where the demand has been made by the husband or his relative after marriage, however, not in connection with the marriage of the parties the same may not amount to dowry in accordance with the definition of Dowry under Section 2 of Dowry Prohibition Act. However, where any demand for property or valuable security is made before or any time after marriage in connection with the marriage of the parties, the same would come within the mischief of section 498A IPC. The words in connection with the marriage of the parties has significance that the demand for dowry is made by parties to the marriage.

30. A perusal of the first information report, as well as, the statement of the witnesses, above mentioned, would demonstrate that there is allegation with regard to payment of rupees 4 lakhs to applicant no.1 for purchase of plot at the time of marriage. The first information report and the statement of the witness does not allege that the applicant nos. 3, 4 and 5 demanded the aforesaid amount from the informant or her family members. In the first information report or the statement of the witness it has not been stated that the various items given at the time of marriage were demanded by the applicant no. 3, 4 and 5.

31. As per prosecution case, it is alleged that after marriage when the informant came to the matrimonial home, accused persons taunted for bringing less dowry and further demanded one car and have assaulted the informant. The law contemplates demand of dowry as punishable, however, the taunting for giving less gifts by itself is not a penal offence. The demand alleged to have been made by the accused person is wholly vague in nature. The date, time and manner in which the demand was made is not been stated in the prosecution case. General and vague allegations with regard to demand of dowry by the applicant nos. 3, 4 and 5 after marriage has been made. It has not been stated that what role has been played by each accused person in respect of the alleged offence.

32. There are allegations against the accused person for physical assault, however, neither the date has been stated when the assault took place nor the role assigned to each accused person is stated in the prosecution case. It has not been shown by the State that there was any injury report in respect of the alleged incident. In terms of section 498A IPC the cruelty would be any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. It has not shown by the prosecution whether the informant has suffered any grave injury or danger to life, limb or health. The

omnibus allegations have been made against the applicant no 3, 4 and 5, however, what role has been played by the aforesaid applicants is not stated in prosecution case.

33. It is also alleged in first information report that the applicants have threatened for life if the car is not given in dowry. The applicants are proceeded under section 506 IPC in this respect. Even in this respect allegations are general in nature and during investigation no specific role has been assigned to the applicant nos. 3, 4 and 5. The allegations against applicant nos. 3, 4 and 5 are not such that a prudent man can arrive at the conclusion that there is sufficient ground for proceeding against the applicant nos. 3, 4 and 5. Learned AGA could not show any material to substantiate that specific allegations existed against the applicant nos. 3, 4 and 5. The State has also not brought on record any injury report in respect of allegation of assault nor it is shown that during investigation specific allegations have been found by investigating officer against the applicant nos. 3, 4 and 5.

34. In view of the fact that allegations in the present case are vague in nature and lacks specification in respect of applicant nos. 3, 4 and 5, the criminal proceedings against applicant nos. 3, 4 and 5 are absurd and improbable that no prudent mind can arrive at conclusion for proceeding against applicants in view of the vague allegations.

35. In view thereof, the present criminal proceedings against applicant nos. 3, 4 and 5 are bad in law, therefore, entire proceedings of Criminal Case No. 6213 of 2018 (State vs. Shabban Khan and others) under Sections 498A, 323, 506 IPC and Section 3/4 of D.P. Act, P.S. Bilsi, District Budaun arising out of Case Crime No. 689 of 2017 as well as charge-sheet dated 20.05.2018, is hereby set aside and quashed against applicant nos. 3, 4 and 5, namely, Smt. Mehtab, Achchan Khan and Kumari Nida, respectively.

36. The present application under Section 482 Cr.P.C. is, accordingly, ***partly allowed.***

(2024) 5 ILRA 2307
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ-B No. 1596 of 2024

Smt. Madeena ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Krishna Kant Dwivedi

Counsel for the Opp. Parties:
Abhishek Kumar Yadav, Bhola Nath Yadav, C.S.C., Deepak Gaur

A. U.P. Revenue Code, 2006 - Sections 35(2) & 207 – Mutation – Appeal When Mutation Proceedings Are Transferred to Another Tehsil – Territorial Jurisdiction – Whether the territorial jurisdiction to entertain or decide an appeal against an order passed in a mutation proceeding transferred outside the Tehsil will lie in the transferred Tehsil or the Tehsil where the subject matter of dispute/unit is situated. Held – Under Section 35(2) of the Code, a person aggrieved by an order of the Tehsildar may prefer an appeal to the Sub-Divisional Officer. The Sub-Divisional Officer of the Tehsil where the holding (unit) is situated has jurisdiction to correct the judgment of the Tehsildar.

The word 'subordinate' has not been used in Section 35 of the Code; therefore, the Full Bench judgment in *Shabbar Husain and Others v. Dy. Director of Consolidation, Muzaffarnagar and Another*, 2019 (4) ADJ 88, does not apply to an appeal filed under Section 35(2) of the Code in mutation proceedings. (Para 20)

B. U.P. Revenue Code, 2006 - Section 206(3) - Objection to Jurisdiction of Revenue Court: An objection regarding the jurisdiction of a court will not be entertained by any appellate, revisional, or executing court unless the following three conditions co-exist: (i) the objection must have been raised before the court of first instance, (ii) it must be raised at the earliest opportunity, and (iii) the party raising the objection must demonstrate that the irregular exercise of jurisdiction has resulted in a failure of justice. All three conditions must coexist for the objection to be entertained (Para 36).

C. U.P. Revenue Code, 2006 - Sections 35(2) & 207 - Mutation Proceedings – Provision under which Appeal is maintainable Sections 35(2) or 207 - both provisions S. 35(2) as well as S. 207 allow for appeals against orders passed by the Tehsildar in mutation cases - S. 207 provides for a first appeal by any party aggrieved by a final order in specified proceedings. Any person aggrieved by an order of the Tahsildar in mutation cases of succession or transfer may prefer an appeal to the Sub-Divisional Officer u/s 35(2) of the U.P. Revenue Code, 2006. In the present case, the rejection of the mutation application by the Tehsildar led respondent No. 5 to file an appeal u/s 207 of the Code before the Sub-Divisional Officer. Petitioner contended that the appeal was not maintainable as it was filed u/s 207 and not S. 35(2). *Held*: Petitioner's contention was misconceived; mere reference to a section, whether Section 207 or Section 35(2), does not affect the maintainability of the appeal, as both provisions allow for appeals against orders passed by the Tehsildar in mutation cases. (Para 38)

D. U.P. Revenue Code, 2006 - Sections 34 - Mutation Proceedings - Appeal - objection as to the territorial jurisdiction - Property in dispute situated within the jurisdiction of Tehsil Mauranipur, District Jhansi. Respondent No. 5 moved mutation application u/s 34 in the court of the Naib Tehsildar, Rewan, District Jhansi. Case was transferred to the court of the Tehsildar, Garautha, District Jhansi. Tehsildar, Garautha, rejected the mutation application. Aggrieved, respondent No. 5 preferred an appeal before the Sub-Divisional Officer (S.D.O.), Mauranipur. Petitioner filed transfer application, and the appeal was transferred to the court of the S.D.M., Jhansi. S.D.M., Jhansi, allowed the appeal. Petitioner challenged the order in revision before the Board of Revenue, which was dismissed. Before writ court it was contended that the appeal against the Tehsildar Garautha's order could have been entertained only by the S.D.O., Garautha, and thus, the appeal before the S.D.M., Mauranipur & S.D.M., Jhansi was not maintainable. *Held:* Once the appeal was transferred on the application filed by the petitioner from the court of S.D.M., Mauranipur, District- Jhansi to the court of S.D.M., Jhansi such an objection cannot be taken by the petitioner as to the territorial jurisdiction of the S.D.M., Jhansi to entertain and decide the appeal. Further objection as to the territorial jurisdiction of S.D.M., Mauranipur was not taken by the petitioner in his objections filed to the appeal and it was only in the written arguments the said objection was taken. Petitioner also failed to demonstrate any failure of justice occurred because of the entertainment of the appeal by the S.D.M., Jhansi. Since the property in dispute was situated in Tehsil Mauranipur, even though the order in the mutation proceedings was passed by the Tehsildar, Garautha, part of the cause of action was present for respondent No. 5 to file an appeal before the S.D.M., Mauranipur. The writ petition was dismissed. (Para 40, 41)

Dismissed. (E-5)

List of Cases cited:

1. Shabbar Husain & ors. Vs Dy. Director of Consolidation Muzaffarnagar & anr. 2019 (4) ADJ 88

2. Hira Lal Patni Vs Sri Kali Nath reported in AIR 1962 SC 199

3. Pathumma & ors. Vs Kuntalan Kutty Dead by Lrs. & ors. Reported in AIR 1981 SC 1683

4. R.S.D.V. Finance Co. Pvt. Ltd. Vs Shree Vallabh Glass Works Ltd. Reported in AIR 1993 SC 2094

5. Rakhi & ors. Vs 1st A.D.J., Firozabad & ors. in AIR 2000 All 166

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard Sri Krishna Kant Dwivedi, learned counsel for the petitioner, Sri Abhishek Kumar Yadav, learned counsel appearing for the respondent no. 5, learned Standing Counsel for the State-respondents and perused the record.

2. This writ petition has been filed for following reliefs:-

"i. issue a writ, order or direction in the nature of Certiorari Quashing the impugned order dated 21.12.23 passed by the respondent no. 2 in Revision no. 3434/2023 (Ann. 1 to the writ petition) and order dated 21.08.23 passed by the respondent no. 3 in Case no. 1987/ 2023 (Ann. 7 to the writ petition).

ii. issue a writ, order or direction in the appropriate nature directing and commanding the Tehsildar, Tehsil Mauranipur, District Jhansi, i.e. respondent no. 4, to stay the further proceeding going on by him in Case no. 6802/2023, Meharban Singh Vs. Smt. Sandal."

3. Brief facts of the case as mentioned in the writ petition are that the land in dispute i.e. land no. 1362 area 0.3820, 1260 area 1.4320, 1363 area 0.1080 situated as Mauza Dewari Singhpur, Tehsil Mauranipur, District Jhansi was recorded in the name of one Noor Khan. After the death of Noor Khan, the property came to his son, namely, Natthu. Natthu was married to Smt. Sandal. Petitioner is the daughter of Natthu and Smt. Sandal. After the death of Natthu, the recorded tenure holder, name of Smt. Sandal was recorded in the revenue record being widow of Natthu. The petitioner was minor at the time of death of her father namely, Natthu. The mother of the petitioner Smt. Sandal contracted, second marriage with Sakur Khan, son of Ilahi Khan on 11.04.1975 after the death of her husband, Natthu and because of the second marriage, Smt. Sandal, the widow of Natthu was left with no right, title or interest in the land in question. Name of Smt. Sandal continued in revenue records and taking advantage of the same Smt. Sandal executed a sale deed dated 31.08.2017 of land number 1260, area 1.4320 in favour of respondent no. 5. After coming to know about the sale deed executed by Smt. Sandal in favour of respondent no. 5, the petitioner instituted Original Suit No. 114 of 2017 for cancellation of the sale dated 31.08.2017, executed by Smt. Sandal in favour of respondent no. 5. The aforesaid suit is pending and the trial court i.e. Civil Judge (Junior Division) Mauranipur, Jhansi by its order dated 23.08.2022 has directed the parties to maintain status quo. After the execution of sale deed on 31.08.2017 by Smt. Sandal in favour of respondent no. 5, the respondent no. 5 moved an application under section

34 of the UP Revenue Code, 2006 (hereinafter referred to as 'Code') for mutation of his name over the land in dispute on the basis of the registered sale deed dated 31.08.2017 in the court of Naib Tehsildar, Rewan, District- Jhansi. The aforesaid case was transferred by order dated 26.04.2018 passed by Additional Commissioner (Administration), Jhansi to the court of the Tehsildar, Garautha, District- Jhansi on an application moved by the respondent no. 5. The Tehsildar, Garautha, District-Jhansi by an order dated 04.03.2023 has rejected the mutation application filed by the respondent no. 5. Against the order dated 04.03.2023 passed by Tehsildar, Garautha, the respondent no. 5 preferred an appeal under Section 207 of the Code before the Sub- Divisional Officer, Mauranipur, District-Jhansi. The appeal filed by the respondent no. 5 was allowed by the S.D.M., Jhansi by its order dated 21.08.2023 and order passed by the Tehsildar, Garautha dated 04.03.2023 was set aside and the court below was directed to consider the case afresh on merits after providing an opportunity of hearing to all parties. The petitioner filed a revision before the Board of Revenue- respondent no.2 against the order dated 21.08.2023 passed by S.D.M., Jhansi, which was registered as Revision No. 3434 of 2023, Smt. Madeena versus Meharban Singh and others. By order dated 21.12.2023, the respondent no. 2 dismissed the revision filed by the petitioner. Hence, the present petition.

4. Primary contention raised by the counsel for the petitioner is that once the order dated 04.03.2023 was passed by the Tehsildar, Tehsil Garautha, District- Jhansi rejecting the application for mutation filed by the respondent no. 5, the appeal filed by the respondent no. 5 before the S.D.M., Mauranipur, District- Jhansi was not maintainable as it was only the S.D.M., Garautha had the jurisdiction to entertain the appeal against an order passed by Tehsildar, Garautha. It has also been contended that the S.D.M., Jhansi had erroneously allowed the appeal filed by the respondent no. 5 against the order dated 04.03.2023 passed by Tehsildar, Garautha ignoring the objection, which was taken by the petitioner in his written submissions as to the maintainability of appeal. In this regard, learned counsel for the petitioner has relied upon the judgment of this Court in case of **Shabbar Husain and others Vs. Dy. Director of Consolidation Muzaffarnagar and another reported in 2019 (4) ADJ 88**. It is further contended by learned counsel for the petitioner that against an order passed under Section 34 of the Code, an appeal lies under Section 35(2) of the Code. In the present case, the appeal has been filed by the respondent no. 5 under Section 207 of the Code and not under Section 35(2) of the Code and therefore, the appeal as filed by the respondent no. 5 is not maintainable.

5. Per contra, learned counsel for respondent no. 5 submitted that the property in dispute is situated within the jurisdiction of Tehsil- Mauranipur, District- Jhansi and as the application filed by the respondent no. 5 under Section 34 of the Code was transferred by the order of Additional Commissioner, Jhansi to the court of Tehsildar, Garautha, the same was decided by Tehsildar, Garautha. It has been further submitted that since part of cause of action arose at Tehsil, Mauranipur, the appeal filed by the respondent no. 5 was maintainable before the S.D.M., Mauranipur, District- Jhansi. It has also been submitted by the counsel for the respondent no. 5 that objection as to the

territorial jurisdiction of S.D.M., Mauranipur was not taken by the petitioner in his objections filed to the appeal filed by the respondent no. 5. It was only in the written arguments the said objection was taken. It is also contended by learned counsel for the respondent that petitioner herself filed Transfer Application No. 384 of 2023 (Smt. Madeena Vs. Meharban Singh and others) under Section 212(2) of the Code. The aforesaid transfer application filed by the petitioner was allowed by order dated 18.05.2023 passed by Commissioner Jhansi and appeal was transferred to the court of S.D.M., Jhansi and it was only thereafter, the appeal was decided by the S.D.M., Jhansi by order dated 21.08.2023. It has been pointed out by learned counsel for the petitioner that this fact regarding moving of transfer application as well as order dated 18.05.2023 passed on the transfer application moved by the petitioner has not been mentioned in the writ petition.

6. Learned counsel for the respondent has produced the photocopy of the certified copy of the order dated 18.05.2023 passed on transfer application filed by the petitioner in Case No. 384 of 2023 (Smt. Madeena Vs. Meharban Singh and others) which is taken on record. It has also been contended by learned counsel for the respondent that once the appeal was transferred on the application filed by the petitioner from the court of S.D.M., Mauranipur, District- Jhansi to the court of S.D.M., Jhansi such an objection cannot be taken by the petitioner as to the territorial jurisdiction of the S.D.M., Jhansi to entertain and decide the appeal.

7. Before considering the rival submissions raised by the counsel for the parties, it would be appropriate to look into the relevant provisions of the U.P. Revenue Code, 2006. Section 35 of the Code provides for mutation in cases of succession or transfer. Section 35 of the Code is quoted as under:-

"35. Mutation in cases of succession or transfer.---(*1) On the receipt of a report under Section 33 or Section 34, or upon facts otherwise coming to his knowledge, the Tahsildar shall issue a proclamation and make such inquiry as appears to be necessary and –*

(a) if the case is not disputed, he shall direct the record of rights (Khatuani) to be amended accordingly; and [***]

[(c) if the case is disputed, he shall decide the dispute and direct, if necessary, the record of rights (khatauni) to be amended accordingly.]

[(2) Any person aggrieved by an order of the Tahsildar under sub-section (1) may prefer an appeal to the Sub-Divisional Officer within a period of thirty days from the date of such order.]"

8. Section 207 of the Code provides for first appeals and is quoted as under:-

" 207. First appeal--*(1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in 1(column 2) of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in 2(column 4), where such order or decree was passed by a Court or officer specified against it in 3(column 3) thereof.*

(2) A first appeal shall also lie against an order of the nature specified –

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against.

9. Section 212 of the Code provides for transfer of cases and the same is quoted as under:-

***"212. Power to transfer cases**.--(1) Where it appears to the Board that it will be expedient for the ends of justice to do so, it may direct that any case be transferred from one revenue officer to another revenue officer of an equal or superior rank in same district or any other district.*

(2) The Commissioner, the Collector or the Sub-Divisional Officer may make over any case or class of cases arising under the provisions of this Code or any other enactment for the time being in force, for decision from his own file to any revenue officer sub-ordinate to him and competent to decide such case or class of cases, or may withdraw any case or class of cases from any such revenue officer and may deal with such case or class of cases himself or refer the same for disposal to any other revenue officer competent to decide such case or class of cases."

10. Section 214 of the Code provides as under:-

***"214. Applicability of Code of Civil Procedure, 1908 and Limitation Act,1963.-** Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceedings under this Code."*

11. Rule 33 of the U.P. Revenue Code Rules, 2016 is reproduced below:-

***"33. Report regarding transfer (Section 34.)** (1) Every report by or on behalf of a person obtaining possession of any land by transfer referred to in section 34 shall, as soon as possible, be made in R.C. Form-11.*

(2) The provisions of sub-rules (3) to (6) of Rule 29 shall mutatis mutandis apply to every report submitted under this rule.

(3) While submitting a report under this rule, the applicant shall also file an affidavit to the effect that the transfer under reference does not contravene the provisions of section 89 of the Code, but where such declaration has been made in the deed, the affidavit under this sub-rule would not be required.

(4) The transferee submitting report for mutation on the basis of transfer shall pay the mutation fee fixed by Government Order issued from time to time."

12. Rule 29 of the U.P. Revenue Code Rules, 2016 is quoted as under:-

***"29. Report regarding succession (Section 33(1))---**(1) Every report by or on behalf of a person obtaining succession possession of any land by succession referred to in section [Section 33(1)] shall be made, as soon as possible, in R.C. Form-9.*

(2) In the application/report for mutation on the basis of Will or intestate succession, the deceased shall not be impleaded as opposite party. In the case of report on the basis of Will, the heir of clause (a) of section 108 or section 110 as the case may be and if there is no heir of the aforesaid clause and in the case of intestate

succession, the heir of the succeeding clause of section 108 or section 110 as the case may be, shall be impleaded as opposite party.

(3) Separate reports shall be made for each village and if the land lies in more than one Tahsil, the Collector shall decide in which Tahsil, the proceedings shall be held.

(4) The aforesaid report may be submitted to the Revenue Inspector through the Lekhpal. The Lekhpal shall immediately issue a receipt therefor. No stamp duty is required to be paid for such report.

(5) If the person obtaining possession by succession is a minor, then such report may be submitted by his guardian or through next friend. (6) If more than one person jointly obtain possession over the land by succession, a report by any one of them shall be deemed to be sufficient compliance for the purposes of section 33(1)."

13. Rule 188 of the U.P. Revenue Code Rules, 2016 is quoted as under:-

***" Provisions of the Code to apply (Section 214)**--Where in relation to any suit, application or proceedings under the Code, any express provision has been made in the said Code or these rules or Regulations made thereunder, the provisions of the Code, these rules or regulations will apply, notwithstanding anything contained in the Code of Civil Procedure, 1908, or the Limitation Act, 1963."*

14. Rule 192 of the U.P. Revenue Code Rules, 2016 is as under:-

***"192. Deterimination of questions in summary proceedings (Section 225 A).** (1) All the questions arising for determination in any summary proceeding under this Code or these rules shall be decided upon affidavits.*

(2) The following proceedings shall be treated as summary proceedings, namely:

Section	***Particulars***
24	*Demarcation proceedings*
25	*Proceeding regarding rights of way and other easements.*
26	*Proceeding regarding removal of obstacle.*
30(2)	*Proceeding regarding physical division of minjumla number.*
31(2)	*Proceeding regarding determination of shares.*
32	*Proceeding regarding correction of records.*
35	*Mutation proceedings.*
38	*Proceeding regarding correction of error or omission.*
49	*Proceeding regarding revision of map and records.*
58	*Proceeding regarding dispute arising in respect of any property referred to in sections 54, 56 or 57.*
66	*Proceeding regarding inquiry into irregular allotment of Abadi sites.*
67	*Proceeding regarding eviction of unauthorised occupants.*
80	*Proceeding regarding declaration for non-agricultural use.*
82	*Proceeding regarding cancellation of declaration.*
98	*Proceeding regarding permission to transfer*

	Bhumidhari land to person other than Scheduled Caste.
101	*Proceeding for exchange.*
105(2)	*Proceeding for possession of Land.*
128	*Proceeding for cancellation of allotment and lease.*
149 & 150	*Proceeding for eviction of Government lessee.*
193	*Proceeding to set aside sale for irregularity.*
195	*Proceeding for setting aside of sale by Collector or Commissioner.*
212	*Proceeding for transfer of cases.*

(3) The State Government or the Board may declare any other proceeding except the suits under the Code or these rules as the summary proceeding.

(4) The procedure for disposal of summary proceedings is contained in Revenue Court Manual."

15. R.C. Form -11 is reproduced as under:-

R.C. FORM-11
[See Rule-33(1)]
Report regarding transfer of land u/s 34 of U.P. Revenue Code, 2006

To,

The Tahsildar
…….Tahsil
……..District

1. Name, parentage and address of applicant……

2. Particulars of land acquired by transfer (including area and land revenue……..)

3. Name, parentage and address of transferor……...……
……

4. Name, parentage and address of other transferee if any ……

5. Nature of transfer (sale, gift etc.……)

6. Date of execution and registration of deed of transfer……

7. Amount of consideration…….……
……

8. Any other details.

Date:

……..
Signature of applicant

16. The judgment in the case of Shabbar Husain (supra) relied upon by the petitioner deals with revision filed under Section 48 of the U.P. Consolidation of Holdings Act, 1953 therefore,s it will be useful to look into provisions of Section 48 of the U.P. Consolidation of Holdings Act. Section 48 of the U.P. Consolidation of Holdings Act, 1953 provides for revision and reference under the U.P. Consolidation of Holdings Act, 1953 and the same is quoted as under:-

***"48. Revision and reference**. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order (other than an interlocutory order) passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.*

(2) Powers under sub-section (1) may be exercised by the Director of

Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation (I) For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (II) - For the purposes of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.

Explanation (III). - The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."

17. In the case of Shabbar Husain (supra) the following question was referred to the Full Bench of this Court, which is quoted in para 2 of the judgment and the same is reproduced as under:-

"The question for determination is thus stated in the referring order:
"Whether the territorial jurisdiction to entertain/decide appeal or revision, against the order passed on the objection or appeal transferred outside the district will be at the transferred district or at the district where the subject matter of dispute/unit situates?"

18. Interpreting the provisions of the U.P. Consolidation of Holdings Act, 1953 the aforesaid question was answered by the Full Bench in following terms:-

"35. If an appeal or objection is transferred outside of the district, an application (revision) under section 48 of the Act would lie before the Deputy Director of Consolidation of the same District, where the matter was transferred and not in the District where holding or unit situates."

19. In paragraph 14 of the judgment in the case of Shabbar Husain and others Vs. Dy. Direction of Consolidation Muzaffarnagar and another (supra); this court has held as under:-

"....the Director of Consolidation may call for and examine the record of any case or proceeding taken by any subordinate authority. The word 'subordinate' in the section assumes significance. It clearly denotes that the revisional court can correct the order of its subordinate authority. Therefore, the Deputy Director of Consolidation of the district, where the case was transferred can correct the order of the Settlement Officer, Consolidation, who is his subordinate authority. In case revision is filed in the district where the holding (unit) situates, the revisional authority, in our opinion, has no jurisdiction to correct the judgment of the appellate authority of another district, who is not his subordinate authority."

20. The judgement in case of Shabbar Husain (supra) will not apply to

the present proceedings as the Full Bench was interpreting a provision i.e. Section 48 of the U.P. Consolidation of Holdings Act, 1953, which is different than the Section 35 of the Code. Under Section 48 of the U.P. Consolidation of Holdings Act, word 'subordinate authority' has been used whereas in the Section 35(2) of the Code, it has been provided that a person aggrieved by an order of the Tehsildar under sub-Section (1) may prefer an appeal to Sub-Divisional Officer. Word 'subordinate' has not been used in the Section 35 of the Code, therefore, the judgment in case of Shabbar Husain (supra) will not apply to an appeal filed under Section 35(2) of the Code.

21. Unlike Code of Civil Procedure, (hereinafter referred to as C.P.C.), (Section 15 to Section 21), the U.P. Revenue Code, 2006 does not provide for place of suing, but from the reading of provisions of Sections 34, 35, Rule 33 and RC Form 11, it is apparent that an application or the report has to be submitted to the Tehsildar of the Tehsil, within whose jurisdiction the land is situated.

22. Thus, it is the place where the property i.e. land lies, an application has to be made to the concerned Tehsildar having jurisdiction over the area. Section 214 of the Code quoted above provides that the provisions of C.P.C. will apply to every suit, application or proceedings under this Code. Rule 186 of the U.P. Revenue Code Rules, 2016 provides that the provisions of C.P.C. shall not be applicable to the summary proceedings under the Code or these Rules, but the principles enshrined in the C.P.C., 1908, shall be observed in the disposal of such proceedings. Rule 192 of the U.P. Revenue Code Rules, 2016 provides that the proceedings under Section 35 of the Code shall be treated as summary proceedings and therefore, even if the provisions of the C.P.C. are not to be applied, the principles enshrined in the C.P.C. have to be followed while deciding the proceeding under Section 35 of the Code.

23. Section 21 of the C.P.C. provides that no objection as to place of suing shall be allowed by any Appellate or Revisional court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

24. Section 21 of the C.P.C. is quoted as under:-

"4[(1)] No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

2.....

3....."

25. Section 206 of the Code provides for jurisdiction of civil court and the revenue courts. Section 206 of the Code is quoted as under:-

"206. Jurisdiction of civil court and revenue courts.---(1) Notwithstanding anything contained in any law for the time being in force, but subject to the provisions of this Code, no civil court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any Revenue Court or revenue Officer is, by

or under this Code, empowered to determine, decide or dispose of.

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

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

(b) no Court other than the revenue Court or the revenue officer specified in 5(column 3) of the Third Schedule shall entertain any suit, application or proceeding specified in 6(column 2) thereof.

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

26. Sub-clause 3 of Section 206 of the Code provides that objection as to jurisdiction that a court or officer mentioned in sub-Section 2 (b) has or has no jurisdiction with respect to any suit, application or proceeding, shall not be entertained by any appellate, revisional or executing court, unless the objections is taken before the court or officer of the first instance, at the earliest opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice. Though, Section 206 of the Code deals with the jurisdiction of the Civil Court viz. a viz. Revenue Court, but the principle underlying the said provision will also apply to the facts of the present case.

27. The Supreme Court in the case of **Hira Lal Patni Vs. Sri Kali Nath reported in AIR 1962 SC 199**, in paragraph no. 4 has held as under:-

"4. The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of Ledgard v. Bull, 13 Ind. App. 134 (P. C.). In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree-holder. The plaint had been filed after obtaining the necessary leave of the High Court under Cl. 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit in over the parties to it. But in the instant case there was no such inherent lack of jurisdiction.

The decision of the Privy Council in the case of 13 Ind. App. 134 (P. C.) is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the court of the subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the Court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial jurisdiction is one which does not go to the competence of the Court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under Cl. 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through Court, he would be deemed to have waived his objection to the territorial jurisdiction of the Court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like S. 21 of the Code of Civil Procedure."

28. The objection has to be taken at the earliest possible opportunity and if the same is not taken, the objection cannot be taken before the appellate or the revisional court. Apart from this, the party raising the objection has to demonstrate that because of irregular exercise of jurisdiction has resulted in failure of justice. Keeping in view the provisions of Section 206 of the Code as well as Section 21 of the C.P.C., the objection as to place of suing has to be taken at the first opportunity and failure to take such an objection will result that the person/party cannot take this objection at appellate or revisional stage.

29. In the facts of the present case, the original application under Section 35(2) of the Code was moved within the jurisdiction of Tehsildar, Tehsil-Mauranipur, where the property in dispute was situated. On a transfer application moved by the respondent no. 5, the application under Section 35 of the Code filed by the respondent no. 5 was transferred to the court of Tehsildar-Garautha, another sub-division of District-Jhansi where the said proceedings were decided. Being aggrieved by the judgment passed by the Tehsildar- Garautha, respondent no. 5 filed an appeal before the S.D.M. Mauranipur under Section 35(2) of the Code.

30. Learned counsel for respondent no. 5 submitted that it was open to the defendants to waive the objection and if they did so, they could not subsequently

take the objection. The petitioner has failed to take objection at the earliest possible opportunity as to the jurisdiction of Sub-Divisional Officer, Mauranipur to entertain the appeal has forfeited his right and he cannot be permitted to take such objection at this stage or before the revisional court. It has also been pointed out by learned counsel for the respondent that it was only on a transfer application moved by the petitioner herself being Case No. 384 of 2023 under Section 212(2) of the Code, appeal which was filed before the S.D.M. Mauranipur was transferred to the court of S.D.M., Jhansi. It is the S.D.M., Jhansi which has ultimately decided the appeal. Once the appeal itself has been transferred on an application filed by the petitioner to the court of S.D.M., Jhansi, now it is not open for the petitioner to challenge that the S.D.M. Jhansi or S.D.M. Mauranipur has no jurisdiction to entertain the appeal and it was only the S.D.M. Garautha has jurisdiction to decide the appeal as the order was passed by the Tehsildar, Garautha. The factum of filing transfer application has not been denied by the petitioner rather in his written submissions made before the Tehsildar- Jhansi which are filed along with the supplementary affidavit, this fact has been admitted in paragraph number (झ)of the written submissions that the appeal was transferred from the court of S.D.M. Mauranipur to the court of S.D.M., Jhansi, by order passed by the Commissioner, Jhansi, Mandal-Jhansi, Jhansi. When the appeal was filed in the court of S.D.M., Mauranipur, no such objection was taken by the petitioner. Rather taking an objection in this regard, the petitioner choose to file a transfer application and got the appeal transferred from the court of S.D.M., Mauranipur to the court of S.D.M., Jhansi. At the stage of final hearing, the petitioner submitted written submissions before the S.D.M., Jhansi wherein this objection has been taken for the first time by the petitioner.

31. The submission of learned counsel appearing for the respondent no. 5 is well founded. As a general rule, neither consent nor waiver (sis), acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit or appeal. But Section 21 of the Code provides an exception, and a defect as to the place of suing, that is to say, the local venue for suits/ appeals cognizable by the Courts under the Code may be waived under this section. The waiver under Section 21 is limited to the objections in the appellate and revisional Courts. But Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Section 15 to 20 may be waived. Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it.

32. In case of **Pathumma and Ors. Vs. Kuntalan Kutty Dead by Lrs. And Ors. Reported in AIR 1981 SC 1683**, in paragraph no. 3, the Supreme Court has held as under:-

"3. We have heard learned counsel for the parties on the question of jurisdiction. An unfortunate aspect of this litigation has been that although that question has been agitated already in three courts and has been bone of contention between that parties for more than a decade, the real provision of law which clinches it was never put forward on behalf of the appellant before us nor was adverted to by the learned District Judge or the High Court. That provision is contained in sub-section (1) of Section 21 of the Code of Civil Procedure which runs thus:

21 (1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfilment of the following three conditions is essential:

(1) The objection was taken in the Court of first instance.

(2) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.

(3) There has been a consequent failure of justice.

All these three conditions must co-exist. Now in the present case conditions Nos. 1 and 2 are no doubt fully satisfied; but then before the two appellate Courts below could allow the objection to be taken, it was further necessary that a case of failure of justice on account of the place of suing having been wrongly selected was made out."

33. In case of **R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd. Reported in AIR 1993 SC 2094**, the Supreme Court has held as under:-

"...It may be further noted that the Learned Single Judge trying the suit had recorded a finding that the Bombay Court had jurisdiction to entertain and decide the suit. Sub- sec.(1) of Section 21 of the Code of Civil Procedure provides that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been consequent failure of justice. The above provision clearly lays down that such objection as to the place of suing shall be allowed by the appellate or revisional court subject to the following conditions :-

(i) That such objection was taken in the Court of first instance at the earliest possible opportunity;

(ii) in all cases where issues are settled then at or before such settlement of issues;

(iii) there has been a consequent failure of justice.

8. In the present case though the first two conditions are satisfied but the third condition of failure of justice is not fulfilled. As already mentioned above there was no dispute regarding the merits of the claim. The defendant has admitted the deposit of Rs. 10,00,000 by the plaintiff, as well as the issuing of the five cheques. We are thus clearly of the view that there is no failure of justice to the defendant decreeing the suit by the Learned Single Judge of the Bombay High Court, on the contrary it would be totally unjust and failure of justice to the plaintiff in case such objection relating to jurisdiction is to be maintained as allowed by the Division Bench of the High Court in its appellate jurisdiction."

34. It has also been contended by learned counsel for the petitioner that while deciding the appeal as well as revision, the courts below have not recorded any finding on the objection raised by the petitioner as to the fact that the appeal was not maintainable before the S.D.M., Mauranipur or S.D.M., Jhansi as the order was passed by Tehsildar, Garautha, the

appeal was maintainable before the S.D.M., Garautha.

35. *Per contra*, it has been contended by the learned counsel appearing for the respondent no. 5 that since the objection was not taken by the petitioner at the very early stage and it was only at the time of hearing, the said objection was taken in the written submissions filed by the petitioner, the said objection is deemed to have been waived by the petitioner. The contention of learned counsel for the petitioner is misconceived. In this regard a reference may be made to judgment of this Court in Rakhi and Ors. Vs. 1st Additional Distict Judge, Firozabad and Ors in AIR 2000 All 166, paragraph no. 26 of the judgment is quoted as under:-

"In the present case, it is admitted that such objection was not taken in the written statement. It is also admitted that no issue was framed. It is also admitted that this objection was raised at the time of argument. It is further admitted that this objection was dealt with by the learned trial court. Admittedly, if no issue is framed in that event, it had sprung surprise on the respondents when raised at the bar at the time of argument. In as much, the applicant had no opportunity to take objection to it. It could be argued by Mr. Diwakar that the applicant did not have any opportunity to adduce sufficient evidence to defend such objection. The Court was never called upon to decide the issue. Unless an issue is framed, it cannot be said that it was in issue. Then again, the absence of objection does not make the decision by the Court wholly without Jurisdiction. It is an irregularity and not an illegality affecting the merit or the validity of the decree. One may acquiesce to the jurisdiction. Therefore, in the present case, the objection raised and adverted to by the Court would not cure the mischief of Section 21 of the Code. On the other hand by reason of Section 21 of the Code such objection would not hit at the root of the decree that have been passed and Could not be said to be without jurisdiction. Therefore, the omission of the appellate court to advert to the question is not fatal. It was neither an objection properly raised in terms of Section 21 of the Code of Civil Procedure nor was in issue. Therefore, the Courts were not called upon to decide the same."

36. As per the judgments of the Supreme Court referred above, all the three conditions must co-exist i.e. firstly the objection has to be taken in the court of first instance, secondly, the objection has to be taken at the earliest possible opportunity and thirdly, there has been a consequent failure of justice. I called upon the learned counsel for the petitioner to point out to me even at this stage any reason why I should hold that a failure of justice has occurred by reason of entertainment of appeal by the S.D.O., Jhansi but he was unable to put forward any.

37. In this view of the matter, I must hold that the appellate court and the revisional court has rightly not entertained the objection whether or not it was otherwise well founded.

38. So far as contention of learned counsel for the petitioner that appeal filed by the respondent no. 5 was under Section 207 of the Code whereas the appeal ought to have been filed under Section 35(2) of the Code and as such the appeal filed by the respondent no. 5 was not maintainable is also misconceived. Section 35(2) of the Code provides for filing of an appeal against an order passed by Tehsildar under

sub-Section 1 of Section 35 of the Code. Section 207 of the Code provides for an appeal by any party aggrieved by final order or decree passed in a suit, application or proceedings specified in column 2 of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

39. From the perusal of the Third Schedule, it is clear that in mutation cases, against an order passed by the Tehsildar, the first appeal has to be filed before the Sub-Divisional Officer. Thus, in my view, there is no illegality in filing an appeal under Section 207 of the Code, merely mentioning of a section whether Section 207 or Section 35(2) of the Code will not make any difference as both the sections provide for filing an appeal against the orders passed by Tehsildar in mutation cases.

40. In the facts of the case, since the petitioner has got herself transferred the appeal, by moving a transfer application before the Commissioner from the court of S.D.M., Mauranipur to S.D.M., Jhansi and further she has taken objection as to jurisdiction only at the time of final hearing while submitting the written submissions, this plea is not open for the petitioner to be raised either before the revisional court or before this Court. Further the petitioner has also failed to demonstrate that any failure of justice has occurred because of entertainment of appeal by the S.D.M., Jhansi or by the S.D.M.,Mauranipur. Since the property in dispute was situated in Tehsil-Mauranipur, though the order in mutation proceedings were passed by the Tehsildar-Garautha as the mutation case was transferred to the court of Tehsildar- Garautha, part of cause of action was there for the respondent no. 5 to file an appeal before the S.D.M., Mauranipur. Thereafter, the appeal was transferred to the court of S.D.M., Jhansi on an application moved by the petitioner herself and ultimately the appeal was decided by the S.D.M., Jhansi. From the perusal of the orders impugned i.e. the appellate order as well as the revisional order, it appears that though, the petitioner has taken objection before the appellate court in the written submissions and before the revisional court in paragraph no. 18 of the memo of revision, but the same has not been pressed by the petitioner either before the appellate court or before the revisional court as there is no mention of such objection being taken by the petitioner in the judgment. Even in the writ petition there is no averment by the petitioner that the objection which was taken by the petitioner was pressed before the appellate court as well as before the revisional court and the same has not been considered by the courts below.

41. In view of the same, I am of the opinion that the appellate court as well as the revisional court have committed no illegality in not considering the plea of the petitioner that the appeal was not maintainable before S.D.M., Mauranipur or Jhansi and it was only maintainable before the S.D.M., Garautha.

42. Accordingly, the writ petition fails and is **dismissed**.

(2024) 5 ILRA 2322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 2714 of 1982

Munder ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioner:
R.S. Pandey, Ankit Pande, Dr. Ramsurat Pande, P.C. Ararwal

Counsel for the Respondent:
C.S.C., Edward Sam Julius Paul, Panna Lal Gupta, T.N. Gupta

A. Registration Act, 1908 - Sections 171(b) & 35 - Transfer of Property Act, 1882 - Section 54 - Adoption deed - Adoption deed is not the sale, hence Section 54 of the T.P. Act, is not applicable - Provisions of Registration Act, 1908, is not applicable, as the adoption deed is not a transaction or declaration of any transfer of property. Adoption is a devolution and not a transfer of the property of the adoptee. From the date of adoption, all the ties of the adopted child in family of his or her birth shall be deemed to be severed. On adoption, the adoptee gets transplanted in the family in which he is adopted with same rights as that of a natural born child. (Para 20)

B. Consolidation of Holdings Act, 1953 - Section 9A(2) - *Belated objection to adoption deed*. Land of Abhilakh was inherited by Bhonu through an adoption deed dated 15.05.1931. The petitioner, in 1972, challenged the deed's validity, on the ground that it was neither stamped nor registered. The petitioner did not dispute the execution of the deed itself. Held: Adoption deeds executed before 1951 did not require registration. The objection raised 45 years later, without challenging the 1934 mutation order, is impermissible. Petition dismissed. (Para 23)

Dismissed. (E-5)

List of Cases cited:

1. Suraj Lamp & Industries Pvt Ltd Vs St.of Har. & anr., SLP (C) No. 13917 of 2009, reported in 2011 (29) LCD 2083

2. Mohammed Akram Husain & anr. Vs Brij Nath & anr. in Civil Misc. Writ Petition No. 674 of 2005, 2007 (25) LCD 11

3. Vinod Kumar & ors. Vs Sudha Land Ventures & Homes Pvt. Ltd, First Appeal from Order No. 2222 of 2015.

4. Yellapu Uma Maheswari & anr. Vs Buddha Jagadheeswararao & ors., in Civil Appeal No. 8441 of 2015 (Arising out of Special Leave Petition (Civil) No. 12788 of 2014.

5. Ramnath Singh & anr. Vs D.D.C. reported in [2014(32) LCD 659].

6. Lal Behari vs. Ram Adhar; 1985 LCD 415

7. A. Raghavamma & anr. Vs A. Chenchamma & anr., Civil Appeal No. 165 of 1961, reported in 1964 AIR (Supreme Court) 136

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

1. Heard learned counsel for petitioner, Shri Panna Lal Gupta, learned counsel for respondent no. 4 as well as Shri Hemant Kumar Pandey, learned State Counsel.

2. The present writ petition has been preferred for quashing of the impugned Revisional order dated 27.01.1982 passed by respondent no. 1 i.e. Deputy Director Consolidation, the impugned appellate order dated 17.07.1979 passed by respondent no. 2 i.e. Assistant Settlement Officer Consolidation and the judgment and order dated 03.10.1978 passed by respondent no. 3 i.e. Consolidation Officer.

3. During the pendency of present writ petition, the petitioner Munder had expired and in his place, his legal heirs have been substituted and they will be addressed as petitioners. Similarly, after the demise of respondent no. 4, Bhonu, his legal heirs have been substituted and they will be addressed as respondents.

4. Learned counsel for petitioner has submitted that Raghunandan had five

sons namely Abhilakh, Kabbil, Badri, Cheekhur and Ram Narayan. Abhilakh was issueless, Kabbil has three sons namely Bhonu, Ram Saran and Ram Samujh. ***Bhonu is respondent no. 4 in the present writ petition***. Badri has one son Munder i.e. the petitioner in the present writ petition. For the rest, it is not necessary to mention as they are not party to the dispute.

5. It is further submitted that after the demise of Abhilakh (issueless), the uncle of the petitioner, the petitioner has a right in the property of Abhilakh.

6. It is further submitted that the land/property of Abhilakh was inherited by Bhonu alleging himself as an adopted son of Abhilakh by adoption deed dated 15.05.1931.

7. The petitioner filed an objection under Section 9A(2) of the Consolidation and Holdings Act, 1953 (hereinafter referred as Act, 1953) when the village had come under Consolidation in the year 1972 by moving an application on 17.07.1978 and raised an objection regarding the validity of the adoption deed dated 15.05.1931 on two counts, firstly, the adoption deed was not stamped and secondly it was not registered. The said objection was rejected by the Consolidation Officer by its judgment and order dated 03.10.1978, against which the petitioner had preferred an appeal which was also dismissed by impugned judgment and order dated 17.07.1979. Against the appellate order, the petitioner preferred a revision which was also dismissed by impugned judgment and order dated 27.01.1982, hence, the present writ petition has been preferred.

8. It is further submitted that the adoption deed is mandatorily required to be registered for the reason that by the said adoption deed, the immovable property was going to be transferred in favour of respondent no. 4 Bhonu which is of the value of more than 100 Rupees, as required under Section 54 of the Transfer of Property Act, 1882 in which it has been provided that in the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Here, the transaction by the adoption deed is more than hundred rupees. In support of his submission, learned counsel for petitioner has placed reliance upon the judgment of Hon'ble Supreme Court in the Case of ***A. Raghavamma and another versus A. Chenchamma and another, Civil Appeal No. 165 of 1961, reported in 1964 AIR (Supreme Court) 136.***

9. It is further submitted that as per Section 17(b) of the Registration Act, 1908, which provides that documents of which registration is compulsory and sub-section 1(b) of Section 17, provides that other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to or in immovable property and Sub-Section provides any other instrument required by law for the time being in force, to be registered and the effect of non-registration has been provided under Section 49 of the Registration Act, 1908, that document will not be admissible in evidence. In support of his submission, learned counsel for petitioner has placed reliance upon the judgments quoted below:-

(1) Suraj Lamp & Industries Pvt Ltd versus State of Haryana and another, SLP (C) No. 13917 of 2009, reported in 2011 (29) LCD 2083.

(2) Mohammed Akram Husain and another versus Brij Nath and another in Civil Misc. Writ Petition No. 674 of 2005, reported in 2007 (25) LCD 11.

(3) Vinod Kumar and others versus Sudha Land Ventures and Homes Pvt. Ltd, First Appeal from Order No. 2222 of 2015.

(4) Yellapu Uma Maheswari and another versus Buddha Jagadheeswararao and others, in Civil Appeal No. 8441 of 2015 (Arising out of Special Leave Petition (Civil) No. 12788 of 2014.

10. It is further submitted that Section 35 provides that the instruments not duly stamped are inadmissible in evidence and in the present case, the adoption deed executed on 15.05.1931 was neither registered nor stamped as per the provisions of the Act, hence it could not be admissible evidence and on the basis of which any judgment and order passed in favour of respondent no. 4 is a nullity and liable to be quashed.

11. On the other hand, learned Standing Counsel and Shri Panna Lal Gupta, learned counsel for respondent no. 4 have submitted that the submission made by learned counsel for petitioner relying upon provisions of different acts are not applicable in the present case as the adoption deed was executed on 15.05.1931. At that time, the registration was not mandatory and it had come by amendment in the year 1977, in the Hindu Adoptions and Maintenance Act, 1956.

12. Learned Standing Counsel has further submitted that it is a devolution of property and not the transfer of property. In support of his submission, he has relied upon following judgments quoted below:-

(1) Raj Kumar Saxena versus Basic Shiksha Parishad, U.P. and others, in Civil Misc. Writ Petition No. 66944 of 2006.

(2) Ravindra Kumar versus State of U.P. and others, in Writ A No. 40700 of 2014.

13. After hearing learned counsel for the parties, going through the records of the case and the judgments relied upon by the learned counsels for the parties, existence of adoption deed dated 15.05.1931 is not disputed between the parties. The petitioner filed his objections on 17.07.1978, before the Consolidation Officer challenging the validity of the adoption deed as it was neither registered nor stamped. In support of his submission, learned counsel for petitioner has submitted that the adoption deed was required to be registered and stamped and has drawn attention of this Court to Section 54 of the Transfer of Property Act, 1882, which is quoted hereinbelow:-

'Section 54:- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in thte case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either

by a registered instrument or by delivery of the property.'

14. A perusal of Section 54 of the Transfer of Property Act, 1882, which is very clear and there is no ambiguity and is defining the word 'sale' i.e. transfer of ownership in exchange for a price paid or promised. The adoption deed is not the sale, hence Section 54 of the Transfer of Property Act, 1882 relied by the learned counsel for petitioner is not applicable in the present case. Placing reliance by learned counsel for petitioner on Section 17 (1)(b) and 17(1)(f) to establish his case that registration of the adoption deed is compulsory is quoted hereinbelow:-

Section 17 Documents of which registration is compulsory

Section 17(1) *The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely,*

Section 17(1)(b):- *other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;*

Section 17(1)(f):- *any other instrument required by any law for the time being in force, to be registered.*

15. The said provisions of Registration Act, 1908, relied upon by learned counsel for petitioner is not applicable in the present case as the adoption deed is not a transaction or declaration of any transfer of property. Adoption deed is a devolution and the said issue has already been decided by this Court in the case of ***Ravindra Kumar and others versus State of U.P. and others in Writ A No. 40700 of 2014****, wherein it has been held, that from the bare perusal of Section 17 of the Registration Act, 1908, nowhere it has been mentioned that for adoption deed registration is compulsory. Compulsory registration of adoption deed has come into force on 26.01.1951 and prior to that, there was no such requirement. This issue has also been decided by this Court in the case of* ***Raj Kumar Saxena versus Basic Shiksha Parishad, U.P and others in Civil Misc. Writ Petition No. 66944 of 2006****, wherein it has been held, that deed regarding adoption of petitioner is subsequent to 26.01.1951, consequently, the deed was required to be compulsorily registered in the State of Uttar Pradesh and it is an undisputed case between the parties in the present case that the adoption deed was executed on 15.05.1931. The petitioner is not disputing the execution of adoption deed but challenging the validity of the same on the ground that it was neither stamped nor registered. And as discussed above, both the things were not required at the time when adoption deed was executed.*

16. The petitioner had not challenged the order of mutation passed in the year 1934, in favour of respondent no. 4 under Section 34 of the L.R. Act, 1901 which is also admitted by the counsel for the petitioner that the name of respondent no. 4 was entered in the revenue records and the same was never challenged under the provisions of either Land Reforms Act, 1950 or in the U.P. Tenancy Act. It is also admitted by learned counsel for petitioner that when the U.P.Z.A and L.R. Act, 1950

had come into force w.e.f 26.01.1951, the entry in the name of respondent no. 4 was intact and the petitioner had not challenged the entry under the provisions of the Act, 1950. When the village had come under consolidation in the year 1972, then for the first time on 17.07.1978 i.e. after about more than 45 years the validity of the adoption deed was challenged by the petitioner in the consolidation proceedings.

17. The judgments relied by the learned counsel for petitioner are not applicable in the facts and circumstances of the present case, as far as the judgment relied upon by learned counsel for petitioner in the Case of ***A. Raghavamma (supra)*** quoting paragraph-14 of the said judgment, that too is not applicable in the present case for the reason that in paragraph-14 of the judgment, the procedure or the custom for adoption was not followed and it was not on the point that the adoption deed was neither registered nor stamped.

18. The judgments relied upon by learned counsel for petitioner in the case of ***Suraj Lamp & Industries Pvt Ltd (supra), Mohammed Akram Husain (supra) & Vinod Kumar (supra)*** deal with validity of an unregistered sale deed as admissible in evidence, so all these judgments pertains to sale deed and not the adoption deed hence the judgments are not applicable.

19. The other judgment relied by learned counsel for petitioner in the case of Yellapu Uma Maheswari (supra) also deals with agreement to sale and not related to the adoption deed.

20. The adoption is a devolution and not a transfer of the property of the adoptee. The adopted child for all purposes from the date of adoption, all the ties of the child in family of his or her birth shall be deemed to be severed. On adoption, the adoptee gets transplanted in the family in which he is adopted with same rights as that of a natural born child.

21. The law is otherwise as held by this Court in the case of ***Lal Behari vs. Ram Adhar; 1985 LCD 415***, wherein this Court has dismissed the petition wherein the petitioner was claiming his co-tenancy rights under the Consolidation proceedings after 11 years without challenging or making any claim during the first settlement and the second settlement.

22. Here, the petitioner has not raised any objection when the application under Section 34 of the Land Reforms Act, 1901 was allowed in favour of respondent no. 4 whereafter, his name was mutated. Then, the Act, 1950 has come into force on 26.01.1951 and the entry was intact, even at that time, the petitioner had not challenged and for the first time after about more than 45 years, in the consolidation proceedings, the petitioner had raised the objections regarding the validity of the adoption deed, cannot be raised at such a belated stage in the light of the law laid down by this Court in the case of **Ramnath Singh and another vs. D.D.C**. reported in **[2014(32) LCD 659].**

23. In view of the facts, circumstances and discussion made hereinabove, the present writ petition is devoid of merit and no interference is called for in the judgments dated 27.01.1982 passed by respondent no. 1 i.e. Deputy Director Consolidation, the impugned appellate order dated 17.07.1979 passed by respondent no. 2 i.e. Assistant Settlement Officer Consolidation and the judgment

and order dated 03.10.1978 passed by respondent no. 3 i.e. Consolidation Officer.

24. The present writ petition is ***dismissed***.

(2024) 5 ILRA 2328
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 4151 of 2016

Jagat Pal & Ors. ...Petitioners
Versus
D.D.C. Lakhimpur Kheri & Ors. ...Respondents

Counsel for the Petitioners:
Satendra Nath Rai

Counsel for the Respondent:
C.S.C., Ashok Kumar, D.P. Singh

A. Constitution of India,1950 - Article 226 - While exercising discretionary jurisdiction under Article 226, the High Court must ensure that justice is done, equity is upheld, and injustice is eliminated. One of the objectives of equity is to promote honesty and fair play. If any unfair advantage has been gained by a party prior to invoking the jurisdiction of the High Court, the Court can take into account such an unfair advantage and may require the party to relinquish the gain before granting relief. Court should not set aside an order that appears to be illegal if the effect is to revive another illegal order, as such an action would perpetuate illegality and confer an undue benefit on the undeserving party or person. (Para 9, 14)

B. Civil Law - Compromise - New Right cannot be created - If a person had no right under the statute, then in such position, any such right could not be recognised or admitted by a compromise or new right could not be created throughout compromise or conciliation.

C. U.P. Consolidation of Holdings Rules, 1954, Rule 25-A - Compromise – Genuineness of the Compromise - In the present matter, the claimant, Jagannath (predecessor-in-interest of the petitioners), failed to prove before the S.O.C. that Bhawani was the original tenure holder of the disputed land. No documents or evidence were placed on record to establish Bhawani as the original tenure holder. The division of shares in the land was not accorded to all legal heirs of Bhawani, and no justifiable reasons were provided for the distribution of land solely between Jagannath and Rambilas, excluding other heirs. All parties to the compromise, including Rambilas/respondent, were identified by Sri Triveni Sahai Gupta, Advocate, who was engaged by the claimant. The identification casts doubt on the authenticity of the compromise. Rambilas was assaulted by Shrichand (predecessor-in-interest of petitioners No. 2 to 7). S.O.C. failed to record satisfaction regarding the genuineness of the compromise, including the legal validity of the agreement between the parties. Compromise dated 06.03.1979, which forms the basis of the S.O.C.'s order dated 18.06.1985, was neither lawful nor genuine.

Dismissed. (E-5)

List of Cases cited:

1. Gadde Venkateswara Rao Vs Govt. of A.P AIR 1966 SC 828

2. Maharaja Chintamani Saran Nath Shahdeo Vs St. of Bihar AIR 1999 SC 3609;

3. Mallikarjuna Mudhagal Nagappa Vs St. of Karn. AIR 2000 SC 2976;

4. Chandra Singh Vs St. of Raj. AIR 2003 SC 2889;

5. St. of Uttaranchal Vs Ajit Singh Bhola 2004 6 SCC 800;

6. St. of Orissa Vs Mamata Mohanty 2011 3 SCC 436)

7. Mohammad Swalleh Vs Third A.D.J., Meerut; (1988) 1 SCC 40

8. Shangrila Food Products Ltd. Vs LIC, (1996) 5 SCC 54

9. Roshan Deen Vs Preeti Lal; (2002) 1 SCC 100

10. Ramesh Chandra Sankla & ors.Vs Vikram Cement & ors.(2008) 14 SCC 58

11. Shiv Prasad Vs Deputy Director of Consolidation, Ghazipur & ors., 2006 (101) RD 624

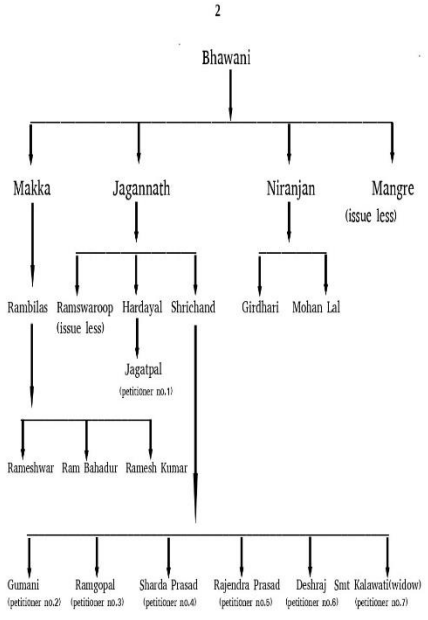
(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Satendra Nath Rai, learned counsel for the petitioners, Sri Hemant Kumar Pandey, learned counsel for the State as also Sri D.P. Singh, learned counsel for the private respondents.

2. By means of the present petition, a challenge has been made to the order dated 19.01.2016 passed by respondent No.1/Deputy Director of Consolidation, Lakhimpur Kheri (in short 'D.D.C.'), in Revision No. 340 of 2011 (Rameshwar & Others vs. Shrichand & Others).

3. Brief facts of the case are as follows:

(i) One Bhawani died leaving behind his four sons namely Jagannath, Niranjan, Makka and Mangre (issue less). The pedigree indicated in Para 4 of the petition is as under:-



(ii) It is alleged that Bhawani was the original tenure holder of the land in issue i.e. Khata No.371 but to establish this fact, no document has been placed on record.

(iii) The name of Makka S/o Bhawani was recorded in the basic year Khatauni of Khata No.371. At the time of initiation of consolidation proceedings in the village namely Khaithava, Pargana-Nighasan, District- Lakhimpur Kheri, in terms of U.P. Consolidation of Holdings, Act, 1953 (is short the 'Act') and Rules of 1954 made thereunder, the name of Makka S/o Bhawani was recorded in revenue records.

(iv) A compromise was filed on 31.07.1975 before Assistant Consolidation Officer (A.C.O.) in regard to Khata No.371. In this Compromise it was prayed that in place of late Makka S/o Bhawani, the names of Rambilas S/o Makka, Girdhari

S/o Niranjan, Mohanlal S/o Niranjan and Jagannath S/o Bhawani be mentioned in revenue records of Khata No. 371.

(v) The A.C.O. rejected the proposal of CH Form 4 and directed to enter the name of Rambilas S/o Makka in revenue records.

(vi) It would be apt to indicate that contesting respondents No.4 to 6 namely Rambilas, Ram Bahadur and Ramesh Kumar are sons of Rambilas.

(vii) Being aggrieved by the order of A.C.O, Jagannath S/o Bhawani and others filed an Appeal No. 1675 under Section 11 of the Act before the Settlement Officer of Consolidation (S.O.C.)/respondent No.2 and vide order dated 09.09.1976, the S.O.C./respondent No.2 allowed the appeal and remanded the matter back to Consolidation Officer (C.O.)/respondent No.3.

(viii) Before the C.O./respondent no.3, a fresh compromise dated 21.08.1978 was filed in Misc. case no.1705/5859 of 1978 u/s 9A(2) of the Act. As per this compromise, the land of Khata no.371 was of late Bhawani and accordingly, the same be provided to Jagannath S/o Bhawani-1/3 share, Girdhari S/o Niranjan-1/6 share, Mohanlal S/o Niranjan-1/6 share, Rambilas S/o Late Makka-1/3 share.

(ix) It would be apt to indicate that all the parties (claimants and opposite party/Rambilas) of the compromise dated 21.08.1978 filed in the case aforesaid were identified by Sri Triveni Sahai Gupta, Advocate, who was engaged by the claimants.

(x) The C.O./ respondent No.3 vide order dated 17.11.78 rejected the compromise dated 21.08.1998 filed in Misc. Case No.1705/5859 of 1978 and directed to record the name of Rambilas in place of Makka, being his legal heir, in revenue records.

(xi) The C.O./respondent No.3, rejected the compromise after observing that it has not been established that land in issue is an ancestral land and as such if compromise is accepted, then it would amount to transfer of property, which is not permissible.

(xii) Being aggrieved by order dated 17.11.78 passed by C.O/respondent No.3 in Misc. Case No.1705/5859 of 1978, Jagannath S/o Bhawani, Girdhari and Mohanlal both sons of Niranjan filed an Appeal No.163 (Jagannath and others vs. Rambilas) before S.O.C/respondent no.2.

(xiii) Before proceeding further, it would be relevant to mention that following question was put to the counsel for the petitioner during course of hearing.

"Whether without establishing/proving the fact that the property/land is an ancestral property, the rights in land can be provided by the authorities under the Act or the co-option is permissible under the Act or under U. P. Zamindari Abolition and Land Reforms Act, 1950 (in short 'Z. A. & L. R. Act') and compromise of such nature would be lawful and the same could be acted upon and the same would be enforceable in law and such nature of agreement/compromise will confer any right"

(xiv) In response to aforesaid, the counsel for the petitioner could not place any provision of law or authority to establish that by way of a compromise, rights in the land can be provided without establishing/ proving the fact that the land is an ancestral property.

(xv) Being aggrieved by the order dated 17.11.1978 passed by Consolidation Officer (C.O.)/ respondent No. 3 in Misc. Case No. 1705. 75859 of 1978 (Jagannath S/o of Bhawani, Girdhari Lal and Mohan Lal both sons of Niranjan) filed an appeal

no. 163 (Jagannath and Ors vs. Rambilas) before the S.O.C./ respondent No. 2.

(xvi) In the aforesaid Appeal No. 163, again a fresh compromise dated 06.03.1979 was filed.

(xvii) The parties to the compromise dated 06.03.1979, including the respondent in appeal namely Rambilas, were identified by Sri Triveni Sahai Gupta, Advocate, who was engaged by the appellants namely Jagannath, Girdhari and Mohan Lal.

(xviii) It is to be noted that parties to the compromise dated 21.08.1978 filed before the C.O./ respondent No. 3 and parties to the compromise dated 06.03.1979 filed before the S.O.C./ respondent No. 2 were identified by Sri Triveni Sahai Gupta, Advocate, who was engaged by the persons claiming right over Khata No. 371 i.e. predecessors-in-interest of the petitioners.

(xix) On aforesaid fact related to identification of the parties to compromise, the following question was put to the counsel for petitioner:

"Whether on compromise, an advocate appearing for claimant/plaintiff also can also identify respondent/defendant?"

(xx) In response to the aforesaid question, the counsel for petitioner stated that he cannot.

(xxi) The identification, aforesaid, as also the observations of C.O./ respondent No. 3 in the order dated 17.11.1978 that it has not been established that land in issue is ancestral land and as such if compromise is accepted then it would amount to transfer of property which is not permissible, creates doubt regarding entering into the compromise by Rambilas.

(xxii) The Appeal No. 163, referred above, was decided on the basis of the compromise on 31.03.1979.

(xxiii) As per compromise dated 06.03.1979, 1/3 share was to be provided to Jagannath and 2/3 share was to be provided to Rambilas in Khata No. 371.

(xxiv) The Appellate Court/S.O.C./respondent No.2 vide order dated 31.03.1979 passed in Appeal No. 163 provided 1/3 share to Jagannath, 1/6 share each to Girdhari and Mohan Lal and 1/3 share to Rambilas.

(xxv) Rambilas, challenging the order dated 31.03.1979, filed a revision before the D.D.C./respondent No.1 under Section 48 of the Act registered as Revision No. 3900 of 1979 (Rambilas vs. Jagannath and Ors).

(xxvi) The D.D.C./respondent No.1, after considering the terms of compromise and order dated 31.03.1979, vide order dated 17.09.1989 allowed the revision and set aside the order dated 31.03.1979 passed in Appeal no. 163 and remanded the matter back to S.O.C./ respondent no. 2 for deciding the appeal afresh.

(xxvii) The S.O.C./respondent No.2, thereafter, vide order dated 18.06.1885 allowed the appeal, which at relevant point of time was registered as Appeal No.1136, on the basis of terms of compromise dated06.03.1979, vide order dated 18.06.1885.

(xxviii) Being aggrieved by order dated 18.06.1985 passed in Appeal No. 1136 by S.O.C./respondent No.2, Rambilas preferred an application dated 24.07.1985 praying therein that order dated 18.06.1885 be set aside and matter be heard and decided on its own merits.

(xxix) Moving of application dated 18.07.1885 by Rambilas fortifies the view of this Court that the compromise dated 21.08.1978 & 06.03.1979, respectively, are/ were doubtful.

(xxx) The application preferred by Rambilas dated 24.07.1985 for recall and setting aside the order dated 18.06.1985 was dismissed for want of prosecution vide order dated 23.03.1990 on the statement given by Rambilas. This further, creates doubt regarding compromise dated 21.08.1978.

(xxxi) Rambilas on coming to know about the order dismissing the application for restoration for want of prosecution preferred an application dated 04.06.1992 for recall of order dated 23.03.1990, inadvertently indicated as order dated 14.10.1990.

(xxxii) The application dated 31.06.1992 was again dismissed for want of prosecution on 02.07.1998.

(xxxii) To recall the order dated 02.07.1998, Rambilas preferred an application dated 02.07.1998.

(xxxiv) During the pendency of the application dated 02.07.1998, Rambilas died and thereafter substitution application dated 03.05.1999 was preferred by the legal heirs of Rambilas and the same was allowed on the same day i.e on 03.05.1999.

(xxxv) The aforesaid application for restoration dated 02.07.1998 preferred by Rambilas was again dismissed for want of prosecution on 05.02.2003.

(xxxvi) After expiry of several years from the date of rejection of restoration application for want of prosecution vide order dated 05.02.2003, an application under Rule 109 of the Rules of 1954 was filed, whereupon an order was passed on 06.04.2011 and thereafter the private respondents no.4 to 6, legal heirs of Rambilas, preferred an appeal dated 11.07.2011 which was dismissed being not maintainable vide order dated 01.01.2015 passed by S.O.C./respondent no.2.

(xxxvii) After order dated 01.01.2015 passed by S.O.C./respondent No.2, indicated above, the private respondents filed the Revision No. 340 of 2011 challenging the order(s) dated 18.06.1885, 23.03.1990 and 05.02.2003.

(xxxviii) The revision aforesaid was filed alongwith an application for condonation of delay. A perusal of the application of condonation of delay reflects that the same was not properly drafted. The delay in challenging the order dated 18.06.1885, 23.03.1990 & 05.02.2003 was not properly explained.

(xxxix) It would be apt to indicate that all the revisionists/private respondents are rustic villagers and in this view of the matter, their application for condonation of delay has to be dealt with.

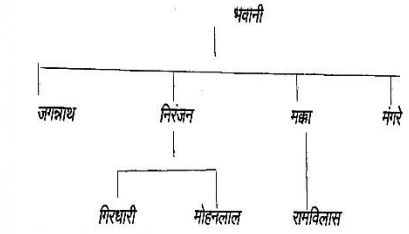
(xl) In the objection to the application for condonation of delay, the petitioners specifically pleaded that the revisionists/private respondents No.4 to 6 were aware about the order dated 18.06.1985 as their application for substitution was allowed vide order dated 03.05.1999 and accordingly the application is liable to be rejected and consequently, the revision filed after delay of about 26 years questioning the order dated 18.06.1885 be also dismissed. In this objection, petitioners also stated that the appeal was decided in terms of compromise on 18.06.1985 that too in compliance of the order dated 17.09.1981 passed in Revision No.3900 of 1979 filed by Rambilas (predecessor-in-interest of the private respondents) and as such also the revision is liable to be dismissed.

(xli) The D.D.C./respondent No.1 after considering the relevant aspect of the case allowed the revision vide impugned order dated 19.01.2016, which is an order of remand. The relevant portion of this order reads as under:-

"पक्षों द्वारा प्रस्तुत तर्क तथा पत्रावली के अवलोकन से विदित है कि प्रतिपक्षी द्वारा जो विधि-व्यवस्थायें प्रस्तुत की गई हैं,

वह सभी मियाद विन्दु पर ही प्रस्तुत की गई हैं। जिसमें माननीय उच्चतम न्यायालयों ने यह विचार व्यक्त किये हैं कि धारा-5 के अन्तर्गत विलम्ब मर्षण के लिये प्रस्तुत आवेदन-पत्र वर्णित लेकिन न्यायालय को विलम्ब को माफ करने की शक्ति, यदि पर्याप्त कारण दर्शाते हुए आवेदन किया गया है। लेकिन पर्याप्त कारण के अभाव एवं आवेदक ने स्पष्ट भावना से आवेदन नहीं किया, तो आवेदन निरस्त किये जाने योग्य । चूंकि निगरानीकर्तागण द्वारा विलम्ब के सम्बन्ध में जो कारण दिये गये हैं, वह सन्तोषजनक है, अस्तु निगरानीकर्तागण धारा 5 भा०परिसी०अधि० का लाभ पाने के हकदार हैं। अन्य माननीय न्यायालयों द्वारा पारित आदेशों के सम्बन्ध में जो विधि-व्यवस्थायें प्रस्तुत की गई हैं, उनमें भी न्यायालयों ने कहा है कि यदि न्यायालय के समक्ष प्रस्तुत आवेदन से न्यायालय इस निष्कर्ष पर पहुंचता है कि आवेदक ने उचित एवं स्पष्ट भावना से मांग की है, तो न्यायिक दृष्टिकोण से उसे धारा-5 का लाभ भी दिया जा सकता है। चकबन्दी में स्वत्व के विवाद सदैव के लिये निर्णीत किये जाते हैं। यदि निगरानीकर्तागण को धारा-5 का लाभ नहीं दिया जाता है तो वह न्याय से वंचित रहेगा, यह नैसर्गिक सिद्धान्त का उल्लंघन होगा। अतएव निगरानीकर्तागण को धारा- भा०परिसी०अधि० का लाभ देकर निगरानी अन्दर मियाद स्वीकार करके उसका निस्तारण गुण-दोष पर किया जाता है।

विवाद आधार वर्ष के खाता संख्या-371 के सम्बन्ध में है, जो मक्का पुत्र भवानी के नाम अंकित था। तस्दीक खतौनी के समय मक्का मृतक के वारिस रामविलास बताये गये तथा खाते में गिरधारी, मोहन लाल पुत्रगण निरंजन व जगन्नाथ पुत्र भगवानी का नाम बतौर सहखातेदार दर्ज होना बताया गया। सहायक चकबन्दी अधिकारी के न्यायालय में दिनांक 31-07-1975 को समझौता दाखिल हुआ। सहायक चकबन्दी अधिकारी ने साक्ष्य के अभाव में सहखातेदारी का तनाजा खारिज कर दिया तथा मृतक मक्का के स्थान पर रामविलास का नाम बतौर वारिस अंकित कर दिया। सहायक चकबन्दी अधिकारी के आदेश के विरूद्ध जगन्नाथ ने अपील दायर की, जो दिनांक 09-09-1976 को चकबन्दी अधिकारी को प्रत्यावर्तित की गई। चकबन्दी अधिकारी के न्यायालय में खाता संख्या-371 में सहखातेदारी दर्ज करने हेतु दिनांक 21-08-1978 को सुलहनामा प्रस्तुत किया गया, जो चकबन्दी अधिकारी ने दिनांक 17-11-1978 को कागजी साक्ष्य के अभाव में तथा अवैधानिक हस्तान्तरण मानकर निरस्त कर दिया। आराजी रामविलास के नाम अंकित रही। चकबन्दी अधिकारी के आदेश के विरुद्ध जगन्नाथ आदि ने अपील दायर की, जिसमें दिनांक 06-03-1979 को सुलहनामा दाखिल हुआ, जिसमें अंकित किया गया कि खाते में 1/3 भाग जगन्नाथ व 2/3 रामविलास के नाम रहेगा। बन्दोबस्त अधिकारी चकबन्दी ने अपील में दिनांक 31-03-1979 को गिरधारी व मोहन लाल का भी 1/3 अंश प्रत्येक दर्ज कर दिया। इस आदेश के विरुद्ध रामविलास ने निगरानी दायर की, जो दिनांक 17-09-1981 को बन्दोबस्त अधिकारी चकबन्दी को प्रत्यावर्तित कर दी गई। बन्दोबस्त अधिकारी चकबन्दी ने सुलहनामा के आधार पर अपील में आदेश पारित कर दिया। यद्यपि सहायक संचालक चकबन्दी ने अपने आदेश दिनांक 17-09-1981 में इस तथ्य का उल्लेख किया है कि सुलहनामे में यह अंकित नहीं है कि विवादित भूमि पैतृक है, परन्तु बन्दोबस्त अधिकारी चकबन्दी ने बिना किसी आधार के आदेश पारित कर दिया है, इसलिए आदेश निरस्त करके रिमाण्ड किया जाता है। पक्षों द्वारा जो सुलहनामा बन्दोबस्त अधिकारी चकबन्दी के न्यायालय में दाखिल किया गया है, उसमें निम्न शजरा प्रस्तुत किया है-



सुलहनामे में उल्लेख किया है कि खाता संख्या-371 में 1/3 जगन्नाथ व 2/3 रामविलास के नाम भूमि दर्ज होगी। गिरधारी व मोहनलाल को कोई हिस्सा नहीं मिलेगा। यद्यपि इस तथ्य का उल्लेख नहीं है कि भूमि पैतृक है अथवा किस आधार पर दो खातेदारों का अंश ही खाते में निर्धारित किया गया है। यदि पत्रावली को चकबन्दी अधिकारी के न्यायालय को प्रत्यावर्तित किया जाता है, तो सभी पक्ष अपना-अपना साक्ष्य प्रस्तुत कर सकेंगे तथा वाद का गुण-दोष पर निर्णय हो जायेगा, जो न्याय संगत प्रतीत होता है। पत्रावली चकबन्दी अधिकारी को प्रत्यावर्तित किये जाने योग्य है।

आदेश

उपरोक्तानुसार रामेश्वर, रामबहादुर, रमेश कुमार पुत्रगण रामविलास द्वारा याजित निगरानी संख्या-340/11 स्वीकार की जाती है। चकबन्दी अधिकारी द्वारा वाद संख्या-1705/5659 धारा-9क (2) में पारित आदेश दिनांक 17-11-1978 तथा बन्दोबस्त अधिकारी चकबन्दी द्वारा अपील संख्या-1136 में पारित आदेश दिनांक 18-06-1985/23-03-1990/05-02-2003 खण्डित किये जाते हैं। पत्रावली चकबन्दी अधिकारी को इस

निर्देश से प्रत्यावर्तित की जाती है कि पक्षों को साक्ष्य का अवसर देकर वाद का निस्तारण गुण-दोष पर करें। पक्ष चकबन्दी अधिकारी के न्यायालय में दिनांक 27-01-2016 को उपस्थित हों। पत्रावली बाद आवश्यक कार्यवाही दाखिल दफ्तर हो।"

4. Assailing the impugned order dated 19.01.2016, learned counsel for the petitioner submitted as under:

(i) Challenging the order(s) dated 18.06.1985, 23.03.1990 and 05.02.2003 passed by the S.O.C/respondent No.2 in an Appeal No.1163 the revision was filed in the month of August 2015, and that too without proper explanation for condoning the huge delay.

(ii) The order dated 31.03.1979 was passed on the basis of compromise deed dated 06.03.1979 entered into between the parties, which was filed before the S.O.C./respondent No.2 and this compromise was admitted to Rambilas (predecessor-in-interest of the private opposite parties namely Rameshwar, Ram Bhadur and Ramesh Kumar, all sons of Late Rambilas), as would appear from the memo of revision filed by Rambilas challenging the order dated 31.03.1979 passed by S.O.C./respondent No.2 on limited ground related to share in the land in issue as share indicated in the compromise dated 06.03.1979 i.e. 2/3 share was not provided to Rambilas by S.O.C./respondent No.2, and the same is apparent from the memo of revision filed by Rambilas wherein he specifically indicated that while passing the order dated 31.03.1979, the S.O.C./respondent No.2 ignored the Clause/Para-5 of the compromise.

(iii) As per the Clause/Para-5 of the compromise deed dated 06.03.1979, Rambilas was entitled to 2/3 of the land in issue, however, the S.O.C./respondent No.2 provided only 1/3 of the share to Rambilas and for this reason, Rambilas approached the revisional authority challenging the order dated 31.03.1979 passed by S.O.C./respondent No.2 and vide order dated 17.09.1989 the D.D.C./respondent No.1 remanded the matter back to the S.O.C./respondent No.2 to pass fresh order after taking note of the terms of the compromise entered into between the parties.

(iv) The S.O.C./respondent No.2 in compliance of order dated 17.09.1981 passed by D.D.C/respondent No.1 in the revision filed by Rambilas decided the Appeal in terms of the compromise deed dated 06.03.1979 vide order dated 18.06.1985 and provided 2/3 share in the land/property in issue to Rambilas.

(v) Rambilas, for the reasons best known to him, filed an application for recall of order dated 18.06.1985, which was dismissed for want of prosecution on 23.03.1990 and thereafter Rambilas preferred an application on 04.06.1992 praying therein to recall the order dated 14.10.1990, which was dismissed for want of prosecution on 02.07.1998 and thereafter on 02.07.1998 itself the application for recall of order dated 02.07.1998 was moved.

(vi) During the pendency of the application dated 02.07.1998, Rambilas died and the respondents no.4 to 6 moved an application for substitution on 03.05.1999, which was allowed on the same day.

(vii) From the aforesaid, it is evident that since 03.05.1999 the respondents No.4 to 6 were aware about the order dated 18.06.1985 and in the application for condonation of delay, the date of knowledge of order dated 18.06.1985 has been indicated as 05.07.2011.

(viii) In view of above, the delay in filing the revision challenging the order(s) dated 18.06.1985, 23.03.1990 and 05.02.2003 was not properly explained and

as such in in view of the same also the facts aforesaid the D.D.C./respondent No.1 committed error of law and facts both in allowing the revision vide impugned order dated 19.01.2016.

5. Opposing the present petition, Sri D.P. Singh, learned counsel for the private respondents, submitted that the order dated 18.06.1985, whereby 1/3 share of the land in issue was provided to Jagannath (predecessor-in-interest of the petitioners No.1 to 7), was obtained by Jagannath by playing fraud before the authorities under the Act. To substantiate the same, he submitted as under:

(i) Initially a compromise was filed before the A.C.O. on 31.07.1975, however, the same was rejected for want of evidence pertaining to co-tenancy and therefore in place of Makka the name of Rambilas(predecessor-in-interest of respondents No.4 to 6) was recorded in the revenue records.

(ii) The order of A.C.O. was challenged in Appeal and the appellate authority vide order dated 09.09.1976 remanded the matter back to the C.O.

(iii) Before the C.O. a fresh compromise dated 21.08.1978 was filed by Jagannath, Mohan Lal, Girdhari and Rambilas and as per this compromise deed, Jagannath was entitled to 1/3 share; Girdhari was entitled to 1/6 share, Mohan Lal was entitled to 1/6 and Rambilas son of Makka was entitled to 1/3 share. This compromise dated 21.08.1978 was also rejected vide order dated 17.11.1978 by the C.O.

(iv) Thereafter, the order dated 17.11.1978 was challenged before the S.O.C. In the appeal, another compromise dated 06.03.1979 was filed. As per this compromise, Jagannath S/o Bhawani was entitled to 1/3 share and Rambilas S/o Makka was entitled to 2/3 share and the share as indicated in compromise dated 06.03.1979 was provided by the S.O.C./respondent No.2 vide order dated 18.06.1985, which was passed in compliance of order dated 17.09.1981 passed by the D.D.C./respondent No.1 in the revision alleged to be filed by Rambilas/(predecessor-in-interest of respondents No.4 to 6), and on coming to know about the order dated 18.06.1985 and fraud played by Jagannath, Rambilas filed the application for recall which was dismissed on 23.03.1990 and thereafter an application dated 04.06.1992 was preferred, which also was dismissed on 02.07.1998 and on 02.07.1998 itself an application for recall was preferred by Rambilas.

(v) During the pendency of the application for recall of order dated 02.07.1998, Rambilas was assaulted on 07.04.1999 by Shrichand/(predecessor-in-interest of the petitioners No.2 to 7) and Gumani/petitioner No.2 as also by Gopal/petitioner No.3 and Rambilas succumbed to the injuries sustained and in relation to the said incident, the trial court after considering the material evidence on record convicted three persons under Section 304(2) IPC vide judgment dated 07.09.2001 passed in Sessions Trial No.51 of 2000 (State Vs. Shrichand and two others) which is annexed as Annexure No. CA-1 to the counter affidavit filed by the private respondents No.4 to 6.

(vi) From the aforesaid, it can be deduced that on account of the dispute pertaining to the land in issue i.e. Khata No.371, the above-named persons assaulted Rambilas with intention to cause death, who ultimately expired on account of the injuries sustained.

(vii) The parties to the compromise dated 21.08.1978 and 06.03.1979 were identified by Sri Triveni Sahai Gupta, Advocate, who was engaged from the side of the petitioners, and as such it creates doubt regarding signing of compromise by Rambilas. In fact, Rambilas never signed the compromise and for this reason, on coming to know about the final order dated 18.06.1885, the application for recall was filed by Rambilas.

(viii) The compromise dated 06.03.1989 appears to be a forged document for the reason(s) that in the first compromise before the A.C.O., it was prayed that in place of Makka, the name of Rambilas S/o Makka, Girdhari S/o Niranjan, Mohanlal S/o Niranjan and Jagannath S/o Bhawani be mentioned in the revenue record of Khata No.371 and in the subsequent compromise dated 21.07.1978 filed before the C.O./respondent no.3, it was prayed that 1/3 share of the land in issue be provided to Jagannath S/o Bhawani, 1/6 share be provided to Girdhari S/o Niranjan and the same share be provided to Mohanlal S/o Niranjan and 1/3 share to be provided to Rambilas S/o Makka and in the last compromise dated 06.03.1989, it was prayed that 1/3 share be provided to Jagannath S/o Bhawani and 2/3 share be provided to Rambilas S/o Makka in the land indicated in Khata No.371.

(ix) All the compromise, in fact, were unlawful because in none of the compromise, it was pleaded that land in issue is an ancestral property in which pleading is required for getting a share in holdings and in this regard, the C.O/respondent No.3 while rejecting the compromise dated 21.08.1978 vide order dated 17.11.1978 specifically observed that it has not been established that land in issue is an ancestral land and as such, if compromise is accepted, then it would amount to transfer of property, which is not permissible and while passing order dated 18.06.1985, the S.O.C./respondent No.2 completely ignored this aspect of the case.

(x) If the order is interfered on the ground that delay was not properly explained, then that eventuality illegality and fraud would perpetuate.

(xi) The impugned order dated 19.01.2016 is not liable to be intreferred on the ground that proper explanation was not given in regard to condoning the delay in filing the revision as by the same the D.D.C./respondent No.1 has done substatial justice between the parties and if this order is set aside or quashed the illegal order dated 18.06.1985 would revive.

(xii) A wrong order on fact and law, if provides substantial justice between the parties, is not liable to be interfered in exercise of power under Article 226/ 227 of the Constituion of India.

(xiii) It is settled principle of law that discretion, if exercised to provide right of hearing, then it should not be interfered by the appellate court or the higher court and as such, the impugned order dated 19.01.2016 is not liable to be interfered by this Court in exercise of power under Article 226/ 227 of the Constitution of India.

6. Considered the aforesaid and perused the record.

7. After taking note of aforesaid, this Court finds that following question has arisen and is to be answered.

"Whether the order dated 19.01.2016 passed by the D.D.C./respondent no.1 is liable to be interefered by this Court despite insufficient explanation given by the respondents No.4 to 6 (legal heirs of

Rambilas) in challenging the order dated 18.05.1985, whereby rights in the land indicated in Khata No.371 were provided to Jagannath/(precessor-in-interest of petitioners) and order(s) dated 23.03.1990 and 05.02.03, whereby application(s) for restoration filed by Rambilas and respondents No.4 to 6, respectively, were dismissed for want of prosecution."

8. Before proceeding further, this Court finds it appropriate to indicate some settled proposition of law on the aforesaid.

9. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person. (Vide **Gadde Venkateswara Rao v. Govt. of A.P** AIR 1966 SC 828; **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar** AIR 1999 SC 3609; **Mallikarjuna Mudhagal Nagappa v. State of Karnataka** AIR 2000 SC 2976; **Chandra Singh v. State of Rajasthan** AIR 2003 SC 2889; **State of Uttaranchal v. Ajit Singh Bhola** 2004 6 SCC 800; and **State of Orissa v. Mamata Mohanty** 2011 3 SCC 436).

10. In a catena of judgments, both this Court and Supreme Court have emphasised that while exercising discretionary jurisdiction under Article 226, the High Court must ensure that justice is done, equity be upheld and injustice is eliminated.

11 . In Jodhey vs State, reported as AIR 1952 All 788, this Court considered the discretionary and equitable jurisdiction of the High Court and the manner in which the same ought to be exercised. Relevant portion of the same reads:-

"There are no limits, fetters or restrictions placed on this power of superintendence in this Clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein."(emphasis supplied)

12. In **Gadde Venkateswara Rao v. Govt. of A.P.; AIR 1966 SC 828**, a three judges Bench of the Supreme Court affirmed the judgment of the Andhra Pradesh High Court where it refused to interfere into a matter on merit even when the appellant alleged violation of principles of natural justice. The Supreme Court observed that if the impugned order passed by the Government would have been set aside by the High Court, it would have restored an illegal order. Paragraph 19 of the judgment reads:-

"19. The result of the discussion may be stated thus: The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said village did not comply with the necessary conditions for such location. The Panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre permanently at Lingopalem. Both the orders of the Government, namely, the order dated March 7, 1962, and that dated April 18, 1963, were not legally passed: the former, because it was made without giving notice to the Panchayat Samithi, and the latter,

because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If ***the High Court had quashed the said order, it would have restored an illegal order it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."*** *(emphasis supplied)*

13. In **Mohammad Swalleh v. Third Additonal District Judge, Meerut; (1988) 1 SCC 40** the Supreme Court dismissed an appeal against an order passed by the High Court wherein the High Court refused to interfere with the order of the District Court which had no jurisdiction to entertain an appeal from the Prescribed Authority under the scheme of the Act on the ground that setting aside District Court's order would mean restoring the erroneous order of the Prescribed Authority. Paragraph 7 of the above referred judgment of the Supreme Court reads:-

"7. It was contended before the High Court that no appeal lay from the decision of the prescribed authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid (sic no appeal lay) before the District Judge, the order of the prescribed authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the prescribed authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. ***If we reiterate the order of the High Court as it is setting aside the order of the prescribed authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception*** *can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the prescribed authority has been set aside, no objection can be taken." (emphasis supplied)*

14. In **Shangrila Food Products Ltd. v. LIC, (1996) 5 SCC 54** the Supreme Court reiterated that while exercising jurisdiction under Article 226 and 227 of the Constitution, a duty is casted upon the High Courts to see to it that equity is upheld. High Court must ensure that any undue advantage gained by a party prior to invoking discretionary jurisdiction of the High Court ought to be taken into account before granting it any relief. Relevant paragraph 11 of the same reads:-

"11. ***It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass***

appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. *What precisely has been done by the learned Single Judge, is clear from the above emphasised words which may be reread with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the findings were to go in favour of the appellant Company and it is proved to be a lawful sub- tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub- tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation of the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed interdependently. For those who seek equity must bow to equity." (imphasis supplied)*

15. In **Roshan Deen vs. Preeti Lal; (2002) 1 SCC 100**, the Supreme Court while setting aside an order passed by the High Court observed that the High Courts while exercising power of superintendence under Article 226 and 227 should ensure that such exercise must ensure that justice is done and at the same time injustice is eliminated. Paragraph 12 of the same reads:-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao [(1984) 2 SCC 673: AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law,"

16. The Supreme Court in the case of **Ramesh Chandra Sankla and Others vs. Vikram Cement and Others and other connected matters, reported as (2008) 14 SCC 58** has considered, affirmed, and reiterated all the aforesaid judgments and held in paragraphs 98 that:-

"98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in Shiv Shankar Dal Mills v. State of Haryana, (1980) 1 SCR 1170, ***Courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience."****(emphasis supplied).*

17. The Supreme Court in **Shangrila (supra)** has held that ***"One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party, priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief."***

18. Now reverting to the relevant facts of the case:-

(i) In the first compromise filed on 31.07.1975 before the A.C.O for providing share in land indicated in Khata No.371, as appears from the record, the prayer was made that in the revenue record of Khata No.371, in place of Makka (father of Rambilas, predecessor-in-interest of respondents No.4 to 6) the name of Girdhari and Mohanlal, both sons of Niranjan, and Jagannath S/o Bhawani be mentioned.

(ii) The aforesaid compromise was rejected by the A.C.O and thereafter Jagannath and others, impleading Rambilas as respondent, filed an Appeal No.1675 before the S.O.C./respondent No.2, which was allowed vide order dated 09.09.1976 and the matter was remanded to the C.O./respondent No.3.

(iii) Before the C.O./respondent No.3, in Misc. Case No.1705/58/59 of 1978, a fresh compromise was filed. As per this compromise, the land indicated in Khata No.371 has to be provided in following manner:-

(a) Jaggannath S/o Bhawani 1/3 share

(b) Girdhari S/o Niranjan 1/6 share

(c) Mohan Lal S/o Niranjan 1/6 share

(d) Rambilas S/o Makka 1/3 share.

(iv) The C.O./respondent No.3 rejected the compromise dated 21.08.1978 after observing that it has not been established that the land in issue is an ancestral land and as such if the compromise is accepted, then it would amount to transfer of property, which is not permissible.

(v) In Appeal No.163, preferred before the S.O.C./respondent No.2 challenging the order dated 17.11.1978 passed by the C.O./respondent No.3, again a fresh compromise dated 06.03.1979 was filed.

(vi) As per compromise dated 06.03.1979, 1/3 share was to be provided to Jagannath S/o Bhawani and 2/3 share was to be

provided to Rambilas S/o Makka in the law indicated in Khata No.371.

(vii) The compromise dated 06.03.1979 is the basis of order dated 18.06.1985 passed by the S.O.C./respondent No.2 and by this order 1/3 share was provided to Jagannath (predecessor-in-interest of petitioners) and 2/3 share was provided to Rambilas predecessor-in-interest of respondents No.4 to 6) in the land indicated in Khata No.371.

(viii) The compromise dated 06.03.1979, the basis of final order dated 18.06.1985, to the view of this Court was not a lawful/ genuine compromise. It is for the following reasons:-

(a) It is settled principle that claimant/plaintiff has to prove/establish his case.

(b) In the instant case it was not proved before the authorities under the Act, including S.O.C./respondent No.2, who passed the order dated 18.06.1985, by the claimant namely Jagannath(predecessor-in-interest of petitioners) that Bhawani was the original tenure holder of the land indicated in Khata No.371.

(c) No document/evidence has been placed on record to prove/establish that Bhawani was the original tenure holder of the land indicated in Khata No.371.

(d) The shares in the land indicated in Khata No.371 were not provided to all the legal heirs of Bhawani, alleged to be the original tenure holder, and there is no justifiable reason on record to justify the division of land in issue between Jagannath and Rambilas and excluding other legal heirs, though according to earlier compromise(s) i.e. compromise filed on 31.07.1975 and compromise filed on 21.08.1978, all the legal heirs of Bhawani were entitled to shares in the land in issue i.e. the land indicated in Khata No.371..

(e) All the parties to the compromise dated 21.08.1978 and compromise dated 06.03.1979, including Rambilas/ respondent, before the C.O./ respondent No.3 and S.O.C./ respondent No.2, were identified by Sri Triveni Sahai Gupta, Advocate who was engaged by the claimant/ predecessor-in-interest of petitioners.

(f) The aforesaid identification creates doubt regarding entering into the compromise by Rambilas.

(g) Compromise dated 06.03.1979, the basis of order dated 18.06.1985 passed by S.O.C./respondent No.2, was not lawful/genuine can also be inferred from the fact that during the pendency of the application for recall of order dated 02.07.1998, Rambilas was assaulted on 07.04.1999 by Shrichand/(predecessor-in-interest of the petitioners No.2 to 7) and Gumani/petitioner No.2 as also by Gopal/petitioner No.3 and Rambilas succumbed to the injuries sustained and in relation to the said incident, the trial court after considering the material evidence on record convicted these persons under Section 304(2) IPC vide judgment dated 07.09.2001 passed in Sessions Trial No.51 of 2000 (State Vs. Shrichand and two others).

(h) Without establishing/proving the fact that the land is an ancestral property, the rights based upon compromise dated 06.03.1979 were provided only to Jagannath and Rambilas excluding other legal heirs of Bhawani in the land indicated in Khata No.371, which in basic year Khatauni was recorded in the sole name Makka (predecessor-in- interest of Rambilas and respondents No.4 to 6), vide order dated 18.06.1985 passed by S.O.C./respondent No.2.

(i) The S.O.C./respondent No.2 in the order dated 18.06.1985 has not recorded the satisfaction regarding genuineness of the compromise which includes the

satisfaction on the lawfulness of the agreement/compromise between the parties as required under the law including Rule 25-A of U.P. Consolidation of Holdings Rules, 1954.

(j) If a person had no right under the statute, then in such position, any such right could not be recognised or admitted by a compromise or new right could not be created throughout compromise or conciliation. On this aspect, the observations made by this Court in the judgment passed in the case of **Shiv Prasad vs. Deputy Director of Consolidation, Ghazipur and others, 2006 (101) RD 624** are extracted hereinunder:-

...11. It is well settled that even if a disclosure has been truthfully made by the applicant, the employer has the right to consider antecedents and fitness and cannot be compelled to appoint a candidate. While doing so, the fact of conviction and background facts of the case, nature of offence, etc. have to be considered. Even if the acquittal has been made, the employer may consider the nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons, and decline to appoint a person, who is unfit or is of dubious character. Further, in case employer comes to conclusion that conviction or grounds of acquittal in criminal case would not affect the fitness for employment, incumbent may be appointed or continued in service.

12. The observations in Avtar Singh v. Union of Indiam [Avtar Singh v. Union of India, (2016) 8 SCC 471 : (2016) 2 SCC (L&S) 425] in aforesaid context are also pertinent to be noticed: (SCC pp. 505-506, para 31)

"31. Coming to the question whether an employee on probation can be discharged/refused appointment though he has been acquitted of the charge(s), if his case was not pending when form was filled, in such matters, employer is bound to consider grounds of acquittal and various other aspects, overall conduct of employee including the accusations which have been levelled. If on verification, the antecedents are otherwise also not found good, and in number of cases incumbent is involved then notwithstanding acquittals in a case/cases, it would be open to the employer to form opinion as to fitness on the basis of material-on-record. In case offence is petty in nature and committed at young age, such as stealing a bread, shouting of slogans or is such which does not involve moral turpitude, cheating, misappropriation, etc. or otherwise not a serious or heinous offence and accused has been acquitted in such a case when verification form is filled, employer may ignore lapse of suppression or submitting false information in appropriate cases on due consideration of various aspects."

3. The conclusions in Avtar Singh case [Avtar Singh v. Union of India, (2016) 8 SCC 471 : (2016) 2 SCC (L&S) 425] as summarised may also be beneficially reproduced: (SCC pp. 507-508, para 38)

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special

circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. n case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

14. Reverting back to the facts of the present case, it may be noticed that there is no dispute that the petitioner had truthfully disclosed involvement in FIR No. 424 of 2011 under Sections 498-A/304-BIPC and Sections 3/4 of the Dowry Prohibition Act registered at PS: Samthar, U.P. at the time of filling of attestation form.

15. A bare perusal of the judgment of acquittal passed in FIR No. 424 of 2011 under Sections 498-A/304-BIPC and 3/4 of the Prohibition of Dowry Act reveals that the marriage of the petitioner with deceased Kanti was solemnised on 5-5-2007. The deceased expired on 4-7-2011 after period of about four years of marriage on consumption of poison which is alleged to have been administered by her husband (petitioner), father-in-law, mother-in-law and brother-in-law in furtherance of common intention of non-fulfilment of demand of dowry. The FIR was registered after filing of a complaint under Section 156(3)CrPC. However, it is pertinent to note that at the stage of evidence, the material prosecution witnesses did not support the prosecution case. Complainant Shiv Kumar (PW 1) stated that his sister prior to marriage was under depression due to illness and her mental balance was not fit. The complaint under Section 156(3)CrPC was stated to have been given by him on the instigation of others. The witness was also duly cross-examined and admitted that the accused had never harassed the deceased or demanded any dowry. He also admitted that his sister had died since she was continuously having pain in her stomach. Similarly, PW 2 Smt Meena (mother of the deceased) and PW 4 Sanjay (brother of the deceased) did not support the prosecution version and were also declared hostile.

16. It cannot be ignored that omnibus allegations had been made against all the family members of petitioner with reference to unfortunate death of deceased within seven years of marriage. However, in the witness box, none of the witnesses supported, who were the close family members of the deceased. The levelling of allegations at the instigation of others has been admitted by PW 1 and it is not out of place that in the Indian context, out of love and affection for deceased and minor differences in matrimonial relations at times allegations are made against the entire family. It is definitely unfortunate that deceased died within seven years of marriage but an adverse inference cannot be drawn under all circumstances against the accused if the same have not been supported in any manner by the witnesses, who were the close family members of the deceased. It has also come on record in evidence of PW 5 Dr Sant Ram Verma that the accused themselves had taken the deceased to the Primary Health Centre and she was in senses at aforesaid time. Further, the deceased did not disclose any other fact except of her illness. The operative portion whereby the accused had been acquitted, giving the "benefit of doubt" is to be appreciated in the light of the evidence on record and the words "benefit of doubt" cannot be mechanically read and applied. The present case is not wherein a "benefit of doubt" was extended on account of discrepancies in the evidence but since the allegations in no manner were supported by the prosecution witnesses. There is no evidence to presume that the petitioner had any role in winning over the witnesses. The findings by the Screening Committee are merely based on involvement of the petitioner in aforesaid FIR and wrong presumption that petitioner had no respect for women without appreciating the judgment of acquittal in correct perspective.

17. In the facts and circumstances, we are of the considered view that having regard to the evidence on record and the fact that the petitioner had already been considered suitable for appointment as SI (EXE) in CISF, the Screening Committee was not justified in concluding that the petitioner was not suitable for appointment to the post in Delhi Police. The Screening Committee failed to appreciate the entirety of facts and was merely swayed by invocation of Section 304-BIPC in FIR which was never supported on record by the material witnesses who were the close relations of the deceased.

8. The court needs to be alive to the realities in such cases as an exaggeration of allegations in such unfortunate incidents, out of minor matrimonial differences cannot be ruled out. In the present case, the benefit of doubt has not been granted by the learned Sessions Judge merely for some discrepancies in evidence or technical reasons but since no cogent evidence was brought on record to support the allegations of demand of dowry soon before the death of deceased

19. In trial for criminal offences, the accused is presumed to be innocent unless proved guilty and it is the duty of the prosecution for establishing the actus reus of the crime as well as the mens rea. When the accused is acquitted after full consideration of prosecution evidence and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted as held in Inspector General of Police v. S. Samuthiram [Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598 : (2013) 1 SCC (Cri) 566 : (2013) 1 SCC (L&S) 229]

20. There can be no second opinion that each case is to be scrutinised on its own facts through the designated officers and in case of the police force, the scrutiny needs to be more closer since the police officials are under a duty to tackle lawlessness. However, at the same time, generalisations cannot be made to deny the offer of appointment merely on the basis of registration of FIR without considering the reasoning in the judgment and the relevant facts and circumstances. Apart from the registration of the aforesaid FIR, there is nothing on record to reflect that the antecedents or the conduct of the petitioner disqualified him in any manner for the appointment to the post of SI (EXE), Delhi Police. It may be difficult to presume that the petitioner would be a threat to the discipline of the police force merely on account of aforesaid FIR and also considering the fact that petitioner had already joined on selection as SI (EXE) in CISF in an exam conducted by SSC. It does not appear to be logical that the petitioner who was found fit for appointment to the post of SI in CISF may be held to be unsuitable for appointment in Delhi Police on the basis of exam conducted by the same recruiting agency i.e. SSC.

19. Having considered the aforesaid, this Court is of the view that order dated 18.06.1985, based upon the ingenuine compromise dated 06.03.1979, was not a lawful order and accordingly considering the principles embodied above, this Court is not inclined to interefere in the order dated 19.01.2016 passed by the D.D.C./respondent No.1, as intereference in the same would revive an another illegal order dated 18.06.1985.

20. For the aforesaid reasons, the present writ petition is **dismissed**.

21. No order as to costs.

(2024) 5 ILRA 2346
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 9357 of 1978

Smt. Rani Jai Ratan Kaur ...Petitioner
Versus
D.D.C. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Swaraj Prakash, S. Shekhar, Sushil Kumar Mishra. V.B. Upadhyaya, V.K. Singh, Vinod Kumar

Counsel for the Opp. Parties:
Anil Bhushan, Arpan Srivastava, C.P. Singh, Neelabh Srivastava, S.C., V.K. Upadhyay

A. Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Chapter IX-A - Sections 240-G & 240-H - Compensation statement amounts to adjudication of title between the land holder and the person claiming Adhivasi right and principles of res-judicata and constructive res-judicata will apply only to Adhivasi who was party to proceedings. Judgment passed u/s 240-G of U.P.Z.A. & L.R. Act operate as res-judicata in the consolidation proceeding.

B. The court examined the order sheet of the case u/s 240-G of the U.P.Z.A. & L.R. Act, as well as the judgment passed by the Additional S.D.O. dated 13.8.1958 in Suit No. 191 of 1957-58, which showed that issues were framed, reference was made, objections were filed by respondent nos. 3 & 4, and evidence was adduced by both parties. Additional S.D.O. held that respondent nos. 3 & 4 were entitled to be recorded as Asami, and their claim for Sirdari rights was rejected. Based on the order dated 13.8.1958, which had attained finality, petitioner no. 1 remained recorded as Bhumidhar, even in the basic year of the consolidation operation, i.e., 1971. Judgment dated 13.8.1958, passed u/s 240-G of the U.P.Z.A. & L.R. Act, operated as res judicata in the consolidation proceedings. Held: The court found that there was proper compliance with Section 240-H of the U.P.Z.A. & L.R. Act. The finding of Deputy Director of Consolidation, that the record does not establish that the judgment u/s 240-G of the U.P.Z.A. & L.R. Act was passed by a competent authority was wholly illegal. Consolidation Officer's order directing that respondent no. 3 shall be recorded as Asami and not as Sirdar was upheld. (Para 15)

Allowed. (E-5)

List of cases cited:

1. Awdhesh Singh & anr. Vs Bikarma Ahir & ors. A.I.R. 1975 Allahabad 324

2. Sukhram Singh & anr. Vs Smt. Harbheji A.I.R. 1969 Supreme Court 1114

3. Mirdad & ors. Vs Board of Revenue & ors. A.I.R. 1977 Supreme Court 94

4. Maqbool Raza Vs Joint Director of Consolidation, U.P., Lucknow & ors. 1967 RD 440

5. Sukhram Singh Vs Smt. Harbheji 1969 RD 165

6. Amba Prasad Vs Mahaboob Ali Shah & ors. A.I.R. 1965 Supreme Court 54

7. Smt.Sonawati & ors. Vs Sri Ram & ors. A.I.R. 1968 Supreme Court 466

8. Preetam Singh (Dead) by Lrs & ors. Vs Assistant Director of Consolidation & ors. JT 1996 (1) SC 471

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

1. Heard Shri V.K. Singh, learned Senior Counsel assisted by Shri S. Shekhar,

learned Counsel for the petitioner, Shri Anil Bhushan, learned Senior Counsel assisted by Shri Arpan Shrivastav, learned counsel for contesting respondent Nos.3 and 4 and Shri Sharad Chandra Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. Brief facts of the case are that village Patka Bogha, Pargana, Khairagarh, District Allahabad came under consolidation operation by way of notification issued under Section 4 of U.P. Consolidation of Holdings Act, 1953, (hereinafter referred to as "U.P.C.H. Act") in the year 1971. According to petitioner No.1 a patta was executed by Raja Sahab in favour of petitioner No.1 in 1929 for maintenance as petitioner No.1 was living separately from her husband and petitioner No.1 being disable to do cultivation sublet the land to respondent Nos. 3 and 4. In the Basic Year of Consolidation Operation, petitioners were recorded as Bhumidhar of the plots of Khata No.3 situated in aforementioned village as mentioned in paragraph No.5 of the writ petition and respondent No.3 was recorded in class-7 as Asami. During consolidation partal, Plot No. 110/3 and 240/2, one Deotadin claimed to be in possession of the plot in dispute. Plots of Khata No. 3/1 was recorded in the name of respondent No.3-Sampat in Class-7 as Asami. Plot of Khata No.1 as mentioned in paragraph No.4 of the writ petition was recorded in the name of petitioner No.1, Rani Jai Ratan Kaur as bhumidhar and respondent No.3-Sampat was recorded in Class-7 as Asami. Plot of Khata No.3 were also recorded in the name of petitioner No.1-Rani Jai Ratan Kaur and respondent No.3-Sampat was recorded in Class-7 as asami. One plot No.73/3 area 3 biswa 10 biswansi of khata No.3 was recorded in Class-9 category in the name of respondent No.3-Sampat. Plots of Khata No.8 were recorded in the name of Shri Sant Bux Singh as Bhumidhar. The disputed plots which were recorded in the name of petitioner No.1-Rani Jai Ratan Kaur was stated to be transferred later on in favour of petitioner Nos. 2 and 3. Against Basic Year Entry an objection under Section 9-A(2) of U.P.C.H. Act was filed by respondent No.3/Sampat for expunging the entry of class-7 and for recording his name as sirdar. Respondent No.3 contested his claim on the ground that he was recorded in 1356 fasli and 1359 fasli, as such, he became Adhivasi and later on Sirdar. It was also pleaded by opposite party No. 3 that Petitioner No. 1, who is the wife of Raja Bhagwati Prasad Singh, is not a disabled person and the entry of Class-7 as Asami in respect to respondent No. 3 is incorrect and is liable to be expunged. On behalf of petitioner No.1. the claim was set up that petitioner No.1 is a disabled person in view of adjudication took place by a competent court, as such the judgment passed by competent court declaring petitioner No.1 is a disabled person will operate as res-judicata between the parties. It was further pleaded on behalf of petitioners that petitioner Nos. 2 and 3 obtained a disputed land by exchanged from petitioner No.1. Consolidation Officer vide order dated 23.03.1972 rejected the objection filed by contesting respondents and ordered to record their name as Asami as well as the name of Ramhit was ordered to be expunged from Plot No. 73/3, area 3 biswa, 10 biswansi and the name of Deotadin was also ordered to be expunged from Plot No. 110/3, area 2 biswa & Plot No. 240/2 area 10 biswa. Respondent Nos.3 and 4 challenged the order of Consolidation Officer dated 23.03.1972 by way of four appeals under Section 11 of U.P.C.H. Act before Settlement Officer Consolidation

which were registered as Appeal Nos.86 to 89. The aforementioned appeals were consolidated and decided by common judgment dated 03.07.1972 dismissing the aforementioned appeals. Respondent Nos.3 and 4 filed four revisions under Section 48 of U.P.C.H. Act before Deputy Director of Consolidation which were registered as revision Nos. 47/3, 48/35, 49/36, and 50/37. The aforementioned revisions were consolidated and heard together. The Deputy Director of Consolidation by order dated 07.07.1973 allowed the aforementioned revisions setting aside the orders of Consolidation Officer and Settlement Officer of Consolidation and remanded the matter back before Consolidation Officer for considering the questions of estoppel etc. In pursuance of the remand order passed by Deputy Director of Consolidation dated 07.07.1973, the Consolidation Officer heard the matter and rejected the objection of respondent Nos.3 and 4 vide order dated 15.10.1974. In appeal filed under Section 11 of U.P.C.H. Act by respondent Nos. 3 and 4 against the order of Consolidation Officer dated 15.10.1974 the Assistant Settlement Officer of Consolidation vide order dated 25.03.1975 allowed the appeal setting aside the order of Consolidation Officer dated 15.10.1974. Revision filed by petitioners under Section 48 of U.P.C.H. Act against the appellate order dated 25.3.1975 was dismissed by Deputy Director of Consolidation vide order dated 9.8.1978. Hence this writ petition on behalf of the petitioners challenging the order dated 09.08.1978 passed by Deputy Director of Consolidation and order dated 25.03.1975 passed by Settlement Officer of Consolidation.

3. In respect to proceedings under Section 240-G and 240-H of U.P.Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as U.P.Z.A.& L.R. Act) brief facts of the case are that in Suit No. 191 of 1957-58 under Section 240-G and 240-H of U.P.Z.A.&L.R. Act an objection was filed by petitioner No.1 on the ground that in view of the provisions contained under Section 157 of U.P.Z.A.&L.R. Act she should be declared disabled and separated wife and the claim of respondent Nos.3 and 4 for Adhivasi/ Sirdari rights is not tenable as respondent Nos.3 and 4 are Asami and petitioner No.1 is Bhumidhar of plot in question. The Compensation Officer framed issues and referred the matter to the Court of Sub-Divisional Officer Meja, Allahabad who was competent to decide the issue of title. The Additional Sub-Divisional Officer vide judgment dated 13.08.1958 decided the matter in a judicial proceeding considering the objection of respondent Nos.3 and 4 holding that the claim of respondent Nos.3 and 4 for Adhivasi/ Sirdari right is rejected and the claim of petitioner No.1 is accepted. One suit under Section 202 of U.P.Z.A.&L.R. Act was also filed against respondent Nos.3 and 4 which was abated under Section 5 of U.P.C.H. Act.

4. This court on 06.11.1978 admitted the writ petition and issued notice to respondent No.4.

5. In pursuance of the order dated 06.11.1978, parties have exchanged their pleadings.

6. Learned Senior Counsel for petitioners submitted that Deputy Director of Consolidation as well as Settlement Officer Consolidation has committed manifest error of law in holding that adjudication took place under Section 240-G of U.P.Z.A.&L.R. Act will not operate as

res-judicata in the consolidation proceeding. He further submitted that Sub-Divisional Officer Meja, Allahabad in suit under Section 240-G of U.P.Z.A.& L.R. Act has held vide judgement dated 13.08.1958 that petitioner No.1 is disabled person and the entry of respondent Nos. 3 and 4 is liable to be expunged. He further placed the proceeding which took place before the Compensation Officer under Section 240-G of U.P.Z.A.&L.R. Act in order to demonstrate that proceeding has taken place in proper manner by referring the dispute to the competent authority, framing issues, giving opportunity to the parties to lead evidence in support of their case and deciding the matter with respect to the title of the parties, accordingly, the adjudication took place under Section 240-H of U.P.Z.A.&L.R. Act will operate as res-judicata in the subsequent consolidation proceeding in view of full Bench decision of this Court reported in ***A.I.R. 1975 Allahabad 324 Awdhesh Singh and another versus Bikarma Ahir and others***. He further submitted that even in the oral evidence before the Consolidation Authorities petitioners' witness namely Ram Kripal has not stated that Raja Sahab is in possession over the land in dispute but Settlement Officer Consolidation as well as Deputy Director of Consolidation has misread the oral evidence adduced by petitioners' witnesses Ram Kripal. He further submitted that petitioner No.1 was held to be disabled person in view of the provision contained under Section 157 of U.P.Z.A.& L.R. Act, as such the same will operate as res judicata in the consolidation proceeding. He further submitted that after adjudication of the claim under Section 240-H of U.P.Z.A.&L.R. Act, no claim was raised by respondent Nos.3 and No.4 till 1972 when the consolidation intervened in the village in question. He further submitted that impugned judgment passed by Deputy Director of consolidation and Settlement Officer of Consolidation are wholly illegal as such, the same are liable to be set aside and judgment of Consolidation Officer be affirmed. He placed reliance upon judgment of Hon'ble Apex Court reported in **A.I.R. 1969 Supreme Court 1114 Sukhram Singh and another Vs. Smt. Harbheji as well as A.I.R. 1977 Supreme Court 94 Mirdad and others Vs. Board of Revenue and others** in support of his argument.

7. On the other hand, learned Senior Counsel for respondent nos.3 & 4 submitted that respondent nos.3 & 4 are in possession over the land in dispute since before 30 years from the date of filing of objection under Section 9 of U.P.C.H. Act that is before date of vesting, as such, they became Sirdar of the land in dispute. He further submitted that the petitioner no.1 is not a disabled person and order passed in the proceeding under Section 240-G of U.P.Z.A. & L.R. Act would not operate as res-judicata in the subsequent title proceeding under Section 9 of U.P.C.H. Act. He next submitted that the dispute under Section 240-G of U.P.Z.A. & L.R. Act was decided by the Sub-Divisional Officer as the Compensation Officer, as such, the same will not come in the way of Consolidation Courts to decide the title dispute according to the evidence adduced before the Consolidation Officer rather on the basis of adjudication took place under Section 240-G of U.P.Z.A. & L.R. Act. He further submitted that the Deputy Director of Consolidation while deciding the first revision filed by respondent nos.3 & 4 against the earlier order of Settlement Officer of Consolidation dated 3.7.1972 has held that Additional Divisional Officer has exercised his power as Compensation

Officer and not as Judicial Officer as such the same will not operate as res-judicata in Consolidation proceeding, the aforementioned judgment of Deputy Director of Consolidation dated 7.7.1973 has not been challenged by the petitioners before any Court, as such, the finding recorded under the earlier revisional judgment of Deputy Director of Consolidation dated 7.7.1973 is binding on the Courts as well as the parties. He next submitted that in the year 1967 petitioners have filed a suit for eviction of the respondents from the land in dispute before the revenue Court under Section 202 of U.P.Z.A. & L.R. Act but the same was abated due to consolidation operation took place in the village in question. He further submitted that theory of separation setup by the petitioner no.1 is for the purposes of the case as age of Santbux Singh being 40 years in the year 1973 indicate that he was born after execution of patta in the year 1929. He further submitted that there is no illegality in the judgment passed by respondent nos.1 & 2, as such, no interference is required in the matter and the writ petition filed by the petitioners is liable to be dismissed. He further placed reliance upon the judgement passed by full Bench of this Court in the case reported in ***1967 RD 440 (Maqbool Raza Vs. Joint Director of Consolidation, U.P., Lucknow & others*** as well as the judgment of Hon'ble Apex Court reported in ***1969 RD 165, Sukhram Singh vs. Smt. Harbheji*** in order to demonstrate that the Consolidation Officer are competent to look into the question as to who is Adhivasi & thereafter Sirdar in spite of the adjudication took place under Section 240-J of U.P.Z.A. & L.R. Act. He further submitted that in view of entry of 1356 fasli & 1359 fasli, the right & title of the respondent Nos.3 and 4 cannot be negatived in view of the law laid down by Hon'ble Apex Court in the case reported in **A.I.R. 1965 Supreme Court 54 Amba Prasad Vs. Mahaboob Ali Shah and others** as well as **A.I.R. 1968 Supreme Court 466 Smt.Sonawati and others vs. Sri Ram and others.**

8. I have considered the argument advanced by learned counsel for the parties and perused the records.

9. There is no dispute about the fact that the plot in dispute was recorded in the name of the petitioner no.1 as bhumidhar and the name of respondent no.3 was recorded as Asami in the basic year of the consolidation operation. There is also no dispute about the fact that the objection under Section 9-A (2) of U.P.C.H. Act filed by respondent no.3 for recording his name as Sirdar after expunging the entry of Class 7/ Asami in respect to the plot in question has been rejected by the Consolidation Officer directing that respondent no.3 shall be recorded as Asami and not as Sirdar. There is also no dispute about the fact that in appeal filed by respondent nos.3 & 4, the order of Consolidation Officer was set aside and respondent nos.3 & 4 was ordered to be recorded as Sirdar after expunging the entry of Jaman-7 from revenue records. There is also no dispute about the fact that the revision filed by the petitioners has been dismissed by the Deputy Director of Consolidation.

10. In order to appreciate the controversy involved in the matter perusal of Section 240-G & 240-H of Chapter IX-A of U.P.Z.A. & L.R. Act will be relevant for perusal, which are as under:

Conferment of Sirdari rights on Adhivasi

"240G. Filing of objections. - Any person interested or the State Government may in the manner prescribed file before the Compensation Officer an objection upon such statement within the period of one month from the date of its publication.

240H. Disposal of Objections. - (1) Except as provided in subordered to record the name-section (2), the Compensation Officer shall after hearing the parties, if necessary, on the objections filed under Section 240- G, dispose of the objections in the manner prescribed.

(2) Where the objection filed under sub-section (1)-

(a) is that the land is not land referred to in sub-section (1) of Section 240-A the Compensation Officer shall frame an issue to that effect and refer it for disposal to the Court which would have jurisdiction to decide a suit under Section 229-B read with Section 234-A in respect of the land and thereupon all the provisions relating to the hearing and disposal of such suits shall apply to the reference as if it were suit;

(b) involves a question of title and such question has not already been determined by a competent court, the Compensation Officer shall, [except in cases in which Section 240-HH applies] refer the question for determination to the [court of competent jurisdiction]. Explanation. - Whether a person is or is not an adhivasi shall not be deemed to raise a question of title within the meaning of this clause.

(3) [The court of competent jurisdiction] shall determine the question referred to him under Clause (b) of sub-section (2) in the manner prescribed and his decision thereon shall be final."

The Chapter IX of U.P.Z.A. & L.R. Act was inserted by U.P. Act No.20 of 1954.

11. In the instant matter order sheet of the proceeding under Section 240-G of U.P.Z.A. & L.R. Act, which took place between 12.2.1957 to 12.8.1957 will be also relevant for perusal, which are as under:

"नकल फर्द एहकाम रानी जैरतन कुवर बनाम आदित्य प्रसाद वगैरह दफा 240जी० मौजा पटखा बागेहा

फै० 13-8-58

12-2-57

आज मुकदमा पेश हुआ पुकार कराई गई। उज्रदार हाजिर हुआ राम करन वगैरह ने बयान तहरीरी दाखिल किया कार्यवाही रिपोर्ट शामिल मिसिल की गई।

14-3-57

ह० चतुरलाल सिंह

मुकदमा ब ता० 14-3-57 को पेश हो और यदि कोई अधिवासी हाजिर न हो तो मुकदमा की कार्यवाही परगना धीश मेजा के यहाँ भेज दिया जावे।

14-3-57

आज मुकदमा पेश हुआ पुकार कराई उजुरदार हाजिर हुआ अधिवासी गण हाजिर हुये।

मुकदमा निजाई है वास्ते कार्यवाही परगना धीश मेजा भेजा जाय और उजुरदार व अधिवासी गण व ता० 5-4-57 को परगनाधीश के इजलास हाजिर हों।

हा० चतुरलाल सिंह

5.4.57

5-4-57

आज मुकदमा मौसूफ होकर पेश हुआ वकील फरीक खाली में 24 काश्त कारान हाजिर आये वाकी गैर हाजिर हैं। फरीक अव्वल की तरफ से कोई भी हाजिर नहीं आया। इस बुल हुकुम

उजुरदारी अदमखारिज 5-4-57के बाद 11-7-57, 25-7-57

22-8-57

वास्ते सूबूत कागजी

Issues

(1) Whether the objections suffers under disability provided under section 157 of the U.P.Z.A. & L.R. Act.

(2) Whether the order objections we re Adhisasis and have become Sirdar of the land, in dispute.

S.d. Illegible

S.D.O.

22-8-57"

12. The perusal of the relevant portion of the order of Additional S.D.O. Meja, Allahabad dated 13.8.1958 in Suit No.191 of 1957-1958 under Section 240-G of U.P.Z.A. & L.R. Act are also relevant for perusal, which is as under:

"In the Court of Addl. S.D.O. Meja, Allahabad.
Suit NO.191 of 57-58 under Section 240G.
Village-Patkha Bagna Pargana Khairagarh,
Tahsil Meja, District- Allahabad.
Rani Jai Ratan Kunwar Vs. Aditya Prasad
Decided on 13.5.1958
Copy of order
In the court of Shri Chauhal Singh Additional S.D.O. Meja
Case No.191 of V. Patkha Bangna Rani Jai Ratan Kunwar vs. Aditya Prasad and Others

This is an objection ..... ……Rani Sahiba's case therefore fully covered under Sub-Section (a) of Section 157 of the U.P.Z.A. & L.R. Act under separation. She is entitled to its benefit. Issue no.I is therefore decided in the affirmative.

Issue No.2:-

Since the applicant objector has been adjudged to be entitled to the benefit under Section 157 (a) of the U.P.Z.A. & L.R. Act the occupants of her lands is not acquire Adhivasi rights but would be Assamis under Section 21 (h) of the U.P.Z.A. & L.R. Act and the issue is decided accordingly.

I, therefore, allow this objection of Rani Jai Ratan Kunwar and order that the names of opposite party be expunged from Adhivasi now Sirdar Khatas and they be entered as sub-tenants. Rani Jai Ratan Kunwar would not be entitled to any compensation.

…… would be cancelled ……may be restored to

.....Rani Jai Ratan Kunwar according to the entry of 1362 F.

Sd/-Chauhal Singh Add. S.D.O. Meja

13.8.1958

13. The ratio of law of full Bench decision of this Court in the case of **Avdhesh Singh (Supra)** will be also relevant. Paragraph no.12 of the judgment is as under:

"12. My answer to the first four questions referred to us are as follows:--

(1) Finality of Compensation Statement under Section 240-J, U. P. Zamindari Abolition and Land Reforms Act extinguishes the rights and title of the land-holder and the land-holder is debarred from showing in collateral or separate proceedings that the land is not held by an Adhivasi, except in cases where the provisions of the Act have not been followed or where the Compensation Statement has been prepared in disregard of the fundamental principles of judicial procedure (Katikara Chintamani Dora v. G`uatreddi Annamanaidu MANU/SC/0336/1973 : [1974]2SCR655 . If the requirements of the Act have not been complied with or the fundamental principles of judicial procedure have been disregarded, the Compensation Statement signed and sealed by the Compensation Officer under Section 240-J (2) of the Act can be assailed in collateral proceedings.

(2) The Compensation Statement signed and sealed under Section 240-J (2) of the Act is final between the land-holder and the State alone.

(3) The Compensation Statement amounts to an adjudication of title between the land-holder and the person claiming Adhivasi rights and the principle of res judicata and constructive res judicata will apply only to an Adhivasi who has been a party to proceedings consequent on an objection of the nature contemplated by Section 240-H (2) (a) of the Act.

(4) The land-holder against whom Compensation Statement has become final and who has received compensation has no locus standi to reagitate his rights in respect of the land in question."

14. The perusal of Paragraph no.12 (3) of the judgment rendered in **Awadhesh Singh (Supra)** as quoted above, demonstrates that the compensation statement amounts to adjudication of title between the land holder and the person claiming Adhivasi right and principles of res-judicata and constructive res-judicata will apply only to Adhivasi who was party to proceedings.

15. The perusal of order sheet of case under Section 240-G of U.P.Z.A. & L.R. Act as well as judgment passed by the Additional S.D.O. dated 13.8.1958 passed in Suit No.191 of 1957-58 fully demonstrate that issues were framed, reference was made, objections were filed by respondent nos.3 & 4 as well as evidences were adduced by both parties including revenue entry of 1356 fasli, 1359 fasli, 1363 fasli, accordingly, Additional S.D.O. Meja, Allahabad has held that respondent nos.3 & 4 are entitled to be recorded as Asami & claim for Sirdari right of respondent nos.3 & 4 was rejected.

16. On the basis of the order dated 13.8.1958, which had attained finality, the petitioner no.1 remained recorded as bhumidhar even in the basic year of the consolidation operation i.e. 1971.

17. In view of the paragraph no.12 (3) of the full Bench decision of this Court in the case of ***Awadesh Singh (supra)***, the judgment dated 15.8.1958 passed under Section 240-G of U.P.Z.A. & L.R. Act will operate as res-judicata in the consolidation proceeding.

18. So far as the argument advanced by learned Senior Counsel for respondent nos.3 & 4 that in view of the finding recorded by Deputy Director of Consolidation while passing the earlier remand order dated 7.7.1973 that judgment dated 13.8.1958 passed under Section 240-G of U.P.Z.A. & L.R. Act will not operate as res-judicata in consolidation proceeding cannot be accepted in view of ratio of law laid down by Hon'ble Apex Court in the case reported in ***JT 1996 (1) SC 471, Preetam Singh (Dead) by Lrs & Others Vs. Assistant Director of Consolidation & Others.*** Paragraph nos.5 & 6 of the judgment rendered in Preetam Singh (supra) will be relevant for perusal, which are as under:

"5. We have heard learned Counsel for the appellants. We can safely say on the strength of the two precedents of the Court in Jasraj Inder Singh v. Hemraj Multanchand : [1977]2SCR973 and Smt. Sukhrani (dead) by LRs. and Ors. v. Hari Shankar and Ors. : [1979]3SCR671 that

the appellant should succeed. In the former case this Court expressed its view that "the remand order by the High Court is a finding at an intermediate stage of the same litigation. The appeal before the Supreme Court is from the suit as a whole and therefore, the entire subject matter is available for adjudication before it.... Otherwise the whole lis for the first time came to the Supreme Court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by the Supreme Court. Intermediate stages of the litigation and orders passed at those stages have a provisional finality.... The contention barred before the High Court is still available to be canvassed before this Court when it seeks to pronounce finally on the entirety of the suit...." In the later case this Court expressed the view "that though a decision given at an earlier stage of the suit will bind the parties at a later stage of the same suit, it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken there from or no appeal did lie, a higher court is not precluded from considering the matter again at a later stage of the same litigation."

6. When the matter was in revision before the Assistant Director (Consolidation), he had the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revisional jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court of revisional jurisdiction otherwise having suo moto power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war of legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation)."

19. The Deputy Director of Consolidation while passing the impugned order has recorded finding that from the record of the proceeding it is not established that judgment dated 13.8.1958 under Section 240-G of U.P.Z.A. & L.R. Act was passed by competent authority from the order sheet of the proceedings as well as the judgment dated 13.8.1958 passed in Suit No.191 of 1957-58, under Section 240-G of U.P.Z.A. & L.R. Act, which is quoted above in the earlier part of this judgment fully demonstrates that each & every requirement Section 240-H of U.P.Z.A. & L.R. Act are fulfilled, as such, impugned judgment passed by revisional Court is wholly illegal. The appellate Court has also passed the impugned judgment contrary to the ratio of law laid down by full Bench of this Court in ***Awadhesh Singh (supra).***

20. The full Bench judgment of this Court in the case of ***Maqbool Raza (supra)*** & judgment of Hon'ble Apex Court in the case of ***Sukh Ram (supra)*** cited by learned Senior Counsel for the respondent nos.3 & 4 will not apply in the instant matter as there was proper compliance of Section 240-H of U.P.Z.A. & L.R. Act in the instant matter and in the full Bench decision of this Court in ***Awadhesh Singh (supra)*** the full Bench decision of ***Maqbool Raza (supra)*** was taken into consideration.

21. Considering the entire facts and circumstances of the case, the impugned judgment dated 25.3.1975 passed by respondent no.2/ Assistant Settlement Officer of Consolidation & judgment dated 9.8.1978 passed by respondent no.1/ Deputy Director of Consolidation are liable to be set aside and the same are hereby set aside.

22. The writ petition stands ***allowed*** and order of Consolidation Officer dated 15.10.1974 is maintained by which basic year entry was maintained.

23. No order as to costs.

(2024) 5 ILRA 2355
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-C No. 9568 of 2024

Murtja ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Pradeep Kumar Rai, Prajyot Rai

Counsel for the Opp. Parties:
C.S.C., Kaushal Kishore Mani

Civil Law - U.P.Z.A.LR Act-Sections 132, 194, 195 & 198-the plot in question is recorded as 'Zohad' (pond) in the Revenue Records-such category is covered u/s 132 of the Act-no bhumidhari right can accrue-certain land covered u/s 132 of the Act can be allotted as Aasami by the land Management Committee as per the Act-The committee has exercised power u/s 195 in allotting the land to the vendor of the Petitioner-lease granted to petitioner rightly rejected-no right accrued to Petitioner by sale deed-allotment in favour of vendor was Aasami lease year to year-Petitioner being a transferee from the original Aasami cannot acquire rights over the land.

W.P. dismissed. (E-9)

List of Cases cited:

1. Jitendra Kumar Vs St. of U.P. & ors., reported in 2018(8) ADJ 503

2. Vakila Vs St. of U.P. & ors., reported in 2008(3) ADJ 444

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

1. Heard Sri Pradeep Kumar Rai, learned counsel for the petitioner, Sri Abhishek Shukla, learned Additional Chief Standing Counsel for the State Respondents and Sri Kaushal Kishore Mani, learned counsel, who has appeared on behalf of the Respondent No. 4, Land Management Committee.

2. The writ petition has been filed questioning the legality, propriety and correctness of the order dated 06.12.2023 passed by the Additional Commissioner (Administration-II) Saharanpur Division, Saharanpur in Case No. 629 of 2023, under Section 333 of the U.P.Z.A. & L.R. Act, 1950 as also the order dated 12.12.2023

passed by the Additional Collector (Finance & Revenue) Saharanpur in Case No. 13 of 2012-13 under Section 115-P of the U.P.Z.A. & L.R. Act, 1950.

3. By the order dated 12.12.2023, the Additional Collector (F & R) Saharanpur after registering a case against the petitioner under Section 115-P of the U.P.Z.A. & L.R. Act has expunged the name of the petitioner and directed the land in dispute to be recorded as 'Johad' at the same time has cancelled the proposal of the Land Management Committee dated 24.02.1976 and approval dated 06.03.1976. The Revision preferred by the petitioner against the said order has also been dismissed by the order dated 06.12.2023.

4. Learned counsel for the petitioner submits that the dispute in the present writ petition relates to Plot No. 110M area 0.1740 which was recorded in the name of one Mohd. Ali son of Faimuddin, as Bhumidhar with Transferable Rights in Khatauni 1419F to 1424F since 1403F. After the death of the said Mohd. Ali, his sons Zulifikar and Mustafa and widow Shakila were recorded under PA-11 by the order of the Revenue Inspector dated 29.04.2008 and their names were also reflected in the Khatauni 1419F to 1424F. Mst. Shakila widow of Mohd. Ali, Zulfikar and Mustafa executed a sale deed dated 18.01.2008 in favour of Mustafa and Murtaza sons of Abdul Latif of the Plot No. 110/1M area 0.174 hectare and the names of Mustafa and Murtaza came to be recorded in the Khatauni 1419F to 1424F by order of the Tehsildar Nakur, Saharanpur dated 29.02.2009.

5. Learned counsel for the petitioner contends that the Deputy Collector, Saharanur submitted a report dated 30.06.2012 to the effect that the Plot No. 110 area 14 Biswa was recorded as 'Zohad' (Pond). The Land Management Committee under its resolution dated 24.02.1976 approved on 06.03.1976 allotted Plot No. 110 area 1 bigha in favour of Mohd. Ali under an agricultural lease. After the death of Mohd. Ali, the land stood recorded in the names of his heirs. The heirs transferred the land in favour of Mustafa and Murtaza, sons of Abdul Latif. In the allotted plot, an area of 0.031 hectare stands recorded as road and remaining area 0.174 hectare is recorded as 'Johad' (Pond) and the allotment in favour of Mohd. Ali was irregular as the land is covered by Section 132 of the U.P.Z.A. & L.R. Act. On the strength of the report dated 30.06.2012, proceeding under Section 115-P of the U.P.Z.A. & L.R. Act was initiated which culminated in order dated 12.12.2013. The Appeal preferred by Mustafa against the order dated 12.12.2013 was dismissed and the Revision under Section 333 was also dismissed. The writ petition filed by Mustafa was also dismissed. Thereafter the petitioner preferred a Revision against the order dated 12.12.2013, which has been dismissed by the order dated 06.12.2023.

6. Learned counsel for the petitioner has assailed the orders impugned primarily on the ground that the Plot No. 110M area 1 Bigha was allotted to Mohd. Ali son of Faimuddin under the proposal of the Land Management Committee dated 12.12.1976 which allotment was also approved on 06.03.1976. The name of the Vendor of the petitioner was recorded over the land as Class-2 since 1395F. Out of total area 1 Bigha, 14 Biswa of Plot No. 110 was recorded as 'Johad' (Pond). Mohd. Ali became Bhumidhar of the plot of area 1 Bigha under Section 131-B of the U.P.Z.A. & L.R. Act, 1950. The petitioner purchased

the plot after inspection of the records on 18.01.2008. The petitioner was also recorded over the plot as Bhumidhar. The proceedings under Section 115-P of the U.P.Z.A. & L.R. Act, 1950 are ex-facie illegal and the impugned orders are liable to be set aside and the writ petition deserves to be allowed. The sale deed in favour of the petitioner is still valid and the entry in the revenue records could be corrected only after the sale deed as set aside. Reliance is placed upon the decision of Coordinate Bench of this court in the case of ***Jitendra Kumar Vs. State of U.P. and others***, reported in ***2018(8) ADJ 503*** and in the case of ***Vakila Vs. State of U.P. & others***, reported in ***2008(3) ADJ 444***.

7. Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State Respondents submits that the Additional Collector (F & R) Saharanpur after considering all aspects has recorded finding of fact that the land allotted to the Vendor of the petitioner was 'Zohad' (Pond) Category 6(1) and covered by Section 132 of the U.P.Z.A. & L.R. Act, 1950 and over which no Bhumidhari Rights could accrue. The said finding of fact has also been upheld in Revision and in such view of the matter no interference is warranted by this Court in exercise of its extra ordinary powers under Article 226 of the Constitution of India and the writ petition is liable to be dismissed at the threshold.

8. I have heard the learned counsel for the petitioner, learned Additional Chief Standing Counsel appearing for the State Respondents and have perused the record as also the case laws cited by learned counsel for the petitioner at the Bar.

9. Admittedly, the Plot No. 110 is Category 6(1) land recorded as 'Zohad' (Pond) in the Revenue Records. Such category of land is covered under Section 132 of the U.P.Z.A. & L.R. Act, 1950 and no Bhumidhari right can be said to accrue in respect of such land.

10. The Khatauni extracts pertaining to the Fasli year 1389 to 1394, 1395 to 1400 filed as Annexure No. 5 to the writ petition depicts that the original allottee Mohd. Ali son of Faimuddin was recorded as Class/ Category-2 Bhumidhar with non-transferable rights over the land of Plot No. 110/1 as lease holder. Land, which is covered under Section 132 of the Act, no Bhumidhari Right can be said to accrue as provided in the Section itself. However, certain land which are covered under Section 132 of the Act can be allotted as Aasami by the Land Management Committee but by virtue of Section 197 sub-Section (2) of the Act, the right to admit any person as Aasami of any tank, pond or other land covered by water shall be regulated by the Rules made under the Act. The allotment of tank, pond or other land are governed by Government Orders issued under Section 126 of the Act. The case at hand is not a case where the allotment has been done under Section 197(2) of the U.P.Z.A. & L.R. Act, as allotment is as Asankramani Bhumidhar and not as Aasami. In the present case, the Land Management Committee has exercised power under Section 195 of the Act in allotting the land to the Vendor of the petitioner. The Additional Collector under the impugned order dated 12.12.2013 has rightly came to the conclusion that the lease could not have been granted of land which is covered by Section 132 of the Act.

11. In the opinion of the Court, no rights could have accrued to the petitioner by virtue of his sale deed dated 18.01.2008 as his vendor had limited rights ad could not have transferred the leased plots. There is no dispute as to the fact that Johad Land (Pond) is land covered by Section 132 of the U.P.Z.A. & L.R. Act, 1950. The status of the vendor of the petitioner can be of an Aasami year to year. I am fortified in my view by the provisions of Section 198(9) of the U.P.Z.A. & L.R. Act, 1950 which contains a deeming clause with regard to any land specified in Section 132 leased out to a tenure holder as Sirdar or Bhumidhar with non-transferable rights prior to a specified date. The Section 198(9) of the U.P.Z.A. & L.R. Act, 1950 is reproduced below:-

"Section 198(9) of the U.P.Z.A. & L.R. Act, 1950 *:- Where any person has been admitted to any land specified in Section 132 as a sirdar or bhumidhar with non-transferable rights at any time before the said date and such admission was made with the previous approval of the Assistant Collector-in-charge of the sub-division in respect of the permissible area mentioned in sub-section (3), then notwithstanding anything contained in other provisions of this Act or in the terms and conditions of the allotment or lease under which such person was admitted to that land, the following consequences shall, with effect from the said date ensure, namely-*

(a) the allottee or lessee shall be deemed to be an asami of such land and shall be deemed to be holding the same from year to year and the allotment or lease of the land to the extent mentioned above shall not be deemed to be irregular for the purposes of sub-section (4);

(b) the proceedings, if any, pending on the said date before the Collector or any other Court or authority for the cancellation of the allotment or lease of such land, shall abate.]"

12. The above provisions indicates that allotments made prior to November 10, 1980 of land specified under Section 132 as Sirdar or Bhumidhar shall be treated to be a Aasami year to year. Thus the allotment in favour of Mohd. Ali Vendor of the petitioner was in the nature of an Aasami lease year to year. There is no provision under the U.P.Z.A. & L.R. Act, 1950 whereunder an Aasami can be granted Bhumidhari rights in respect of the land leased to him and thus permitting him to transfer the land by way of sale deed. The petitioner being a transferee from the original Aasami cannot acquire any rights over the land. The sale deed dated 18.10.2008 executed in favour of the petitioner is in fact void ab-initio and no rights can be said to accrue to the petitioner therefrom. The Court is not impressed by the argument of learned counsel for the petitioner that he is a bonafide purchaser of the plot for consideration and the impugned orders could not have been passed till the sale deed stood cancelled. The Court is also not impressed with the submission of learned counsel for the petitioner that possession of the plot in question could not be taken except by filing a suit for eviction.

13. Section 194 of the U.P.Z.A. & L.R. Act provides that the Land Management Committee shall be entitled to take possession of land comprised in a holding or part thereof in certain situations including a situation where the land covered by Section 132 of the Act was held by an Aasami and the Aasami has been ejected or his interest therein has otherwise

extinguished. Section 194 of the U.P.Z.A. & L.R. Act, 1950 is reproduced here under:-

"194. Land Management Committee to take over land after extinction of interest therein.

- The [Land Management Committee] [Substituted by U.P. Act No. 37 of 1958.] shall be entitled to take possession of land comprised in a holding or part thereof if-

(a) [the land was held by a bhumidhar, and his interest in such land is extinguished under Clause (a) or Clause (aa) of Section 189 or Clause (a), Clause (b), Clause (c), Clause (cc) or Clause (e) of Section 190;] [Substituted by U.P. Act No. 8 of 1977 (w.e.f. 28.01.1977).]

(b) [* *] [Omitted by U.P. Act No. 8 of 1977 (w.e.f. 28.01.1977).]*

(c) the land being land falling in any of the classes mentioned in Section 132, was held by an asami and the asami has been ejected or his interest therein have otherwise extinguished under the provisions of this Act."

14. Thus the Land Management Committee/Gaon Sabha concerned is within its powers to take possession of the land after interest of Aasami in any land gets extinguished.

15. In view of the above, this Court is not inclined to interfere in the orders impugned. Consequently, the writ petition is **dismissed**. However, there will be no order as to costs,.

(2024) 5 ILRA 2359
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 12796 of 2024

Hem Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Sanjay Kumar Mishra

Counsel for the Opp. Parties:
C.S.C., Nipun Singh

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - U.P. Avas Evam Vikash Parishad Adhiniyam, 1965 - Petitioner was bhumidhar with transferable rights –by virtue of section 55 of the Adhiniyam-provision of Land Acquisition Act subject to modifications provided under the schedule alone would apply-repeal of LA Act would not affect any right, privilege, obligation or liability acquired, incurred under the said enactment-present case acquisition proceedings were not finalized before 01.01.2014 as no award was declared by parishad at that time-award declared in 2024-compensation should be determined as per the provisions of the new Act, 2013 by treating the reference date of 20214-date of enforcement of the New Act-impugned award quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. U.P. Avas Evam Vikas Parishad Vs Chandra Shekhar & ors. , (2024) 3 SCR 585

2. Atul Sharma & anr. Vs St. of U.P. & ors., 2017 (10) ADJ 308

3. Gauri Shankar Gaur Vs St. of U.P., (1994) 1 SCC 92

4. U.P. Avas Ewam Vikas Parishad Vs Jainul Islam & anr., (1998) 2 SCC 467

5. Nagpur Improvement Trust, AIR 1962 SC 955

6. St. of M.P. Vs G.C. Mandawar, AIR 1954 SC 493

7. Union of India & ors. Vs Tarsem Singh & ors., (2019) 9 SCC 304

8. Executive Engineer, Gosikhurd Project Ambadi, Bhandara, Maharashtra Vidarbha Irrigation Development Corporation v. Mahesh & ors., (2022) 2 SCC 772

9. Hori Lal Vs St. of U.P. & ors., 2019 SCC OnLine SC 129

10. Pyare Lal & ors. Vs U.O.I. & ors., 2024 (153) ALR 771

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

1. Heard Sri Shiv Kant Mishra, holding brief of Sri Sanjay Kumar Mishra, learned counsel for the petitioner, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for the State-respondents and Sri Nipun Singh, learned counsel for respondent no.4.

2. The petitioner has prayed for quashing of the award dated 27.02.2024 passed by Additional District Magistrate (Land Acquisition), Agra in respect of Khasra Nos. 109/1, area 0.2910 hectare, 109/2, area 0.6450 hectare, 70M, area 0.0890 hectare, 72, area 0.2150 hectare, 74, area 0.1900 hectare, 67, area 0.1900 hectare, 68, area 0.0510 hectare, 69, area 0.4170 hectare, 70M, area 0.5560 hectare, 71, area 0.3920 hectare situated at Village Bhood, Tehsil and District Bulandshahr and for a further direction to the said authority to prepare a fresh award treating 'relevant date' with reference to which market value is to be determined as 01.01.2014, i.e. the date of enforcement of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the New Act, 2013').

3. The petitioner, indisputably, was bhumidhar with transferable rights of the aforesaid plots. A notification under Section 28 of U.P. Avas Evam Vikash Parish Adhiniyam, 1965 (hereinafter referred to as 'the Adhiniyam') was issued on 11.08.1979. It was followed by notification under Section 32 of the Adhiniyam dated 07.07.1982. The petitioner filed Writ Petition No.6695 of 1983 for putting a restraint on the respondents from enforcing Grihstha Yojana No.1 Scheme in pursuance of the aforesaid notifications and to declare Sections 55(1) and 32(2) of the Adhiniyam as ultra vires of the Constitution. The writ petition was dismissed in default on 15.03.2000 and, thereafter, the restoration application was also dismissed on 19.07.2002. Possession of the land was taken by the Parishad on 28.06.2002, however, award of the subject land was not made until 27.02.2024.

4. In the impugned award dated 27.02.2024, the reference date for calculating compensation for the acquired land has been taken to be the date of notification under Section 28 dated 11.08.1979 treating it to be at par with notification under Section 4 of the Land Acquisition Act, 1894 (for short 'the LA Act'). Accordingly, the exemplar sale deeds of the period three months prior to notification under Section 28 dated 11.08.1979 alone have been considered in determining compensation for the subject land. Market value of the acquired land has been determined by applying the principle of betting system. For the land situated upto a distance of 100 feet from the road, compensation determined is at the rate of

Rs.31.42 per sqr. yard, for the land upto 600 feet at the rate of Rs.21.05 per sqr yard and beyond it, at the rate of Rs.15.71 per sqr yard, apart from other statutory benefits.

5. The sole contention of learned counsel for the petitioner is that after coming into force of New Act of 2013, the compensation has to be determined with reference to the date of enforcement of the said Act, i.e. 01.01.2014. In support of his contention, he places reliance on Section 24(1) of the New Act, 2013 and the recent judgment of Supreme Court in **U.P. Avas Evam Vikas Parishad Vs. Chandra Shekhar and others (Civil Appeal No.3855 of 2024 arising out of SLP (C) No.779 of 2016, decided on 05.03.2024)**[1]**.**

6. On the other hand, Sri Nipun Singh, learned counsel appearing on behalf of Parishad, submits that by virtue of Section 55 of the Adhiniyam, the provisions of Land Acquisition Act, 1894 applies, subject to modifications specified in the Schedule. There has been no amendment in the said provision so as to make applicable the provisions of the New Act, 2013, therefore, the claim of the petitioner is unsustainable. In support of his submissions, he places reliance on a Division Bench judgment of this Court in **Atul Sharma and another Vs. State of U.P. and others**[2].

7. We have considered the rival submissions and perused the material on record.

8. It is noteworthy that by virtue of Section 55 of the Adhiniyam read with the Schedule, the provisions of the Land Acquisition Act, 1894, as amended in the State of Uttar Pradesh, subject to modifications specified in the Schedule, have been made applicable. Section 55 of the Adhiniyam is as follows:

"55. Power to acquire land.–(1) Any land or any interest therein required by the Board for any of the purposes of this Act, may be acquired under the provisions of the Land Acquisition Act, 1894 (Act No. 1 of 1894), as amended in its application to Uttar Pradesh, which for this purpose shall be subject to the modification specified in the Schedule to this Act.

(2) If any land in respect of which betterment fee has been levied under this Act is subsequently required for any of the purposes of this Act, such levy shall not be deemed to prevent the acquisition of the land under the Land Acquisition Act, 1894 (Act No. 1 of 1894)."

9. By Act No. 68 of 1984, drastic amendments were made in the LA Act. The Statement of Objects and Reasons – emphasizes the need to balance individual interest with larger interest of the community. Two main features of the Amending Act, 1984 was to provide (i) timelines in initiating and concluding various stages of the proceedings so as to avoid delay of long periods which 'renders unrealistic the scale of compensation offered to the affected persons' and (ii) to provide adequate measures to compensate for the delay. To meet these concerns, main proposals for amendments, inter alia, are as follows:

"(iii) A time-limit of one year is proposed to be provided for completion of all formalities between the issue of the preliminary notification under Section 4(1) of the Act and the declaration for acquisition of specified land under Section 6(1) of the Act.

(v) It is proposed to provide for a period of two years from the date of publication of the declaration under Section 6 of the Act within which the Collector should make his award under the Act. If no award is made within that period, the entire proceedings for the acquisition of the land would lapse. He has also been empowered to correct clerical or arithmetical mistakes in the award within a certain period from the date of the award.

(viii) Solatium now payable at the rate of fifteen per centum of the market value of the land acquired in consideration of the compulsory nature of the acquisition, is proposed to be increased to thirty per centum. Similarly, the rate of interest payable on the excess compensation awarded by the Court and on the compensation in cases where possession of land is taken before payment of compensation, are also proposed to be increased substantially.

(ix) Considering that the right of reference to the civil court under Section 18 of the Act is not usually taken advantage of by inarticulate and poor people and is usually exercised only by the comparatively affluent landowners and that this causes considerable inequality in the payment of compensation for the same or similar quality of land to different interested parties, it is proposed to provide an opportunity to all aggrieved parties whose land is covered under the same notification to seek re-determination of compensation, once any one of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act.

(x) As a large number of cases for the acquisition of land are pending before various authorities for a very long time and payment of the market value of the land obtaining on the date of the preliminary notification under Section 4 of the Act in respect of such land is likely to be unrealistic and iniquitous, it is proposed to provide for payment of simple interest at ten per centum per annum on the amount of compensation for the period commencing from the date of issue of the notification under Section 4 of the Act to the date of tender of payment or deposit of compensation awarded by the Collector in respect of all pending proceedings on the 30th April, 1982, the date when the earlier Bill for the amendment of the Act was introduced in the House of the People."

10. After amendments in LA Act, question arose before the Supreme Court in **Gauri Shankar Gaur v. State of U.P.**[3] whether the provisions of LA Act as amended by Amending Act, 1984 stood incorporated in the Adhiniyam by virtue of Section 55 read with the Schedule. There was difference of opinion in the Two Judges Bench and the matter was referred to Larger Bench of Three Judges. The issue came to be decided by Three Judges Bench in **U.P. Avas Ewam Vikas Parishad v. Jainul Islam and Another**.[4] In paragraph 13 of the judgment, the point of difference between the Two Judges was noted as follows:

"13. Ramaswamy,J. was of the view that Section 55 of the Adhiniyam read with the Schedule made an express incorporation of the provisions of Section 4(1) and Section 6 as modified and incorporated in the Schedule and that the Schedule effected necessary structural amendments to Sections 4, 5, 17 and 23 incorporating therein the procedure and principles with necessary modifications and that it is a complete code in itself. He, therefore, held that Section 55 and the Schedule adopted only by incorporation

Sections 4(1) and 6(1) and the subsequent amendments to Section 6 did not become part of the Adhiniyam and they have no effect on the operation of the provisions of the Adhiniyam. Sahai,J. however, took a contrary view. He was of the opinion that whether a legislation was by way of incorporation or by way of reference is more a matter of construction by the courts keeping in view the language employed by the enactment, the purpose of referring or incorporating provisions of an existing Act and the effect of it on the day-to-day working. According to the learned Judge such legislation by incorporating is subject to exceptions and that one such situation where legislation by incorporation is excluded is if it creates difficulty in day-to-day working. The learned Judge was of the view that in our constitutional set-up the exception can be extended further and the courts should lean against a construction which may result in discrimination. He, therefore, held that the amendments introduced in the LA Act by the 1984 Act would be applicable to acquisition of land for the purpose of the Adhiniyam and restriction of three years added by the first proviso to Section 6 of the LA Act was applicable to acquisition for the purposes of the Adhiniyam also. The learned Judge, however, took note of the fact that the Parishad had entered into possession and had constructed housing colonies as there was no interim order in favour of the landowners during pendency of the writ petitions in the High Court and observed that larger social interest requires this Court to mould the relief in such a manner that justice may not suffer. He, therefore, held that even though publication of declarations under the Act were beyond the period of three years it was not in the interest of justice to quash the proceedings but the landowners should be paid compensation of the land acquired on market value prevalent in the year in which the declaration analogous to Section 6 of the earlier Act was published/issued by fictionally assuming that fresh notification under the Act analogous to Section 4 was issued in that year."

11. The Supreme Court considered the plea of the Parishad that by virtue of Section 55 of the Adhiniyam, the provisions of the LA Act, subject to modifications provided under the Schedule alone would apply as it is legislation by incorporation. On behalf of the land owners, it was contended that the provisions of the Amending Act at least to the extent the same relates to award of additional statutory benefits if not applied would offend Article 14 of the Constitution and would render Section 55 of the Adhiniyam unconstitutional. The Supreme Court relied on its previous judgment in **Nagpur Improvement Trust**[5] decided by a Special Bench of Seven Judges. Therein, Section 61 of the Nagpur Improvement Trust Act, 1936, which is identical to Section 55 of the Adhiniyam, was under consideration and it was ruled that –

"Article 14 confers an individual right and in order to justify a classification there should be something which justifies a different treatment to this individual right. It seems to us that ordinarily a classification based on the public purpose is not permissible under Article 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land? In other words can different

principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other.

* * *

It is equally immaterial whether it is one Acquisition Act or another Acquisition Act under which the land is acquired. If the existence of two Acts enables the State to give one owner different treatment from another equally situated the owner who is discriminated against, can claim the protection of Article 14."

12. The contention that when acquisition is under two different Legislations, Article 14 cannot be invoked, was repelled relying on **State of M.P. v. G.C. Mandawar**[6] by observing as follows –

"28. The principle laid down by this Court in State of M.P. v. G.C. Mandawar that Article 14 cannot be invoked when the alleged discrimination is on account of laws made by two different legislatures has no application in the present case because under the LA Act as well as under the provisions of the Adhiniyam the acquisition is to be made by the same authority, viz., the State Government of Uttar Pradesh, and discrimination arises on account of action taken by the same authority."

13. The Supreme Court after considering the rival contentions held that the provisions of the Amending Act in so far as it relates to determination of compensation, if not applied to acquisitions made under the Adhiniyam, "the consequence would be that the provisions of the LA Act, as applicable under the Adhiniyam, would suffer from the vice of arbitrary and hostile discrimination". Such a consequence could be avoided if the provisions of the Adhiniyam are construed to mean that the provisions of the LA Act, as amended by the 1984, Act, relating to determination of compensation would apply to acquisitions of land for the purposes of the Adhiniyam. The relevant discussion is in paragraphs no.31 and 32 and the same is extracted below:-

"31. Since the present case involves acquisition of land under the provisions of the L.A. Act as applicable under the Adhiniyam, it is fully covered by the law laid down by this Court in Nagpur Improvement Trust Vs. Vithal Rao: (1973) 1 SCC 500. Keeping in view the principles laid down in the said decision of this Court, it has to be held that if the provisions of the Adhiniyam are so construed as to mean that the provisions of the L.A. Act, as they stood on the date of enactment of the Adhiniyam, would be applicable to acquisition or land for the purpose of the Adhiniyam and that the amendments introduced in the L.A. Act by the 1984 Act relating to determination and payment of compensation are not applicable, the consequence would be that the provisions of the L.A. Act, as applicable under the Adiniyam, would suffer from the vice of arbitrary and hostile discrimination. Such a consequence would be avoided if the provisions of the Adhiniyam are construed to mean that the provisions of the L.A. Act, as amended by the 1984 Act, relating to determination and payment of compensation would apply to acquisition of land for the purposes of the Adhiniyam. There is nothing in the Adhiniyam which precludes adopting the latter construction. On the other hand, the provisions of the

Adhiniyam show that the intention of the Legislature, while enacting the Adhiniyam, was to confer the benefit of solatium @ 15% by modifying Section 23(2) in the Schedule, which benefit was not available under the provisions of the L.A. Act as it was applicable in the State of Uttar Pradesh at the time of enactment of the Adhiniyam. It cannot, therefore, be said that the intention of the Legislature, in enacting the Adhiniyam, was to deny to the landowners the benefits relating to determination and payment of compensation which would be available to them under any amendment made in the L.A. Act after the enactment of the Adhiniyam. We are, therefore, of the opinion that on a proper construction of Section 55 of the Adhiniyam it must be held that while incorporating the provisions of the L.A. Act in the Adhiniyam the intention of the legislature was that amendments in the L.A. Act relating to determination and payment of compensation would be applicable to acquisition of lands for the purposes of the Adhiniyam. This means that the amendments introduced in the L.A. Act by the 1984 Act relating to determination and payment of compensation, viz, Section 23(1-A) and Section 23(2) and 28 as amended by the 1984 Act would be applicable to acquisitions for the purpose of the Adhiniyam under Section 55 of the Adhiniyam.

32. In view of the construction placed by us on the provisions of Section 55 of the Adhiniyam that the provisions of the L.A. Act, as amended by the 1984 Act relating to determination and payment of compensation, would be applicable to acquisition of land for the purposes of the Adhiniyam, it is not necessary to deal with the submission that if the provisions of the 1984 Act are held to be not applicable in the matter of acquisition of land for the purposes of the Adhiniyam the provisions of the L.A. Act, as applicable under the Adhiniyam, would be void on the ground of repugnance under Article 254 of the Constitution."

(emphasis supplied)

14. The effect of aforesaid enunciation of law is that even though Section 11-A of the Act of 1894, which stipulated that the acquisitions would lapse in case award is not declared within two years, would not have the effect of acquisitions made under the Adhiniyam getting lapsed but the beneficial provisions relating to determination of compensation would apply.

15. In **Union of India and others Vs. Tarsem Singh and others**[7] the Supreme Court considered the vires of Section 3-J of the National Highways Act, 1956 as amended by National Highways Laws (Amendment) Act, 1997. It excluded the applicability of Land Acquisition Act, 1894 to acquisitions made under the said Act. It was held that the said provisions resulting in non-grant of solatium and interest in respect of lands acquired under National Highways Act, which were available if lands were acquired under Land Acquisition Act, 1894 was violative of Article 14 of the Constitution of India. The plea based on Article 31-C read with Article 39(b) of the Constitution was held to be not tenable. The classification between landowners, whose land were acquired for National Highways under the National Highways Act, 1956 and landowners whose land was acquired for other public purposes was held to have no rational nexus with the object sought to be achieved by the National Highways Laws (Amendment) Act, 1997. Again the fundamental principle reiterated in the said case was that the State cannot accord different treatment to

affected persons based on legislation under which acquisition is made. In arriving at the said conclusion, once again reliance was placed on Nagpur Improvement Trust (supra). The beneficial provisions of LA Act relating to solatium and interest were held to be applicable to acquisitions made under the National Highways Act, 1956. The relevant conclusion contained in para-52 of the Law Report is as follows:

"We therefore declare that the provisions of the Land Acquisition Act relating to solatium and interest contained in Sections 23(1-A) and (2) and interest payable in terms of Section 28 proviso will apply to acquisitions made under the National Highways Act. Consequently, the provision of Section 3-J is, to this extent, violative of Article 14 of the Constitution of India and, therefore, declared to be unconstitutional."

16. Here, it is worthwhile to note the relevant provisions of the New Act, 2013. Section 24 of the Act contemplates lapsing of certain acquisition proceedings and also determination of compensation as per provisions of the New Act in cases where no award had been made under Section 11 of the Land Acquisition Act, 1894. For ready reference, Section 24 is extracted below:-

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,--

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

17. Section 114 repeals the Land Acquisition Act, 1894 but, at the same time, saves the action taken under the said Act by applying Section 6 of the General Clauses Act, 1897. Section 114 is extracted below:-

"(1) The Land Acquisition Act, 1894 (1 of 1894) is hereby repealed.

(2) Save as otherwise provided in this Act the repeal under sub-section(1) shall not be held to prejudice or affect the general application of section 6 of the

General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals."

18. In this regard, we may also take note of Section 6 of the General Clauses Act, 1897, which is as follows:-

"6. Effect of repeal. Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

(emphasis supplied)

19. A combined reading of Section 114 of the New Act along with Section 6 of the General Clauses Act 1897 would establish beyond doubt that the repeal of Land Acquisition Act, 1894 would not affect any right, privilege, obligation or liability acquired, accrued or incurred under the said enactment, consequent to its repeal. Thus, the acquisition made by U.P. Avas Evam Vikas Parishad in the instant case would not lapse but, at the same time, the right of the petitioner to receive compensation also gets saved.

20. Under the New Act, undoubtedly, the rate of compensation is much higher as compared to LA Act. Thus, while repealing LA Act, the New Act, by virtue of Section 24(1)(a) mandates determination of compensation in cases where no award has been made, as per the provisions of the New Act. Obviously, it is a balancing act of the legislature. While it saves acquisitions under the LA Act in larger interest of the community, it protects the interest of the affected persons by providing them with compensation as per the principles enshrined under the New Act.

21. In **Executive Engineer, Gosikhurd Project Ambadi, Bhandara, Maharashtra Vidarbha Irrigation Development Corporation v. Mahesh and others**[8], the Supreme Court considered the issue as to whether limitation of two years prescribed under Section 11-A for making award under LA Act, 1894 would apply even after repeal of the said Act, or the twelve months period specified in Section 25 of the New Act, 2013 will apply for award made under clause (a) of Section 24(1) of LA Act, 1894? Giving a purposive interpretation, the Supreme Court ruled that in such cases, the limitation of twelve months prescribed under Section 25 of the New Act, 2013 would apply. In so holding, the Supreme Court held that notification under Section 6 of the LA Act, 1894 is to be treated at par with notification under

Section 19 of the Act. Consequently, the award is to be made in such cases within twelve months from 01.01.2014, the date of commencement of New Act, 2013 if the limitation had not expired as per Section 11-A of the LA Act. We may usefully refer to the relevant extract from the said judgment –

"30. A rational approach so as to further the object and purpose of Sections 24 and 26 to 30 of the 2013 Act is required. We are conscious that Section 25 refers to publication of a notification under Section 19 as the starting point of limitation. In the context of clause (a) to Section 24(1) of the 2013 Act there would be no notification under Section 19, but declaration under Section 6 of the 1894 Act. When the declarations under Section 6 are valid as on 1-1-2014, it is necessary to give effect to the legislative intention and reckon the starting point. In the context of Section 24(1)(a) of the 2013 Act, declarations under Section 6 of the 1894 Act are no different and serve the same purpose as the declarations under Section 19 of the 2013 Act.

31. Consequently, we hold that in cases covered by clause (a) to Section 24(1) of the 2013 Act, the limitation period for passing/making of an award under Section 25 of the 2013 Act would commence from 1-1-2014, that is, the date when the 2013 Act came into force. Awards passed under clause (a) to Section 24(1) would be valid if made within twelve months from 1-1-2014. This dictum is subject to the caveat stated in paras 20 to 23* (supra) that a declaration which has lapsed in terms of Section 11-A of the 1894 Act before or on 31-12-2013 would not get revived."

22. Where the award is declared under the saving clause embodied in Section 24(1)(a) of the New Act, 2013, it has been held in several judgments of Coordinate Benches that the reference date for making the award would be 01.01.2014, the date of commencement of New Act. While coming to the said conclusion, reliance has been placed on the judgment of Supreme Court in **Hori Lal vs. State of U.P. & others**[9] and D.O. letter of the State Government dated 26.10.2015 clarifying that the reference date in such cases would be 01.01.2014. In **Pyare Lal and 24 others vs. Union of India and 4 others**[10], we have taken the same view. The relevant paragraphs from the said judgment are extracted below:

"10. In **Smt. Sabita Sharma** (supra), a Co-ordinate Bench of this Court, after examining various earlier Division Bench judgements of this Court and most of which were upheld with the dismissal of special leave petitions filed before the Supreme Court and in one case, namely, **Hori Lal vs. State of U.P. and 3 Others** with dismissal of Civil Appeal No.1462 of 2019, held that the relevant date would be 01.01.2014 i.e., the date of commencement of the new Act, 2013. The judgement takes notice of Section 113 of the new Act, 2013, which empowers the Central Government to make such provisions or give such directions not inconsistent with the provisions of the new Act, 2013, as may appear to it to be necessary or expedient for removal of the difficulty. It has been held that in exercise of said power, the Central Government had issued a D.O. No.13013/01/2014-LRD(Pt) dated 26.10.2015 wherein the issue at hand was specifically answered in reference to a query raised by the Government of Maharashtra. The relevant part of the said D.O. is extracted below:

S. No.	Issues raised by the Government of Maharashtra	Opinion of the DoLR
1.	While determining the amount of compensation under Section 27 of the RFCTLAR&R Act, 2013 of Hon'ble Supreme Court's orders are followed or cost of assets have to be separately computed in addition to cost of land?	Under Section 26 of the RFCTLAR&R Act, 2013 market value of land is determined while under section 27, value of all assets attached to the land is added to the market value to determine the amount of compensation. Thus, it is not contradictory to the Supreme Court's orders quoted in the letter of Maharashtra Government.
2.	Under Section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894.	Under section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894. Department of Land Resources agrees to this, as there is no other reference date, that can be treated as equivalent to date of SIA notification under the RFCTLAR&R Act, 2013.
3.	For calculation of market value, under Section 24(1)(a), reference date should be 01.01.2014 (commencement of RFCTLAR&R Act, 2013) or date of issuing preliminary notification under Land Acquisition Act, 1894?	The reference date for calculation of market value, under Section 24(1)(a) should be 01.01.2014 (commencement of RFCTLAR&R Act, 2013), as the Section reads "in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply. Under section 26 reference date is date of preliminary notification, but section 24 is a special case of application of the Act in retrospective cases, and a later date of determination of market value is suggested (i.e., 01.01.2014) with a view to ensure that the land

		owners/farmers/affected families get enhanced compensation under the provisions of the RFCTLAR&R Act, 2013 (as also recommended by Standing Committee in its 31st report).

11. The Division Bench, thereafter, concluded as follows:

"From a perusal of the D.O. letter dated 26th October, 2015, issued by the concerned Ministry of the Central Government forwarded to the Principal Secretary of the State of U.P., for information and necessary action, it is evident that the said direction was made in order to remove difficulty arose in giving effect to the provisions of the RFCTLARR Act, 2013, in the matter of calculation of market value under Section 24(1)(a), in the land acquisition proceedings initiated under the Act, 1894. The said directions issued by the Central Government being in exercise of the power under Section 113 of the RFCTLARR Act, 2013 have statutory force and are binding on all the State Government being in view of the power conferred on the Central Government to make such provision or give such directions which are not inconsistent with the provisions of the RFCTLARR Act, 2013, for removal of any difficulty arising in giving effect to the provisions of the RFCTLARR Act, 2013."

12. It is noteworthy that when same view was taken by an earlier Division Bench in Hori Lal (supra), the matter travelled to Supreme Court and the **Civil Appeal No.1462 of 2019 (Hori Lal vs. State of U.P. and Others)** was dismissed by the Supreme Court repelling the contention that the relevant date would be the date on which the award was made. The view taken by the Division Bench of this Court that relevant date would be 1st of January, 2014 was thereby upheld. The relevant extract from the said judgement of the Supreme Court is as follows:

"20. We, therefore, find no good ground to accept the submission of the learned counsel for the appellant when he contended that the date for determining the compensation should be the date on which the Land Acquisition Officer passed the award. This argument does not have any basis and is, therefore, not acceptable for the simple reason that such date is not provided either in the old Act, 1894 or in the Act, 2013.

21. Indeed, how the compensation is required to be determined and with reference to what date, is provided under the Act and admittedly the date suggested by the learned counsel is not the date prescribed either in the old Act or the new Act. This submission has, therefore, no merit and deserves to be rejected. It is accordingly rejected.

22. We, therefore, find no good ground to take a different view than what was taken by the High Court in the impugned order"

13. In view of the above discussion, we are of the opinion that the issue is no more res integra. The relevant date for determining the compensation in respect of acquisition initiated under the old Act but where award could not be made by the time the new Act, 2013 came into force, would be 1st of January, 2014 i.e., the date of commencement of the new Act, 2013. "

23. In the instant case, admittedly, the notification under Section 32 of the Adhiniyam, which is at par with Section 6 notification under LA Act, was made on 07.07.1982. However, award was not made for almost 42 years. This became possible because the timelines under the Amending Act are held to be inapplicable. Now, should the Parishad continue to delay the awards taking benefit of the non-applicability of the timelines and at the same time, also not pay compensation according to the New Act?

24. This controversy has now been settled by the Supreme Court in **Chandra Shekhar (supra).** The said case also arose out of the acquisition made under the Adhiniyam. The notification under Section 28 was issued on 17.07.2004. It also appears that the subsequent action of the Parishad was subjected to challenge and it was held that the same was not valid as proper opportunity, as contemplated under Section 5-A of the Land Acquisition Act 1894, was not given. The Supreme Court upheld the judgment of the High Court quashing the subsequent action of Parishad on the ground of non compliance of the procedure. The Supreme Court, however, held that since substantial development had already taken place, therefore, it would not be proper to quash the acquisition but the land holder should be substantially compensated. It specifically considered the impact of

Section 55 of Adhiniyam and held that the New Act shall be deemed to be read in place of Old Act, 1894 on the ground that the acquisition had not attained finality before 01.01.2014. The relevant observations in this regard are as follows:-

"18. Having held so, the question that falls for further consideration is as to what should be the future course of action for the appellant-Board, so that neither the public interest to utilize the subject-land for the Scheme that has been substantially developed is frustrated nor the true tenure holders are deprived of the adequate compensation for their land. It may be seen from Section 55 of the 1965 Act that the compensation for the acquired land was required to be assessed in accordance with the provisions of the Land Acquisition Act 1894, which stood repealed w.e.f. 01.01.2014 by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the 2013 Act"). Section 55 of the 1965 Act cannot be given effect unless it is declared by way of a deeming fiction that instead of 1894 Act which now stands repealed, the compensation shall be assessed in accordance with the provisions of the 2013 Act. We hold accordingly. Since the acquisition could not attain finality before 01.01.2014, we are of the considered opinion that the Acquiring Authority/Board are obligated to pay compensation to the ex-propriated owners, as is to be assessed in accordance with Section 24(1) of the 2013 Act.

19. Consequently, we hold that the tenure-holders/owners of Khasra No.673, which was still under the acquisition process when 2013 Act came into force, shall be entitled to be paid compensation in accordance with Section 24(1) of the 2013 Act."

25. The Supreme Court, at the same time, did not make applicable the procedure relating to carrying out of Social Impact Assessment Study under the New Act and only determination of compensation was directed to be made as per the New Act.

26. In the instant case also, admittedly, the acquisition proceedings were not finalized before 01.01.2014 as no award was declared by the Parishad by that time. The award has been declared, as noted above, on 27.02.2024 and, therefore, in our opinion, the Competent Authority should have determined compensation as per the provisions of the New Act, 2013 by treating the reference date as 01.01.2014, i.e. the date of enforcement of the New Act as emerges from combined reading of **Chandra Shekhar** (supra) and **EE, Gosikhurd Project** (supra).

27. In **Jainul Islam (supra)**, the Larger Bench of Supreme Court has held that the beneficial provisions of the Amending Act, 1984 relating to determination of compensation would apply to the acquisitions made under the Adhiniyam to save it from arbitrariness and discrimination. As the Act, 1894, as amended from time to time, stands replaced by the New Act, 2013, we are of the considered opinion that the affected persons would be entitled to compensation as per the New Act, 2013, again to save Section 55 of the Adhiniyam from being rendered unconstitutional on the touchstone of Article 14 of the Constitution.

28. In the impugned award, reliance has been placed on Division Bench decision of this Court in **Atul Sharma (supra),** which in view of the judgment of Supreme Court in **Chandra Shekhar (supra)** stands impliedly overruled in so far as it holds that compensation for acquired land under the Adhiniyam would be payable under the Land Acquisition Act, 1894 even in respect of acquisition which could not be finalized until the enforcement of the said Act, i.e. 01.01.2014. The judgment in **Jainul Islam (supra),** in our opinion, has wrongly been interpreted in the impugned award and the said judgment, when read with the recent pronouncement made in **Chandra Shekhar (supra)**, clarifies the legal position that the acquisitions made under the Adhiniyam which could not be finalized until coming into force of New Act, 2013, would be governed by the New Act in respect of determination of compensation.

29. Accordingly, the impugned award is hereby quashed and the matter is remitted back to the Additional District Magistrate (Land Acquisition), Agra (respondent no.3) for determining the compensation afresh in the light of observations made herein above.

30. The writ petition stands **allowed**. There is no order as to costs.

(2024) 5 ILRA 2372
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-C No. 16608 of 2024

Amity Int. School ...Petitioner
Versus
Presiding Officer Labour Court & Anr. ...Opp. Parties

Counsel for the Petitioner:
Rahul Chaudhary

Counsel for the Opp. Parties:
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Natural justice-Application by the Petitioner to decide issue no.1 as preliminary issue rejected-impugned-workman (Respondent no.2) has been terminated after departmental enquiry-aggrieved-he moved claim petition under U.P.

Industrial Disputes Act, 1947-labour court framed two issues-first adhering to natural justice-second as to legality and validity of terminating the services –issue qua violation of principles of natural justice and fair play during the domestic enquiry should be decided as a preliminary issue.

W.P. allowed. (E-9)

List of Cases cited:

1. Shankar Chakravarti Vs Britannia Biscuit Co. Ltd & anr. reported in 1979 AIR 1652

2. M.L. Singla Vs Punjab National Bank reported in 2018 (18) SCC 21

3. Kurukshetra University Vs Prithvi Singh reported in AIR 2018 S.C. 973

4. Shamli Distillery & Chemical Works Shamli Vs St. of U.P. & ors. in Writ-C No.31147 of 2019

5. Gregory Patrao & ors. Vs Mangalore Refinery and Petrochemicals Ltd. & ors. reported in (2022) 10 SCC 461

6. M/s. Swarup Vegetable Product Industries Ltd. Vs Labour Court II, Meerut reported in 1998 (1) AWC 491

7. H.R. Sugar Factory Vs St. of U.P. reported in 1997 (76) FLR 355

8. D.P. Maheshwari Vs Delhi Administration & ors., AIR 1984 SC 153

9. Cooper Engineering Ltd. Vs Shri P.P. Mundhe (1975) 2 SCC 661

10. Karnataka St. Road Transport Corpn. Vs Lakshmidevamma (Smt.) & anr. (2001) 5 SCC 433

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent no.1 and Shri Shekhar Srivastava, Advocate who has assisted the Court without filing his memo of appearance on behalf of respondent no.2.

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

3. The petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India assailing the order dated 18.11.2023 passed by the Presiding Officer, Labour Court, Ghaziabad whereby application dated 08.08.2023 (Paper No.13-D) moved on behalf of the petitioner to decide the issue no.1 as a preliminary issue has been rejected.

4. Facts culled out from the record are that the workman (respondent no.2) has been terminated from service after departmental enquiry vide order dated 20.05.2020 w.e.f. 01.06.2020. Having been aggrieved, respondent no.2 has moved claim petition under the U.P. Industrial Disputes Act, 1947 (in brevity **'Act, 1947'**). On the said application, question has been referred for adjudication with respect to termination of respondent no.2 since 01.06.2020. During pendency of adjudication case, labour court, vide order dated 27.01.2023, has framed two issues, first, qua adhering to the principles of natural justice while conducting the domestic enquiry and, second, legality and validity of terminating the services of workman with effect from 01.06.2020. At later stage, the petitioner has moved an application dated 08.08.2023 (Paper No.13-D) to decide the issue no.1 as a preliminary

issue. The labour court has rejected the said application, vide order dated 18.11.2023, which is under consideration before this Court.

5. It is submitted by learned counsel for the petitioner that the labour court has illegally rejected the said application (Paper No.13-D) without properly considering the gravity of issue no.1. The question relating to violation of principles of natural justice while conducting the domestic enquiry is a paramount consideration for deciding the adjudication case under the Act, 1947, therefore, same is liable to be decided as a preliminary issue. In support of his submission, learned counsel for the petitioner has cited the following cases :-

(i) Shankar Chakravarti vs. Britannia Biscuit Co. Ltd & Another reported in 1979 AIR 1652 (Full Bench decision).

(ii) M.L.Singla vs. Punjab National Bank reported in 2018 (18) SCC 21.

(iii) Kurukshetra University vs. Prithvi Singh reported in AIR 2018 S.C. 973.

(iv) Shamli Distillery And Chemical Works Shamli vs. State of U.P. And 2 Others decided by Coordinate Bench of this Court on 13.11.2019 in Writ-C No.31147 of 2019.

6. Per contra, Shri Shekhar Srivastava, Advocate vehemently opposed the submissions advanced by counsel for the petitioner and contended that issue no.1 regarding violation of principles of natural justice in domestic enquiry cannot be considered as preliminary issue inasmuch as it is a question of fact and requires evidence to decide the same. It is further contended that intention of the establishment is only to protract the litigation. Both the issues, as framed by the labour court, vide order dated 27.01.2023, requires common evidence to be adduced by the parties, therefore, once the evidence are adduced by the parties, there is no justification to decide one issue as a preliminary issue inasmuch as both the issues can be decided simultaneously. In support of his case he has cited the following cases :-

(i) Judgment of the Apex Court in the case of Gregory Patrao & Others vs. Mangalore Refinery and Petrochemicals Limited & Others reported in (2022) 10 SCC 461.

(ii) Full Bench judgment of this Court in the case of M/s. Swarup Vegetable Product Industries Ltd. vs. Labour Court II, Meerut reported in 1998 (1) AWC 491.

(iii) Division Bench of this Court in the case of H.R. Sugar Factory vs. State of U.P. reported in 1997 (76) FLR 355.

7. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it is manifested that question for consideration in the instant matter lies in a narrow compass as to whether issue relating to the violation of principles of natural justice, while conducting domestic enquiry, can be tried/examined as a preliminary issue.

8. The Labour Court has rejected the application dated 08.08.2023 moved in this regard citing the Full Bench judgment of the Hon'ble Supreme Court in the case of D.P. Maheshwari vs. Delhi Administration & Others reported in **AIR 1984 SC 153**. In the said judgment, the Hon'ble Supreme Court has raised concern qua protraction of litigation before the Labour Court/Labour Tribunal which may

led to misery and jeopardize industrial peace. Consequent thereto, ultimately workman is the sufferer. It is apposite to mention that equal Bench strength (Hon'ble Three Judges Bench) of the Hon'ble Supreme Court in the matter of Cooper Engineering Ltd. vs. Shri P.P. Mundhe reported in **(1975) 2 SCC 661** and Shankar Chakravarti (Supra) has emphasized that violation of principles of natural justice, during the domestic enquiry, should be decided first as a preliminary issue. In the subsequent judgments passed by the Hon'ble Supreme Court, the case of Shankar Chakravarti (Supra) has been followed as a law of the land. Case of D.P. Maheshwari (Supra) has been decided subsequent to the cases of Cooper Engineering Ltd. (Supra) and Shankar Chakravarti (Supra). However, while deciding the case of D.P. Maheshwari (Supra), the Hon'ble Supreme Court has observed that with the change of time, the policy to decide the preliminary issue first should be reversed. For ready reference observation made by the Hon'ble Supreme Court is quoted herein below :-

"There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes Where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Article 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask them selves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

9. It is pertinent to mention that in the case of D.P. Maheshwari (supra), no independent consideration has been made by the Hon'ble Supreme Court to the ratio decided in the previous cases i.e. Cooper Engineering Ltd. (Supra) and Shankar Chakravarti (Supra). Besides this Full Bench of this Court has occasioned to consider and decide the question in this respect in the case of M/s. Swarup Vegetables (Supra). Before the Full Bench,

two questions were referred which are quoted herein below :-

"1. Whether the Labour Court/Industrial Tribunal have any statutory or legal obligation to decide any issue as preliminary issue while adjudicating an industrial dispute in accordance with procedure provided under Rules framed under U.P. Industrial Disputes Act ?

2. Whether the High Court can in exercise of its jurisdiction under Article 226 of the Constitution mandate a Court or Tribunal to follow a procedure contrary to statutory Rules ?"

10. Question no.1 is relevant for the purposes of deciding the instant writ petition. While answering the question no.1, the Full Bench of this Court has considered the relevant judgment of the Hon'ble Supreme Court including the case of Shankar Chakravarti (Supra) and D.P. Maheshwari (Supra) and concluded in paragraph 16 of the judgment that all the issues should be decided simultaneously. For ready reference paragraph no.16 of the judgment passed by the Full Bench of this Court in the case of Swarup Vegetables (Supra) is quoted herein below :-

"16. From the conspectus of views expressed by the Supreme Court in the aforementioned decisions, the position that emerges is that once a reference has been made to an Industrial Tribunal, then all the issues which arise, whether jurisdictional or merit, must be decided together. The process of adjudication by the Industrial Tribunal or Labour Court must be completed as expeditiously as possible. It is not obligatory on the Industrial Tribunal or Labour Court to frame a preliminary issue. Law does not enjoin the Tribunal to decide if the enquiry was fair and proper initially and then to grant an opportunity to the management if the finding went against it, to adduce evidence on the delinquency of the workmen and the punishment imposed. On the other hand the law casts a duty on the Industrial Tribunal/Labour Court to decide not only whether the domestic enquiry was fair and proper but also whether the punishment imposed by the employer was justified in the facts and circumstances of the case. The Industrial Tribunal/Labour Court should consider the entire case in the light of the evidence adduced before it. The Industrial Tribunal/Labour Court should particularly bear in mind the provisions of Section 11A of the Central Act and Section 6(2-A) of the U.P. Act' and remember that the main purpose of creating a forum for industrial adjudication is to avoid delay in disposal of proceedings. Viewed in this angle, we hold the Division Bench of this Court in the case of D.C.M. Shriram Industries Ltd. (1996 (72) Fac LR 713) was not right in holding that the management can lead evidence to establish the charges against the workman only after decision on the issue whether domestic enquiry was fair and proper and, therefore, such issue should be taken as a preliminary issue. It is, accordingly, overruled. The decision of the single Judge in M/s. Star Paper Mills Ltd. (1987 Lab IC 1854) (supra) is also overruled. The decision of the single Judge in the case of M/s. Vikram Cotton Mills (1989 (59) Fac LR 386) (supra) has our approval."

11. However, the ratio decided by the Hon'ble Supreme Court in the case of Shankar Chakravarti (Supra) was subsequently affirmed by the Constitution Bench (Hon'ble Five Judges Bench) of the Hon'ble Supreme Court in the case of Karnataka State Road Transport Corpn. vs.

Lakshmidevamma (Smt.) and Another reported in **(2001) 5 SCC 433**. The relevant paragraph no.41 of the said judgment upholding the correctness of law laid down in the case of Shankar Chakravarti is quoted herein below :-

"In view of the above, I am of the opinion that Shambhu Nath Goyal case does not lay down correct law. The law has been correctly laid in Shankar Chakravarti case and Rajendra Jha case. The correct procedure is as stated in Shankar Chakravarti case subject to further safeguards for workman as already indicated above."

12. Importance of deciding the issue relating to violation of principles of natural justice during domestic enquiry as a preliminary issue has succinctly been decided and upheld by the Hon'ble Supreme Court in both the cases i.e. Cooper Engineering Ltd. and Shankar Chakravarti (Supras). In all the subsequent judgments, the Hon'ble Supreme Court has followed the judgment of Shankar Chakravarti (Supra) and upheld that the preliminary issue qua violation of principles of natural justice during the domestic enquiry has to be decided first. In the matter of M.L.Singla (Supra) the Hon'ble Supreme Court has held that it would obligatory upon the labour court to first frame the preliminary issue on the question of legality and validity of the domestic enquiry and confined its discussion only for examining the legality and proprietory of the enquiry proceeding. For ready reference paragraph nos. 20 to 32 and 46 of the said judgment are quoted herein below :-

"20. The first error was that it failed to decide the validity and legality of the domestic enquiry. Since the dismissal order was based on the domestic enquiry, it was obligatory upon the Labour Court to first decide the question as a preliminary issue as to whether the domestic enquiry was legal and proper.

21. Depending upon the answer to this question, the Labour Court should have proceeded further to decide the next question.

22. If the answer to the question on the preliminary issue was that the domestic enquiry is legal and proper, the next question to be considered by the Labour Court was whether the punishment of dismissal from the service is commensurate with the gravity of the charges or is disproportionate requiring interference in its quantum by the Labour Court.

23. If the answer to this question was that it is disproportionate, the Labour Court was entitled to interfere in the quantum of punishment by assigning reasons and substitute the punishment in place of the one imposed by respondent No.1-Bank. This the Labour Court could do by taking recourse to the powers under Section 11A of the ID Act.

24. While deciding this question, it was not necessary for the Labour Court to examine as to whether the charges are made out or not. In other words, the enquiry for deciding the question should have been confined to the factors such as-what is the nature of the charge(s), its gravity, whether it is major or minor as per rules, the findings of the Enquiry Officer on the charges, the employee's overall service record and the punishment imposed etc.

25. If the Labour Court had come to a conclusion that the domestic enquiry is illegal because it was conducted in violation of the principles of natural justice thereby causing prejudice to the rights of the employee, respondent No.1-Bank was under legal obligation to prove the

misconduct (charges) alleged against the appellant (employee) before the Labour Court provided he had sought such opportunity to prove the charges on merits.

26. The Labour Court was then under legal obligation to give such opportunity and then decide the question as to whether respondent No.1-Bank was able to prove the charges against the appellant on merits or not.

27. If the charges against the appellant were held proved, the next question to be examined was in relation to the proportionality of the punishment given to the appellant.

28. If the charges against the appellant were held not proved, the appellant was entitled to claim reinstatement with back wages either full or partial depending upon the case made out by the parties on the issue of back wages.

29. The second error was that the Labour Court called upon the parties to lead evidence on all the issues including the charge of misconduct in the first instance itself.

30. The third error committed by the Labour Court was that it proceeded to examine the findings of the Enquiry Officer on the charges like an Appellate Court, appreciated the evidence adduced before the Enquiry Officer and the one adduced before it and then came to a conclusion that the findings of the Enquiry Officer are perverse. This the Labour Court could not do.

31. Assuming that the Labour Court had the jurisdiction to direct the parties in the first instance itself to adduce evidence on merits in support of the charges yet, in our opinion, it was obligatory upon the Labour Court to first frame the preliminary issue on the question of legality and validity of the domestic enquiry and confined its discussion only for examining the legality and propriety of the enquiry proceedings.

32. Depending upon the finding on the preliminary issue on the legality of the enquiry proceedings, the Labour Court should have proceeded to decide the next questions. The Labour Court while deciding the preliminary issue could only rely upon the evidence, which was relevant for deciding the issue of legality of enquiry proceedings but not beyond it.

46. In our view, the reasoning, which we have given while dealing with the first three errors committed by the Labour Court in Paras 20 to 33, are based on the law laid down in aforementioned cases, which are approved in Shankar Chakravarti's case (supra).”

13. In the case of Kurukshetra University (Supra), the Hon’ble Supreme Court has discussed this issue in detail in light of the ratio decided in the case of Shankar Chakravarti (Supra) and came to conclusion that preliminary issue with regard to legality of the domestic enquiry should be decided first. Relevant paragraph nos. 14 to 24 of the said judgment is quoted herein below :-

“14. The question as to what are the powers of the Labour Court and how it should proceed to decide the legality and correctness of the termination order of a workman under the Labour Laws in reference proceedings and what are the rights of the employer while defending the termination order in the Labour Court remains no more res integra and is settled by series of decisions of this Court beginning from AIR 1958 SC 130 (Indian Iron & Steel Co. Ltd. & Anr. Vs. Their Worken) till AIR 1979 SC 1653 (Shankar

Chakravarti vs. Britannia Biscuit Co. Ltd. & Anr.) and also thereafter in several decisions as mentioned below.

15. In between this period, this Court in several leading cases examined the aforesaid questions. However, in Shankar's case (supra), this Court took note of entire case law laid down by this Court in all previous cases and reiterated the legal position in detail.

16. The legal position, in our view, is succinctly explained by this Court (two-Judge Bench) in the case of Delhi Cloth & General Mills Co. vs. Ludh Budh Singh, 1972(3) SCR 29-1972(Lab IC) 573 in Propositions 4, 5 and 6 in the following words:

"(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal.

But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide

the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it."

17. The aforesaid principle of law was quoted with approval in Shankar's case (supra) by a Bench of three Judges in Para 23 observing, "..... After an exhaustive review of the decisions bearing on the question and affirming the ratio in R.K. Jain's case (1972 Lab IC 13) this Court extracted the emerging principles from the review of decisions. Propositions 4, 5 and 6 would be relevant for the present discussion."

18. The aforementioned decisions were extensively discussed by the Constitution Bench in the case of Karnataka State Road Transport Corpn. vs. Lakshmidevamma(Smt.) & Anr., 2001 (5) SCC 433 wherein the law laid down in the aforementioned two cases was approved.

19. When we examine the facts of this case in the light of the aforementioned principles of law, we find that the termination of the respondent was by way of punishment because it was based on the adverse findings recorded against the respondent in the domestic enquiry.

20. So the question, which the Labour Court was expected to decide in the first instance as a "preliminary issue", was whether the domestic enquiry held by the appellant (employer) was legal and proper. In other words, the question to be decided by the Labour Court was whether the domestic enquiry held by the appellant was conducted following the principles of natural justice or not.

21. If the domestic enquiry was held legal and proper then the next question which arose for consideration was whether the punishment imposed on the respondent(delinquent employee) was proportionate to the gravity of the charge leveled against him or it called for any interference to award any lesser punishment by exercising the powers under Section 11-A of the ID Act.

22. If the domestic inquiry was held illegal and improper then the next question, which arose for consideration, was whether to allow the appellant (employer) to prove the misconduct/charge before the Labour Court on merits by adducing independent evidence against the respondent (employee). The appellant was entitled to do so after praying for an opportunity to allow them to lead evidence and pleading the misconduct in the written statement. (see- also Para 33 at page 1665/66 of Shankar's case (supra)).

23. Once the appellant(employer) was able to prove the misconduct/charge before the Labour Court, then it was for the Labour Court to decide as to whether the termination should be upheld or interfered by exercising the powers under Section 11-A of the ID Act by awarding lesser punishment provided a case to that effect on facts is made out by the respondent(employee).

24. We are constrained to observe that first, the Labour Court committed an error in not framing a "preliminary issue" for deciding the the legality of domestic enquiry and second, having found fault in the domestic inquiry committed another error when it did not allow the appellant to lead independent evidence to prove the misconduct/charge on merits and straightaway proceeded to hold that it was a case of illegal retrenchment and hence the respondents' termination is bad in law."

14. Having considered the law laid down by the Hon'ble Supreme Court in the cases, as discussed above, and precisely the observations made by the Constitutional

Bench of Hon'ble Supreme in the case of Karnataka State Road Transport Corporation (Supra), this Court has no doubt in mind that the issue qua violation of principles of natural justice and fair play during the domestic enquiry should be decided first as a preliminary issue. There is no need to discuss the merits of the case or other points inasmuch as matter referred to the labour court is still sub judice, therefore, any observation made by this Court would effect the merits of the case. As such, instant writ petition succeeds and is **allowed**. Order impugned dated 18.11.2023 passed by the Presiding Officer, Labour Court is hereby quashed. Application dated 08.08.2023 (Paper No.13-D) filed on behalf of the petitioner is allowed and the labour court is directed to decide the issue no.1 as a preliminary issue. It is expected that unnecessary adjournment/delay shall be avoided by the parties concerned and the labour court shall make endeavour to decide the adjudication case, as early as possible.

(2024) 5 ILRA 2381
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 21022 of 2021

M/S Pragyason Cons. Pvt. Ltd....Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Sr. Advocate, Udayan Nandan

Counsel for the Opp. Parties:
C.S.C.

A. U.P. Minor Minerals (Concessions) Rules, 1963 - G.O. dated 14.08.2017 - Clause 17 - Forfeiture of Earnest Money - Conditions - Letter of Intent - Non-submission of Documents - Refund of Earnest Money - Right to Claim Refund - As per Clause 17 of G.O. dated 14.08.2017, forfeiture of earnest money can only be ordered if, upon verification, any document or certificate submitted by the individual is found to be false, fabricated, or incorrect. No letter of intent shall be issued to such a person. Further, G.O. dated 09.10.2017, provides that no person in the State of U.P. shall be granted more than two mining leases aggregating an area in excess of 50 hectares. In case information is provided to the authority by the applicant himself that the applicant has been issued two letters of intent for two or more mining leases or for areas exceeding 50 hectares, he has the right to choose one of the mining lease areas, and the amount deposited for the remaining areas would be refunded upon verification. (Para 21)

B. U.P. Minor Minerals (Concessions) Rules, 1963 - G.O. dated 14.08.2017 - Condition of Submission of Documents - Directory or Mandatory - G.O. mandates that the relevant documents are to be submitted by the highest bidder within three days of acceptance of his bid. However, the provision does not prescribe any penalty for non-compliance. It is a settled principle that in the absence of any penal provision, such a requirement is considered directory and not mandatory. (Para 22)

C. Facts: Petitioner participated in an e-auction and deposited an earnest money of Rs. 90 lakhs - Upon the acceptance of his bid, a letter was issued to the petitioner to furnish relevant documents for the issuance of a letter of intent - Instead of submitting the documents, the petitioner sought a refund of the earnest money, stating that he had been granted more than two mining leases - District Magistrate rejected the refund application on the ground that the petitioner's failure to furnish documents caused a loss of revenue to the State - Held - Forfeiture of earnest money is not sustainable as no

document or certificate was ever furnished by the petitioner - Impugned order forfeiting the petitioner's security deposit was quashed - Respondents were directed to refund the security deposit of Rs. 90 lakhs. (Paras 21, 23)

Allowed. (E-5)

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Jayant Banerji, J.)

1. Heard Shri Udayan Nandan, for the petitioner and learned Standing Counsel for the state respondents.

2. The petitioner by means of this writ petition seeks a writ of certiorari for quashing the order dated 16.07.2020 passed by the District Magistrate, respondent no. 2 (annexure 9 to the writ petition) and the order dated 20.11.2020 (annexure 11 to the writ petition) passed by the Secretary, Mines and Minerals, U.P.

3. By the order dated 16.07.2020, the District Magistrate has rejected petitioner's application for refund of earnest money deposited by him for participating in an e-auction for grant of a lease in District Hamirpur for which an advertisement had been issued on 03.01.2020.

4. The order of the District Magistrate has been affirmed in revision by the first respondent, hence, this petition.

5. The facts of the case briefly stated are that an advertisement was issued on 03.01.2020 inviting bids for grant of mining leases in District Hamirpur. The petitioner submitted its bid along with earnest money of Rs. 90 lakhs on 24.04.2020. The bid of the petitioner, being the highest, was accepted. On 05.03.2020, a letter was issued calling upon the petitioner to furnish relevant documents so that a letter of intent could be issued in his favour.

6. In the meantime, the petitioner on 07.03.2020 participated in the bidding for grant of leases in District-Fatehpur which was, however, cancelled.

7. Since, the letter dated 05.03.2020 could not be complied with, allegedly on account of the prevailing pandemic, yet another reminder was issued to the petitioner on 16.05.2020 requiring submission of the relevant documents within three days.

8. It appears that in the meantime, on 14.05.2020, yet another advertisement was published, inviting tenders for grant of mining leases in District Fatehpur. The petitioner participated in the bidding and was issued a letter of intent on 18.06.2020.

9. After this letter of intent was issued, the petitioner on 19.06.2020 represented to the District Magistrate, Hamirpur for refund of the earnest money of 90 lakhs deposited by him for participation in the bidding held consequent to the advertisement dated 3.01.2020. It is this application which has been rejected holding that the petitioner deliberately failed to furnish the required documents within three days after acceptance of his bid as was provided in the tender. This has caused huge loss of revenue to the State. Therefore, petitioner is not entitled to a refund. Accordingly, the earnest money of 90 lakhs deposited by the petitioner was forfeited in favour of the State. Thus order has been affirmed by the revisional authority.

10. The submission of learned counsel for the the petitioner is that the application dated 19.06.2020 seeking refund of earnest money was in accordance with Rule 10(3) of the U.P. Minor Minerals (Concessions) Rules, 1963, as amended by the 47th Amendment Rules, 19.10.2019, which provided that no person in the State of U.P. can be granted leases in excess of an area of 50 hectares. The Government Order dated 19.10.2019 provides the modalities for refund of earnest money in cases where more than two mining leases have been granted in favour of one entity or the aggregate of leases granted is in excess of 50 hectares.

11. It is additionally reiterated that Rule 10(3) of 47th Amendment Rules limits the maximum number of leases that can be granted in favour of one entity to two and the other condition is that the aggregate area of these two leases cannot exceed 50 hectares.

12. Since, the petitioner had been granted two leases in District-Fatehpur consequent to the advertisement issued on 14.05.2020, the petitioner informed the authorities opting to operate two leases granted in Fatehpur which option was with the petitioner.

13. This amended provision has not been taken into consideration by the respondent while passing the impugned orders. The earnest money would be forfeited, if at all, if the information of grant of more than two leases having an aggregate area in excess of 50 hectares had not been communicated by the petitioner and was discovered by the authorities on their own. Such is not the position in the case at hand. The petitioner intimated the respondent no.1 immediately on obtaining two leases in District-Fatehpur and therefore, exercised his option of not going ahead with his bid offered for the mining lease in District-Hamirpur.

14. Learned Standing Counsel has opposed the writ petition and has reiterated what has been stated in the impugned order especially that the petitioner was required to submit documents prior to grant of letter of intent in his favour within three days of the acceptance of his bid. This specific condition mentioned in the tender was not complied with by the petitioner despite issuance of the reminders on 05.03.2020 and 16.05.2020. This inaction of the petitioner resulted in huge loss to the exchequer and therefore, the earnest money deposited by the petitioner has been rightly forfeited as lease could not be operated by any other person also.

15. Learned Standing Counsel has also referred to GO No. 1875/86-2017-57 (सामान्य)/2017 which is dated 14.08.2017. This very same GO also find mention in the order passed by the revisional authority. He has specifically refered the Clause 17 of this Notification which reads as follows:-

"17- ई- निलामी समाप्त होने के पश्चात 03 कार्य दिवस के अन्दर सफल बोलीदाता को अपने मूल अभिलेख का सत्यापन उस जनपद के जिलाधिकारी जहाँ क्षेत्र स्थित है, के द्वारा अथवा निदेशक, भूतत्व एवं खनिकर्म, निदेशालय के द्वारा कराना होगा। निदेशक द्वारा मूल अभिलेख की सत्यापन की स्थिति में अभिलेख सत्यापन की आख्या ई-मेल के माध्यम से संबंधित जिलाधिकारी को प्रेषित की जायेगी। अभिलेख सत्यापन के पश्चात ही जिलाधिकारी द्वारा लेटर आफ इन्टेंट जारी किया जायेगा। सत्यापन में यदि कोई अभिलेख अथवा प्रमाण पत्र कूटरचित, असत्य अथवा गलत पाया जाता है तो लेटर आफ इन्टेंट जारी नही किया जायेगा तथा बयाने की धनराशि (अर्नेस्ट मनी) जब्त कर ली जायेगी।"

16. He has also referred to Clause 19 of the tender notice dated 03.01.2020 which reads as follows:-

"विज्ञप्ति की शर्त संख्या-19 मे उल्लेख किया गया है कि- ई- नीलामी समाप्त होने के पश्चात 03 कार्य दिवस के अन्दर सफल बोलीदाता को अपने मूल अभिलेख का सत्यापन उस जनपद के जिलाधिकारी, जहाँ क्षेत्र स्थित है, के द्वारा अथवा निदेशक, भूतत्व एवं खनिकर्म निदेशालय के द्वारा कराना होगा। निदेशक, द्वारा मूल अभिलेख के सत्यापन की स्थिति में अभिलेख-सत्यापन की आख्या ई-मेल के माध्यम से सम्बन्धित जिलाधिकारी को प्रेषित की जायेगी। अभिलेख-सत्यापन के पश्चात ही जिलाधिकारी द्वारा आशय पत्र (लेटर आफ इन्टेट) जारी किया जायेगा। सत्यापन में यदि कोई अभिलेख अथवा प्रमाण पत्र कूटरचित, असत्य अथवा गलत पाया जाता है तो लेटर आफ इन्टेंट जारी नही किया जायेगा तथा बयाने की धनराशि (अर्नेस्ट मनी) जब्त कर ली जायेगी।

आप द्वारा शासनादेश दिनांक- 09.10.2019 में दिये गये निर्देशों एवं विज्ञप्ति दिनांक- 03.01.2020 में दी गयी शर्तों के अनुसार अभिलेख प्रस्तुत नही किया गया है, जिस कारण आपके प्रकरण में अग्रेतर कार्यवाही किया जाना सम्भव नहीं है।"

17. In rejoinder, the submission of learned counsel for the petitioner is that Clause 17 of the GO dated 14.08.2017, relied upon by learned Standing Counsel, does not empower the respondents to forfeit the earnest money deposited by the petitioner. Forfeiture of earnest money under the this provision is provided only in case the documents or certificates submitted by a person are found forged, fabricated or false. Additionally, no letter of intent would be issued in favour of such person. This condition does not apply because it is the admitted case of the respondents that no documents or certificates were ever furnished by the petitioner.

18. It is next submitted that in any case, the condition that relevant documents are to be submitted by the person whose bid is found highest within three days after such acceptance does not provide any penal clause for its non-compliance. The provision is, therefore, merely directory and not mandatory. In support of this contention, learned counsel for the petitioner has placed reliance upon the decision of the Apex Court in ***State of Bihar and others v. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472*** wherein it has been held that any requirement under a statute in the absence of a penal clause or provision for its non-compliance, the provision is deemed to be directory and not mandatory. Therefore, also the earnest money deposited by the petitioner could not be forfeited especially in the absence of any quantification of loss suffered by the State on account of petitioner not having furnished relevant documents within three days from acceptance of this bid.

19. We have considered the submissions made by learned counsel for the parties. From the narration of the facts above and submission made by learned counsel for the parties, the point which arises for consideration in the writ petition is whether the respondents were empowered to order forfeiture of the earnest money deposited by the petitioner in favour of the State.

20. The State has relied upon the GO No GO No. 1875/86-2017-57 (सामान्य)/2017 which is dated 14.08.2017, relevant part whereof has already been quoted hereinabove.

21. We are in agreement with the submission of learned counsel for the petitioner that forfeiture of earnest money could be ordered only when, upon the verification, any document or certificate filed by an individual was found false, fabricated or incorrect.

22. There does not appear to be any penal consequence provided for non-

compliance of the earlier part of this provision which requires the highest bidder to submit relevant documents within a period of three days from acceptance of his bid. Therefore, in view of the judgment relied upon by the learned counsel for the petitioner, the provision has to be held to be directory and not mandatory. This view is further supported by the fact that in case this provision was mandatory, non-compliance would have resulted in adverse consequences having visited the petitioner on the 4th day itself. The authorities, on the contrary, have issued at least two reminders to the petitioner on 05.03.2020 and 16.05.2020.

23. Under the circumstances, reliance upon GO No. 1875/86-2017-57 (सामान्य)/2017 which is dated 14.08.2017 for forfeiture of his earnest money deposited by the petitioner is unsustainable.

24. In the context of the arguments, it is necessary to refer to GO No. 2168/86-2019-57(सामान्य)/2017, dated 09.10.2017, copy whereof has been filed as annexure 8 to this writ petition, which states that it has been issued to amend the notification dated 14.08.2017, No. 1875/86-2017-57(सामान्य)/2017TC1 on account of the amendments incorporated in the UP Minor Minerals (Concessions) (47th Amendment) Rules 2019. The relevant portion of this notification for the purposes of this writ petition whereby clause 13 of the Government Order dated 14.08.2017 was amended, is quoted below:-

"13(9)- अधिकतम दो खनन पट्टे या 50 हे० से अधिक के क्षेत्र को, उ० प्र० राज्य में किसी व्यक्ति/फर्म कम्पनी के पक्ष में स्वीकृत नही किया जायेगा। यदि किन्ही परिस्थितियों में एक व्यक्ति/ फर्म/ कम्पनी द्वारा अपने पक्ष में दो खनन पट्टे या 50 हे० से अधिक के खनन पट्टे स्वीकृत करा लिया जाता है, तो अन्त में स्वीकृत खनन पट्टे निरस्त कर पट्टा अन्तर्गत जमा सम्पूर्ण धनराशि जब्त कर ली जायेगी तथा केवल प्रारम्भ के दो क्षेत्र अथवा 50 हे० के खनन पट्टे ही अनुमन्य होंगे। परन्तु यदि आवेदक स्वयं अपने पक्ष में दो खनन पट्टे या 50 हे० से अधिक के खनन पट्टे हेतु जारी लेटर ऑफ इटेन्ट की सूचना देता है, तो उक्त सीमा के अन्तर्गत कोई भी खनन पट्टा क्षेत्र के चयन का उसे अधिकार होगा तथा शेष क्षेत्रों की जमा धनराशि पुष्टि के उपरान्त यथावत वापस कर दी जायेगी।"

25. A bare perusal of the provision cited above reveals that it provides that a person in the State of U.P. cannot be granted more than two mining leases for an aggregate area in excess of 50 hectares. It further provides if in a case this condition stands violated, the last lease shall stand cancelled and the earnest money deposited for the same will also stand forfeited and only the first two leases which are not for more than 50 hectares shall remain approved. This provision is subject to proviso that if information is provided by the applicant that he has been issued two letters of intent for two or more mining leases or that their areas are in excess of 50 hectares, he will have right to choose any of the mining lease areas and the amount deposited for the remaining areas would be returned after verification.

26. The contention of learned counsel for the petitioner that the intimation of two choices of the petitioner getting more than two leases whose an area of aggregate was intimated to the authorities by the petitioner and therefore, he had, under the relevant provision, option to retain any of the two leased areas for which letter of intent had been issued in his favour. Under the circumstances, the respondents had no option but to refund the earnest money deposited by the petitioner, regarding the mining area in District-Hamirpur.

27. In view of the forgoing discussion, this Court is constrained to hold

that the forfeiture of the petitioner's security deposit of Rs. 90 lakhs is without any authority of law. Accordingly, this petition is hereby allowed and the impugned orders 16.07.2020 and 20.11.2020 are hereby quashed.

28. The respondents are directed to refund the security deposit of Rs. 90 lakhs to the petitioner expeditiously, positively within a period of four weeks from the date a certified copy of this order is filed before them.

(2024) 5 ILRA 2386
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 33710 of 2021

M/S Deep Builders & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Ashish Malhotra, Syed Mohd. Fazal

Counsel for the Opp. Parties:
C.S.C.

Civil Law - Mining Lease - Cancellation of Letter of Intent - Forfeiture of Security Deposit and Royalty - U.P. Minor Minerals (Concession) Rules, 2017 [As amended by the 43rd Amendment] - Rule 29 - U.P. Minor Minerals (Concession) (Forty Seventh Amendment) Rules, 2019, w.e.f. 13.08.2019 - Rule 34(4) – Petitioner participated in the bidding for the grant of a mining lease of ordinary sand, a Letter of Intent was issued, and the petitioner deposited 25% of the bid amount as security and an equivalent amount as the first installment of royalty. Subsequently, the Letter of Intent was cancelled, and by the order of the District Magistrate, the security deposit and first instalment towards royalty were forfeited in favor of the State - Held - There exists no power under the relevant rules to forfeit the security deposit or the first instalment once the Letter of Intent has been cancelled - Impugned order was without the sanction of law and hence quashed - State was directed to refund the security deposit and the first instalment of royalty deposited by the petitioner, along with simple interest at the rate of 9% thereon (Para 21, 25, 26)

Allowed. (E-5)

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Jayant Banerji, J.)

1. Heard Shri Syed Mohd. Fazal, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

This writ petition seeks a writ of certiorari for quashing the order dated 28.08.2021 passed by the third respondent, the District Magistrate/District Officer, Ghaziabad.

2. By this order and in purported exercise of powers conferred by Rule 34 (4) of the U.P. Minor Minerals (Concession) (Forty Seventh Amendment) Rules, 2019 and for their non compliance, the security deposited by the petitioner as also the first instalment consequent to the issuance of Letter of Intent with regard to Plot Nos. 290M, 301M, 303M, 304M, 310M, 311M, 314M area 12.512 hectares has been forfeited in favour of the State.

3. The facts of the case briefly stated are that the petitioner participated in the bidding for grant of mining lease of

ordinary sand for a period of five years over plots situated in Village Pachayra, Tehsil Loni, District Ghaziabad having a total area of 12.512 hectares. The auction was for a mining of annual quantity of 2,50,240 cubic meters of sand.

4. Since the bid of the petitioner was the highest, a Letter of Intent was issued in its favour on 31.10.2017. The petitioner thereafter deposited 25% of the bid amount as security and an equal amount as the first instalment of royalty in accordance with Rule 28(2)(i) of the U.P. Minor Minerals (Concession) Rules, 1963.

5. The Letter of Intent was cancelled on 28.01.2019. However, no order was passed for refund of the security amount or the first instalment forcing the petitioner to approach this Court by means of Writ – C No.19354 of 2021.

6. During the pendency of the said writ petition, the order dated 28.08.2021 was passed. The petitioner thereafter withdrew his earlier Writ – C No.19354 of 2021 and the instant writ petition is being filed challenging the order of the District Magistrate dated 28.08.2021, whereby the security and first instalment towards royalty has been forfeited in favour of the State.

7. The contention of learned counsel for the petitioner primarily is that there exists no power with the respondents to forfeit the security deposit or the first instalment deposited by him, once the Letter of Intent has been cancelled. The impugned order therefore, is without any sanction of law and is liable to be quashed. The amount deposited by the petitioner is liable to be refunded along with interest, thereon.

8. Elaborating further, it has been submitted that at the time, the Letter of Intent was issued in favour of the petitioner, the U.P. Minor Minerals (Concession) Rules, 2017 as amended by the 43rd Amendment, therein, were in force.

9. On the date, the Letter of Intent was cancelled namely 28.01.2019, it is the 44th Amendment Rules, which were operational. Neither the 43rd nor the 44th Amendment Rules contain any provision for forfeiture of the security deposit and/or the royalty paid by the petitioner on cancellation of the Letter of Intent. He has reiterated that after issuance of the Letter of Intent, a mining plan was submitted by the petitioner within the time prescribed for the same. This mining plan was also granted approval by the respondents. Thereafter, the petitioner applied for environmental clearance and before the same could be granted, the Letter of Intent has been cancelled. No order for forfeiture was passed at the time of cancellation of the Letter of Intent and this order has been passed after the petitioner had preferred a revision to the State Government, wherein the matter was remitted back to the third respondent to pass appropriate orders on the prayer of the petitioner for refund for security deposit and also the royalty deposited by him. However, no order was passed and, therefore, the petitioner approach this Court by means of Writ – C No.19354 of 2021 and during the pendency of this writ petition, the impugned order has been passed.

10. He has also submitted that the order of forfeiture if at all can only be passed at the time of the order passed for cancelling the Letter of Intent. This cannot be done subsequently.

11. Learned counsel for the petitioner has placed reliance upon various provisions of law during arguments.

12. The first provision placed by learned counsel for the petitioner is Rule 29 of the U.P. Minor Minerals (Concession) (Forty Third Amendment) Rules, 2017 to submit that forfeiture of security deposit is provided where lease deed is not executed within three months due to a fault on the part of the Lease holder. In the case at hand no lease deed was ever executed. Hence this provision is not at all attracted. Rule 29(1) thereof reads as follows:-

"29. Execution of lease deed *(1) The successful bidder/tenderer after receiving letter of intent of concerned e-tender/e-auction/e-tender cum c-auction shall produce, approved Mining Plan and Clean. Environment Certificate prescribed as per rule, and a lease deed concerning the same will be executed in form MM-6 or in similar format. The registration of the said executed lease deed will be registered within three months period. The period of lease will be counted from the date of execution of the concerned lease deed. If due to fault on the part of lease holder, registration of the said executed lease deed is not registered within three months, then the said lease deed will be treated as null and void and the amount of security will be seized by the District Magistrate."*

13. Rule 34(4), non compliance whereof is the basis of the impugned order reads as follows:-

"(4) Mining operations shall in respect of all minor mineral be undertaken in accordance with the mining plan, detailing, yearly development schemes, aspect of reclamation and rehabilitation of mined out areas including progressive mine closure scheme duly approved by the Director:

Provided that the lessee shall start the mining operation after obtaining environmental clearance if required under the provisions of Environment Impact Assessment Notification, dated September 14, 2006 issued by the Ministry of Environment, Forest and Calamite change Government of India as amended from time to time:

Provided further that an application seeking prior environmental clearance in all cases shall be made by the project proponent or end user agency as the case may be, in as provided in paragraph-6 of the Environment Impact Assessment Notification, dated September 14, 2006 as amended from time to time."

14. Relying upon the provisions quoted above, he has submitted that the proviso to Rule 34(4) requires a lessee to start mining operations only after obtaining environmental clearance and that the proviso casts a duty upon the lessee or the proponent to apply for environmental clearance.

15. Rule 34(5) provides that a mining lease shall be executed only after environmental clearance has been obtained.

16. Rule 34 of the Uttar Pradesh Minor Minerals (Concession) (Forty Fourth Amendment) Rules, 2017 reads as follows:-

"34. (1) The 'Selected Applicant' before the execution of mining lease deed under the provisions of Chapters II, IV and IX or issuing a mining permit under Chapter VI of these rules, shall get prepared a mining plan by the person,

recognized and registered by the Director, having the qualification and experience namely:-

(i) a degree in Mining Engineering or post-graduate degree in Geology granted by university established or incorporated by or under Central Act or a Provincial Act or a State Act, including any institution recognized by the University Grants Commission established under section 4 of the University Grants Commission Act, 1956; and

(ii) professional experience of 05 years of working in a supervisory capacity in the field of mining after obtaining the degree.

(2) The selected applicant of e-tender/ bidder of e-auction shall submit the mining plan for approval to the Director, who may within thirty days from the date of receipt of mining plan approve, modify or reject it positively.

(3) The mining plan once approved shall be valid for entire duration of the mining lease/license or for five years whichever is earlier. If the lease period is more than five years then in that case the lease holder will resubmit mining plan before the Director, Geology and Mining, Uttar Pradesh.

(4) Mining operations shall in respect of all minor mineral be undertaken in accordance with the mining plan, detailing, yearly development schemes, aspect of reclamation and rehabilitation of mined out areas including progressive mine closure scheme duly approved by the Director: Provided that the lessee shall start the mining operation after obtaining environmental clearance if required under the provisions of Environment Impact Assessment Notification, dated September 14, 2006 issued by the Ministry of Environment, Forest and Calamite change Government of India as amended from time to time : Provided further that an application seeking prior environmental clearance in all cases shall be made by the project proponent or end-user agency as the case may be, in as provided in Paragraph 06 of the Environment Impact Assessment Notification, dated September 14, 2006 as amended from time to time."

17. He has therefore, submitted that the relevant Rule 34 was identical in both the 43rd and 44th Amendment, Rules.

18. The U.P. Minor Minerals (Concession) (Forty Seven Amendment) Rules 2019 came into force from 13.08.2019. Rule 34, therein reads as follows:-

"34 Mining operations to commence within six months –

(1) The 'Selected Applicant' before the execution of mining lease deed under the provision of chapter II, IV and IX or issuing a mining permit under chapter VI of these rules, shall get prepared a mining plan by the person, recognized and registered by the Director, having the qualification and experience namely:-

(i) a degree in Mining Engineering or post-graduate degree in Geology granted by university established or incorporated by or under Central Act or a Provincial Act or a State Act, including any institution recognized by the University Grants Commission established under section 4 of the University Grants Commission Act, 1956; and

(ii) Professional Experience of 05 years of working in a Supervisory Capacity in the field of mining after obtaining the degree.

(2) The Selected applicant shall, within one month of issuance of letter of intent, submit the mining plan for approval

to the Officer authorized by notification in this behalf by the State Government, who may within thirty days from the date of receipt of mining plan approve, modify or reject it positively. The project proponent shall, within one month of approval of mining plan, submit the application for grant of Environment Clearance to the competent authority.

(3) The mining plan once approved shall be valid for entire duration of the mining lease/permit or for five years whichever is earlier. If the lease period is more than five years, then in that case the lease holder will resubmit mining plan before the Officer authorized by notification in this behalf by the State Government.

(4) Mining operations shall in respect of all minor mineral be undertaken in accordance with the mining plan, detailing yearly development schemes, aspect of reclamation and rehabilitation of mined out areas including progressive mine closure scheme duly approved by the Officer authorized by notification in this behalf by the State Government.

Provided that the lessee shall start the mining operation after obtaining environmental clearance if required under the provisions of Environment Impact Assessment Notification, dated September 14, 2006 issued by the Ministry of Environment, Forest and climate change, Government of India as amended from time to time. During the process of grant of Environment clearance, the proponent shall be bound to complete all desired formalities to resolve the objections raised by the competent authority within the required time frame.

Provided further that an application seeking prior environmental clearance in all cases shall be made by the project proponent or end-user agency as the case may be, in as provided in Paragraph 06 of' the Environment Impact Assessment Notification, dated September 14, 2006 as Amended from time to time.

(5) The mining lease deed will be executed only after approval of mining plan by the Officer authorized by notification in this behalf by the State Government and within one month from the date of issuance of environment clearance certificate in favour of the proponent. Mining operation shall commence, immediately for the lessee of river bed mineral within 03 (three) months from the date of the execution of the lease deed by the lessee of other minor minerals and the lessee shall thereafter conduct such operations without deliberate intermission in a proper, skillful in work-man like manner.

(6) Financial assurance has to be furnished by every lease holder. The amount of financial assurance shall be Rupees Twenty five thousand for insitu-rock deposit and Rupees Fifteen thousand for sand or morrum or bajari or boulder or any of these in mixed state exclusively found in the river bed mines per acres of the mining lease area put to use for mining and allied activities. However, the minimum amount of financial assurance to be furnished in any of the forms referred to in sub-rule (7) shall be Rupees Two Lacs. For each category of mines be respective of area."

19. It is submitted that not only are the Rules of 2019 applicable because the Letter of Intent in favour of the petitioner stood cancelled on 28.01.2019, more than six months prior to the enforcement of the Forty Seven Amendment Rules.

20. Learned Standing Counsel has submitted that the impugned order has been passed for violation of Rule 34(5) of the U.P. Minor Minerals (Concession) (Forty

Seven Amendment) Rule, 2019 but has not been able to point out from the said Rule, no power of the State Government to either forfeit the security deposit or the first instalment.

21. Upon a consideration of the submissions made and upon a careful scrutiny of the U.P. Minor Minerals (Concession) Rules, 2017 and 2019, we are unable to discern any power of forfeiture.

22. Under the circumstances therefore, the impugned order cannot be sustained and the petition deserves to be allowed.

23. The deposit made by the petitioner in the year 2017 as the Letter of Intent was cancelled on 28.01.2019, the security deposit as also the first instalment of royalty, which had been deposited by the petitioner upon cancellation of the Letter of Intent is liable to be refunded. The respondents instead of refunding this amount have forfeited the same, wrongly and illegally and in the absence of any power to do so.

24. Under the circumstances, the submission of learned counsel for the petitioner, he is entitled to interest on this delayed payment has substance.

Learned counsel for the petitioner has placed reliance upon a judgment of the Apex Court in ***Dharmendra Kumar Singh vs. State of U.P.*** AIR 2020 SC 5360, especially paragraph 43, therein, wherein in similar circumstances 9% interest is payable.

25. Accordingly, we allow the writ petition and quash the impugned order dated 28.08.2021 and direct the respondents to refund the security deposit and the first instalment of royalty deposited by the petitioner within a period of three weeks from today.

26. This refund shall be accompanied with simple interest at the rare of 9%, calculated from the date of cancellation of the Letter of Intent till actual payment is made.

(2024) 5 ILRA 2391
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Capital Case No. 20 of 2021

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

Counsel for the Appellants:
Sri Aditya Gupta, Sri G.S. Chaturvedi (Sr. Advocate)

Counsel for the Respondent:
A.G.A., Sri Kuldeep Johri, Sri Kuldeep Kumar Dixit

(A) Criminal Law – Criminal Procedure Code,1973 - Sections 161, 164, 173 (2), 207, 293, 311, 313, 315, 319, 354(3), 366(1), 374(2) & 415 - Indian Penal Code, 1860 - Sections 302, 307 & 34 - Conviction and Sentenced - Complaint - FIR - offence of Murdered of three minor daughters of informant - were of six persons inflicting injuries using an axe - Capital sentence - reference and jail appeals - Appreciation of evidence – convicted appellants on the account of enmity – they have been held guilty under section 302/34 IPC – they killed three minor daughters of informant – lapse in investigation – trial court held that shoddy and

suspicious investigation was conducted by the IO in giving clean chit to the accused persons - finding of the trial court is based on appreciation of the medical jurisprudence is correct – held, court uphold the judgment of conviction of the appellants – appeal qua conviction is dismissed. (Para – 95, 98, 99, 100)

(B) (A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 173 (2), 311, 313, 315, 366(1), 374(2) & 415 - Indian Penal Code, 1860 - Sections 302, 307 & 34 - Conviction and Sentenced - Complaint - FIR - Conviction – Sentence – Capital punishment - jail Appeal - murder of three minor girl child – Capital case and the death reference – Whether rarest of rare Case – Held, appellants are aged about 75 & 50 yeas - no any previous criminal history – trial court not recorded any aggravating circumstances and has even not scrutinized the case in the light of mitigating circumstances – no any finding that awarding of severest punishment is the only possibility in the case – trial court also no recorded any finding that accused persons are menace to the society - there is no *mens rea* of the appellant to killed the three daughters as motive was killed to informant who succeeded in running away - - held, instant case cannot be termed as 'rarest of rare case', even though accused has committed a grave offence - hence, capital punishment awarded to both the appellants should be commuted to life imprisonment for a fixed term of 20 years – appeal qua sentence is modified.
(Para – 95, 96, 98, 99)

Capital Case Dismissed. (E-11)

List of Cases cited:

1. Vadivelu Thevar Vs St. of Madras, 1957 0 AIR (SC) 614,

2. Javed Shaukat Ali Qureshi Vs St. of Guj., (2023) 9 SCC 164,

3. n Tarun Tyagi Vs C.B.I. reported in (2017) 4 SCC 490,

4. St. of Mah. Vs Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564,

5. St. of U.P. Vs Ram Kumar & ors., 2017(5) R.C.R.(Criminal)785,

6. Chhannu Lal Verma Vs St. of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192,

7. Dnyaneshwar Suresh Borkar Vs St. of Mah., 2019(2) R.C.R.(Criminal) 302,

8. Manoharan Vs St. by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746,

9. Veerendra Vs St. of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254,

10. The St. of Har. Vs Anand Kindo & anr. etc., 2022(4)R.C.R. (Criminal)735,

11. Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571,

12. Sundar @ Sundarrajan Vs St. by Inspector of Police, 2023 Cri.L.R.(SC) 473,

13. Ravindar Singh Vs The St. Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220,

14. Digambar Vs The St. of Mah., 2023 Cri. L.R. (SC) 564,

15. Bhaggi @ Bhagirah @ Naran Vs The St. of M. P., 2024(1) Crimes 121,

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Reference No. 17 of 2021 is made by the Additional Sessions Judge, Court No. 43, Shahjahanpur for confirmation of capital punishment in Sessions Trial No. 853 of 2003. The Jail Appeal being Capital Case No. 20 of 2021 has been filed by the appellants challenging the judgment of conviction dated 22.11.2021 holding the appellants-Rajendar and Narvesh guilty of offence punishable under Section 302 of IPC and order of sentence of the same date

vide which both the accused-appellants were sentenced to death under Section 302 of IPC.

2. The Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Aditya Gupta, learned counsel for the appellant, Sri Kuldeep Johri, learned counsel for the informant and learned A.G.A. for the State.

4. With the aid of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated. After judgement was reserved, certain clarification were again sought by both the learned counsels for the parties by giving hearing in open Court.

5. The case of the prosecution is that on the intervening night of 15.10.2002/16.10.2002, a complaint was given by the informant-Avdhesh Kumar (who was later on charge sheeted as an accused). The written complaint (Ex.Ka-2) reads as under :

"...one Chutkannu alias Nathulal of our village harbours enmity towards me since I have given evidence as a witness in a criminal case against him. Due to this reason on dated 15-10-2002 at around 6 PM when after giving fodder to my milch animals, I was lying on a cot in my house, just at that time Chutkannu alias Nathulal having his licensed gun, alongwith one Rajendarr who was having a local made gun and Narvesh Kumar who was having a local made Rifle, came to my house and opened fire at me to commit my murder. I ran away from there to save my life. On hearing the sound of gunshot fire, my neighbour Ramesh s/o of Kanauji Lal, his wife Alka, Devesh Kumar, Hari Sharan s/o of Ram Chander came over there. On raising the hue and cry, all the accused persons hit my three daughters who were sleeping near me, in the mosquito net, vizually, Rhohini 09years, Neeta 08 years, both of whom died on the spot due to the gunshot injuries while my third daughter Surbhi 07 years also passed away in the way, while I was coming to the police station. I, my wife Shashi and the witnesses mentioned above besides other people of our village have seen the accused persons commit the murder. Due to fear of the accused persons I have come hiding to the police station. The dead bodies of my daughters are lying in my house.."

6. On the basis of the aforesaid written complaint (Ex.Ka-2), the police registered formal F.I.R. (Ex.Ka-26), against three accused persons namely Chutkannu alias Nathulal and his brother Rajendar and son - Narvesh Kumar. Accused-Chutkannu died around the year 2010 as verified by the Trial Court.

7. During the course of investigation, a site plan of the crime was prepared as pointed out by complainant-Avdhesh Kumar. The same was exhibited as Ex.Ka-7. The dead body of all three daughters of informant were sent for postmortem examination which was also done on 16.10.2002. The Postmortem reports of Rohini aged 09 years is Exhibit A-5, Neeta aged about 08 years is Exhibit A-4 and Surbhi aged about 07 years is Exhibit A-6. During investigation, the Investigating Officer did not arrest any of the above named three accused persons and rather started investigating of the case in a manner that, Avdhesh Kumar, the father of

three girls, had in fact committed the gruesome murder in presence of his wife namely Shashi Devi (PW-5). Accordingly by giving a clean chit to the three accused persons, at initial stage itself, the Investigating Officer namely Hoshiyaar Singh (PW-13) submitted report under Section 173 (2) Cr.P.C. against accused-Avdhesh Kumar which was exhibited as Exhibit A-25. Charge under Section 302 of IPC was framed against accused-Avdhesh Kumar on 12.3.2004 which reads as under :

"...that on dated 15-10-2002 at around 18:00 hours in village Jeva Mukundpur in your own house which is within the territorial jurisdiction of PS Nigohi Shahjahanpur, you opened fire from your licensed firearm, possessed by you, at your own 03 daughters vizually, Rohini, Neeta and Surbhi and thereby you ave committed their murder. Thus, you have committed an offence which is punishable under Section 302 I.P.C. and which is within the cognizance of this Court"

8. In the evidence, initially 06 prosecution witnesses were examined. Har Saran Lal (PW-1) stated that he knew accused-Avdhesh Kumar and he had no knowledge who committed murder of the three daughters of Avdhesh Kumar. However, he came to know from the villagers that Chutkannu alias Nathulal, Rajendarr and Narvesh Kumar had killed the three daughters of Avdhesh Kumar. This witness was declared hostile and was cross examined by A.D.G.C. and when confronted with his statement under Section 161 Cr.P.C., he refused having made such statement. He further stated that Chutkannu alias Nathulal was a previous convict in a case of murder where he has been granted bail by the High Court.

9. Kali Charan (PW-2) is a witness to three Panchayatnama which were exhibited as Ex.Ka-1 to Ex.Ka-3. In cross examination, this witness stated that Avdhesh Kumar was a witness in an F.I.R. under Section 307 IPC registered against Chutkannu. Chutkannu was putting pressure on Avdhesh Kumar for not giving evidence against him. However, Avdhesh did not accept it and therefore, Chutkannu was extending threat to Avdhesh Kumar.

10. Sarvesh Kumar (PW-3) is real brother of Avdhesh who stated that three daughters of Avdhesh were murdered at night and on that day, he was in village-Nigohi. At midnight, Avdhesh along with Har Saran Lal, Ram Niwas, Rajiv and Mukesh came on a tractor and informed him that his daughters were murdered. Thereafter, the Panchayatnama was done in his presence. In cross examination, this witness stated that people told him that Chutkannu, Rajendar and Narvesh committed murder of the three daughters of Avdhesh.

11. Dinesh Kumar (PW-4) stated that he knew Avdhesh Kumar. He had heard the noise of firearm on the night of incident. He visited the house of Avdhesh in the morning where he found that the three daughters of Avdhesh were lying dead. He had seen Avdhesh carrying a licensed gun and he has no knowledge who had committed the murder of the three girls. This witness was declared hostile. In cross examination by ADGC, he denied that he has given a statement to the Investigating Officer that on the intervening night of 15/16.10.2002, he had heard the noise of three fire shots. He also denied that he had gone to the house of Avdhesh and had not seen any person running from the spot. This witness was further confronted with his

statement under Section 161 Cr.P.C., to which he replied that he has not made such statement and had no knowledge as to how the Investigating Officer had recorded the same.

12. In cross examination by defence, he stated that initially Chutakannu was arrested but under the influence of one Prem Awasthi, the police had released him.

13. Smt. Shashi Devi (PW-5), wife of Avdhesh Kumar and mother of the three girls who were murdered, stated that her three daughters, Rohini, Neeta and Surbhi were sleeping on one cot. At about 7.00 PM, Chutkannu carrying a licensed gun, Rajendar carrying country made double barrel gun and Narvesh carrying country made pistol, came, stated kill them and started firing. PW-5 was washing utensils and when she raised voice, the accused persons ran away. When she came near her daughters, she found that Rohini and Neeta had died and she along with her husband took Surbhi to the Police Station, however, she died on way. This witness was also declared hostile and was cross examined by ADGC. She denied having made any statement to police under Section 161 Cr.P.C. which was read over to her. She denied the suggestion that she insisted with her husband-Avdhesh Kumar to bring winter clothes for their daughters and due to anger and under the influence of liquor, her husband opened fire and killed his three daughters. She denied suggestion that being wife of Avdhesh Kumar she was not giving correct statement. In further cross examination by defence, she stated that apart from three girls which were murdered, she has five more children out of which, three are daughters and two are sons, who are alive.

14. Ashok Kumar (PW-6) stated that on hearing the noise of gunshot, he had gone to the house of Avdhesh Kumar where three girls were found dead. He stated that wife of Avdhesh Kumar told him that Chutkannu alias Nathulal, Rajendarr and Narvesh Kumar who were also the resident of her village had come to kill her husband-Avdhesh and the gunshots hit her daughters. Avdhesh Kumar was having enmity with Chutakannu. Thereafter, Avdhesh Kumar got an F.I.R. registered against Chutkannu etc. Chutkannu had a licensed gun and he has died about 4 to 5 years ago. In cross examination, this witness stated that Avdhesh had sufficient agricultural land and had no shortage of any finance.

15. After initially recording the statements of these six witnesses, the prosecution moved an application under Section 319 Cr.P.C. for summoning Rajendar and Narvesh as additional accused which was allowed and de novo trial started. The above statements of PW-1, PW-4 and PW-5 were recorded before de novo trial referred to in this judgment as these witnesses were later on confronted and corroborated with their earlier statements when they again appeared after framing of charge against Rajendar and Narvesh.

16. In de novo trial, fresh charges were framed against Rajendar and Narvesh under Section 302/34 IPC on 24.1.2018.

17. Therefore, the prosecution, out of six witnesses whose statements were already recorded, recorded statement of PW-1 again. The first statement was recorded on 3.2.2007 and for the second time, it was recorded on 13.12.2018 that is after a period of about 11 years. In the second statement, PW-1 stated that sixteen years ago, at the evening time, he heard the

noise of firing. When he went to the house of Avdhesh Kumar, he saw that his one daughter was lying dead on one cot and two daughters on another cot. He stated that Narvesh, Chutkannu and Rajendar were seen coming. They were carrying guns and many people gathered. In cross examination, this witness stated that his elder brother's name is Ram Saran and he has two sons namely Ram Niwas and Shree Niwas. Chutkannu was murdered and his both nephews are accused in the said murder case. He denied the suggestion that due to enmity, he is making a false statement. He further stated that Ram Bharose was murdered and Vinod was injured in an incident and in that case, on account of murder of Ram Bharose, he (PW-1) was sentenced to life imprisonment and he is on bail from the High Court. This witness stated that accused-Avdhesh Kumar has two real brothers namely Sarvesh and Narendra Dev who are residing at Village-Nigohi. This witness further stated that his real niece Prema is married in Village-Akholi. He also stated that the elder daughter of Avdhesh namely Archana has been married to his niece-Prema's son namely, Chhotu and thus he is related to Avdhesh Kumar. This witness further stated that he has made statement to the Investigating Officer that he has heard noise of firing in night but he has not seen anybody firing or running away and he had not witnessed the incident.

18. Dinesh Kumar (PW-4) whose first statement was recorded on 7.1.2009, again appeared for the second time on 4.2.2019 and stated that on hearing the noise of firing, he went to the house of Avdhesh Kumar which is situated 4 to 5 houses away. Avdhesh Kumar was carrying double barrel gun from which smoke was emitting out. In the morning at about 8.00 AM, Avdhesh Kumar came and told him that he had killed his three daughters and PW-4 should help him as he was under the influence of liquor at night. Liquor was kept under his cot and two empty cartridges were lying there. This witness further stated that Chutkannu, Rajendar and Narvesh have not killed the three girls rather Avdhesh Kumar, under the influence of liquor, killed his own daughters.

19. This witness stated that at the time of incident, his wife was Village Pradhan. Avdhesh Kumar was having enmity with Chutkannu, Narvesh and Rajendar and, therefore, he has named them in the F.I.R.

20. In cross examination on behalf of accused-Avdhesh Kumar, he stated that his wife-Nirmala contested election against Pratima Devi who is wife Narender Dev, the real brother of Avdhesh Kumar. When confronted with his previous statement, this witness stated that it is correct that his statement was previously recorded in the Court and in that statement he had stated that he had not heard any noise of firing and he had gone to the house of Avdhesh Kumar in the morning and found that his three daughters were lying dead. He further stated that previous statement was made because accused-Avdhesh Kumar had threatened him to kill. When the Court asked a question that why he has made false statement on oath, this witness stated that under the threat of Avdhesh Kumar, he has not made the same statement which he has made at the time of recording the present statement.

21. In further cross examination on behalf of accused-Narvesh, he stated that the Investigating Officer recorded his statement twice and on second occasion, he

told that Avdhesh Kumar had killed his three daughters and requested for help. He further stated that at night when he reached at the house of Avdhesh Kumar, no petromax gas was lightening and he was carrying a torch. This witness stated that at the time when the accident took place, Avdhesh Kumar had only five daughters and his financial condition was very poor and he used to ply Tanga to earn his livelihood.

22. In her second statement, Shashi Devi, PW-5, (wife of Avdhesh Kumar and mother of the three girls who were murdered) stated that about sixteen years ago, her husband-Avdhesh Kuamr had enmity with Chutkannu. Chutkannu had given gunshot injury to one Rajnessh and her husband-Avdhesh Kumar was witness in the said case. She stated that Chutkannu was putting pressure on Avdhesh Kumar not to appear as witness against him otherwise he would be killed. She stated that at about 6-7 PM, petromax gas was lightening, her husband-Avdhesh Kumar was lying on a cot and her three daughters namely Rohini, Neeta and Surbhi were also lying on another cot. Her two daughters, Pooja and Archana, were lying inside the room and she was washing utensils. At that time, Chutkannu, carrying single barrel licensed gun, Rajendar, carrying double barrel country made gun and Narvesh, carrying country made pistol, came and shot dead the three daughters of Shashi Devi and Avdhesh Kumar. Her husband escaped and ran away from door of the room which was in a dilapidated condition. She stated that accused fired on his husband-Avdhesh Kumar which hit his three daughters. Rohini and Neeta died on the spot and Surbhi got injured and when she raised voice, the accused persons ran away and her neighbours, Har Saran and Kali Charan came there. Thereafter, she along with her husband took Surbhi to Police Station but she also died on her way. The complaint was given by her husband. After the postmortem of the deceased-girls was conducted, the Police arrested Avdhesh Kumar by saying that he has killed his daughters rather she had made a statement that Chutkannu, Narvesh and Rajendar have killed her daughters. She further stated that in the case where her husband was a witness and Chutkannu was an accused, Chutkannu was convicted.

23. In cross examination, this witness stated that when she was washing utensils her face was towards north. The Investigating Officer has colluded with accused-Rajendar, Narvesh and Chutkannu and has recorded her false statement in this regard though she has made a categoric statement to the Investigating Officer that aforesaid three persons had killed his daughters. She stated that her husband never used to consume liquor and at the time of incident, he was lying on a cot and on hearing the noise of firing, he succeeded in running away from a passage of small room and she had seen the accused persons in the light of burning a petromax gas. She further stated that the Investigating Officer by himself firing from the gun, took away the gun of her husband and empty cartridges.

24. This witness further stated that in her previous statement if the factum of petromax gas is not mentioned, she cannot tell the reason. This witness further stated that she has not given any such statement that before Dussehra, she insisted upon her husband-Avdhesh Kumar to get winter clothes for her daughters and due to that reason her husband was disturbed and stated that he would not get it. This witness

categorically stated that she has told to the Investigating Officer that when she was washing utensils, Chutkannu, carrying single barrel licensed gun, Rajendar, carrying double barrel country made gun and Narvesh, carrying country made pistol, came and killed her daughters and her husband ran away from the door of a dilapidated room. This witness stated that she has no knowledge if elder brother of her husband namely Narendra Dev has been convicted for life and is on bail. She pleaded ignorance that her father-in-law, Damodar Das was murdered but she has no knowledge.

25. Narendra Dev (PW-7) is a witness who had written the complaint and read over the same to his brother Avdhesh Kumar and submitted the same under the signature of Avdhesh Kumar to police. In cross examination, he stated that his son Gyandev is an Advocate and he himself is a convict in the case under Section 302 of IPC. He denied the suggestion that after due consideration, in order to save life of Avdhesh, a false FIR has been registered. In further cross examination, this witness stated that his father died in an accident.

26. Rajneesh (PW-8) stated that he has no knowledge about the incident and who committed the murder of daughters of Avdhesh Kumar as he was out of the village. This witness was declared hostile and in cross examination by ADGC was confronted with the statement under Section 161 of Cr.P.C. to which he stated that he has not made any such statement. In cross examination by defence, this witness stated that Narendra Dev has even scribed a complaint in another FIR against Chutkannu @ Nathulal.

27. Lal Bahadur (PW-9) clearly denied any knowledge of the incident. This witness was also declared hostile and in cross examination by ADGC, he denied having given a statement under Section 161 Cr.P.C. In cross examination on behalf of accused persons, he stated that when he reached the house of Avdhesh Kumar, he has not seen anyone running from the place, his daughters were lying dead and he was sitting with his gun.

28. Ram Bahore (PW-10) has also denied having any knowledge about the incident by saying that he came 4-5 days after the incident. He was also declared hostile and in cross examination by ADGC, he denied making any statement under Section 161 Cr.P.C. In cross examination by accused-Narvesh Kumar, he denied that in statement under Section 161 Cr.P.C., he has stated that he apprehended that the fires were shot from the gun of Avdhesh.

29. Bade Lalla (PW—11) also stated that he has no knowledge about the incident and he was also declared hostile. In cross examination by ADGC, he denied the statement under Section 164 Cr.P.C. In cross examination of accused Narvesh Kumar, he denied that under the influence of Avdhesh Kumar, he has not given any statement.

30. Dr. Anil Sood (PW-12) conducted the postmortem of three girls, namely, Rohini, Neeta and Surbhi and found the following injuries :-

"Name Rohini Age 09 years

Ante Mortem Injuries

1. A gunshot would of entry 2 cm. x 0.5 cm into skull cavity deep (to and through). It was on the right side fo the skull about 5 cm above the right ear. The margins were inverted. Blackening and Tattooing present.

2. Gunshot injury of Exit 10 cm x 5 cm Bone deep communicating to injury no.1 of entry was present on the left side of the face. The margins were everted. Left Frontal, Mandible and Maxilla Bones were broken.

3. Contusion 4 cm x 2 cm and 3 cm x 2 cm on right arm 9 cm below right shoulder is seen

Lungs were both Pale.

Liver – Lacerated.

Spleen – Pale.

Kidney – both Pale.

Time since death – Died on dated 15.10.2002, about one day old.

Cause and manner of death – Immediate cause- Shock and hemorrhage.

Death due to – ante mortem firearm injury….'

'Name- Neeta Age 08 years, Height- cm

Ante Mortem Injuries-

1. A Gunshot Wound of Entry 0.3 cm x 0.2 cm Brain Cavity Deep on Right Side of Skull 4 cm above Right ear present. Margins are inverted. No Blackening and Tattooing present.

2. A Gunshot Wound of Exit 8 cm x 9 cm Brain Cavity Deep which communicated to injury no. 1 was on Left Temporal Parietal side. Margins were everted.

3. A Gunshot Wound of Entry size 0.3 cm x 0.2 cm x Muscle deep to 0.4 cm x 0.2 cm x skin deep in front of right hand. No Blackening or Tattooing.

4. A Gunshot Wound of Exit 10 cm x 5 cm x cavity deep on Right side of Stomach and 4 cm above Right Iliac crest. Margins everted. Blackening and Tattooing present. The Right Parietal and Temporal bone were fractured. The Brain matter was lacerated.

***Lungs** were both Pale.*

***Liver** – lacerated.*

Spleen – Pale

***Kidney** – both Pale.*

***Time since death** – Died on dated 5.10.2002*

***Cause and manner of death** – Immediate cause – Shock and hemorrhage.*

***Death due to** – ante mortem firearm injury….'*

"Name – Surbhi Age 07 years, Height - cm,

Ante Mortem Injuries-

1. A Gunshot Wound of Entry 1 cm x 0.2 cm Stomach cavity deep (to and through) which was in the Left and went upto the Left buttock. It was 4 cm below Iliac crust. Margins were inverted. No Blackening and Tattooing.

2. A Gunshot Wound of Exit 10 cm x 6 cm x Abdominal Cavity deep. The injury communicated with the injury no.1. It was above the Iliac crust. Margins were everted.

Lungs were both Pale.

Liver – Lacerated.

Spleen – Pale.

Kidney – Both Pale.

Time since death – Died on dated 15.10.2002

Cause and manner of death Immediate cause – Shock and hemorrhage.

Death due to – ante mortem firearm injury …"

31. In cross examination, this witness stated that injury no. 1 of Surbhi was mentioned as a firearm injury and death occurred about six hours prior to the postmortem.

32. Hoshiyar Singh (PW-13), retired Sub Inspector, the Investigating Officer stated that on 15.10.2002 at about 6.00 p.m., the incident took place and after

taking the chick report, he reached the place of occurrence and recorded the statement of informant. Site plan was prepared as Exhibit-Ka-10. A recovery of blood stained earth, a mosquito net and the pellets of empty cartridges etc. were taken in possession by separate recovery memo which are Exhibits Ka-8 to Ka-10. A double barrel licensed gun along with ten live cartridges were recovered in presence of the witnesses, Hari Sharan and Sarvesh Kumar which is Exhibit Ka-11.

33. Upon the identification of the licensed gun of 12 bore No.5344/80 it was also taken in possession vide Exhibit-Ka-12.

34. The Panchayatnama of all the three dead girls was prepared which are Exhibit Ka-1 to Ka-3. The photographs of the deceased, Neeta, Rohini and Surbhi which is Exhibit Ka-13 along with letter of Chief Medical Officer, sample-C is exhibited as Ka-13 to K-24. On 21st October, 2002, the articles which were taken in possession i.e. blood stained earth, mosquito net, 12 bore gun, pellets were sent to Forensic Science Lab, Agra. Statement of Doctor Anil Sood who conducted the postmortem was also recorded. The statement of Smt. Shashi was recorded in case diary who stated that the offence was committed by the Avdhesh Kumar. Avdhesh Kumar was arrested in presence of Bade Lalla and he confessed having committed murder of his three daughters who were sleeping on a single cot. His confession statement was sent to the Court. The statements of Chutkannu @ Nathulal, Rajendar and Narvesh Kumar were also recorded. Similarly statement of other witness was also recorded. Thereafter, charge-sheet was presented against Avdhesh Kumar vide Exhibit Ka-25 and his previous criminal history was also recorded on the charge sheet.

35. The chick FIR and GD CC were exhibited as Ka-26 and Ka-27. He further stated that he enquired from the Avdhesh Kumar about the time then he stated that it was time of sunset and started crying by saying that he has committed the offence and, therefore, PW-13 found that Chutkannu @ Nathulal, Rajendar and Narvesh Kumar were falsely implicated. This witness further denied that PW-5-Shashi wife of Avdhesh Kumar did not make any such statement that her husband was a witness in an incident when Chutkannu @ Nathulal gave gun shot injury to one Rajneesh and that when he recorded the statement of Shashi, a petromax gas was on. He further denied that Shashi has not given any such statement that her husband Avdhesh Kumar was lying on a cot in Baramada (Courtyard) and two daughters, Pooja & Archana were lying on a cot inside the room. This witness even denied that Shashi has not given the statement that Chutkannu alias Nathulal carrying a single barrel licensed gun, Rajendar carrying country made double barrelled gun, Narvesh Kumar carrying country made pistol came and killed the three daughters of Shashi and thereafter, her husband ran away from the door.

36. He further stated that Shashi has not given statement that she was washing utensils in the courtyard and her face was towards north side. Shashi (PW-5) told him that she insisted upon Avdhesh Kumar that as winter season is coming after Diwali, he should get the winter clothes for his daughters. Shashi has stated that she had five daughters and no son, therefore, her husband was disturbed. He also stated that Shashi has given statement that under the

influence of liquor, her husband opened fire and hearing the noise, she woke up and found that her husband- Avdhesh Kumar was standing near the cot of her dead daughters, when she asked her husband, he started crying.

37. In further statement, this witness by opening seal of a packet which carried a 12 barrel licensed gun, this witness stated that this is a licence gun of Avdhesh Kumar which was recovered, the same was exhibited as Ex-1, four cartridge of 12 bores were Exhibit TC-1 to TC-4 as this witness stated that these are the same empty cartridges which were sent to F.S.L. and two empty cartridges marked as EC-1 and EC-2 were stated to be recovered at the spot. These were exhibited as Ex.2 and Ex.3, one cartridge was Exhibited-4 and some pellets from one packet were exhibited as Ex.5 to Ex.11.

38. In cross examination, he stated that after recovery of the gun and empty cartridges, the cartridges were deposited in the police station but were never produced before the Magistrate. He also stated that the empty cartridges and the gun were not deposited in the Sadar Malkhana. This witness also stated that on 16.10.2002, he made the recovery of gun and empty cartridges and after two days, he deposited the same in the police station on 18.10.2002 vide G.D. No.25 at 18:15 a.m.. and for two days, the gun and empty cartridges remained in his custody before these were deposited to the Malkhana. This witness further stated that sample seal was prepared on simple paper and no copy was prepared. The sample seal is not present on the letter prepared by him. The bundle carrying the gun and empty cartridges which were opened in the Court did not carry the sample seal prepared by him. He denied the suggestion that by firing from the gun of Avdhesh Kumar himself, he has made fake recovery of empty cartridges. He further stated that before sending the gun and empty cartridges to Ballistic Expert, he has not produced the same before Magistrate even before the Superintendent of Police. He also denied that with regard to keeping the case property in safe custody of the head Moharrir, he did not record his statement in CD and he cannot tell the name of head Moharrir, in whose custody, the same were kept.

39. This witness also stated that the G.D. by which the case property was taken out from the Malkhana is not available on record and the C.D. in which the case details of case property is mentioned, is not the copy of G.D. This witness further stated that constable-Tikaram who has taken the case property to Ballistic Expert, his statement is also not recorded in CD. This witness also stated that in the recovery memo(Exhibit-Ka-9), he has not mentioned that there was fresh smell of gun powder on the empty cartridges. This witness also stated that in none of the Panchayatnama of three girls, he recorded about recovery of empty cartridges or its time and on 16.10.2002, witness Dinesh did not make statement to him that Avdhesh Kumar came to his house on the same morning at about 8:00 a.m. and told him that he has committed murder of three daughters under the influence of liquor and that the liquor and two empty cartridge were lying under the cot, rather stated that the statement was recorded on 22.10.2002.

40. In cross examination on behalf of Avdhesh Kumar, this witness stated that none of the witnesses whose statements recorded in CD have stated that Avdhesh Kumar or Narvesh Kumar and Rajendar,

have committed the offence. The statement of PW-13 concluded on 14.3.2019.

41. The prosecution evidence was closed on 14.3.2019 and the case for the first time was fixed for recording statement of accused under Section 313 Cr.P.C. on 16.3.2019.

42. On 16.3.2019, finding the F.S.L. Report not on record, a direction was issued that the FSL report through special messenger be requisitioned from FSL, Agra. The case was adjourned for this purpose on two occasions.

43. On 27.3.2019, another order was passed and prosecution was directed to produce the FSL report, but an application was moved from the side of the prosecution that regarding the concerned report of the present session case, there is no entry available in the police station therefore as per order of the Court, special messenger was sent for obtaining report at FSL, Agra but the report was not provided and an objection was raised that case file is not traceable, therefore, correct date of deposit of the parcel in the laboratory and its number be informed. The prosecution was directed that the case number and the correct date be informed and the report be submitted before the next date and the case was adjourned for 29.3.2019.

44. On 29.3.2019, the following order was passed :

"आरोप पत्रावली पेश हुई। मुल० अवधेश व नरवेश जेरे जमानत हाजिर है। मुल राजेन्द्र जेल से तलब होवे अभियोजन को Forensic report दाखिल करने के निर्देश थे परन्तु Prosecution की ओर से एक प्रा०पत्र इस आशय का प्रेषित किया गया कि मौजूदा सत्र परीक्षण से संबंधित अभिलेखों का इंद्राज थाने पर उपलब्ध नहीं है और न्यायालय के आदेश के अनुपालन में विशेष वाहक का० 1509 सरोज यादव को विधि विज्ञान प्रयोगशाला आगरा भेजा गया था परन्तु रिपोर्ट नही दी गई और इस टिप्पणी के साथ प्रा०पत्र प्रस्तुत किया गया कि अभियोगTrace नहीं हो पा रहा है। प्रयोगशाला में जमा करने का सही दिनांक व लाट नं० के साथ भेजने का कष्ट करे।

अभियोजन को निर्देशित किया जाता है कि लाट नं० व सही दिनांक अंकित कर Prosecution Report नियत दिनांक तक प्रस्तुत करे।

पत्रावली दि० 29.3.19 को पेश है। "

45. On 1.4.2019, trial court passed following order:

"Put up case. File is taken up Rajendar as accused and other co-accused on bail. The FSL report is received. Same be kept on the file for recording statement under Section 313 Cr.P.C. Adjourned to 2.4.2019."

46. Thereafter on 2.4.2019 statement of the accused was recorded under section 313 Cr.P.C. and the case was adjourned for 5.4.2019 when accused side moved an application that they do not want to lead any evidence. However, accused Avdhesh sought time to file written argument.

"Case called out. Accused present. Learned ADGC Cr.) has today filed a copy of the FSL report which pertains to the blood stained an application 144-A has also been moved stating that the FSL report is incomplete and the report regarding the weapon of the offence is missing. He has prayed that he be given time to call for the FSL report regarding the weapon of the offence. This is an old case and previously time was granted to the prosecution to file the FSL report but instead of filing the complete report the prosecution has filed an incompleted one.

A last opportunity is being awarded to the prosecution to file the remaining FSL report positively by date fixed 1.4.2019".

47. Thereafter the statement of the accused persons were recorded under Section 313 Cr.P.C.. All the incriminating evidence were produced and were put to the witness. In the statement Avdhesh Kumar it is stated that Sarvesh is not an eye witness and Dinesh has given a false statement as wife of Dinesh and real sister-in-law of Avdhesh had contested village Pradhan election and due to that enmity he has given false statement. It is stated that his wife Shashi was told him that correct statement is made against accused persons. He further stated that he has been falsely implicated. The police is not trying to find out the truth under the influence of Block Pradhan, namely Vinod who was using political pressure, therefore, he has been named in the FIR. In their statement Rajendar and Navesh have stated that they have been falsely implicated by Avdhesh on account of previous enmity in a criminal case.

48. Thereafter, the Trial Court acquitted the accused-Avdhesh Kumar of the charges and held accused-appellants, Rajendar and Narvesh guilty of offence punishable under Section 302 IPC as the third accused-Chutkannu had died during pendency of case in 2010. Both the appellants were sentenced to death as noticed above.

49. Learned Senior Advocate has argued that statement of PW-1, PW-4 & PW-5 are not trustworthy.

50. It is argued that statements of all the aforesaid three witnesses were recorded twice i.e. firstly, when the charges against Avdhesh were framed on 12.3.2004 and secondly, after summoning of the appellant under Section 319 Cr.P.C. when charges were again framed on 24.01.2018, under Section 302/34 IPC. It is argued that statements of these witnesses were recorded after a gap of more than 10 years after their statements were recorded for the first time and there are material improvements and contradiction in the statements recorded in the second time as confronted during cross examination by accused – Narvesh and Rajendar.

51. With reference to PW-1, it is argued that while recording his first statement, he has stated that he had no knowledge who committed murder of three daughters of Avdhesh Kumar and he had come to know this fact from the villagers that Chutkannu alias Nathulal, Rajendar and Narvesh had killed the three daughters of Avdhesh Kumar. This witness was declared hostile and when confronted, he even denied having made any statement under Section 161 Cr.P.C.. Learned Senior Advocate submits that the first statement of PW-1 was recorded on 03.02.2007 and post de novo trial, it was recorded on 13.12.2018, when this witness made improvements and stated that when he had gone to the house of Avdhesh Kumar on hearing the noise of firing, he had seen one daughter of Avdhesh was lying dead on one cot and two daughters on the other cot. He had seen Narvesh, Chutkannu and Rajendar coming from that side and they were carrying guns and many people gathered.

52. It is argued by the counsel for the appellant that once this witness was declared hostile at the first instance when only Avdhesh Kumar was facing trial, his second statement after 11 years levelling allegation against the three additional accused is not at all trustworthy. It is

submitted that this witness has admitted that one Ram Bharose was murdered and Vinod was injured and he i.e. PW-1 was an accused in the aforesaid incident and was sentenced to life and he is on bail from the High Court. This witness further stated that Avdhesh Kumar has two real brothers namely Sarvesh and Narendra Dev. Real niece of this witness namely Prema is married in village-Akholi and elder daughter of Avdhesh Kumar namely Archana is married to his niece Prema's son namely Chhotu and he is in direct relationship with Avdhesh Kumar. Learned Senior counsel argued that after 11 years of recording of first statement, on account of new development in the family and PW-1 himself being convicted to life, he has changed his statement and, therefore, his statement cannot be relied upon as he has motive to falsely implicate Narvesh and Rajendar.

53. It is next argued that even first statement of PW-4 was recorded on 07.01.2009. In the first statement, PW-4 had stated that he had visited the house of Avdhesh Kumar in the morning and found that his three daughters were lying dead and he had seen Avdhesh Kumar carrying a licensed gun but he had no knowledge who had committed murder. At that stage, this witness was also declared hostile and denied having made any statement under Section 161 Cr.P.C. Learned counsel argued that while making statement again this witness made improvements by stating that when he had gone to the house of Avdhesh Kumar, he was carrying a double barrel gun from which smoke was emitting and Avdhesh Kumar told him that he had killed his three daughters and PW-4 should help him as he was under the influence of liquor at night and had kept liquor and two empty cartridges under his cot.

54. Learned counsel for the appellant has further submitted that this witness has stated that his wife was Village Pradhan and Avdhesh Kumar was having enmity with Chutkannu, Narvesh and Rajendar and, therefore, he had named them in the F.I.R. In cross examination, this witness admitted that his wife Nirmala contested and won the Election of Village Pradhan against Pratima Devi who is wife of Narendra Dev, real brother of Avdhesh Kumar. When confronted with his earlier statement recorded before the Court, he admitted the same to be correct. Counsel submits that even this witness, in view of the changed circumstances and because of the political enmity against Avdhesh Kumar, has changed his version and, therefore, he is not a reliable witness.

55. Learned Senior Counsel argues that the star witness namely Shashi Devi (PW-5) who is wife of Avdhesh Kumar and (mother of the three girls who were murdered), in her first statement, had stated that Chutkannu, carrying a licensed gun, Rajedra, carrying a country made double barrel gun and Narvesh, carrying a country made pistol, came and started firing. At that time she was washing utensils and when she heard the noise of firing, the accused persons ran away. She came near her daughters and found that Rohini and Neeta had died and she along with her husband took her third daughter namely Surbhi to Police Station but she died on her way. Even this witness was declared hostile at the time of first statement and denied having made any statement under Section 161 Cr.P.C. wherein she had stated that she was demanding winter clothes from her husband for her five daughters which he could not bring and due to anger and under the influence of liquor, he committed murder of his three daughters.

56. Learned counsel for the appellant has referred to her second statement recorded after about 10 years to submit that even PW-5 has made improvements. She has stated that her husband Avdhesh Kumar was a witness to a case wherein Chutkannu had given gunshot injury to one Rajneesh and Chutkannu was putting pressure on Avdhesh Kumar not to appear as a witness, however, he did not bow to his demand and Chutkannu was later on convicted in the said case. This witness further stated that at about 6-7 PM, the Petromax Gas was lighting, her husband was lying on a cot and her three daughters were lying on another cot when three accused persons came carrying their respective weapons and fired towards Avdhesh who ran away and they shot dead her three daughters. Her husband succeeded in running away through a passage from a dilapidated room. This witness stated that accused persons came to fire upon her husband but killed her three daughters. In cross examination, this witness stated that the Investigating Officer, in collusion with the three accused persons, recorded her false statement against her husband as narrated above and rather the Investigating Officer took the licensed gun of her husband by firing upon two shots and also took the empty cartridges. In cross examination with regard to her previous statement recorded in the Court, she pleaded ignorance about non mentioning of Petromax Gas Light as well as denied that she had demanded winter clothes for her five daughters and being disturbed by the same and under the influence of liquor, her husband murdered her three daughters. It is submitted that save her husband, she has levelled false allegation.

57. Counsel for the appellant thus submits that in view of the variation and improvements made by PW-5, even her statement is not reliable. Learned counsel has relied upon the judgment of Supreme Court in **Vadivelu Thevar Vs. State of Madras, 1957 0 AIR (SC) 614** wherein the Supreme Court has held that generally speaking, oral testimony may be classified into three categories namely (i) Wholly reliable; (ii) Wholly unreliable and (iii) Neither wholly reliable nor wholly unreliable. Counsel submits that this judgment is consistently upheld by the Supreme Court and even in a recent judgment in **Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164**, the ***Vadivelu Thevar Case*** (Supra) has been reiterated. Learned counsel has argued that in view of the same, statements of all the three witnesses namely PW-1, PW-4 & PW-5 being inconsistent statements are liable to be held as totally unreliable.

58. Learned counsel has next argued that even the statement of PW-7, Narendra Dev, who has written the complaint (Tehrir) and on behalf of Avdhesh which was given to the police under the signature of Avdhesh Kumar, being real brother of Avdhesh Kumar is also an interested witness as he has admitted that he himself is a convict and is undergoing life sentence in a case under Section 302 of IPC.

59. Counsel then referred to the statement of PW-8 who though declared hostile, in cross examination has admitted that Chutkannu alias Nathulal was murdered during the trial and even in that case, the complaint was scribed by Narendra Dev. Counsel submits that Narendra Dev being an interested witness having enmity with family of Chutkannu, his statements cannot be relied upon.

60. Counsel submits that PW-9 & PW-10 have denied having seen the incident or giving any statement under Section 161 Cr.P.C.

61. It is further submitted that the last witness of fact is Bade Lalla (PW-11) in whose presence the accused-Avdhesh Kumar had made confession statement before Investigation Officer (PW-13) has also not supported the prosecution version and he was also declared hostile.

62. Learned counsel has even referred to the site plan (Ex.Ka-7) to submit that it was prepared at the instance of Avdhesh Kumar also did not prove the prosecution version against accused Narvesh and Rajendar as in the Site Plan (Ex.Ka-7), the place marked 'X' from where accused have opened fire on Avdhesh Kumar who was lying on a cot marked 'C' and the place where cot 'A' & 'B' on which the three girls were shot dead, do not fall in the line of firing range if, from the place 'X', the three accused persons had fired upon the point 'C' where accused-Avdhesh was sitting on a cot. It is submitted that site plan itself do not prove that the firing had occurred at the instance of the appellants in the manner as stated in the site plan detailed by Avdhesh Kumar.

63. It is next argued that none of the three accused persons were arrested by the police after the registration of the F.I.R. and upon verification, the Investigating Officer, Hoshiyaar Singh (PW-13), had come to a conclusion, after recording statements of witnesses under Section 161 Cr.P.C. that it is Avdhesh Kumar who had murdered his own three daughters as he was seen at the place of incident carrying a gun which was emitting smoke and made confession statement in presence of PW-11 that he has killed his three daughters.

64. Counsel submits that no recovery was effected from any of the accused and, therefore, in the absence of recovery of any weapon of offence, convicting the appellants on the basis of unreliable statements of PW-1, PW-4 & PW-5, is unsustainable as the Trial Court has not adopted a correct approach. Learned counsel for the appellant has further submitted that at page 3 of the impugned judgment, the Trial Court has made the following observations :

"At this (initial) stage of writing the judgement, it is 'highly' imperative to divulge here that the instant case is a glaring example where due to a botched investigation carried out by an investigating officer, an innocent father who was a victim of dastardly act committed by the actual accused persons in which his 3 small daughters were gruesomely murdered in his presence and in the presence of his wife. Yet more, as if this was not enough this innocent father, who was the complainant of this case, was turned into a murderer by the purposely designed defective investigation of the investigating officer. A complainant of a case ensures that the accused persons are brought to face the consequence of their offence. However, the complainant himself became 'hunted' in this case due to the contorted investigation (of the case). In other words, 'Sh. Hoshiyar Singh' the 'investigating officer' of this case, most shamelessly, did a complete 'turn around' in this case. 'Avdhesh' who was the 'complainant' of this case, 'in whose house' the 'alleged incident' of crime 'occurred' and 'whose 03 minor daughters' were 'killed' in that incident, was himself

made the 'culprit' by 'Sh. Hoshiyar Singh', the investigating officer. According to him (the investigating officer), it was Avdhesh/the complainant who had actually carried out the murder of his own 03 daughters and not the accused persons vizually, Chutkannu alias Nathulal, Narvesh and Rajendar (against whom the FIR was got registered by the complainant Avdhesh) on that fateful day. How this complete turn around of the facts transpired in the investigation is something which this Court shall deal with, in detail, in the later part of the judgment. For now, it is sufficient to divulge here, cursorily that after accusing the complainant (Avdhesh) of having murdered his own three daughters, the investigation was completed by the investigating officer. Thereafter, even the 'Chargesheet', which is on record as 'Exhibit A-25' was filed 'only' against Avdhesh (Complainant) before the Court in Crime No. 224 of 2002 under Section 302 IPC PS Nigohi, Shahjahanpur. In other words, solely the complainant was named in the Chargesheet whereas, the original three accused persons, namely, Chutkannu alias Nathulal, Narvesh and Rajendar, against whom all, 'Tehrir' was given and F.I.R. 'was' registered were dropped out in the report, under Section 173 (3) Cr.P.C., by the Investigating Officer."

65. Learned counsel submits that the Trial Court, at the very beginning of impugned judgement, has drawn conclusion that Avdhesh Kumar has been falsely implicated as the Investigation Officer (PW-13) in a shameless manner did not conduct a proper investigation against the three accused persons including the appellants. It is submitted that the Trial Court, before recording findings in the judgment, has concluded that Avdhesh Kumar is an innocent person. It is next argued that Trial Court did not follow the correct procedure. Counsel submits that after framing of fresh charges against the appellants on 24.01.2018, de novo trial started and statement of all the 13 witnesses were recorded. Counsel submits that last statement of PW-13 was concluded on 14.3.2019 when prosecution evidence was closed and the case was fixed for recording statement of accused under Section 313 Cr.P.C. on 16.3.2019. Counsel laid emphasis on the fact that it is only at that stage, the Trial Court in the order dated 16.3.2019 observed that in fact ballistic/F.S.L report is not on record and, therefore, three successive orders were passed on 16.3.2019, 27.3.2019 & 29.3.2019 directing the prosecution to procure the report from Forensic Science Laboratory, Agra. In these orders, it is observed that the Police as well as Forensic Science Laboratory at one point of time has raised objection that there is no entry available either in the police station or in the Forensic Science Laboratory regarding the case number or F.I.R. vide which the report was sent and through special messenger, the report was produced before the Court for the first time on 1.4.2019 when observing that the F.S.L Report is received and the case was fixed for recording statement of accused under Section 313 Cr.P.C. on the next date i.e. 2.4.2019. Counsel submits that the order dated 1.4.2019 is silent if this F.S.L. report was supplied to the accused persons and therefore there is non compliance of Section 207 Cr.P.C.

66. Learned counsel with reference to the F.S.L. Report has submitted that neither this document was exhibited by the prosecution either by re-recording statement of PW-13 or by tendering the

same by the Public Prosecutor as an exhibit on record.

67. Counsel submits that a careful perusal of the statement recorded under Section 313 Cr.P.C. of Avdhesh Kumar, Rajendar and Narvesh show that this F.S.L. Report was never put to them and, therefore, none of the accused was given adequate opportunity to rebut the said report as it was neither part of the report submitted under Section 173 (2) Cr.P.C. nor it was proved exhibited in the statement of PW-13 nor it was tendered to be exhibited. Counsel submits that in such circumstance, the accused were denied a valuable right to examine the Investigating Officer regarding the F.S.L. Report.

68. Reliance has been placed by the counsel for the appellant in the decision of Supreme Court in **Tarun Tyagi vs. C.B.I. reported in (2017) 4 SCC 490** wherein the Supreme Court has held that where a scientific report is not supplied to the accused under Section 207 Cr.P.C. and is not put to an accused under Section 313 Cr.P.C., it amounts to denying the valuable right as accused had no occasion to cross examine the Investigating Officer on the point.

In the present case, expert who prepared the FSL report, has not been examined and after the report was produced before the Trial Court, the same has been taken into consideration under Section 293 Cr.P.C., therefore, in the absence of FSL report ever supplied to either of the accused at any stage and no application was filed by the prosecution under Section 311 Cr.P.C. to summon the Investigating Officer for further cross examination, an important right of the accused is taken away.

69. Learned counsel has argued that all the witnesses are highly interested witnesses and having enmity with the family of the Chutkannu, therefore, the appellants have been falsely implicated. It is also argued that against submission of challan report against accused Avdhesh, no complaint was filed before any authority for further investigation or reinvestigation of the case to suggest that the police authorities recording statement of witnesses under Section 161 Cr.P.C., has drawn wrong or biased conclusion that primarily Avdhesh has committed the offence.

70. Learned counsel submits that the licensed gun which was recovered from Avadhesh alongwith two cartridges were sent to FSL and as per the FSL report, it was found that the empty cartridge were fired from the same licensed gun of Avdhesh. It is submitted that investigation is highly shoddy as all victims suffered bullet injuries i.e. one injury by Rohini having entry/exit wound, two injuries by Neeta with entry/exit wound and one injury by Surbhi with entry/exit wound but no bloodstained bullets were recovered at the spot and this raises a suspicion that Avdhesh has committed the murder and has destroyed this important evidence.

71. Learned counsel submits that though the trial court has recorded finding that 13 prosecution witnesses were called for into two halves i.e. there was two sets of witnesses for recording the statements so as to prove the manner in which murder of three daughter of Avdhesh was committed. One set of two witnesses stated that Chutkannu and others have stated Avdhesh committed murder.

The learned counsel submitted that in view of the two set of evidence, the evidence which is scrutinized and relied upon by the Trial Court against appellants, in fact is not sufficient to hold them guilty because the first informant-Avdhesh, himself being accused was never examined as prosecution witness against appellants. He being an eye-witness to the evidence against appellants was never examined and appellants were never afforded opportunity to cross examine him. It is submitted that if Avdesh was examined as a prosecution witness, the truth would have come on record as to who had committed murder. It is submitted that to save skin of Avdhesh, neither prosecution nor the trial Court made any effort to examine him as a witness.

72. Learned counsel submits that trial court has wrongly relied upon the statement of the witness who had stated that it is the appellants Narvesh and Rajendar who have committed murder by holding that the motive proved against the appellant was that Avdhesh was witness against Chutkannu and in that case Chutkannu was convicted.

73. Learned counsel submits that motive set up by the prosecution against Avdhesh is that he has five daughters and no son and he had a poor financial condition. When his wife asked him to bring winter clothes for the daughters and he being unable to buy the clothes, has committed murder of his three minor daughters by his licensed gun.

74. Learned counsel has argued that since the trial court has at initial formed opinion that Avdhesh was not the accused, therefore, no effort was made to bring FSL report on record in accordance with law though same suggested that the empty cartridges were fired by the licensed gun of Avdhesh and he was acquitted of the charges.

75. Learned counsel submits that even as per the FIR motive was attributed only to Chutkannu that he was accused in a case where Chutkannue had caused firearm injury to one Rajneesh and Avdhesh Kumar was the witness of that case and Chutkannu was putting pressure on Avdhesh Kumar not to depose against him. It is submitted that no motive is attributed towards the appellants-Rajendar and Avdhesh and admittedly Chutkannu was murdered somewhere in the year 2010.

76. Learned counsel submits that in the absence of any motive against the appellants Rajendar and Narvesh, trial court has wrongly drawn a conclusion that they have committed offence.

77. Learned counsel submits that it has come in the statement of PW-1 that Chutkannu was murdered and his elder brother Ram Saran and his two sons Ram Niwas and Sriniwas are accused in the said murder case.

78. Learned counsel submits that on account of enmity, prosecution witness have deposed against the appellants and the prosecution has failed to prove the motive against the appellant.

79. Learned counsel lastly argued that severest punishment of death penalty has been awarded to the appellant without recording any finding that how it is a ‘rarest of rare case’. It is submitted that Rajendar is presently 75 years of age and Narvesh is 50 years of age and trial Court did not examine the aggravating or mitigating circumstance before awarding death penalty.

80. In reply learned State counsel has argued that even in the absence of any scientific evidence against the appellants Rajendar and Narvesh if the Court finds that the statement of prosecution witnesses are trustworthy, the same have been rightly relied upon by the trial court. It has also been argued that on account of any fault on the part Investigation Officer (PW-13), prosecution case does not become weak when the eye witnesses have supported the prosecution version.

81. Learned counsel has argued that Chutkannu, the deceased, has enmity with the appellant Avdhesh, therefore, he alongwith his son Narvesh and brother Rajendar have committed offence.

82. It is submitted that in view of protection given under Article 20 (3) of the Constitution of India read with Section 315 of Cr.P.C., Avdhesh could not be examined as a prosecution witness as he himself was facing trial as accused and, therefore, statement of PW-5 as eye-witness is rightly relied upon by the Trial Court.

83. It will be relevant to note down that the Trial Court while recording the finding has acquitted Avdhesh and no appeal against acquittal has been filed by the State. The Trial Court while convicting the appellants, Narvesh and Rajendar, has heavily relied upon the postmortem of the three girls and has also recorded the finding that the firing was not done by Avdheh from his double barrel gun and rather it was fired upon by a different weapon. The operative part of the judgment of the Trial Court is reproduced as under :

"Now the Court shall deal with the post mortem examination report of Rohini, Neeta and Surbhi, the 3 daughters of Avdhesh who were gunned down on the evening of 15.10.2002. This discussion will make it clear as to what kind of 'ante mortem firearm injuries' did those 3 girls suffer and also that 'could those 'all' ante mortem firearm injuries have possibly come by the use of 'one' single (kind of) firearm weapon or 'more than one' (kind of) firearm weapon was used in the firing on dated 15.10.2002, inside the house of Avdhesh. This Court is of the most considered opinion that the discussion about the nature of injuries sustained by the 3 deceased daughters of Avdhesh will cast ample light on the perpetrators of this crime. It will certainly not be out of the context to reiterate here that accused Avdhesh had just 'one licensed DBBL shot gun'. If it was Avdhesh who had committed the crime on dated 15.10.2002 then the nature of injuries and the weapon used to give those injuries must have been one. But on the other hand, if the nature of injuries sustained by all the 3 girls were the result of different types of fire arms or more than one type of guns/ rifles, then it will certainly help this Court in drawing an inference that 'on dated 15.10.2002, more than one kind of deadly firearm were used in the firing due to which different (kinds of) injuries were suffered by the daughters of Avdhesh. This will also be indicative of an inevitable inference that 'whether on dated 15.10.2002 it was more than one person who opened fire on the 3 daughters inside the house of Avdhesh and also that whether the firing was done from more than one type of firearms or from a single firmarm. But, much, before the Court gets down to discuss the post mortem examination report of Rohini 9 years, Neeta 8 years and Surbhi 7 years, it is equally imperative for this Court to first quote a few relevant excerpts from the <u>various Books/ Journals of 'Medico-Legal Jurisprudence and</u>

Toxicology'. These relevant extracts will potentially make it clear as to what (particular) kinds of injuries can only ensue by the use of a particular kind of firearms only. Thereafter, the Court shall apply those well settled rules discussed in the excerpts (below) to the facts and circumstances of the instant case in order to arrive at a just and reasonable conclusion. It will certainly not be out of the context to also divulge here that according to Avdhesh and his wife, Smt. Shashi (since it is their version) that their 3 daughters had been shot dead by the 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh who were having a Rifle, a desi gun and a tamancha. At this point, for the discussion, it is not relevant as to which of the 3 named accused persons was having which particular kind of firearm since it will be seen by the Court in the later part of the judgment when it will deal with the oral evidence. Therefore, as of now, from the deposition of Avdhesh and his wife, Smt. Shashi, it is apparent that 3 different kinds of weapons were used by the assailants/ 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh. Whereas, on the other hand it is the version of the prosecution that since the murder of the 3 girls had been committed by their father/ Avdhesh, who owns only a DBBL shotgun, therefore, it was only one 'single shot gun' that was used in committing the murder of the 3 daughters of Avdhesh. In view of the above, this Court shall first discuss the kinds of injuries these differently named weapons cause on the surface of the skin and then compare them with the post mortem examination of the 3 deceased girls. To begin with, in 'Parikh's Textbook of Medical Jurisprudence and Toxicology (for classrooms & Courtrooms), Medical Publication' it is stated and I quote,

"Shot Gun Injuries – The characteristics of shotgun injuries are due to (1) multiplicity of the projectiles including shots and wads (2) shot dispersion with the distance and (3) unusual projectiles in refilled cartridges or in muzzle loaders. The wounding by the shot gun is both due to shot or pellets and at appropriate distance, due to the wad.

When a shot gun is fired, the projectiles travel in a compact mass. As the stage increases, the individual pellets continue at their own speed and direction but spreading in a cone like manner ignoring the loss in velocity with distance and drop due to gravity. A rough calculation of the 'rate of spread' is '1 inch per yard' from the 'muzzle'.

When a shot gun is fired with the muzzle in contact with or near the body, the shot enters as a mass and the gases produced by the explosion cause considerable laceration of the surface skin, destruction of the deeper tissues, and often fragmentation of bone. Scorching of the skin, singeing of hair and blackening are seen around the wound. The powder residues are driven into the skin wound often very deeply and tattooing may be seen around and also in the depth of the wound. With smokeless powder, there is relatively less blackening and tattooing. The wad is often found in the wound and this may prove an important clue to the type of cartridge used. The exit wound, when present, may show greater disruption of tissues than is seen in the entrance wound, a number of exit wounds due to multiple pellets and bony fragments may be seen. Occasionally, even in contact or near injuries, the shot and wad may remain in the body and there is no exit wound. Shot gun projectiles which generally do not exit out of the body, may when the shot size is sufficiently large and the firing has taken

place from sufficiently near distance, give rise to a single entrance and multiple exit wounds.

In shot gun injuries, close distance phenomenon such as burning, scorching and blackening are generally seen upto about a yard. The halo of tattooing also gradually widens upto about a yard but upto about three yards, a few particles of powder grains may still be found on careful search. Infrared photography for the determination of powder marks particularly on dark colour clothing is of considerable assistance in the estimation of range.

The shot enters as a single mass upto about a yard. Upto about two yards, the overshot wad may be seen in the body. The wadding can produce an injury about three yards. Upto 2-3 yards, the shot produces an entrance hole with individual pellets holes round the periphery. An independent injury may be caused by the wad. As the range of fire increases, in separate pellets entering the body, appears round the central opening caused by the main mass of the shot. With further increase in the range, this is followed by more even distribution of pellet injuries with disappearance of the central aperture. At still longer ranges, the shot depending upon its size and velocity, may not lodge in the body.

Rifled Firearm Injuries- Rifled weapons may produce two wounds, one of entry and one of exit. Their dimensions vary with the calibre of the weapon. The Power of penetration of the tissues is generally greater with 'rifle and pistol' bullets than with the revolver bullets...when a bullet makes an entry into the human body, it first stretches the skin, then effects penetration of the skin and subsequently depending upon the energy, effects penetration soft tissues or bones and either lodges in the body or comes out causing an exit wound. After the entry of the bullet, the skin partially returns to its original position. The size of the entry wound may therefore, be smaller than the size of the bullet, especially at lower speed.

Entry wound- the entry wound are in relation to the distance of the muzzle of a firearm from the body. When a weapon is discharged, the projectile leaves the muzzle at its maximum velocity and is followed by a flame, burning and unburnt particles from the propellant charge together with metallic particles and by gases formed by explosion under tremendous pressure. At close range, all these will cause injury to the body giving the entry wound many special characteristics which the exit wound will lack...In a close contact, discharge from the muzzle consisting of the flame, powder, metallic particles and gases under pressure may be blown into the track taken by the bullet through the body. In a close shot, within the range of flame and powder blast, within a few inches from the muzzle the entrance wound is circular, singed by flame. In case of smokeless powder, there will be less blackening and shows tattooing. However, the blackening and tattooing may be absent on the body if the injury is on a clothed part. In a near shot within the range of powder blast but outside the range of flame, within 1-2 feet, in case of handguns and more in case of other weapons, the deposit of tattooing is spread out over a larger area but there is no singeing of har or charring of the skin. As the range increases tattooing from the powder becomes more sparse until no trace of powder marks can be found which is normally beyond a yard. In a distant shot there is no burning, no tattooing, no soot. The wound is circular with inverted margins and may be same size or even slightly smaller than the bullet owing to the initial stretching of the skin.

Exit wound- this is free from the signs of burning, blackening or tattooing.

The fibres of the clothes are turned out at the exit. The wound is usually split form within outwards. It has everted irregular edges. It is often bigger than the missile...usually there is more bleeding at the exit wound than at the entrance. In a close contact shot the entry wound being split by blast is larger than the exit unless the bullet comes out sideways or carrying bone with it. In a distant shot, the entry wound may be slightly smaller than or the same size as the exit wound. The wound edges may be inverted at the entry and everted at the exit.

When the projectile traverses the skull, the angle struck is ascertained from the way the track has opened up. An entrance bullet hole bevels inwards and therefore, the entrance is usually clean cut and the defect on the inner surface of the bone is larger than that on the outer surface. An exit hole in the skull is bevelled outwards. It is larger on the outer than on the inner surface of the bone and may justly be referred to as crater shaped...as the obliquity of the fire is increased, the wound becomes elongated in shape, and if the skin is struck at a tangent, penetration may fail to occur and only a slight linear furrowing of the skin may be produced..."

According to 'Field's Expert Evidence (Expert Evidence and opinions of third person – Medical and non- medical) 3rd Edition, 1988', and I quote,

"there is one more method which is sometimes considered as possible help towards the determination of the range of a fatal shot, namely the effect of the striking velocity of the bullet. A bullet travelling with a very high velocity will cause greater damage to tissues and make a larger wound one travelling at a very low velocity."

In ' Modi's Medical Jurisprudence and Toxicology, 20th Edition by N.J. Modi', it has been stated and I quote,

"Distance of the Firearm- if a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over the area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburned gunpowder or smokeless propellant powder...blackening is found if a firearm like shotgun is discharged from a distance of not more than 8 feet and a revolver or pistol is discharged within about 2 feet...blackening with a high power rifle can occur upto about one feet...at a distance of one to three feet, small shot makes a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun as the shot enter as one mass but are scattered after entering the wound and cause great damage to the internal tissues...on the other hand, at a distance of six feet, the central aperture is surrounded by separate openings in an area of about two inches in diameter made by few pellets of the shot which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched but is tattooed to some extent. At a distance of twelve feet the charge of shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter..."

In 'H.W.V. Cox's Medical Jurisprudence and Toxicology revised by Dr. Bernard Knight, 5th Edition',

"...upto about one yard/ one meter, the wound is likely to be single, due to the shot entering the body in one mass. Beyond this satellite pellet holes begin to appear around the main wound margins. Even

wads are also present in the wound at this distance...at a moderate range, between one and five yards (one to five meters) the wound will begin to enlarge due to the spread of the pellets...".

It will not be out of the context to also refer to 'Medical Jurisprudence by R. M. Jhala and V. B. Raju, 4th Edition',

"...the wounds of entrance caused by a shotgun have characteristics of their own. Upto the distance of one yard the whole charge fired from the gun enters the body en masse. This produces a round wound with ragged edges. When inflicted close vicinity there is also blackening and burning around the wound as with other firearm injuries. Beyond one yard, there is dispersion of pellets in the cartridge. The extent of dispersion offers a valuable guide in assessing the distance. According to Taylor, the dispersion of pellets in inches equals about 1 and a half times distance in yards. According to him, the dispersion is less if the barrel is choked...whereas, the characteristic of Rifle firearm shot is the fact that usually the wound of exit is larger and sometimes many times larger than the wound of entry...

Wound of exit- the bullet together with the core of tissue ahead, acquires larger size and bigger mass...this mass has an opportunity to act on unsupported skin. This leads to the skin yielding to a tearing force and hence the wound is lacerated and turned outwards, i.e., everted. The conventional larger size of the wound of exit is essentially attributable to larger mass carried ahead by the bullet..."

Having quoted the relevant excerpts from the various textbooks on MedicoLegal Jurisprudence and Toxicology, this Court shall now venture to discuss various case laws keeping in mind the subject matter of discussion 'ante mortem gunshot injuries', at this stage of writing the judgment. In 'Jaibir and others vs. State' '(Criminal Appeal no. 1056 of 1978) decided on September 23, 1986', following ante mortem injuries were found on the dead body of the deceased.

1. Gunshot wound of entry 4 cm x 3 cm on right side forehead 2 cm above the right eye brow. No blackening or charring present around the wound. Wound was brain cavity deep.

2. Gunshot wound of exit 5 cm x 4 cm on back of head in middle. It communicates with injury no. 1.

3. Gunshot wound of entry 2 cm x 2 cm into abdominal cavity deep back of right side abdomen upper part 4 cm from lumber and spine. No blackening charring present around the wound.

4. Gunshot wound of exit in mid axillary line on left side (3cm x 3 cm) chest 16 cm below the axilla. Communicates to injury no. 3.

5. Gunshot wound of entry 1 cm x 1 cm bone deep on back of left forearm upper part. No blackening or charring present underneath.

6. Gunshot wound of exit 2 cm x 2 cm infront of left forearm, middle point. It communicates with injury no. 5"

Internal examination revealed that all the skull bones were fractured. Membrane and brain were lacerated. All cranial fossae were fractured..."

It was so observed (under similar circumstances as in here before this Court) by 'the Hon'ble High Court of Allahabad' and I quote,

"...it is noteworthy that out of the six gun-shot wounds found on the dead body of deceased, three were wounds of entry and the remaining three were the wounds of exit. There is thus no dispute that the deceased had received three gunshot wounds, one of which was received on right side forehead, the second on back of right side of abdomen and the third on back of

left forearm and all the three bullets had passed through and through. The post mortem report also shows that there was no blackening or charring present around any of these wounds which indicates that the shots had been fired from a distance. From looking at the injuries, it must be inferred that all the three wounds had been caused by some powerful firearm with a long barrel such as rifle...none of these injuries could have been caused by a country made pistol, which is comparatively less powerful with low velocity and small barrel...Injury no. 1 which has a gunshot wound of entry on the forehead and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as rifle because all the skull bones underneath this injury had been fractured. It is common knowledge that the skull bones are thick and stronger and require more power for being fractured...so far as injury no. 3 and 5 are concerned, in our opinion, could have been easily caused by the shot fired from a country made pistol or revolver fired from a distance of more than 5 to 6 feet but less than 10 or 12 feet..."

Keeping in mind the above stated established principles of the Medico-Legal Jurisprudence and Toxicology and also relevant excerpts from the case law quoted above, the Court shall analyze the post mortem examination report of the 3 deceased daughters of Avdhesh and assess as to what kind of injuries did the deceased sustain and from what (kind of) weapon could those injuries have come to them. This will sufficiently indicate whether different kinds of firearms were used in the killing of the 3 deceased girls on dated 15.10.2002 or was it just one kind of firearm weapon that killed the 3 daughters of Avdhesh.

First the Court shall take up the post mortem examination report of deceased Rohini aged 09 years on the date of incident.]

Ante Mortem Injuries

1. A Gunshot wound of entry 2 cm x 0.5 cm into skull cavity deep (to and through). It was on the right side of the skull about 5 cm above the right ear. The margins were inverted. Blackening and Tattooing present.

2. Gunshot injury of Exit 10 cm x 5 cm Bone deep communicating to injury no. 1 of entry was present on the left side of the face. The margins were everted. Left Frontal, Mandible and Maxilla Bone were broken.

It is the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which indicates the fact that these 1 & 2 injuries to the deceased have been caused by 'one bullet' and not from any shotgun, which accused Avdhesh owns. A shot gun cannot cause so much of damage as is caused in the injury no. 2. A shotgun does not create so much of force, once fired that it could fracture a skull bone which arguably is one of the strongest bone in the body. The injury no. 1 and 2 are clean cut injuries of one single 'Rifle' bullet since one is an entry and second is the exit wound. In the most considered opinion of the Court a shotgun cartridge cannot cause such an injury as is divulged in injury no. 1 and 2 of deceased Rohini. Since, the above injuries have been caused in the skull and by looking at the injuries, it must be inferred that these two wounds had been caused by a 'powerful firearm' with a 'long barrel' such as 'rifle'. None of these injuries could have been caused by a shotgun or a country made pistol, which is comparatively 'less powerful' with 'low velocity' and 'small

barrel'...Injury no. 1 which has a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as 'rifle' because 'the Maxilla, Mandible and tempo parietal bones in and around the skull' underneath this injury have been fractured. It is common knowledge that the 'skull bones' are 'thick' and 'stronger' and 'require more power for being fractured. Under these circumstances, it is next to impossible that the assailant could have been Avdhesh who only had a DBBL shot gun at the time of the incident, according to the prosecution version. A DBBL shotgun inconceivably cannot cause such a fatal injury.

3. Contusion 4 cm x 2 cm and 3 cm x 2 cm on right arm 4 cm below right shoulder is seen. Brain matter was lacerated.

So far as injury no. 3 is concerned, it is the most considered opinion of the Court that when a person gets such life taking injuries then such an injured person before he dies must be bearing extreme pain and agony. While the perosn is dying of such brutal injuries, it is not inconceivable that the injured in those few minutes of for that matter a few seconds of the final moments of his life will throw his arms and legs around in pain thinking of anyone who can save his life. During these final countdowns of his life the person during the course of throwing around his arms and legs in extreme pain might have struck his hands to some hard object which might cause contusion in his. Even in this case, the victim has a contusion in her hand. It is very human to throw around arms and legs in pain. The victim is a small girl of 09 years. When she sustained these injuries, it might be that Rohini had threw her arms around in extreme pain in those final moments of her life when she was attacked barbrously by the assailants. In that reaction, it is common for the deceased to have got those contusions.

Now I shall take up the post mortem examination report of second daughter Neeta, aged 08 years on the date of the incident.

Ante Mortem Injuries

1. A Gunshot Wound of Entry 0.3 cm x 0.2 cm Brain Cavity Deep on Right Side of Skull 4 cm above Right ear present. Margins are inverted. No Blackening and Tattooing present.

2. A Gunshot Wound of Exit 8 cm x 9 cm Brain Cavity Deep which communicated to injury no. 1 was on Right Temporal and Parietal side. Margins are everted.

The Right Parietal and Temporal bones were fractured. The Brain matter was lacerated.

So far as deceased Neeta is concerned, it is the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which indicates the fact that these 1 & 2 injuries to the deceased have been caused by one bullet. Further, the above injuries have been caused in the skull. From looking at the injuries, it must be inferred that these two wounds had been caused by some 'powerful firearm' with a 'long barrel' such as 'rifle' because it is only a metallic missile fired from a Rifle is capable of fracturing Parietal and Temporal bones. Even the brain matter was lacerated. These injuries could not have been caused by a shotgun or a country made pistol, which is comparatively 'less powerful' with 'low velocity' and 'small barrel'...Injury no. 1 which has a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon

such as 'rifle' because 'the tempo parietal face bone has been fractured. It is common knowledge that even this bone is considered as a 'thick' and 'stronger' and 'requires more power' for being fractured. This amount of energy can only be generated from a metallic projectile fired from a powerful firearm like 'Rifle'. Only a metallic bullet fired from a Rifle can cause such a lethal injury. So much so, the deceased was a small and tender girl of barely 08 years. Her facial/skull tempo-parietal bones were pierced and fractured and it can only be due to the force of a metallic bullet/ projectile that was generated from being fired from a 'Rifle'.

Moreover, the ante mortem injuries in the post mortem report of Neeta shows that there is absence of blackening and tattooing. In the instant case, according to the prosecution version, accused Avdhesh was standing in front of the cot where his three (deceased) daughters were sleeping. Further according to the prosecution version, in the middle of the night, Smt. Shashi, wife of Avdhesh, woke up upon hearing the gunshot sounds. Also according to the prosecution version, when Shashi/ Pw5 woke up, she allegedly saw Avdhesh, 'drunk', 'standing' with his licensed DBBL gun in his hands from which he allegedly shot his daughters, in front of the cot of deceased girls. Under these circumstances, when the accused Avdhesh was standing in front of the cot of the girls, the distance in such case between Avdhesh and the girls should not have been more than 3-4 feet. Firstly, the firing which caused injury no. 1 and 2 are the result of Rifle firing and not a shotgun, however, even if Avdhesh had fired from his DBBL shotgun having a cartridge, then why in the world, there is no blackening and tattooing on the body of deceased Neeta according to injury no. 1 and 2. It is just impossible that if accused Avdhesh had allegedly fired from his DBBL shotgun from a distance of 3-4 feet, still then there is devoid of blackening and tattooing. This only confirms the conclusion of the Court that deceased Neeta was fired from a 'Rifle' and not from a 'Shotgun', whereas accused Avdhesh was only having a DBBL shotgun and not 'Rifle'. This shows that in the incident dated 15.1.2002 there was not just 'Rifle' firearm that was used but also a 'shotgun' firearm that was used separately by the assailants. Now the million dollar question is that if according to the prosecution, accused Avdhesh 'only' had a 'DBBL shotgun' who had fired from a close distance as his wife Shashi saw him standing with his 'DBBL shotgun' in front of the cot on which their daughters were, then blackening and tattooing should have been there, but as things stand, neither there is no blackening or tattooing, which indicates that the firing was done from a distance of more than 5-6 feet and also, at the cost of repetition, the injury no. 1 and 2 could only come from a Rifle and not a shotgun DBBL. If that is the case, then in the most considered opinion of this Court, the person/ accused who fired at the three daughters of Avdhesh could not have been accused Avdhesh himself, for all the reasons discussed above, rather the person who fired was having a 'Rifle' and not a 'shot gun'. So much so, the attacker even stood at a distance of more than 6 feet from the deceased and therefore, that person was someone other than, Avdhesh. In other words, one of the persons who fired from a 'Rifle' on the fateful night of 15.10.2002 was someone else and not Avdhesh. The firing was not done by Avdhesh from his DBBL Shotgun but this other person was someone else who was having a Rifle and even stood at a distance of more than 6 feet from the 3 girls, especially, deceased

Neeta, since there is absence of Blackening and tattooing on her body. 3. A Gunshot Multiple Wound of Entry size 0.3 cm x 0.2 cm x Muscle deep to 0.4 cm x 0.2 cm x skin deep in front of Right hand. No Blackening or Tattooing.

This injury shows that these are 'pellet' injuries since there are multiple wounds of entry. These entries are very small of the size 0.3 x 0.2 cm x muscle deep upto 0.4 cm x 0.2 cm x skin deep. This injury could have only been caused by a shotgun firing. Having said that, this injury shows no 'blackening' or 'tattooing' which is further indicative of the fact that the assailant who fired from his gun stood at a distance of more than 6 feet. It is this reason that the pellets when they travelled after being fired from the shotgun by the assailant did not form the tattooing on the skin of the deceased Neeta. This is self explanatory of the distance between deceased Neeta and her assailant which was more than 6 feet. The post mortem examination report of Neeta divulges that in the ante mortem injuries, there were total of 23 pellets that were found inside the body of the deceased, out of which there were 18 small pellets while there were 5 wads. Inspite of total 23 pellets that were found in the body of Neeta, aged 08 years, still there is absence of tattooing goes to show that the distance between Neeta and her killer was beyond 6 feet or even more. If that is the case, then how in the world that assailant can be accused Avdhesh who was standing in front of the cot of his 3 daughters when his wife Shashi woke up suddenly hearing the gunshots in the middle of the night, according to the prosecution version. At the cost of repetition, if accused Avdhesh had shot dead Neeta, from his DBBL shotgun from such a close distance of 3-4 feet, then blackening or tattooing must have been there on the body of Neeta, so far as injury no. 3 is concerned. Absence of blackening and tattooing, only formidable the conclusion of the Court that the alleged shooter was not Avdhesh but was someone who stood at distance of more than 6 feet and so he could not have been accused Avdhesh himself.

4. A Gunshot Wound of Entry 10 cm x 5 cm x cavity deep on Right side of Stomach and 4 cm above Right Iliac crest. Margins Inverted. Blackening and Tattooing present. In the most considered opinion of this Court, injury no. 4 is only a gunshot wound of entry. There is no gunshot wound of Exit which is communicating with injury no. 4. therefore, in the most considered opinion of this Court, injury no. 4 could have been caused by some less powerful firearm like a shot gun which was fired from a closer distance of less than 3-4 feet which is why there is presence of blackening and tattooing. Moreover, there were several pellets that were found in an around this injury. However, since the said firearm was not a Rifle whose metallic projectile goes through and through, that is out of the body, the missile from the firearm that caused injury no. 4 could not make an exit from the body due to the less force created in the bullet that is fired from it. In the instant case, out of the 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh, it is alleged that accused Chutkannu had a licensed shot gun of 12 bore, Rajendar was carrying a desi katta while Narvesh was carrying a desi Rifle. Injury no. 4 might appears to have been caused from that firearm which does not create as lethal force in the projectile if fired from it, as does a Rifle. Therefore, this injury appears to have been caused a shot gun and not a Rifle.

Now I shall take up the post mortem examination report of third daughter

Surbhi, aged 07 years on the date of the incident.

Ante Mortem Injuries

1. A Gunshot Wound of Entry 1 cm x 0.2 cm Stomach cavity deep (to and through) which was in the Left and went up to the Left buttock. It was 4 cm below Iliac crust. Margins were inverted. No Blackening and Tattooing.

2. A Gunshot Wound of Exit 10 cm x 6 cm x Abdominal Cavity deep. The injury communicated with the injury no. 1. It was above the Iliac crust. Margins were everted.

Even, in case of deceased Surbhi, aged 07 years, in the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which itself is indicative of the fact that injuries 1 and 2 have been caused by one bullet. Further, the above injury has been caused in the stomach. From looking at the injuries, it must be inferred that these two wounds have also been caused by some 'powerful firearm' with a 'long barrel' such as 'rifle', reason being that there is an 'exit wound' which goes to show that the force of the projectile was such that the bullet had made an exit. Only in case of 'Rifle' with a long barrel can produce such effect. The injury further denounces the probability completely that it may have been caused by a shotgun for the reason that there is absence of blackening and tattooing. Furthermore, the injuries 1 and 2 also suggest that the assailant must have stood at a distance of more than 6 feet from the deceased Surbhi. Had if this distance was less than 6 feet, then in that situation there must have been blackening or at least tattooing on the body of deceased Surbhi. It is the most considered opinion of this Court that even in case of Surbhi, the assailant was neither having a shotgun nor was he standing at a closer distance of less than 3-4 feet from her. Having said so, rather the shooter was having a lethal firearm like 'Rifle' which could only produce such force in the projectile causing these injuries as in this case. So much so, the shooter was also standing at a distance of more than 5-6 feet from the cot on which the deceased 3 girls of Avdhesh were sleeping. Therefore, it is equally the most considered opinion of this Court that considering the above analysis, it is next to impossible that the assailant could have been accused Avdhesh who at the time of the incident was allegedly having a DBBL shot gun and was also standing very close rather in front of the cot on which the 3 of his daughters were sleeping. Since it is the prosecution version that on the sound of the gunshot firing in the middle of the night, Smt. Shashi wife of accused Avdhesh woke up and she saw accused Avdhesh drunk and was standing in front of the cot on which their 3 daughters lay dead and Smt. Shashi saw (allegedly) accused Avdhesh was having his DBBL shot gun in his hands. In view of the analysis carried out above, None of these injuries could have been caused by DBBL shotgun, owned by accused Avdhesh, as he is said to be having in his hands at the time of incident (according to the prosecution version). Put in other words, Injury no. 1 which is reportedly a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as 'rifle' because 'the tempo parietal face bone has been fractured. It is common knowledge that even this bone is considered as a 'thick' and 'stronger' and 'requires more power or force' in order to be fractured. This amount of energy can only be generated from a metallic projectile fired from a powerful firearm like 'Rifle'. Only a metallic bullet fired from a Rifle can

cause such a lethal injury. So much so, the deceased was a small and tender girl of barely 09 years. Her facial bones were pierced and fractured with the force of a bullet that was generated from that gunshot. The ante mortem injuries in the post mortem report of Surbhi shows that there is no blackening and tattooing. In the instant case, according to the prosecution version, accused Avdhesh was standing in front of the cot where his three (deceased) daughters were sleeping. Further according to the prosecution version, in the middle of the night, Smt. Shashi, wife of Avdhesh woke up upon hearing the gunshot sounds. Also according to the prosecution version, when Shashi/Pw5 woke up, she allegedly saw Avdhesh, drunk, standing with his licensed DBBL gun in his hands from which he allegedly shot his daughters, in front of the cot of deceased girls. Under these circumstances, when the accused Avdhesh was standing in front of the cot of the girls, the distance in such case between Avdhesh and the girls should not have been more than 3-4 feet. If Avdhesh had fired from his DBBL shotgun having a cartridge, then why in the world, there is no blackening and tattooing on the body of deceased Surbhi according to injury no. 1 and 2. It is just impossible that if accused Avdhesh had allegedly fired from his DBBL shotgun from a distance of 3-4 feet, still then there is devoid of blackening and tattooing. This only confirms the conclusion of the Court that deceased Surbhi was fired at from a 'Rifle' and not from a 'Shotgun'. Having said that accused Avdhesh only had a DBBL shotgun and not 'Rifle'. This shows that in the incident dated 15.1.2002, there was not just 'Rifle' firearm that was used but also 'shotgun' firearm that was put to use. Now the million dollar question is that if according to the prosecution, accused Avdhesh only had a DBBL shotgun who had fired from a distance, then blackening and tattooing should have been there, but as things stand, there is no blackening or tattooing, which indicates that the shotgun was fired from a distance of more than 5- 6 feet. If that is the case, then in the most considered opinion of this Court, the person/ accused who fired at the three daughters of Avdhesh could not have been accused Avdhesh himself, for all the reasons discussed above, rather the person who fired from a 'shot gun' was a person/ accused who stood at a distance of more than 6 feet from the deceased and that person was someone other than, Avdhesh. In other words, the person who fired from shotgun on the fateful night of 15.10.2002 was someone else but not Avdhesh. The firing was not done by Avdhesh from his DBBL Shotgun but this other person was someone else who stood at a distance of more than 6 feet from the 3 girls, especially, deceased Surbhi, since there is absence of Blackening and tattooing on her body."

84. It will also be relevant to refer to certain recent judgments of the Supreme Court on capital punishment on award of capital punishment.

85. The Supreme Court in the case ***State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564***, has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

86. The Supreme Court in ***State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.(Criminal)785***, has held that taking

consideration of facts and circumstances of the case, the capital punishment is to be converted into life imprisonment.

87. The Supreme Court in ***Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192***, has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

"Aggravating circumstances*: A court may, however, in the following cases impose the penalty of death in its discretion:*

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Mitigating circumstances*: In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:*

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

88. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.(Criminal) 302***, it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special

reason as per requirement of Section 354(3) Cr.P.C. It is also held in the judgment that when the DNA report is not done, an adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendnecy of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted .

89. The Supreme Court in ***Manoharan Vs. State by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746***, has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

90. In ***Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254***, the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

91. In ***The State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. (Criminal)735***, the Supreme Court has again held that if there is any circumstance favouring the accused such as lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menance to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

92. In Re: ***Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571*** , the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

93. In ***Sundar @ Sundarrajan Vs. State by Inspector of Police, 2023 Cri.L.R.(SC) 473***, the Supreme Court held that it is the duty of the Court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty. It is also held that even though the crime committed by the accused is unquestionably grave and unpardonable, it will not be appropriate to affirm the death sentence as 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation.

94. In ***Ravindar Singh Vs. The State Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220, Digambar Vs. The State of Maharashtra, 2023 Cri. L.R. (SC)***

564, Bhaggi @ Bhagirah @ Naran Vs. The State of Madhya Pradesh, 2024(1) Crimes 121, the Supreme Court has commuted the death sentence despite holding that the offence committed was brutal or barbaric, however, considering the mitigating circumstances, the capital sentence was commuted to life for a fixed term of sentence.

95. After hearing the learned counsel for appellants, learned counsel for the informant as well as learned AGA for State and on perusal of the paper book as well as on the appraisal of the entire Trial Court's record as noticed above, we find that there is a limited scope of interference in the present appeal for the following reasons :

(a) It is the consistent stand of the prosecution that immediately after the incident, the informant Avdhesh Kumar got the FIR registered. It was scribed by his brother-Narendra Dev (PW-7) who has categorically stated that he had drafted the complaint as directed by Avdhesh Kumar, which was read over to him and, thereafter he had signed the same and submitted to the police. In this complaint, the informant has stated that accused Chutkannu alias Nathulal had enmity towards him as Avdhesh was a witness in a criminal case against him. On the date of incident, at about 6:00 p.m., after giving fodder to his milch cattle he was lying on a cot when due to this enmity Chutkunnu alias Nathulal having his licensed gun along with his brother, Rajendar who has having a country made double barrel gun and son- Narvesh Kumar who was also having country made pistol, came to his house and opened fire at him with intention to kill him. He ran away to save his life. All the three accused persons hit his three daughters who were sleeping on a nearby cot, in the mosquito net and killed them. Two of them died on the spot and the youngest was critically injured who passed away on way to police station. This witness has stated that he and his wife have witnessed the incident and other people have seen the accused persons at spot.

(b) A perusal of the record show that Hoshiyaar Singh (PW-13), the Investigating Officer, without initiating any investigation against the three accused persons, named in the FIR, gave them a clean chit and proceeded in a manner as if Avdhesh Kumar (father of the girls) has committed the murder. This witness has recovered the licensed gun of Avdhesh Kumar along with ten live cartridges and two empty cartridges and then recorded statements of witnesses, to come to a conclusion of investigation that it is Avdhesh Kumar who has committed the murder. However, in the detailed judgment as noticed above, the Trial Court found that Avdhesh Kumar is innocent and rather the entire mischief is played by Hoshiyaar Singh (PW-13), Investigating Officer in giving clean chit to three accused persons who were named in the FIR.

(c) Perusal of the postmortem report, the three minor girls; nature of gun shot injuries sustained by them having entry and exit wound show that the entry wound size is of different sizes, which suggest that different weapons were used in commission of offence. This corroborate the version of the prosecution as per F.I.R. and, therefore, this Court finds that the finding of the Trial Court which is based on appreciation of the medical jurisprudence is correct that the gun shots were not fired by the double barrel licensed gun of Avdhesh Kumar.

(d) At the cost of repetition, it is again held that the shoddy and suspicious

investigation was conducted by PW-13 in giving clean chit to Chutkannu alias Nathulal, Rajendar and Narvesh Kuamr even in the absence of recovery of the gun made from them which in ordinary course, he was required to do the proper custodial investigation by arresting them in such a heinous crime. PW-13 himself had drawn a conclusion that they are innocent persons and, therefore, they were not even arrested and no charge-sheet was filed against three named persons in the F.I.R.

Therefore, this aspect of the mala fide investigation cannot absolve the appellants Rajendar and Narvesh Kumar of the commission of offence.

(e) The star witness of the prosecution i.e. Shashi Devi (PW-5), the wife of Avdhesh Kumar and the mother of the three girls who were murdered, is consistent in her statement that the above named three accused persons carrying their respective weapons came to the house of the informant who was lying on a cot and his three minor daughters were lying on two different cots and by opening fire with intention to kill her husband, they (accused persons) killed the three daughters of the informant and her husband succeeded in running away.

The argument of the counsel for the appellant that the PW-5 was declared hostile when she was examined at the first instance when only Avdhesh Kumar was facing trial is of no consequence as she was not supporting the chargesheet submitted against Avdhesh Kumar which is contrary to the allegation in the F.I.R. and, therefore, she was declared hostile in that circumstance as she did not depose against her husband who is informant in the F.I.R naming the three accused person.

A perusal of the statement of Shashi Devi (PW-5) after the de novo trial started, is clear that at about 7.00 PM, accused-Chutkannu, carrying a licensed gun, Rajendar, carrying a double barrel country made gun and Narvesh, carrying country made pistol came and shouted to kill them and started firing. The defence could not put a dent on her testimony as this witness stated that she was very much present there and was washing utensils and on hearing the noise of gunshot, she raised voice and many people gathered. The Trial Court has rightly noticed that when this witness was confronted with her statement under Section 161 Cr.P.C. recorded by Investigating Officer, Hosiyar Singh (PW-13), she consistently stated that she has not made any such statement and rather she has told him that the above named three accused persons had killed her three daughters.

This witness also denied the suggestion that she has made statement under Section 161 Cr.P.C. that she had insisted upon her husband to bring winter clothes for her daughters. The Trial Court has rightly recorded finding that the financial condition of Avdhesh Kumar was not poor as he is owner of agricultural land and was having two more daughters namely Pooja and Archana. Therefore, in our opinion, if investigation of IO Hosiyar Singh (PW-13) concluded that it was Avdhesh Kumar who has killed his three daughters due to poverty, do not find weight with the Court as he had two more daughters who were sleeping in the same premise but, no damages were caused to them by Avdhesh Kumar.

Therefore, we find the statement of Shashi Devi (PW-5) as reliable statement in terms of the decision in Vadivelu Thevar Case (Supra). Some minor discrepancies with regard to non mentioning of burning of petromax gas at the time of incident, is not a serious discrepancy as a lady who has just lost her three minor daughters may not

be mentally in a position to give each minute details while recorded her statement.

(f) It has come in the statement of Har Saran Lal (PW-1) that when he had gone to the house of Avdhesh on hearing the noise of firing, Chutkannu, Rajendar and Narvesh were seen coming carrying guns and many people had gathered. He had seen that two daughters of Avdhesh were lying on one cot and one daughter was lying on another cot.

A suggestion was given to this witness that in the intervening period, accused Chutkannue was murdered, in which his nephews were accused and, therefore, he is making a false statement is of no consequence as this witness has deposed with regard to the incident which occurred much prior to the death of Chutkannu and he has categorically stated that he had seen the three accused at the place of occurrence with there respective guns. Even the suggestion given to this witness that the elder daughter of Avdhesh namely Archana is now married to his niece's son and, therefore, he is giving a false statement is again of no consequence as the marriage took place much after the incident and Court is to asses the motive, if it exists prior to the date incident when the three girls were murdered.

(g) The Trial Court has recorded finding that Dinesh Kumar (PW-4) is not trustworthy as in his first statement, when only Avdhesh Kumar was facing the Trial, he has stated that he has not heard any noise of firing and when he had gone to the house of Avdhesh Kumar in the morning, he saw that his three daughters were lying dead, when confronted with the statement after the de novo stage of trial, when this witness again appeared, has stated that when he had gone to the house of Avdhesh Kumar, he was carrying a double barrel licensed gun from which smoke was emitting out and Avdhesh told him that under the influence of liquor, he had committed the murder of his own three daughters.

This witness stated that he has not made any such statement on the earlier occasion under the threat extended by Avdhesh. However, it is worth noticing that statement was recorded after 11 years and in the intervening period, he had not lodged any complaint before the police that Avdhesh Kumar was extending threat to him and, therefore, testimony of PW-4 is not trustworthy because only this witness has stated that the financial condition of Avdhesh was very poor and he used to ply a Tanga to earn his livelihood, is contrary to the revenue record produced on behalf of Avdhesh Kumar that he is land owner and his financial condition is not poor that he had committed murder of his three daughters.

(h) Narendra Dev (PW-7) who is brother of informant-Avdhesh has also categorically stated that he had drafted a complaint on asking of Avdhesh Kumar and after it was read over to him, he has signed the same and has given to the police.

Though it has come in the cross examination that he was convicted in a case under Section 302 IPC, however, that incident being subsequent to the present incident will have no bearing regarding conduct of this witness at the relevant time.

(i) Rajneesh (PW-8), Lal Bahadur (PW-9) and Ram Bahore (PW-10) have not supported the case of the prosecution as against Avdhesh Kumar and when confronted with their statement under Section 161 Cr.P.C., they have denied that they have made any such statement to police that Avdhesh Kumar has committed murder of his three daughters.

(j) This also suggest that the Investigating Officer (PW-13) has not

conducted the investigation in proper and fair manner. Even Bade Lalla (PW-11), a witness set up by the prosecution against Avdhesh Kumar that in his presence, Avdhesh Kumar had recorded confession of killing of his three daughters, has not supported the prosecution version and denied having made any such statement under Section 161 Cr.P.C.

96. The argument raised by the learned counsel for the appellant is that the trial court at the initial stage has recorded finding that Avadhesh has been falsely implicated may be an irregularity in dictating the judgment but it is not an illegality. So far as the argument with regard to FSL report of the gun recovered from Avadhesh is concerned, the same was neither supplied to any of the accused nor it was put to the accused persons in their statement under Section 313 Cr.P.C.. Therefore, in view **Tarun Tyagi's Case (Supra)**, no reliance can be placed on this report.

97. Even otherwise this report was only against Avdhesh Kumar as PW-13 by not conducting custodian investigation of Chhutkan alias Nathulal Rajendar and Narvesh did not try to recover the weapon of offence from them though the postmortem report suggests that more than one type of weapons were used in commission of offence which supports the FIR version as stated by PW-5.

98. Another argument raised by the counsel for the appellant that Avdhesh Kumar has not given any statement against appellant Rajendar and Narvesh by appearing as prosecution witness is of no consequence, in view of the protection under Section 315 Cr.P.C. read with Article 20(3) of the Constitution of India. Therefore, we uphold the judgment of conviction of appellant Rajendar and Narvesh. However, we are unable to uphold the capital punishment awarded by the trial court as it is not a "rarest of rare" case for the following reasons:-

(a) The appellant Rajendar is presently aged about 75 years whereas Narvesh is aged about 50 years. As per prosecution version they came alongwith Chutkannu who was having enmity with informant Avdhesh Kumar. Therefore, they have been held guilty under Section 302/34 IPC.

(b) The trial court has not recorded any aggravating circumstances and has even not scrutinized the case of the appellants in the light of mitigating circumstances. Nothing has come on record that both the appellants had any previous criminal history though co-accused Chutkannu (since deceased) had criminal history.

(c) Trial court has not recorded any finding that awarding of severest punishment, is the only possibility in the case as no finding is recorded that there is no possibility of reformation and rehabilitation of the convicts in the society.

(d) The trial court has also not recorded any finding that accused persons are menace to the society or are having criminal antecedents of multiple cases as nothing has come on record that both the appellants are having any criminal history.

(e) There is no mens rea of the appellant to kill the three daughters as the motive was to kill Avdhesh who succeeded in running away.

(f). As noticed above, it has been held by the Supreme Court in ***Nisar Ramzan Sayyed Case (Supra), Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar,***

Manoharan Case (Supra), Veerendra Case (Supra), Anand Kindo & Another Case (Supra), Ravindar Singh Case (Supra), Digambar's Case (Supra) and Bhaggi @ Bhagirah @ Naran's Case (Supra) that if the Court is inclined to award death penalty, there must be exceptional circumstance warranting imposition of excess penalty which cannot be reversed.

99. Therefore, finding that the case of the appellants can not be termed as "rarest of rare" case even though accused has committed a grave offence, we are of the opinion that capital punishment awarded to both the appellants should be commuted to life imprisonment for a fixed term of 20 years.

100. With the aforesaid modification, the appeal qua conviction is dismissed. However, the appeal qua sentence is modified.

101. The accused-appellants are already in custody. They will undergo the remaining sentence in accordance with law.

102. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 5 ILRA 2427

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 22.05.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 6343 of 2024

Jitendra Mangala ...Applicant

Versus

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

Counsel for the Applicant:
Bhuvnesh Kumar Singh, Sangeeta Shukla

Counsel for the Opposite Parties:
G.A., Sushil Kumar Chaturvedi

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Negotiable Instruments Act 1881-Section 138-quashing of entire proceedings-the case involved a cheque issued on behalf of one M/s Prerna Construction, but the complaint named only the applicant, the proprietor of the company, without impleading the company itself as an accused-section 141 of the NI Act requires the company to be impleaded when a cheque is issued on its behalf-since the company was not made a party in the complaint the proceedings were defective-The court quashed the complaint as they were not maintainable due to non-impleading of the company-However, the court permitted the opposite party to file a fresh complaint within one month, properly impleading the company.(Para 1 to 14)

The application is allowed. (E-6)

List of Cases cited:

1. Himanshu Vs B. Shivamurthi & anr.(2019) 3 SCC 797

2. Aneeta Hada Vs M/S God Father Travels & Tours Pvt Ltd (2012) 5 SCC 661

3. Dilip Hariramani Vs Bank of Baroda (2022) Live Law SC 457 N. Harihare Krishnan Vs J. Thomas (2018) 3 SCC 663

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

1. Heard Sri Bhuvnesh Kr. Singh, learned counsel for the applicant, Sri Sushil Kr. Chaturvedi, learned counsel for opposite party No.2 and Sri Rajeev Kr. Singh, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of entire proceeding of Complaint Case No. 14 of 2018 (Smt. Manju Sharma vs. Jitendra Mangala), u/s 138 N.I. Act, P.S. Tajganj, District Agra, pending before the Additional Court No.1, Agra as well as summoning order dated 1.9.2018.

3. The factual matrix giving rise to the present case are that the complaint was filed by opposite party No.2 against the applicant u/s 138 N.I. Act. In the aforesaid complaint, it was mentioned that cheque was issued by M/s Prerana Construction Pvt. Ltd., but only the present applicant who is the proprietor of the company M/s Prerana Construction Pvt. Ltd. was impleaded as accused. The court below after perusal of the record, summoned the present applicant by summoning order dated 1.9.2018 and by way of present application, the proceeding of aforesaid complaint case is under challenge.

4. Learned counsel for the applicant submits that it is undisputed that the cheque in question was issued on behalf of the company M/s Prerana Construction Pvt. Ltd., but while filing the impugned complaint, the company in question was not impleaded as accused. Therefore, the proceeding cannot be proceeded against the accused who is the proprietor of the company who is vicariously liable only when the company is impleaded as a party in the complaint. Therefore, the impugned complaint is barred by Section 141 N.I. Act. Learned counsel for the applicant also argued that in case paragraphs No. 6 of 13 of ***Himanshu vs. B. Shivamurthi and another; (2019) 3 SCC 797***, Hon'ble Apex Court observed that the complaint, in absence of the company, is defective and at this stage company cannot be arrayed. Therefore, fresh complaint is also barred because fresh notice is required to be given to the company which is necessary for arising of the cause of action.

5. per contra learned counsel for opposite party No.2 and learned A.G.A. submitted that the cheque in question was issued on behalf of the company by the applicant, therefore, he is personally liable, therefore, there is no illegality in the summoning order and the impugned proceeding.

6. Considering the rival submissions of the parties and on perusal of the record, it appears that the cheque in question was issued on behalf of the company M/s Prerana Construction Pvt. Ltd. to opposite party No.2, but while filing the impugned complaint, opposite party No.2 did not implead the company as accused which is the basic requirement u/s 141 N.I. Act.

7. The Apex Court also in the cases of ***Aneeta Hada vs. M/S God Father Travels and Tours Pvt. Ltd.; (2012) 5 SCC 661, Himanshu vs. B. Shivamurthi and another; (2019) 3 SCC 797, Dilip Hariramani vs. Bank of Baroda; 2022 LiveLaw (SC) 457*** as well as ***N. Harihara Krishnan vs. J. Thomas 2018 (3) SCC 663*** observed that without impleading the body corporate which includes the company itself, proceeding u/s 141 N.I. Act cannot be proceeded.

8. So far as the contention of learned counsel for the applicant that fresh complaint after impleading the company is also barred because Hon'ble Apex Court in the case of ***Himanshu vs. B. Shivamurthi (supra)*** has observed that in absence of notice of demand, being served on the

company, the company cannot be arrayed as accused, is concerned, in the case of ***Himanshu vs. B. Shivamurthi (supra)*** the issue was whether on objection raised by the accused that company was not impeaded as party in the complaint filed for dishonoring of the cheque on behalf of the company but the High Court has permitted to implead the company and Hon'ble Court observed that as the statutory demand notice was not issued to the company, therefore, at this stage company cannot be proceeded by impleading the same in the complaint. Paragraphs No. 6, 11 & 13 of the ***Himanshu vs. B. Shivamurthi (supra)*** are being quoted as under:-

"6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

9. In the case of ***Himanshu vs. B. Shivamurthi (supra)*** drawer of the cheque during the pendency of the proceeding before the Apex Court also deposited the entire cheque amount showing his bona fide which was also directed to be paid to the complainant at the time of disposal of the case. However, in the present case situation is totally different. In the impugned complaint, the applicant was not impleaded in his personal capacity but was impleaded as proprietor of the company M/s Prerana Construction Pvt. Ltd. and notice was also served upon the company M/s Prerana Construction Pvt. Ltd. through the applicant, being its proprietor/executive director. It is not in dispute that the applicant is active director of the company in question as per the allegation of the complaint and also involved in its day to day business. Therefore, notice upon the applicant, being director of the company, will be deemed to be notice upon the company itself.

10. Therefore, facts of the ***Himanshu vs. B. Shivamurthi (supra)*** are different from the present case. Therefore, ratio of ***Himanshu vs. B. Shivamurthi***

(supra) will not be applied in the present case. Even otherwise, the applicant can raise all his defence during trial.

11. Hon'ble Apex Court in the case ***of NEPC Micon Ltd. vs. Magma Leasing Ltd.; 1999 (4) SCC 253, observed that it is the duty of court to interpret Section 138 N.I. Act consistent with the legislature intent and purpose so as to suppress the mischief and advance the remedy. Therefore, second complaint by impleading the company is not barred for bouncing of the cheque in question issued by the company M/s Prerana Construction Pvt. Ltd.***

12. Even otherwise, the drawer of the cheque in the case of ***Himanshu vs. B. Shivamurthi (supra)*** deposited the cheque amount before Hon'ble Supreme Court, showing his bone fide. However, in the present case order sheet shows that though the complaint was filed in the year 2018, the applicant as well as his company tried their best to avoid facing trial, despite issuance of summons and bailable warrant, therefore, such type of drawer of cheque should not be allowed to take benefit of technicality at the cost of justice.

13. In view of the above legal position, the present complaint is not maintainable as the company M/s Prerana Construction Pvt. Ltd. was not impleaded as a party. In view of the above, the proceeding of Complaint Case No. 14 of 2018 (Smt. Manju Sharma vs. Jitendra Mangala), u/s 138 N.I. Act, P.S. Tajganj, District Agra is hereby quashed.

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

15. However, opposite party No.2 is permitted to filed fresh complaint by impleading the company, namely, M/s Prerana Construction Pvt. Ltd., within a period of one month.

(2024) 5 ILRA 2430
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Special Appeal No. 345 of 2024

Ram Pratap Singh ...Appellant
Versus
Union of India & Ors. ...Respondents

Counsel for the Appellant:
Avneesh Tripathi

Counsel for the Respondents:
A.S.G.I., Rohan Gupta

Civil Law - Service Matter- Appellant-appointed as Junior Engineer (Trainee) on adhoc basis - for a period of two years - extended further for six months – Appellant applied again - selected on the post of Assistant Engineer (Civil) on regular basis - He was accorded the first financial upgradation and later on was promoted to the post of Senior Assistant Engineer (SG) - Board of Directors had approved the Recruitment and Promotion Rules in respect of non-academic staff- Appellant claims that his right to promotion got affected by the new policy - represented the matter - Institute Level Grievance Redressal Committee and the Board-Sub Committee refused – Appellant filed Writ – Rejected – Hence, appellant preferred Special Appeal – Dismissed (Para - 3,4,5,9,49)

HELD: The suitability for the job, for which the selection and appointment is to be made, is an

area of technical experts of the field and generally the Court does not inhere such expertise and skills to assess the suitability and eligibility vis-a-vis selection & appointment had to be made. The Court cannot embark upon any enquiry by way of judicial review to prescribe, which qualifications would be better qualification for the employer to provide as an essential qualification for the post. Prescription of qualifications and other conditions of service pertains to the field of policy is within the exclusive discretion and jurisdiction of the authority. In the instant appeal there was no challenge to the Rules/Regulations, which were duly adopted by the Competent Authority, therefore, the recruitment process which was adopted by the employer cannot be held to be an arbitrary exercise. (Para - 30, 31, 46)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Dr. Thingujam Achouba Singh & ors. Vs Dr. H.N.Nabachandra Singh & ors., (2020) 20 SCC 312

2. P.U. Joshi Vs Accountant General, 2003 2 SCC 632

3. Maharashtra Public Service Commission Vs Sandeep Shriram Warade, (2019) 6 SCC 362

4. Chief Manager, Punjab National Bank Vs Anit Kumar, (2021) 12 SCC 80

5. Deepak Singh Vs St. of U.P, 2019 SCC Online ALL 4471 (FB)

6. Vincent Nirmala Vs U.O.I.& ors (W.P. (C) 2742/2021)

7. P.Chitranjan Menon & ors. Vs A. Balakrishnan & ors, AIR 1977 SC 1720

8. Roshan Lal & ors. Vs International Airport Authority of India & ors, AIR 1981 SC 597

9. Edukanti Kistamma Vs S. Venkatareddy, AIR 2010 SC 313

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

1. Heard Sri Avneesh Tripathi, learned counsel for the appellant-petitioner and Sri Rohan Gupta, learned counsel for the opposite party nos.2 to 4.

2. Present Special Appeal has arisen from a judgment and order of the learned Single Judge dated 11th March, 2024 passed in Writ A No.19126 of 2023 (Ram Pratap Singh and another vs. Union of India and 3 others) by which the writ petition filed by the appellant-petitioner has been dismissed.

FACTS

3. The facts giving rise to this appeal in a nutshell are that the Indian Institute of Technology, Kanpur1 is an engineering institute. Initially, it was a society and subsequently, it was incorporated by the Central Government under the Institutes of Technology Act, 19612. Initially, the appellant-petitioner was appointed as a Junior Engineer (Trainee) in the pay scale of Rs.1400-2600 in IIT-Kanpur on April 27, 1988 on temporary and adhoc basis for a period of two years from the date of his joining and the said period was extended for a further period of six months vide Office order dated 10.05.1990. Subsequently, his pay scale of Rs.1400-2600 was changed to Rs.5000-8000/-. In January, 1991 the IIT-Kanpur had published an advertisement for appointment on the post of Junior Engineer and finally, the appellant was selected on the said post.

4. Thereafter, the appellant applied against the advertisement No.2/2005 and he was duly selected on the post of Assistant Engineer (Civil) on regular basis with effect from 14.12.2005 (F/N) or the date of assumption of charge on the position of

Assistant Engineer (Civil), whichever is later. He was accorded the first financial upgradation in the Grade Pay of Rs.4600/- vide Office Order dated 08.05.2014 and later on was promoted to the post of Senior Assistant Engineer (SG) in the pay scale of Rs.33100-187800 Level-9 with Grade Pay of Rs.5400/-, with effect from 01.01.2018, vide Office Order dated 30.01.2019. The pay scale of Rs.33,100-1,87,800/- was the same pay scale as given to the promoted Senior Assistant Engineer/Assistant Engineer.

5. Meanwhile, the Board of Directors in its 227th meeting dated 11.10.2018 had approved the Recruitment and Promotion Rules in respect of non-academic staff. The IIT Kanpur decided to adopt and implement the Recruitment and Promotion Rules as per procedures approved by the Board. Thereafter, the promotion policy was notified vide Office Order dated 27.11.2018. The appellant claims that his right to promotion got affected by the new policy and as such, he represented the matter before the IIT Kanpur on 14.06.2019. The same was examined by the Institute Level Grievance Redressal Committee and the Board-Sub Committee, constituted for grievance examinations, wherein it was found that there is no merit in the claim set up by the appellant and he was advised to apply for the promotion as and when the post is advertised, subject to meeting the eligibility criteria. Therefore, the Board of Governors in its 244th meeting dated 12th January, 2022 had refused to accept his request and the same was communicated to him vide letter dated 28.02.2022 issued by the Deputy Registrar (Admin.) of IIT Kanpur.

6. It is claimed that the appellant possessed all the essential qualifications required for being considered for appointment on the post of Executive Engineer. It transpires that in the earlier advertisement dated 25.05.2015 at serial no.3 the posts of Executive Engineer (Electrical) (reserved for OBCs) & Air-conditioning (UR) were mentioned and the applications were invited from the Assistant Executive Engineer with 5 years service in the grade; or Graduate Assistant Engineers with 8 years service in the grade or Diploma holders Assistant Engineers with outstanding records & ability and 10 years service in the grade. Thereafter, the IIT Kanpur had published an advertisement no.1/2023 dated 16.9.2023 inviting applications for recruitment on various posts including five posts of Executive Engineer, wherein the essential qualification for the post of Executive Engineer were changed and now the qualification was added that the applicants holding the rank of Assistant Executive Engineer at Level-10 would alone be eligible for the recruitment.

7. The appellant and other similarly situated employees represented the matter before IIT Kanpur on 25.9.2023. Consequently, a corrigendum was issued on 20.9.2023 whereby the recruitment process for the post of Executive Engineer was kept in abeyance. Meanwhile, the Director of IIT Kanpur had retired from service and the charge of the Director was given to Senior-most Professor, who is now acting as Officiating Director. He had published the advertisement dated 04.09.2023 for various posts including five posts of Executive Engineer at serial no.18, wherein the incumbents were required to possess the essential qualifications, (i) Master's Degree in Civil Engineering from a recognized University/Institute with at least 55% in the

qualifying degree; (ii) At least eight years relevant experience out of which at least three years of regular clear service at Assistant Executive Engineer level or equivalent (Level 10, 7th CPC) OR (i) A first-class degree in Civil Engineering from a recognized University/Institute; (ii) At least ten years relevant experience out of which at least 5 years of regular clear service at Assistant Executive Engineer level or equivalent (Level 10, 7th CPC).

8. Aggrieved with the aforesaid advertisement, the appellant had filed Writ A No.19126 of 2023 praying for the following reliefs:-

"i) to issue a writ, order or direction in the nature of certiorari quashing the advertisement dated 04.09.2023 bearing Advertisement No.1/23 issued by the Recruitment Section of the respondent no.2 in so far as it relates to the selection on the post of Executive Engineer at Serial No.18 (Annexure-1 to the instant writ petition);

ii) to issue a writ, order or direction in the nature of mandamus directing respondent No.2 to allow the petitioner to participate in the recruitment process.

(iii) to issue any other suitable writ, order or direction which the Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case.

(iv) to award costs of this petition to the petitioner."

9. The learned Single Judge after extensively considering the pleadings; submissions of the parties and the import of judgement & order passed by Hon'ble Supreme Court in the case of **Dr. Thingujam Achouba Singh and Others v. Dr. H.N.Nabachandra Singh and Others3**, proceeded to dismiss the writ petition vide order dated 11.3.2024, which is under challenge in the present Special Appeal.

SUBMISSION ON BEHALF OF THE APPELLANT

10. Sri Avneesh Tripathi, learned counsel for the appellant vehemently argued that the impugned judgement and order dated 11.3.2024, passed by the learned Single Judge suffers from manifest error of law and accordingly, the same is liable to be set aside. He submitted that the appellant had approached to this Court and asked for the relief to participate in the selection process and not for promotion on the post in question. The petitioner-appellant had also questioned the proprietary and legality of the conditions imposed in the impugned advertisement and submitted that the impugned advertisement is made just to preclude the appellant from appearing in the direct recruitment for the post of Executive Engineer. He submitted that learned Single Judge has failed to appreciate the controversy in hand. Even though the issues were framed in paragraph 12 of the judgement but the same were contrary to the assertions made in the writ petition and in particular, the reliefs, which were sought in the writ petition. Learned Single Judge has also failed to appreciate the core issue of arbitrariness of the Board of Governors while putting the conditions in the advertisement, which were nowhere prescribed in any other IITs. He submitted that learned Single Judge has heavily relied upon the fact that the petitioner had not questioned the power of the Board of Directors in adherence to which the impugned conditions of the advertisement were prescribed. He submitted that the

impugned order on this score is also unsustainable as the specific pleading has been set up by the petitioner in paragraph Nos.18, 25, 36, 37, 41 & 42 of the writ petition.

11. It was further argued by Sri Tripathi that the order impugned is also unsustainable as the learned Single Judge has expressed an opinion that in absence of challenge being made to the Recruitment & Promotion Rules, 2018 of IIT Kanpur4 and also without challenge to the resolution of the Board of Governors dated 23.12.2022, no relief can be accorded to the petitioner. He submitted that in fact, Rules, 2018 would have no bearing or relevance as the same do not talk about the post in question i.e. Executive Engineer. Neither, the same has prescribed the qualification for the post in question nor the resolution of the Board of Governors prescribes as such, and for the first time, the alleged Rules, 2018 had been brought on record alongwith the counter affidavit with an endorsement as confidential document and the same was not available in public domain. Therefore, in absence of relevant resolution available in public domain, the same could not be challenged by the applicant. Moreover, in most arbitrary manner the qualifications were imposed through the advertisement in question.

12. Sri Avneesh Tripathi vehemently submitted that learned Single Judge had taken note of Section 33 (2) (b) of the IT Act, 1961 which provides to lay down the policy regarding cadres, methods of recruitment and conditions of service of employees but in most arbitrary manner, learned Single Judge has failed to appreciate that the Board of Governors prescribed qualifications in the impugned advertisement without any authority. He had also stated that in most arbitrary manner, the Board of Governors had taken note of resolution of the IIT Council dated 19.10.2009, wherein it is manifestly clear that no such power inheres the Board of Governors to determine the service conditions, rather it is only limited to creation of new posts. Learned Single Judge had also utterly failed to take note of this very submission that the impugned conditions were imposed in such arbitrary manner solely for the reason that the rightful claim of the petitioner appellant could be denied. The precise observation of learned Single Judge to the extent, that in absence of any challenge to the Rules or resolution passed by the Board of Governors, no relief could be accorded to the petitioner, is also misconceived as the said document had been placed by the IIT Kanpur alongwith counter affidavit with a note that the said document is confidential and the same is not in public domain.

SUBMISSION ON BEHALF OF RESPONDENTS

13. Replying to the aforesaid submission made by the learned counsel representing the appellant-petitioner, Shri Rohan Gupta, learned counsel for the IIT Kanpur has strenuously argued that the appellant is working as Senior Assistant Engineer (Special Grade), which is Level-9 post and he cannot be promoted to the post of Executive Engineer, which is a Level-11 post. Admittedly, the age of the appellant is 59 years while the maximium age in the advertisement was given as 55 years, therefore the appellant is not eligible for direct recruitment. The advertisement in question further prescribes the essential qualifications as determined by the Board of Governors of the IIT-Kanpur in the meeting dated 11.12.2022. Both the

prescriptions i.e. age as 55 years, and the eligibility criteria as laid down by the Board, had not been assailed in the writ petition. He has placed reliance on the judgement in the case of **Dr. Thingujam Achouba Singh and others vs. Dr. H. Nabachandra Singh and others5**, in which it was held that in absence of challenge to the Rules laying down the eligibility criteria, the consequential advertisement could not be challenged.

14. Sri Rohan Gupta further submitted that the Writ Court has proceeded to decide the matter on the basis of the fact that Rule 6 of the Rules, 2018 clearly provides that the direct recruitment would generally be done at the entry level posts and it also prescribes the eligibility criteria for the entry level posts. The post of Executive Engineer is, therefore, a promotional post. Rule 6 itself further provides that lateral entry of external candidates may sometimes be permitted by the Board for special needs. Rules, 2018 do not prescribe the eligibility criteria for the post of Executive Engineer. However, the Board has the powers to permit lateral entry and has done so in its meeting dated 11.12.2022. Rule 6 of the Rules, 2018 empowers the Board to permit lateral entry of external candidates even on the post of Executive Engineer, which is to be normally filled up by promotion. It was essential for the petitioner to have challenged the Rules, 2018 and the resolution of the Board of Governors dated 11.12.2022 prescribing the essential qualifications for the post of Executive Engineer and as such, any claim, in absence of challenge, is not tenable in the eyes of law.

15. It was further submitted that the petitioner has not challenged the eligibility criteria as prescribed by the Board and therefore, this question was not considered by the Writ Court. The petitioner had set up his claim in the writ petition that the CPWD Rules for direct recruitment would apply to IIT Kanpur and the ground qua the competence of the Board to frame the rules was only taken in the rejoinder affidavit without moving any amendment application to challenge the Rules or the Resolution of the Board dated 11.12.2022. The IIT Council is a separate entity and it was not made a party in the writ petition and as such, the Union of India could not clarify the stand of the IIT Council.

16. We have carefully considered the rival submissions placed by the learned counsels representing the respective parties at the bar and perused the record.

FINDINGS OF THE LEARNED SINGLE JUDGE

17. Learned Single Judge after noticing the arguments advanced on behalf of the parties formulated three categorical points and issues to be addressed namely (a) whether Board of Governors, IIT Kanpur is justified in adopting resolution dated 23rd December, 2022 to hold direct recruitment drive in respect of 5 posts of Executive Engineer to the disadvantage of the petitioners, who claim departmental promotion; (b) whether in absence of any challenge to the rules taking aid of which resolution dated 23rd December, 2022 has been adopted and whether in the absence of challenge to the resolution, the same can be held bad; and (c) whether five posts of Executive Engineer advertised by respondents do fall under promotion quota.

18. Learned Single Judge in his wisdom had taken the first and second points together as both were interrelated.

Firstly, he had considered whether there is an authority vested under the rules with the Board of Governors, whether challenge or no challenge, the resolution will be valid and conversely if the Court finds there to be no such power under the rules vested with Board of Governors, the resolution would get rendered null and void and the Court even in the absence of any challenge hold that to be so and consequential action even if not under challenge would become bad and can be struck down. Learned Single Judge had considered the petitioner's argument to the effect that there lies no such power with Board of Governors and during the argument, the Advocates appearing for the respective parties do agree that the Rules, 2018, which were adopted by modifying earlier Rules, 2013, notified on 27th November, 2018 were the rules in existence and they had also accepted that these rules came to be further modified and notified on 28th May, 2021, which had been brought on record alongwith counter affidavit filed by the respondents.

19. Learned Single Judge has also taken into consideration the objection of the petitioner that the Board of Governors is responsible only for general superintendence and control qua affairs of the institute but is not vested with the powers to formulate or approve rules and regulations for recruitment and laying down accordingly eligibility criteria etc. for selection and appointment upon faculty and non-faculty positions in the institute. The objection, which was taken in the rejoinder to the extent that Recruitment and Career Progression Scheme, which was floated by the IIT Council, the top composite body for different IITs, way back in the year 1999, would prevail as this authority is superior to the Board. Learned Single Judge has considered Section 33 (2) (b) of the IT Act, 1961 and accepted that Section 33 (2) (b) provides for laying down policy regarding cadres, methods of recruitment and conditions of service of employees etc. The learned Single Judge had also considered the relevant question qua the legal position, if there are no such policies laid down. Section 33 of the IT Act, 1961 is reproduced hereunder:-

"33. (1) It shall be the general duty of the Council to co- ordinate the activities of all the Institutes.

(2) Without prejudice to the provisions of sub. section (1), the Council shall perform the following functions, namely: -

a) to advise on matters relating to the duration of the courses, the degrees and other academic distinctions to be conferred by the Institutes, admission standards and other academic matters;

b) **to lay down policy regarding cadres, methods of recruitment and conditions of service of employees, institution of scholarships and freeships, levying of fees and other matters of common interest;**

c) to examine the development plans of each Institute and to approve such of them as are considered necessary and also to indicate broadly the financial implications of such approved plans;

d) to examine the annual budget estimates of each Institute and to recommend to the Central Government the allocation of funds for that purpose;

e) to advise the Visitor, if so required, in respect of any function to be performed by him under this Act; and

f) to perform such other functions as are assigned to it by or under this Act."

(emphasis supplied)

20. For considering the aforesaid provisions learned Single Judge has

considered Sections 10, 11 and 13 of the IT Act, 1961, which are reproduced hereunder:-

"10. The following shall be the authorities of an Institute,

a) a Board of Governors;

b) a Senate; and

c) Such other authorities as may be declared by the Statutes to be the authorities of the Institute.

11. The Board of an Institute shall consist of the following persons, namely:-

a) the Chairman, to be nominated by the Visitor;

b) the Director, ex officio,

(c) one person to be nominated by the Government of each of the States comprising the zone in which the Institute is situated, from among persons who, in the opinion of that Government, are technologists or industrialists of repute;

(d) four persons having special knowledge or practical experience in respect of education, engineering or science, to be nominated by the Council; and

(e) two professors of the Institute, to be nominated by the Senate.

Explanation:- In this section, the expression "zone" means a zone as for the time being demarcated by the All-India Council for Technical Education for the purposes of this Act

13. (1) Subject to the provisions of this Act, the Board of any Institute shall be responsible for the general superintendence, direction and control of the affairs of the Institute and shall exercise all the powers of the Institute not otherwise provided for by this Act, the Statutes and the Ordinances, and shall have the power to review the acts of the Senate.

(2) Without prejudice to the provisions of sub- section (1), the Board of any Institute shall-

(a) take decisions on questions of policy relating to the administration and working of the Institute;

(b) institute courses of study at the Institute;

(c) make Statutes;

(d) institute and appoint persons to academic as well as other posts in the Institute;

(e) consider and modify or cancel Ordinances;

(f) consider and pass resolutions on the annual report, the annual accounts and the budget estimates of the Institute for the next financial year as it thinks fit and submit them to the Council together with a statement of its developments plans;

(g) exercise such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the Statutes.

(3) The Board shall have the power to appoint such committees as it considers necessary for the exercise of its powers and the performance of its duties under this Act."

21. As far as the submission of the counsel for the appellant-petitioner that the power of the Board of Governers is limited , we are in consonance with the view taken by the Learned Single Judge, as the Sections 25, 26 and 27 of the IT Act 1962 explicitly lays down the power of the Board which are repoduced hereunder:-

" 25 - Appointments

All appointment on the staff of any Institute, except that of the Director, shall be made in accordance with the procedure laid down in the Statutes, by----

(a) the Board, it the appointment is made on the academic staff in the post of Lecturer or above or if the appointment is made on the non-academic staff in any cadre the maximum of the pay-scale for which exceeds six hundred rupees per month;

(b) by the Director, in any other case."

" 26 - Statutes

Subject to the provisions of this Act, the Statutes may provide for all or any of he following matters, namely:---

.....

(e) the term of office and the method of appointment of officers of the Institute;

(f) the qualifications of teacher of the Institute;

(g) the classification, the method of appointment and the determinations of the terms an conditions of service of, teachers and other staff of the Institute;

(h) the constitution of pension, insurance and provident funds for the benefit of the officers, teachers and other staff of the Institute;

(I) the constitution, powers and duties of the authorities of the Institute;

..."

" 27 - Statutes how made

(1) The first Statutes of each Institute shall be framed by the Council with the previous approval of the Visitor and a copy of the same shall be laid as soon as may be before each House of Parliament.

(2) The Board may, from time to time, make new or additional Statutes or may amend or repeal the Statutes in the manner hereafter in this section provided.

(3) Every new Statute or addition to the Statutes or any amendment or repeal of a Statute shall require the previous approval of the Visitor who may assent thereto or withhold assent or remit it to the Board or consideration.

(4) A new Statute or a Statute amending or repealing an existing Statute shall have no validity unless it has been assented to by the Visitor."

22. Heavy reliance has also been placed by learned counsel for the appellant-petitioner before learned Single Judge that All India Council for Technical Education has the general powers over and above the Institutes of Technology and the IT Act, 1961 does vest power in the IITs to inform Ministry of Human Resources and Development to create post by virtue of delegated power. Executing this power a resolution, as adopted by All India Council at item no. 40.4, was placed before the Board on 19th October, 2009, wherein it was decided that flexibility would be given to the IITs for creation of posts. IITs may be delegated the power to create posts subject to the ratio of 10:1.1.1 between students, faculty and non-faculty. However, the IITs would be required to inform the Ministry while creating the posts under these delegated powers. This aspect of the matter has also been considered by the learned Single Judge. The relevant paras 21, 22 and 23 of the judgement is extracted below:-

"21. According to aforesaid provisions, residuary power lies with Board, which is not provided elsewhere. The first statute and ordinances have to be framed vide Section 6(1) of the IT Act, 1961 and that power lies with both the Board and the Council both. Section 38-(c) provides that so long as statutes and ordinances are not framed for each of the institutes of colleges, the statute and ordinance of the Indian Institute of Technology, Kharagpur will prevail.

22. In total circumspect of the provisions as discussed above, it is clear that either rules are framed by the council as Apex Body on all India basis or Board for the IIT Kanpur, the provisions of the IIT Kharagpur provide for such conditions to which Rule 6 of the recruitment and promotion rules can be said to be repugnant, the rules as famed by the Board of Governors exercising power under Section 13(1) would prevail. 13(2)-c also empower the Board to frame statutes, therefore, taking recourse to the harmonious constructions of the provisions as contained under Section 13(1) and 13(2) c and 33(1) (b) and 38-(C) of the IT Act, 1961, it can safely be concluded that Board of Governors being Apex Body of the IIT Kanpur under the Act, 1961 is fully empowered to frame recruitment and promotions rules and since it has framed such rules right from 2013 onwards as amended Rules 2021, such rules are held to be valid.

23. As the argument has been advanced that All India Council has the general powers over and above institutes of Technology and the Act, 1961 does vest power in the IITs to inform Ministry of Human Resources and Development to create post by virtue of delegated power, executing this power a resolution as adopted by All India Council as item no. 40.4 placed before the Board date 19th October, 2009 is reproduced hereunder:

"Item No. 40.4: Autonomy of the Institutes - financial, functional and managerial:

The issue of autonomy is closely linked with the capacity of the institutions to raise their own resources. In order to suggest ways and means of achieving more autonomy, it was decided to constitute a Committee comprising Dr. Anil Kakodkar, Chairman, BoG, lIT Bombay and four other members to be nominated by the Chairman to suggest a roadmap for the autonomy and future of the lITs. The Committee would inter alia examine the issue of increase in fees by the IITS in a gradual manner. While doing so, the interest of weaker sections of society i.e. SCs/STs/OBCs would be taken care of. It should be ensured that any student entering the IIT system should be able to avail educational loan and the same must be facilitated by the Institutes. The Committee could suggest an interest loan waiver scheme for students who continue to do research and take up teaching assignments. In fact a portion of the loan could be even considered for being written off for every year of teaching in a publicly funded institution in such a way that the entire loan could be written off if one has served in publicly funded institutions for more than 30 years or so. Any person who does Ph.D. must be supported. The Non Plan grants to be given to the lITs, which are in the process of being raised through the Block Grant scheme, should be linked to the actual students' strength. The ratio of B.Tech.

Post Graduate and Research students in the Institutes should be maintained at optimum levels, while affecting increase in students' strength. The Institutes should be entitled for matching grants from the Government in case they generate more resources through research projects from the industry, consultancy, donations from alumni and others etc. All these issues will be examined by the above Committee which will submit its report within 4 months and will also follow up on the implementation of its recommendations.

It was also decided that flexibility would be given to the IITs for creation of posts. ITs may be delegated the power to create posts subject to the

ratio of 10:1:1.1 between students, faculty and non-faculty. However the ITs would be required to inform the Ministry while creating the posts under these deligated powers. Addl. Secretary (MHRD) was asked to get this processed for issue of appropriate orders in this regard, after obtaining the approval of the Ministry of Finance.

The Directors of Ilts expressed that there was a need for more laboratory staff. AS & FA stated that clarifications have been issued to the ITs that requirement of increased number of technical staff due to OSC expansion only could be allowed even if the ratio exceeds the norms of 1:1.1 between faculty to non-faculty staff.

It was also clarified that for the purpose of new cars for the Directors of new ITs, the BoG of the concerned Institute was competent to approve.

It was also decided that every II'T would present its vision document at the Retreat proposed in January, 2010."

(emphasis supplied)

23. Learned Single Judge has considered the objection of the counsel for IIT, Kanpur that the Rules do not provide the post of Superintending Engineer and in such situation the resolution was adopted by the Board of Governors to create a post as required as the Board inheres the residuary powers and in view of the provisions contained under Section 2 (b) of Section 33 of IT Act, 1961, the Board had passed the resolution on 23.12.2022 and the resolution of the Board of Governors was a valid act within the ambit and scope of powers vested in it. Learned Single Judge has exhaustively considered the first and second issues and rejected the relief to the appellant-petitioner while answering the points (a) and (b). Learned Single Judge has also considered the additional ground, which was taken at the time of argument qua the question of consideration of age and had opined that even otherwise, prescribed qualification is a pure administrative policy decision of employer either by framing rules or otherwise by executing instructions to meet the requirements as per suitability. Relevant paragraph nos.25, 26, 27, 28, 29, 30, 31 & 32 of the judgement are reproduced hereunder:-

"25. In view of above, in respect of both point nos. 1 and 2, I hold that Board of Governors of IIT Kanpur is justified in framing recruitment Rules 2018 as modified/ amended in 2021 and since Rule 6 of rules provides for powers for the direct recruitment even upon post falling in lateral entries (P-19) that includes post of Executive Engineer, the resolution adopted by it to make a direct recruitment upon such post dated 23rd December, 2022 is also valid. Besides the above, I also find that petitioners are not eligible for the post of Executive Engineer for the simple reason that they are not working as Assistant Executive Engineer.

26. So for the post of Executive Engineer is concerned, there should be no quarrel because Rules vide P-19 to the schedule make post of Executive Engineer at pay matrix level- 11 in the Group- A to be filled up by promotion only from Assistant Executive Engineer, pay matrix level 10 and the essential qualification under the advertisement is also three years of regular clear service at Assistant Executive Engineer, level- 10 or equivalent level. So essential qualification prescribed under the advertisement, rules are same.

27. Under the circumstances, therefore, petitioners cannot question the advertisement as far as post of Executive Engineer is concerned because they have nothing to put on stake, being not eligible

even by way of promotion upon the posts in question. There is no prayer in the writ petition seeking promotion to the post of Assistant Executive Engineer, so no relief as such can be granted to promote them first as Assistant Executive Engineer if lying vacant then to direct to consider their claim for the post of Executive Engineer.

28. The question of consideration of age would have arisen had petitioners been working at pay matrix level-10 which is not a case in hand even otherwise prescribed qualification is a pure administrative policy decision of employer either by framing rules or otherwise by executing instructions to be meet requirements as per suitability required.

29. In my above view, I find support from paragraph 16 of the judgment of the Supreme Court in the case of Dr. Thingujam Achouba Singh and Others (Supra) Paragraph 16 runs as under:

"16.So far as relaxation of upper age-limit, as sought by the petitioners in one of the writ petitions is concerned, the High Court has directed the competent authority and Executive Council of the Society to consider for providing such relaxation clause. We fail to understand as to how such direction can be given by the High Court for providing a relaxation which is not notified in the advertisement. While it is open for the employer to notify such criteria for relaxation when sufficient candidates are not available, at the same time nobody can claim such relaxation as a matter of right. The eligibility criteria will be within the domain of the employer and no candidate can seek as a matter of right, to provide relaxation clause."

30. Admittedly, there is no challenge to the rules. The pleading in the writ petition are absolutely silent about validity of these rules. In fact these rules have though been not annexed with writ petition but a particular table has been annexed which is P-19, which is provided under the schedule of the recruitment and selection Rules 2018 amended in 2021. This table has been relied upon by the petitioner to take the plea that post in question is a promoted post.

31. In the rejoinder affidavit although plea has been taken vide paragraph 8 that IIT Council shall be laying down the rules of recruitment shall be providing for conditions of service as per Institutes of Technology Act, 1961, but neither any policy has been annexed or even referred to by the petitioner in the rejoinder affidavit, nor even recruitment and Career Progression Scheme as referred to in paragraph 8 of the rejoinder affidavit has been brought on record.

32. In the same judgment of Dr. Thingujam Achouba Singh and Others (Supra), the Court has held merely because rules are not in public domain notifying it, cannot itself be a ground to challenge and further if the rules are not challenged the Court will not embark upon an enquiry as to the validity of such rules. Vide paragraph 13 and 14, the Court has held thus:

"13.At the outset, it is to be noticed that though, in none of the writ petitions, Rules governing appointment to the post of Director was under challenge, the High Court has gone into the validity of the Rules, as amended, and held that amendments to the Rules were not carried out by following the Rules, Regulations and Bye-laws of the Society. The specific plea of the respondent authorities in the writ petitions, that there is no challenge to validity of the Rules but same has been brushed aside by the High Court by merely stating that such an objection is of technical nature. At this stage, it is relevant to note that such objection raised should not have been brushed aside by the High Court by

holding that such objection is of a technical nature. In all these writ petitions in which common order [H. Nabachandra Singhv.Union of India, 2017 SCC OnLine Mani 52] is passed by the High Court, validity of advertisement dated 16-8-2016 alone was under challenge. We are of the view that the High Court has committed an error in going into the validity of the Rules, in absence of any challenge to the same. In any event, it was the case of the respondent authorities that the Rules governing appointment were amended by following the Rules and such amendment was also approved by the competent authority, of Ministry of Health & Family Welfare.

14. Further, the fact of not notifying the amended Rules has also been made basis for grant of relief by the High Court. In this regard, the High Court has held that not notifying the amended Rules would strike at the root of the amendment process of the recruitment rules, as such, unless such Rules are notified, the same cannot be enforced. It appears from the impugned order itself that it was the specific plea in the counter-affidavit filed before the High Court that the said Rules were not framed under Article 309 of the Constitution of India and further there is no specific provision in the Rules, Regulations and Bye-laws of RIMS for notifying the same. It is true that in a public institution, rules are required to be made available, but at the same time not notifying to public at large cannot be the ground to invalidate the notification, in the absence of any provision to that effect in the Bye-laws of the Society or the Rules and Regulations framed for recruitment to the post of Director."

24. Learned Single Judge has also considered the third point whether these five posts of Executive Engineer would have fallen in promotion quota and rejected the same on the ground that since these are lateral positions and the Board of Governors is vested with the power to fill up within vacancies by direct recruitment.

FINDINGS BY THE COURT

25. The IIT Kanpur is a body corporate established under the IT Act, 1961 and declared as an institute of national importance to provide for education and research in various branches of Engineering, Technology, Science and Arts and also for advancement of learning and dissemination of knowledge in such branches. The governing body of the IIT Kanpur consists of a Chairman, a Director and other members of the Board of the institute. The Chairman of the Board is nominated by the Visitor (Hon'ble President of India) and the Director of the institute is appointed by the IIT Council with the prior approval of the Visitor. Section 13 of the IT Act, 1961 provides that the Board of the IIT Kanpur is responsible for the general superintendence, direction and control of the affairs of the institute and is required to exercise all the powers of the institute not otherwise provided in the IT Act, 1961, the Statutes and the Ordinances. The Board is empowered to formulate, approve all rules or regulations for recruitment and/or to lay down the eligibility criteria for academic and non-academic staff of the institute. In view of Section 25 of the IT Act, 1961 the Board is the appointing authority for academic staff as well as for all non-academic staff in any cadre.

26. Considering the rival submissions, we find that the core issues before this court are:-

"(i) whether this Court may take a judicial review of the qualification

prescribed by the employer for direct recruitment or for promotion and

(ii) whether in absence of serious challenge to the Rules/Regulations, which are duly adopted and enacted by the Competent Authority, the challenge to consequential recruitment process can be entertained by this Court."

ISSUE NO.I

27. The record reflects that the Board in its meeting dated 11.10.2018 had approved the Recruitment and Promotion Rules qua the non-academic staff of the IIT Kanpur. Consequently, the IIT Kanpur decided to adopt and implement the Recruitment and promotion Rules as per the procedures approved by the Board and constituted the Promotion Committee vide Office Order dated 27.11.2018. In IIT Kanpur Recruitment and Promotion Rules, all the non-teaching/non-academic posts in the institute are categorized into three groups (Group A, Group B and Group C). Under each group there will be a number of cadres, each cadre having a ladder with multiple levels of posts. The lowest post in a ladder will be called the entry post and the remaining posts within a ladder will be called selection posts. The direct recruitment will normally be done at the entry post in a ladder. However, in the interest of institute, lateral entry of external candidates may sometimes be permitted by Board for special needs under Groups A and B posts. The promotions of institute employees can be made on both the entry posts and selection posts. However, the promotion of institute employees to entry level posts will be vacancy based.

28. The aforesaid Rule was modified/amended by the Board in its 238th meeting dated 09.04.2021 in exercise of its powers conferred by Section 13 (1) & (2) of the IT Act, 1961. Thereafter the Board in its 251st meeting dated 11.12.2022 had also considered and approved the creation of a new designation for a Senior Engineer position namely Senior Superintending Engineer against the sanctioned Group 'A' Officers' positions and consequently approved the advertisement to fill up the 05 positions of Executive Engineer apart from other positions on mission mode recruitment drive on account of the urgent requirement of expansion of infrastructure in the institute. Suffice to indicate that the advertisement qua the Executive Engineer contained the same eligibility criteria, as has been duly approved by the Board in its 251st meeting dated 11.12.2022.

29. It is reflected from the record that the appellant was initially inducted as Junior Engineer (Trainee) w.e.f. 06.05.1988 to 05.11.1990 on contractual basis. Fresh recruitment drive was taken by the IIT Kanpur and in response thereof, the appellant got an appointment as Junior Engineer from 18.01.1991. Thereafter, on 01.07.2003 he was accorded the first promotion on the post of Assistant Engineer (Level-7 post). Later on he was also accorded the second promotion and became Senior Assistant Engineer on 01.01.2014 and continued till 31.12.2017. Thereafter, he got his third promotion on the post of Senior Assistant Engineer (Selection Grade) on 01.01.2018. Meanwhile, the Board of Governors, which is the Apex Body of IIT Kanpur, had adopted resolution, which was required to expedite the dedicated task of recruitment drive on a mission mode and under the IT Act, 1961 the consequential resolution was adopted by the Board of Governors on 23.12.2022. Accordingly, consequential advertisement

was issued for direct recruitment on the various posts including the post of Senior Superintending Engineer, and the Executive Engineer, by prescribing essential qualifications, which falls under the domain of the employer and the recruiting authority to cater the most suitable candidate to accomplish the task.

30. The present matter relates to the premier institution of the country. The suitability for the job, for which the selection and appointment is to be made, is an area of technical experts of the field and generally the Court does not inhere such expertise and skills to assess the exact suitability and eligibility vis-a-vis selection & appointment had to be made. Generally, the Court cannot embark upon any enquiry by way of judicial review to prescribe, which qualifications would be better qualification for the employer to provide as an essential qualification for the post upon which the selection and appointment has to be made.

31. Prescription of qualifications and other conditions of service pertains to the field of policy and is within the exclusive discretion and jurisdiction of the authority. It is not open to the Courts to direct the authority to have a particular method of recruitment or eligibility criteria. The Hon'ble Supreme Court in **P.U. Joshi vs. Accountant General6** had initally dealt with the issue in regard to the limitation of the courts in deciding the qualification for requitment on a post. The relevent is extracted hereunder;-

"8. ..... The stand on behalf of the appellants private parties is that their service rights are to be governed by the rules relating to their service as on the date of bifurcation on 1.3.1984 and that the rules and the services conditions cannot be altered to their detriment by the subsequent rules. It is also contended that the appellants, working as Supervisors, are also performing duties that are discharged by the Assistant Accounts Officers and they would, therefore, be entitled to the scale of pay of Rs. 2000-3200 of A.A.Os. (earlier SG Supervisors) on the principle of 'equal pay for equal work'. The denial of promotional prospects to the category of Supervisors, like the appellants, is also challenged on the ground of arbitrariness and hostile discrimination. Lastly, it was contended that before bifurcation though it was assured that the pay structure for the Accounts and Entitlement offices would be the same as the one before bifurcation and the existing promotional prospects and selection grade will be applicable mutatis mutandis, it was not actually adhered to after bifurcation and for this reason also, relief as prayed for ought to be granted. "

While dealing with the aforesiad issue the court held,

"..... prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy and is within the exclusive discretion and jurisdiction of the State and it is not for the Courts to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that on the State. It is also open and within the compete17ncy of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time totime, as the administrative exigencies may need or necessitate. There is no right in any employee of the State to claim that rules

governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

32. The same issue arose before the Hon'ble Apex Court in **Maharashtra Public Service Commission vs. Sandeep Shriram Warade 7** in para no 3 of the judgement , which is extracted as below ;-

" 3 . Learned Counsel for the Appellants submitted that academic qualifications coupled with the requisite years of practical experience in the manufacturing and testing of drugs were essential qualifications for appointment. Research experience in a research and development laboratory was a desirable qualification which may have entitled such a person to a preference only. The latter experience could not be equated with and considered to be at par with the essential eligibility to be considered for appointment.The High Court erred in misreading the advertisement to redefine the desirable qualification as an essential qualification by itself."

33. The issue, which was arisen before Hon'ble Apex Court in **Maharashtra Public Service Commission vs. Sandeep Shriram Warade** (supra), has been answered in paragraph-9 of the judgement as under:-

"9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

34. Similar issue has been dealt with by the Hon'ble Apex Court in the case of **Chief Manager, Punjab National Bank vs. Anit Kumar8** where the Apex Court held:

"7.3. Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution

or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications. However, at the same time, the employer cannot act arbitrarily or fancifully in prescribing qualifications for posts. In the present case, prescribing the eligibility criteria/educational qualification that a graduate candidate shall not be eligible and the candidate must have passed 12th standard is justified and as observed hereinabove, it is a conscious decision taken by the Bank which is in force since 2008. Therefore, the High Court has clearly erred in directing the Appellant Bank to allow the Respondent-original writ Petitioner to discharge his duties as a Peon, though he as such was not eligible as per the eligibility criteria/educational qualification mentioned in the advertisement."

35. A Full Bench of this Court in **Deepak Singh Vs. State of U.P.9** has observed:-

"52. Now we proceed to deal with the reference in the case of Himani Singh v. State of U.P., the advertisement in question prescribed the qualification of Graduate in Commerce "O' level Diploma issued by any Government Recognised Institution. The petitioners were non-suited as they hold a Post-Graduate Diploma in Computer Application. Thus, the claim of the petitioners, before the learned Single Judge, was that their qualifications are superior to the prescribed qualification i.e. "O' level Diploma in Computer Application. In the said case, the Uttar Pradesh Subordinate Services Selection Commission, Lucknow had issued a Notification on 27.8.2018 notifying 13 that the "O' level Diploma in Computer Application had been specified as essential eligibility qualification and it further provided that there does not exist any Government Order specifying the equivalent of qualification with "O' level Diploma in Computer Operation and that National Institute of Electronics and Information Technology (hereinafter referred to "NIELIT'), earlier DOEAC Society had informed that apart from NIELIT no other institution was authorized to grant "O' level Certificate in Computer Operation. The learned Single Judge, in his judgement dated 04.12.2018, rejected the contention of the petitioners therein relying upon the earlier decision of the learned Single Judge in Civil Misc. Writ Petition No. 19687 of 2018 (Yogendra Singh Rana v. State of U.P.). While dismissing the said writ petition, learned Single Judge held that the assessment with regard to the suitability of the higher qualification with a higher proficiency in the field of Computer Operation is in the field of policy and would not justify interference by the Writ Court. Before the Special Appeal Court, the petitioners had argued that the judgement of the Yogendra Rana (supra) is subject matter of pending appeal in which interim order has also been passed. It was thus argued before the Special Appeal Court that in view of decision in the case of Jyoti K.K. (supra) and Parvez Ahmad Parry (supra), the matter requires to be considered by the larger Bench that is how the matter was referred vide order dated 15.2.2019.

36. A Division Bench of Delhi High Court in **Vincent Nirmala vs. Union of India & ors10** , came across the following question :

" Petitioner impugns condition at Serial No. 9 in Schedule I of the National Company Law Tribunal (Recruitment, Salary and other Terms and Conditions of Service of Officers and other Employees)

Rules, 2020 (hereinafter referred to as the Rules), issued by Respondent No. 1, to the extent that they prescribe a degree in law as a qualification for an Assistant to be promoted to the post of Court Officer in Respondent No. 3, National Company Law Tribunal (hereinafter referred to as the NCLT)."

The Division Bench while relying on the judgement passed by the Hon'ble Apex Court in **P.U. Joshi** held :

" Supreme Court in **P.U. Joshi (supra)** has held that prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy and is within the exclusive discretion and jurisdiction of the State and it is not for the Courts to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. It is also open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

37. In view of the aforementioned law as pronounced by the Apex Court, this Court proceeds to answer the point no.I as follows.

38. In the facts as enumerated in detail we do not find that the present matter is fit to take a judicial review of the qualification prescribed by the employer/IIT, Kanpur under direct recruitment.

ISSUE NO.II

39. It is reflected from the record that the maximum age prescribed for direct recruitment qua the post in question was 55 years, whereas admittedly, the appellant has crossed 59 years' age. Even on this score, the appellant is not eligible for direct recruitment for this reason alone. Other than the above criteria, the other essential qualification had also been determined by the Board of Governors of the IIT Kanpur in its 251st meeting held on December 11, 2022, (as is evident from page 299 and 301 of the paper book), wherein the Board had approved the creation of a new designation for a Senior Engineer position (Senior Superintending Engineer) against the sanctioned Group A Officers' positions and the advertisement to fill up one post of Senior Superintending Engineer, one post of Superintending Engineer and five posts of Executive Engineer, as a part of the mission mode recruitment drive.

40. We find that since Rule 6 of IIT Rules, 2018 empowers the Board of Governors to permit the lateral entry of external candidates and the essential qualification was also provided under the Board's resolution dated 11.12.2022, wherein the essential qualification for the post of Executive Engineer was also laid down and in absence of any challenge to the same, no relief could be accorded to the appellant-petitioner. As in latin it says

Subla Fundamento cadit opus i.e. A foundation being removed, the superstructure falls. Hence till the root cause is not struck down the concequential act cannot be washed away.

41. The Hon'ble Apex Court in **Dr. Thingujam Achouba Singh and others v. Dr. H.N. Nabachandra Singh and others11,** dealt with the issue, the relevent question is extracted hereunder ;

" Inspite of the fact that in all the three writ petitions, advertisement dated 16.08.2016 inviting applications to fill up the post of Director was under challenge, and no challenge to the Rules and Regulations governing the recruitment to the post of Director was made; the High Court however has gone into the validity of recruitment Rules and recorded finding that Rules were not amended as per the Rules, Regulations and Bye Laws of the Society. Further, notification is quashed on the ground that after amendment to the Rules, such Rules were not notified to public at large, as such, they were not in the public domain. The High Court has also held that the experience criteria as prescribed by the Medical Council of India Regulations was not prescribed in the advertisement and such Regulations would have a binding effect, for filling up the post of Director in RIMS. Consequently, further direction is issued to the competent authority to consider providing relaxation in respect of upper age limit or the qualification as sought by the writ Petitioner therein."

The Hon'ble Apex Court, while testing the legality of challenge to the consequential order without any challenge to the validity of the Rules and Regulations, held;

"..... We are of the view that the High Court has committed, an error in going into the validity of the Rules, in absence of any challenge to the same. In any event, it was the case of the Respondent authorities that the Rules governing appointment were amended by following the Rules and such amendment was also approved by the competent authority, of Ministry of Health & Family Welfare. Further, the fact of not notifying the amended Rules has also been made basis for grant of relief by the High Court. In this regard, the High Court has held that not notifying the amended Rules would strike at the root of the amendment process of the recruitment rules, as such, unless such Rules are notified, the same cannot be enforced. It appears from the impugned order itself that it was the specific plea in the counter affidavit filed before the High Court that the said Rules were not framed Under Article 309 of the Constitution of India and further there is no specific provision in the Rules, Regulations and Bye-Laws of RIMS for notifying the same. It is true that in a public institution, Rules are required to be made available, but at the same time not notifying to public at large cannot be the ground to invalidate the notification, in the absence of any provision to that effect in the Bye-Laws of the Society or the Rules and Regulations framed for recruitment to the post of Director."

42. In **P.Chitranjan Menon & ors. Vs. A. Balakrishnan & ors.12**, the Hon'ble Supreme Court held that in absence of challenge to the basic order, subsequent consequential order cannot be challenged. The relevent para is reproduced as below:-

" 9 . While the earlier judgments were all decided against the respondents, the Kerala High Court in the judgment under appeal took a different view. The decision under appeal proceeds on the basis

that a regrettable mistake crept into the judgment in O.P. No. 1431 of 1970 and the earlier decision proceeded on the basis that there was a III Grade mentioned in G.O. 814 dated 17th November, 1962. The High Court was of the view that there was a III Grade under the G O. above referred to, the earlier decision missed the fact that these Grades were not applicable on 1st January, 1962. Though G.O. 814 of 1962 was not placed before us we are not sure whether there was any mistake in the earlier judgment for the G.O. MS 97/67 dated 11th March, 1967, refers to persons being transferred from the Malabar District Board as Panchayat Executive Officers III Grade. Be that as it may we are satisfied that the respondents are not entitled to the reliefs prayed for by them in the writ petitions. As the appellants were promoted to a higher post before the respondent were integrated into the Government Service on 1st January, 1962. Further throughout the appellants have been treated as occupying a higher post and respondents much lower post. Though the promotion of the appellants was before 1st January, 1962, and was confirmed by various orders of the Government the respondents herein did not choose to challenge the orders till the year 1974. In the circumstances, we are satisfied that the order of the Kerala High Court has to be set aside and the appeal is allowed with costs. "

43. **Roshan Lal & ors. Vs. International Airport Authority of India & ors.13,** wherein the petitions were primarily confined to the seniority list and the Apex Court held that challenge to appointment orders could not be entertained because of inordinate delay and in absence of the same, validity of consequential seniority cannot be examined. In such a case, a party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

44. The Hon'ble Supreme Court in **Edukanti Kistamma v. S. Venkatareddy14** held as follows:-

"12. It is a settled legal proposition that **challenge to consequential order without challenging the basic order/statutory provision on the basis of which the order has been passed cannot be entertained.** Therefore, it is a legal obligation on the part of the party to challenge the basic order and only if the same is found to be wrong, consequential order may be examined (vide **P. Chitharangja Menon v. A Balakrishnan** (1977) 3 SCC 255; **H.V. Pardasani v. Union of India** (1985) 2 SCC 46 and **Govt. of Maharashtra v. Deokar's Distillery** (2003) 3 SCC 669."

45. In the light of the discussions, as above and in absence of serious challenge to the Rules, 2018 and the Board of Governor's resolution dated 23.12.2022, we find that learned Single Judge has not erred in law to appreciate the belated attempt.

46. While considering the facts and law as elucidated above and relevant Rules/Regulations, which have been brought on record by the contesting respondents through the counter affidavit before learned Single Judge, we are of the opinion, that for the reason best known to the appellant-petitioner, there was no such challenge to the Rules/Regulations, which were duly adopted and enacted by the Competent Authority, therefore, the

consequential recruitment process which was adopted by the employer/IIT Kanpur, cannot be held to be an arbitrary exercise which may warrant any interference in the intra court appeal.

CONCLUSION

47. In view of the facts and relevant authorities of Apex Court holding the field and in view of the discussion made above, we are of the considered opinion that there is no infirmity in the recruitment process adopted by the employee/IIT Kanpur.

48. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 11.3.2024. The judgement and order of learned Single Judge dated 11.3.2024 dismissing the writ petition suffers from no error of law and same is upheld.

49. For reasons stated above, the Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2024) 5 ILRA 2450
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal Defective No. 358 of 2024

Jagran Prakashan Ltd. ...Appellant
Versus
Shri Krishna Mohan Trivedi & Ors. ..Respondents

Counsel for the Appellant:
Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C., Man Mohan Singh

Labour Law - Uttar Pradesh Industrial Disputes Act - 4-K- Reference of disputes to Labour Court or Tribunal – Maintainability - The impugned order neither in the category of judgment, order or award passed by the Tribunal, Court or Statutory Arbitrator nor an order passed in exercise of appellate or revisional jurisdiction by the Government or Officer or Authority – Title of an application/claim and reference does not determine the jurisdiction of a forum- The same only depends on the substance of the application/claim/demand. (Para - 11, 27)

Respondent-workman approached Deputy Labour Commissioner - demand illegal and unjustified termination of service - Appellant filed written St.ment before the Authority and Authority referred the dispute to the Labour Court, under Section 4-K of the UPID Act - The workman filed his St.ment of claim - During the pendency of the proceedings - already pending for over four years - Writ Petition filed on 11.12.2023 - questioning the very reference before the Labour Court – Writ Court - Held, reference can be made by the St. Government - dismissed – Hence, instant special appeal - Dismissed (Para - 13, 14, 15, 32)

Held: The provisions of section 4-K reveal that industrial dispute, contained in the First Schedule, is required to be referred to a Labour Court. The reference was made to provisions of Section 16-A of the WJ Act and 2A of the Central ID Act in the demand, before the Deputy Labour Commissioner and in the claim before the Labour Court, which led to the dismissal of the workman, wherein reference has been made to the dispute pertaining to the recommendations

and implementation of the Wage Board, it cannot bring the subject matter of dispute as that of wages, i.e., instead of the same being in relation to the dismissal, the same would be that of wages. As the dispute is pending before the Labour Court for over four years and it has not yet proceeded even to the stage of cross-examination. (Para - 29,33)

Appeal is dismissed. (E-13)

List of Cases cited:

1. M/s Vajara Yojana Seed Farm, Kalyanpur & ors. Vs Presiding Officer, Labour Court II, U.P., Kanpur & anr.: (2003) 1 UPLBEC 496

2. Sheet Gupta Vs St. of U.P. & ors. : AIR 2010 ALL 46 (FB)

3. Central Mine Planning and Design Institute Limited Vs U.O.I.& anr.: (2001) 2 SCC 588.

4. Jagaran Prakashan Limited Vs Presiding Officer, Labour Court : 2020 (167) FLR 412

5. Bureau Chief Rastriya Sahara & anr.Vs Labour Commissioner, U.P. & ors. (Writ C No. 23241 of 2016)

6. Hind Filters Limited & anr.Vs Hind Filters Employees' Union & anr.: 2023 INSC 799

(Delivered by Hon'ble Arun Bhansali, C.J.)

1. Heard Shri Sanjay Kaushal, learned Senior Counsel, assisted by Shri Chandra Bhan Gupta and Shri Manoj Kumar Dubey, learned counsel for the appellant, Shri Man Mohan Singh, learned counsel for respondent No. 1 and Shri Manish Goyal, learned Additional Advocate General, assisted by Shri Ankit Gaur, learned Standing Counsel for the State-respondents.

2. This special appeal, under Chapter VIII Rule 5 of the Allahabad High Court Rules (for short 'Rules'), is directed against order dated 11.12.2023, passed by learned Single Judge in Writ – C No. 39505 of 2023, whereby the said writ petition along with 60 other connected writ petitions, filed by the appellant/petitioner-Company, aggrieved of the reference made by the State Government to the Labour Court, Gautam Buddh Nagar, under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 (for short 'UPID Act'), has been dismissed.

3. The office has reported the appeal as barred by 98 days.

4. An application, supported by affidavit, seeking condonation of delay in filing the appeal has been filed.

5. Though the affidavit, giving out reasons for condonation of delay, is very cursory and only formality sake, as the application is not contested by learned counsel for the respondents, the delay in filing the appeal is condoned.

6. The office has also raised objection that the appeal appears to be not maintainable, in view of the Chapter VIII Rule 5 of the Rules. Learned counsel for the respondents has also raised objection to the maintainability of the appeal and placed reliance on **M/s Vajara Yojana Seed Farm, Kalyanpur and others Vs. Presiding Officer, Labour Court II, U.P., Kanpur and another : (2003) 1 UPLBEC 496.**

7. Learned counsel for the appellant submits that the issue raised about the maintainability has no substance as the present case does not fall in any of the categories, wherein the special appeal has been held to be not maintainable. Reliance is placed on **Sheet Gupta Vs. State of U.P.**

and Others : AIR 2010 ALL 46 (FB) and Central Mine Planning and Design Institute Limited Vs. Union of India and Anothers : (2001) 2 SCC 588.

8. We have considered the submissions made by learned counsel for the parties on the aspect of maintainability of the special appeal. The provisions of Chapter VIII Rule 5 of the Rules, *inter alia*, read as under:

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

9. A Full Bench of this Court, in the case of **Sheet Gupta (supra)**, wherein on account of conflict in two Division Bench Judgement of this Court including in **Vajara Yojana Seed Farm (supra)**, relied on by learned counsel for the respondent, came to the following conclusion:

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

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

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

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

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

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

(i) the Tribunal,

(ii) Court or

(iii) Statutory Arbitrator

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

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

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

10. A perusal of the above would reveal that the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India, in respect of any judgement, order or award by (i) the Tribunal, (ii) Courts or (iii) Statutory Arbitrator, made or purported to be made in exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India and the order made by one Judge in the exercise of jurisdiction by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award of (i) the Government or (ii) any Officer or (iii) Authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e., under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India, the appeal would not be maintainable.

11. In the present case, the order impugned has been passed by the State Government exercising powers under the UPID Act and against the said order, the judgment impugned has been passed by learned Single Judge. The said impugned order would fall neither in the category of judgment, order or award passed by the Tribunal, Court or Statutory Arbitrator nor an order passed in exercise of appellate or revisional jurisdiction by the Government or Officer or Authority and therefore, it cannot be said that the present appeal, against the order passed by learned Single Judge, would not be maintainable. The judgment in the case of **Vajara Yojana Seed Farm (supra)**, would have no application to the present case, wherein the Division Bench was dealing with appeals arising out of writ petitions in which the award of Labour Court was challenged, which is not the case in the present appeal.

12. Having cleared the decks about the maintainability of the appeal, the appeal is being considered on merit.

13. The respondent-workman approached the Deputy Labour Commissioner, Department of Labour, Uttar Pradesh, Gautam Buddh Nagar (NOIDA), raising demand regarding illegal and unjustified termination of his service vide order dated 05.03.2016. In the application, made by the workman/claimant, reference was made to Section 16-A of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (for short 'WJ Act') and Section 2-A of Industrial Disputes Act, 1947 (for short 'Central ID Act'). The appellant-Management, filed its written statement before the Authority and the Authority, by its order dated 01.08.2019, referred the dispute to the Labour Court, Gautam Buddh Nagar under Section 4-K of

the UPID Act. The respondent-workman filed his statement of claim before the Labour Court, Gautam Buddh Nagar and the same was contested by the appellant. A rejoinder was filed, list of documents were submitted and preliminary issue as to whether the domestic enquiry was held against the principles of natural justice was framed on 20.09.2021, whereafter it appears that the matter is stuck at the said stage, wherein the same is fixed for cross-examination of the workman by the appellant-employer.

14. During the pendency of the proceedings before the Labour Court, which was already pending for over four years, present writ petition came to be filed on 11.12.2023 questioning the very reference before the Labour Court under provisions of Section 4-K of the UPID Act.

15. Learned Single Judge, with reference to judgment in **Jagaran Prakashan Limited Vs. Presiding Officer, Labour Court : 2020 (167) FLR 412 and Bureau Chief Rastriya Sahara and another Vs. Labour Commissioner, U.P. and others: Writ – C No. 23241 of 2016 and other connected matters decided on 03.04.2023, wherein the petitioner -Jagaran Prakashan was also a petitioner in Writ – C No. 22872 of 2016,** came to the conclusion that the Court has already taken a view that reference can be made by the State Government and the said orders having not been assailed by the appellant, came to the conclusion that no case for interference was made out and consequently, dismissed the writ petitions.

16. Learned counsel for the appellant made vehement submissions that the two judgments, relied on by the learned Single Judge, only deal with the issue of the State Government being the appropriate Government, which was not the issue raised in the present writ petition. The core issue was as to whether the reference could be made under the UPID Act or the same was required to be made under the Central ID Act by the State Government and that too to the Industrial Tribunal and not the Labour Court. Further submissions have been made that the workman, in his demand before he Deputy Labour Commissioner, made specific reference to provisions of Section 16-A of the WJ Act and Section 2A of the Central ID Act and that as the plea, in the demand notice, before the Deputy Labour Commissioner and the claim, before the Labour Court, are based on the provisions of WJ Act in relation to the wages, the said subject matter would fall within the Third Schedule of the Central ID Act and in terms of Section 10(1)(d) of the Central ID Act, the dispute could only be referred to the Industrial Tribunal and as, admittedly, the Labour Court at NOIDA is not an Industrial Tribunal, the matter could not have been referred to the Labour Court. Submissions have also been made that the proviso to Section 10(1)(d) of the Central ID Act would not be attracted in the present case as according to the respondent's own assertion, 150 workmen are affected by the demand of wages raised, which resulted in his termination and therefore, the judgment impugned passed by learned Single Judge as well as the reference made by the State Government deserves to be set aside. Reliance has been placed on **Hind Filters Limited and Another Vs. Hind Filters Employees' Union and Another : 2023 INSC 799.**

17. Learned counsel for the respondent-workman contested the submissions made. It was reiterated that the issue raised is squarely covered by orders

passed in appellant's own challenge laid earlier to the jurisdiction of the State Government and referring the dispute to the Labour Court and as such, the learned Single Judge was justified in dismissing the writ petitions. It is emphasized that irrespective of making reference to the provisions of WJ Act and Central ID Act, the crux of the matter is that the respondent-workman had questioned the validity of his dismissal by the appellant-employer, which dispute squarely falls within the Second Schedule of Central ID Act and First Schedule of UPID Act and has rightly been referred to the Labour Court by the State Government under provisions of Section 4-K of the UPID Act, which is, in substance, *pari materia* with provisions of Section 10 of the Central ID Act and therefore, the appeal deserves dismissal.

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

19. It is surprising, as to how, after four years of the reference made by the State Government on 01.08.2019, in the year 2023, after contesting the matter before the Labour Court, the issue of reference being without jurisdiction has dawned on the petitioner-appellant.

20. Be that as it may, the plea, raised is that the present dispute, could not have been referred to the Labour Court though the Deputy Labour Commissioner, Gautam Buddh Nagar had the jurisdiction to refer the matter, which could only be referred to an Industrial Tribunal. The foundation of the said arguments, as noticed hereinbefore, lies in the fact that the demand raised, before the Deputy Labour Commissioner, by the workman made reference to provisions of Section 16-A of the WJ Act and Section 2A of the Central ID Act. The said aspect was reiterated in the claim, filed before the Labour Court, pursuant to the reference made by the State Government.

21. A perusal of the demand raised before the Deputy Labour Commissioner as well as the claim filed before the Labour Court would reveal that though the same in the title/subject matter makes reference to the said two statutes, in the demand raised and claim filed, reference to the provisions of WJ Act has been made only as a pre-cursor, which led to the dispute and ultimate dismissal of the workman.

22. The prayer made before the Deputy Labour Commissioner, *inter alia*, reads as under:

"PRAYER

In view of the submissions made hereinabove and also in view of the facts and circumstances of the case, the Claimant/workman prays for intervention as per law for facilitating justice to the Claimant/workman in getting back his employment with the management/opposite party who deprived him from that. The management be made to see reason and recall the impugned order alleged to have been issued on 05.03.2016 along with the report of the sham enquiry conducted by it and advised to reinstate the Claimant/workman in service with full back wages and consequential benefits of service. The Claimant/workman also prays for any other order or orders as the Esteemed Authority may deem fit and proper in the facts and circumstances of the case.

The Claimant/workman prays accordingly."

23. Similarly, in the claim filed before the Labour Court, the following prayer was made:

"PRAYER

In view of the submissions made hereinabove by the Workman/Applicant, it is most respectfully prayed that this Hon'ble Court may be pleased to direct the Management to:

i) Reinstate the Workman in service by quashing and setting aside alleged order dated 05.03.2016 passed on the basis of the findings of defective enquiry conducted by a biased and prejudiced Enquiry Officer and by quashing and setting aside the illegal suspension/termination of the workman by allowing him to resume his duties with back wages and continuity of service and with all other consequential reliefs applicable to his service with the Management as if his services were never terminated;

ii) Make payment of Pay and Allowances for the period of illegal suspension/termination with admissible interest;

iii) Pay costs of this litigation; and

iv) Pass any other order/orders as may be deemed fit and proper in the facts and circumstances of the case."

24. A bare perusal of the above would reveal that the workman has sought setting aside of the order of termination, agitating the enquiry as defective and has claimed back wages and continuity in service with other consequential reliefs along with pay and allowances for the period of suspension/termination with admissible interest. No relief worth the name in relation to the wages in terms of the provisions of the WJ Act and the implementation of the recommendation of the Wage Board and payment of the revised wages has been sought/made.

25. The order of reference made by the Deputy Labour Commissioner dated 01.08.2019, *inter alia*, reads as under:

"औद्योगिक विवाद का विवरण

क्या सेवायोजक द्वारा अपने कर्मचारी कृष्ण मोहन त्रिवेदी, पुत्र श्री अनिल कुमार तिवारी, पद इलेक्ट्रिशियन की सेवाएं दिनांक 05–03–2016 को समाप्त किया जाना उचित अथवा वैधानिक है? यदि नहीं, तो संबंधित कर्मचारी अपने सेवायोजक से किस हित लाभ/ आनुतोष (रिलिफ) पाने का अधिकारी है एवं अन्य किस? विवरण सहित।

(पी0के0सिंह)
उप श्रमायुक्त, उ0प्र0
नोएडा, गौतमबुद्ध नगर
दिनांक 1.8.19"

26. A perusal of the above would also reveal that the reference made is in relation to the validity of the order of termination dated 05.03.2016 and no reference whatsoever has been made to the element of wages. Admittedly, the Second Schedule of the Central ID Act, which enumerates matters within the jurisdiction of the Labour Court provides 'discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed' and similar is the position in the UPID Act, wherein in the First Schedule, identical entry has been indicated.

27. It is well settled that the title of an application/claim and reference made therein does not determine the jurisdiction of a forum. The same only depends on the substance of the application/claim/demand. As such the reliance placed solely on the reference made to provisions of WJ Act and Central ID Act by the appellant, cannot be accepted.

28. Provisions of Section 4-K of the UPID Act, *inter alia*, reads as under:

"4-K. Reference of disputes to Labour Court or Tribunal – *Where the State Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute or any matter appearing to be connected with, or relevant to, the dispute to a Labour Court if the matter of industrial dispute is one of those contained in the First Schedule, or to a Tribunal if the matter of dispute is one contained in the First Schedule or the Second Schedule for adjudication.*

Provided that where the dispute relates to any matter specified in the Second Schedule and is not likely to affect more than one hundred workmen, the State Government may, if it so thinks fit, make the reference to a Labour Court."

29. A perusal of the above provisions reveal that industrial dispute, contained in the First Schedule, is required to be referred to a Labour Court. The plea, sought to be raised by the appellant-petitioner only on account of the fact that reference was made to provisions of Section 16-A of the WJ Act and 2A of the Central ID Act in the demand, before the Deputy Labour Commissioner and in the claim before the Labour Court, enumerating the events, which led to the dismissal of the workman, wherein reference has been made to the dispute pertaining to the recommendations and implementation of the Wage Board, by itself, cannot bring the subject matter of dispute as that of wages, i.e., instead of the same being in relation to the dismissal, the same would be that of wages. The very fact that the Labour Court has framed preliminary issue about validity of the domestic enquiry also substantiates the said aspect.

30. Insofar as, reliance placed on the judgment in the case of **Hind Filters Limited (supra)** is concerned, the subject matter of the dispute referred by the Labour Commissioner as noticed in para 10 of the judgment, pertains to wages only, which is not the case in the reference made in the present case, as such, the said judgment has no application to the present case.

31. In view of the above facts situation, the plea, raised by the appellant, wherein there is an admission pertaining to the appropriate Government being the State Government in light of the decided cases of the appellant-organization as laid down by learned Single Judge, the fresh plea raised, based only on the indications made in the demand and the claim, has no substance.

32. Consequently, no case is made out for interference in the judgment impugned passed by the learned Single Judge though on different grounds. The appeal is, therefore, dismissed.

33. As the dispute is pending before the Labour Court for over four years and it has not yet proceeded even to the stage of cross-examination on the aspect of fairness of the enquiry, the Labour Court is directed to proceed with the matter with utmost expedition as the termination pertains to the year 2016.

(2024) 5 ILRA 2457
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

First Appeal No. 373 of 2024

Dheeraj ...Appellant
Versus
Smt. Chetna Goswami ...Respondent

Counsel for the Appellant:
Satyendra Narayan Singh

Counsel for the Respondent:

Family Law - Family Courts Act, 1984 – Section 19 - Respondent (Wife) filed petition - Guardians and Wards Act, 1890 - Section 25 - Family Court, Ghaziabad seeking custody of her child - Appellant in Writ Petition came to know through Court Notice published in newspaper - Filed application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 – Raised Objection-Lacks territorial jurisdiction to entertain the case – Application Rejected – Hence, instant appeal (Para - 1,3,4,5)

Held: The question whether the minor is ordinarily residing at a given place is a question of fact which cannot be decided without an enquiry into the factual aspects of the case. Moreover, the residence by volition or by compulsion within the territorial jurisdiction of the Court cannot be treated as place of ordinary residence. The words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is perhaps to avoid the mischief that minor may be forcibly removed to a distant place, but still the application for minor's custody could be filed within the jurisdiction of the Court from whose jurisdiction he had been removed. The scope of scrutiny at the stage of consideration of an application under Order VII, Rule 11 of Civil Procedure Code 1908 is confined only to the averments made in the petition. (Para - 30, 32)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Jagdish Chandra Gupta Vs Dr. Ku. Vimla Gupta, reported in AIR 2003 All 317

2. Manish Sehgal Vs Meenu Sehgal reported in (2013) 202 DLT 87

3. Ruchi Majoo Vs Sanjeev Majoo reported in (2011) 6 SCC 479

4. Jagir Kaur Vs Jaswant Singh reported in AIR 1963 SC 1521 : (1963) 2 Cri LJ 413

5. Prashant Chanana Vs Mrs. Seema alias Priya, reported in AIR 2010 P&H 99

6. Kamla & ors. Vs KT Eshwara Sa & ors., reported in (2008) 12 SCC 661

7. Saleem Bhai & ors. Vs St. of Mah. and another & ors., reported in (2003) 1 SCC 557

8. Srihari Hanumandas Totala Vs Hemant Vithal Kamat & ors. reported in (2021) 9 SCC 99

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This Appeal under Section 19 of the Family Courts Act, 1984 arises out of the judgment and order dated 18.03.2024 passed by the Additional Principal Judge, Family Court No. 4, Ghaziabad in Misc. Case No. 15/2021 under section 25 of the Guardians and Wards Act, 1890 (Smt. Chetna Goswami versus Dheeraj).

2. The grievance of the appellant is that the learned Court below, vide impugned order dated 18.03.2024, has rejected his application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908.

3. The relevant facts of the case, in brief, are that the respondent, Smt. Chetna Goswami filed a petition having Case No. 15 of 2021 under section 25 of the Guardians and Wards Act, 1890, before the learned Family Court at Ghaziabad seeking custody of her child, namely, Master Kunj having date of birth as 18.08.2013.

4. The case of the appellant as narrated in the writ petition is that after coming to know about the case through

Court Notice published on 22.10.2021 in the newspaper 'Rastriya Sahara', he preferred an application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, in Case No. 15 of 2021 pending before the Court of Additional Principal Judge, Family Court No. 4, Ghaziabad, inter alia, praying for the dismissal of the aforesaid case filed by the respondent under Section 25 of the Guardians and Wards Act, 1890. The ground taken by the Appellant in the said application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 was that Family Court at Ghaziabad lacks territorial jurisdiction to entertain the said case, as the minor is currently studying at K.M. Public School (Senior Secondary), Bhiwani, Haryana.

5. The learned Court below on the basis of the averments made in the application under Order VII Rule 11 of the Code of Civil Procedure, 1908, passed a detailed order dated 18.03.2024 whereby the application filed by the appellant was rejected. For a ready reference, extract of the said order dated 18.03.2024 passed by the Additional Principal Judge, Family Court, Court No. 4, Ghaziabad is being reproduced below:

"6- पत्रावली के अवलोकन से स्पष्ट है कि प्रार्थनी की ओर से प्रस्तुत वाद विपक्षी के विरुद्ध अंतर्गत धारा 25 गार्जियन वार्ड्स एक्ट प्रस्तुत वाद विपक्षी के विरुद्ध अंतर्गत धारा 25 गार्जियन वार्ड्स एक्ट प्रस्तुत करके अपने नाबालिग पुत्र कुंज की अभिरक्षा विपक्षी से हटाकर प्रार्थनी को दिए जाने के अनुतोष हेतु प्रस्तुत किया गया है। पत्रावली के अवलोकन से स्पष्ट है कि विपक्षी का स्थाई पता आवास सं० जी-133, संजयनगर, सेक्टर-23 थाना कविनगर, जनपद गाजियाबाद है। विपक्षी द्वारा पत्रावली में दाखिल अपना आधार कार्ड की छायाप्रति के अवलोकन से स्पष्ट है कि उसका स्थाई पता जनपद गाजियाबाद है, जिससे विपक्षी इन्कार नहीं करता है। प्रार्थना पत्र 27 में के माध्यम से विपक्षी का यह कहना है कि वर्तमान में उसका पुत्र भिवानी, हरियाणा में शिक्षा ग्रहण कर रहा है व विपक्षी का अस्थायी पता भितानी, हरियाणा है, जिसके समर्थन में उसने कागजात 36 ग/2 ता ग 36 / 5 दाखिल किए है। उक्त कागजात के अवलोकन से यह स्पष्ट होता है कि भिवानी, हरियाणा में विपक्षी का पता अस्थाई है जबकि उसका स्थाई पता जनपद गाजियाबाद में है।

7- Section 9(1) Guardians and Wards Act, 1890 deals with Court having jurisdiction to entertain application. It confers that if the application with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

8- उक्त प्राविधान से स्पष्ट है कि न्यायालय की क्षेत्राधिकारिता कथित नाबलिग के स्थाई निवास से ही निर्धारित होगी व इस कारण ही माननीय प्रधान न्यायाधीश द्वारा प्रस्तुत वाद दर्ज रजिस्टर कर विपक्षी को नोटिस प्रेषित किया गया। कथित नाबालिग का स्थाई पता उसके पिता का स्थाई पता है, जो जनपद गाजियाबाद का है, जिसे उभयपक्ष स्वीकार भी करते है। नाबालिग को पढ़ाई के प्रयोजन से कही बाहर जनपद भिवानी हरियाणा ले जाए जाने से उसके स्थाई निवास के पते में कोई विपरीत प्रभाव नहीं पड़ता है विपक्षी के आधार व कागज सं० 36 ग /2 में भी पता अस्थाई ही दर्ज है। धारा 25 गार्जियन एण्ड वार्ड्स एक्ट के प्रार्थना पत्र के निस्तारण में न्यायालय को यह देखना है कि बच्चे का भविष्य किसके पास सुरक्षित है व कौन उसके भलाई के लिए उत्तम पक्ष होगा। जनपद गाजियाबाद के परिवार न्यायालय उक्त आदेश गुणदोष पर पारित करने का क्षेत्राधिकार हासिल है।

9- उपरोक्त सम्पूर्ण विवेचना के आधार पर यह निष्कर्ष निकलता है कि इस न्यायालय को प्रस्तुत वाद के सुनवाई का क्षेत्राधिकार हासिल है व प्रस्तुत दावा आदेश 7 नियम 11 सिविल प्रक्रिया संहिता के प्राविधान में बाधित नहीं कहा जा सकता है व तदनुसार प्रार्थना पत्र 27 में अन्तर्गत आदेश 7 नियत 11 सिविल प्रक्रिया संहिता निरस्त किये जाने योग्य है।

आदेश

विपक्षी का प्रार्थना पत्र 27ग अंतर्गत आदेश 7 नियम 11 सिविल प्रक्रिया संहिता निरस्त किया जाता है।

पत्रावली वास्ते सनुवाई प्रार्थना पत्र 26 ग जवाबदावा/तनकी दिनांक 30-04-2024 को पेश हो/"

6. Being aggrieved by the aforesaid order dated 18.03.2024, the appellant preferred the instant appeal. While pressing

the appeal, the learned Counsel for the appellant most emphatically argued that the learned Court below, without taking into consideration the fact that when on 25.10.2023, the application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 was filed raising the question of territorial jurisdiction on account of the fact that the child lives in Bhiwani, Haryana and is receiving his education there. As such, petition under section 25 of the Guardians and Wards Act,1890 could not be filed or entertained in the Court having its jurisdiction at Ghaziabad.

7. It has further been pleaded that on 18.03.2024, the learned Family Court has dismissed the application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 on the ground that the jurisdiction for filing the Case shall be ascertained from the permanent residence, which does not mean permanent address of the ward. The appellant has further submitted that the Family Court has misinterpreted the provisions of Section 9 (1) of the Guardians and Wards Act, 1890 and has misconstrued the expression "where the minor ordinarily resides". It has further been submitted that the question vested in the expression "where the minor ordinarily resides" is a mixed question of fact and law and the same cannot be answered without holding enquiry into the factual aspect of the controversy.

8. Heard Sri Satyendra Narain Singh, learned counsel for the appellant and perused the material available on record.

9. The question that has culled out for consideration in the instant appeal is whether the learned court below has committed any illegality while deciding the application under Order VII Rule 11 of the of the Code of Civil Procedure, 1908 by interpreting the provisions of Section 9 of the Guardians and Wards Act, 1890.

10. For the better appreciation of the case, Section 9 of the Guardians and Wards Act, 1890 is being reproduced below:

"9. Court having jurisdiction to entertain application

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

11. From a bare reading of section 9 of the Guardians and Wards Act, 1890, it is evident that sub-section (1) of Section 9 identifies the Court competent to pass an order for the custody of the minor. Sub-sections (2) and (3) thereof deal with Courts that can be approached for guardianship of the property owned by the minor.

12. For determining the territorial jurisdiction of the Court under section 9 of the Guardians and Wards Act, 1890, the

expression "where the minor ordinarily resides" is the pivotal point for consideration. The said expression has been used in different contexts and has often come up for interpretation before the courts of law. While reading the said expression "where the minor ordinarily resides", it is imperative to see whether the minor is ordinarily residing at a given place? This is primarily a question of intention which, in turn, is a question of fact. It may at best be a mixed question of law and fact but unless jurisdictional facts are admitted, it can never be a pure question of law, capable of being answered without any enquiry into the factual aspects of the controversy.

13. While explaining the expression "where the minor ordinarily resides", the Hon'ble Supreme Court in the case of **Jagdish Chandra Gupta versus Dr. Ku. Vimla Gupta,** reported in **AIR 2003 All 317**, has been pleased to hold as under:

"19. *The expression ordinarily resides and residing at the time of the application are not synonymous and stipulate different situations which are not inter-changeable. The place where the minor ordinarily resides indicates a place where the minor is expected to reside but for the special circumstances. It excludes places to which the minor may be removed) at or about the time of the filing of the application for the enforcement of the guardianship and custody of the minor. The place has to be determined by finding out as to whether the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to different place."*

14. Further, in the case of **Manish Sehgal** versus **Meenu Sehgal** reported in **(2013) 202 DLT 87**, rendered by the High Court of Delhi and affirmed by the Hon'ble Supreme Court of India vide its order dated 30.01.2014 in **Manish Sehgal** versus **Meenu Sehgal, S.L.P. (Civil) No(s). 1590-1590 of 2014;** it has been held as follows:

"16. It is settled law that the place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular court has jurisdiction to entertain the proceedings or not. The moving of minors from one place to another and consequently from one jurisdiction to another does not help the party who raises the plea of jurisdiction. The main question i.e. whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case.

17. In view of the abovesaid facts and circumstances as explained earlier, I am of the view that the impugned order cannot be interfered with. In view of facts stated in the petition, it is clear that the place where the children have gone to study cannot be presumed to be place of their ordinary residence."

15. In the case of **Ruchi Majoo** versus **Sanjeev Majoo** reported in **(2011) 6 SCC 479**, the Hon'ble Apex Court has examined the purpose of the expression "ordinarily resident" appearing in section 9 (1) of the Guardians and Wards Act, 1890 and observed as under:

"26.*...We may before doing so examine the true purpose of the expression "ordinarily resident" appearing in Section 9(1). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two*

words that comprise the expression. The word "ordinary" has been defined by Black's Law Dictionary as follows:

"Ordinary (adj.).—Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterised by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word "reside" has been explained similarly as under:

"Reside.—Live, dwell, abide, sojourn, stay, remain, lodge. (Western-Knapp Engg. Co. v. Gilbank [129 F 2d 135 (CCA 9th Cir 1942)] , F 2d at p. 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right. (Bowden v. Jensen [359 SW 2d 343 (Mo Banc 1962)] , SW 2d at p. 349.)"

16. The **Webster's Dictionary** also gives the word "reside" a similar meaning, which may be gainfully extracted as follows:

"1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: with in."

17. In the case of **Jagir Kaur** versus **Jaswant Singh** reported in **AIR 1963 SC 1521 : (1963) 2 Cri LJ 413**, the Hon'ble Apex Court while dealing with a case under Section 488 of the Code of Criminal Procedure, 1973 and the question of jurisdiction of the court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the said provision and held that "resides" implies something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words: (AIR p. 1524, para 8)

"8. ... Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word 'resides' thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case."

18. Further, in the case of **Prashant Chanana** versus **Mrs. Seema alias Priya,** reported in **AIR 2010 P&H 99,** it has been observed that Section 9 (1) makes it clear that it is the ordinary place of residence of the minor which determines the jurisdiction of a particular Court to entertain an application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere at the date of presentation of the challan.

19. Thus, a bare perusal of section 9 (1) of the Guardians and Wards Act, 1890 makes it apparent that it is the ordinary place of residence of minor which determines the jurisdiction of the Court for entertaining an application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere on the date of presentation of the petition. The fact that the minor is found actually residing at the place when the application for the guardianship of the

minor is made does not determine the jurisdiction of the Court.

20. Coming to the factual matrix of the case, it would be apt to refer to the pleadings made in the application as preferred by the applicant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 before the Court below. In Paragraph 4 of affidavit filed in support of application under Order VII Rule 11 of the Code of Civil Procedure, 1908, the appellant has deposed that the minor is currently residing at House No. 2644, Sector 13, Bhiwani, Haryana for the purpose of pursuing his studies at K.M. Public School (Senior Secondary), Bhiwani, Haryana. Further, in Paragraph No. 5 of the said affidavit, the appellant has stated that the minor is presently residing at House No. 2644, Sector 13, Bhiwani, Haryana and was residing at the same place on the date of filing of the said case. He has further stated that since the minor is not residing within the territorial jurisdiction of the Family Court at Ghaziabad, the respondents/plaintiff has no cause of action against him and the learned Family Court at Ghaziabad has no jurisdiction to entertain the said case.

22. Furthermore, the appellant has also mentioned in Paragraph 3 of the application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908, that the minor is presently residing at House No. 2644, Sector 13, Bhiwani, Haryana for the purpose of education. For a better appreciation of the case, Paragraph 3 of the said application is reproduced hereinbelow:

"3. यह कि मास्टर कुंज वर्तमान में के०एम० पब्लिक स्कूल सीनियर सैकेंडरी भिवानी हरियाणा में अपनी पढाई करने के लिये मकान नं0-2644. सैक्टर-3 भिवानी हरियाणा में विपक्षी के पास रहता है। और मकान नं0-2644 सेक्टर 13 भिवानी हरियाणा से ही प्रतिदिन शिक्षा पाने के लिये अपने स्कूल में आता जाता है/" *(emphasis supplied)*

23. From the description of address of the appellant/defendant as mentioned in the affidavit filed in support of the application under Order VII Rule 11 of the Code of Civil Procedure, 1908, it is evident that House No. 2644, Sector-3, Bhiwani, Haryana is his current address while he mentioned his address as G-133, Sanjay Nagar, Sector-23, Police Station Kavi Nagar, District Ghaziabad. The relevant portion of the affidavit is being extracted below:

"शपथपत्र ओर से धीरज पुत्र श्री ओमप्रकाश आयु करीब 35 वर्ष निवासी जी- 133 संजयनगर सैक्टर-23, थाना कविनगर जिला गाजियाबाद उत्तर प्रदेश हाल निवासी मकान नं0-2644 सैक्टर-13, भिवानी हरियाणा निम्न प्रकार है/"

(emphasis supplied)

24. Moreover, from a perusal of the pleadings, it is crystallised that the appellant himself has admitted that Master Kunj is currently residing at House No-2644 Sector-13, Bihwani, Haryana for the purpose of pursuing his Education at K.M. Public School (Senior Secondary) along with him.

25. Be that as it may, it is noteworthy that the question of jurisdiction has been challenged by the appellant by way of filing of an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 which provides for rejection of plaint under certain specified conditions. Rule 11 of Order VII of the Code of Civil Procedure, 1908 is extracted below:

"11. Rejection of plaint. -

The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law:

(e) where it is not filed in duplicate

(f) where the plaintiff fails to comply with the provisions of rule 9

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

26. In the case of **Kamla and others** versus **KT Eshwara Sa and others,** reported in (2008) 12 SCC 661, the Hon'ble Supreme Court has been pleased to observe as under:

"21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."

27. It is settled law that for invoking clause (d) of Order VII Rule 11 of the Code of Civil Procedure, 1908, only the averments made in the plaint would be relevant and thus, for this purpose, there cannot be any addition of subtraction. The issue of merits of the matter would not be within the realm of the court as the court at that stage will not consider any evidence or enter a disputed question of fact or law. While dealing with the application under Order 7, Rule 11 of the Civil Procedure Code, 1908, the averments made in the plaint alone are to be seen. It is also trite that jurisdiction is a mixed question of law and fact, and a plaint should

not ordinarily be rejected on the ground of jurisdiction, without framing a distinct issue and taking evidence.

28. In the case of **Saleem Bhai and Others versus State of Maharashta and Others,** reported in **(2003) 1 SCC 557**, the Hon'ble Supreme Court held that the averments in the plaint are germane and the relevant facts which need to be looked into for deciding an application under Order VII Rule 11 of the Civil Procedure Code, 1908 are the averments in the plaint. For a ready reference, Paragraph 9 and 10 of the said judgment is quoted hereinbelow,

"9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

10. We are, therefore, of the view that for the aforementioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law."

29. The Hon'ble Supreme Court in the case of **Srihari Hanumandas Totala versus Hemant Vithal Kamat and Others** reported in **(2021) 9 SCC 99**, has been pleased to deal the scope of Order VII Rule 11 of the Code of Civil Procedure, 1908 and has laid down as under:

"24. In a more recent decision of this Court in Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another, a three Judge bench of this Court, speaking though Justice AM Khanwilkar, was dealing with the rejection of a plaint under Order 7 Rule 11 by the Trial Court, on the ground that it was barred by limitation. The Court referred to the earlier decisions including in Saleem Bhai v. State of Maharashtra, Church of Christ Charitable Trust (supra), and observed that: (Church of Christ Charitable Trust case, SCC p. 714, para 11)

"11..... It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into indeciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment. These principles have been

reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100."

25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

25.1. To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

25.2. The defense made by the defendant in the suit must not be considered while deciding the merits of the application;

25.3. To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

25.4. Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused."

30. The question whether the minor is ordinarily residing at a given place is primarily a question of fact which cannot be decided without an enquiry into the factual aspects of the case. Moreover, the residence by volition or by compulsion within the territorial jurisdiction of the Court cannot be treated as place of ordinary residence. The words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is perhaps to avoid the mischief that minor may be forcibly removed to a distant place, but still the application for minor's custody could be filed within the jurisdiction of the Court from whose jurisdiction he had been removed or in other words where the minor would have continued to remain but for his removal.

31. In the case of **Ruchi Majoo** versus **Sanjeev Majoo** reported in **(2011) 6 SCC 479**, the Hon'ble Supreme Court while considering section 9(1) of the Guardians and Wards Act, 1890 has held that solitary test for determining the jurisdiction of the Court under section 9 Guardians and Wards Act, 1890 is ordinary residence of the minor. The expression used in section 9 (1) is "where the minor ordinarily resides". Whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be mixed question of law and fact. It has further been held that unless jurisdictional facts are admitted, the question "where the minor ordinarily resides" can never be pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. (emphasis supplied)

32. In the instant case, the factum of 'ordinary residence' of the minor is a disputed question of fact and thus, the question whether the Court at Ghaziabad has territorial jurisdiction to entertain the petition under Section 25 of the Guardians and Wards Act, 1890 is a mixed question of law and fact. The aforesaid question cannot be determined without holding an enquiry into the factual aspects of the controversy

and without framing a distinctive issue in this regard. The scope of scrutiny at the stage of consideration of an application under Order VII, Rule 11 of Civil Procedure Code 1908 is confined only to the averments made in the petition. Thus, the question whether the Court has territorial jurisdiction being mixed question of law and fact cannot be decided by way of an application under Order VII, Rule 11 of the Civil Procedure Code, 1908.

33. In view of the deliberations made in preceeding paragraphs and also the factual matrix of the case, this court is of the considered opinion that the learned Court below has rightly rejected the application filed by the appellant-defendant under Order VII Rule 11 of the Civil Procedure Code, 1908. The present Appeal does not call for any interference by this Court. Accordingly, the same is **dismissed**, being devoid of merits.

34. However, it is made clear that this Court has not expressed any opinion on the merits of the case and the observations in the present judgment are only for the purpose of deciding the present appeal and will have no bearing on the adjudication of the case and/or any other related proceedings. It is further provided that while deciding the issue of its' territorial jurisdiction, the learned Court below shall not, in any manner, be influenced by the finding recorded by it on the subject regarding the place of residence in the impugned order dated 18.03.2024 and shall decide the same on merit, strictly in accordance with law.

(2024) 5 ILRA 2467
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 1002479 of 2010

Smt. Mridula Singh ...Petitioner
Versus
L.D.A. ...Opp. Party

Counsel for the Petitioner:
Sudeep Seth, Brijesh Kumar Singh

Counsel for the Opp. Parties:
D.K. Upadhyaya, Ajaay Kumar Singh, Dipesh Shukla, Mahendra Pratap Singh, Naveen Chandra Upadhyay, Rajesh Singh Chauhan

A. Transfer of Property Act, 1882 - Sections 105 & 107 - Registration Act, 1908 - Sections 17(1)(d) & 49 - Effect of Non-Registration of Lease Deed - A lease deed dated 05.12.2000, executed in favor of the petitioner for a period of 30 years, with an annual rent reserved, required mandatory registration under S. 17(1)(d) of the Registration Act and S. 107 of the Transfer of Property Act, 1882. The Court held that in the absence of such registration, the lease deed did not confer any right, title, or interest in the property upon the petitioner. Further, as per S. 49 of the Registration Act, the unregistered lease deed is not admissible in evidence to establish any right under the transaction of the lease between the parties. (Para 42)

B. Transfer of Property Act, 1882 – Sections 113 & 116 – Waiver of Notice to Quit – Effect of Holding Over: Mere acceptance of rent by the L.D.A. does not constitute an act of intention to treat the garden lease as subsisting, nor does it create a tenancy by holding over. Despite rent acceptance, the L.D.A. repeatedly asked the petitioner to vacate the land and initiated eviction proceedings. After issuing a notice to vacate, no further rent was accepted by the L.D.A. Held, acceptance of rent cannot be construed as a waiver of notice or an intention to continue the lease. The petitioner's

intention to use the land not for its original gardening purpose but to retain it with her residential plot renders Section 116 inapplicable. (Para 47, 50)

C. Constitution of India, Art. 12 – State - Uttar Pradesh Urban Planning and Development Act, 1973 - Section 4 - Registration Act, 1908 - Section 90(1)(d) - Exemption of Certain Documents Executed by or in Favor of Government: Held: The Lucknow Development Authority (L.D.A.), though falling within the definition of 'St.' under Article 12, is not "Government." The L.D.A. is a statutory body corporate, having perpetual succession and a common seal, and vested with the power to acquire, hold, and dispose of property. A lease deed executed by the L.D.A. is not a sanad, inam, title deed, or any other document evidencing a grant or assignment by the Government of land or any interest therein under S. 90(1)(d) of the Registration Act, 1908, so as to be exempt from registration. There exists a clear distinction between "St." and "Government" under law. (Para 56)

D. U.P. Urban Planning and Development Act, 1973—Section 26-A(4)—Show Cause Notice—Incorrect Mention of Statutory Provision—Effect of: Issuance of a show cause notice citing the incorrect statutory provision (Section 26(4) instead of Section 26-A(4)) does not invalidate the notice or the subsequent proceedings. It is settled law that a wrong reference to a provision of law does not invalidate an order or notice, provided the authority has the power to issue it under another relevant provision of the statute. Mere mention of a non-existent provision does not affect the legality of the proceedings initiated by the notice when the competent authority acts within its powers. An order made under an incorrect provision remains valid if it can be traced back to a valid provision under which the order could have been legitimately made. Petitioner submitted reply to the notice, and the impugned order was passed after considering his reply. The Court upheld the proceedings initiated under the 1973 Act despite the incorrect mention of the wrong provision, as the L.D.A. adhered to due process as per Section 26-A(4) and afforded the petitioner a fair hearing. (Paras 69, 71)

E. Constitution of India, Article 226—Judicial Review—Motive of Authority: The court has no jurisdiction to examine the motive that induced the authority to exercise its powers. (Para 72, 73)

F. Evidence Act - Estoppel - No Estoppel Against Statutory Provisions: The Court reaffirmed that there can be no estoppel against the provisions of a statute. The petitioner argued that since the L.D.A. executed the lease deed and accepted lease rent from the petitioner, it was estopped from challenging the validity of the lease deed. The Court rejected this submission, and held that statutory mandates cannot be overridden by conduct or acceptance of payments. (Para 43, 44)

G. Post-Hearing Submission of Additional Written Arguments - Practice Disapproved: After the conclusion of oral submissions, the matter was posted for delivery of judgment/order on 21.05.2024. However, on 17.05.2024, the petitioner submitted written arguments introducing several new submissions that were not argued during the hearing. A copy of the written arguments was not served upon the other side. The Court disapproved the conduct of introducing new arguments after the hearing had concluded and without the knowledge of the opposite side. Nevertheless, in the interest of justice, the Court proceeded to consider the new submissions made through the written arguments while adjudicating the matter.

H. U.P. Urban Planning and Development Act, 1973 - Government Order dated 05.03.1996—Allotment of Additional Land - Petitioner's Plot No. 3/84 measures 300 square meters. She was granted a garden lease for Plot No. 3/85, measuring 352

square meters. The petitioner challenged the legality of the order directing her to vacate land granted on a garden lease and prayed that the L.D.A. be directed to allot the land under the garden lease for residential purposes. Held: The land bearing Plot No. 3/85, which is larger than Plot No. 3/84 allotted to the petitioner, cannot be treated as additional land. It is a separate residential plot, larger than the one allotted to the petitioner. Petitioner subsequent lease deed was not registered and conferred no enforceable rights to the petitioner to retain possession of the land. Mere existence of two graves on the land of the L.D.A. does not create any legal bar against the land being sold by the L.D.A. as residential property. The order directing her to vacate, issued after providing an opportunity to respond and considering her explanation, cannot be held to be invalid, even if it is alleged to have been passed with some ulterior motives (Para 75)

Dismissed. (E-5)

List of Cases cited:

1. St. of M.P. Vs Bhailal Bhai, 1964 SCC OnLine SC 10

2. Kale & ors. Vs Deputy Director Of Consolidation ors.: (1976) 3 SCC 119

3. Sarup Singh Gupta Vs S. Jagdish Singh: (2006) 4 SCC 205,

4. Satrudhan Sahani Vs St. of Bihar, 1990 SCC OnLine Pat 281,

5. Kallingal Moosa Kutti Vs Secretary of St. for India in Council, 1919 SCC OnLine Mad 299,

6. Daso Kewat Vs St. of Bihar, 1995 SCC OnLine Pat 314,

7. R.S. Grewal Vs Chander Parkash Soni, (2019) 6 SCC 216,

8. St. of W.B. Vs Vishnunarayan & Associates (P) Ltd., (2002) 4 SCC 134,

9. Dr. Virendra Kumar Dixit Vs St. of U.P., 2014 SCC OnLine All 16476

10. Food Corpn. of India Vs V.K. Traders: (2020) 4 SCC 60

11. Sevoke Properties Ltd. Vs W.B. St. Electricity Distribution Co. Ltd.: (2020) 11 SCC 782

12. Yogendra Kumar Vs St. of U.P.: 2012 SCC OnLine All 410

13. The Field Council of Norwegian Evangelical Mission & ors. Vs. St. of U.P. & ors. 2018 (9) ADJ 649

14. Corpn. of the City of Bangalore Vs Kesoram Industries & Cotton Mills Ltd., 1989 Supp (2) SCC 753

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

1. Heard Sri B.K. Singh Advocate, the learned counsel for the petitioner, Sri Mahendra Pratap Singh Advocate, the learned State Counsel, and perused the record.

2. By means of the Writ Petition filed under Article 226 of the Constitution of India, the petitioner has prayed for quashing of an order dated 13.04.2010 passed by the Prescribed Authority/Joint Secretary, Lucknow Development Authority (L.D.A), whereby the petitioner has been directed to remove her possession over plot number 3/85, Vishwas Khand, Gomti Nagar, Lucknow, failing which the L.D.A will remove the encroachment made by the petitioner on the aforesaid plot. The petitioner has also prayed for issuance of a Writ of Mandamus, commanding the opposite parties not to interfere in possession of the petitioner in respect of Plot No. 3/85, Vishwas Khand, Gomti Nagar, Lucknow.

Order on Amendment Application

3. On 08.08.2023, the petitioner has filed an application for amendment of the Writ Petition seeking to add a prayer for issuance of a Writ in the nature of Mandamus, commanding the L.D.A to allot an additional land area of 180 square meters to the petitioner in pursuance of a Government Order dated 05.03.1996 read with a Government Order dated 20.04.1998. An application dated 22.03.2023 submitted by the petitioner, to the Vice Chairman L.D.A has been annexed with the affidavit in support of the amendment application, wherein she stated that the Government Order dated 05.03.1996 provides that if standard plots could not be carved out, the allottee of adjacent land will be given the land. She stated that all the plots situated in the row, where the petitioner's house is situated, measure 300 Square meters, whereas the land in question (Plot No. 3/85) measures less than 300 Square meters and it is merely 180 Square meters additional land.

4. A copy of a Government Order dated 05.03.1996 has been annexed with the affidavit filed in support of the amendment application and it provides that as far as possible, in case the additional land can be used as a new plot, it should be allotted as a new plot. Where it is not possible to create a new plot as per the layout plan, the land should be offered to the allottees of both the adjacent plots or to allottee of one adjacent plot, whichever is practical.

5. The petitioner has also annexed a copy of a Government Order dated 20.04.1998, which inter alia provides that in case any allottee wants to purchase an additional land, he will be charged price at the current rate, but where the development authority itself offers additional land to the transferee, price thereof shall be taken at the rate prevalent at the time of original allotment along with simple interest.

6. In the written arguments filed after closure of the submissions, the learned Counsel for the petitioner has relied upon a judgment of the Hon'ble Supreme Court in the case of **State of M.P. versus Bhailal Bhai**, 1964 SCC OnLine SC 10, in which it has been held that: -

"14…The jurisdiction conferred by Article 226 is in very wide terms. This article empowers the High Court to give relief by way of enforcement of fundamental rights and other rights by issuing directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. According to the petitioners a writ in the nature of mandamus can be appropriately used where money has been paid to the Government by mistake to give relief by commanding repayment of the same. That in a number of cases the High Courts have used the writ of mandamus to enforce such repayment is not disputed. …

15. We see no reason to think that the High Courts have not got this power. If a right has been infringed — whether a fundamental right or a statutory right — and the aggrieved party comes to the court for enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that that existing right has been infringed. Where there has been only a threat to infringe the right, an order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has

been held by this Court that where there has been a threat only and the right has not been actually infringed an application under Article 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It will hardly be reasonable to say that while the court will grant relief by such command in the nature of an order, of injunction where the invasion of a right has been merely threatened the court must still refuse, where the right has been actually invaded, to give the consequential relief and content itself with merely a declaration that the right exists and has been invaded or with merely quashing the illegal order made.]

16. For the reasons given above, we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law."

7. In **Bhailal Bhai** the petitioner was claiming a consequential relief of refund of money paid to the Government by mistake, which is not the case here. The principle laid down in **Bhailal Bhai** would apply if the petitioner establishes existence of a fundamental right or a statutory right and infringement thereof and by way of amendment he seeks to add a relief of that wrong being undone consequent to a declaration that his right was infringed. In such circumstances, the courts will give necessary consequential relief. Where the petitioner cannot establish the existence of a Fundamental or a Statutory right and the infringement or violation thereof, there would be no occasion to claim any new relief by way of amendment of the Writ Petition claiming the same to be a consequential relief.

8. The Writ Petition was filed in the year 2010 challenging cancellation of garden lease and by way of amendment application filed in the year 2023, the petitioner is seeking to add a new prayer for allotment of Plot No. 3/85 to the petitioner for residential purpose claiming the same to be additional land appurtenant to her Plot No. 3/84. The amendment will change the nature of the Writ Petition, which was filed challenging cancellation of the garden lease. The prayer sought to be amended is not for a consequential relief and the petitioner does not have a Fundamental or Statutory right of the prayer sought to be incorporated by way of amendment. Therefore, the application for amendment of the Writ Petition is rejected.

Order on the Writ Petition

9. Briefly stated, the facts pleaded in the Writ Petition are that the petitioner is the owner of plot number 3/84 Vishwas Khand, Gomti Nagar, Lucknow, on which she has constructed a house. Plot No. 3/85 measuring 352 Square meters with two graves existing thereon, is adjacent to the petitioner's Plot No. 3/84.

10. Vide order dated 16.10.1986, the L.D.A had allotted Plot No. 3/85 to the petitioner for a garden lease. The allotment letter states that on the request made by the petitioner, 352 Square meters land available near Plot No. 3/84, was being allotted to her on garden lease. The rate of rent and other conditions of lease will be communicated to the petitioner separately.

11. On 02.09.1989, the L.D.A. executed a garden lease in favour of the petitioner in respect of Plot No. 3/85. The lease deed dated 02.09.1989 states that the allotted land was being transferred to the

petitioner on a temporary garden lease at the rate of Rs.415/- per year. The land will be used for the purpose of gardening only and no construction of any kind will be raised thereon. The period of garden lease was 10 years. The petitioner would not have the right to sublet the land. It was a condition of the lease that the petitioner will not raise any permanent construction on the land and she could merely erect a fence of barbed wires and in case the L.D.A. needed the land, the allotment of the land could be cancelled at any time. The description of allotted land mentioned in the lease deed is Plot No. 3/85, Vishwas Khand, Gomti Nagar, Lucknow measuring 352.80 Square meters.

12. A copy of the layout plan has also been annexed with the Writ Petition, which shows the land of garden leases bearing Plot No. 3/85 Vishwas Khand, Gomti Nagar, having an area of 352.80 square meters.

13. The petitioner has pleaded in the Writ Petition that she had constructed a boundary wall surrounding Plot No. 3/85 and the garden lease was renewed on 15.12.2000 for a further period of 20 years. A copy of the lease deed dated 15.12.2000 has been annexed as Annexure No. 4 to the Writ Petition, which mentions that the land was being transferred on garden lease for a period of 30 years, as against a period of 20 years pleaded in para 6 of the petition. This lease deed dated 15.12.2000 was not registered.

14. On 28.07.2005, L.D.A issued a notice to the petitioner stating that she had constructed a boundary wall in violation of the conditions of garden lease and that she had deposited lease rent for one year only. Therefore, the Vice Chairman L.D.A had cancelled the allotment of land made in favour of the petitioner.

15. On 04.04.2009, the Joint Secretary, L.D.A issued a letter to the petitioner stating that she had been granted garden lease of Plot No. 3/85 as at that time, the number of plots available was in excess of the demand of the plots. Subsequently the demand of plots had increased. It was one of the conditions of the lease agreement that in case of need of land, the L.D.A could cancel the allotment of the land. The cancellation of allotment had already been communicated to the petitioner by means of the earlier letter dated on 28.07.2005. The letter dated 04.04.2009 sent by the Joint Secretary of L.D.A directed the petitioner to handover possession of the land to L.D.A., failing which L.D.A. will recover possession of the land.

16. The petitioner filed Writ Petition No. 4147 (M/B) of 2009, in which an interim order was passed on 29.07.2009 directing the parties to maintain status quo regarding Plot No. 3/85. The aforesaid petition was disposed off finally by means of an order dated 06.08.2009, directing the opposite parties not to dispossess the petitioner without following the due process of law.

17. Thereafter, the Prescribed Authority/Joint Secretary of L.D.A issued a notice dated 03.02.2010 giving the petitioner an opportunity to submit her explanation as to why L.D.A. should not take possession of the land under Section 26(4) of Uttar Pradesh Urban Planning and Development Act, 1973 (hereinafter referred as “the Act of 1973”).

18. The petitioner submitted a detailed reply to the aforesaid show cause

notice stating that she had not raised any permanent construction such as any room on Plot No. 3/85 and she had raised a low boundary wall surrounding the Plot, which cannot be treated as a permanent construction. She further stated that she had deposited lease rent of the land and the lease had been renewed for a further period of 20 years upto the year 2020 through an agreement dated 15.10.2000. Thereafter the petitioner has deposited rent for a period of 10 years from 2001 to 2010. The petitioner alleged that the reason for cancellation of the lease was that L.D.A. wanted to transfer the land in favour of a Cabinet Minister of the State Government. She further stated that the reason mentioned in the letter dated 04.04.2009 was different from the reason mentioned in the earlier letter dated 28.07.2005. The petitioner also stated that the notice had been issued under Section 26(4) of the Act of 1973, whereas Section 26 of the Act of 1973 contains only 3 sub-sections and there was no sub-section (4) in Section 26.

19. On 13.04.2010, the Prescribed Authority passed the impugned order wherein it is recorded that the learned counsel for the petitioner had contended that Section 26 of Act of 1973 does not apply to any private land and it relates to public lands only whereas the leased property is not a public property and that even if it is assumed that the lease has been cancelled, status of the petitioner would be of tenant as sufferance and not of an encroacher. It was further contended on behalf of the petitioner that two graves existed on the land in question and, therefore, the land could not used for residential purpose. On the other hand, the learned counsel for L.D.A. had submitted that the land was not recorded in the revenue records as Kabristan.

20. The Prescribed Authority recorded that Plot Nos. 3/84 and 3/85, Vishwas Khand, Gomti Nagar were carved out from land forming a part of Khasra Nos. 1210 P, 1229 P, 1230 P and 1267 P. The lands bearing Khasra Nos. 1210 and 1267 were lands of Sullage Farm, which had been transferred by Nagar Nigam to L.D.A in the year 1982. Land bearing Khasra No. 1229 and 1230 had been acquired in the year 1983 for Ujariyaon Residential Scheme, Part 1. No graveyard is recorded in any of the Khasra numbers in the revenue record. The Prescribed Authority concluded that the aforesaid facts established that the land bearing No. 3/85 is not a graveyard and it is a residential land.

21. The Prescribed Authority further held that the original file of L.D.A regarding the plot in question had gone missing. Even if the garden lease had been renewed, the officer who had signed the renewal deed as the transferor, has signed it on 12.01.2001, whereas the first line of the renewal deed mentioned the date 15.12.2000, which contradiction makes the lease deed suspicious, more so in absence of the original file. The officer who had signed the renewal deed dated 15.12.2000, had himself issued the letter dated 28.07.2005 cancelling the allotment of Plot No. 3/85 in favour of the petitioner, which establishes that the lease stands cancelled.

22. It is also recorded in the impugned order dated 15.04.2010 that the petitioner has given a letter dated 15.12.2008 requesting that Plot No.3/85, which is adjacent to her Plot No. 3/84, be allotted to her for residential purpose and be transferred to her on freehold basis. She had given a reminder letter dated 12.10.2009 also to the Vice-Chairman L.D.A. The Vice-Chairman had made a noting on the

file on 19.06.2009 stating that as the agreement executed in the year 2000 had not been registered, no effective lease existed in favour of the petitioner. As the petitioner violated the condition of lease deed and raised a boundary wall and did not handover possession of the land to L.D.A. even after giving notice, the Vice-Chairman passed an order dated 19.06.2009 for taking possession of the land.

23. The Prescribed Authority held that no lease in favour of the petitioner is in existence and, therefore, the land has reverted to the L.D.A and it falls in the category of public property. Regarding the contention of the petitioner that she has already deposited the lease rent, the Prescribed Authority stated that the petitioner had deposited lease rent for a period of one year only in the year 1989. Thereafter, she deposited Rs.3,320/- towards lease rent for 8 years on 08.02.2008. She did not deposit any other amount from 1989 to 2008 and thereafter she deposited Rs.830/- towards lease rent for a period of 2 years, on 13.02.2009. The amount was deposited by the petitioner towards arrears of lease rent and the contention of the petitioner's learned counsel had become a tenant at sufferance, was rejected.

24. The Prescribed Authority directed the petitioner to remove her possession from Plot No. 3/85, Vishwas Khand, Gomti Nagar, Lucknow, otherwise L.D.A will take possession of the land.

25. The L.D.A has filed a counter affidavit stating that the garden lease granted to the petitioner had been cancelled by means of an order dated 15.04.1989 but the order dated 15.04.1989 was recalled by means of an order dated 06.05.1989 in furtherance of a representation submitted by the petitioner. Thereafter the garden lease was cancelled by means of an order dated 28.07.2005 on the ground that the petitioner had erected a boundary wall and she had deposited lease rent for a period of one year only. The notice dated 03.02.2010 had wrongly made a mention of Section 26(4) of Act of 1973 but the petitioner had submitted a reply to the notice and the Prescribed Authority has passed the order dated 13.04.2010 after considering the petitioner's reply.

26. The petitioner has stated in the rejoinder affidavit that Fateh Bahadur Singh had moved an application dated 26.02.2004 for registration in L.D.A for allotment of Plot No. 3/85, Vishwas Khand, Gomti Nagar, Lucknow, which was even before cancellation of the petitioner's lease. As per the procedure laid down by the L.D.A for registration/ allotment of residential plots/houses, an advertisement for registration of any scheme for residential plots/houses shall be published in at least two newspapers of State/National level. Any person who or any member of whose family has a plot/house in any colony developed by L.D.A., Uttar Pradesh Avas Vikas Parishad, the Improvement Trust or any local body or cooperative society, shall not be eligible for allotment of any plot/house. Clause 30.1 of the procedure for registration/allotment of plot/house provides that the allottee will have to take possession of the plot as per actual measurement. In case the area or dimensions are different, the allottee will have to make payment as per the modified situation.

27. Submissions of the learned Counsel were heard on 16.05.2024, during which the learned counsel for the petitioner

submitted that the notice dated 03.02.2010 was issued under Section 26(4) of the Act of 1973, whereas there is no such provisions in the aforesaid Act and no proceedings could be initiated and no orders could be passed in furtherance of the notice issued under a non-existent provision. He has submitted that the petitioner's lease deed was cancelled arbitrarily as the authorities wanted to transfer the land to a Cabinet Minister, who already holds 4 - 5 plots of land of L.D.A. and who is not entitled to be transferred any other plot from L.D.A. as no persons is entitled to get more than one plot of L.D.A.

28. The Court put a query to the learned counsel for the petitioner as to whether the lease deed dated 15.12.2000 executed in favour of the petitioner had been registered, to which he replied that the L.D.A. having executed the lease dated 15.12.2000 and having accepted rent under this deed, is estopped from challenging its validity.

29. After hearing of oral submissions, the matter was posted for 21.05.2024 for delivery of judgment/order. On 17.05.2024, the learned counsel for the petitioner supplied written arguments containing several new submissions which had not been advanced during hearing of the case. The written arguments filed do not contain any acknowledgment of its receipt by the learned Counsel for the respondents. This conduct of adding new arguments after close of the hearing of the case behind the back of the other side cannot be appreciated by the Court. Yet, in the interest of justice, the Court proceeds to examine the submissions made through written arguments.

30. It has been submitted in the written arguments that although Section 17 of the Registration Act, 1908 bars the admissibility of an unregistered lease deed executed for a period of more than one year, it is not open the for the L.D.A to deny the relationship of the lesser and lessee as it has never denied the due execution of the lease deed and it has accepted the lease rent from time to time.]

31. The learned counsel for the petitioner next submitted that a conjoint reading of Section 105 to107 of the Transfer of Property Act, 1882, clarifies that a lease can be created simply where the lesser grants a right and interest to a lessee to enjoy an immovable property for a consideration and puts a lessee into possession of the land while accepting periodic consideration. He has submitted that the present case fulfills all the requirements of Section 105 to 107 even in absence of registration of the lease deed.

32. Section 107 of the Transfer of Property Act provides that, *"a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."* Therefore, there is no room to doubt that the L.D.A could not have granted any leasehold rights to the petitioner without execution of a registered lease deed as per the provisions contained in Section 107 of the Transfer of Property Act, 1908.

33. Section 17 (1)(d) of the Registration Act, 1908, provides that *"leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, are required to be registered compulsorily."*

34. Section 49 of the Registration Act, 1908 provides as follows: -

"49. Effect of non-registration of documents required to be registered*.—No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—*

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under CHAPTER II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

35. The learned counsel for the petitioner has referred to the decision of the Hon'ble Supreme Court in the case of **Kale & Others versus Deputy Director Of Consolidation Ors**: (1976) 3 SCC 119, **Sarup Singh Gupta versus S. Jagdish Singh**: (2006) 4 SCC 205, **Satrudhan Sahani versus State of Bihar**, 1990 SCC OnLine Pat 281, **Kallingal Moosa Kutti versus Secretary of State for India in Council**, 1919 SCC OnLine Mad 299, **Daso Kewat versus State of Bihar**, 1995 SCC OnLine Pat 314, R.S. **Grewal versus Chander Parkash Soni**, (2019) 6 SCC 216, **State of W.B. versus Vishnunarayan & Associates (P) Ltd**., (2002) 4 SCC 134**, Dr. Virendra Kumar Dixit versus State of U.P.,** 2014 SCC OnLine All 16476,

36. The question involved in **Kale** (Supra) was if any title was conveyed to the appellant under a family arrangement, whether the said conveyance can only be by a registered instrument under the provisions of the Registration Act and the Transfer of Property Act. Before proceeding to decide the question, the Hon'ble Supreme Court discussed in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all, in the following words: -

"9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise Kerr on Fraud at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

The object of the arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain .and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term ***"family arrangement" is applied. Family arrangements are governed by principles which are not applicable to dealings between strangers****. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."*

37. The Hon'ble Supreme Court held in light of the facts of **Kale** (Supra) that: -

"the family settlement arrived at by the parties was oral, and the petition filed by them on August 7, 1956 before the Assistant Commissioner, was merely an

information of an already completed oral transaction. In other words, the petition was only an intimation to the Revenue Court or authority that the matters in dispute between the parties had been settled amicably between the members of the family, and no longer required determination and that the mutation be effected in accordance with that antecedent family settlement. Since the petition did not itself create or declare any rights in immovable property of the value of Rs 100 or upwards, it was not hit by Section 17 (1)(b) of the Registration Act, and, as such, was not compulsorily registrable."

38. The Hon'ble Supreme Court has specifically held in **Kale** (Supra) that Family arrangements are governed by principles which are not applicable to dealings between strangers, and further, that as the document in question did not itself create or declare any rights in immovable property of the value of Rs 100 or upwards, it was not hit by Section 17 (1)(b) of the Registration Act, it was not compulsorily registrable. Therefore, the decision in the aforesaid case is not at all relevant for decision of the instant Writ Petition which asserts the existence of lease hold rights on the basis of an unregistered lease deed executed by L.D.A. in favour of the petitioner for a period of 30 years.

39. Per Contra, the learned Counsel for the respondents has relied upon the decisions in the cases of **Food Corpn. of India versus V.K. Traders**: (2020) 4 SCC 60 and **Sevoke Properties Ltd. versus W.B. State Electricity Distribution Co. Ltd.:** (2020) 11 SCC 782.

40. In Food Corpn. of India versus V.K. Traders (Supra), the Hon'ble Supreme Court held that no reliance can be placed upon the lease deeds which do not satisfy the statutory requirements of Section 17(1)(d) of the Registration Act, 1908 as these lease deeds thus cannot be accepted as evidence of valid transfer of possessory rights.

41. In **Sevoke Properties Ltd. versus W.B. State Electricity Distribution Co. Ltd**., (2020) 11 SCC 782, it was held that in terms of the provisions of Section 107, a lease of immovable property for a term exceeding one year can only be made by a registered instrument. Where the indenture of lease has not been registered, the contents of the indenture would be inadmissible in evidence for the purpose of determining the terms of the contract between the parties. This is the plain consequence of the provisions of Sections 17 and 49 of the Registration Act, 1908. The only purpose for which the lease can be looked at is for assessing the nature and character of the possession of the respondent.

42. Having considered the submissions advanced and the case-laws placed by the learned Counsel for the parties, this Court is of the considered view that the lease deed dated 05.12.2000 executed in favour of the petitioner for a period of 30 days, reserving an yearly rent, was necessarily required to be registered in view of the Statutory mandate contained in Section 17 (1) (d) of the Registration Act and Section 107 of the Transfer of Property Act. In absence of registration, it conferred no right, title or interest in the property upon the petitioner as per the statutory provision contained in Section 49 of the Registration Act, 1908 and it will not be admissible in evidence of the transaction of lease between L.D.A. and the petitioner.

43. The learned counsel for the petitioner next submitted that the L.D.A having executed the lease deed and having accepted the lease rent from the petitioner, is estopped from challenging validity of the lease deed.

44. In this regard, it would be sufficient to refer to the well established principle of law that there can be no estoppel against the provisions of a Statue. When Section 17(1)(d) of the Registration Act and 107 of the Transfer of Property Act clearly provides that a lease for a term exceeding one year or reserving a yearly rent can be made by a registered instrument only, and Section 49 of the Registration Act provides that an unregistered lease deed conferes no right, title or interest in the property upon the petitioner and it will not be admissible in evidence of the transaction of lease between L.D.A. and the petitioner, there can be no estoppel against the plea of invalidity of an unregistered lease deed.

45. The learned Counsel for the petitioner next relied upon the case **of Sarup Singh Gupta versus S. Jagdish Singh**, (2006) 4 SCC 205 wherein after serving a notice upon the appellant terminating the lease under Section 106 of the Transfer of Property Act, the respondent instituted a suit for his eviction on 02.06.1979. Before filing the suit two notices were given to the appellant on 10.02.1979 and 17.03.1979. According to the appellant, despite notice terminating the tenancy, the respondent accepted rent for the months of April and May 1979 and thereafter. The Hon'ble Supreme Court referred to Section 113 of the Transfer of Property Act, 1882 which reads as follows: -

"113. Waiver of notice to quit.—A notice given under Section 111 clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting."

46. The Hon'ble Supreme Court held that: -

"6. ...A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given under Section 111 clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative.

* * *

8. In the instant case, as we have noticed earlier, two notices to quit were given on 10-2-1979 and 17-3-1979. The suit was filed on 2-6-1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself constitutes an act on the part of the landlord showing an intention to treat the lease as subsisting. In our view, mere acceptance of rent did not by itself constitute an act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord

did file a suit for eviction, and even while prosecuting the suit accepted the rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by the courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. It cannot, therefore, be said that mere acceptance of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended. In the instant case, we find no other fact or circumstance to support the plea of waiver. On the contrary, the filing of and prosecution of the eviction proceeding by the landlord suggests otherwise."

47. Applying the law laid down in **Sarup Singh Gupta** (Supra) to the facts of the present case, it is clear that the mere acceptance of rent by L.D.A. did not by itself constitute an act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the garden-lease as subsisting. The fact remains that even after accepting the rent, the L.D.A. initiated proceedings for eviction and after giving the notice, it did not accept any rent. It cannot, therefore, be said that by accepting rent, L.D.A. intended to waive the notice to handover possession of the land and to treat the lease as subsisting. Even if rent was neither tendered nor accepted, the L.D.A. would be entitled to the payment of the arrears of rent for the period the land remained in occupation of the petitioner. Therefore, **Sarup Singh Gupta (Supra)** does not in any manner helps the petitioner, rather it supports the case of the respondent.

48. The learned Counsel for the petitioner has also relied upon the judgment in the case of **Shanti Prasad Devi versus Shankar Mahto**, (2005) 5 SCC 543, wherein the question involved was of interpretation of Section 116 of the Transfer of Property Act, which reads thus: -

"116. Effect of holding over.—If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106."

(emphasis added by the Hon'ble Supreme Court)

49. The Hon'ble Supreme Court held that: -

***"18**. ... on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying "assent" to the continuance of the lease even after expiry of lease period...."*

50. Even as per the law laid down in **Sarup Singh Gupta** and **Shanti Prasad**

Devi (Supra), the mere deposit of rent in the bank account of L.D.A. will not make the petitioner a tenant by holding over, unless it is established that the rent had been accepted by a legal representative of L.D.A. competent to assent to the petitioner continuing in possession, which is not the case here, as the competent authorities of L.D.A. have repetitively asked the petitioner to vacate the land occupied by her and the petitioner wants to continue in possession of the land not for the purpose for which it was initially granted to her, i.e. for gardening purpose, but she wants to retain it as an additional land forming a part of her residential plot. In these circumstances, neither Section 116 of the Transfer of Property Act, nor the judgments in the cases of in **Sarup Singh Gupta and Shanti Prasad Devi** (Supra) support the petitioner's claim.

51. The learned counsel for the petitioner has also submitted that Section 90 of the Registration Act exempts lease deeds executed by any statutory body.

52. Section 90 of the Registration Act 1908 provides as follows:-

"90. Exemption of certain documents executed by or in favour of Government.—*(1) Nothing contained in this Act or in the Indian Registration Act, 1877 (3 of 1877), or in the Indian Registration Act, 1871 (8 of 1871), or in any Act thereby repealed, shall be deemed to require, or to have at any time required, the registration of any of the following documents or maps, namely—*

(a) documents issued, received or attested by any officer engaged in making a settlement or revision of settlement of land-revenue, and which form part of the records of such settlement; or

(b) document and maps issued, received or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land, and which form part of the record of such survey; or

(c) documents which, under any law for the time being in force, are filed periodically in any revenue-office by patwaris or other officers charged with the preparation of village-records; or

(d) sanads, inam, title-deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land; or

(e) notices given under Section 74 or Section 76 of the Bombay Land-Revenue Code, 1879 (Bombay Act 5 of 1879), of relinquishment of occupancy by occupants, or of alienated land by holders of such land.

(2) All such documents and maps shall, for purposes of Sections 48 and 49, be deemed to have been and to be registered in accordance with the provisions of this Act."

53. Section 3 (23) of the General Clauses Act provides that "Government" or "the Government", shall include both the Central Government and any State Government;"

54. "Central Government" is defined in Section 3(8) of the general Clauses Act as follows: -

"(8) "Central Government" shall,—

(a) in relation to anything done before the commencement of the Constitution, mean the Governor-General or the Governor-General-in-Council, as the case may be; and shall include,—

(i) in relation to functions entrusted under sub-section (1) of Section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioners' Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of Section 94 of the said Act; and

(b) in relation to anything done or to be done after the commencement of the Constitution mean the President;

and shall include,

(i) in relation to functions entrusted under clause (1) of Article 258 of the Constitution to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;

(ii) in relation to the administration of a Part C State before the commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under Article 239 or Article 243 of the Constitution as the case may be;

(iii) in relation to the administration of a Union territory the administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution;"

55. The "State Government" is defined in Section 3(60) of the General Clauses Act as follows: -

"(60) "State Government,"—

(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorized at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government;

(b) as respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor, in a Part B State, Rajpramukh, and in a Part C State, the Central Government;

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union territory, the Central Government;

and shall, in relation to functions entrusted under Article 253-A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article;"

56. L.D.A. has been notified by the State government under Section 4 of the Act of 1973 and it is a body corporate having perpetual succession and a common seal and it has the power to power to acquire, hold and dispose of property. A bare reading of the aforesaid statutory provisions makes it manifest that L.D.A. is not "Government", although it falls within the definition of 'State' under Article 12 of the Constitution of India. "State" and "Government" are not one and the same. A lease deed executed by the L.D.A is not a sanad, inam, title-deed or other document

evidencing a grant or assignment by Government of land or of any interest in land, as referred to in Section 90 (1) (d) of the Registration Act so as to be deemed to have been registered. The submission of the learned counsel for the petitioner is without any merit and the same is turned down.

57. The learned Counsel for the petitioner has relied upon a judgment of Patna High Court in **Satrudhan Sahani versus State of Bihar**: AIR 1991 Pat 211, wherein an advertisement was published in the newspapers inviting applications for settlement of a tank for fishing purpose for a period of ten years with effect from 01.04.1985. The petitioners and the respondents filed applications and the selection agency recommended settlement in favour of the respondents. The selection committee approved the suggestion. The petitioners filed an objection before the Collector of the district objecting to settlement in favour of the respondents. The Collector sought a report from the Additional Collector, who submitted a report that three out of the four respondents had completed the training given by the Agency and as such they had a better claim for taking settlement. The Collector directed that the settlement be made in favour of the respondents. In this factual background, the Patna High Court held that: -

"13. In view of series of judgments of the Supreme Court, now it is not possible to dismiss, a writ application filed on behalf of a person who feels that he has been discriminated by the State Government or an Authority which can be held to be a 'State' within the meaning of Art. 12 of the Constitution, in matters of settlement of fishery rights in tanks and jalkars belonging to the State, only on the ground that no registered document has been executed in favour of such petitioner by the competent authority. When the Supreme Court, by the aforesaid order passed in connection with this case itself, directed that the writ application be heard on merit after setting aside the earlier order passed by this Court, in my view the decision of the Full Bench in Chetlal Sao's case (AIR 1986 Pat 267) (supra) on the question of maintainability of a writ application in absence of a registered document stands overruled."

58. However, the provisions of Section 17 (1) (d), Section 49, Section 90 of the Registration Act, or Section 107 of the Transfer of Property Act were not considered by the Patna High Court while deciding **Satrudhan Sahani** (Supra). Therefore, besides the point the decision of Patna High Court is not binding on this Court, this decision is not an authority on the question of effect of Section 17 (1) (d), 49, Section 90 of the Registration Act, or Section 107 of the Transfer of Property Act.

59. The learned Counsel for the petitioner has also relied upon **Kallingal Moosa Kutti versus Secretary of State for India in Council**, 1919 SCC OnLine Mad 299, in which the first defendant had taken a lease of certain lands taken from the Government under Section 3 of the Government Grants Act contained a clause that the defendant should not erect buildings on the land, but the Grantee violated this condition. The Secretary of State filed a suit for ejectment. The lessee pleaded that the lease deed was not registered and it was not admissible in evidence. The High Court held that a lease granted by the Government was covered by Section 90 (1) (d) of the Registration Act. In the present case, the lease deed has not

been executed by the Government under the Government Grants Act and, therefore, **Kallingal Moosa Kutti** (Supra) does not apply to a lease deed executed by the L.D.A.

60. Reliance has also been placed by the learned Counsel for the petitioner on **Daso Kewat versus State of Bihar**, 1995 SCC OnLine Pat 314, in which the Patna High Court held that a lease of land granted by the Crown under the Crown Grants Act, 1895 or the Government Grants Act, 1895 was outside the operation of Section 107, Transfer of Property Act, 1882 which provided that a lease of a movable property from year to year, or for any term exceeding one year or reserving a yearly rent could be made only by a registered instrument and it was covered by Section 90 (1) (d) of the Registration Act. However, the lease deed in favour of the petitioner has not been executed by the by the Crown under the Crown Grants Act, 1895 or the Government Grants Act, 1895 and it has been executed by the L.D.A. and not by the Government. Therefore, **Daso Kewat** (Supra) also does not apply to the present case.

61. Regarding the notice having been issued by the L.D.A quoting a wrong statutory provision, the petitioner has relied upon the decisions of the Hon'ble Supreme Court in the cases of **R.S. Grewal versus Chander Parkash Soni**, (2019) 6 SCC 216 and **State Of West Bengal & Ors versus Vishnunarayan And Associates (P) Ltd**.: (2002) 4 SCC 134.

62. In **R.S. Grewal (**Supra) a suit for possession had been filed against the first respondent, who was a tenant inducted by Shiv Dev Kaur Grewal, in the Court of Civil Judge, Senior Division, Ludhiana. The defendant claimed that he had taken the shop in his possession on rent as a tenant from Dr Shiv Dev Kaur Grewal, who was not a limited owner of the property. Moreover, it was pleaded that the defendant was in occupation as a tenant and a suit for possession treating him to be a trespasser was not maintainable. The Hon'ble Supreme Court held that Shiv Dev Kaur fulfilled the description of a "landlord" under Section 2(c) of the East Punjab Urban Rent Restriction Act, 1949; the first respondent who was covered by the expression "tenant" under Section 2(i) of the East Punjab Urban Rent Restriction Act, 1949 acquired the character of a statutory tenant and was protected under it; the statutory protection afforded to the tenant did not cease to exist upon the death of Shiv Dev Kaur; a suit for possession on the basis that the tenant was a trespasser after the death of Shiv Dev Kaur was not maintainable and the remedy of the appellants was to pursue eviction proceedings on the grounds contemplated by the East Punjab Urban Rent Restriction Act, 1949. The aforesaid decision was given in view of the peculiar facts and circumstances of that case, where the suit was filed wrongly treating the defendant to be a trespasser whereas he was a statutory tenant and proceedings for his eviction could be initiated under the East Punjab Urban Rent Restriction Act, 1949 only. This principle would not apply to the mention of a wrong provision in issuing a notice by the L.D.A., where the proceedings have rightly been initiated under the Act of 1973.

63. The learned Counsel for the petitioner has also placed reliance on the judgment in the case of **State of W.B. versus Vishnunarayan & Associates (P) Ltd.,** (2002) 4 SCC 134, in which it was held that in the absence of specific statutory

provision a person cannot be evicted by force by the State or its executive officers without following due course of law, on the ground of public interest and without any opportunity to show cause. In that case, proceeding for eviction of a lessee was initiated under Section 6-A of the West Bengal Government Premises (Tenancy Regulation) Act, 1976, which provides for Eviction of unauthorised occupants and penalty for such occupation. The Hon'ble Supreme Court held that: -

"23. Section 6-A Eviction of unauthorised occupants can be invoked against any person, who is not a tenant or who remains in occupation of any government premises without written order of the prescribed authority. The respondents were tenants under the erstwhile Company and continued to be so, as held by us. Therefore, they cannot be evicted by invoking powers conferred on the authority under Section 6-A of the Act of 1976. However, we are not deciding the controversy as to whether this Act would apply only to residential premises, as held by the High Court".

64. In the present case, the term of garden lease granted on 02.09.1989 stood expired and the subsequent lease deed dated 15.12.2000 has not been registered and it conferred no right, title or interest on the petitioner as per Section 49 of the Registration Act. Therefore, the petitioner is not a lessee of L.D.A. and she has no legally enforceable right in respect of the land which is a prerequisite for maintaining a Writ Petition.

65. Sri. M. P. Singh, the learned counsel for the opposite parties has submitted that a wrong mention of the statutory provisions will not invalidate the notice, if the power to issue notice is traceable to some other provision of the statue and the notice has been issued by the Competent Authority. He has relied upon the judgments in the cases of **Yogendra Kumar versus State of U.P.**: 2012 SCC OnLine All 410 and **The Field Council of Norwegian Evangelical Mission and Ors. Vs. State of U.P. and Ors**. 2018 (9) ADJ 649.

66. In **Yogendra Kumar versus State of U.P**.: 2012 SCC OnLine All 410, Rule 17(1)(a) of the Rules provides that a police officer against whom an enquiry is contemplated or is proceeding, may be placed under suspension. However, in the said order of suspension, in place of Rule '17(1)(a)', Rule '17(1)(b)' has been mentioned. A Division Bench of this Court held that: -

"It is well settled legal position that merely because an order has been made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it."

67. In **The Field Council of Norwegian Evangelical Mission and Ors. Vs. State of U.P. and Ors**. 2018 (9) ADJ 649, a coordinate Bench of this Court held that: -

"35. It is settled law that merely mentioning of a wrong provision or a Section of the Act at the time of exercising power, which could have been validly exercised otherwise by an officer, does not invalid or vitiate such an order. If the power

exists under the Act and the Rules for an officer to act in a particular manner, mere wrong mention of a provision of the Act/Section under which such power is exercised would not invalidate such an order."

68. Section 26-A of the U. P. Urban Planning and Development Act, 1973 contains provision regarding encroachment or obstruction on public land. Sub-section (4) of Section 26-A of the Act of 1973 provides that: -

"26-A. Encroachment or obstruction on public land.—
* * *
(4) If there are grounds to believe that a person has made any encroachment or obstruction on a land in a development area which is not a private property, the Authority or an officer authorised by it in this behalf may serve upon the person making encroachment or obstruction, a notice requiring him to show cause why he shall not be required remove the encroachment or obstruction within such period not being less than fifteen days as may be specified in the notice, and after considering the cause, if any, shown by such person, may order removal of such encroachment or obstruction for reason to be 'recorded in writing
Provided that ..."

69. The mere fact that in place of Section 26-A(4), the notice issued by L.D.A. wrongly made a mention of Section 26(4) of the Act, which is in fact a non-existent provision, will not affect the legality of the proceedings initiated by the notice, more particularly when the petitioner has given a reply to the notice and the explanation given by her has been taken into consideration by the authority.

70. The learned counsel for the petitioner has next relied upon a decision of this Court in **Dr. Virendra Kumar Dixit versus State of U.P**., 2014 SCC OnLine All 16476, wherein it was held that even if the petitioners had encroached upon the acquired land and had constructed boundary wall, then too the L.D.A. had no right to demolish the boundary wall without adopting due procedure of law.

71. In the present case, the L.D.A. has taken recourse to the due process of law provided in Section 26-A(4) of the Act of 1973 and has passed the impugned order after giving opportunity of hearing to the petitioner and after taking into consideration her explanation. Therefore, it cannot be said that the L.D.A. has proceeded to take back possession of the land from the petitioner without adopting due process of law.

72. This Court is not inclined to accept the submission of the petitioner that the reason for cancellation of the lease was that L.D.A. wanted to transfer the land in favour of a Cabinet Minister of the State Government and that the Cabinet Minister has owns plots of L.D.A. and he is not entitled to get the land in question. Firstly, neither the land has been allotted to any person, nor the validity of the subsequently allotment is being adjudicated in this Writ Petition. The petitioner has assailed the legality of the impugned order directing her to vacate the land that was given on garden lease for a period of 10 years from 02.09.1989. The subsequent lease deed dated 05.12.2000 executed in favour of the petitioner was not registered and it confers no right upon her. If the petitioner has no right to continue in possession of the land, the order passed after giving her an opportunity to show cause and after taking

into consideration the explanation offered by the petitioner, directing her to vacate the land, cannot be said to be bad in law even it it had been passed with some ulterior motive.

73. In **Corpn. of the City of Bangalore versus Kesoram Industries and Cotton Mills Ltd**., 1989 Supp (2) SCC 753, it was held that *"The court has no jurisdiction to examine the validity of the reasons that goes into the decision or the motive that induced the delegated authority to exercise its powers."*

74. Secondly, the allegation that the person whom the L.D.A. wanted to allot the land, was not eligible to get the land as he already has 4-5 plots of L.D.A., is as vague as it can be, as the Writ Petition does not contain any particulars of any other Plot / House owned by that person in any colony developed by L.D.A. or Housing Board etc. That person has not been arrayed as a party to the Writ Petition. No plea founded on such vague allegations can be adjudicated by this Court.

75. The petitioner now wants to get the land of garden lease allotted for residential purpose in terms of Government Order dated 05.03.1996, which provides in unequivocal terms that as far as possible, in case the additional land can be used as a new plot, it will be used in that manner only. The petitioner's Plot No. 3/84 measures 300 Square meters and the Plot No. 3/85, regarding which garden lease had been granted to the petitioner, measures 352 Square meters, as is apparent from the allotment letter dated 16.10.1986. Therefore, as per the Government Order dated 05.03.1996, the land bearing No. 3/85, which measures more than the Plot No. 3/84 allotted to the petitioner, cannot be treated merely as an additional land, and it is a separate residential plot, larger than the plot allotted to the petitioner. In case L.D.A wants to transfer it as a residential plot, the petitioner has no right to claim its allotment as additional land. The land is a residential land and the mere existence of two graves on the land of L.D.A. does not create any legal bar against the land being sold by the L.D.A. as a residential land and it does not give rise to any right in favour of the petitioner for getting the land allotted to her as additional land appurtenant to her plot no. 3/85.

76. In view of the aforesaid discussion, I am of the considered view that the impugned order dated 13.04.2010 passed by the Prescribed Authority/Joint Secretary, L.D.A., whereby the petitioner has been directed to remove her possession over plot number 3/85, Vishwas Khand, Gomti Nagar, Lucknow, failing which the L.D.A will remove the encroachment made by the petitioner on the aforesaid plot, does not suffer from any illegality.

77. The petitioner does not have any legal right to retain possession of Plot No. 3/85, Vishwas Khand, Gomti Nagar, Lucknow. As none of the legally enforceable rights of the petitioner has been violated by the respondents, the petitioner is not entitled to get any relief in this Writ Petition. Accordingly, the Writ Petition is ***dismissed.***

78. Before parting with the case, it is observed that L.D.A. is free to transfer Plot no. 3/85, Vishwas Khand, Gomti Nagar, Lucknow, to any person, but the Plot has to be transferred in accordance with the relevant laws and the applicable rules. The L.D.A. shall ensure that the public property is transferred in a manner so as to ensure

that all eligible persons get a chance to purchase it and L.D.A. gets the highest possible consideration for the same.

(2024) 5 ILRA 2488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.05.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ B No. 1968 of 1978

Raj Bahadur & Ors. ...Petitioners
Versus
Deputy Director of Consolidation Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
R.K. Srivastava, A.R. Khan, Dr. Ramesh Kumar Srivasta, Prem Chandra, Vijay Kumar Dixit

Counsel for the Respondent:
Bireshwar Nath, Ashok Kumar Misra

When village had come under the consolidation-objections were filed by the Petitioners and Respondents claiming their rights on Khata no.23-Consolidation officer partly allowed the claim in favor of the Petitioners-Two Appeals filed Petitioner's Appeal rejected-Revision filed-rejected-Impugned-Contending that the Revision Court has exceeded its jurisdiction u/s 48 of the Act, 1953-but the revisional Court had not admitted any new fact either in the form of document or otherwise -held that the deputy Director of Consolidation has unfettered powers in doing complete justice between the parties- Deputy Director of Consolidation is having jurisdiction to arrive at a different conclusion on same evidence but cannot exceed its jurisdiction by admitting new facts.

Writ Petition dismissed. (E-9)

List of Cases cited:

1. Ram Dular Vs Deputy Director of Consolidation, Jaunpur & ors. reported in 1994 Supp (2) SCC 198.

2. Moti & ors. Vs Deputy Director of Consolidation & ors. reported in 2005 (99) RD 222

3. Shri Jagdamba Prasad (Dead) Thr. LRs. & ors. Vs Kripa Shankar (Dead), Thr. LRs & ors. reported in 2014 STPL (Web) 239 SC.

4. Preetam Singh (dead) by LRs. & ors. Vs Assistant Director of Consolidation & ors. reported in (1996) 2 SCC 273

5. Sheo Nand & ors. Vs Deputy Director of Consolidation Allahabad & ors. reported in 2000 (3) SCC 103

6. Sher Singh Vs Joint Director of Consolidation & ors. reported in 1978 (3) SCC 172

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

1. Heard learned counsel for the parties and gone through the record of the case.

2. During the pendency of the present writ petition, petitioner nos. 1, 2, 4, 5 & 6 had died and their legal representative/heirs have already been substituted (hereinafter referred to as the petitioners). Similarly, the respondent nos. 5, 6, 7, 8, 9, 9/1, 10, 13, 14, 15, 15/1, 16 & 17 had died and their legal representatives/heirs have also been substituted (hereinafter referred to as the respondents).

3. The present petition has been preferred for quashing of the impugned revisional order dated 03.03.1978 passed by the Deputy Director of Consolidation.

4. Learned counsel for the petitioners has submitted that the original tenure holder was Angad Rai and thereafter his son

Purai. Purai had three sons namely Horilal, Rikhai and Sheo Charan. The petitioners belong to the family of Horilal whereas the respondents belong to the family of Sheo Charan. The dispute is between the descendants of Horilal and Sheo Charan for Khata No. 23 situated at Danpur, Tanda, District Faizabad.

5. It is further submitted that when the village had come under the consolidation, the objections were filed by the petitioners and the respondents claiming their rights on Khata No. 23.

6. It is further submitted that the Consolidation Officer had decided the objections of the objectors and partly allowed the claim in favour of the petitioners with regard to certain Gatas of Khata No. 23 treating it as a sole tenancy of the petitioners.

7. It is further submitted that against the said order, two appeals under Section 11 (1) of the Consolidation and Holdings Act, 1953 (hereinafter referred to as, the Act, 1953) were filed by the both the parties as both were aggrieved. The appeal preferred on behalf of the petitioners was rejected vide order dated 04.04.1972 and the appeal preferred on behalf of the respondents was allowed. Against the appellate order dated 04.04.1972, the petitioners preferred a revision under Section 48 of the Act, 1953, which was also dismissed and feeling aggrieved the present writ petition has been preferred.

8. It is further submitted that the revisional Court has exceeded its jurisdiction by re-appreciating the evidence and substituting the findings given by the Consolidation Officer by its own finding which is not within the jurisdiction of Deputy Director of Consolidation under Section 48 of the Act, 1953.

9. It is further submitted that Section 48 of the Act, 1953 only empowers the Director of Consolidation to examine the record of any case decided or proceedings taken by any subordinate authorities for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order and not empowered for appreciating the evidence and substituting it by his own findings, hence the impugned order passed by the revisional court is without jurisdiction and in support of his submissions, learned counsel for the petitioners has relied upon several judgments of Hon'ble Supreme Court as well as this Court, which are as follows:-

(i) Firstly, learned counsel for the petitioners has relied upon the para no. 3 of the judgment passed by Hon'ble Supreme Court in the case of ***Ram Dular vs. Deputy Director of Consolidation, Jaunpur and Ors.*** reported in ***1994 Supp (2) SCC 198.***

(ii) Secondly, he has placed reliance upon the para no. 6 of the judgment passed by this Court in the case of ***Moti and Ors. vs. Deputy Director of Consolidation and Ors.*** reported in ***2005 (99) RD 222.***

(iii) Lastly, the learned counsel for the petitioners has relied upon the para nos. 13 and 14 of the judgment of Hon'ble Supreme Court in the case of ***Shri Jagdamba Prasad (Dead) Thr. LRs. & Ors. vs. Kripa Shankar (Dead), Thr. LRs and Ors.*** reported in ***2014 STPL (Web) 239 SC.***

10. On the other hand, learned counsel for respondents and the learned State Counsel has submitted that Section 48 of the Act, 1953 has been amended and

Explanation-III has been added by Act No. 3 of 2002 and giving it a retrospective effect w.e.f 10.11.1980, whereby the Director of Consolidation/Deputy Director is empowered to examine the correctness, legality or propriety of any order to examine any finding whether of fact or by law, recorded by any subordinate authority with power to re-appreciate oral or documentary evidence.

11. At this stage, learned counsel for petitioner has submitted that Act No. III of 2002 has come into force with effect from 10.11.1980 empowering the Director of Consolidation to examine any finding whether of fact or law with power to reappreciate oral or documentary evidence whereas the order passed by the Revisional Court is of the year 1978 when there was no such amendment or power given to the Deputy Director of Consolidation.

12. Learned State Counsel in reply to the aforesaid has submitted that the submission of learned counsel for petitioner is not tenable. In support of his submission, he has relied upon the certain relevant paragraphs of the judgments of Hon'ble Supreme Court. The details of which are as follows :-

(i) **Preetam Singh (dead) by LRs. and Ors. vs. Assistant Director of Consolidation and Ors.** reported in **(1996) 2 SCC 273.**

(ii) The second judgment passed by Hon'ble Supreme Court, which has been relied by learned Standing Counsel is in the case of **Sheo Nand And Others versus Deputy Director of Consolidation Allahabad and others** reported in **2000 (3) SCC 103.**

13. It is further submitted that the judgment in the case of **Sheo Nand (supra)** given by the Hon'ble Supreme Court by referring to the Section 48 of the Act, 1953, when explanation-III was not added to the same.

(iii) Lastly, the learned Standing Counsel has relied upon paragraph 15 of the judgment in the case of Sri Jagdamba Prasad (Dead) (Supra), which has been relied by learned counsel for the petitioners also.

14. The court has asked the learned counsel for petitioners that except that legal submission any other submission if he wanted to make on the merits of the case, learned counsel for petitioner has replied that he is confining his submission only to the power of the Deputy Director of Consolidation as per Section 48 of the Act, 1953, except that the Deputy Director of Consolidation had not considered the agreement entered into between the parties for division of shares.

15. After hearing learned counsel for the parties and going through the record of the case, it is an admitted case between the parties that they are descendents of Purai- the original tenure holder and the dispute is with regard to the Khata No. 23 situated at Village Danpur, Tanda, District Faizabad. The controversy involved in the present petition which is to be adjudicated by this Court is whether under Section 48, the Deputy Director of Consolidation is empowered to pass an order by appreciating the evidence and substituting the findings in the order passed by the Consolidation Officer. For that Section 48 alongwith explanation III is quoted hereinbelow:-

"48. Revision and reference. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than an interlocutory order] passed by such authority in the case or proceedings, and may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1)].

.....[Explanation (III). - The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re- appreciate any oral or documentary evidence"

16. Explanation (III) has come into force by U.P. Act No. 3 of 2002 w.e.f. 10.11.1983 whereby the Director/Deputy Director of Consolidation has been empowered to re-appreciate any oral or documentary evidence but prior to that the such power was not with the Director/Deputy Director of Consolidation but in the light of the judgment cited by learned Standing Counsel in the case of Sheo Nand (supra) wherein it has been held that Deputy Director of Consolidation would have full power under Section 48 to re-appreciate or reevaluate the evidence on record. The said finding was given by the Hon'ble Supreme Court when explanation-III was not added to the Section 48.

17. For proper adjudication of the controversy involved in the present petition, it is apt to reproduce the relevant paras relied by learned counsel for the petitioners as well as by the learned Standing Counsel.

18. Firstly, the judgments relied by learned counsel for the petitioners is being reproduced hereunder:-

(a) relevant extract of para no. 3 of the judgment passed by Hon'ble Supreme Court in the case of Ram Dular (supra) is extracted hereinbelow:-

".....It is clear that the Director had power to satisfy himself as to the legality of the proceedings or as to the correctness of the proceedings or correctness, legality or propriety of any order other than interlocutory order passed by the authorities under the Act. But in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity thereof it cannot assume to itself the jurisdiction of the original authority as a fact-finding authority by appreciating for itself of those facts de novo. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or there was any procedural irregularity which goes to the rest (sic root) of the matter, had been committed in recording the order or finding. ...."

(b) para no. 6 of the judgment passed by this Court in the case of Moti (supra) is reproduced hereinbelow:-

"6. It is well settled that Deputy Director of Consolidation while exercising the revisional power conferred by Section 48 of the Act can only interfere with the finding recorded by Consolidation Officer and Settlement Officer, if they are found to be illegal, irregular, improper or correct, but he has no jurisdiction to substitute his own findings after re-appraisal of evidence. Reference may be made to the decision of the Hon'ble Apex Court in the case of Gaya Deen and Ors. vs. Hanuman Prasad reported in 2001 (92) RD 79 (SC) and that of learned Single Judge of this Court in the case of Jangi Lal v. Deputy Director of Consolidation, Allahabad reported in 2000 (1) AWC 59."

(c) para nos. 13 and 14 of the judgment passed by Hon'ble Supreme Court in the case of Shri Jagdamba Prasad (dead) supra is quoted hereinbelow:-

"13. Based on the rival factual and legal contentions raised by the parties, the following points would arise for our consideration :

1. Whether the Revisional Authority exceeded its jurisdiction under Section 48 of the Uttar Pradesh Consolidation of Holdings Act, 1953 in entertaining additional document at revision stage?

2. Whether the High Court was correct in concurring with the findings of the Revisional Authority?

3. 3. What order the appellants are entitled to?

Answer to Point No. 1

14. Section 48 of the Act is pari materia to Section 115 of the Code of Civil Procedure, 1908. It is pertinent to mention at this point the decision of this Court given in the case of Sher Singh v. Joint Director of Consolidation & Ors. [(1978) 3 SCC 172]. The relevant paragraphs read as under:

"4. The principal question that falls for our determination in this case is whether in passing the impugned order, the Joint Director of Consolidation, exceeded the limits of the jurisdiction conferred on him under Section 48 of the 1953 Act. For a proper decision of this question, it is necessary to advert to Section 48 of the 1953 Act as it stood on the relevant date before its amendment by Act VIII of 1963:

" Section 48 of the U.P. Consolidation of Holdings Act.— The Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."of the U.P. Consolidation of Holdings Act.— The Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."

5. As the above section is pari materia with Section 115 of the Code of Civil Procedure, it will be profitable to ascertain the scope of the revisional jurisdiction of the High Court. It is now well-settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by

the subordinate courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly. In other words, it is not open to the High Court while exercising its jurisdiction under Section 115 of the Code of Civil Procedure to correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the court to try the dispute itself."

19. Now, the judgments on which reliance has been placed by learned Standing Counsel are being quoted:-

(a) Para no. 6 of the judgment passed by Hon'ble Supreme Court in the case of Preetam Singh (dead) (supra) is quoted:-

"When the matter was in revision before the Assistant director (Consolidation), he had the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revisional jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court of revisional jurisdiction otherwise having suo moto power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war of legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation)."

(emphasis supplied)

(b) para nos. 20 and 21 of the judgment passed by Hon'ble Supreme Court in the case of Sheo Nand (supra) is quoted hereinbelow:-

"20. The section gives very wide powers to the Deputy Director. It enables him either suo motu on his own motion or on the application of any person to consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and to pass appropriate orders. These powers have been conferred on the Deputy Director in the widest terms so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the revenue records may be prepared accordingly.

21. Normally, the Deputy Director, in exercise of his powers, is not expected to disturb the findings of fact recorded concurrently by the Consolidation Officer and the Settlement Officer (Consolidation), but where the findings are perverse, in the sense that they are not supported by the evidence brought on record by the parties or that they are against the weight of evidence, it would be the duty of the Deputy Director to scrutinise the whole case again so as to determine the correctness, legality or propriety of the orders passed by the authorities

subordinate to him. In a case, like the present, where the entries in the revenue records are fictitious or forged or they were recorded in contravention of the statutory provisions contained in the U.P. Land Records Manual or other allied statutory provisions, the Deputy Director would have full power under Section 48 to reappraise or re-evaluate the evidence-on-record so as to finally determine the rights of the parties by excluding forged and fictitious revenue entries or entries not made in accordance with law."

(emphasis supplied)

(c) para no. 15 of the judgment passed by Hon'ble Supreme Court in the case of Shri Jagdamba Prasad (supra) is quoted hereunder:-

"According to the legal principle laid down by this Court in the case mentioned above, the power of the Revisional Authority under Section 48 of the Act only extends to ascertaining whether the subordinate courts have exceeded their jurisdiction in coming to the conclusion. Therefore, if the Original and Appellate Authorities are within their jurisdiction, the Revisional Authority cannot exceed its jurisdiction to come to a contrary conclusion by admitting new facts either in the form of documents or otherwise, to come to the conclusion. Therefore, we answer point no. 1 in favour of the appellants by holding that the Revisional Authority exceeded its jurisdiction under Section 48 of the Act by admitting documents at revision stage and altering the decision of the subordinate courts."

20. In the light of the judgment cited by learned Standing Counsel in the case of Sheo Nand (supra) wherein it has been held that Deputy Director of Consolidation would have full power under Section 48 to re-appreciate or re-evaluate the evidence on record. The said finding was given by the Hon'ble Supreme Court when explanation-III was not added to the Section 48. The para nos. 20 and 21 of the said judgment has already been quoted in preceding paragraph no. 19 (b) of the present judgment.

21. The judgment relied by learned Standing Counsel in the case of Preetam Singh (supra) wherein it has been held that the Assistant Director of Consolidation should not have fettered in doing complete justice between the parties when the entire matter was before him. The relevant para no. 6 of the said judgment has already been quoted in the preceding paragraph no. 19 (a) of the present judgment.

22. As far as the judgments cited by learned counsel for the petitioners are concerned, thereafter in subsequent judgments, the Hon'ble Supreme Court has held that the Deputy Director of Consolidation has unfettered power in doing complete justice between the parties, as mentioned above.

23. Paragraph nos. 13 & 14 of the judgment in the case of Jagdamba Prasad (Dead) (supra), relied by learned counsel for the petitioners where the Hon'ble Supreme Court has made reference of the judgment in the case of **Sher Singh Vs. Joint Director of Consolidation and others** reported in **1978 (3) SCC 172,** wherein the power/jurisdiction of Deputy Director of Consolidation was confined to cases of illegal or irregular exercise or non exercise or illegal assumption of jurisdiction but para no. 15 of the same judgment which has been relied by learned Standing Counsel has clarified the earlier settled position of law. The relevant extract of the said judgment has already been

quoted in the preceding paragraph no. 18 (c) of this judgment.

24. In the judgment of Shri Jagdamba Prasad (Dead) supra, the Hon'ble Supreme Court has distinguished the earlier settled position of law by giving jurisdiction to the revisional authority to arrive at contrary conclusion on the same evidence but has held that revisional authority cannot exceed its jurisdiction to come to a contrary conclusion by admitting new facts either in the form of document or otherwise to come to conclusion and it is not the case of the petitioners that the revisional Court in the revision had admitted any new fact either in the form of document or otherwise so the said judgment is not of any help to the petitioner.

25. The submission of learned counsel for the petitioners that the compromise was not considered by the revisional Court, the said submission was replied by the learned counsel for the respondents that there was no agreement /compromise between the petitioners and the respondents. The compromise which was relied by the petitioners was in between Baburam and Ram Narain- the real brothers and the decedents of the family of Horilal at the time of suit between the Baburam and Ram Narain in the year 1883 A.D. when Baburam and Ram Narain sought partition of the certain groves in the Court of learned Munsif and it was the partition between two real brothers i.e. decedents of the Horilal i.e. the family of the petitioners and not between the family of Horilal and Sheo Charan and this finding in the order of Consolidation Officer is not disputed by the learned counsel for the petitioners.

26. The reading of all the judgments relied by learned Standing Counsel in the cases of Preetam Singh (dead) (supra), Sheo Nand (supra) and the judgment in the case of *Shri Jagdamba Prasad (Dead) (supra) (which has been* relied by both the counsels), clarified the position that the Deputy Director of Consolidation can decide the matter after appreciating the evidence to do complete justice to the parties.

27. From the aforesaid, the position which emerges out is that the Deputy Director of Consolidation is having jurisdiction to arrive at a different conclusion on the same evidence but the revisional authority cannot exceed its jurisdiction by admitting new facts either in the form of document or otherwise so the paragraph nos. 13 & 14 of the judgment in the case of Shri Jagdamba Prasad (Dead) (supra) is not of any help to the petitioner in the light of paragraph 15 of the same judgment, as the revisional court in the said case had admitted new and fresh evidence.

28. In view of the facts, circumstances and discussion made hereinabove, the writ petition is dismissed.

(2024) 5 ILRA 2495
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal Under Section 37 of Arbitration and Conciliation Act No. 8 of 2020

Bhartia Rashtriya Rajmarg Pradhikaran ...Appellant

Versus

Neeraj Sharma & Ors. ...Respondents

Counsel for the Appellant:
Sri Pranjal Mehrotra

Counsel for the Respondents:
Ms. Shalini Goel

A. Arbitration Law – Non-receipt of signed copy of arbitral award - Arbitration and Conciliation Act, 1996 - Section 31 - National Highways Act, 1956 - Sections 3A & 3D -- The delivery of an arbitral award is substantive, as it activates the commencement of several critical timelines. This stage marks the termination of the arbitral proceedings and sets the clock ticking for any remedial actions available under the Arbitration Act. (Para 8, 10)

Several procedural timelines include the periods within which parties may seek to correct, interpret, or request an additional award u/s 33 of the Arbitration Act, or challenge the award u/s 34 of the Arbitration Act. The delivery of the signed copy of the arbitral award is not a mere formality; it is a substantive requirement that marks the conclusion of the arbitration proceedings and the commencement of potential post-award actions.

A literal interpretation, which ignores the practical reality that the party was aware of the arbitral award and acted upon it, would be contrary to the spirit of the Arbitration Act. A narrow view of Section 31(5) of the Arbitration Act would defeat the Arbitration Act's purpose (expeditious dispute resolution) if it allowed a party to delay proceedings unjustly by claiming non- receipt of a signed copy despite having knowledge of the award's contents. (Para 11, 14, 15)

B. If a party begins to comply with the award's directives or uses the award's findings in subsequent actions, it indicates a *de facto* acceptance of the award. Such actions provide clear evidence that the party has understood and accepted the award's contents, thus making any later claims of non-receipt appear disingenuous. (Para 16)

In the instant case, the appellant has assailed the order of the Learned District Judge based asserting that they never received a signed copy of the arbitral award. As per the order of the Learned District Judge, the appellant was fully aware of the contents of the arbitral award dated July 28, 2016 and had acted on it, thereby demonstrating a practical acknowledgement of the arbitral award. In view of the award dated July 28, 2016, the Appellant through its letter dated May 22, 2017 asked the Special Land Acquisition officer to calculate the compensation amount and publish a supplementary award. In compliance of the same, the Competent Authority that is the Special Land Acquisition Officer calculated the amount of compensation to be paid and sent it to the Appellant on May 31, 2017. It is evident that, the Appellant, even despite the non-receipt of a signed copy of the arbitral award dated July 28, 2016 accepted the same and acted upon it. Therefore, **the appellant cannot now evade the consequences by exploiting a procedural technicality regarding the non-receipt of a signed copy. It is crucial to interpret S. 31(5) of the Arbitration Act in a matter that aligns with the Arbitration Act's overarching goals of promoting fairness and expeditious dispute resolution.** (Para 12, 13)

C. Doctrine of estoppel is vital in maintaining procedural fairness and integrity within the arbitration process. Estoppel prevents a party from taking inconsistent positions that would harm the opposing party or undermine the legal process's credibility. In arbitration, this doctrine ensures that a party cannot claim ignorance or non-receipt of an award after having acted upon it. Estoppel operates to uphold fairness by ensuring that parties cannot benefit from their own wrongdoing or negligence. If a party, aware of the award, delays raising objections or seeks to take advantage of procedural nuances to avoid compliance, estoppel can prevent such tactics. This doctrine aligns with the fundamental principles of justice and equity, ensuring that parties engage with the arbitration process honestly and transparently. (Para 17)

The Learned District Judge, Mathura, was justified in dismissing the appellant's application u/s 34 of the Arbitration Act as time- barred. The appellant's awareness of the award and its subsequent actions negate the claim of non-receipt of a signed copy. The principle of estoppel further prevents the appellant from contradicting their previous acknowledgment of the award. A balanced interpretation of S. 31(5) of the Arbitration Act supports the Learned District Judge's decision, ensuring procedural fairness and upholding the Arbitration Act's objectives of expeditious dispute resolution. The appellant's claim of patent illegality in the Learned District Judge's judgment lacks substance. The decision to dismiss the S. 34 application as time-barred was grounded in the appellant's evident awareness of the award and their subsequent actions. (Para 19)

The arbitral award dated July 28, 2016 having attained finality, cannot be questioned at this stage.

Application dismissed. (E-4)

Precedent followed:

1. U.O.I., Vs Bhola Prasad Agrawal, 2022 SCC OnLine Chh 1644 (Para 4)

2. U.O.I. Vs Tecco Trichy Engineers, (2005) 4 SCC 239 (Para 7)

3. Rahul Vs Akola Janta Commercial Cooperative Bank Ltd., 2023 SCC OnLine Bom 814 (Para 9)

Present application assails the judgment and order dated 16.11.2019, passed by the District Judge, Mathura rejecting the application filed by the appellant herein u/s 34 of the Arbitration Act.

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

1. The instant application has been filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') against the judgment and order dated November 16, 2019 passed by the District Judge, Mathura rejecting the application filed by Bharatiya Rashtriya Rajmarg Pradhikaran (hereinafter referred to as the 'Appellant') under Section 34 of the Arbitration Act.

FACTS

2. I have laid down the factual matrix of the instant lis below:

(a) A notification was issued under Section 3A of the National Highways Act, 1956 (hereinafter referred to as the 'NHAI Act') on December 4, 2009 followed by a declaration dated June 25, 2010 under Section 3D of the NHAI Act in respect of the land in question. Thereafter, the Competent Authority declared the award determining the amount of compensation in respect of the land in question under Section 3G of the NHAI Act.

(b) Against the award of the Competent Authority, the Respondents filed a petition under Section 3G(5) of the NHAI Act before the Arbitrator (Additional Commissioner (Administration), Agra Division, Agra). The Arbitrator published an award on July 28, 2016 and remanded the matter to the Competent Authority.

(c) The appellant filed an application under Section 34 of the Arbitration Act against the award dated July 28, 2016 which was rejected vide judgment and order dated November 16, 2019.

(d) Against the judgment and order dated November 16, 2019, the appellant has filed the instant application under Section 37 of the Arbitration Act before this Court.

CONTENTIONS OF THE APPELLANT

3. Shri Pranjal Mehrotra, learned counsel appearing for the appellant has

made the following submissions before this Court:

(i) As per the provisions of Section 3G(5) of the NHAI Act, the Arbitrator ought to have determined the amount itself. As such, the Arbitrator was not justified in remitting the matter back to the Competent Authority.

(ii) Learned District Judge acted with patent illegality in passing the impugned judgment and order dated November 16, 2019.

(iii) The appellant never received a signed copy of the arbitral award dated July 28, 2016 which is a mandatory requirement under Section 31(5) of the Arbitration Act. As such, the Learned District Judge was not justified in dismissing the application filed by the appellant as time barred.

CONTENTIONS OF THE RESPONDENT

4. Learned counsel appearing for the Respondents has made the following submission before this Court:

The appellant had knowledge of the arbitral award dated July 28, 2016 and was fully aware of the same. As such, it is not open for it to now argue that since the appellant did not receive a signed copy of the award dated July 28, 2016, the period of limitation for challenging an arbitral award under Section 34 of the Act never started. Learned District Judge did not err in dismissing the application filed by the appellant under Section 34 of the Act as time barred. Reliance in this regard is placed upon the judgment of the High Court of Chhattisgarh in ***Union of India -v- Bhola Prasad Agrawal reported in 2022 SCC OnLine Chh 1644.***

ANALYSIS

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. The primary issue raised in the instant case is that whether or not the Learned District Judge was justified in dismissing the application filed by the appellant under Section 34 of the Arbitration Act since the appellant was never served with a signed copy of the arbitral award, which is a mandatory requirement under Section 31(5) of the Arbitration Act. Relevant parts of Section 31(5) of the Arbitration Act have been extracted herein below for ease of reference:

"31. Form and contents of arbitral award. —

(1) ...

(2) ...

(3) ...

(4) ...

(5) After the arbitral award is made, a signed copy shall be delivered to each party."

7. Section 31(5) of the Arbitration Act while seemingly procedural in nature, embodies broader objectives. The Hon'ble Supreme Court in ***Union of India -v- Tecco Trichy Engineers*** reported in **(2005) 4 SCC 239** propounded the importance of the requirement to deliver a signed copy of the arbitral award on parties. Relevant paragraph of the said judgment reads as under:

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the

stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

8. Delivery of an arbitral award under Section 31(5) of the Arbitration Act plays a pivotal role by initiating various stages of the arbitration process, setting limitation periods, and conferring rights upon the parties. In the realm of sports, where victory and defeat hang in balance, arbitration serves as the referee adjudicating disputes on the field of play. Section 31(5) of the Arbitration Act acts as the final whistle, signalling the end of the match and the declaration of the winner. For the prevailing party, the delivery of the award marks the culmination of their efforts and provides them with a means of enforcing their rights against the losing party. Conversely, for the losing party, the delivery of the award represents the beginning of the period within which they may challenge the award on specified grounds under Section 34 of the Arbitration Act.

9. The Bombay High Court in ***Rahul -v- Akola Janta Commercial Co-operative Bank Ltd.*** reported in **2023 SCC OnLine Bom 814** espoused on the significance of delivering the signed copy of an award under Section 31(5) of the Arbitration Act to the party, relevant paragraphs thereof read as under:

"24. The entire object and purport of Section 31(5) of the A & C Act, when it states that a signed copy of the award shall be delivered to each party, appears to be, that the party to the award should be made known the nature, effect and import of the award, so that each party, may then take a decision whether to challenge the award further by instituting appropriate proceedings under Section 34 of the A & C Act, before the Court, or in case there are any inaccuracies, corrections, interpretations or need for an additional award therein, to get it corrected by filing an application under Section 33 of the A & C Act, before the Arbitrator. This also so, for the reason that both Section 33(1) and 34(3) of the A & C Act, provide for limitations of time in this regard to approach either the Arbitral Tribunal or the Court for the said purpose and therefore the delivery of the award as contemplated in Section 31(5) has the effect of setting in motion these time periods, within which the remedies available are to be availed of by the party. It is in this context it has to be understood that the signed copy of the award has to be delivered to the 'party', as defined in Section 2(h) of the A & C Act, so that a decision can be taken by the 'party' regarding the future course of action to be adopted, within the time frame as stipulated

by the provisions of the Statute. The delivery of the signed copy of the award, is therefore information, brought to the notice and knowledge of each party, as to the contents of the award, so as to make the 'party', aware that the limitation to raise a challenge, has started to run, which knowledge/information is equally available to the 'party', when it receives the certified copy of the award signed by the Arbitrator. The purpose of the provision, of imparting knowledge to the 'party', as to the contents of the award, is achieved whether a signed copy is delivered or the certified copy of the signed award is obtained by the 'party'. In either case knowledge/information as to the contents of the award stands attributed to the 'party', and the time as provided in Section 33(1) and 34(3) of the A & C Act, begins to run therefrom. The situation is quite different when the award is not delivered to the 'party', or obtained by the 'party', but is delivered or obtained to/by the counsel or agent of the 'party' as the knowledge of the 'party', as defined in Section 2(1)(h) of the A & C Act, is what is contemplated by Section 31(5), as in that circumstances a plea can successfully be raised by the 'party', of non-compliance with the requirement of Section 31(1) which would entitle it to claim that the time for challenging the award under Section 34(3) or for correction/interpretation/modification of the award or passing of an additional award did not begin to run.

25. All the judgments cited by Mr. Bhattad, learned counsel for the petitioner, contemplate the requirement of Section 31(5) vis-a-vis the time as prescribed in Section 34(3) for challenging of the award. In fact, the factual position in Anilkumar Jinabhai Patel (supra) is quite similar to the factual position as extant in the present matter.

26. Section 32(1) of the A & C Act pressed into service by Mr. Bhattad, learned counsel for the petitioner, merely contemplates that the arbitration proceedings stand terminated by the final arbitral award, or by an order of the Arbitral Tribunal under sub-section (2) thereof. It does not contemplate that the arbitral proceedings stand terminated, only upon delivery of the arbitral award, as contemplated by Section 31(5) and therefore nothing turn around the language of Section 32(1) insofar as the present issue is concerned.

27. Section 36(1) of the A & C Act, provides that when the time for making an application to set aside the arbitral award under Section 34 has expired, then subject to Section 36(2) the award shall be enforced as a decree under the Code of Civil Procedure. The contention of Mr. Bhattad, learned counsel for the petitioner, is that since the signed copy of the award was not delivered to the petitioner, in terms of Section 31(5) of the A & C Act, the time for making the application for setting aside the arbitral award had not expired and the execution proceedings were therefore infirm, is in my considered opinion taking a too literal and narrow view of the language of Section 31(5) of the A & C Act, which would defeat the very purpose and object of the Act itself, as once a 'party', is held to have received/obtained the signed copy of the award, maybe a certified copy, as indicated above the information regarding the contents of the award stands attributed to the party, and therefore the time, would begin to run for raising a challenge to the award. Once that time has expired, it cannot be permitted to be said that though a certified signed copy was obtained by the 'party', from the Arbitrator, still the time under Section 31(1) or 34(3) of the A & C Act, did not run and expire, as a signed

copy of the award, in terms of Section 31(5) was not delivered to the 'party'. It is a settled position of law, that where the literal meaning of a provision, entails in doing violence to the meaning, intent and purpose of the Act, it would call for a purposeful and constructive meaning to be given to the language of the provision."

10. The importance of Section 31(5) cannot be overstated as it initiates several procedural timelines. These include the periods within which parties may seek to correct, interpret, or request an additional award under Section 33 of the Arbitration Act, or challenge the award under Section 34 of the Arbitration Act. The delivery of the signed copy of the arbitral award is not a mere formality; it is a substantive requirement that marks the conclusion of the arbitration proceedings and the commencement of potential post-award actions. In ***Union of India v. Tecco Trichy (supra)***, the Hon'ble Supreme Court emphasized that the delivery of an arbitral award is substantive, as it activates the commencement of several critical timelines. This stage marks the termination of the arbitral proceedings and sets the clock ticking for any remedial actions available under the Arbitration Act.

11. However, interpreting Section 31(5) too literally in all cases may lead to unjust outcomes, undermining the fundamental objectives of arbitration. The literal adherence to this provision might be used strategically by parties to delay the enforcement of the award, thus defeating the principle of expeditious dispute resolution that arbitration seeks to promote.

12. In the instant case, the appellant has assailed the order of the Learned District Judge based on the assertion that they never received a signed copy of the arbitral award. However, as highlighted by the Learned District Court, it is essential to consider several critical facts. Relevant portions from the impugned order dated November 16, 2019 passed by the Learned District Judge Court under Section 34 of the Arbitration Act are delineated below:

"इस पत्र से यह स्पष्ट है कि, मध्यस्थ के निर्णय दिनांकित 28.07.2016 के परिप्रेक्ष्य में परियोजना निदेशक, राष्ट्रीय राजमार्ग प्राधिकरण, सी०एम०यू०, मथुरा द्वारा अपने पत्रांक 44271 दिनांकित 22.05.2017 द्वारा विशेष भूमि अध्याप्ति अधिकारी को अनुपूरक अभिनिर्णय घोषित कर उपलब्ध कराने हेतु पत्र भेजा गया है एवं उसके अनुपालन में सक्षम प्राधिकारी/विशेष भूमि अध्याप्ति अधिकारी द्वारा धनराशि का गणना प्रपत्र तथा धनराशि की गणना दिनांक 31.05.2017 को परियोजना निदेशक, राष्ट्रीय राजमार्ग प्राधिकरण, सी०एम०यू०, मथुरा द्वारा प्रेषित की गयी है, जिससे यह स्पष्ट है कि , मौजूदा आपत्तिकर्ता यानि परियोजना निदेशक, राष्ट्रीय राजमार्ग प्राधिकरण, सी०एम०यू०, मथुरा द्वारा मध्यस्थ के निर्णय दिनांकित 28.07.2016 को स्वीकार किया गया है एवं उसके अनुपालन में प्रतिकर की गणना करने हेतु सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी, संयुक्त संगठन, मथुरा को पत्र प्रेषित किया गया है एवं इस पत्र के तथा मध्यस्थ महोदय के पंचाट निर्णय दिनांकित 28.07.2016 के अनुपालन में सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी, संयुक्त संगठन ने तहसीलदार छाता से स्थलीय जाँच कर एवं इस जाँच की आख्या के अनुसार स्थल का निरीक्षण कर जाँच आख्या परियोजना निदेशक, राष्ट्रीय राजमार्ग प्राधिकरण, फरीदाबाद को प्रेषित की। स्थलीय जाँच आख्या एवं सर्वेयर की जाँच आख्या के अनुसार मध्यस्थ महोदय के निर्णय दिनांकित 28.07.2016 के अनुपालन में सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी द्वारा अनुपूरक अधिनिर्णय घोषित कर मुवलिग 29,04,000/- का प्रतिकर विपक्षीगण संख्या 1 लगायत 4 हेतु निर्धारित किया गया है एवं उक्त प्रतिकर निर्धारण मध्यस्थ महोदय के अनुमोदन हेतु भी प्रेषित किया गया है, जिसके सम्बन्ध में मध्यस्थ ने अनुमोदन का कोई प्रावधान न होने का कथन करते हुए सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी, संयुक्त संगठन, मथुरा को पत्र वापस प्रेषित किया गया है, जिससे स्पष्ट है कि, मध्यस्थ पंचाट निर्णय दिनांकित 28.07.2016 का क्रियान्वयन हो चुका है। इस प्रकार प्रश्नगत मध्यस्थ निर्णय दिनांकित

28.07.2016 की पहले से ही जानकारी होने तथा इसके अनुपालन हेतु दिनांक 22.05.2017 को सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी, संयुक्त संगठन, मथुरा को मौजूदा आपत्तिकर्ता द्वारा पत्र भेजने तथा सक्षम अधिकारी/विशेष भूमि अध्याप्ति अधिकारी, संयुक्त संगठन, मथुरा के पत्रावली पर मौजूद पत्र दिनांकित 31.05.2017 एवं गणना प्रपत्र के अवलोकन से स्पष्ट है कि, मध्यस्थ के पंचाट निर्णय दिनांक 28.07.2016 का क्रियान्वयन हो चुका है, अतः मध्यस्थ के पंचाट निर्णय दिनांकित 28.07.2016 का दिनांक 31.05.2017 से पूर्व अनुपालन हो जाने के कारण दिनांक 01.11.2017 को भारतीय राष्ट्रीय राजमार्ग प्राधिकरण द्वारा मध्यस्थ निर्णय दिनांकित 28.07.2016 के विरुद्ध प्रस्तुत मौजूदा आपत्ति अंतर्गत धारा 34 मध्यस्थ सुलह अधिनियम 1996 कानूनन अपोषणीय हो जाती है, अतः मौजूदा आपत्ति अंतर्गत धारा 34 मध्यस्थ सुलह अधिनियम 1996 द्वारा, भारतीय राष्ट्रीय राजमार्ग प्राधिकरण द्वारा परियोजना निदेशक, सी०एम०यू० मथुरा, फरीदाबाद, हरियाणा कानूनन पोषणीय न होने के कारण निरस्त होने योग्य है।

आदेश

आपत्तिकर्ता भारतीय राष्ट्रीय राजमार्ग प्राधिकरण की आपत्ति कानूनन पोषणीय न होने के कारण निरस्त की जाती है।

पत्रावली नियमानुसार अभिलेखागार प्रेषित हो।"

13. What emerges from the order of the Learned District Judge is that the appellant was fully aware of the contents of the arbitral award dated July 28, 2016 and had acted on it, thereby demonstrating a practical acknowledgement of the arbitral award. In view of the award dated July 28, 2016, the Appellant through its letter dated May 22, 2017 asked the Special Land Acquisition officer to calculate the compensation amount and publish a supplementary award. In compliance of the same, the Competent Authority that is the Special Land Acquisition Officer calculated the amount of compensation to be paid and sent it to the Appellant on May 31, 2017. What is evident is that, the Appellant, even despite the non-receipt of a signed copy of the arbitral award dated July 28, 2016 accepted the same and acted upon it. Therefore, the appellant cannot now evade the consequences by exploiting a procedural technicality regarding the non-receipt of a signed copy. It is crucial to interpret Section 31(5) of the Arbitration Act in a matter that aligns with the Arbitration Act's overarching goals of promoting fairness and expeditious dispute resolution.

14. A literal interpretation, which ignores the practical reality that the party was aware of the arbitral award and acted upon it, would be contrary to the spirit of the Arbitration Act. This was aptly summarized by the Bombay High Court in ***Akola Janta (supra)*** when it remarked that a narrow view of Section 31(5) of the Arbitration Act would defeat the Arbitration Act's purpose if it allowed a party to delay proceedings unjustly by claiming non-receipt of a signed copy despite having knowledge of the award's contents.

15. In ***Bhola Prasad (supra)***, the High Court of Chhattisgarh while dealing with a case wherein the signed copy of the award was not delivered to the appellant therein in accordance with Section 31(5) of the Arbitration Act, held that the Court under Section 34(2) of the Arbitration Act was justified in dismissing the application as time barred since the appellant therein despite non delivery of the signed copy of the arbitral award was aware of its contents. Relevant paragraph is extracted herein:

"21. True, in the instant case, the Appellant had not received or was not delivered signed copy of the award as contained in Section 31(5) of the Arbitration Act, but, when Respondent 1 moved the application before Respondent 2

for enhancement of the compensation on the basis of the arbitral award dated 7.3.2018 the Appellant became aware of passing of the arbitral award and on 20.1.2019 on which he got legal opinion from the Advocate he became aware that he had to file an appeal/objection against the arbitral award. Meaning thereby, on 20.1.2019 itself, the Appellant was very well aware that he had to prefer an appeal/objection against the arbitral award. True, as per the provisions of Section 31(5) of the Arbitration Act, it is necessary to deliver a signed copy of the arbitral award to each of the parties after passing of the arbitral award, but, in the instant case, it has not been done so by the Arbitrator. This Court is of the view that provision of delivery of a signed copy of the arbitral award to each of the parties to the proceeding is meant for the purpose that the parties should aware of the contents of the award passed and if any of them has grievance, he can proceed further in accordance with law. As observed earlier, the Appellant had already become aware of the award when Respondent 1 moved the application before Respondent 2 for enhancement of the compensation on the basis of arbitral award dated 7.3.2018 and a legal opinion on this had also been obtained by the Appellant from the Advocate on 20.1.2019. Therefore, mere non-delivery of a signed copy of the award as contained in Section 31(5) of the Arbitration Act does not create any prejudice to the Appellant. Accordingly, in my considered view, the District Judge has rightly rejected the appeal/application moved under Section 34(2) of the Arbitration Act on the ground of limitation."

16. A party which has knowledge of the contents of an arbitral award, understands its implications, and begins to act upon it demonstrates practical acknowledgment of the arbitral award. This behaviour effectively nullifies any subsequent claims of non-receipt of a signed copy, as the party has already engaged with the award substantively. Courts have often observed that practical engagement with an arbitral award signifies awareness, which should trigger the timelines for any further legal action. The emphasis on acting upon the award is crucial. For instance, if a party begins to comply with the award's directives or uses the award's findings in subsequent actions, it indicates a de facto acceptance of the award. Such actions provide clear evidence that the party has understood and accepted the award's contents, thus making any later claims of non-receipt appear disingenuous.

17. The doctrine of estoppel is vital in maintaining procedural fairness and integrity within the arbitration process. Estoppel prevents a party from taking inconsistent positions that would harm the opposing party or undermine the legal process's credibility. In arbitration, this doctrine ensures that a party cannot claim ignorance or non-receipt of an award after having acted upon it. Estoppel operates to uphold fairness by ensuring that parties cannot benefit from their own wrongdoing or negligence. If a party, aware of the award, delays raising objections or seeks to take advantage of procedural nuances to avoid compliance, estoppel can prevent such tactics. This doctrine aligns with the fundamental principles of justice and equity, ensuring that parties engage with the arbitration process honestly and transparently.

18. Courts have often highlighted that a purely literal interpretation, ignoring

the practical realities and broader legislative objectives, can lead to unjust outcomes. A strict literal interpretation could enable parties to delay or obstruct the arbitration process by claiming non-receipt of a signed copy despite being aware of the award's contents and having acted upon it. The legislative intent behind Section 31(5) of the Arbitration Act is to ensure that parties are adequately informed about the award to take necessary legal actions within prescribed timelines. Therefore, an interpretation that considers the party's actual awareness and actions, even if a signed copy was not formally received, aligns better with the legislative intent and the principles of justice and equity.

19. The Learned District Judge, Mathura, was justified in dismissing the appellant's application under Section 34 of the Arbitration Act as time-barred. The appellant's awareness of the award and its subsequent actions negate the claim of non-receipt of a signed copy. The principle of estoppel further prevents the appellant from contradicting their previous acknowledgment of the award. A balanced interpretation of Section 31(5) of the Arbitration Act supports the Learned District Judge's decision, ensuring procedural fairness and upholding the Arbitration Act's objectives of expeditious dispute resolution. The appellant's claim of patent illegality in the Learned District Judge's judgment lacks substance. The decision to dismiss the Section 34 application as time-barred was grounded in the appellant's evident awareness of the award and their subsequent actions.

20. In light of the same, this Court finds no reason to interfere with the impugned judgment and order dated November 16, 2019 passed by the Learned District Judge, Mathura under Section 34 of the Arbitration Act. The arbitral award dated July 28, 2016 having attained finality, cannot be questioned at this stage.

21. Accordingly, the instant application is dismissed. There shall be no order as to the costs.

(2024) 5 ILRA 2504
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2024

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

First Appeal from Order No. 2664 of 2016

Saroj ...Appellant
Versus
M/S Mangla Oil Carier Pvt. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Vikash Singh, Nigamendra Shukla

Counsel for the Respondents:
Anand Pati Tiwari, Bhartednu Pathak

A. Insurance Law – Compensation - The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. However, the Court hastened to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted. (Para 4)

B. Words and Phrases – '*income*' - If the dictionary meaning of the word "income" is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income tax or professional tax although some elements

thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute. (Para 4)

Appellant submitted that a very meager amount has been awarded by the claims tribunal. The claimant has fully proved his income by producing cogent evidence and the claims tribunal has erred in awarding compensation accepting Rs. 4,153/-as monthly income of the claimant and amount of Rs. 1,765/-received by the claimant under the head of H.R.A. was deducted by the tribunal from the income of the deceased. The claims tribunal has erred in deducting amount of H.R.A., whereas the house rent allowance includes in the income of the claimant.

C. In assessing the compensation payable the settled principles need to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. The award of compensation must cover among others, the following aspects:

(i) Pain, suffering and trauma resulting from the accident;
(ii) Loss of income including future income;
(iii) The inability of the victim to lead a normal life together with its amenities;
(iv) Medical expenses including those that the victim may be required to undertake in future; and
(v) Loss of expectation of life. (Para 5)

Compensation can be granted for disability as well as for loss of future earnings for the first head relates to the impairment of a person's capacity while the other relates to the sphere of pain and suffering and loss of enjoyment of life by the person himself.

The benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals. In the case of a self-employed person, an addition of 40% of the established income should be made where the age of the victim at the time of the accident was below 40 years. (Para 5)

The claimant had received grievous injuries in the accident and has become permanent disable. As per disability certificate there was disability of 45%. So far as income of the claimant-injured is concerned, the claims tribunal has erred in excluding the amount received towards H.R.A. from the monthly income of the injured. The amount of Rs. 1,765/-received by claimant under the head of H.R.A. is included in his monthly income for the purposes to calculate the just compensation. The claimant-appellant is also entitled for 50% future prospects. (Para 8)

Appeal allowed. Compensation awarded by the claims tribunal has been modified and enhanced. (E-4)

Precedent followed:

1. National Insurance Co. Ltd. Vs Indira Srivastava, 2008 (2) SCC 763 (Para 4)

2. Jagdish Vs Mohan & ors., 2018 (2) T.A.C. 14 (Para 5)

Present appeal challenges the judgment and award dated 18.04.2016, passed by Additional District Judge, Motor Accident Claims Tribunal, Ghaziabad in M.A.C.P. No. 380 of 2013 by which compensation of Rs.6,10,068/- along with 6% interest has been awarded in favour of claimant-appellant on account of injuries received by him.

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. List has been revised.

2. Heard Sri Nigamendra Shukla, learned counsel for the appellant and Sri Bhartendu Pathak, learned counsel for the respondent no.3 and perused the record. No one is present on behalf of respondent nos. 1 and 2, who are owner and driver of vehicle.

3. This first appeal from order has been filed by the appellant against the

judgement and award dated 18.04.2016 passed by Additional District Judge, Court No.- 13/ Motor Accident Claims Tribunal, Ghaziabad in M.A.C.P. No. 380 of 2013 (Sanoj Kumar Vs. M/s Mangala Oil Carrier Pvt. Ltd. and others) by which compensation of Rs. 6,10,068/- along with 6% interest has been awarded in favour of claimant-appellant on account of injuries received by him.

4. It is submitted by learned counsel for the appellant that a very meager amount has been awarded by the claims tribunal. The claimant has fully proved his income by producing cogent evidence and the claims tribunal has erred in awarding compensation accepting Rs. 4,153/- as monthly income of the claimant and amount of Rs. 1,765/- received by the claimant under the head of H.R.A. was deducted by the tribunal from the income of the deceased. The claims tribunal has erred in deducting amount of H.R.A., whereas the house rent allowance includes in the income of the claimant. Learned counsel for the appellant has placed reliance on the judgement of Hon'ble Apex Court in the case of ***National Insurance Co. Ltd. Vs. Indira Srivastava*** reported in ***2008 (2) SCC 763***. The relevant paragraph nos. 19 and 21 are reproduced hereinbelow:-

"19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

21. If the dictionary meaning of the word "income" is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income tax or professional tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute."

5. It is further submitted that nothing has been awarded towards future prospects, wheres, the claimant-appellant is entitled for 50% future prospects as the claimant was in permanent job and was below 40 years at the time of accident in view of law laid down by Hon'ble Apex Court in the case of ***Jagdish Vs. Mohan and others*** reported in ***2018 (2) T.A.C. 14***. The relevant paragraph nos.8, 9 and 10 are reproduced herein below:-

"8 In assessing the compensation payable the settled principles need to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. The award of compensation must cover among others, the following aspects:

(i) Pain, suffering and trauma resulting from the accident;

(ii) Loss of income including future income;

(iii) The inability of the victim to lead a normal life together with its amenities;

(iv) Medical expenses including those that the victim may be required to undertake in future; and

(v) Loss of expectation of life.

In Sri Laxman @ Laxman Mourya v Divisional Manager, Oriental Insurance Co. Ltd., this Court held:

"The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only 2011 (12) SCALE 658 for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident." In K Suresh v New India Assurance Company Ltd., this Court adverted to the earlier judgments in Ramesh Chandra v Randhir Singh and B Kothandapani v Tamil Nadu State Transport Corporation Limited. The Court held that compensation can be granted for disability as well as for loss of future earnings for the first head relates to the impairment of a person's capacity while the other relates to the sphere of pain and suffering and loss of enjoyment of life by the person himself. In Govind Yadav v New India Insurance Company Limited , this Court adverted to the earlier decisions in R D Hattangadi v Pest Control (India) (Pvt) Ltd., Nizam's Institute of Medeical Sciences v Prasanth S Dhananka, Reshma Kumari v Madam Mohan, Arvind Kumar Mishra v New India Assurance Company, and Raj Kumar v Ajay Kumar and held thus:

"18. In our view, the principles laid down in Arvind Kumar Mishra v. New India Assurance3 Co. Ltd. and Raj Kumar v. Ajay Kumar must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident." (Id at page 693) (2012)12SCC274 (1990) 3 SCC 723 (2011) 6 SCC 420 (2011) 10 SCC 683 (1995) 1 SCC 551 (2009) 6 SCC 1 (2009) 13 SCC 422 (2010) 10 SCC 254 (2011) 1 SCC 343 These principles were reiterated in a judgment of this Court in Subulaxmi v MD Tamil Nadu State Transport Corporation12 delivered by one of us, Justice Dipak Misra (as the learned Chief Justice then was).

9 Having regard to these principles, it would be now appropriate to assess the case of the appellant for enhancement of compensation. The accident took place on 24 November 2011. The appellant was a skilled carpenter and self-employed. The claim of the appellant that his earnings were Rs. 6,000/- per month cannot be discarded. This claim cannot be regarded as being unreasonable or contrary to a realistic assessment of the situation on the date of the accident.

10 In the judgment of the Constitution Bench in Pranay Sethi (supra), this Court has held that the benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals. In the case of a self-employed person, an addition of 40 per cent of the established income should be made where the age of the victim at the time of the accident was below 40 years. Hence, in the present case, the appellant would be entitled to an enhancement of Rs. 2400/- towards loss of future prospects."

6. On the other hand, learned counsel appearing on behalf of respondent-Insurance Company submits that the compensation awarded by the claims

tribunal is almost just and proper and no ground for enhancement is made out. Learned counsel for the Insurance Company submits that since the age of claimant was 33 years at the time of accident, the appropriate multiplier would be 16 and the claims tribunal has erred in applying the multiplier of 17, however he has not disputed that the claimant is entitled to receive 50% towards future prospects. It is further submitted that the claims tribunal has recorded the finding that the vehicle was plied in violation of terms and conditions of Insurance Policy as the permit of the vehicle was not filed either by claimant or by owner of the vehicle and right of recovery has rightly been given to the Insurance Company. If the compensation is enhanced, then respondent-Insurance Company may be permitted to recover the same from the owner of the vehicle.

7. Considered the rival submissions of learned counsel for the parties and perused the record.

8. As per the case of the claimant, the claimant had received grievous injuries in the accident and has become permanent disable. As per disability certificate there was disability of 45%. So far as income of the claimant-injured is concerned, the claims tribunal has erred in excluding the amount received towards H.R.A. from the monthly income of the injured. The amount of Rs. 1,765/- received by claimant under the head of H.R.A. is included in his monthly income for the purposes to calculate the just compensation. The claimant-appellant is also entitled for 50% future prospects in view of law laid down by Hon'ble Apex Court in the case of ***Jagdish (supra).***

9. In view of above, the appeal preferred by claimant-appellant is partly allowed. The compensation awarded by the claims tribunal is reassessed as under:-

i. Monthly Income= Rs. 4,153/- + Rs. 1765/- = Rs. 5,918/-

ii. Annual Income= Rs. 5,918 x 12= Rs. 71,016/-

iii. Future prospects (50%)= Rs. 35,508/-

iv. Total Annual Income= Rs. 71,016/- + Rs. 35,508/- = Rs. 1,06,524/-

v. Loss of income (45%) = Rs. 47,935.8 /- = Rs, 47,936/-

vi. Multiplier applicable(16) = Rs. 47,936/- x 16 = Rs. 7,66,976/-

vii. Medical expenses = Rs.2,21,823/-

viii. Pain and suffering = Rs. 7,000/-

ix. Total compensation = Rs. 7,66,976/- + Rs. 2,21,823/- + Rs. 7,000 /- = Rs. 9,95,799/-

10. In view of above the judgment and award of the claims tribunal is modified and compensation is enhanced from Rs. 6,10,068/- to Rs. 9,95,799/-.

11. The claimant-appellant is also entitled for 6% interest on the enhanced amount from the date of judgement and award dated 18.04.2016.

12. The respondent-Insurance Company is directed to pay the enhanced amount along with interest to the claimant within a period of two months from today. In case of default in depositing the amount as indicated above, the Insurance Company is liable to pay interest @ 10% on the enhanced amount till payment.

13. However, the respondent-Insurance Company is at liberty to recover the deposited enhanced amount from the respondent no.1, who is owner of the offending vehicle.

14. No order as to cost.

(2024) 5 ILRA 2509
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

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

Habeas Corpus Writ Petition No. 146 of 2024

Shiv Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Akshay Raghuvanshi, Pulkit Srivastava, Ritesh Kumar Singh, Shivendra Singh

Counsel for the Respondent:
G.A.

A. Family Law – Child custody - The writ of habeas corpus, as is legally well settled, is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown. (Para 9)

The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of *parens patriae* jurisdiction and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor. (Para 10, 14)

B. In cases of child custody, a petition seeking a writ of habeas corpus may be entertained in a case where it is established that the custody of the child is illegal or without authority. There may also be cases where the custody of the child has been forcibly altered, which renders the present custody illegal, and in the said circumstance, the Court may be persuaded to issue a writ of habeas corpus. (Para 7, 8, 23)

In a child custody matter, a writ of habeas corpus would not be entertainable unless it is established that the detention of the minor child by the parent or others is illegal and without authority of law. (Para 23)

In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. (Para 19)

There is absolutely no material on record, which may suggest that the custody of the petitioner no.1 (corpus) was taken away by the respondent no.5, from the petitioner no.2, at any point of time. The question of the custody, therefore, being illegal, would not arise in the facts of the case. (Para 20)

In a case such as this, where the custody of the minor child is with his biological mother ever since birth and there is no material to suggest that the custody was altered illegally, at any point of time, it may be presumed that the custody of the child with his mother is not, prima facie, unlawful. (Para 21)

C. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate statutory forum. (Para 16, 24)

It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child. (Para 22)

Petitioners have not disputed the aforesaid legal and factual position, and the only grievance, sought to be raised, is w.r.t. a claim for visitation rights on behalf of the father. (Para 24, 25)

Petition dismissed. (E-4)

Precedent followed:

Master Prakhar @ Palash & anr. Vs St. of U.P. & ors., (2022) ILR 5 All 1459 (Para 7)

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

1. Heard Sri Akshay Raghuvanshi, learned counsel for the petitioners and Sri Pankaj Saxena, learned AGA-I appearing for the State-respondents.

2. Pleadings in the petition indicates that the respondent no.5, wife of the petitioner no.2, went back to her maternal home, on 10.08.2018, shortly after her marriage with the petitioner no.2, on 03.05.2018. The respondent no.5 is stated to have been pregnant at that point of time, and she was blessed with a baby boy on 11.01.2019.

3. It is submitted that during this period, the respondent no.5 throughout stayed at her maternal home, and the child was born during the period of her stay at her maternal home.

4. It has also been pleaded that the respondent no.5, after birth of the petitioner no.1 (corpus), stayed at her maternal home, and the child has been under her custody continuously.

5. A case is sought to be set up that the petitioner no.2, father of the petitioner no.1, attempted to meet his son on a number of occasions, but has not been permitted to do so by his father-in-law, respondent no.4.

6. Learned AGA-I pointed out that the petitioner no.2 is stated to have left her matrimonial home, in the month of August, 2018, and thereafter, the petitioner no.1 (corpus) was born on 11.01.2019, while the mother was at her maternal home, and since then the infant is continuously under the custody of her mother; accordingly, the custody of the petitioner no.1 (corpus), a minor child, with his mother, cannot, prima facie, be stated to be illegal and the present petition seeking a writ of habeas corpus would not be entertainable.

7. Counsel for the petitioner has sought to controvert the aforesaid assertion by placing reliance upon a decision in **Master Prakhar @ Palash and another Vs. State of UP and others**[1], to contend that in a child custody matter, a petition filed by a parent, seeking a writ of habeas corpus would be entertainable.

8. There can be no quarrel with the aforesaid proposition that in cases of child custody, a petition seeking a writ of habeas corpus may be entertained in a case where it is established that the custody of the child is illegal or without authority. There may also be cases where the custody of the child has been forcibly altered, which renders the present custody illegal, and in the said circumstance, the Court may be persuaded to issue a writ of habeas corpus.

9. The writ of habeas corpus, as is legally well settled, is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown.

10. The principal duty of the Court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The principle is well settled that in such matters the welfare of the child is of paramount consideration.

11. In child custody matters, habeas corpus proceedings may not be utilized to justify or examine the legality of the custody. The power of the Court in granting the writ is qualified only in cases where detention of a minor is by a person not entitled to his/her legal custody. For the exigence of a writ, it would be required to be proved that the detention of the minor child is illegal and without any authority of law, and that the welfare of the child requires that the present custody should be changed.

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

13. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

14. The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of parens patriae jurisdiction and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

15. In a given case, while dealing with a petition for issuance of a writ of habeas corpus concerning a minor child, directions may be issued for return of the child or the Court may decline to change the custody of the child, keeping in view all the attending facts and circumstances and taking into view the totality of the facts and circumstances of the case brought before the Court; the welfare of the child being the paramount consideration.

16. In a case where facts are disputed and a detailed inquiry is required, the Court may decline to exercise its extraordinary jurisdiction and may direct

the parties to approach the appropriate legal forum.

17. In the facts of the present case, it is undisputed that the respondent no.5 had left her matrimonial home soon after her marriage, and the petitioner no.1 (corpus) was born during the period of her stay at her maternal home on 11.01.2019.

18. It is also not disputed that the petitioner (corpus) has throughout been under the custody of his mother, who has continuously stayed at her maternal home, and is presently, also, staying there.

19. In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful.

20. There is absolutely no material on record, which may suggest that the custody of the petitioner no.1 (corpus) was taken away by the respondent no.5, from the petitioner no.2, at any point of time. The question of the custody, therefore, being illegal, would not arise in the facts of the case.

21. In a case such as this, where the custody of the minor child is with his biological mother ever since birth and there is no material to suggest that the custody was altered illegally, at any point of time, it may be presumed that the custody of the child with his mother is not, prima facie, unlawful.

22. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

23. In a child custody matter, a writ of habeas corpus would not be entertainable unless it is established that the detention of the minor child by the parent or others is illegal and without authority of law.

24. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate statutory forum.

25. Counsel for the petitioners has not disputed the aforesaid legal and factual position, and the only grievance, sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

26. The petition stands **dismissed** accordingly.

27. Needless to say that the dismissal of the writ petition would not preclude the petitioner no.2 from agitating his right with regard to guardianship and custody, and also seeking visitation rights, by initiating appropriate proceedings before the proper statutory forum.

(2024) 5 ILRA 2513
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.05.2024

BEFORE

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

Habeas Corpus Writ Petition No. 797 of 2023

Ayra Khan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Akhilesh Kumar Tiwari

Counsel for the Respondent:
G.A.

A. Family Law – Guardians and Wards Act, 1890- Section 17-
Mulla, Principles of Mahomedan Law, 22nd Edition- Chapter XVIII - A writ of habeas corpus is prerogative process for securing the liberty of the subject by affording effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody would have to be treated as equivalent to illegal detention for the purpose of granting a writ directing custody of the minor child. (Para 10)

In a petition seeking issuance of a writ of habeas corpus relating to the custody of a minor child, the principle duty of the Court would be to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child be handed over to the care and custody of some other person. In doing so, the paramount consideration would undoubtedly be the welfare of the child and the role of the High Court in examining such cases would have to be on the touchstone of principles of *parens patriae* jurisdiction. (Para 16)

Habeas corpus proceedings would not ordinarily lie to justify or examine the legality of the custody of the minor child, and the question in this regard would have to be addressed by the Court in exercise of its discretionary jurisdiction. The prerogative writ of habeas corpus, is in the nature of an extraordinary remedy, and is to be issued taking into consideration, the circumstances of a particular case. (Para 17)

In child custody matters, the remedy ordinarily lies under the statutory law, or the personal law, as applicable in the facts of the case; however, in cases which justify the exercise of the extraordinary discretionary jurisdiction u/Article 226, a writ of habeas corpus would be issued where it is demonstrated that the detention of minor child, is illegal or without any authority of law. (Para 18)

In the present case, parties have not disputed the legal position that in the case of a female child of 2-1/2 years, her biological mother would be legally entitled to her custody as per the personal law. The detention of the petitioner no. 1 (corpus) by the respondent no. 5 (grandmother), in the said circumstances, cannot, prima facie, be legally supported. (Para 22)

In the entirety of the facts and circumstances of the case, it would be in the paramount interest of the petitioner no. 1 (corpus) that the interim arrangement, as per terms of the previous order dated 16.04.2024, permitting the petitioner-corpus to go along with the petitioner no. 2, her biological mother, be continued. (Para 23)

B. The provisions of the personal law are to be applied consistently with the provisions of the GWA, and insofar as the question of custody is concerned, the rights of parties in the present case, are to be governed by the personal law. Section 17 of the GWA relates to matters to be considered by the court in appointing a guardian, and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so

consistently with the law to which the minor is subject, keeping in view the welfare of a minor. (Para 11)

The matters relating to 'Guardianship of Person and Property' are provided under Chapter XVIII of Principles of Mahomedan Law and Part-A thereof pertains to 'Appointment of Guardians'. In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA. (Para 12)

Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor. (Para 13)

The subject matter relating to 'Guardianship of a Person of a Minor' is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and Sections 352 thereof, which relates to the right of mother to custody of infant children states that the mother is entitled to custody (hizanat) of her male child until he has completed the age of seven years. (Para 14, 15)

Petition disposed of. (E-4)

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

1. Heard Sri Akhilesh Kumar Tiwari, learned counsel for the petitioners, Ms. Harshita Rani, learned A.G.A. appearing for the State-respondents and Sri Faizan Siddiqui, learned counsel appearing for the respondent nos. 4 and 5.

2. The present petition has been filed with the assertion that the petitioner no. 2, mother of the petitioner no. 1 (corpus), was ousted from her matrimonial home, on 08.09.2023, by her husband, respondent no. 4, and the petitioner no. 1 (corpus), minor daughter, who at that point of time was less than two years, was detained.

3. It has been further asserted that the respondent no. 4 had thereafter gone out of the country and the petitioner no. 1 (corpus) was being illegally detained by the respondent No. 5, mother-in-law of the petitioner no. 2.

4. Pursuant to the rule nisi issued earlier, the petitioner no. 1 (corpus), was produced before the Court, on the previous date i.e. 16.04.2024, by the State authorities, along with the respondent no. 5.

5. Taking into consideration the age of the petitioner-corpus and that the petitioner no. 2 being her biological mother would be legally entitled to have her custody, by way of an interim arrangement, and as agreed by counsel for the parties, the petitioner no. 1 (corpus) was permitted to go along with the petitioner no. 2.

6. Today, upon the case case being taken up, it has been pointed out that the petitioner no. 2 is present in Court, along with the petitioner no. 1 (corpus).

7. The petitioner no. 1 (corpus), and the petitioner no. 2 have been identified Sri Akhilesh Kumar Tiwari, learned counsel.

8. Sri Faizan Siddiqui, learned counsel appearing for the respondent nos. 4 and 5 has stated that the respondent no. 4 is out of the country, and that there are no instructions as to when he would return.

9. Learned A.G.A., on the basis of an enquiry made from the petitioner no. 2, in Court, submits that she has stated that the petitioner no. 1 (corpus) is being taken care

of by her, since the previous date, when the corpus was permitted to go along with her in terms of the order passed by the Court by way of an interim arrangement. She has further stated that she has sufficient means to take good care of her minor child, petitioner no. 1 (corpus).

10. A writ of habeas corpus is prerogative process for securing the liberty of the subject by affording effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody would have to be treated as equivalent to illegal detention for the purpose of granting a writ directing custody of the minor child.

11. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 18901. Section 17 of the GWA relates to matters to be considered by the court in appointing a guardian, and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA, and insofar as the question of custody is concerned, the rights of parties in the present case, are to be governed by the personal law.

12. The matters relating to 'Guardianship of Person and Property' are provided under Chapter XVIII of Principles of Mahomedan Law2 and Part-A thereof pertains to 'Appointment of Guardians'. In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA.

13. Further, Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

14. The subject matter relating to 'Guardianship of a Person of a Minor' is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and Sections 352 thereof, which relates to the right of mother to custody of infant children, is set out hereinbelow:-

"**352. Right of mother to custody of infant children**.—The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f).”

15. It would be seen that in terms of Section 352, abovementioned, the mother is entitled to custody (hizanat) of her male child until he has completed the age of seven years.

16. In a petition seeking issuance of a writ of habeas corpus relating to the custody of a minor child, the principle duty of the Court would be to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that the present custody should be

changed and the child be handed over to the care and custody of some other person. In doing so, the paramount consideration would undoubtedly be the welfare of the child and the role of the High Court in examining such cases would have to be on the touchstone of principles of parens patriae jurisdiction.

17. Habeas corpus proceedings would not ordinarily lie to justify or examine the legality of the custody of the minor child, and the question in this regard would have to be addressed by the Court in exercise of its discretionary jurisdiction. The prerogative writ of habeas corpus, is in the nature of an extraordinary remedy, and is to be issued taking into consideration, the circumstances of a particular case.

18. In child custody matters, the remedy ordinarily lies under the statutory law, or the personal law, as applicable in the facts of the case; however, in cases which justify the exercise of the extraordinary discretionary jurisdiction under Article 226, a writ of habeas corpus would be issued where it is demonstrated that the detention of minor child, is illegal or without any authority of law.

19. The facts regarding which there is no dispute, and which were noticed in the previous order, are that the petitioner no. 1 (corpus) is a minor girl of age about 2-1/2 years. The respondent no. 4, father of the petitioner no. 1 (corpus) is presently living abroad, where he is stated to be having a job, and there is no indication of the time frame within which he is to return.

20. The petitioner no. 2 is stated to have left her matrimonial home due to some differences with her husband and her in-laws, and the petitioner-corpus was stated to be with the respondent no. 5, her grand mother, an elderly lady.

21. Counsel for the parties agree that looking to the age of the petitioner-corpus, it may be difficult to ascertain her wishes, and the questions with regard to her custodial rights would have to be examined on the principles of parens patriae jurisdiction by seeking to ascertain what would be in the best interest of the corpus.

22. Counsel for the parties have not disputed the legal position that in the case of a female child of 2-1/2 years, her biological mother would be legally entitled to her custody as per the personal law. The detention of the petitioner no. 1 (corpus) by the respondent no. 5, in the said circumstances, cannot, prima facie, be legally supported.

23. It has, also, not been disputed by counsel for the parties that in the entirety of the facts and circumstances of the case, it would be in the paramount interest of the petitioner no. 1 (corpus) that the interim arrangement, as per terms of the previous order dated 16.04.2024, permitting the petitioner-corpus to go along with the petitioner no. 2, her biological mother, be continued.

24. Having regard to the aforesaid, the rule issued earlier, is made absolute.

25. The arrangement, in terms of which the petitioner no. 1 (corpus) was permitted to go along with the petitioner no. 2, her mother, would continue.

26. Counsel for the parties have stated that the parties would continue to explore the possibilities of reconciliation.

27. It is made clear that in case of any dispute with regard to guardianship or custody, or any claim with regard to visitation rights, it would be open to the parties concerned to take recourse to appropriate statutory remedy.

28. The petition stands **disposed of**.

(2024) 5 ILRA 2517
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2024 & 20.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 271 of 2024

Faizan Khan ...Petitioner
Versus
Adhikshak Janpad/Kendriya Karagar, Bareilly & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandrakesh Mishra, Sri Daya Shankar Mishra (Sr. Advocate)

Counsel for the Respondent:
A.S.G.I., Sri Alok Ranjan Mishra, G.A.

A. Criminal Law – Detention – The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 - Section 3(1) - The competent authority under COFEPOSA and PIT NDPS Act is required to consider the representation submitted by the detenue which is an additional right to his right to make representation to the State Government and Central Government. (Para 15)

The detention of the petitioner is based on two F.I.Rs. i.e. C.C. No. 65 of 2021 and 1091 of 2021. Admittedly, the petitioner after facing full length trial stand acquitted in first F.I.R. i.e. C.C. No. 65 of 2021 vide judgment dated 09.06.2023 passed by Special Judge (NDPS Act)/Additional Sessions Judge, Bareilly and, therefore, this very base of this F.I.R. in both impugned orders stand vitiated. (Para 17A)

(1) In the impugned rejection order dated 12.3.2024, no reasons has been assigned for dealing with the judgment of acquittal of petitioner. On the face of it, this order is totally non speaking order as in one line it has been stated that the representation of the petitioner stand rejected. Even nothing has been stated in this order that any opportunity of hearing was granted to the petitioner before passing of this order.

(2) With regard to second F.I.R. i.e. Case Crime No. 1091 of 2021, it is admitted case of the prosecution that the petitioner was not named in the F.I.R. and his name surfaced on the disclosure of an accused who was arrested at the spot. Therefore, the petitioner was neither arrested at the spot by the police nor any recovery of narcotic drugs and psychotropic substances was effected from him. In the absence of the Court verdict holding him guilty of offence, impugned order of detention is very harsh.

B. Where the ground of detention were vague or based on stale event or there is delay in decision on the representation, the detention order can be set aside. (Para 16)

Fact which needs consideration is that Case Crime No. 65/2021 where the petitioner stands acquitted relates to 2021 and second and third F.I.R. also pertains to same year within short span of time. The petitioner surrendered on 12.1.2022 in F.I.R. No. 1091 of 2021 and in the intervening period he has not committed any new offence under the NDPS Act. Even the third F.I.R. i.e. Case Crime No. 28 of 2021 26.01.2021 which though not relied upon in the impugned orders is also of same District i.e. Bareilly. Therefore, from 2021 till 12th January 2024 when the detention period of the petitioner started, despite gap of three years, there was no fresh F.I.R. registered against the petitioners and this fact was not recorded in the rejection

order though a detailed representation was given by the petitioner. (Para 17B)

Grounds taken in the impugned orders that petitioner was hiding himself is apparently incorrect and this aspect is not at all considered while passing both the impugned orders as it is apparent that when his name surfaced in second F.I.R. i.e. Case Crime No. 1091 of 2021, the petitioner surrendered before the Special Judge, NDPS Act on 12.01.2022 and was again granted bail. (Para 17C)

When the petitioner was facing trial of Case Crime No. 65 of 2021 and on various dates, he regularly appeared before the Special Judge, NDPS Act, Bareilly where the prosecution evidence was recorded and then his statement u/s 313 Cr.P.C. was recorded and in between at least 13-14 dates were given. Therefore, (Para 17C)

C. When vital material or vital facts are withheld and not placed by the Sponsoring Authority before the Detaining Authority, it vitiate the procedure. Petitioner submits that admittedly in the instant case, till date the vital material relied upon by the Sponsoring Authority or by the Screening Authority had not been disclosed to the petitioner and, therefore, detention of the petitioner under PIT NDPS Act is illegal. (Para 14)

D. Right provided u/Article 22 (5) of the Constitution of India is a substantive right and, if there is violation of the same, the detention order is liable to be quashed. (Para 13)

Thus, it is apparent that the material forming basis of the opinion of the competent authority i.e. proposal of the Sponsoring Authority and recommendation of the Screening Authority, to pass impugned orders were never supplied to the petitioner and he has not been afforded proper opportunity of hearing and the impugned order of rejection is totally non speaking order w.r.t. the pleas raised by the petitioner. (Para 18)

E. It will be matter of trial whether confession recorded by the police of a co-accused while in police custody will be admissible against the co-accused i.e. petitioner when after his arrest, no recovery of narcotic drugs and psychotropic substances is effected. (Para 17A)

Accordingly, the impugned orders are set aside. The petitioner be released forthwith if he is not required in any other case on furnishing surety bond and personal bond. (Para 19)

Petition allowed. (E-4)

Precedent followed:

1. Smt. Icchu Devi Choraria Vs U.O.I.& ors., 1980 0 AIR (SC) 1983 (Para 13)

2. Mohinuddin Vs D.M., Beed & ors., 1987 0 AIR (SC) 1977 (Para 13)

3. Smt. Shalini Soni Vs U.O.I.& ors., 1981 0 AIR (SC) 431 (Para 13)

4. S. Gurdip Singh Vs U.O.I.& ors., 1981 0 AIR (SC) 362 (Para 13)

5. Sushanta Kumar Banik Vs St. of Tripura & ors., 2022 0 AIR (SC) 4715 (Para 14)

6. Kamleshkumar Ishwardas Patel Vs U.O.I.& ors., 1995 0 Supreme (SC) 538 (Para 15)

7. Kamalveer Singh Vs Adhikshak Janpad Karagar & ors., 2024 0 Supreme (All) 466 (Para 16)

8. Tofan Singh Vs St. of T. N., (2013) 16 SCC 31 (Para 17(A))

Present petition is to issue a writ in the nature of Habeas Corpus for quashing the order dated 22.07.2022 u/s 3 (1) of PIT NDPS Act and to release the petitioner from judicial custody.

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Heard Shri Daya Shankar Mishra, learned Senior Counsel assisted by Shri Chandrakesh Mishra, learned counsel

for the petitioner, Sri Alok Ranjan Mishra, learned counsel for the Union of India, learned A.G.A. for the State and perused the record.

2. In this petition is to issue a writ in the nature of Habeas Corpus for quashing the order dated 22.07.2022 under Provision 3 (1) of PIT NDPS Act and to release the petitioner from judicial custody.

3. Brief facts of this case are that the petitioner Faizan Khan @ Raja Babu was arrested in F.I.R. No. 65 of 2021 registered under Section 8/ 21 of NDPS Act, Police Station- Qila, District- Bareilly on 01.03.2021. The petitioner was granted bail on 04.06.2021 and was released from custody.

4. As per the first additional affidavit filed on behalf of the petitioner, vide judgement dated 09.06.2023 passed by the Special Judge, NDPS Act/ Additional Sessions, Court No.8, Bareilly after a full length trial, the petitioner was acquitted of the charge.

5. It is further stated that later on the petitioner was nominated as an accused in F.I.R. No. 1091 of 2021 registered on 27.11.2021, on the disclosure of a co-accused. The petitioner was neither named in the F.I.R. nor arrested at the spot and, therefore, no recovery of either Narcotic Drugs and Psychotropic Substances was affected from him. It is stated that the petitioner later on surrendered before the Court on 18.01.2022 and, thereafter, he was granted bail on 04.03.2022. It is further stated that the charge sheet has been submitted and case is pending trial and no adverse order has been passed against the petitioner.

6. It is further stated that the impugned order dated 22.07.2022 is passed invoking the provisions of PIT NDPS Act is based upon the aforesaid two FIRs Nos. 65 of 2021 and 1091 of 2021. It is submitted that copy of the order was never served upon the petitioner, who was released from the custody on 4.3.2022 in the second F.I.R., till 12.01.2024. It is submitted that intervening period against the petitioner neither any proceedings under Sections 82/ 83 of the Cr.P.C. was pending nor any such proceeding is pending before the trial court where the second F.I.R. is pending. It is also submitted that the petitioner, who was on bail in the first F.I.R. No. 65 of 2021, where he has already been acquitted vide judgement dated 09.06.2023, was regularly appearing and his statement under Section 313 Cr.P.C. was recorded, well within the knowledge of the prosecuting agency as per dates described in paragraph no.11 of the petition. The learned counsel for the petitioner submitted that it has been wrongly noticed in the impugned order that the petitioner was absconding though he was facing the trial and appearing before the court in the first F.I.R. It is submitted that while passing impugned order on 06.03.2024. It is stated that the order dated 22.07.2022 is served upon the petitioner on 12.01.2024 when he was arrested and lodged in the District Jail Bareilly on 12.01.2024 and, therefore, he will remain in preventive detention for one year w.e.f. 12.01.2024 till 11.01.2025. Learned counsel for the petitioner has assailed that both these orders by way of filing this writ petition.

7. Learned counsel for the petitioner submits that one of the ground taken is that the opinion formed by the counseling authority for sending the proposal to the screening committee; the report prepared by the screening committee and the material relied upon both the

counseling authority and screening committee were never supplied to the petitioner and, therefore, he was denied his right for making an effective representation against the impugned orders.

8. Learned counsel for the petitioner submits that after a gap of two months vide order dated 12.03.2024, the representation filed by the petitioner stands rejected by the Deputy Secretary to Government of India, Department of Revenue PIT NDPS Division by passing a totally non speaking order and without assigning any reasons and the grounds taken by the petitioner in his representation.

9. Two separate replies by the learned counsel for the State-respondent nos. 1 & 4 as well as learned counsel for the Union of India-respondent nos. 2 & 3 are filed by way of affidavit. In the reply filed by State, it is stated that the petitioner is lodged in Central Jail Bareilly in compliance of the order passed by the Competent Authority under Provision of PIT NDPS Act. It is submitted that representation of the petitioner stands rejected by the Competent Authority.

10. In reply filed by the Union of India, the details of F.I.R. No. 65 of 2021 is given. Wherein, it was admitted that the petitioner was granted bail by the trial court. Learned counsel for the respondent nos. 2 & 3 could not dispute that the petitioner stands acquitted in this F.I.R. after facing full length trial. With regard to the second F.I.R. No. 1091 of 2021, it is stated that persons, namely, Parvez Alam, Moinuddin, Avinash and Babu Gora @ Ansaar along with Shaan Khan were arrested and they nominated the petitioner as their associate. However, it is admitted that the petitioner was not arrested at the spot and he surrendered before the Special Judge, NDPS Act, Bareilly on 18.01.2022 and was later on released on bail. However, it is submitted that subsequently the petitioner was nominated in one more F.I.R., the details of which are placed on record vide second supplementary affidavit filed by the petitioner i.e. F.I.R. No.0028 of 2021 dated 26.01.2021 under Section 8/ 21/ 29 of NDPS Act, 1985, Police Station Qila, District Bareilly. In this F.I.R., three persons, namely, Parvez Alam, Moinuddin and Avinash were arrested and they informed that they have purchased ten small packets of 10 gms/ 20 gms of smack from Sahib Raza, Kadir and Faizan (present petitioner) for the purpose of selling to general public.

11. However, it is submitted that the petitioner was not arrested in this F.I.R. and he is on bail. It is further submitted that report dated 20.06.2022 of counseling authority and NCB Zonal Unit, Lucknow was received by Ministry on 04.07.2022, which was sent to Screening Committee on 04.07.2022 Screening Committee recommended the proposal for preventive detention under PIT NDPS Act and accordingly the detention order dated 22.07.2022 was passed under Section 3 (1) of PIT NDPS Act by the Detaining Authority that the Joint Secretary to Government of India. It is also submitted that the petitioner was concealing himself from the process of law and surrendered on 12.01.2024 and the order became operative from the date of said order for one year. It is submitted that all the grounds of detention was duly served upon the petitioner as he was found involved under the NDPS Act. It is also submitted that the representation of the petitioner after due consideration stands rejected by the Competent Authority on 12.03.2024 by

following due process of law and the same stands communicated to the petitioner.

12. In reply, counsel for the petitioner submits that mere mentioning of ground in the order of detention do not comply with the mandate of providing the material on the basis of which, the Sponsoring Authority has prepared the proposal and Screening Authority has submitted a report to the competent authority. In the absence of supplying the same, the representation filed by the petitioner in which this ground is specifically taken, is rejected by passing a non speaking order as mere formalities and do not protect the legal right of the petitioner.

13. Counsel for the petitioner has referred to the decision in **Smt. Icchu Devi Choraria Vs. Union of India and others, 1980 0 AIR (SC) 1983**, to submit that it is held by the Supreme Court of India that right provided under Article 22 (5) of the Constitution of India is a substantive right and, if there is violation of the same, the detention order is liable to be quashed. Similar view is taken by the Supreme Court in **Mohinuddin Vs. District Magistrate, Beed and others, 1987 0 AIR (SC) 1977, Smt. Shalini Soni vs. Union of India and others, 1981 0 AIR (SC) 431 and in S. Gurdip Singh vs. Union of India and others, 1981 0 AIR (SC) 362.**

14. Counsel has then relied upon another decision in **Sushanta Kumar Banik Vs. State of Tripura and Ors., 2022 0 AIR (SC) 4715,** whereby the Supreme Court has held that when vital material or vital facts are withheld and not placed by the Sponsoring Authority before the Detaining Authority, it vitiate the procedure. Counsel submits that admittedly in the instant case, till date the vital material relied upon by the Sponsoring Authority or by the Screening Authority had not been disclosed to the petitioner and, therefore, detention of the petitioner under PIT NDPS Act is illegal.

15. Learned counsel has relied upon another judgment of Supreme Court in **Kamleshkumar Ishwardas Patel vs. Union of India and others, 1995 0 Supreme (SC) 538** wherein it has been held that the competent authority under COFEPOSA and PIT NDPS Act is required to consider the representation submitted by the detenue which is an additional right to his right to make representation to the State Government and Central Government.

16. Counsel has also relied upon the judgment of this Court in **Kamalveer Singh Vs. Adhikshak Janpad Karagar and Others, 2024 0 Supreme (All) 466**, wherein it has been held that where the ground of detention were vague or based on stale event or there is delay in decision on the representation, the detention order can be set aside.

17. After hearing the counsels for the parties, we find merit in the present writ petition for the following reasons :

A. The detention of the petitioner is based on two F.I.Rs. i.e. Case Crime No. 65 of 2021 and 1091 of 2021. Admittedly, the petitioner after facing full length trial stand acquitted in first F.I.R. i.e. Case Crime No. 65 of 2021 vide judgment dated 09.06.2023 passed by Special Judge (NDPS Act)/Additional Sessions Judge, Court No.8 Bareilly and, therefore, this very base of this F.I.R. in both impugned orders stand vitiated.

In the impugned rejection order dated 12.3.2024, no reasons has been assigned for dealing with the judgment of acquittal of petitioner. On the face of it, this order is totally non speaking order as in one line it has been stated that the representation of the petitioner stand rejected. Even nothing has been stated in this order that any opportunity of hearing was granted to the petitioner before passing of this order.

With regard to second F.I.R. i.e. Case Crime No. 1091 of 2021, it is admitted case of the prosecution that the petitioner was not named in the F.I.R. and his name surfaced on the disclosure of an accused who was arrested at the spot. Therefore, the petitioner was neither arrested at the spot by the police nor any recovery of narcotic drugs and psychotropic substances was effected from him. In the absence of the Court verdict holding him guilty of offence, impugned order of detention is very harsh.

Though no reliance can be placed on the third F.I.R. which is brought to the notice of this Court by way of reply on behalf of respondent Nos.2 & 3, Union of India. However, perusal of the F.I.R. No. 28 of 2021 dated 26.01.2021 also reflects that police arrested three persons from a car and recovered 10/20 grams of smack in small packets and again recorded their confession in which, it has come that they received the same from three persons namely Sahab Raja, Nazim and petitioner-Faizan Khan Alias Raja Babu. It is admitted by respondent No.2 & 3 that petitioner is on bail in the said case as well and nothing was recovered from him. In both these F.I.Rs. i.e. Case Crime No. 1091 of 2021 dated 27.11.2021 and Case Crime No. 28 of 2021 dated 26.01.2021, it will be matter of trial whether confession recorded by the police of a co-accused while in police custody will be admissible against the co-accused i.e. petitioner when after his arrest, no recovery of narcotic drugs and psychotropic substances is effected in view of the decision of Supreme Court in **Tofan Singh vs. State of Tamil Nadu, (2013) 16 SCC 31**.

B. Another fact which needs consideration is that Case Crime No. 65/2021 where the petitioner stands acquitted relates to 2021 and second and third F.I.R. also pertains to same year within short span of time. The petitioner surrendered on 12.1.2022 in F.I.R. No. 1091 of 2021 and in the intervening period he has not committed any new offence under the NDPS Act. Even the third F.I.R. i.e. Case Crime No. 28 of 2021 26.01.2021 which though not relied upon in the impugned orders is also of same District i.e. Bareilly. Therefore, from 2021 till 12th January 2024 when the detention period of the petitioner started, despite gap of three years, there was no fresh F.I.R. registered against the petitioners and this fact was not recorded in the rejection order though a detailed representation was given by the petitioner.

C. Another fact which is highlighted by the petitioner is that the petitioner was facing trial of Case Crime No. 65 of 2021 and on various dates, he regularly appeared before the Special Judge, NDPS Act, Bareilly where the prosecution evidence was recorded and then his statement under Section 313 Cr.P.C. was recorded and in between at least 13-14 dates were given. Therefore, grounds taken in the impugned orders that petitioner was hiding himself is apparently incorrect and this aspect is not at all considered while passing both the impugned orders as it is apparent that when his name surfaced in second F.I.R. i.e. Case Crime No. 1091 of 2021, the petitioner surrendered before the Special Judge,

NDPS Act on 12.01.2022 and was again granted bail.

18. Thus, from the above, it is apparent that the material forming basis of the opinion of the competent authority i.e. proposal of the Sponsoring Authority and recommendation of the Screening Authority, to pass impugned orders were never supplied to the petitioners in terms of the decisions in **Smt. Icchu Devi Choraria's Case (Supra), Mohinuddin's Case (Supra), Smt. Shalini Soni's Case (Supra) and S. Gurdip Singh's Case (Supra)** and he has not been afforded proper opportunity of hearing and the impugned order of rejection is totally non speaking order with regard to the pleas raised by the petitioner.

19. Accordingly, this petition is allowed. The impugned orders are set aside. The petitioner be released forthwith if he is not required in any other case on furnishing surety bond and personal bond.

20. However, it is made clear if petitioner is found involved in any subsequent F.I.R., it will be open for the authorities to initiate fresh proceedings against the petitioner.

Hon'ble Arvind Singh Sangwan,J.
Hon'ble Ram Manohar Narayan Mishra,J.

(Order on Correction Application No.3 of 2024.)

1. Heard learned counsel for the petitioner and learned A.G.A. for the State and perused the material available on record.

2. Learned counsel for the petitioner prays for correction in the order dated 14.05.2024 passed by this Court.

3. Learned counsel for the petitioner submitted that due to typographical mistake in the order dated 14.05.2024 in the tenth line of paragraph No.11 of the order the date of surrender is mentioned as 12.01.2024, where as it is 10.01.2024. Similar mistake has occurred in fourth line of paragraph No.17 B date of surrender is wrongly mentioned 12.01.2024, whereas the correct date of surrender is 10.01.2024.

4. Counsel further submitted that in paragraph No.19 inadvertently it is mentioned that "the petitioner be released forthwith if he is not required in any other case, on furnishing surety bond and personal bond."

5. It is submitted that since the petitioner was detained under the preventive detention, therefore, there is no provision for furnishing surety bond and personal bond.

6. Accordingly, paragraph No.19 is recast as follows- Accordingly, this petition is allowed. The impugned orders are set-aside. The petitioner be set at liberty forthwith if he is not required in any other case.

7. With the aforesaid modification/ correction in the order dated 14.05.2024, the application for correction stands disposed of.

(2024) 5 ILRA 2523
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 10525 of 2024

Tamilnadu Generation & Distribution Corp. Ltd. & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri P.K. Upadhyay

Counsel for the Respondents:
C.S.C., Sri Kartikeya Saran, Sri Prabhav Srivastava

A. Arbitration Law – Maintainability - Alternative remedy - Micro, Small and Medium Enterprises Development Act, 2006 - Sections 18 & 19 - Arbitration and Conciliation Act, 1996 - Section 34 - A person cannot be permitted to bypass the statutory requirement of depositing 75% of the decretal amount by invoking the jurisdiction of the High Court u/Articles 226/227 of the Constitution of India. (Para 9)

A bare perusal of Section 18(3) of the MSME Act, 2006 would reveal that the provisions of the Arbitration and Conciliation Act, 1996 have been made applicable to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to S.7(1) of the Act of 1996. Thus, remedy of filing objection u/s 34 of the Act of 1996 is available to the petitioner to get the award set aside. (Para 7)

Section 19 of the MSME Act, 2006, in unequivocal terms, provides that no application for setting aside the award made by the Council shall be entertained by any court unless the appellant has deposited 75% of the amount in terms of the award or, as the case may be, in the manner directed by such court. Thus, in case the petitioners avail the remedy u/s 34 of the Act of 1996, they would be required to deposit 75% of the amount in terms of the award before the challenge is entertained. (Para 8)

In view of the provisions of Section 18(4), where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in pursuance of an arbitration agreement u/s 7(1) of that Act. Hence, the remedy which is provided u/s 34 of the Act of 1996 would govern an award of the Facilitation Council. However, there is a super added condition which is imposed by S. 19 of MSMED Act, 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant depositing with the Council 75% of the amount in terms of the award. S. 19 has been introduced as a measure of security for enterprises for whom a special provision is made in the MSMED Act by Parliament. (Para 9)

Thus, the instant petition, without making pre-deposit as per statutory provision, would not be maintainable. In case of breach of principles of natural justice, alternative remedy is not an absolute bar. The writ petition would have been entertained without relegating the petitioners to the alternative remedy u/s 34 of the Act of 1996, had the petitioners agreed to deposit 75% of the amount in terms of impugned award in this Court. (Para 10)

Petition dismissed. (E-4)

Precedent followed:

M/s India Clycols Limited & anr. Vs Micro and Small Enterprises Facilitation Council, Medchal - Malkajgiri & ors. in Civil Appeal No.7491 of 2023, arising out of SLP (C) No.9899 of 2023, decided on 06.11.2023 (Para 4)

Present petition challenges the order dated 01.01.2024, whereby respondent no.2 (Zonal MSEFC, Meerut Zone, Meerut) (for short 'the Facilitation Council') has declared an award of a total sum of Rs.1,49,48,762/- in favour of respondent no.3, in exercise of powers u/s 18 of the MSME Act, 2006.

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

1. Heard Sri S.T. Raja, learned counsel assisted by Sri P.K. Upadhyay, for the petitioners, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for respondents no.1 and 2 and Sri Kartikeya Saran, learned counsel for respondent no.3.

2. The instant writ petition under Article 226 of the Constitution of India has been filed challenging the order dated

01.01.2024 whereby respondent no.2 (Zonal Micro and Small Enterprises, Facilitation Council (MSEFC), Meerut Zone, Meerut) (for short 'the Facilitation Council') has declared an award of a total sum of Rs.1,49,48,762/- in favour of respondent no.3, in exercise of powers under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'the MSME Act, 2006).

3. The case of the petitioners is that respondent no.3, being a registered firm, approached the petitioners pursuant to an e-tender dated 04.01.2021 for supply of 11 KV Vertical Gang Operated Air breaks switch with composite polymer insulator, single square pole transformer structure material with clamp and 11 KV Solid Core type GH fuse sets for HVDS and a contract deed/ purchase order No.146 dated 19.01.2021 came to be executed. The petitioners issued purchase order dated 26.02.2021 asking respondent no.3 to supply the goods and it is alleged that respondent no.3 failed to supply the goods as per the terms and conditions of the supply order. The petitioners, accordingly, issued a letter dated 15.03.2022 to respondent no.3 with regard to non supply of goods, however, respondent no.3 approached the Facilitation Council by making a reference on 05.04.2022 under Section 18 of the MSME Act, 2006. While the reference was pending, respondent no.3 approached this Court by filing Writ-C No.11981 of 2022 claiming various reliefs. The writ petition was disposed of by a Coordinate Bench of this Court by order dated 19.07.2022 with an observation that the Authority under Section 18 of the MSME Act, 2006 shall decide the reference application in accordance with law within a period of four weeks from the date of receipt of the order. It is in pursuance of the order dated 19.07.2022 passed by this Court that the impugned award has been declared by the Facilitation Council.

4. Respondent no. 3 raised preliminary objection with regard to maintainability of the writ petition on the ground of availability of alternative remedy of filing objections against the impugned award under Section 34 of the Arbitration and Conciliation Act, 1996, read with Section 18(3) of the MSME Act, 2006. Additionally, it is also contended that unless 75% of the amount in terms of impugned award is deposited by the petitioners, the challenge would not be maintainable in view of Section 19 of the MSME Act, 2006. In support of his submission, he places reliance on the judgment of Supreme Court in the case of **M/s India Clycols Limited and another Vs. Micro and Small Enterprises Facilitation Council, Medchal - Malkajgiri and others in Civil Appeal No.7491 of 2023, arising out of SLP (C) No.9899 of 2023, decided on 06.11.2023**.

5. Per contra, learned counsel for the petitioners submitted that the impugned award is ex parte as on the last date of hearing, the video link was not sent to the counsel for the petitioners. According to him, the video link was sent at the head office of the petitioner-company and to its officers, ignoring the request of the counsel to send video link to him, as arguments were to be advanced by him only. It is urged that since the impugned award has been rendered in violation of principles of natural justice, therefore, availability of alternative remedy of filing objection under Section 34 of the Act of 1996 would not debar the petitioners from invoking the writ jurisdiction. In respect of condition relating to pre-deposit of 75% of the amount, he

submits that since the petitioner is a Government company, therefore, the said condition be dispensed with. He even did not accept the suggestion of the Court to deposit the amount as contemplated under Section 19 before advancing arguments on merits and submitted that the case be decided.

6. In order to deal with the submissions advanced, the Court may refer to the provisions of Sections 18 and 19 of the MSME Act, 2006. The same are quoted below:-

"**18. Reference to Micro and Small Enterprises Facilitation Council.**—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

19. Application for setting aside decree, award or order.— No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers

reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

(emphasis supplied)

7. A bare perusal of Section 18(3) of the MSME Act, 2006 would reveal that the provisions of the Arbitration and Conciliation Act, 1996 have been made applicable to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to sub-section (1) of Section 7 of that Act, i.e. the Act of 1996. Thus, remedy of filing objection under Section 34 of the Act of 1996 is available to the petitioner to get the award set aside.

8. Section 19 of the MSME Act, 2006, in unequivocal terms, provides that no application for setting aside the award made by the Council shall be entertained by any court unless the appellant has deposited 75% of the amount in terms of the award or, as the case may be, in the manner directed by such court. Thus, in case the petitioners avail the remedy under Section 34 of the Act of 1996, they would be required to deposit 75% of the amount in terms of the award before the challenge is entertained.

9. In **M/s India Clycols Limited (supra),** the Supreme Court held that a person cannot be permitted to bypass the statutory requirement of depositing 75% of the decretal amount by invoking the jurisdiction of the High Court under Articles 226/227 of the Constitution of India. The writ petition was held to be not maintainable for the said reason. The relevant observations made in this regard in paragraphs 10, 12 and 13 of the judgment are reproduced below:-

"10. In terms of Section 19, an application for setting aside an award of the Facilitation Council cannot be entertained by any court unless the appellant has deposited seventy-five per cent of the amount in terms of the award. In view of the provisions of Section 18(4), where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in pursuance of an arbitration agreement under sub-section (1) of Section 7 of that Act. Hence, the remedy which is provided under Section 34 of the Act of 1996 would govern an award of the Facilitation Council. However, there is a super added condition which is imposed by Section 19 of MSMED Act, 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant depositing with the Council seventy-five per cent of the amount in terms of the award. Section 19 has been introduced as a measure of security for enterprises for whom a special provision is made in the MSMED Act by Parliament. In view of the provisions of Section 18(4), the appellant had a remedy under Section 34 of the Act of 1996 to challenge the award which it failed to pursue.

12. The appellant failed to avail of the remedy under Section 34. If it were to do so, it would have been required to deposit seventy-five per cent of the decretal amount. This obligation under the statute was sought to be obviated by taking recourse to the jurisdiction under Articles 226/227 of the Constitution. This was clearly impermissible.

13. For the above reasons, we are in agreement with the view of the Division Bench of the High Court that the writ

petition which was instituted by the appellant was not maintainable."

(emphasis supplied)

10. Thus, in view of law laid down by Supreme Court in **M/s India Clycols Limited (supra),** we are of considered opinion that the instant petition, without making pre-deposit as per statutory provision, would not be maintainable. We hold so being fully aware of the legal position that in case of breach of principles of natural justice, alternative remedy is not an absolute bar. We would have entertained the writ petition without relegating the petitioners to the alternative remedy under Section 34 of the Act of 1996, had the petitioners agreed to deposit 75% of the amount in terms of impugned award in this Court. As counsel for the petitioners is not agreeable to comply with the said condition, therefore, we decline to examine the challenge and uphold the preliminary objection of learned counsel for respondent no. 3.

11. The writ petition is, accordingly, **dismissed** as not maintainable, however, without prejudice to the rights of the petitioners to avail such other remedy as may be available to them under the law.

(2024) 5 ILRA 2528
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Civil Misc. Arbitration Application No. 4 of 2024
With
Civil Misc. Arbiration Application No. 5 of 2024

M/S Geo Miller & Co. Pvt. Ltd. ...Appellant
Versus
U.P. Jal Nigam & Ors. ...Respondents

Counsel for the Appellant:
Sri S.D. Singh with Sri Shadab Alam, Advocates Sri Sujeet Kumar with Ms. Chhaya Gupta, Advocates

Counsel for the Respondents:
Sri Vimlesh Kumar Rai, Advocate for U.P. Jal Nigam, Sri Anand Prakash Paul, Advocate for Kanpur Development Authority

A. Arbitration Law – Extension of mandate of the arbitrator - When a bench of coequal strength is faced with conflicting judgments of other coequal benches, the judgment delivered earlier will continue to govern the field of law, till such time, the same is overturned or in case the question(s) of law, if referred to the larger bench is answered. This will also hold true when a lower court is faced with conflicting judgments of a higher court, or a coordinate bench is faced with conflicting judgments of a division bench. (Para 24)

Precedents are not mere legal doctrines; they are the embodiment of centuries of legal wisdom and collective judicial experience. When courts deviate from established precedents without due consideration, they risk undermining the credibility and legitimacy of the legal system. Therefore, it is imperative for courts to uphold the sanctity of legal precedents and adhere to established principles of judicial discipline, even in the face of conflicting opinions or pressures to depart from precedent. (Para 22)

B. The judgments in *Lucknow Agencies* (*infra*) and *Indian Farmers Fertilizers* (*infra*) having been delivered under different factual scenarios will continue to govern the field of law as far as Section 29A of the Act is concerned before this Court. All applications filed u/s 29A of the Act till such time as the Larger Bench, reference to which was made vide this Court's order dated February 26, 2024, returns its decision on the

questions of law, will have to be decided in accordance with the law laid down in *Lucknow Agencies* and *Indian Farmers Fertilizers*. The judgment in *A'Xykno Capital Services* (*infra*) having been delivered after the aforesaid judgments, will not hold any precedential value. Needless to say, this position will be subject to the decision of the Larger Bench. (Para 33)

The doctrine of *per incuriam* is based on the latin phrase meaning "thorough lack of care". It allows the courts to depart from established precedent when a previous decision was made without proper consideration of relevant statutes, regulations, or binding authorities. However, **the doctrine of per incuriam must be exercised with caution to ensure that it is not used as a pretext for disregarding inconvenient precedent. The principle should only be invoked in exceptional cases where the error is clear and unequivocal, and where adherence to the precedent would result in a grave injustice. *Per incuriam* should be used sparingly and only in exceptional cases.** (Para 32)

C. It has been held in *Indian Farmers Fertilizers* (*infra*) that where an arbitrator has been appointed u/s 11 of the Act, an application for extension of the mandate of the arbitral tribunal u/s 29A of the Act will lie before the court which appointed the arbitrator. (Para 27)

In light of the aforesaid, since the appointment of the arbitrator in ARBT NOS. 4 and 5 of 2024 was made by this Court in exercise of its powers u/s 11 of the Act, the instant applications filed u/s 29A(4) and S. 29(A(5) of the Act are maintainable before this Court. (Para 34)

ARBT NO.4 of 2024 is allowed and the mandate of the arbitrator is extended for a period of 8 months from the date of this judgment. ARBT NO. 5 of 2024 is also allowed and the mandate of the arbitrator is extended for a period of 8 months from the date of this judgment. (Para 35, 36)

Applications allowed. (E-4)

Precedent discussed:

1. M/s. Jaypee Infratech Ltd. Vs Ehbh Services Private Ltd. & anr., 26.02.2024 (Para 5(i))

2. Lucknow Agencies LKO Vs UP Awas Vikas Parishad & ors., MANU/UP/0885/2019 (Para 5(iv))

3. Indian Farmers Fertilizers Cooperative Ltd. Vs Manish Engineering Enterprises, MANU/ UP/ 0515/2022 (Para 5(v))

4. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680 5 (Para 5(vii))

5. Union Territory of Ladakh & ors. Vs Jammu and Kashmir National Conference & anr., 2023 SCC OnLine SC 1140 (Para 5(vii))

6. State of Uttar Pradesh & ors. Vs Ajay Kumar Sharma, (2016) 15 SCC 289 (Para 11)

7. Mary Pushpam Vs Telvi Curusumary, (2024) 3 SCC 224, (Para 20)

Present applications have been filed u/s 29(A)(4) and S. 29(A)(5) of the Arbitration & Conciliation Act, 1996, praying for extension of the mandate of the arbitral tribunal.

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

1. These applications have been filed under Section 29(A)(4) and Section 29(A)(5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for extension of the mandate of the arbitral tribunal.

2. Since the instant applications (ARBT – 4 of 2024 and ARBT – 5 of 2024) involve similar issues, they are being taken up together.

FACTS

3. The brief factual matrix involved in ARBT – 4 of 2024 has been delineated below:

(a) M/s Geo Miller and Co. Pvt. Ltd. (hereinafter referred to as the 'Petitioner – ARBT 4') and U.P. Jal Nigam and Others (hereinafter referred to as the 'Respondents - ARBT 4') entered into a contract. Disputes and differences arose between the parties which were referred to arbitration.

(b) Petitioner – ARBT 4 filed an application under Section 11 of the Act for appointment of an arbitrator before this Court.

(c) Vide orders dated September 16, 2021 and October 6, 2021, this Court appointed Mr. Justice R.D. Khare (Former Judge of this Court) as the sole arbitrator.

(d) The time limited for making an arbitral award as provided under Section 29A of the Act expired on February 29, 2024. The arbitrator could not publish his award within the statutory time limit, and therefore, he asked the parties to seek extension of time in accordance with the law.

(e) Hence, the Petitioner – ARBT 4 filed the instant application being Civil Misc. Arbitration Application No. – 4 of 2024 under Section 29A of the Act.

4. The brief factual matrix involved in ARBT – 5 of 2024 has been delineated below:

(a) Disputes and differences arose between GPT Infraprojects Limited (hereinafter referred to as the 'Petitioner – ARBT 5) and Kanpur Development Authority (hereinafter referred to as the 'Respondent – ARBT 5') which were referred to arbitration.

(b) The arbitrator in the case was appointed by this Court under Section 11 of the Act vide orders dated June 18, 2021 and July 29, 2021.

(c) Since the time limit to make an arbitral award in accordance with Section 29A of the Act was about to expire on March 7, 2024, the Petitioner – ARBT 5 filed the instant application being Civil Misc. Arbitration Application No. – 5 of 2024 seeking extension of time before this Court.

CONTENTIONS OF THE APPLICANT IN ARBT NO. 4 OF 2024

5. Sri S.D. Singh, learned counsel appearing for the applicant has made the following submissions:

(i) This Court vide its order dated February 26, 2024 passed in ***M/s. Jaypee Infratech Limited -v- Ehbh Services Private Limited and Another*** had referred the issue regarding Section 29A of the Act before the Larger Bench in light of various conflicting judgments passed by different Coordinate Benches of this Court.

(ii) The question which arose in the present matter was that what will be the situation for deciding the cases during the pendency of the issues referred to the Larger Bench.

(iii) According to various judgments of the Hon'ble Supreme Court, earlier decision can be relied upon during the pendency of the reference before the Larger Bench unless there is a specific order restraining the Court from deciding any matter on the issues that have been referred to the Larger Bench.

(iv) Judgment of this Court in ***Lucknow Agencies LKO -v- UP Awas Vikas Parishad and Ors.*** reported in **MANU/UP/0885/2019** deals with a different situation and as such the said judgment is not in conflict of any of the judgments delivered by other Coordinate Benches of this Court. In the said case it has

been held by this Court that when the arbitrator has not been appointed under Section 11 of the Act, an application under Section 29A of the Act would be maintainable only before the court as defined under Section 2(1)(e) of the Act.

(v) The issue that "Whether an application filed under Section 29A of the Act for extension of the mandate of the arbitral tribunal is maintainable before this Court or before the Court as defined under Section 2(1)(e) of the Act, when this Court has appointed the arbitrator under Section 11 of the Act" arose before this Court for the first time in ***Indian Farmers Fertilizers Cooperative Limited -v- Manish Engineering Enterprises*** reported in ***MANU/UP/0515/2022.***

(vi) It has been held in Indian Farmers Fertilizers (supra) that when this Court has exercised its jurisdiction under Section 11 of the Act to appoint the arbitrator, an application under Section 29A of the Act would be maintainable before this Court only. Therefore, it is clear that the first judgment on this issue is Indian Farmers Fertilizers (supra).

(vii) The instant matter or any other similar matter are not required to be kept pending till such time the reference made to Larger Bench is answered. The instant matter or any other similar matter is needed to be decided by this Court based on its judgement in ***Indian Farmers Fertilizers (supra),*** as per the law laid down by the Hon'ble Supreme Court in ***National Insurance Co. Ltd. -v- Pranay Sethi & Ors. reported in (2017) 16 SCC 680 and Union Territory of Ladakh & Ors. -v- Jammu and Kashmir National Conference and Anr. reported in 2023 SCC OnLine SC 1140.***

(viii) The Constitution Bench of the Hon'ble Supreme Court in ***Pranay Sethi (supra)*** held that there can be no scintilla of doubt that an earlier decision of co-equal Bench binds another Bench of the same strength".

(ix) The Hon'ble Supreme Court in ***Union Territory of Ladakh & Ors. -v- Jammu and Kashmir National Conference and Anr. (supra)*** dealt with the issue that what will be the course of action for deciding the pending matters or the matters which have been filed during the interregnum period, when any issue is pending before the Larger Bench.

(x) Based on the facts and circumstances of this case, it is prayed that this Court may be pleased to exercise its jurisdiction under Section 29(A) of the Act and extend the time period for making the arbitral award.

ANALYSIS AND CONCLUSION

6. I have heard the learned counsel appearing for the parties and perused the material on record.

7. The question of law involved in the instant applications is as to which of the judgments in light of the conflicting position of law on Section 29A of the Act espoused by different coordinate Benches of this Court would hold the field till such time as the reference to Larger Bench made vide this Court's order dated February 26th, 2024 is answered. Hence, for the better adjudication of the matter, I have divided the instant judgment into two issues:

Issue No. 1: When there are conflicting judgments of different benches of coequal strength of a court on a similar question of law, which one assumes the status of binding precedent when the said question of law has been referred to a larger bench for adjudication ?

Issue No. 2: Which judgment will govern the field of law on Section 29A of the Act as far as this Court is concerned ?

ISSUE NO. 1

8. The principle of judicial discipline is a cornerstone of the legal system, essential for maintaining the integrity, coherence, and predictability of judicial decisions. One of the key mechanisms through which judicial discipline is maintained is the doctrine of stare decisis, which literally means "to stand by things decided". Under this doctrine, courts are bound to follow their own previous decisions when confronted with similar legal issues. This principle serves several important purposes. Firstly, it promotes consistency and predictability in the law, ensuring that similar cases are decided in a uniform manner. This fosters legal certainty and promotes the rule of law by providing litigants with a clear understanding of their rights and obligations. Secondly, stare decisis promotes respect for judicial authority and fosters public confidence in the legal system. By adhering to established legal precedents, courts demonstrate a respect for the decisions of their predecessors and the principle of continuity in the law. This enhances the legitimacy of judicial decisions and reinforces the notion that courts are impartial arbiters of legal disputes, guided by established legal norms rather than personal preferences or biases.

9. Additionally, the doctrine of stare decisis promotes judicial efficiency by reducing the need for courts to revisit settled legal issues. By following established legal precedents, courts can focus their attention on resolving new and novel legal questions, rather than re-litigating issues that have already been decided. This streamlines the judicial process and enables the courts to operate more effectively, ensuring that scarce judicial resources are allocated efficiently.

10. When a Coordinate Bench issues a judgment on a particular legal issue, that judgment becomes binding precedent for subsequent cases involving a similar issue before another Coordinate Bench. This ensures that similar cases are decided in a consistent and uniform manner, regardless of the particular composition of the Bench.

11. In ***State of Uttar Pradesh and Others -v- Ajay Kumar Sharma reported in (2016) 15 SCC 289,*** the Hon'ble Supreme Court espoused on the significance of the doctrine of stare decisis as follows:

"13. Time and again this Court has emphatically restated the essentials and principles of "precedent" and of stare decisis which are a cardinal feature of the hierarchical character of all common law judicial systems. The doctrine of precedent mandates that an exposition of law must be followed and applied even by coordinate or co-equal Benches and certainly by all smaller Benches and subordinate courts. That is to say that a smaller and a later Bench has no freedom other than to apply the law laid down by the earlier and larger Bench; that is the law which is said to hold the field. Apart from Article 141, it is a policy of the courts to stand by precedent and not to disturb a settled point. The purpose of precedents is to bestow predictability on judicial decisions and it is beyond cavil that certainty in law is an essential ingredient of rule of law. A departure may only be made when a

coordinate or co-equal Bench finds the previous decision to be of doubtful logic or efficacy and consequentially, its judicial conscience is so perturbed and aroused that it finds it impossible to follow the existing ratio. The Bench must then comply with the discipline of requesting the Hon'ble Chief Justice to constitute a larger Bench.

14. If binding precedents even of coordinate strength are not followed, the roots of continuity and certainty of law which should be nurtured, strengthened, perpetuated and proliferated will instead be deracinated. Although spoken in a totally different context, we are reminded of the opening stanza of the poem "The Second Coming" authored by William Butler Yeats. The lines obviously do not advert to the principle of precedent but they are apposite in bringing out the wisdom of this ancient and venerable principle.

"Turning and turning in the widening gyre

The falcon cannot hear the falconer;

Things fall apart; the centre cannot hold;

Mere anarchy is loosed upon the world."

12. What follows from the aforesaid decision of the Hon'ble Supreme Court is that the doctrine of stare decisis holds paramount importance. The adherence to precedent is not merely a matter of legal formalism but serves the vital function of bestowing predictability on judicial decisions, thereby fostering certainty in the law. The analogy drawn by the Hon'ble Supreme Court to William Butler Yeats' poem "The Second Coming" poignantly captures the essence of the doctrine of stair decisis. Just as the falcon in Yeats' poem struggles to maintain its courts amidst chaos and disarray, so too does the legal system face the risk of fragmentation and disintegration when courts fail to uphold established precedents. Without the anchor of precedent to guide its decisions, the judiciary risks descending into a state of "mere anarchy", where the fundamental principles of justice and equity are cast aside in favour of individual whim or caprice.

13. Indeed, the parallels between Yeats' evocative imagery and the principles of stare decisis are striking. The image of "things fall apart" when the centre cannot hold resonates with the chaos that ensues when legal precedent is disregarded, leading to uncertainty, inconsistency, and a loss of faith in the judicial system. In contrast, the preservation of precedent serves as a bulwark against the tide of legal tumult, anchoring the law in a bedrock of stability and continuity.

14. Justice Benjamin N. Cardozo eloquently stated "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Thus, while precedent provides a foundation for legal reasoning, it also allows for the exercise of judicial wisdom and discretion in exceptional cases.

15. In the intricate tapestry of legal precedent, one of the most formidable challenges facing the judiciary is the dilemma of conflicting precedents. At the hear of the dilemma lies the clash of titans – two or more precedents that stand in direct opposition to one another. This clash may arise due to a variety of reasons,

including divergent interpretations of statutory language, conflicting judicial philosophies, or evolving societal norms. When confronted with conflicting precedents by earlier benches of coequal strength, courts usually have limited options before them. One such option is the principle of distinguishing, whereby a court seeks to identify meaningful differences between the conflicting precedents and apply the one that is most applicable to the case at hand. This approach allows courts to preserve the integrity of both precedents while harmonizing their application to the facts before them. In addition to the same, another option available to courts in cases of conflicting precedents is to make a reference to a bench of larger strength. This option recognizes the complexity and significance of the issue at hand. Take for example, the practice of en blanc review present in the United States. En blanc review involves rehearing a case before all the judges of a court, rather than a smaller panel, and is typically reserved for cases of exceptional importance or complexity. By convening a larger bench, courts ensure that decisions of significant consequences are made with the benefit of a wider range of perspectives and expertise.

16. However, the question remains as to the path that must be followed till such time as the larger bench returns its decision.

17. Reference in this regard can be made to the judgment of the Hon'ble Supreme Court in ***National Insurance Company Limited -v- Pranay Sethi (supra)*** wherein the Hon'ble Supreme Court grappled with a similar question and concluded as follows after making a reference to precedents:

"16. In State of Bihar v. Kalika Kuer [State of Bihar v. Kalika Kuer, (2003) 5 SCC 448] , it has been held :

"10. ... an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. ..."

The Court has further ruled :

"10. ... Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

17. In G.L. Batra v. State of Haryana [G.L. Batra v. State of Haryana, (2014) 13 SCC 759 : (2015) 3 SCC (L&S) 575] , the Court has accepted the said principle on the basis of judgments of this Court rendered in Union of India v. Godfrey Philips India Ltd. [Union of India v. Godfrey Philips India Ltd., (1985) 4 SCC 369 : 1986 SCC (Tax) 11] , Sundarjas Kanyalal Bhatija v. Collector, Thane [Sundarjas Kanyalal Bhatija v. Collector, Thane, (1989) 3 SCC 396] and Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel [Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel, AIR 1968 SC 372] . It may be noted here that the Constitution Bench in Madras Bar Assn. v. Union of India [Madras Bar Assn. v. Union of India, (2015) 8 SCC 583] has clearly stated that the prior Constitution Bench judgment in Union of

India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1] is a binding precedent. Be it clarified, the issues that were put to rest in the earlier Constitution Bench judgment were treated as precedents by the later Constitution Bench.

18. In this regard, we may refer to a passage from Jaisri Sahu v. Rajdewan Dubey [Jaisri Sahu v. Rajdewan Dubey, AIR 1962 SC 83] :

"10. Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision [Dasrath Singh v. Damri Singh, 1925 SCC OnLine Pat 242 : AIR 1927 Pat 219] given by a Bench is not brought to the notice of a Bench [Ram Asre Singh v. Ambica Lal, AIR 1929 Pat 216] hearing the same question, and a contrary decision is given without reference to the earlier decision. The question has also been discussed as to the correct procedure to be followed when two such conflicting decisions are placed before a later Bench. The practice in the Patna High Court appears to be that in those cases, the earlier decision is followed and not the later. In England the practice is, as noticed in the judgment in Gundavarupu Seshamma v. Kornepati Venkata Narasimharao [Gundavarupu Seshamma v. Kornepati Venkata Narasimharao, 1939 SCC OnLine Mad 367 : ILR 1940 Mad 454] that the decision of a Court of Appeal is considered as a general rule to be binding on it. There are exceptions to it, and one of them is thus stated in Halsbury's Laws of England,

'1687. ... the court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords.'

In Katragadda Virayya v. Katragadda Venkata Subbayya [Katragadda Virayya v. Katragadda Venkata Subbayya, 1955 SCC OnLine AP 34 : AIR 1955 AP 215] it has been held by the Andhra High Court that under the circumstances aforesaid the Bench is free to adopt that view which is in accordance with justice and legal principles after taking into consideration the views expressed in the two conflicting Benches, vide also the decision of the Nagpur High Court in D.D. Bilimoria v. Central Bank of India [D.D. Bilimoria v. Central Bank of India, 1943 SCC OnLine MP 97 : AIR 1943 Nag 340] . The better course would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether it should follow the one Bench decision or the other. We have no doubt that when such situations arise, the Bench hearing cases would refer the matter for the decision of a Full Court."

19. Though the aforesaid was articulated in the context of the High Court, yet this Court has been following the same as is revealed from the aforestated pronouncements including that of the Constitution Bench and, therefore, we entirely agree with the said view because it is the precise warrant of respecting a precedent which is the fundamental norm of judicial discipline.

20. In the context, we may fruitfully note what has been stated in Pradip Chandra Parija v. Pramod Chandra Patnaik [Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1] . In the said case, the Constitution Bench was dealing with a situation where the two-Judge Bench [Pradip Chandra Parija v. Pramod Chandra Patnaik, Civil Appeal No. 791 of 1993, order dated 24-10-1996 (SC)] disagreeing with the three-Judge Bench [Nityananda Kar v. State of Orissa, 1991 Supp (2) SCC 516 : 1992 SCC (L&S) 177] decision directed the matter to be placed before a larger Bench of five Judges of this Court. In that scenario, the Constitution Bench stated :

"6. ... In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. ..."

21. In Chandra Prakash v. State of U.P. [Chandra Prakash v. State of U.P., (2002) 4 SCC 234 : 2002 SCC (L&S) 496] , another Constitution Bench dealing with the concept of precedents stated thus :

"22. ... The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in Raghubir Singh [Union of India v. Raghubir Singh, (1989) 2 SCC 754] held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or smaller number of Judges. ..."

Be it noted, Chandra Prakash [Chandra Prakash v. State of U.P., (2002) 4 SCC 234 : 2002 SCC (L&S) 496] concurred with the view expressed in Raghubir Singh [Union of India v. Raghubir Singh, (1989) 2 SCC 754] and Pradip Chandra Parija [Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1] .

22. In Sandhya Educational Society v. Union of India [Sandhya Educational Society v. Union of India, (2014) 7 SCC 701] , it has been observed that judicial decorum and discipline is paramount and, therefore, a coordinate Bench has to respect the judgments and orders passed by another coordinate Bench. In Rattiram v. State of M.P. [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] , the Court dwelt upon the issue, what would be the consequent effect of the later decision which had been rendered without noticing the earlier decisions. The Court noted the observations in Raghubir Singh [Union of India v. Raghubir Singh, (1989) 2 SCC 754] and reproduced a passage from Indian Oil Corpn. Ltd. v. Municipal Corpn. [Indian Oil Corpn. Ltd. v. Municipal Corpn., (1995) 4 SCC 96] which is to the following effect : (Rattiram case [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] ,

"27. ... '8. ... The Division Bench of the High Court in Municipal Corpn., Indore v. Ratnaprabha Dhanda [Municipal Corpn., Indore v. Ratnaprabha Dhanda, 1988 SCC OnLine MP 116 : 1989 MP LJ 20] was

clearly in error in taking the view that the decision of this Court in Ratnaprabha [Municipal Corpn., Indore v. Ratnaprabha, (1976) 4 SCC 622] was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do. ...' (Indian Oil Corpn. case [Indian Oil Corpn. Ltd. v. Municipal Corpn., (1995) 4 SCC 96] , SCC p. 100, para 8)"

23. It also stated what has been expressed in Raghubir Singh [Union of India v. Raghubir Singh, (1989) 2 SCC 754] by R.S. Pathak, C.J. It is as follows : (Rattiram case [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] ,

"26. ... '28. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. ...' (Raghubir Singh case [Union of India v. Raghubir Singh, (1989) 2 SCC 754] , SCC p. 778, para 28)"

24. In Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] the three-Judge Bench had delivered the judgment on 12-4-2013. The purpose of stating the date is that it has been delivered after the pronouncement made in Reshma Kumari case [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . On a perusal of the decision in Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , we find that an attempt has been made to explain what the two-Judge Bench had stated in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] . The relevant passages read as follows : (Rajesh case [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , SCC p. 61, paras 8-9)

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27. We are compelled to state here that in Munna Lal Jain [Munna Lal Jain v. Vipin Kumar Sharma, (2015) 6 SCC 347 : (2015) 3 SCC (Civ) 315 : (2015) 4 SCC (Cri) 195] , the three-Judge Bench should have been guided by the principle stated in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] which has concurred with the view expressed in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] being earlier in point of time would be a binding precedent and not the decision in Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] ."

18. What emerges from the wisdom of the Hon'ble Supreme Court is that the doctrine of precedent, is not without its nuances and complexities. As elucidated by the Hon'ble Supreme Court, an earlier decision, even if considered incorrect by a later Bench, retains its binding effect on subsequent Benches of coordinate

jurisdiction. The principle which emerges is that the earlier decision must be followed until the decision of the larger bench is returned. This principle is rooted in tradition, certainty, and the integrity of precedent itself. As articulated by the Apex Court, the law would be bereft of utility if thrown into a state of uncertainty by conflicting decisions. Throughout history, the stability and continuity of law have been upheld through adherence to established precedent. By following the earlier decision, even in the face of conflicting precedents, courts preserve the integrity of the legal system and uphold the principle of stare decisis – the notion that like cases should be decided like. From a practical standpoint, following the earlier decision until the decision of the larger bench is returned serves to promote certainty and predictability in the administration of justice. When conflicting precedents arise, uncertainty abounds, and litigants may be left in a state of limbo, unsure of their rights and obligations under the law. By adhering to the earlier decision, courts provide a measure of stability and clarity, allowing parties to proceed with confidence while awaiting resolution from the larger bench.

19. In ***Union Territory of Ladakh & Others -v- Jammu and Kashmir National Conference (supra)***, the Hon'ble Supreme Court reiterated the principle laid down in ***Pranay Sethi (supra)*** and propounded that when conflicting decisions of coequal benches exist, the earlier one is to be followed as binding precedent. Relevant paragraph is extracted herein:

"35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 6805. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

20. Recently, in ***Mary Pushpam -v- Telvi Curusumary reported in (2024) 3 SCC 224,*** the Hon'ble Supreme Court reiterated the significance of the doctrine of judicial discipline and propriety:

"Vikram Nath, J.— *The rule of "Judicial Discipline and Propriety" and the doctrine of precedents has a merit of promoting certainty and consistency in judicial decisions providing assurance to individuals as to the consequences of their actions. The Constitution Benches of this Court have time and again reiterated the rules emerging from judicial discipline. Accordingly, when a decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to*

be respected and is binding subject to right of the Bench of such co-equal quorum to take a different view and refer the question to a larger Bench. It is the only course of action open to a Bench of co-equal strength, when faced with the previous decision taken by a Bench with same strength."

21. The Hon'ble Supreme Court's aforesaid pronouncements serve as a clarion call, admonishing against the perils of judicial vacillation and indecision. The directive to accord precedence to earlier judgments, notwithstanding doubts cast by subsequent coordinate benches, elucidates the unwavering commitment to upholding the rule of law and preserving the sanctity of legal precedent. The Supreme Court's assertion that decisions of coordinate benches of the same High Court are to be respected and considered binding, subject to the right of coequal benches to refer the question to a larger bench, reflects the delicate balance between adherence to precedent and the pursuit of legal evolution by reaffirming the authority of precedent while acknowledging the judiciary's prerogative to revisit established doctrines when warranted.

22. Precedents are not mere legal doctrines; they are the embodiment of centuries of legal wisdom and collective judicial experience. When courts deviate from established precedents without due consideration, they risk undermining the credibility and legitimacy of the legal system. Therefore, it is imperative for courts to uphold the sanctity of legal precedents and adhere to established principles of judicial discipline, even in the face of conflicting opinions or pressures to depart from precedent.

23. This is reminiscent of Shakespeare's "Hamlet", where the protagonist grapples with the weight of inherited wisdom and the demands of his own conscience. Hamlet's dilemma mirrors the judicial predicament faced by courts when confronted with conflicting precedents. Like Hamlet, judges must navigate the intricate web of legal doctrines and precedents, weighing the authority of past decisions against the exigencies of the present moment. In embracing the rule of precedent, the judiciary echoes Hamlet's famous soliloquy (To be, or not to be, that is the question), acknowledging the enduring power of tradition while grappling with the imperatives of justice and fairness.

24. In light of the aforesaid, Issue No. 1 is answered as follows:

"When a bench of coequal strength is faced with conflicting judgments of other coequal benches, the judgment delivered earlier will continue to govern the field of law, till such time, the same is overturned or in case the question(s) of law, if referred to the larger bench is answered. This will also hold true when a lower court is faced with conflicting judgments of a higher court, or a coordinate bench is faced with conflicting judgments of a division bench."

ISSUE NO.2

25. In Lucknow Agencies (supra), which was delivered on March 15, 2019, a Coordinate Bench of this Court while considering an application under Section 29A(4) and Section 29(A)(5) of the Act held that given the fact that the arbitrator in the case was not appointed by the High Court under Section 11 of the Act, and that the Allahabad High Court does not exercise

ordinary original civil jurisdiction, it does not have the power to hear an application under Section 29A of the Act, and the same will have to be made before the Court as defined under Section 2(1)(e) of the Act. Relevant paragraphs from the aforesaid judgment are extracted herein:

"3. In the instant case an Arbitrator was appointed by the Housing Commissioner of the Housing Board, U.P. and not by this Court under Section 11 of the Act, 1996. The proceedings could not be concluded within the time limit specified for rendering the arbitral award under Section 29-A but the parties by their consent extended the period for six months as has been recorded in the proceedings before the Arbitral Tribunal dated 13.01.2018, however, the proceedings could not be concluded even during this extended period of six months, therefore, this application has been filed.

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11. On a bare reading of the aforesaid provision it is evident that if an Arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court. Now, this provision applies where the High Court exercises original civil jurisdiction to try suits involving commercial dispute as deferred in Section 2(1)(c) of the Act, 2015 as is evident from the use of the words 'filed on the original side of the High Court'. The Allahabad High court does not exercise original civil jurisdiction involving commercial disputes as defined in Section 2(1)(c) of the Act, 2015 as is evident from Rule 1 to 9 of Chapter VIII of the Allahabad High Court Rules, 1952. Moreover, Sub-section 3 of Section 10 of the Act, 2015 very categorically provides that if an arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the Act, 1996 that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. Therefore, in the facts of the present case as the Allahabad High Court does not exercise original civil jurisdiction involving commercial disputes the application under Section 29-A of the Act, 1996 relating to a commercial dispute would lie before the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted and in an Arbitration relating to a non commercial dispute it would lie before the principal civil court of original jurisdiction i.e. the Court of District Judge as referred hereinabove. This is how the Act of 1996 and the Act, 2015 have to be read together to arrive at a harmonious understanding of the two Acts in matters of Arbitration."

26. This Court in Lucknow Agencies (supra) did not deal with a situation wherein the arbitrator was appointed under the powers contained in Section 11 of the Act, and hence this Court, did not deal with the potential conflict between Section 11 of the Act and Section 29A of the Act which might arise in such a situation.

27. The aforesaid issue was dealt with for the first time by this Court in ***Indian***

Farmers Fertilizers (supra), which was delivered on March 11, 2022. This Court held that where an arbitrator has been appointed under Section 11 of the Act, an application for extension of the mandate of the arbitral tribunal under Section 29A of the Act will lie before the court which appointed the arbitrator. Relevant paragraphs are extracted herein:

"43. Here, we are concerned with the extension of time limit for the arbitral award under Section 29A, wherein an arbitrator has been appointed by the High Court exercising power under Section 11 of the Act. Section 42 will not be attracted and it is only the High Court which has the power to grant extension to the Arbitral Tribunal for making award.

44. Reliance placed on the various decisions by the respondent's counsel relate to the definition of the word "court" under Section 2(1) (e) prior to the amendment of year 2015. In none of the judgment placed before the Court Sections 11 and 29A of the Act has been taken into consideration.

45. As far as decision of coordinate Bench of this Court in case of M/s. Lucknow Agencies and Another (supra) is concerned, the arbitrator was appointed by the Housing Commissioner and not by the High Court exercising power under Section 11 of the Act. The Court while considering the provisions of Section 29A(4) and (5) held that it was the principal Civil Court where the application for extension of time for arbitral award was maintainable and not before the High Court. In the said judgment there was no consideration as to subsection (6) and (7) of Section 29A of the Act. The said decision is distinguishable on the facts of the present case.

46. In the present case this Court exercising power under Section 11 of the Act has appointed the arbitrator way back in the year 2014.

47. Thus, the question framed above stand answered holding that the application for extension of time for arbitral award moved under Section 29A is maintainable before this Court."

28. Unlike ***Lucknow Agencies (supra)***, this Court in ***Indian Farmers Fertilizers (supra),*** squarely addressed the issue of arbitrators appointed under Section 11 of the Act and the corresponding jurisdiction of this Court to grant extensions of time under Section 29A of the Act. The different approach adopted by this Court in ***Lucknow Agencies (supra)*** and ***Indian Farmers Fertilizers (supra)*** underscores the contextual specificity inherent in legal interpretation. The judgment in Indian Farmers Fertilizers (supra) clarified the the jurisdictional contours in cases involving arbitrators appointed under Section 11 of the Act.

29. At first glance, the judgments in ***Lucknow Agencies (supra)*** and ***Indian Farmers Fertilizers (supra)*** may appear to be at odds with each other. However, a closer examination reveals that they are not conflicting but rather complementary expressions of judicial wisdom. The divergence in factual scenarios necessitates different interpretative approaches. Context serves as the lens through which legal principles are applied to real – life scenarios, ensuring that the law remains relevant and responsive to the complexities of human affairs. Legal interpretation is not a mechanical exercise but a nuanced art that requires judges to consider the underlying facts and circumstances. As Justice Oliver Wendell Holmes famously remarked, "The

life of the law has not been logic; it has been experience". In other words, the law must reflect the lived experiences of individuals and communities to be meaningful and just. ***Lucknow Agencies (supra)*** and ***Indian Farmer Fertilizers (supra)*** exemplify this principle by taking into account the different factual scenarios before them and tailoring their interpretation accordingly. In ***Lucknow Agencies (supra)***, where the arbitrator was not appointed by the High Court under Section 11 of the Act, this Court recognized the jurisdictional limitation of the Allahabad High Court and directed the parties to the appropriate forum as defined under the Act. On the other hand, ***Indian Farmers Fertilizers (supra),*** dealt with a different factual scenario wherein the arbitrator was appointed by this Court under Section 11 of the Act.

30. However, this Court in ***A'Xykno Capital Services (supra),*** this Court took a divergent view. After discussing the doctine of per incuriam , this Court held that the judgment in ***Indian Farmers Fertilizers (supra)*** cannot be considered as a binding precedent. This Court further held that irrespective of who appointed the arbitrator, it is only the court as defined under Section 2(1)(e) of the Act that can entertain an application under Section 29A of the Act. Relevant paragraphs are extracted below:

"68. Upon applicability of aforesaid judgment, clearly the ratio decidendi enunciated not only by previous Coordinate Benches of this Court but also by Hon'ble the Supreme Court as indicated hereinabove as well as specific provisions of statute, in the considered opinion of this Court and with all due respect could not be considered in the case of Indian Fertilizers (supra) due to which it cannot be said to have attained the status of a binding precedent.

69. In the light of aforesaid aspects as indicated hereinabove, the question is answered as follows:-

'The concept of 'Court' as envisaged under Section 29A read with Section 2(1)(e) of the Act of 1996 does not include a High Court not having original civil jurisdiction as in the case of Allahabad High Court and an application as such under Section 29A of the Act of 1996 would be maintainable only in the Principal Civil Court of original jurisdiction in a district.'"

31. In ***Jaypee Infratech (supra),*** I had discussed why the reasoning adopted in ***A'Xykno Capital Servies (supra)*** was flawed:

"50. The reasoning as adopted in A'Xykno Capital Services (supra), will lead to a situation wherein although not intended by the legislature, power of substitution under Section 29A(6) would be bestowed upon the Court as defined under Section 2(1)(e) of the Act even when the initial appointment of the arbitrator(s) may have been made under Section 11 of the Act by the High Courts or the Supreme Court. Each provision in the Act, is required to be interpreted in the context under which it has been used. Literal rule of interpretation is not the only rule of interpretation. Section 29A of the Act, as interpreted in A'Xykno Capital Services (supra), creates absurdity by putting two provisions of the Act, in direct conflict with each other. Section 29A of the Act, cannot be read in isolation with Sections 11 and 14 of the Act. The judgment in A'Xykno Capital Services (supra) further goes against the principle of judicial hierarchy.

51. In A'Xykno Capital Services (supra), this Court also held that the power

to substitute an arbitrator under Section 29A of the Act is not akin to the power to appoint an arbitrator under Section 11(6) of the Act. This, in my view, is an erroneous reasoning. The usage of the term "appointed" in Section 29(7) of the Act indicates that substitution under Section 29(6) of the Act amounts to appointment:

"(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal."

52. Furthermore, the distinguishing of the judgment of Lucknow Agencies (supra), in Indian Fertilizers (supra), was held as erroneous by this Court in A'Xykno Capital Services (supra). To my view, this could not have been done. The judgments in Lucknow Agencies (supra) and Indian Fertilizers (supra) were delivered on different factual scenarios and therefore, the varying interpretation of Section 29A of the Act in the said judgments was not in conflict with each other. Where a High Court or the Supreme Court has not appointed the arbitrator, the Court within the meaning of Section 2(1)(e) of the Act can exercise the powers contained under Section 29A of the Act as the same would not lead to a conflict with the provisions contained under Section 11 of the Act and will also not go against the principal of judicial hierarchy. However, in case, where the appointment of the arbitrator(s) has been made under Section 11 of the Act, it is only the Court which appointed the arbitrator(s) that can hear an application under Section 29A of the Act."

32. In my view, the judgment of this Court in ***Indian Farmers Fertilizers (supra)*** ought to have been followed in ***A'Xykno Capital Services (supra).*** The doctrine of per incuriam is based on the latin phrase meaning "thorough lack of care". It allows the courts to depart from established precedent when a previous decision was made without proper consideration of relevant statutes, regulations, or binding authorities. However, the doctrine of per incuriam must be exercised with caution to ensure that it is not used as a pretext for disregarding inconvenient precedent. The principle should only be invoked in exceptional cases where the error is clear and unequivocal, and where adherence to the precedent would result in a grave injustice. Per incuriam should be used sparingly and only in exceptional cases.

33. In light of the above, the Issue No. 2 is answered as follows:

"The judgments in Lucknow Agencies (supra) and Indian Farmers Fertilizers (supra) having been delivered under different factual scenarios will continue to govern the field of law as far as Section 29A of the Act is concerned before this Court. All applications filed under Section 29A of the Act till such time as the Larger Bench, reference to which was made vide this Court's order dated February 26, 2024, returns its decision on the questions of law, will have to be decided in accordance with the law laid down in Lucknow Agencies (supra) and Indian Farmers Fertilizers (supra). The judgment in A'Xykno Capital Services (supra) having been delivered after the aforesaid judgments, will not hold any precedential value. Needless to say, this position will be subject to the decision of the Larger Bench."

DIRECTIONS

34. In light of the aforesaid, since the appointment of the arbitrator in ARBT NOS. 4 and 5 of 2024 was made by this Court in exercise of its powers under

Section 11 of the Act, the instant applications filed under Section 29A(4) and Section 29(A(5) of the Act are maintainable before this Court.

35. Accordingly, ARBT NO.4 of 2024 is allowed and the mandate of the arbitrator is extended for a period of 8 months from the date of this judgment.

36. ARBT NO. 5 of 2024 is also allowed and the mandate of the arbitrator is extended for a period of 8 months from the date of this judgment. There shall be no order as to the costs.
